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THE FORGOTTEN MAN ON THE WELFARE ROLL: A STUDY OF PUBLIC SUBSIDIES FOR STRIKERS

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In determining the substance of bargainable terms in the collective agreement, however, the parties are left free—in principle at least—to reinforce their demands with economic force. If negotiations fail, differences are resolved by economic contest, and collective bargaining is conducted with an awareness by both parties that either can resort to economic weapons to resolve a dispute. But even here the law does not play a wholly passive role, for it prescribes the sword and shield, the net and trident with which the gladiators do battle.¹

Among the most important weapons given by the law to employees is the provision of subsidies from the public coffer for the duration of labor disputes which result in cessation of employment. By increasing the economic power of employees during strikes, the government exerts a significant influence on modern labor-management relations; yet the practical and legal consequences of subsidies to strikers have been little studied or discussed.² The three major sources of public

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1. C. SUMMERS & H. WELLINGTON, *CASES AND MATERIALS ON LABOR LAW* 753 (1968).

2. Irving Bernstein, chronicler of the American labor movement, described the provision of public subsidies to strikers as "a circumstance with little inherent significance." I. BERNSTEIN, *TURBULENT YEARS: A HISTORY OF THE AMERICAN WORKER 1933-1941*, at 307 (1969) [hereinafter cited as BERNSTEIN]. The definitive empirical

aid to strikers are welfare benefits, unemployment compensation, and food stamps.³

I. WELFARE BENEFITS

The pre-Depression welfare system in the United States was modeled after the English Poor Law of 1601.⁴ Under the Poor Law each parish was responsible for preventing its poor from starving. This goal was to be achieved by the principle of "less eligibility," which set the level of relief lower than the amount which an individual could earn by working. Generally, participation in a workhouse by an able-bodied adult or child was a condition precedent to his receiving relief. In the United States the town or the county took the place of the English parish, but little else changed. The state provided for

study of the relationship between public subsidies for strikers and labor-management relations is A. THIEBLOT & R. COWIN, *WELFARE AND STRIKES: THE USE OF PUBLIC FUNDS TO SUPPORT STRIKERS* (1972) [hereinafter cited as THIEBLOT & COWIN], to which I made some contribution in terms of background information on the early history of welfare benefits for strikers. The first article on the legal aspects of subsidies for strikers was 16 DEPAUL L. REV. 516 (1967). The major article on the legal questions involved in welfare benefits for strikers is Comment, *Welfare for Strikers: IIT v. Minter*, 39 U. CHI. L. REV. 79 (1971) [hereinafter cited as *Welfare for Strikers*]. See also Pati & Hill, *Economic Strikers, Public Aid and Industrial Relations*, 23 LAB. L.J. 32 (1972); Note, *Welfare Assistance to Strikers in Need: The Protestant Ethic Revisited*, 67 NW. U.L. REV. 245 (1972). This article will consider the legal problems and economic consequences not only of welfare provisions, but also of the two other major subsidy programs, unemployment compensation and food stamps.

3. It should be recognized that strikers on a given occasion may receive significant subsidies from several other federal programs by virtue of their eligibility for welfare benefits or food stamps. These programs include: Medical Assistance (Medicaid), 42 U.S.C. §§ 801-05 (Supp. II, 1972), see SOCIAL & REHABILITATIVE SERVICE, U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, CHARACTERISTICS OF STATE ASSISTANCE PROGRAMS UNDER TITLE XIX OF THE SOCIAL SECURITY ACT (Pub. Assistance Series No. 49, 1970); School Lunch Programs, 42 U.S.C. §§ 1751-64 (1970, Supp. II, 1972); food commodities (prior to the food stamp program); and mortgage relief or rent supplements, e.g., 12 U.S.C. § 1715z-1 (1970, Supp. II, 1972). See THIEBLOT & COWIN 12-14, 19, 50, 196. On the whole, however, the support given to strikers by these programs is not substantial. *Id.* at 195-96. In addition, strikers may continue to receive certain other subsidies, such as veterans' benefits, which they were receiving prior to the strike and which are not related to any need created by the strike. See *Welfare for Strikers* 85. Because it exists independent of the strike, this aid does not have the significant impact on collective bargaining that provision of special subsidies does. Indeed, these payments are not subsidies to strikers as such and are, accordingly, beyond the scope of this article.

4. Poor Relief Act of 1601, 43 Eliz. 1, c. 2. For a discussion of the problems of public subsidization of striking employees in England, see Jennings, *Poor Relief in Industrial Disputes*, 46 L.Q. REV. 225 (1930).

indigents who had no definite place of abode, war veterans, victims of natural disaster, and certain special classes of needy persons such as dependent children, the blind, and the aged. The federal government had no role in public assistance except to provide veterans' pensions and disaster relief. On the other hand, private agencies often played an important, and sometimes dominant, role in some municipalities.⁵

The pre-Depression welfare system was designed to help those individuals who, because of physical or mental defects, were incapable of securing gainful employment; it was not designed for, nor was it capable of, providing assistance to any great number of able-bodied unemployed. Not surprisingly, then, the system collapsed with the rise of mass unemployment during the Depression. By 1931, all private and local relief agencies were without resources; by 1933, even the states could no longer sustain the burden of providing for all people without income or resources.⁶ One of the first tasks of the Roosevelt Administration, in fact, was to save the country from starvation. The Federal Emergency Relief Act⁷ in 1933 established the Federal Emergency Relief Administration (FERA), which was given some \$500 million to distribute as grants-in-aid to the bankrupt local and state public assistance agencies. Under Harry Hopkins, its administrator, FERA took decisive action to assist the unemployed.⁸

Two months after taking office, however, Hopkins encountered a problem the dimensions and implications of which neither he nor anyone else recognized at the time. In May 1933 the Executive Director of the Pennsylvania State Emergency Relief Board wrote Hopkins questioning the eligibility for relief under the Act of certain strikers in Montgomery County. Hopkins answered that the Federal Emergency Relief Act was intended to provide relief for "needy unemployed" without regard to labor disputes in which they might be involved, unless the Department of Labor determined that "the basis for relief is unreasonable and unjustified."⁹ Although Hopkins' position

5. See J. BROWN, *PUBLIC RELIEF: 1929-1939*, at 3-59 (1940) [hereinafter cited as BROWN].

6. *Id.* at 63-142.

7. Act of May 12, 1933, ch. 30, 48 Stat. 55.

8. See BROWN 301; A. SCHLESINGER, *THE COMING OF THE NEW DEAL* 263-67 (1959).

9. Hopkins' full reply was:

The Federal Emergency Relief Administration is concerned with administer-

was not supported by the language or legislative history of the Act,¹⁰ the idea that relief should be given to all those in need has some plausibility. Any inconsistency between Hopkins' principle of supplying relief and the exception for "unreasonable and unjustified" strikes was more theoretical than real, since the Department of Labor developed no means for deciding whether a strike was "unreasonable or unjustified." The significance of Hopkins' position cannot be overstated; it was the first recorded instance in which the government¹¹ authorized the expenditure of public funds for individuals whose need arose not from circumstances beyond their control, but from the deliberate decision to strike in an effort to better their economic condition.¹²

Among the first to benefit from Hopkins' policy was the Cannery and Agricultural Workers Industrial Union which, in the fall of 1933, struck the growers in the southern end of the Central Valley of Cali-

ing relief to the needy unemployed and their families. Each case applying for relief to the local emergency relief agencies should be treated on its merits as a relief case wholly apart from a controversy in which the wage earner may be involved.

The FERA will not attempt to judge the merits of any labor dispute. State and Federal agencies, as well as courts, exist which are duly qualified to act as arbiters and adjusters in such disputes.

Unless it be determined by the Department of Labor that the basis for relief is unreasonable and unjustified, the FERA authorizes local relief agencies to furnish relief to the families of striking wage earners after careful investigation has shown that their resources are not sufficient to meet emergency needs.

FERA, MONTHLY REPORT 7 (July 1933).

10. Federal Emergency Relief Act § 4(a), ch. 30, § 4(a), 48 Stat. 57 (1933):

Out of the funds of the Reconstruction Finance Corporation made available by this Act, the Administrator is authorized to make grants to the several States to aid in meeting the costs of furnishing relief and work relief and in relieving the hardship and suffering caused by unemployment in the form of money, service, materials, and/or commodities to provide the necessities of life to persons in need as a result of the present emergency, and/or to their dependents, whether resident, transient, or homeless.

11. It should be noted that private relief had, on occasion, been given to strikers. The Red Cross, for example, assisted strikers in Harlan County, Kentucky, during the coal strike of 1931. BERNSTEIN 381. In *City of Spring Valley v. County Bureau*, 115 Ill. App. 545 (1904), the court struck down a local administrative regulation disqualifying strikers from receipt of public assistance under a state law which provided room, board, and necessary care for non-resident diseased persons. The court's rationale, however, was that the County Bureau lacked authority to adopt the regulation, since the law specifically provided that diseased individuals without someone to care for them would be assisted by the state. The "need" of these individuals arose not from their participation in a strike but from their affliction with smallpox.

12. FERA affirmed this position in October 1933 and again in September 1934. See U.S. WORKS PROGRESS ADMINISTRATION, CHRONOLOGY OF THE FEDERAL EMERGENCY RELIEF ADMINISTRATION 22, 25 (1937), cited in THIEBLOT & COWIN 34.

fornia. The strike was subsidized with federal funds by the California State Relief Administration, which decided the strikers were eligible for relief and supplied their wants. The workers learned, however, that the provision of subsidies for strikers is a two-edged sword, for FERA used the threat of withdrawal of relief to obtain acceptance of a compromise settlement.¹³

The first widely publicized provision of relief to strikers occurred a year later in connection with the 1934 textile strike.¹⁴ On August 27, 1934, newspapers across the country reported that the striking members of the United Textile Workers would receive public relief.¹⁵ This announcement raised a storm of protest;¹⁶ a few days later, the Alabama Relief Administrator terminated relief to strikers, ending the strike.¹⁷

Hopkins' justification for the new federal policy of supporting strikers was that subsidies would not have a significant impact on the number or duration of strikes and would tend to prevent violence. The dispositions of the California agricultural strike of 1933 and the textile strike of 1934 indicate that subsidies did, in fact, influence both the duration of strikes and the ability of the government to control the terms of strike settlements.¹⁸ Nonetheless, Hopkins' view generally prevailed, and the eligibility of strikers for FERA assistance was established.¹⁹

With the passage of the Social Security Act²⁰ in 1935, Congress reorganized the public assistance program by establishing a system of

13. BERNSTEIN 156-60.

14. *Id.* at 307-08.

15. *Id.* at 308.

16. Spokesmen for the Southern States Industrial Council and the Illinois Manufacturers Association complained to Hopkins. An attorney for textile manufacturers in Georgia wrote to President Roosevelt: "[T]he strike never would have been called . . . without the financial support from the Federal Government." Letter from H.H. Swift to Franklin D. Roosevelt, Aug. 27, 1934, *quoted in* BERNSTEIN 308.

17. BERNSTEIN 312.

18. Hopkins also mistakenly suggested that the costs to the government of supplying welfare benefits to strikers would be "almost negligible." *Id.* at 307. *See* note 50 *infra*.

19. BROWN 270:

In many localities from time to time, there were departures from the general principle and in some cases, local officials yielding to pressures from labor or from industry gave or refused relief on some other basis than need. On the whole, however, the Federal policy was followed in local practice

20. Act of Aug. 14, 1935, ch. 531, 49 Stat. 620, *as amended*, 42 U.S.C. § 301 *et seq.* (1970).

grants-in-aid for the states, which in turn provided assistance to dependent children, the aged, the blind, and other special groups. Congress did not consider the question of public subsidization of strikers; the Roosevelt Administration planned to employ most of the able-bodied unemployed on public works and to restrict the new welfare system to unemployables.²¹ After the 1935 Act, the states dispensed two types of welfare benefits. First, they took over the responsibility for financing (in part) and administering (in total) payments to the special groups under the Social Security Act. Secondly, they continued their own programs of general assistance, financed solely out of state funds, for other needy individuals not included in the federal categories.

There is no indication that any state legislature, in enacting a general assistance program, considered whether such a program should be used to aid strikers. Certainly, the state statutes contain no disqualification for strikers, although some contain ambiguous work requirements which disqualify applicants for failure to accept work without good cause,²² and which could be interpreted by welfare officials as justifying or mandating striker disqualification.²³ Hopkins' decision in the Montgomery County case, however, strongly influenced the new state welfare administrators, many of whom had participated in FERA, to pay benefits to needy strikers.²⁴ Although the exact dates on which many states began to provide aid to strikers are unknown, a few did, through their interpretation of state standards for administering both the state and federal programs, so provide prior to World War II. In Pennsylvania, union members were even told in advance of a strike that the state would supply relief.²⁵

Public subsidization of strikers became more widespread after World War II. Labor union participation in various war relief projects established ties with both public and private relief organizations. In

21. See BROWN 306-12. The Federal Emergency Relief Act was intended only to be a temporary means of dealing with the problem of massive need. *Id.*

22. See, e.g., CAL. WELF. & INST'NS CODE §§ 11308-08.8 (Deering Supp. 1972); DEL. CODE ANN. tit. 31, § 518 (Supp. 1970); ILL. ANN. STAT. ch. 23, § 11-20(3) (Smith-Hurd Supp. 1973); MASS. GEN. LAWS ANN. ch. 117, § 3 (Supp. 1973); N.Y. SOC. SERV. LAW § 131(4) (McKinney Supp. 1972); OHIO REV. CODE ANN. § 5113.04 (Page 1970, Supp. 1972).

23. See *Welfare for Strikers* 96-97.

24. See BROWN 270.

25. On July 5, 1936, Thomas Kennedy, Lieutenant Governor of Pennsylvania and an officer of the United Mine Workers, told the Steel Workers Organizing Committee that it could depend on relief funds in the event of a strike. BERNSTEIN 434.

1946 the Congress of Industrial Organizations (CIO) formed the Community Services Program to utilize these ties in order to assure that a fund would be permanently available to support union members during strikes. This organized approach to exploiting public welfare and assistance funds for the benefit of the labor union movement was used successfully in the strikes against General Motors in Michigan in 1945,²⁶ in the United Steel Workers strike in 1946, and in the Electrical Workers strike against General Electric in Pennsylvania in 1948.²⁷ The greatest single accomplishment of organized labor's efforts to systematically obtain welfare benefits was the receipt of an estimated \$45 million in public assistance during the four-month steel strike in 1959-1960.²⁸ In addition, unions made organized efforts to gain representation in community welfare organizations and to lobby for aid. General public assistance has apparently been available for strikers in California since World War II,²⁹ in Illinois since 1950,³⁰ and in New York since 1952.³¹

26. THIEBLOT & COWIN 37-38. The Attorney General of Michigan in 1948 issued an opinion holding strikers eligible for general assistance. [1947-1948] MICH. ATT'Y GEN. BIENNIAL REP. 729:

It is the opinion of the Attorney General that as to whether the strike is "lawful" or "unlawful" has no bearing on the question. If the individual is participating in either an "unlawful" strike or a "lawful" strike and is eligible for aid under the welfare act, as determined by the welfare board, such person is entitled to relief.

27. THIEBLOT & COWIN 37-38. In 1956 the AFL-CIO founded its Department of Community Services which assumed the functions of the old Community Services Program. *Id.* at 40.

28. This estimate was made by I.W. Abel, then Secretary-Treasurer of the United Steel Workers; the union contribution was only about \$20 million. U.S. NEWS & WORLD REP., Oct. 3, 1960, at 101-03. Another estimate credited various federal, state, and local benefits to the striking steelworkers at \$22,750,000. N. CHAMBERLAIN & J. KUHN, COLLECTIVE BARGAINING 174 (2d ed. 1965) [hereinafter cited as CHAMBERLAIN & KUHN].

At present, the following twenty-four states provide general assistance to strikers: Alaska, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Massachusetts, Michigan, Minnesota, Missouri, Montana, New Hampshire, New Jersey, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, West Virginia, and Wisconsin. Letter from Lawrence M. Cohen, Lederer, Fox & Grove, Chicago, to author, June 7, 1972 (reflecting an informal survey of state officials). It should be recognized that eligibility requirements, as well as the type and quantity of assistance available, vary from state to state, and even between localities within a given state. See *Welfare for Strikers* 97.

29. See THIEBLOT & COWIN 135.

30. See *Strat-O-Seal Mfg. Co. v. Scott*, 72 Ill. App. 2d 480, 218 N.E.2d 227 (1966); Illinois Attorney General, Opinion (May 27, 1950) (unpublished).

31. See *Lascaris v. Wyman*, 61 Misc. 2d 212, 215, 305 N.Y.S.2d 212, 216 (Sup.

Despite the availability of general assistance benefits in many states, the use of public assistance as a source of subsidy for strikers did not become significant until after the 1961 amendment³² to the Social Security Act. Prior to 1961 the federal government had assisted the states in providing Aid to Families with Dependent Children (AFDC).³³ Eligibility for this aid was limited to families whose need was created by the death, absence, or incapacity of a parent. Proponents of welfare reform claimed that this eligibility requirement forced many fathers into real or pretended "abandonment" of their families. This problem allegedly became widespread with increased unemployment during the 1959-1960 recession.³⁴ The 1961 amendment, by providing for federal funding of the new Aid to Families with Dependent Children of Unemployed Parents (AFDC-U), was intended to remedy this situation by expanding assistance to include needy children of unemployed parents.³⁵ There is little evidence to indicate that Congress intended through the creation of AFDC-U to provide a new source of public subsidies for strikers; indeed, Congress does not seem to have considered the possibility.³⁶ But by changing the operative language of the Act to permit aid to children whose parents were present but unemployed, Congress permitted states, in effect, to provide AFDC-U benefits to strikers' families. Admittedly, prior to 1961 children "deserted" by strikers could obtain AFDC benefits, assuming the family met the financial eligibility requirements. But there is no evidence that many strikers took advantage of this possibility, probably

Ct. 1969). Indeed, some members of Congress noted receipt of general assistance by strikers as early as 1947. See H.R. REP. NO. 245, 80th Cong., 1st Sess. 12-13 (1947).

32. Act of May 8, 1961, Pub. L. No. 87-31, § 407, 75 Stat. 75, amending 42 U.S.C. §§ 601-06 (1958) (codified at 42 U.S.C. § 607 (1970, Supp. II, 1972)).

33. Act of Aug. 14, 1935, ch. 531, §§ 401-06, 49 Stat. 627, as amended, 42 U.S.C. §§ 601-06 (1970).

34. See S. REP. NO. 165, 87th Cong., 1st Sess. (1961); *Hearings on H.R. 3854 & 3865 Before the House Comm. on Ways & Means*, 87th Cong., 1st Sess. 94-95 (1961); 107 CONG. REC. 1679 (1961) (remarks of President Kennedy); *Welfare for Strikers* 88-89.

35. S. REP. NO. 165, *supra* note 34, at 1-3. See also *Hearings on H.R. 12080 Before Senate Comm. on Finance*, 90th Cong., 1st Sess. 264 (1967); 107 CONG. REC. 1679 (1961) (remarks of President Kennedy). The states provide about one-third of the funds for the AFDC-U program. 42 U.S.C. § 603 (1970).

36. *But see* 107 CONG. REC. 3766 (1961) (remarks of Cong. Mills) (states may use AFDC-U to subsidize strikers). If a father is receiving unemployment compensation—regardless, presumably, of whether he is "unemployed" as a result of participation in a strike—AFDC-U benefits are prohibited by statute. 42 U.S.C. § 607(b) (2)(C)(ii) (1970).

because they were unwilling to leave their homes.³⁷ The AFDC-U program offered the striker the possibility of obtaining welfare for his family without "abandoning" it. Not surprisingly, strikers were not slow to take advantage of the program.³⁸

Of course, the striker's family does have to meet the financial eligibility requirements of the AFDC-U program. In 1961 Congress delegated to the states the task of establishing financial eligibility standards.³⁹ These standards differ substantially from state to state.⁴⁰ Nevertheless, the families of strikers can meet the *income* requirements of almost every state since their sole source of income dries up with the occurrence of the strike.⁴¹ The *asset* standards are a different story. When enforced they disqualify great numbers of strikers' families.⁴² There is, however, considerable evidence to suggest that errors in administration and outright fraud enable many strikers to avoid the asset requirements.⁴³

37. One major exception occurred in the 1959-1960 steel strike, since AFDC must have been a significant source of the public subsidies received by striking steelworkers and their families. See note 28 *supra* and accompanying text.

38. See THIEBLOT & COWIN 11. For an example of an attempt to restrict AFDC benefits to "employable persons," see H.R. 6004, 92d Cong., 1st Sess. (1971).

39. See 42 U.S.C. §§ 601, 602(a)(7), 603 (1970, Supp. II, 1972); S. REP. No. 165, *supra* note 34, at 3; 45 C.F.R. § 233.20(a)(2) (1972) (regulations of the Dep't of Health, Education, and Welfare (HEW)).

40. Generally, state legislatures delegate rule-making authority, including responsibility for prescribing financial eligibility criteria, to the appropriate state agency. *E.g.*, MICH. STAT. ANN. §§ 16.410 (1968), 16.414 (Supp. 1973); OKLA. STAT. ANN. tit. 26, § 16 (1969); VA. CODE ANN. § 63.1-105(e) (1973). In some states, legislatures have provided a general criterion which the administrative regulation must meet. *E.g.*, DEL. CODE ANN. tit. 31, § 503(d) (Supp. 1970) ("reasonable subsistence compatible with decency and health"); ILL. ANN. STAT. ch. 23, § 4-1.6 (Smith-Hurd Supp. 1973) ("insufficient to meet the basic maintenance needs of the family or the child"); WIS. STAT. ANN. § 49.01 (1957, Supp. 1973) ("dependent person"). The administrative regulations vary considerably, but most provide that unless a family's income, less designated exclusions, reaches a specified limit, aid will be provided. See THIEBLOT & COWIN 246-49.

41. The fact that strikers' families frequently qualify automatically suggests that the eligibility standards themselves are defective. Whether the standard is indefinite or specifies a certain income level, see note 40 *supra*, a striker's family which depends entirely on the striker's income would qualify, without further inquiry. See generally Note, *AFDC Income Attribution: The Man-in-the-House and Welfare Grant Reductions*, 83 HARV. L. REV. 1370 (1970).

42. Again, the standards vary considerably from state to state, usually specifying a maximum dollar-value for real property (excluding the residence), personal property, and financial assets.

43. Federal regulations require only that the applicant make a declaration of eligibility to begin to receive benefits. 45 C.F.R. § 205.20 (1972). Since the Supreme Washington University Open Scholarship

The work requirement of the AFDC-U program has also been ineffective in the case of strikers. Unlike the financial requirements, the work requirement is outlined by the Department of Health, Education, and Welfare (HEW).⁴⁴ The present standard permits aid to be granted if the "father has not without good cause, within such 30-day period prior to the receipt of such aid, refused a bona fide offer of employment or training for employment."⁴⁵ In many cases, work is not available for strikers; in others, the work requirement is not enforced.⁴⁶ Congress apparently did not consider whether a striker is a person who "refused" work "without good cause." A sponsor of the 1961 amendment emphasized that Congress intended to provide assistance only to the "involuntarily unemployed"⁴⁷—but this is no more satisfactory than the "good cause" criterion.⁴⁸ HEW's "good cause" standard has not been improved by state statutes, none of which expressly grants or denies AFDC-U benefits to strikers. Instead of clarifying the work requirement, HEW has added to the confusion by

Court's decision in *Shapiro v. Thompson*, 394 U.S. 618 (1969), states cannot impose waiting-period requirements on applicants who move into the jurisdiction. Generally, the great number of eligible recipients created by a strike is more than state welfare administrators can effectively investigate and process. *Welfare for Strikers* 92-96 provides detailed discussion of the administrative headaches created by striker-applicants, and concludes that the asset requirements are generally ineffective because: (1) the requirements "are not suited to measuring the real extent of a striker's need," *id.* at 92; (2) strikers are often exempted from some of the requirements; and (3) "the procedures for administering the current AFDC-U program are ill-suited for properly dealing with strikers." *Id.* at 93.

44. 45 C.F.R. § 233.100(a)(3)(ii) (1972); see 42 U.S.C. § 602(a)(19)(F) (Supp. II, 1972). Prior to 1967 the work requirement was left to the discretion of the states. See H.R. REP. No. 544, 90th Cong., 1st Sess. 107-08 (1967); S. REP. No. 744, 90th Cong., 1st Sess. 160 (1967).

45. 45 C.F.R. § 233.100(a)(3)(ii) (1972).

46. See *Welfare for Strikers* 91-92. The author suggests that, although strikers are required to register for alternative work, the requirement is not effective because most employers will not hire men for a short—and unpredictable—time, and because many administrators will "not require a worker to accept a job that would jeopardize his union standing." *Id.* at 91.

47. 107 CONG. REC. 3767 (1961) (remarks of Cong. Byrnes). See also H.R. REP. No. 1414, 87th Cong., 2d Sess. 15-16 (1962).

48. See *Welfare for Strikers* 89 n.59:

The use by Congress of the term "involuntary" is significant only because it did not depart from common usage. As a basis for distinguishing between eligible and ineligible unemployed, however, the term is inadequate. A member of a giant union such as the United Auto Workers is hardly free to choose whether or not to strike. And the term invites an arbitrary distinction between a strike which is voluntary union action, and a lockout, which causes involuntary unemployment for union members.

approving both state administrative regulations that declare strikers to be "employed" and those that declare them to be "unemployed."⁴⁹

Opposition to the widespread use⁵⁰ of the public assistance system

49. HEW has general authority to review state administrative regulations which interpret state AFDC-U statutes. 42 U.S.C. § 602(b) (1970); see 45 C.F.R. § 201.3 (1972). Of the fifty states and the District of Columbia, only twenty-nine participate in the AFDC-U program: ARIZ. REV. STAT. ANN. § 46-292 (Supp. 1972); CAL. WELF. & INST'NS CODE §§ 11200-507 (Deering Supp. 1972); COLO. REV. STAT. ANN. § 119-9-1(4)(b) (Supp. 1967); DEL. CODE ANN. tit. 31, § 504(2) (Supp. 1970); D.C. CODE ANN. § 3-202(a)(4) (1966); FLA. STAT. ANN. § 409.225 (1973); HAWAII REV. STAT. §§ 346-55 (Supp. 1972); ILL. ANN. STAT. ch. 23, § 4-1.1 (Smith-Hurd Supp. 1973); KAN. STAT. ANN. § 39-709(D) (Supp. 1972); ME. REV. STAT. ANN. tit. 22, §§ 3741-56 (1964, Supp. 1972); MD. ANN. CODE art. 88A, § 45(c) (1969); MASS. GEN. LAWS ANN. ch. 118 (Supp. 1972); MICH. STAT. ANN. § 16.456 (Supp. 1973); MINN. STAT. ANN. § 256.73 (1971); MO. REV. STAT. § 208.041 (Supp. 1973); MONT. REV. CODES ANN. §§ 71-501 to -510 (1971); NEB. REV. STAT. § 43-504 (Supp. 1969); N.J. STAT. ANN. § 44:10-1(c) (Supp. 1973); N.Y. SOC. SERV. LAW §§ 343-62 (McKinney 1966, Supp. 1972); OHIO REV. CODE ANN. § 5107.03(A) (Page Supp. 1972); OKLA. STAT. ANN. tit. 56, § 164(d) (1969); ORE. REV. STAT. §§ 418.035-.145 (1969); PA. STAT. ANN. tit. 62, § 201 *et seq.* (1968); UTAH CODE ANN. § 55-15-23(c)(1) (1963); VT. STAT. ANN. tit. 33, § 2701(1) (Supp. 1973); VA. CODE ANN. §§ 63.1-105 to -126 (1950, Supp. 1973); WASH. REV. CODE ANN. § 74.12.010 (Supp. 1972); W. VA. CODE ANN. § 9-1-2(c) (Supp. 1972); WIS. STAT. ANN. § 49.19 (1957, Supp. 1973).

Only Oregon automatically disqualifies strikers. Kansas and Nebraska generally deny benefits to strikers but make an exception in the case of a lockout. Maryland denies benefits to strikers who are disqualified from unemployment compensation. Delaware and Pennsylvania deny benefits to strikers who are engaged in illegal strikes. Minnesota has not yet assisted workers during a strike. Apparently, the other states automatically pay benefits. Letter from Thomas Scarletter, Attorney, HEW, to Jean Rogers, Assistant United States Attorney, Baltimore, Md., Nov. 29, 1971. In 1967 the Senate defeated a proposal that would have made the AFDC-U program mandatory. 113 CONG. REC. 33,195 (1967). For a detailed discussion of the various programs and agencies in all fifty states, see U.S. DEP'T OF HEW, COMPILATIONS BASED ON CHARACTERISTICS OF STATE PUBLIC ASSISTANCE PLANS (1970).

Technically, applicants for AFDC-U are required to wait thirty days before receiving benefits. 42 U.S.C. § 607(b)(1)(A) (1970). Some states waive this provision, in effect, by paying general assistance benefits during the waiting period. *Welfare for Strikers* 104 n.153. Other states grant immediate benefits under a special emergency AFDC-U program. 42 U.S.C. § 602 (1970). Moreover, a few strikers have received benefits under the section of the AFDC statute which provides payments to families for foster home care of dependent children. 42 U.S.C. § 608 (1970). See THIEBLOT & COWIN 11 n.6.

50. For a detailed empirical analysis of the use of tax-supported welfare payments to strikers, see THIEBLOT & COWIN 49-185. The authors present a number of case studies and statistics which demonstrate the prevalence of striker use of the various programs. For example, the authors, citing RESEARCH & STATISTICS DIV., UTAH STATE DEP'T OF HEALTH & WELFARE, RE STAT REPORT (1968), indicate that during the copper strike of 1967-1968, almost 600 strikers received over \$400,000 in welfare

to subsidize strikers was slow to develop.⁵¹ In *Strat-O-Seal Manufacturing Co. v. Scott*⁵² taxpayers brought an action to enjoin the Illinois Department of Public Aid from paying general assistance benefits to strikers and AFDC-U benefits to strikers' children. The taxpayers argued that strikers are not "persons who for unavoidable causes are unable to maintain a decent and healthful standard of living,"⁵³ as required by state statute, and should be disqualified by the provision that "any employable person who refuses suitable employment or training for self-support work shall not receive general assistance."⁵⁴ Similarly, the taxpayers contended that children of strikers should be denied AFDC-U benefits because strikers, by voluntarily walking off their jobs, had "refuse[d] without good cause . . . to accept employment in which . . . they are able to engage."⁵⁵ The statute left to the administrative agency the task of defining "good cause,"⁵⁶ and since 1950 the Illinois Department of Public Aid had permitted general assistance payments to strikers.⁵⁷ Nevertheless, the taxpayers argued that strikers and their families should be disqualified from receiving welfare just as they were disqualified from receiving unemployment compensation.⁵⁸ The court rejected the analogy, drawing a distinction between the two types of subsidy: "Compensation is generated through lack of work with economic need purely incidental thereto. Assistance is triggered by economic need with lack of suitable work incidental there-

benefits administered by the state of Utah, 40% of this amount coming from state taxes. THEBLOT & COWIN 49-51. During the Westinghouse strike of 1970-1971, strikers received an estimated \$2.5 million in total benefits, including food stamps, general assistance, and AFDC-U. An average worker could receive about 65% of his pre-strike net income from these benefits, without resort to his union's strike fund. *Id.* at 82-101. And in the General Motors strike of 1970, the state of Michigan dispensed over \$14.3 million in AFDC cash payments and over \$692,000 in state general assistance to strikers. The authors estimate that a total bill to the public of \$30 million for all forms of assistance was paid in all states involved. *Id.* at 102-42.

51. Indeed, the first legal attack on the provision of the older AFDC benefits to strikers did not come until 1959. *State v. Montana Dep't of Pub. Welfare*, 136 Mont. 283, 347 P.2d 727 (1959).

52. 72 Ill. App. 2d 480, 218 N.E.2d 227 (1966).

53. Law of Aug. 4, 1949, § 4-1, [1949] Ill. Laws 417 (repealed 1967).

54. Law of June 19, 1957, § 1, [1957] Ill. Laws 722 (repealed 1967).

55. ILL. ANN. STAT. ch. 23, § 605.3 (Smith-Hurd 1965), *as amended*, ILL. ANN. STAT. ch. 23, § 11-20(3) (Supp. 1973).

56. *Id.*

57. Illinois Attorney General, Opinion (May 27, 1950) (unpublished) (general assistance available for strikers); *see* [1962] ILL. ATT'Y GEN. REP. 189 (AFDC-U available for strikers).

58. *See* ILL. ANN. STAT. ch. 48, § 434 (Smith-Hurd 1971).

to.”⁵⁹ The court then addressed the most basic question: Did the state legislature intend to disqualify strikers from welfare benefits as well as from unemployment compensation? The court noted that general assistance had been paid to strikers since an opinion of the state attorney general in 1950,⁶⁰ and that the legislature had acquiesced in this interpretation of the statute for fifteen years.⁶¹ Although the attorney general’s opinion was not binding, the court acknowledged that it was “persuasive,”⁶² and held that although strikers are not out of work for “unavoidable causes,” they have not for “good cause” refused an offer of employment.⁶³ This holding appeared to be based less on the court’s determination of the purpose of the statute than on the court’s view of labor economics. The court noted that “labor union membership or activity and the right to strike in proper cases and under proper circumstances is an accepted fact in our industrial community,”⁶⁴ and that to deny welfare benefits to strikers would be “to strangle otherwise authorized activity”⁶⁵ by interjecting the state into labor disputes. A striker’s unemployment is avoidable, the court said, “only if it may be said that it can be avoided by abdicating the right to participate in a proper strike To so hold is to place a hangman’s noose over an existing right when the legislature has not specifically done so.”⁶⁶

59. 72 Ill. App. 2d at 483, 218 N.E.2d at 229. The court’s statement implies that there is little connection between a welfare recipient’s poverty and his lack of employment, and little connection between an unemployed person’s lack of employment and his need for financial assistance. An attempt by the state of California to argue that the distinction between welfare benefits and unemployment compensation warranted terminating unemployment compensation—but not welfare benefits—without a hearing, was characterized by Justice Douglas as

surprisingly disingenuous. First it seeks to distinguish *Goldberg v. Kelly*, 397 U.S. 254, on the ground that “welfare is based on need; unemployment insurance is not.” But that simply is not true, for the history makes clear that the thrust of the scheme for unemployment benefits was to take care of the need of displaced workers, pending a search for other employment.

California Dep’t of Human Resources Dev. v. Java, 402 U.S. 121, 135 (1971) (Douglas, J., concurring).

60. See note 57 *supra*.

61. 72 Ill. App. 2d at 483-85, 218 N.E.2d at 229-30. The court also noted that an unsuccessful attempt had been made during this interval to incorporate into the welfare statute the striker disqualification which appeared in the unemployment compensation statute. *Id.* at 483-85, 218 N.E.2d at 229.

62. *Id.* at 485, 218 N.E.2d at 230.

63. *Id.*

64. *Id.*

65. *Id.* at 486, 218 N.E.2d at 230.

66. *Id.* at 485-86, 218 N.E.2d at 230-31. The court’s view of the taxpayers’ ar-

Strat-O-Seal set a pattern for both the arguments and the court's reasoning in the next case involving public subsidies for strikers. In *Lascaris v. Wyman*⁶⁷ (*Lascaris I*) a county commissioner of the New York Department of Social Services brought a declaratory judgment action against the State Commissioner of Social Welfare seeking a judicial determination of the right of strikers to receive state welfare benefits. Again, the case turned on interpretation of a statute. As in *Strat-O-Seal*, plaintiff argued that the plain language of the statute disqualified strikers from receiving benefits, which are to be paid only to "those unable to maintain themselves," and not to an "employable" person who "has refused to accept employment for which he is fitted."⁶⁸ As in Illinois, the New York Commissioner had made an administrative determination that strikers were eligible for welfare benefits,⁶⁹ and benefits had been paid accordingly since 1952. Unlike Illinois, however, after the first seven weeks of a strike New York does not disqualify strikers from receiving unemployment compensation.⁷⁰ The *Lascaris I* court based its decision to uphold the Commissioner's practice of awarding benefits to strikers on two grounds. First, it stated that the state welfare statute and the state labor statute's guarantee of the right to strike must be read together, and that "strict and narrow application . . . of the Social Welfare Law cannot be used to force the employee back to work and to forfeit his rights under the Labor Law."⁷¹ Secondly, it found in the legislature's acquiescence in the Commissioner's administrative determination tacit approval of the policy of providing welfare benefits to strikers. Again, however, a judicial understanding of labor policy and economics appeared to prevail over the expressed intent of the legislature, as manifested in the language

gument is an indication of its attitude toward the role of relative economic strength at the bargaining table: "Plaintiffs would have us hold that you can participate, or acquiesce in a strike at the place of your employment only if you can initially afford it and then only as long as you can continue to afford it." *Id.*

67. 61 Misc. 2d 212, 305 N.Y.S.2d 212 (Sup. Ct. 1969).

68. N.Y. SOC. SERV. LAW § 131 (McKinney 1966), as amended, (Supp. 1972).

69. 61 Misc. 2d at 215, 305 N.Y.S.2d at 216.

70. N.Y. LABOR LAW § 592 (McKinney 1965). See also *id.* § 593(2)(b), which provides that "no refusal to accept employment shall be deemed without good cause, nor shall it disqualify any claimant otherwise eligible to receive benefits if there is a strike, lockout or other industrial controversy in the establishment in which the employment is offered."

71. 61 Misc. 2d at 215, 305 N.Y.S.2d at 216-17. The right to strike is guaranteed by N.Y. LABOR LAW § 713 (McKinney 1965); accord, 29 U.S.C. §§ 157, 163 (1970).

of the statute.⁷²

After *Lascaris I* the New York legislature amended the state public assistance statute by adding a detailed list of circumstances in which a person is not to be deemed "employable"⁷³ and thus exempt from the requirement to accept work. The list did not include persons participating in a labor dispute. In July 1971 the Communications Workers of America (CWA) called a nationwide strike against the New York Telephone Company. Although a settlement was reached between the employer and the national union, several local CWA chapters in New York refused to ratify the agreement and continued their strike. Consequently, in *Lascaris v. Wyman*⁷⁴ (*Lascaris II*) Commissioner Lascaris, who was nothing if not persistent, again unsuccessfully sought a declaratory judgment upholding his decision not to pay welfare benefits to strikers. The trial court granted Lascaris' request for a preliminary injunction prohibiting the State Commissioner of Social Welfare from terminating state financing of the county welfare system⁷⁵ in response to Lascaris' refusal to pay benefits to strikers. The court later granted summary judgment for plaintiff⁷⁶ on the ground that strikers are "employable" persons who refuse to accept employment. The court pointed out that the state legislature must have been aware of *Lascaris I* and that its failure to include persons involved in a labor dispute as "unemployable" persons indicated its intention to disqualify such persons from receiving welfare benefits.⁷⁷

72. 61 Misc. 2d at 215, 305 N.Y.S.2d at 217.

73. Law of May 24, 1971, ch. 298, § 5, [1971] N.Y. Laws 942, amending N.Y. Soc. SERV. LAW § 131(4) (McKinney 1966).

74. 68 Misc. 2d 523, 327 N.Y.S.2d 379 (Sup. Ct. 1971), *rev'd*, 38 App. Div. 163, 328 N.Y.S.2d 289, *aff'd*, 31 N.Y.2d 386, 292 N.E.2d 667, 340 N.Y.S.2d 397 (1972). Plaintiff did not contest paying benefits to the *families* of strikers.

75. 78 L.R.R.M. 2531 (N.Y. Sup. Ct. 1971). The court indicated that, in view of the 1971 amendment to the Social Services Law, it was doubtful that *Lascaris I* was still good law, particularly since there was a serious question as to the legality of the continued strike. Noting that in ruling on the request for a preliminary injunction it was obligated to balance the equities, the court held that the equities favored granting an injunction until the case was decided on the merits because to do otherwise would jeopardize the entire public assistance program in the county, and because "if the plaintiff grants public assistance to the strikers and it is ultimately determined that they were not entitled thereto, considerable doubt exists as to whether the plaintiff would be able to recover the amounts paid to each individual." 78 L.R.R.M. at 2532.

76. 68 Misc. 2d 523, 327 N.Y.S.2d 379 (Sup. Ct. 1971).

77. *Id.* at 525, 327 N.Y.S.2d at 381.

The Appellate Division of the New York Supreme Court unanimously reversed the trial court in *Lascaris II* and awarded summary judgment for defendant.⁷⁸ The court held that a striker, both before and after the 1971 amendment to the Social Services Law, was an "employable individual," but that he was not disqualified for refusing employment with his struck employer. Without reference to legislative history, the court concluded that the legislature could not have

intended that such a refusal by a striker to work for his employer would serve as the basis for denial of public assistance. To so hold would subject union employees to union sanctions if they refused to obey strike orders and denial of welfare benefits if they did [obey], and would thus be tantamount to a denial to them of their right to strike guaranteed them under federal and state law⁷⁹

Thus the implicit threat of union sanctions renders a striker's decision to remain on strike "involuntary." The court emphasized that the legislature did not disqualify from unemployment compensation employees who refused to accept work in an establishment which was the site of a labor dispute,⁸⁰ and that, similarly, the legislature probably did not intend to make refusal of employment in a struck establishment grounds for disqualification from welfare.⁸¹ The court also noted that strikers had traditionally received welfare benefits under New York law and that other states paid welfare to strikers.⁸² Since the 1971 amendment merely enumerated certain classes of "unemployable" persons, it was not applicable to strikers; since the legislature did not expressly remove strikers' eligibility, the court held that the legislature had, in effect, endorsed the administrative policy upheld in *Lascaris I*.

78. 38 App. Div. 163, 328 N.Y.S.2d 289 (1972).

79. *Id.* at 166, 328 N.Y.S.2d at 293. Since the Supreme Court has sanctioned the union practice of fining, with an implicit threat of expelling, a union member who refuses to honor an authorized strike, *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967), it may be argued that the refusal of a union member-employee to work for his employer during a strike is not "voluntary." But more recent cases weaken this argument; if the employee *resigns* from the union, at least if there is no express limitation on his right to resign in the union by-laws, an attempt by the union to fine him for returning to work constitutes an unfair labor practice. *Booster Lodge No. 405, Int'l Machinists v. NLRB*, 412 U.S. 84 (1973) (per curiam); *NLRB v. Granite State Joint Bd., Textile Workers Local 1029*, 409 U.S. 213 (1973). See generally Summers, *The Law of Union Discipline: What the Courts Do in Fact*, 70 *YALE L.J.* 175 (1960).

80. 38 App. Div. at 166-67, 328 N.Y.S.2d at 293.

81. *Id.*

82. *Id.* at 167, 328 N.Y.S.2d at 293. The court listed eleven major New York strikes in which benefits had been paid. *Id.* at 167 n.5, 328 N.Y.S.2d at 293 n.5.

The Appellate Division rejected plaintiff's argument that payment of benefits violates the state's traditional policy of remaining neutral in strikes, insisting that denial of benefits would assist employers and thus itself not be "neutral." The neutrality argument, the court concluded, cuts both ways and therefore should give way to "the broad humanitarian policy clearly enunciated by the legislature" in the Social Services Law.⁸³ Finally, the court held that the granting of state welfare benefits to strikers is not preempted by federal regulation of collective bargaining, and should not be conditioned upon the Social Welfare Department's view of the lawfulness of a strike.⁸⁴

83. *Id.* at 168, 328 N.Y.S.2d at 295, *citing* N.Y. Soc. SERV. LAW § 131(1) (McKinney Supp. 1972), which provides, in part:

It shall be the duty of social services officials, insofar as funds are available for that purpose, to provide adequately for those unable to maintain themselves They shall, whenever possible, administer such care, treatment and service as may restore such persons to a condition of self-support or self-care, and shall further give such service to those liable to become destitute as may prevent the necessity of their becoming public charges.

To avoid the apparent inconsistency between the legislature's withholding of unemployment compensation during the first seven weeks of a strike, arguably to maintain state neutrality for at least a substantive period, and the granting of welfare benefits immediately, the court distinguished between the two kinds of subsidy:

Clearly, however, unemployment compensation and welfare assistance serve different purposes. Public assistance is designed to supply unmet subsistence needs while unemployment compensation is designed to cushion the shock of seasonal, cyclical, or technological unemployment without reference to demonstrated needs.

38 App. Div. at 168, 328 N.Y.S.2d at 294-95.

84. 38 App. Div. at 169, 328 N.Y.S.2d at 295. On the latter question, the court, citing *In re Heitzenrater*, 19 N.Y.2d 1, 224 N.E.2d 72, 277 N.Y.S.2d 633 (1966), stated that "our Court of Appeals has recognized that it is not appropriate or wise for a social welfare agency to inquire into the legality of a strike, but suggests that the question of 'fault' in work stoppage is best left to federal and state labor boards especially qualified to deal with them" The court thus left open the question whether a *court* might determine that a particular strike is illegal and cut off welfare benefits. Such a decision might further complicate "neutrality" considerations.

New York, while allowing unemployment compensation benefits to strikers after a statutory seven week waiting period, views the waiting period as a manifestation of the neutrality of the state and as a method by which the state avoids the imputation that a dispute may be financed through unemployment compensation benefits. *In re Ferrara's Claim*, 10 N.Y.2d 1, 8, 176 N.E.2d 43, 47, 217 N.Y.S.2d 11, 15 (1961). It can also be argued, of course, that the state is encouraging longer strikes by first providing aid at the point where the strikers are most in need of it. How the state's neutrality is preserved by denying benefits before a certain date but allowing them thereafter is not explained. A more logical rationale for the legislature's position is that the state would save a considerable sum, without undue harm to the striker, by denying benefits for several weeks immediately after the beginning of the dispute when the striker least needs supplemental benefits.

The decision of the Appellate Division in *Lascares II* was affirmed by the New York Court of Appeals,⁸⁵ which held that strikers were eligible for welfare benefits both before and after the 1971 amendment to the Social Services Law. Like the Appellate Division, the Court of Appeals suggested that either payment or non-payment of benefits would violate the neutrality principle,⁸⁶ a position with some philosophical merit but no historical validity. The court indicated that it would not interpret the law as precluding payment of benefits to strikers in the absence of a clear legislative intent to this effect.⁸⁷ It rejected plaintiff's preemption argument on the grounds that there is a question whether provision of subsidies has an impact on the collective bargaining system, and that in any event the state has sufficient interest in "providing welfare for its needy citizens" that the court would not find this practice precluded by the preemption doctrine in the absence of a clear showing that Congress specifically intended "to deprive the State of the power to serve that interest . . . even if such aid has some impact on national labor policy."⁸⁸

A separate attempt to adjudicate the right of New York strikers to receive welfare benefits was dismissed for lack of jurisdiction in *Russo v. Kirby*.⁸⁹ Striking CWA members filed a class action in federal court challenging the refusal of another county commissioner of the New York Department of Social Services to pay them welfare benefits. The district court granted a preliminary injunction,⁹⁰ basing its juris-

The position of the New York courts illustrates the lack of logic inherent in the arguments of state neutrality and public financing of strikes. While these arguments may serve as rationalizations for the legislature's action in the face of a statutory mandate expressly denying benefits to certain classes of workers, as the unemployment compensation statutes generally do, they should not be applied to welfare statutes containing no such statutory command.

Note, *Welfare Assistance to Strikers in Need: The Protestant Ethic Revisited*, 67 Nw. U.L. Rev. 245, 259 n.100 (1972).

85. 31 N.Y.2d 386, 292 N.E.2d 667, 340 N.Y.S.2d 397 (1972).

86. *Id.* at 395, 292 N.E.2d at 671-72, 340 N.Y.S.2d at 402. The court described neutrality as "in reality, little more than an admirable fiction." *Id.*

87. *Id.* at 395-96, 292 N.E.2d at 672, 340 N.Y.S.2d at 403.

88. *Id.* at 397, 292 N.E.2d at 673, 340 N.Y.S.2d at 404.

89. 453 F.2d 548 (2d Cir.), *rev'g* 78 L.R.R.M. 2533 (E.D.N.Y. 1971).

90. 78 L.R.R.M. at 2540-41. The injunction ordered the commissioner to cease refusing applications from strikers, or disqualifying such applications, and ordered retroactive payment to all strikers whose applications had been processed but later disqualified. The court also waived the usual procedure of requiring the filing of a bond. It did not address the problem of how welfare payments were to be recouped if it were later determined that plaintiffs were not entitled to receive them.

diction on a finding that the denial of benefits raised a substantial federal question in view of the National Labor Relations Act's (NLRA's)⁹¹ guarantee of the right to strike. Although *Lascares II* was pending, the district court in *Russo* refused to follow the abstention doctrine by awaiting the state court's construction of the 1971 amendment to the Social Services Law. The district court held that the strikers had a "fair chance of success for the ultimate relief sought"⁹² on two grounds. First, under section 593(2) of the New York Labor Law⁹³ no individual is required to accept employment in any establishment during a labor dispute on pain of losing unemployment compensation. Reading the Labor Law in conjunction with the Social Services Law, as required by *Lascares I*,⁹⁴ if a refusal to accept work in a struck establishment does not disqualify a striker from unemployment compensation, it should not disqualify him from welfare benefits.⁹⁵ Secondly, section 131(4) of the Social Services Law⁹⁶ does not include a refusal to work during a strike in its list of situations constituting a "refusal to accept employment."⁹⁷

The Second Circuit Court of Appeals reversed⁹⁸ on the ground that the district court lacked jurisdiction. The court indicated that for jurisdiction to attach the case must arise *directly* under a federal law,⁹⁹

91. Act of July 5, 1935, ch. 372, 49 Stat. 449, as amended, 29 U.S.C. §§ 151-68 (1970) [hereinafter cited as NLRA]. NLRA § 7, 29 U.S.C. § 157 (1970), provides:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158 (a)(3).

Jurisdiction was thus based on 28 U.S.C. § 1337 (1970), without regard to the amount in controversy. With regard to strikers whose benefits were terminated without a hearing, jurisdiction was also based on 28 U.S.C. § 1343 (1970). See *Goldberg v. Kelly*, 397 U.S. 254 (1970).

92. 78 L.R.R.M. at 2538, quoting *Sherman v. Posner*, 266 F. Supp. 871, 873 (S.D.N.Y. 1966).

93. N.Y. LABOR LAW § 593(2) (McKinney 1965).

94. See note 71 *supra* and accompanying text.

95. 78 L.R.R.M. at 2538. The court was strangely silent about § 592(1) of the Labor Law, which suspends payment of unemployment compensation benefits to striking employees for a seven-week period.

96. N.Y. SOC. SERV. LAW § 131(4) (McKinney 1965).

97. *Id.* The court did not explain why it assumed that the list was intended to be exclusive.

98. 453 F.2d 548 (2d Cir. 1971).

99. See *Mishkin, The Federal "Question" in the District Courts*, 53 COLUM. L. Washington University Open Scholarship

and that "facts must be alleged to show that federal law in the particular case creates a duty or remedy."¹⁰⁰ The NLRA, said the court, does not create a cause of action for denial of state welfare benefits.¹⁰¹ Further, the court dismissed as "insubstantial" the strikers' claim that violation of their constitutional rights is a basis for jurisdiction.¹⁰² And the court indicated that even if jurisdiction did exist, the facts presented a "classic case for abstention."¹⁰³

In *Francis v. Davidson*¹⁰⁴ a strikers' challenge to the denial of welfare benefits was decided on the merits, the court finding jurisdiction

REV. 157, 165-69 (1953). See generally Cohen, *The Broken Compass: The Requirement that a Case Arise "Directly" Under Federal Law*, 115 U. PA. L. REV. 890 (1967).

100. 453 F.2d at 551, citing *Gully v. First Nat'l Bank*, 299 U.S. 109 (1936); *Shoshone Mining Co. v. Rutter*, 177 U.S. 505 (1900); *T.B. Harms Co. v. Eliscu*, 339 F.2d 823 (2d Cir. 1964), cert. denied, 381 U.S. 915 (1965); Wechsler, *Federal Jurisdiction and the Revision of the Federal Code*, 13 LAW & CONTEMP. PROB. 216 (1948).

101. 453 F.2d at 551.

102. Plaintiffs' argument that denial of welfare benefits to strikers violates equal protection was dismissed on the ground that "the basis of classification is clearly not unreasonable." *Id.* Plaintiffs' argument that withdrawal of benefits without a hearing violates due process was dismissed on the ground that the dispute was purely one of law, not of fact, and that therefore no hearing was required. *Id.* at 551-52. Actually, jurisdiction probably could have been based on 28 U.S.C. § 1343 (1970), which provides:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by . . . any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights

Of course, to get jurisdiction under 28 U.S.C. § 1343(3) or (4) (1970), plaintiffs would have had to allege a violation of 42 U.S.C. § 1983 (1970), which provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

See *Francis v. Davidson*, 340 F. Supp. 351 (D. Md.) (three-judge court), *aff'd without opinion*, 409 U.S. 904 (1972).

103. 453 F.2d at 552, citing *Reetz v. Bozanich*, 397 U.S. 82 (1970). See generally Wright, *The Abstention Doctrine Reconsidered*, 37 TEXAS L. REV. 815 (1959). The court, in denying the district court's jurisdiction, did not reach defendant's claim that paying welfare benefits to strikers conflicts with national labor policy.

104. 340 F. Supp. 351 (D. Md.) (three-judge court), *aff'd without opinion*, 409 U.S. 904 (1972).

on the basis of alleged infringement of personal liberties and denial of equal protection.¹⁰⁵ *Francis* tied the strikers' right to receive AFDC-U benefits to HEW policy. Maryland uniquely denies AFDC-U payments to persons who are ineligible for unemployment compensation,¹⁰⁶ including strikers. This policy was challenged on two grounds in a class action brought by striking fathers. First, plaintiffs argued that by denying benefits to strikers, Maryland violated the equal protection clause. The court rejected this argument, holding, like the *Russo* court, that "rational bases exist for Maryland's position denying AFDC-[U] benefits to children of fathers who are out of work because of labor disputes."¹⁰⁷ Secondly, plaintiffs claimed that Maryland's policy conflicted with an HEW regulation that required states, pursuant to their AFDC-U authority, to define "unemployed" as including "any father who is employed less than 30 hours a week."¹⁰⁸ The court held that Congress had empowered HEW "to require each participating state (1) to include, or (2) to exclude from its respective AFDC-[U] program those out of work because of involvement in labor disputes, or (3) to leave that decision to each state."¹⁰⁹ The regulation in question, by mandating that all fathers who work under thirty hours per week be regarded as unemployed, had the effect of prohibiting the state from denying benefits to a striker who otherwise qualified.

Francis, although confirming the right of strikers to receive benefits under present law, permitted HEW to reverse this policy by changing its regulations. After the decision was affirmed by the Supreme

105. The court based jurisdiction on 28 U.S.C. § 1343(3) (1970), *see* note 102 *supra*, concluding:

While . . . the matter is not free from doubt, this Court, in the absence of any clear guidance from the Supreme Court or from the Fourth Circuit, adopts the approach followed in *Johnson v. Harder*, [438 F.2d 7 (2d Cir. 1971)] and holds that the alleged deprivation of AFDC-[U] benefits in this case constitutes an allegation of infringement of personal liberties and that the constitutional equal protection contentions advanced by plaintiffs herein, while rejected, are not frivolous.

340 F. Supp. at 360.

106. MD. ANN. CODE art. 88A, § 45(c) (1957); Social Services Administration, Maryland Dep't of Employment & Social Services, Rule 200.X.A.(2).

107. 340 F. Supp. at 363. The court acknowledged that there were also "rational reasons for the opposite view which has been adopted by most of the states." *Id.* The court listed the bases offered by the state to justify the policy: (1) harmony of the state's unemployment compensation and AFDC-U programs; (2) discouragement of voluntary unemployment; and (3) maintenance of governmental neutrality in economic strikes. *Id.* at 363 n.22.

108. 45 C.F.R. § 233.100(a) (1971).

109. 340 F. Supp. at 367.

Court, without opinion,¹¹⁰ HEW promulgated a new regulation¹¹¹ specifically giving to states participating in the AFDC-U program the option of providing a striker disqualification, as well as any of the disqualifications frequently contained in state unemployment compensation laws. Thus the impact of *Francis* on state welfare administration was obviated; without clear direction from Congress, HEW will leave the striker eligibility question to the states.¹¹²

The most significant attack on the practice of supplying public assistance to strikers came in *ITT v. Minter*.¹¹³ Plaintiffs, employers, sought unsuccessfully to enjoin the Commissioner of the Massachusetts Department of Public Welfare from making welfare benefits available to striking employees.¹¹⁴ The federal district court denied relief on the grounds that the employers made no showing of irreparable injury and lacked a reasonable chance of success on the merits.¹¹⁵ The First Circuit Court of Appeals affirmed.¹¹⁶

Plaintiffs' major argument in *Minter* was that state subsidization of strikers violates the preemption doctrine¹¹⁷ by indirectly interfering with the national policy of free collective bargaining. Specifically, plaintiffs contended that a federal policy of encouraging the settlement

110. 409 U.S. 904 (1972).

111. 38 Fed. Reg. 18,549 (1973), *revising* 45 C.F.R. § 233.100(a)(1) (1972):

[A]t the option of the State, such definition need not include a father whose unemployment results from participation in a labor dispute or who is unemployed by reason of conduct or circumstances which result or would result in disqualification for unemployment compensation under the State's unemployment compensation law.

112. For discussion of the effect of the new regulation on the preemption issue, see notes 432-34 *infra* and accompanying text.

113. 318 F. Supp. 364 (D. Mass.), *aff'd*, 435 F.2d 989 (1st Cir. 1970), *cert. denied*, 402 U.S. 933 (1971).

114. General Welfare and AFDC-U are available to qualifying strikers' families in Massachusetts under MASS. GEN. LAWS chs. 117 & 118 (Supp. 1972). Plaintiffs argued, as taxpayers had in *Strat-O-Seal*, see notes 52-66 *supra* and accompanying text, that since the state specifically prohibits unemployment compensation for strikers, MASS. GEN. LAWS ch. 151A, § 25(b) (1965, Supp. 1972), welfare benefits should be prohibited as well. The appellate court rejected the argument, first distinguishing the functions of the two types of subsidy, and secondly pointing out that it "would not lightly expand the legislature's expressed negative in one piece of legislation to constitute an unexpressed proviso in another. Indeed, silence on an issue where a legislature has shown its capacity to speak is all the more significant." 435 F.2d at 995.

115. 318 F. Supp. 364 (D. Mass. 1970).

116. 435 F.2d 989 (1st Cir. 1970).

117. *Id.* at 991. See generally Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337 (1972); Meltzer, *The Supreme Court, Congress, and State Jurisdiction*

of labor-management disputes by private bargaining, free of state interference, is frustrated when the state provides economic assistance to one party during a strike. The court noted that the problem of a possible conflict between national labor policy and the administration of state welfare laws is outside the scope of *San Diego Building Trades Council v. Garmon*,¹¹⁸ "its ancestors and progeny," because this conflict does not involve attempted state regulation of an activity that is "clearly or arguably 'within the compass' of sections 7 and 8 [of the NLRA] and therefore within the sole jurisdiction of the [National Labor Relations] Board," but constitutes only a "tangential frustration of the national policy objective of unfettered collective bargaining."¹¹⁹ To determine whether the state's activity should be preempted, the court employed a "balancing process . . . in which both the degree of conflict and the relative importance of the federal and state interests are assessed."¹²⁰ In balancing these interests, the court stated that it must look at the *class* of situation generally, rather than at the specific dispute before it, "to determine the quantum of impact on collective bargaining stemming from the granting of welfare benefits to strikers."¹²¹ Factors to be assessed in balancing the conflicting interests include:

how many states permit strikers to receive welfare; whether or not strikes tend to be of longer duration where welfare is received; any studies or expert testimony evaluating the impact of eligibility for benefits on the strikers' resolve; a comparison between strike benefits and welfare benefits; the impact of the requirement that welfare recipients accept suitable employment; how many strikers actually do receive welfare benefits; and a host of other factors. In addition, the state's legitimate interests must also be considered: its interests in minimizing hardship to families of strikers who have no other resources than the weekly pay check, its concern in avoiding conditions that could lead to violence, its interest in forestalling economic stagnation in local communities, etc.¹²²

over Labor Relations: I, 59 COLUM. L. REV. 6 (1959); Michelman, *State Power to Govern Concerted Employee Activities*, 74 HARV. L. REV. 641 (1961); Note, *Preemption of State Labor Regulations Collaterally in Conflict with the National Labor Relations Act*, 37 GEO. WASH. L. REV. 132 (1968).

118. 359 U.S. 236 (1959).

119. 435 F.2d at 992.

120. *Id.*, citing Note, *Federal Preemption: Governmental Interests and the Role of the Supreme Court*, 1966 DUKE L.J. 484.

121. 435 F.2d at 993.

122. *Id.*

Despite "the inadequacy of the evidence before the district court," the appellate court held that granting welfare benefits does not sufficiently frustrate federal collective bargaining policy, and that state interests are not "so insubstantial compared to the federal interest," as to invoke the preemption doctrine.¹²³

The *Minter* court believed that because of its complexity the preemption issue would be more appropriately considered by Congress than by the courts, particularly since Congress is already involved in the administration of welfare programs to the extent of establishing minimum requirements for state welfare plans.¹²⁴ Further, although the court did not "attribute heavy weight to congressional silence," it stated that it was doubtful that "if striker eligibility for welfare had a significant impact on labor-management relations, Congress would be unaware of that impact."¹²⁵

Another major effort to induce the courts to apply the preemption doctrine to state subsidization of strikers by means of welfare payments occurred in *Super Tire Engineering Co. v. McCorkle*.¹²⁶ In an effort to surmount the objections raised by the *Minter* court concerning the

123. *Id.* at 994. The district court found that although granting welfare benefits might give strikers some advantage in a labor dispute, its effect on labor-management relations was "indirect and peripheral." 318 F. Supp. at 366. Although twenty-five percent of the strikers had applied for welfare benefits, the appellate court stated, "Our record is almost bereft of any indication of significant impact on either plaintiff. . . . There is no evidence of any relationship between the availability of welfare benefits to present or prospective striker recipients and the likelihood of prolongation of either strike." 435 F.2d at 991 n.3. Neither court considered the possibility of taking judicial notice of various economic literature setting forth the rather self-evident proposition that aid to one party in a strike has the effect of increasing the ability and willingness of that party to continue the strike until the opposing party makes concessions. See notes 369-78 *infra* and accompanying text.

124. 435 F.2d at 993-94.

125. *Id.* at 994. The court's reasoning is faulty on two grounds. First, since the provision of public assistance to strikers did not commence until after 1961, at least insofar as it involved federal funds, it was impossible for the Taft-Hartley Congress, or even the Landrum-Griffin Congress—both of them demonstrably more concerned with labor law than post-1961 Congresses—to have taken note of the impact of public subsidies on strikes. Secondly, the events of the last decade have proven rather conclusively that Congress does not have cognizance of a number of factors—for example, in foreign affairs—which one might expect it to.

The court also indicated that Congress was left free to provide specifically for preemption if the *Minter* decision met with its disfavor. See *Penn Dairies v. Milk Control Comm'n*, 318 U.S. 261 (1943). Of course, this argument cuts both ways.

126. Civil No. 853 (D.N.J., July 13, 1971), *appeal dismissed as moot*, 469 F.2d 911 (3d Cir. 1972).

absence of evidence indicating that the payment of welfare benefits to strikers has a substantial impact on the collective bargaining process, employers sought to put expert testimony¹²⁷ into evidence. The district court inexplicably refused to admit the proffered testimony and denied plaintiffs' request for a preliminary injunction.

Plaintiffs' appeal was held by the Third Circuit Court of Appeals to be mooted by the settlement of the strike.¹²⁸ The court reasoned that with the termination of the strike the employers' contention that the provision of welfare benefits to strikers is unconstitutional was rendered moot unless it fell within either of two theories: (1) the "continuing effects" theory, in which the injury to the claimant continues after the specific object of litigation is no longer obtainable,¹²⁹ or (2) the so-called *Southern Pacific* theory, in which short-term government actions may be litigable after their cessation if they are "capable of repetition, yet evading review."¹³⁰ The court believed, however, that *Local 8-6, Oil Workers v. Missouri*¹³¹ requires that in all labor cases "settlement of the underlying labor dispute, absent special circumstances, requires a holding of mootness."¹³² The court's interpretation of *Oil Workers* has not been followed in other strike subsidy cases,¹³³ but will make it difficult to adjudicate the subsidization question on the merits in the Third Circuit.

Thus state provision of welfare benefits to strikers has not been successfully challenged; indeed, in *Francis* the denial of benefits was held contrary to federal policy under the special circumstances presented by Maryland's welfare regulations.¹³⁴ Provision of welfare benefits to strikers has resisted claims that it is contrary to the intent of state legislatures, inconsistent with the denial of unemployment compensation benefits under identical circumstances, inconsistent with the principle of governmental neutrality in labor disputes, and violative of the preemption doctrine. In addition, challenges to subsidization may

127. The testimony was to be that of Professor Herbert R. Northrup of the Wharton School of Finance who had directed the study by Thieblot and Cowin on the effects of payment of public subsidies to strikers on the collective bargaining system.

128. 469 F.2d 911 (3d Cir. 1972).

129. E.g., *Gray v. Sanders*, 372 U.S. 368, 375-76 (1963).

130. *Southern Pac. Terminal Co. v. ICC*, 219 U.S. 498, 516 (1911).

131. 361 U.S. 363 (1960).

132. 469 F.2d at 922.

133. E.g., *Grinnell Corp. v. Hackett*, 475 F.2d 449 (1st Cir. 1973); *IIT v. Minter*, 435 F.2d 989 (1st Cir. 1970), *cert. denied*, 402 U.S. 933 (1971).

134. See notes 104-12 *supra* and accompanying text.

face unresolved problems of federal jurisdiction and mootness raised by *Russo* and *Super Tire*, respectively.

II. UNEMPLOYMENT COMPENSATION

A second source of public subsidies for strikers is the unemployment compensation system. Technically, unemployment compensation is a subsidy provided at the expense of employers rather than the general public since unemployment benefits are paid from a state fund financed by employer payroll taxes.¹³⁵ As a practical matter, however, these subsidies are provided at the expense of the public since the costs of unemployment compensation are passed on to the consuming public by employers in the form of higher prices.

With the enactment of the National Health Insurance Act¹³⁶ in 1911, Great Britain became the first industrial nation to adopt a national unemployment compensation system. The system was financed by contributions from employers, workers, and the government.¹³⁷ The adoption of a similar system in the United States was initially opposed by organized labor, both because workers feared that they would be required to contribute to the fund, and because of the prevailing philosophy of "voluntarism," under which labor believed in non-intervention by the government in labor affairs.¹³⁸ Prior to the Depression, some corporations had established, either unilaterally or through collective bargaining, company unemployment insurance plans. Most of these plans failed, however, during the Depression.¹³⁹ State efforts to provide aid for the unemployed were also generally unsuccessful. Proposed legislation based on contribution and insurance principles, after the British model, failed to pass in New York and Ohio. In 1932 Wis-

135. The Federal Unemployment Tax Act, 26 U.S.C. §§ 3301-11 (1970, Supp. II, 1972), imposes an excise tax on employers. Payments to an unemployment fund of a state pursuant to a certified unemployment compensation law may be credited against the federal tax. *Id.* § 3302. The criteria for approval and certification of state plans by the Secretary of Labor are found at *id.* § 3304.

136. National Insurance Act of 1911, 1 & 2 Geo. 5, c. 55. See generally J. HARRIS, UNEMPLOYMENT AND POLITICS: A STUDY IN ENGLISH SOCIAL POLICY 1886-1914, at 295-334 (1972).

137. See I. BERNSTEIN, THE LEAN YEARS: A HISTORY OF THE AMERICAN WORKER 1920-1933, at 489 (1960). See generally Larson & Murray, *The Development of Unemployment Insurance in the United States*, 8 VAND. L. REV. 181 (1955).

138. I. BERNSTEIN, *supra* note 137, at 347-54.

139. *Id.* at 184-85, 489-90. The total number of workers covered by employer, union, and negotiated plans never exceeded one percent of the total labor force. *Id.* at 490.

consin established the first system of unemployment compensation reserves, but it never became fully operative.¹⁴⁰

The American Federation of Labor's (AFL's) traditional belief in voluntarism, fostered by a distrust of government and a view of all forms of subsidy as doles, came under increasing pressure during the early years of the Depression. At the same time, the self-reliant trade unions, which had been the backbone of the early labor movement in the United States, were unable to cope with the massive problems of unemployment and declining wage levels and the desperation strikes of 1930-1931. In November 1932 the AFL officially endorsed a government unemployment insurance program to be administered by the states with federal assistance. The program included a provision that benefits were not to be denied any employee solely because of his participation in a strike.¹⁴¹

The Democratic Party platform in 1932 called for a national solution to the problem of deprivation arising from widespread unemployment.¹⁴² The result, after considerable compromise, was passage of the Social Security Act¹⁴³ in 1935. The Act established a system administered on a state-by-state basis with some federal financing from the collection of an excise tax on employers.¹⁴⁴ The states were permitted to collect an additional tax from employers whose employees collected

140. *Id.* at 492-501. New York's proposed plan did not contemplate providing unemployment benefits to strikers. A faction of the AFL voluntarists in New York supported payments to strikers, which stiffened opposition of employers to the entire concept of unemployment insurance. The resulting split enabled the conservative opposition to keep the bill in committee. *Id.* at 492-96.

In Ohio, a commission studied alternative methods of providing assistance and recommended a compulsory insurance system. A bill reflecting the study never got out of committee. See REPORT OF THE OHIO COMMISSION ON UNEMPLOYMENT COMPENSATION (1932).

In Wisconsin, legislation based on a "jobless reserve system," without contribution from either employees or the government, was passed in 1932, Act of Jan. 28, 1932, ch. 20, [1931] Wis. Laws Spec. Sess. 57, but operation was delayed, and then abandoned, because of congressional consideration and passage of a federal social security law. By requiring each employer to develop its own reserves, with the amount of the contribution to depend on the employer's employment level, the plan was intended to stabilize employment. See I. BERNSTEIN, *supra* note 137, at 498-501. See generally R. HOAR, WISCONSIN UNEMPLOYMENT INSURANCE (1934).

141. See I. BERNSTEIN, *supra* note 137, at 345-53.

142. See A. SCHLESINGER, *supra* note 8, at 301 (1959).

143. Act of Aug. 14, 1935, ch. 531, 49 Stat. 620, as amended, 42 U.S.C. § 301 et seq. (1970).

144. *Id.* at §§ 901-02, 49 Stat. 639, as amended, 26 U.S.C. § 3302 (1970). See note 135 *supra*.

more than a given amount of benefits.¹⁴⁵ To assist the states in drafting legislation to implement the unemployment compensation system, the Social Security Board, which was created as a general advisory council on social security,¹⁴⁶ composed several model bills. The bills were based in large part on the British experience in administering unemployment insurance.¹⁴⁷ The model bill adopted in most states contained a provision which served to disqualify workers whose unemployment was "due to a stoppage of work which exists because of a labor dispute."¹⁴⁸ Other states excepted from disqualification employees out of work as a result of a lockout,¹⁴⁹ or as a result of an

145. As a result, many states tax employers on the basis of an "experience rating," which reflects the amount of unemployment compensation paid during preceding years to the employers' workers. *E.g.*, ALA. CODE tit. 26, § 204 (Cum. Supp. 1971); ILL. ANN. STAT. ch. 48, § 576 (Smith-Hurd 1966); TEX. REV. CIV. STAT. ANN. art. 5221b-5(c) (1971, Supp. 1973).

146. See Act of Aug. 14, 1935, ch. 531, §§ 701-04, 49 Stat. 635.

147. See Shadur, *Unemployment Benefits and the "Labor Dispute" Disqualification*, 17 U. CHI. L. REV. 294, 294-95 (1950).

148. The bill provided, in part:

An individual shall be disqualified for benefits . . . for any week with respect to which the commissioner finds that his total or partial unemployment is due to a stoppage of work which exists because of a labor dispute at the factory, establishment or premises at which he is or was last employed: *Provided*, That this subsection shall not apply if it is shown to the satisfaction of the commissioner that—

(1) He is not participating in or financing or directly interested in the labor dispute which caused the stoppage of work; and

(2) He does not belong to a grade or class of workers of which, immediately before commencement of the stoppage, there were members employed at the premises at which the stoppage occurs, any of whom are participating in or financing or directly interested in the dispute;

Provided, That if in any case separate branches of work which are commonly conducted as separate businesses in separate premises, are conducted in separate departments of the same premises, each such department shall, for the purpose of this subsection, be deemed to be a separate factory, establishment, or other premises.

SOCIAL SECURITY BOARD, DRAFT BILLS FOR STATE UNEMPLOYMENT COMPENSATION OF THE POOLED FUND AND EMPLOYER RESERVE ACCOUNT TYPES § 1(5) (1936). For examples of statutes modeled after this bill, see CAL. UNEMP. INS. CODE § 1262 (Decring 1956); DEL. CODE ANN. tit. 19, § 3315(4) (1953, Supp. 1970); ME. REV. STAT. ANN. tit. 26 § 1193(4) (Supp. 1973); MINN. STAT. ANN. § 268.09(5) (Supp. 1973); MO. REV. STAT. § 288.040(5) (Supp. 1973); N.J. REV. STAT. § 43:21-5(d) (Supp. 1973); N.Y. LABOR LAW § 592(1) (McKinney 1965); N.D. CENT. CODE § 52-06-02 (4) (1960); OKLA. STAT. ANN. tit. 40, § 215(d) (1954); WASH. REV. CODE ANN. § 50.20.090 (1962); WIS. STAT. ANN. § 108.04(10) (Supp. 1973). See generally D. NELSON, UNEMPLOYMENT INSURANCE: THE AMERICAN EXPERIENCE 1915-1935 (1969).

149. ARK. STAT. ANN. § 81-1105(f) (1960); COLO. REV. STAT. ANN. § 82-4-9(1)

employer's failure to observe state or federal labor regulations.¹⁵⁰

The "labor dispute" disqualification was based on three rationales. First, it was thought that to pay benefits to workers who were unemployed due to their voluntary decision to advance their own economic interests by striking would be contrary to the basic purpose of the Social Security Act, which was to assist those individuals involuntarily unemployed.¹⁵¹ Secondly, it was reasoned that for the government to require an employer to finance a strike by his own employees violated governmental neutrality.¹⁵² Finally, payment of benefits to strikers was thought to place an overly severe demand on the unemployment compensation fund.¹⁵³

The labor dispute disqualification established in the area of unemployment compensation the basic principle that individuals whose unemployment or need resulted from their efforts to further their economic interests through the exercise of collective action were not to receive subsidies at the expense of the public. As a corollary to this principle, it was also established that individuals who were unemployed as a result of a labor dispute in which they were not participating were entitled to receive public subsidies because their unemployment was involuntary. The first principle has generally prevented unemployment compensation from becoming a source of public subsidies for strikers. There are, however, exceptions to this principle which permit the use of unemployment compensation to subsidize strikers in certain

(1963); KY. REV. STAT. § 341.360(1) (1969); MD. ANN. CODE art. 95A, § 6(e) (1969); MICH. STAT. ANN. § 17.531(8) (Supp. 1973); OHIO REV. CODE ANN. § 4141.29(D)(1)(a) (Page Supp. 1972); PA. STAT. ANN. tit. 43, § 802(d) (1964).

150. *E.g.*, MONT. REV. CODES ANN. § 87-106(d) (1964); W. VA. CODE ANN. § 21A-6-3 (Supp. 1972). *See generally* U.S. DEP'T OF LABOR, COMPARISON OF STATE UNEMPLOYMENT LAWS (1968).

151. *Haynes v. Unemployment Comp. Comm'n*, 353 Mo. 540, 546-47, 183 S.W.2d 77, 81-82 (1944); *see* *Emrick v. Unemployment Comp. Comm'n*, 53 Del. 561, 563-64, 173 A.2d 743, 745 (1961); *Lawrence Baking Co. v. Unemployment Comp. Comm'n*, 308 Mich. 198, 208, 13 N.W.2d 260, 263-64 (1944); *cf.* *Haley v. Board of Rev., Div. of Empl. Sec.*, 106 N.J. Super. 420, 426-27, 256 A.2d 71, 74-75 (1969).

152. *Miville v. Maine Empl. Sec. Comm'n*, 219 A.2d 752, 753-54 (Me. 1966); *Sweeney v. Board of Rev., Div. of Empl. Sec.*, 43 N.J. 535, 539, 206 A.2d 345, 347 (1965); *In re Steelman*, 219 N.C. 306, 310, 13 S.E.2d 544, 547 (1941); *Marathon Elec. Mfg. Corp. v. Industrial Comm'n*, 269 Wis. 394, 404-05, 69 N.W.2d 573, 579-80 (1955); *see* *Saunders v. Maryland Unempl. Comp. Bd.*, 188 Md. 677, 682, 53 A.2d 579, 581 (1947).

153. *See* Pribram, *Compensation for Unemployment during Industrial Disputes*, 51 MONTHLY LAB. REV. 1375, 1376 (1940).

circumstances.¹⁵⁴

The most significant exception to the principle occurs in New York and Rhode Island. To prevent strikers from suffering too severely in labor disputes, New York grants unemployment compensation to strikers after a labor dispute has lasted seven weeks.¹⁵⁵ Rhode Island does the same after six weeks.¹⁵⁶ In the past, Alaska,¹⁵⁷ Louisiana,¹⁵⁸ Pennsylvania,¹⁵⁹ and Tennessee¹⁶⁰ have had similar provisions which were repealed as a result of public pressure.

The next most serious deviation from the general principle of denying unemployment compensation to participants in a labor dispute is the so-called "fault" or "lockout" exception. A number of states

154. For example, under the Railroad Unemployment Insurance Act, 45 U.S.C. §§ 351-67 (1970), striking railroad employees may receive unemployment compensation benefits unless "such strike was commenced in violation of the provisions of the Railway Labor Act or in violation of the established rules and practices of a bona fide labor organization of which [the employee] was a member." 45 U.S.C. § 354 (a-2) (iii) (1970). See *Brotherhood of Ry. & S.S. Clerks v. Railroad Retirement Bd.*, 239 F.2d 37 (D.C. Cir. 1956); *Hearings Before a Subcomm. of the House Comm. on Interstate and Foreign Commerce*, 75th Cong., 3d Sess. 133 (1938): "Thus, the unemployment fund would become a strike benefit fund to a group directly responsible for the stoppage of work, causing their unemployment as well as that of related groups not directly involved in the strike." See also notes 148-50 *supra* and accompanying text.

155. N.Y. LABOR LAW § 592(1) (McKinney 1965). See *In re Burger*, 277 App. Div. 234, 236, 98 N.Y.S.2d 932, 934 (1950), *aff'd*, 303 N.Y. 654, 101 N.E.2d 763 (1951): "The main purpose of section 592 is clear. The State is to stand aside for a time, pending the settlement of differences between employer and employees, to avoid the imputation that a strike may be financed through unemployment insurance benefits." In *In re Kelly v. Catherwood*, 33 App. Div. 2d 830, 305 N.Y.S.2d 741 (1969), *aff'd*, 29 N.Y.2d 877, 278 N.E.2d 649, 328 N.Y.S.2d 442 (1972), the seven-week suspension was held constitutional in the face of a union attack. The court pointed out:

These benefits are paid from the Unemployment Insurance Fund, to which employers are the sole contributors . . . and to require employers to subsidize wages lost by employees who are on strike or who have been locked out would subvert the delicate balance of power existing between labor and management upon which the collective bargaining process depends.

Id. at 831, 305 N.Y.S.2d at 743.

156. R.I. GEN. LAWS ANN. § 28-44-16 (1969).

157. Law of Jan. 17, 1939, ch. 1, § 25, [1939] Alas. Laws 46 (repealed 1941) (eight weeks).

158. Act of July 2, 1938, no. 164, [1938] La. Acts 394 (ten weeks), *amended by* Act of June 30, 1940, no. 11, [1940] La. Acts 33 (repealed 1946) (three weeks).

159. Law of May 29, 1945, no. 408, § 9, [1945] Pa. Laws 1167 (repealed 1947) (four weeks).

160. Act of March 10, 1939, ch. 131, § 8, [1939] Tenn. Pub. Acts 511 (repealed 1947) (four weeks).

by statute¹⁶¹ and two by judicial construction¹⁶² have ruled that employees whose unemployment results from a lockout rather than a strike are entitled to receive unemployment compensation. The justification for this exception is that workers unemployed as a result of a lockout are not voluntarily unemployed in an effort to improve their economic condition.¹⁶³ From an administrative point of view, this exception is a nightmare because of the virtual impossibility in many situations of distinguishing a strike from a lockout.¹⁶⁴ And the administrative difficulty suggests a difficulty in principle as well. The lockout is the employer's counterpart of the strike. With limited exceptions it is used defensively rather than offensively; that is, it is used not to force a reduction in wage costs but to minimize increases in wage costs. Whether a given dispute is a strike or a lockout depends, then, on which of the two sides succeeds in landing its punch first. Viewed in this light, an individual unemployed because of a lockout is as much unemployed as a result of his efforts to improve his economic condition as the individual who is unemployed as a result of a strike.¹⁶⁵

161. See note 149 *supra*.

162. See *Bunny's Waffle Shop, Inc. v. California Empl. Comm'n*, 24 Cal. 2d 735, 151 P.2d 224 (1944), *construing* CAL. UNEP. INS. CODE § 1262 (Deering 1956); *Teamsters Locals 222 & 976 v. Board of Rev., Dep't of Empl. Sec.*, 10 Utah 2d 63, 348 P.2d 558 (1960), *construing* UTAH CODE ANN. § 35-4-5(d) (Supp. 1973). See generally Lewis, *The Lockout Exception: A Study in Unemployment Insurance Law and Administrative Neutrality*, 6 CALIF. W.L. REV. 89 (1969).

163. Lewis, *supra* note 162, at 112, points out that this justification was more applicable to "earlier periods in American labor history."

164. See *id.*:

An even more difficult terrain for employment security commissioners, referees, appeals boards, and the courts to negotiate is the strike-lockout distinction. In most, if not all, litigated cases, elements of both forms of economic warfare are present and with conflict inevitable, the thrust of the lockout exception itself generates pressure on each disputant to behave in such a way as to create the impression most favorable to it. The problem is magnified for the employer and the claimant by court interpretations which vary appreciably among the states as to the measure of responsibility for the work stoppage, and as to which of the parties it is to be attached.

165. The fact that a lockout and a strike are economic counterparts was used by employers in *Holland Motor Express, Inc. v. Michigan Empl. Sec. Comm'n*, 42 Mich. App. 19, 201 N.W.2d 308 (1972), to support a claim that the lockout exception violates equal protection by imposing an arbitrary exception to the labor dispute disqualification. The court upheld the lockout exception on the ground that the state legislature had not acted arbitrarily in distinguishing between those who are voluntarily unemployed and those who are involuntarily unemployed for the purpose of determining eligibility for unemployment compensation benefits.

A third deviation from the basic principle is the "establishment" concept. The labor dispute disqualifications in all states limit disqualification to situations in which the unemployment results from a labor dispute at the "establishment" in which an individual works.¹⁶⁶ The purpose of this limitation is to prevent the employee from losing benefits because of the existence of a labor dispute at another establishment in which he presumably has no interest. The problem with this exception is that in some industries, specifically the automobile industry, no "establishment" is complete in itself; rather, each plant is part of a larger division. Accordingly, if employees strike at one plant, they inevitably force the cessation of operations at other plants as well. Historically, the United Auto Workers (UAW) has generally followed a strategy of striking only a few key plants. This strategy eventually forces the shutdown of the remaining plants but leaves workers in these plants free to apply for unemployment benefits without being disqualified under the labor dispute disqualification, even though their unemployment is as much a result of their collective effort to improve their economic condition, as is the unemployment of the workers at the plants which are actually struck.¹⁶⁷

Another significant deviation from the no-subsidy concept occurs when employees have been laid off prior to the commencement of the labor dispute.¹⁶⁸ In these cases most courts and administrative agencies have ruled that the workers' continued unemployment is due not to the labor dispute but to the lack of work which originally caused their layoff.¹⁶⁹ In so holding, courts and agencies have failed to recognize that with the existence of the labor dispute these employees would not

166. See generally Lesser, *Labor Disputes and Unemployment Compensation*, 55 YALE L.J. 167, 168 (1945).

167. See Park v. Employment Sec. Comm'n, 355 Mich. 103, 94 N.W.2d 407 (1959). Courts also disagree as to the meaning of "establishment;" for discussion of the prevailing tests, see 58 MICH. L. REV. 1239, 1240 (1960). See generally Barker, *Unemployment Benefits in Labor Controversies: The Anachronisms of the Establishment Doctrine*, 16 BUFFALO L. REV. 715 (1967).

168. See Note, *Effect of Participation in a Labor Dispute Upon Continuation of Unemployment Benefits*, 52 CORNELL L.Q. 738 (1967).

169. See, e.g., *Ruberoid Co. v. California Unempl. Ins. App. Bd.*, 59 Cal. 2d 73, 378 P.2d 102, 27 Cal. Rptr. 878 (1963); *Brechu v. Rapid Transit Co.*, 20 Conn. Supp. 210, 131 A.2d 211 (1957); *Muncie Foundry Div. of Borg-Warner Corp. v. Review Bd. of Unempl. Sec. Div.*, 114 Ind. App. 475, 51 N.E.2d 891 (1943); *Tucker v. American Smelting & Refining Co.*, 189 Md. 250, 55 A.2d 692 (1947); *American Dredging Co. v. Unemployment Comp. Bd. of Rev.*, 208 Pa. Super. 451, 222 A.2d 449 (1966); cf. *Fort Smith Chair Co. v. Laney*, 238 Ark. 636, 383 S.W.2d 666 (1964).

return to work and, consequently, would remain unemployed after the commencement of the dispute because of the dispute rather than the original cause of the layoff.¹⁷⁰ If these employees participate in the labor dispute by picketing or other action, they may lose their right to receive benefits.¹⁷¹ Of course, it would seem to be within the power of the employer to prevent subsidies in this instance. Should the employer recall these employees to work, and should they refuse to cross the picket line, it would then be evident that their unemployment from the time of recall resulted from the existence of the labor dispute. Their disqualification from unemployment compensation would presumably follow.¹⁷²

Another departure from the no-subsidy policy occurs in the case of employees who lose their positions as the result of their replacement in the course of a labor dispute.¹⁷³ A number of courts have held that an employee disqualified under the labor dispute provision becomes qualified for unemployment compensation benefits upon resumption of production¹⁷⁴ in the plant in which he was employed or upon his ultimate discharge.¹⁷⁵ Some cases still permit eligibility even though the employee refuses to accept a re-employment offer from his employer.¹⁷⁶ Since the continued unemployment of these employees clearly is the result of a labor dispute, those courts and administrative agencies which have, in effect, removed the disqualification upon the

170. For discussion of eligibility requirements for unemployment compensation for employees who refuse to cross a picket line, see 44 IOWA L. REV. 819 (1959); 37 NOTRE DAME LAW. 739 (1962). Normally, these employees are disqualified under either the labor dispute disqualification or the voluntary leaving disqualification if their refusal is the result of sympathy, but not if it is the result of fear. See, e.g., *Shell Oil Co. v. Cummins*, 7 Ill. 2d 329, 131 N.E.2d 64 (1955); *Meyer v. Industrial Comm'n*, 240 Mo. App. 1022, 223 S.W.2d 835 (1949). When an employee refuses out of sympathy, he, in effect, joins the strike, *Kellogg Co. v. NLRB*, 457 F.2d 519 (6th Cir. 1972), and payment of benefits to him would constitute a strike subsidy.

171. See Note, *Effect of Participation in a Labor Dispute Upon Continuation of Unemployment Benefits*, 52 CORNELL L.Q. 738, 742-49 (1967).

172. See *Merryman v. Administrator, Unempl. Comp. Act*, 23 Conn. Supp. 233, 181 A.2d 260 (1962); *Ablondi v. Board of Rev.*, 8 N.J. Super. 71, 73 A.2d 262 (1950); *In re Sadowski*, 257 App. Div. 529, 13 N.Y.S.2d 553 (1939); *Mosko v. Unemployment Comp. Bd. of Rev.*, 199 Pa. Super. 73, 184 A.2d 395 (1962).

173. See Mandelker, *Refusals to Work and Union Objectives in the Administration of Taft-Hartley and Unemployment Compensation*, 44 CORNELL L.Q. 477 (1959).

174. E.g., *Sakrison v. Pierce*, 66 Ariz. 162, 185 P.2d 528 (1947); *Lawrence Bakery Co. v. Michigan Unempl. Comp. Comm'n*, 308 Mich. 198, 13 N.W.2d 260 (1944).

175. E.g., *Milne Chair Co. v. Hake*, 190 Tenn. 395, 230 S.W.2d 393 (1950).

176. E.g., *Barber v. California Empl. Stabilization Comm'n*, 130 Cal. App. 2d 7, 278 P.2d 762 (1954).

employer's resumption of production or replacement of the employee seem to have misconstrued the labor dispute disqualification. From a policy standpoint, however, it would seem that payment of benefits under these circumstances would not be as harmful as in the other exceptions to disqualification because payment of benefits here does not prolong the strike or upset the collective bargaining process, although recognition by the employees that they can collect benefits in these circumstances might have these deleterious effects.

A final exception to the labor dispute disqualification is the "intervening employment" exception. Although strikers generally make little attempt to find other employment—since few employers desire to hire employees who will quit upon termination of a strike, and since the number of open jobs, particularly in small communities, is limited—some strikers do secure temporary bona fide employment. Attempts by these strikers to claim unemployment compensation upon termination of their temporary employment have been defeated in most states on the ground that this unemployment is really due to a labor dispute and not to the layoff by the temporary employer.¹⁷⁷ As one court pointed out, to do otherwise "would permit a striker to obtain any sort of temporary work and when it was terminated to apply for benefits for the loss of the temporary job even though the work stoppage still continued."¹⁷⁸ In *Great Lakes Steel Corp. v. Michigan Employment Security Commission*¹⁷⁹ the court adopted a contrary rule, thus extending an invitation to every striker in Michigan to obtain "employment" following commencement of a strike and, after working at his new employment for a day, to be "laid off" and thus be eligible for unemployment compensation.¹⁸⁰ Among the first to accept the court's invitation to chicanery were employees of the Dow Chemical Corporation who, represented by the United Steel Workers (USW), commenced an economic strike in early 1972. They then filed for unemployment compensation with the state's Employment Security Commission, but were denied benefits under

177. See, e.g., *Alin v. Alaska Empl. Sec. Comm'n*, 17 Alas. 607 (1958); *Hopkins, Inc. v. California Empl. Comm'n*, 24 Cal. 2d 744, 151 P.2d 229 (1944); *Scott v. Smith*, 141 Mont. 230, 376 P.2d 733 (1962).

178. *Alin v. Alaska Empl. Sec. Comm'n*, 17 Alas. 607, 615 (1958).

179. 381 Mich. 249, 161 N.W.2d 14 (1968), *aff'g* 6 Mich. App. 656, 150 N.W.2d 547 (1967).

180. The court did not make clear whether the unemployment compensation so payable was to be charged against the account of the interim employer or the struck employer.

Michigan's labor dispute disqualification.¹⁸¹ Following this action, a number of employees secured temporary employment with other employers. In most cases the duration of this "employment" was one day. After filing notice of termination of such "employment," the strikers applied for and were granted unemployment compensation. The Commission's decision to grant benefits to the USW is currently being challenged in *Dow Chemical Co. v. Taylor*,¹⁸² if it is upheld it will, in effect, eliminate the striker disqualification in Michigan.

The labor dispute disqualification and its exceptions have, at various times in various states, led both management and labor to seek to extend or restrict the disqualification both by exerting political pressure on state legislatures and by litigating.¹⁸³ The most significant legal attack on the principle of subsidization came, not surprisingly, in Rhode Island. In *ITT v. Carter*¹⁸⁴ the preemption argument was raised for the first time to challenge payment of unemployment compensation to strikers. The court's treatment of the argument was, even in terms of the strike subsidy cases, both careless and unrealistic. In denying the employer's request for an injunction against the payment of unemployment benefits to striking workers, the court held that the state statute¹⁸⁵ authorizing the payments did not conflict with the NLRA's protection of the right to organize for collective bargaining.¹⁸⁶ The court distinguished *General Electric Co. v. Callahan*,¹⁸⁷ which prohibited inquiries into a labor dispute by a state arbitration board on the ground that such inquiries constituted the type of coercion that the Labor Management Relations Act¹⁸⁸ intended to eliminate, stating that

181. MICH. STAT. ANN. § 17.531(8) (Supp. 1973).

182. 57 F.R.D. 105 (E.D. Mich. 1972) (motion to dismiss denied). See notes 234-37 *infra* and accompanying text.

183. See, e.g., *In re George's Claim*, 14 N.Y.2d 234, 199 N.E.2d 503, 250 N.Y.S.2d 421 (1964), in which an employer attacking New York's application of the establishment concept apparently advanced the general argument that payment of unemployment compensation to strikers interferes with interstate commerce and is consequently prohibited under the supremacy clause. The court rejected the argument, pointing out that the constitutionality of New York's unemployment compensation law was upheld in *W.H.H. Chamberlain, Inc. v. Andrews*, 299 U.S. 515 (1937), as not infringing on the federal commerce power and that, consequently, regulation of eligibility for such benefit does not interfere with interstate commerce.

184. Civil No. 3770 (D.R.I., April 6, 1967).

185. R.I. GEN. LAWS ANN. § 28-44-16 (1969).

186. NLRA § 7, 29 U.S.C. § 157 (1970).

187. 294 F.2d 60 (1st Cir. 1961), *cert. denied*, 369 U.S. 832 (1962).

188. Act of June 23, 1947, ch. 120, 61 Stat. 136, *as amended*, 29 U.S.C. §§ 141-44, 151-67, 171-87 (1970) [hereinafter cited as LMRA].

in *Callahan* "the State Board could clearly conflict with the policy of free negotiations. It had direct coercive power."¹⁸⁹ Rather than examine the extent of potential interference with free bargaining, as the *Callahan* court had done,¹⁹⁰ the *Carter* court viewed the removal of subsidies as granting management an unfair advantage, namely, "the pressure of economic insecurity due to the unemployment stemming from the strike."¹⁹¹ That the imposition of such pressure is the heart of the collective bargaining process was not considered. Furthermore, the court indicated that the state has a valid and historical interest in preventing the "health problems" which would be created by "striking employees' inability to feed their families."¹⁹² Finally, the court summarily dismissed the employer's contention that payment of unemployment compensation to strikers violates the fourteenth amendment, stating that the Supreme Court has upheld the constitutionality of unemployment compensation laws.¹⁹³

In *Almacs, Inc. v. Hackett*¹⁹⁴ a group of employers sought to enjoin the Director of the Rhode Island Department of Employment Security from paying unemployment compensation to their employees, whose strike was approaching the six-week mark. The *Almacs* court rejected the employers' preemption argument¹⁹⁵ and dismissed the case on two grounds. First, the court held that Rhode Island's unemployment compensation statute is "part of a broad state-federal cooperative effort to protect citizens against economic vicissitudes," and was not intended to affect collective bargaining rights.¹⁹⁶ Likewise, the court found no evidence that the NLRA was intended to "override" state welfare laws, and noted increasing congressional financial support for unemployment compensation programs both where benefits are paid

189. Civil No. 3770 (D.R.I., April 6, 1967).

190. See 294 F.2d at 67:

The obvious statutory purpose is to coerce agreement by invoking official action to mold public opinion with respect to a labor dispute to the end of bringing the pressure of public opinion to bear to force a settlement. This is quite contrary to the national policy not to compel agreement but instead only to encourage voluntary agreements freely arrived at after "good faith" bargaining between the parties.

191. Civil No. 3770 (D.R.I., April 6, 1967).

192. *Id.*

193. *Id.*, citing *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495 (1937).

194. 312 F. Supp. 964 (D.R.I. 1970).

195. See notes 117-25 *supra* and accompanying text.

196. 312 F. Supp. at 967-68.

to strikers and where they are not.¹⁹⁷ Secondly, the court found that provision of unemployment compensation to strikers falls within both exceptions to the *Garmon* rule. Although deciding the case on the pleadings, the court held that the “imposition upon collective bargaining power of the grant or denial of state benefits is speculative and limited,”¹⁹⁸ and thus within the “peripheral concern” exception.¹⁹⁹ And “the concern of the state for the well-being of its unemployed and ultimately for the health of the local community is a most important interest ‘deeply rooted in local feeling and responsibility,’ ”²⁰⁰ and thus within the “local interest” exception.

The question should not be whether Congress indicated an express intent specifically to prevent the use of unemployment compensation to upset the balance of power in labor-management relations—almost certainly it never considered this possibility—but whether Congress, in enacting the NLRA, had a general purpose to establish a balance of power and to exclude any state action which would alter that balance. *Garmon* makes clear that the particular intention of the state law is irrelevant; if the *effect* of the law is to alter the balance created by the NLRA, the law is deemed preempted.²⁰¹

A final attack on the Rhode Island unemployment compensation statute came in *Grinnell Corp. v. Hackett*.²⁰² Again, an employer re-

197. *Id.* at 968. The court reached this conclusion concerning congressional intent without discussing any legislative history. H.R. REP. No. 245, *supra* note 31, at 12-13, in discussing an amendment to the Wagner Act, noted:

A few States pay strikers after the fifth, sixth, or seventh week of a strike. This clearly is a perversion of the purposes of the social security laws, which Congress intended to provide for unemployment compensation for those out of work involuntarily and through no fault of their own. We therefore have provided that a striker's status as an “employee” stops when he starts receiving unemployment compensation from any State. He may receive relief from his union, from local welfare funds, or from charity without losing that status.

See note 206 *infra*. *See generally* H.R. REP. No. 510, 80th Cong., 1st Sess. (1947) (conference report); 1 & 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947 (1947).

198. 312 F. Supp. at 968.

199. For further discussion of *Garmon* and its exceptions, see notes 398-434 *infra* and accompanying text.

200. 312 F. Supp. at 968.

201. 359 U.S. at 244: “Regardless of the mode adopted, to allow the States to control conduct which is the subject of national regulation would create potential frustration of national purposes.” *Accord*, *Amalgamated Ass'n of Street Employees v. Lockridge*, 403 U.S. 274, 292 (1971): “Pre-emption . . . is designed to shield the system from conflicting regulation of conduct. It is the conduct being regulated, not the formal description of governing legal standards, that is the proper focus of concern.”

202. 344 F. Supp. 749 (D.R.I. 1972), *rev'd*, 475 F.2d 449 (1st Cir. 1973).

quested an injunction restraining the state from paying unemployment compensation benefits to the employer's striking workers. By introducing expert evidence,²⁰³ the employer sought to avoid the objection raised in *Minter* that there was no evidence showing the impact of striker subsidies on the collective bargaining process. But the court denied relief on two contradictory grounds. First, relying on *Minter*, it ruled that the issue of preemption should be resolved by Congress and not by the courts.²⁰⁴ Secondly, it held that the state's interest in providing for the welfare of its inhabitants is "so substantial that this Court will not conclude that Congress has excluded such state action."²⁰⁵ The court indicated that it was influenced by Congress' failure to adopt a recent proposal prohibiting states from granting unemployment compensation to strikers.²⁰⁶ In a further contradiction, the court also indicated that the case fell within the "local feeling" exception to the *Garmon* rule.²⁰⁷

On appeal, the First Circuit Court of Appeals reversed and remanded.²⁰⁸ First, the court held that the case was justiciable, pointing out that while *Minter* had recognized that it would be preferable for Congress to resolve the question of preemption, it did not preclude judicial resolution of the question when presented in a particular case.²⁰⁹ Unlike the Third Circuit in *Super Tire*,²¹⁰ the court held that

203. It was stipulated that the strikers had received in one week a total of \$31,190 in unemployment benefits—an average benefit of \$77.20. *Id.* at 751.

204. *Id.* at 754.

205. *Id.*

206. In a message to Congress in 1969, President Nixon proposed legislation prohibiting the New York-Rhode Island system of providing unemployment compensation to strikers. See note 155 *supra* and accompanying text. The proposal was embodied in H.R. 12,625, 91st Cong., 1st Sess. (1969), and rejected by the House Ways and Means Committee on the implausible ground that management as well as labor preferred that the matter be left to the states. See H.R. REP. NO. 612, 91st Cong., 1st Sess. 18 (1969).

An earlier attempt on the federal level to restrict unemployment benefits to strikers also failed. Proposed House amendments to the NLRA contained a provision which removed a striker's "employee" status in the event he received unemployment compensation, although not if he received strike benefits, charity, or local welfare funds. H.R. 3020, 80th Cong., 1st Sess. 4 (1947). The provision was not contained in the Senate bill, S. 1126, 80th Cong., 1st Sess. (1947), and was not enacted as part of the LMRA. See note 194 *supra*.

207. 344 F. Supp. at 754.

208. 475 F.2d 449 (1st Cir. 1973).

209. *Id.* at 453-54.

210. See notes 126-33 *supra* and accompanying text. *Grinnell* followed *Minter* in finding that the provision of benefits to strikers presents a recurring question

although the strike which had given rise to the case had ended, the case was not moot in view of the continuing nature of the problem. Next, the court examined the history of congressional treatment of the subsidization question in an effort to determine congressional intent. The court noted that Congress had failed in enacting the Social Security Act to require disqualification for labor disputes,²¹¹ and that a conference committee had dropped a provision contained in the original Hartley bill²¹² which would have denied employee status to a striker who accepted unemployment compensation.²¹³ The court also made reference to Congress' refusals in 1969 and 1970 to accede to President Nixon's request for legislation requiring the states to deny unemployment compensation to strikers.²¹⁴ Finally, the court recog-

involving significant public rights, and thus is within the ambit of *Southern Pacific*. 475 F.2d at 453-54.

211. 475 F.2d at 454-55:

Indeed, in detailing the requirements for state laws that would exempt employers from the federal unemployment tax, Congress specifically established three conditions to insure the compatibility of state unemployment compensation laws with the then brand-new labor statute—unemployment compensation could not be denied to an otherwise eligible individual for refusing to accept new work (1) if the position offered was vacant due directly to a labor dispute, (2) if the wages for the offered job were substantially less favorable than those prevailing locally for comparable work or (3) if a condition of the offered employment was membership in a company union or resignation from a bona fide union. [Social Security Act, now compiled in Federal Unemployment Tax Act] § 903(a)(5), 49 Stat. 640, 26 U.S.C. § 3304(a)(5). Certainly, had it thought it necessary to preserve its labor policy, Congress could also have required state laws to bar payment of benefits to strikers. Moreover, pursuant to § 3304(a) the Social Security Board, presumably aware of the Congressional intent, approved, within the next few years, four state laws which allowed payments to strikers.

212. H.R. 3020, 80th Cong., 1st Sess. (1947).

213. 475 F.2d at 455.

214. See note 206 *supra*. The court quoted the following explanation for abandoning the proposed requirement:

We have tried to keep from prohibiting the States from doing the things the States believe are in the best interest of their people. . . . For example, there are two States . . . which will pay unemployment benefits when employees are on strike [I]f the State wants to do it we believe they ought to be given latitude to enable them to write the program they want.

475 F.2d at 455, quoting 115 CONG. REC. 34,106 (1969) (remarks of Cong. Mills). But the court believed that this explanation, by itself, was not sufficient to establish a clear congressional purpose:

[I]n the absence of any floor amendment or debate related to that particular change in either house, and of any real consideration of the issue at any level in the Senate, we cannot take the House Committee's deletion, and Congress' subsequent approval of the substitute bill, as a clear indication of the intent of the entire Congress not to preempt unemployment payments to strikers.

475 F.2d at 456.

nized the eligibility of strikers for benefits under the Railroad Unemployment Insurance Act²¹⁵ and the Food Stamp Act of 1964.²¹⁶ But the court failed to find in this legislative history an unambiguous revelation of intent and concluded, "The most that can fairly be said, in the face of this legislative record, is that Congress has been and presently is aware of the problem, has had the opportunity to resolve it, and has acted in closely analogous circumstances."²¹⁷ Accordingly, the court was left with the following questions: "[D]oes the payment of unemployment compensation to strikers 'palpably infringe' upon federal labor policy . . . and is the state interest in cushioning the impact of unemployment stronger than the federal interest in untrammelled collective bargaining?"²¹⁸ It concluded that these questions could be resolved only on facts found by the district court and accordingly remanded.

In remanding, however, the *Grinnell* court gave the district court a series of instructions which came close to directing the court to find no preemption. With respect to the infringement issue, the appellate court indicated that only evidence relating to the impact of unemployment compensation benefits in a strike situation was to be considered since both welfare and food stamps, unlike unemployment compensation, are available immediately to strikers.²¹⁹ The court also noted the absence of proof that a substantial number of strikers are eligible for and receive unemployment compensation, and instructed the district court to require a showing that provision of such benefits has an impact on the *length* of strikes before finding an infringement on federal labor policy.²²⁰ On the state interest question, the court was unwilling to

215. 45 U.S.C. § 354(a-2)(iii) (1970).

216. 7 U.S.C. § 2014(c) (1970).

217. 475 F.2d at 457.

218. *Id.*

219. Admittedly, some kind of adjustment should be made for the fact that unemployment compensation benefits are not receivable for the first seven weeks of the strike. It seems obvious, however, that evidence demonstrating the impact of any of the types of subsidization would be equally probative of the impact of any particular subsidy, since all of them increase the employees' economic power and thus influence labor-management relations.

220. 475 F.2d at 457-58. The study by Thieblot and Cowin, note 2 *supra*, introduced as an exhibit in the district court, appears strongly to demonstrate causation. The court recognized that the provision of benefits might "produce higher settlements with the generally attendant inflationary effects," but pointed out that in the strikes studied by Thieblot and Cowin only seven to thirteen percent of strikers received unemployment compensation, and that no statistical analysis comparing the length of strikes

assume that the state's interest in providing unemployment compensation was the same as its interest in providing welfare benefits. The purpose of welfare is ostensibly to alleviate "real hardship—serious threats to the physical well-being, indeed in some cases survival, of individuals," based on actual need, while the purpose of unemployment compensation is to avoid "economic insecurity" or to insure "against the temporary disruption of a flow of income."²²¹ The waiting period imposed by the unemployment compensation statute, the court suggested, is "aimed at preserving the standard of living and meeting the obligations previously undertaken with reasonable expectation that the prior flow of income would continue."²²² Thus the state's interest in unemployment compensation may be "narrower" than in welfare, and "the secondary economic and social effects of unemployment payments or their absence" must be considered.²²³ These include "minimization of violence in labor disputes" and "avoidance of economic stagnation in local communities."²²⁴ But a finding that "a substantial percentage of striking workers in Rhode Island would, if denied unemployment compensation, qualify for public assistance"²²⁵ would justify a conclusion that the state's interests in unemployment benefits and welfare are "substantially the same," thus bringing the case within *Minter*.²²⁶

There have been two attempts in Michigan to invoke the preemption theory to preclude payment of unemployment compensation to individuals involved in a labor dispute. In *Holland Motor Express, Inc. v. Michigan Employment Security Commission*²²⁷ employers claimed

in New York and Rhode Island to states which do not provide unemployment benefits to strikers was done. 475 F.2d at 458.

221. 475 F.2d at 459.

222. *Id.* at 460.

223. *Id.* at 460-61.

224. *Id.* at 461. See THIEBLOT & COWIN 207:

The contention seems to be that if tax supported payments to strikers are provided, there will be a reduction in the manifest bitterness during the strike and improved morale after it. There seems to be little empirical evidence to support such reasoning. The Chicago Teamsters strike in 1970, the New York Telephone strike of 1971-72, the Westinghouse strike . . . and the Johns-Manville strike . . . are all examples of strikes marred by more than ordinary violence, but also characterized by the use of public support funds for strikers.

225. 475 F.2d at 460-61.

226. *Id.* No person can receive both welfare and unemployment compensation. 42 U.S.C. § 607(b)(2)(C)(ii) (1970); 45 C.F.R. § 233.100(c)(1)(v)(b) (1972).

227. 42 Mich. App. 19, 201 N.W.2d 308 (1972).

that payment of unemployment benefits to workers unemployed as a result of a lockout frustrated the NLRA's protection of an employer's right to lock out employees. Because unemployment benefits paid to workers in Michigan are charged against their employers' accounts in the unemployment compensation fund,²²⁸ the benefits are in effect subsidized by the employers. This subsidization, argued employers, has the effect of discouraging exercise of the right to lock out employees, which is inconsistent with federal labor policy.²²⁹ The court rejected the argument because unemployment payments are made *directly* by the state, although an employer's taxes are increased with the paying out of benefits to his employees,²³⁰ and because the unemployment compensation system is designed to benefit the entire state by relieving the distress of unemployment, regardless of the merits of the underlying labor dispute.²³¹ The court also rejected employers' argument that the legislative distinction²³² between strikes and lockouts in determining eligibility for unemployment benefits violates equal protection.²³³

228. MICH. STAT. ANN. §§ 17.513-522 (1968, Supp. 1973).

229. 42 Mich. App. at 28-30, 201 N.W.2d at 312-13. See *NLRB v. Brown*, 380 U.S. 278 (1965); *NLRB v. Truck Drivers Local No. 449*, 353 U.S. 87 (1957).

230. 42 Mich. App. at 30, 201 N.W.2d at 313, citing *NLRB v. Gullett Gin Co.*, 340 U.S. 361 (1951), and *Lawrence Baking Co. v. Michigan Unempl. Comp. Comm'n*, 308 Mich. 198, 13 N.W.2d 265 (1944).

231. 42 Mich. App. at 27, 201 N.W.2d at 315.

232. MICH. STAT. ANN. § 17.531(8) (Supp. 1973).

233. 42 Mich. App. at 28, 201 N.W.2d at 312. Employers' theory was that both strikes and lockouts are "legitimate economic weapons," and that "there is no rational basis for distinguishing between them with respect to disqualification for unemployment benefits." *Id.* at 24, 201 N.W.2d at 310. The court relied on the rules enumerated in *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61 (1911), which sustain a legislative classification "if any state of facts reasonably can be conceived that would sustain it." *Id.* at 79. The court found in the statute's "declaration of policy," MICH. STAT. ANN. § 17.502 (1968), a legislative intent to alleviate the economic insecurity caused by involuntary unemployment and to encourage employers "to provide stable employment," and found a "rational and justifiable relation" between that intent and the statute's distinction between employee-initiated and employer-initiated unemployment.

The facts in *Holland* illustrate the artificiality of the strike-lockout distinction. The employers, motor carriers, were engaged in union contract negotiations in both Michigan and Illinois. Employees were represented by Teamsters in both states, although other unions were involved in Illinois. After negotiations broke down in Michigan, the union commenced selective strikes there; employers responded with defensive lockouts. When an agreement was reached, the Michigan employees returned to work. When the Illinois workers later commenced selective strikes, and were defensively locked out, the ensuing reduction in work involving transportation of goods between Illinois and Michigan forced the employers to lay off some workers in Michigan. It was this second period of unemployment for which the Michigan strikers

In *Dow Chemical Co. v. Taylor*²³⁴ the exception to the striker disqualification for employees laid off from interim employment²³⁵ was challenged. An employer argued that the payment of unemployment compensation to striking workers who had obtained, and then been laid off from, temporary work during the strike, interfered with the employer's "federally protected right to bargain collectively."²³⁶ The court recognized that paying unemployment compensation to strikers under these circumstances could result in a frustration of federal policy, denied defendant's motion to dismiss, and directed that discovery proceed and the case be prepared for trial.²³⁷

Although the Rhode Island cases²³⁸ have cast doubt on the possibility of judicial application of the preemption doctrine where state law permits subsidization of strikers through the unemployment compensation system, the Michigan cases offer some hope that courts will expose themselves to the increasing volume of relevant empirical evidence and will come to recognize the economic impact of strike subsidies on labor-management relations. With this understanding, courts may begin to prohibit a state activity which substantially alters the balance of power Congress intended to preserve with the NRLA.

III. FOOD STAMPS

The most recent chapter in the story of public subsidies for strikers began with the Food Stamp Act of 1964.²³⁹ The concept underlying

were awarded unemployment benefits on the ground that they were locked out. 42 Mich. App. at 22-23, 201 N.W.2d at 309-10. Yet, their layoff was directly caused by the strikes called by representatives of their union in Illinois. To describe the Michigan workers as "involuntarily" unemployed is to ignore the pattern of events responsible for the employers' immediate decision to lay them off.

234. 57 F.R.D. 105 (E.D. Mich. 1972).

235. See notes 179-82 *supra* and accompanying text.

236. 57 F.R.D. at 107.

237. *Id.* at 108:

[T]his court views the issue of supremacy as a mixed question of law and fact. This court does not believe . . . that congressional inaction or failure to pass particular amendments to unemployment tax laws results in a definitive statement of congressional intent. Moreover, whether in fact the payment of unemployment compensation infringes an employer's collective bargaining right cannot be decided by this court on the pleadings submitted.

238. *Grinnell Corp. v. Hackett*, 475 F.2d 449 (1st Cir. 1973), *rev'g* 344 F. Supp. 749 (D.R.I. 1972); *Almac's, Inc. v. Hackett*, 312 F. Supp. 964 (D.R.I. 1970); *ITT v. Carter*, Civil No. 3770 (D.R.I., April 6, 1967).

239. Act of Aug. 31, 1964, Pub. L. No. 88-525, 78 Stat. 703, *as amended*, 7 U.S.C. §§ 2011-26 (1970, Supp. II, 1972).

the Act was not a new one; from 1939 to 1943 a food stamp program had been conducted under the auspices of the Agriculture Department. Ominously, the program was terminated because of the corruption and inefficiency which characterized its administration.²⁴⁰ The concept was revived in 1954 when Congresswoman Sullivan of Missouri made the first of many attempts to get a food stamp bill through Congress.²⁴¹ In 1959 she persuaded Congress to authorize a pilot food stamp program which would operate only in certain counties and municipalities. The Eisenhower Administration refused, however, to implement the program, and it was not until the commencement of the Kennedy Administration that the program got under way.²⁴² By 1964 the pilot program proved to be a social and administrative success in those areas in which it operated. Nevertheless, Sullivan's proposal to make the program nationwide met with strong opposition from the conservative coalition which dominated Congress. Passage of the expanded program in 1964 was the result of a "deal," pursuant to which certain southern Democrats voted for the food stamp program and certain northern liberals voted for a program of cotton and wheat subsidies.²⁴³ There is no clear evidence that either the supporters or opponents of the Act contemplated the possibility that the food stamp program would be used as a means of subsidizing strikers.²⁴⁴ It was certainly not intended for that purpose. Nevertheless, nothing in the loose language of the Act disqualified strikers.²⁴⁵

240. See 110 CONG. REC. 7126 (1964) (remarks of Cong. Brown).

241. H.R. 7870, 83d Cong., 2d Sess. (1954); see 100 CONG. REC. 1692 (1954).

242. See 110 CONG. REC. 7131-32 (1964) (remarks of Cong. Sullivan).

243. *Id.* at 7140-41 (remarks of Cong. Saylor); *id.* at 7125 (remarks of Cong. Brown); see H.R. REP. NO. 189, 90th Cong., 1st Sess. 18-19 (1967). This combination of disparate interests responsible for the farm subsidy-food support "deal" typifies the cooperation between minority groups in a pluralistic democracy. See generally R. DAHL, *THE IDEA OF DEMOCRACY* (1954). Usually, this cooperation occurs at the expense of the majority and serves not the general good but rather the special interests of the respective minorities.

244. See 116 CONG. REC. 42,015 (1970) (remarks of Cong. Abbit): "As a member of the [Agriculture] committee in 1964, when this program started, I for one had no idea that food stamps were to be used to subsidize strikers." Although Congressman Poage indicated in 1967 that the Agriculture Committee had considered the strike subsidy problem in 1964, 113 CONG. REC. 12,637 (1967) (remarks of Cong. Poage), I have not located any contemporary evidence that either the Agriculture Committee or Congress as a whole discussed the possibility of using food stamps to subsidize strikers.

245. Food Stamp Act of 1964 § 5(b), 7 U.S.C. § 2014(b) (1970), requires only that the Secretary of HEW "establish uniform national standards of eligibility for participation by households in the food stamp program" which must be met by par-

The Food Stamp Act authorized, in counties which elected to participate in the program, the sale of food stamps—essentially a special kind of scrip—at less than face value to needy households. The Act left to the states the task of establishing standards for determining household eligibility, the number of stamps permitted per household, and the rate at which the stamps could be purchased.²⁴⁶ Purchasers of stamps could exchange them for American food goods²⁴⁷ at participating stores which, in turn, would be reimbursed from the United States Treasury. The Act contemplated that the food stamp program would be small, costing only \$75 million, to be supplied from general funds.²⁴⁸ The Act provided that costs of administering the program be borne by the counties.²⁴⁹

participating states and must prescribe household income and asset criteria. 7 U.S.C. § 2014(c) (1970), amending 7 U.S.C. § 2014 (1964), excludes from eligibility households which include an “able-bodied adult between the ages of eighteen and sixty-five” who has “refused to accept employment or public work” under prescribed circumstances. An exception to this disqualification is made for “refusal to work at a plant or site subject to a strike or lockout for the duration of such strike or lockout.” *Id.* The status of able-bodied adults who are initially unemployed because of a strike or lockout is not indicated, however.

Apparently, some congressmen warned in 1964 that the loose language of the Act might prove to be a source of difficulty. *See* 116 CONG. REC. 42,022 (1970) (remarks of Cong. Crane); *id.* at 37,546 (remarks of Sen. Thurmond).

246. 7 U.S.C. § 2019 (1970, Supp. II, 1972); Letter from James E. Springfield, Deputy Director, Food Stamp Division, U.S. Dep’t of Agriculture, to U.S. Chamber of Commerce, May 24, 1969:

Under the Food Stamp Act, the State welfare agency is responsible for the certification of applicant food stamp families, using eligibility standards which have been proposed by the State welfare agency and approved by the Department of Agriculture. These standards include maximum net income limitations consistent with the income standards used by the State welfare agency in the administration of its Federally-aided public assistance programs. These standards also place a limitation on the resources to be allowed eligible households. Families in which all members are receiving some form of welfare assistance are eligible to participate. Other low-income families may also be eligible if their income and resources do not exceed the established levels.

247. 7 U.S.C. § 2012(b) (1970) carefully restricts the use of stamps to “food or food product for human consumption except alcoholic beverages, tobacco, those foods which are identified on the package as being imported, and meat and meat products which are imported.”

248. *Id.* § 2025(a) (1970).

249. Responsibility for paying some of the costs of administering the program has led a number of counties to decline to participate. The Agriculture Department’s refusal to implement the program in 109 such counties in Texas was challenged unsuccessfully in *Jay v. United States Dep’t of Agriculture*, 441 F.2d 574 (5th Cir. 1971), *rev’g* 308 F. Supp. 100 (N.D. Tex. 1969). *Accord*, *Tucker v. Hardin*, 430 F.2d 737 (1st Cir. 1970). The only states which have no counties participating in the food stamp

The food stamp program grew rapidly, partly because the eligibility standards were more liberal than those for public assistance.²⁵⁰ Soon, however, the deficiencies of the Act in terms of draftsmanship and concept became evident. Its failure to define the term "household" and its failure to impose some kind of work requirement enabled classes of recipients not contemplated by Congress to take advantage of benefits intended for the poor. And in the fall of 1965, lumberers in the Northwest became the first group of strikers to find in the Act a source of public subsidy.²⁵¹

Misuse of the food stamp program was late in coming to the attention of Congress. But the discussion, debate, and compromise which followed congressional recognition of the problem illustrate the difficulty the political process has in correcting unintended use of social legislation. Although there may have been some prior mention of the possible use of food stamps as a strike subsidy,²⁵² it was not until the publicity attending the use of food stamps in the 1967 Ford strike²⁵³ and the Montana copper strike later the same year²⁵⁴ that the conservative opposition in the House attempted to block funding of the program by focusing on strikers' use of food stamps. At the same time, the House hearings²⁵⁵ on extension of the Food Stamp Act disclosed major deficiencies in the administration of the program. Among these were inadequate

program are Arizona, Delaware, Massachusetts, Nevada, and New Hampshire. *See Hearings on H.R. 15896 et al. Before the House Agriculture Comm.*, 90th Cong., 2d Sess., ser. ZZ, at 23-24 (1968) (Table III: Food Stamp Program).

250. *See Hearings on H.R. 1268, H.R. 1269, H.R. 1318, H.R. 1317, & H.R. 7105 Before the House Agriculture Comm.*, 90th Cong., 1st Sess., ser. D, at 15-25 (1967).

251. For discussion of the early use of food stamps, see 117 CONG. REC. 21,672-73 (1971) (remarks of Cong. Michel).

252. *See note 244 supra.*

253. 114 CONG. REC. 24,232 (1968) (remarks of Cong. Michel), citing the *Wall Street Journal*, quoted the president of one UAW local as estimating that as many as seventy-five percent of its 4,700 members would make use of food stamps before the strike ended.

254. N.Y. Times, Feb. 13, 1968, at 25, col. 5, *quoted in* 114 CONG. REC. 24,232 (1968). The article indicated that the provision of food stamps was an important factor in the prolongation of the strike, and noted that over 500 miners in Anaconda, Montana, were receiving both food stamps and \$100 per month in welfare benefits.

255. *Hearings, supra* note 249. One of the most peculiar features of these hearings was the sparcity of protest by employers' groups against the use of food stamps to subsidize strikers. The Greater Detroit Board of Commerce did write a letter to the committee pointing out that during the 1967 Ford strike 3,809 strikers' families in Detroit received \$273,171 worth of food stamps at a cost of \$157,420, for a net subsidy of \$115,751. *Id.* at 130-31.

procedures for screening applicants with regard to income eligibility and inadequate identification of participants.²⁵⁶

The hearings prompted Congresswoman May of Washington to introduce a bill which authorized a continuation of the food stamp program but disqualified "any person who is engaged in a strike, labor dispute, or voluntary work stoppage,"²⁵⁷ and "any person who is a student attending an institution of higher learning."²⁵⁸ The Senate Agriculture Committee adopted the May bill rather than the Sullivan bill, which merely extended the program another four years with an open-ended appropriation. House proponents of the Sullivan bill argued that all workers idled by strikes were not in favor of the strikes,²⁵⁹ that disqualification of strikers would work an economic hardship on persons involved in a lawful activity,²⁶⁰ and that the value of stamps provided for strikers represented only a small percentage of the total cost of the program.²⁶¹ Proponents of the May bill argued that the provision of food stamps to strikers *was* costly,²⁶² and that the limited resources available for the program should be used to help those whose need arose from circumstances beyond their control.²⁶³ The House passed a compromise bill which disqualified strikers and students, but provided for an open-ended appropriation.²⁶⁴

The Senate, meanwhile, passed an open-ended appropriation without a striker disqualification, and the matter went to a joint conference committee.²⁶⁵ In committee, liberals made abandonment of the disqualification the price for their continued support of the farm subsidy program. The Senate conferees, many of whom represented large farming interests, succeeded in removing the striker disqualification from the conference bill.²⁶⁶ Conservative House conferees refused to

256. In one highly publicized case, a resident of Philadelphia acted as a proxy on behalf of 969 individuals to buy \$53,128 worth of food stamps for \$36,892. 114 CONG. REC. 11,278-79 (1968) (remarks of Cong. Sullivan). See also *id.* at 15,869-70 (remarks of Cong. Martin) (use of food stamps by college students).

257. H.R. 18,249, 90th Cong., 2d Sess. (1968).

258. *Id.*

259. See 114 CONG. REC. 24,233 (1968) (remarks of Cong. Sullivan).

260. *Id.* at 24,227-28 (remarks of Cong. Olsen).

261. See *Hearings, supra* note 249, at 34-35.

262. See 114 CONG. REC. 24,232-33 (1968) (remarks of Cong. Michel).

263. *Id.* at 23,946 (remarks of Cong. May).

264. *Id.* at 24,244.

265. See *id.* at 24,687, 26,196.

266. *Id.* at 28,314.

sign the conference report, and led a fight on the House floor to send the House conferees back to committee with binding instructions to secure Senate concurrence in retaining the striker disqualification.²⁶⁷ The proposal to send the bill back to conference was defeated,²⁶⁸ and the conference bill was enacted.²⁶⁹

In 1970 the food stamp program was significantly amended, but provision of food stamps to strikers was not eliminated. In September 1969 the Senate passed a bill²⁷⁰ which modified the program by providing free food stamps and eliminating the requirement that a household purchase all the food stamps allotted to it. Meanwhile, a Nixon Administration proposal²⁷¹ introduced in the House authorized the distribution of free food stamps and partial use of a household food stamp allotment, and contained a work requirement similar to that contained in the proposed Family Assistance Plan.²⁷² After extensive hearings²⁷³ marked by concern for the skyrocketing costs of the food stamp program, the House Agriculture Committee reported a clean bill to the House which included a prohibition against free food stamps, a requirement that the states eventually assume ten percent of the cost of the program, and a work requirement which disqualified any household containing an able-bodied adult (except mothers of children under eighteen, students, or persons caring for children or incapacitated adults) who refused to register for work or to accept a job salaried at the higher of the applicable state or federal minimum wage.²⁷⁴ The bill survived attempts to add a striker disqualification,²⁷⁵ a self-certifi-

267. *Id.* at 28,001-08.

268. *Id.* at 28,009.

269. *Id.* at 31,310 (passage of S. 3068, 90th Cong., 2d Sess. (1968)).

270. S. 2014, 90th Cong., 2d Sess. (1969). *See also Hearings on S. 2014 Before the Senate Comm. on Agriculture & Forestry*, 90th Cong., 2d Sess. (1969).

271. H.R. 12,222, 90th Cong., 2d Sess. (1969).

272. H.R. 1, 92d Cong., 1st Sess. (1971).

273. *Hearings Before the House Agriculture Comm.*, 90th Cong., 2d Sess., ser. Q, pts. 1 & 2 (1969). Discussion of the striker subsidization issue is found in *id.* pt. 2, at 794-98, 808. Again, no representative of business appeared to oppose subsidization. The Secretary of Agriculture estimated that the food stamp program would cost \$1.5 billion in fiscal 1971. *Id.* pt. 1, at 17. *See H.R. REP. NO. 1402*, 91st Cong., 2d Sess. (1970).

274. H.R. 18,582, 91st Cong., 2d Sess. (1970). The work requirement was severely criticized in a minority report, H.R. REP. NO. 1402, *supra* note 273, at 6042-47.

275. H.R. REP. NO. 1402, *supra* note 273, at 6049-50. The disqualification was omitted on the ground that the Committee "does not wish to take sides in labor disputes and does not believe this bill is the proper place to solve labor-management problems."

cation provision,²⁷⁶ and authorization for free stamps,²⁷⁷ and was passed by the House in December 1970.²⁷⁸ Again, a joint conference committee produced compromise legislation. The amendments dropped the House provision that the states share the costs of the program, permitted families with an income of less than thirty dollars per month to receive free stamps, authorized self-certification for welfare recipients only, and retained the House work requirement.²⁷⁹

Again in 1971 and 1973 efforts to disqualify strikers from food stamp eligibility were defeated. A proposed amendment to a 1971

Id. at 6035. Objections to the use of food stamps by strikers paralleled the traditional rationales for the labor dispute disqualification in unemployment compensation, *see* notes 151-53 *supra* and accompanying text. The objections here were that subsidization violates governmental neutrality in labor disputes, prolongs strikes, and forces taxpayers to subsidize other taxpayers who are "by choice, unemployed." 116 CONG. REC. 36,603-04 (1970) (remarks of Cong. Goodling); *see id.* at 34,865-67 (remarks of Cong. Ashbrook); 114 CONG. REC. 28,003 (1968) (remarks of Cong. Teague).

276. H.R. 19,889, § 5(c), 91st Cong., 2d Sess. (1970). Backers of this provision ignored the possibility that self-certification would lead to widespread fraud. That the program was already subject to considerable abuse was revealed by a study showing that in Washington in 1970 some \$600,000 worth of stamps were wrongfully distributed; the irregularities involved thirty percent of all participants in the state's food stamp program. Floyd, *Food Stamp Pirates Take Their Cut*, 49 TODAY'S HEALTH 23 (1971), *cited in* 117 CONG. REC. H 210-11 (daily ed. Jan. 27, 1971). *See also* United States v. Wilson, 438 F.2d 479 (7th Cir. 1970), *cert. denied*, 402 U.S. 929 (1971). The bill's work requirement penalized only the individual for failure to register for or accept work and thus left open the possibility that disqualified individuals could take food from their children.

277. H.R. 19,889, *supra* note 276, at § 6(b), provided free stamps for households with income not exceeding the equivalent of \$30 per month for four persons.

278. 116 CONG. REC. 42,035 (1970). Publicity concerning the provision of food stamps to General Motors strikers in the fall of 1970 increased House floor support for a striker disqualification amendment. *See, e.g., id.* at 36,603-04 (remarks of Cong. Goodling); *id.* at 34,865-67 (remarks of Cong. Ashbrook). Another new bill to disqualify strikers was introduced on November 17, 1970. S. 4505, 91st Cong., 2d Sess. (1970). Support for the amendment was further increased by recognition that strikers' eligibility was partly responsible for the tremendous increases in the cost of the food stamp program. For example, the cost rose from \$102 million in August 1970 to \$116 million in September, \$123 million in October, and \$127 million in November—the period corresponding to the General Motors strike. 116 CONG. REC. S 19,764 (daily ed. Dec. 8, 1970) (remarks of Sen. McGovern). An estimated \$12 million to \$14 million was expended for stamps to Detroit strikers alone. 116 CONG. REC. 42,022 (1970) (remarks of Cong. Poage). Nonetheless, the striker disqualification was defeated by a recorded vote of 183 to 172; the vote was misleadingly close due to the absence of a number of House liberals who opposed the amendment. *See id.* at 42,032-33.

279. Act of Jan. 11, 1971, Pub. L. No. 91-671, 84 Stat. 2048, *amending* 7 U.S.C. §§ 2011-25 (1964) (codified at 7 U.S.C. §§ 2011-26 (1970, Supp. II, 1972)).

agriculture appropriations bill²⁸⁰ which would have prohibited distribution of food stamps to strikers' families was defeated by the House.²⁸¹ In 1973 another striker disqualification was passed by the House;²⁸² after a conference committee was unable to resolve the striker issue,²⁸³ a new bill to disqualify strikers was defeated on the floor of the Senate²⁸⁴ by the same farm-labor alliance which had earlier made provision of food stamps to strikers the price of the farm subsidy program.²⁸⁵ After parliamentary maneuvers in the House prevented a second vote on the disqualification amendment,²⁸⁶ the House, forced to choose between an agriculture bill without the amendment and no bill at all, passed the bill without amendment. Again, a combination of special interest groups preserved subsidies for both farmers and striking laborers.

Thus Congress has resisted efforts to disqualify strikers' households from receiving food stamps. The Agriculture Department recently issued a regulation which specifically renders a worker's participation in either a strike or lockout irrelevant in determining eligibility.²⁸⁷ The work requirement²⁸⁸ may eliminate some strikers from eligibility, but

280. H.R. 9270, 92d Cong., 1st Sess. (1971).

281. 117 CONG. REC. 21,676-77 (1971) (by a vote of 225 to 172). Proponents of the amendment again argued that subsidizing strikers' families prolongs strikes, *id.* at 21,674 (remarks of Cong. Goodling), and violates governmental neutrality in labor-management relations, *id.* at 21,672-73 (remarks of Cong. Michel). Opponents again argued that it is unfair to punish strikers who voted against calling a strike, *id.* at 21,674 (remarks of Cong. Foley); *id.* at 21,673 (remarks of Cong. Hungate), or the families of strikers, *id.* at 21,675 (remarks of Cong. Conyers); *id.* at 61,673 (remarks of Cong. Burton).

282. 119 CONG. REC. H 6352-53 (daily ed. July 19, 1973) (by a vote of 208 to 207). The House had voted favorably on a preliminary version of the amendment by a vote of 213 to 203. *Id.* at H 6334.

283. *See id.* at S 15,213 (daily ed. July 31, 1973).

284. *Id.* at S 15,238 (by a vote of 58 to 34).

285. *Id.* at S 15,237 (remarks of Sen. Humphrey): "There are honest differences of opinion about this amendment. I simply say to my colleagues, if you want a farm bill, you must vote down this amendment . . ."

286. *Id.* at H 7437 (daily ed. Aug. 3, 1973) (remarks of Cong. Steiger).

287. 7 C.F.R. § 271.3(e)(4) (1973): "No household shall be denied participation in the program solely on the grounds that a member of the household is not working because of a strike or lockout at his usual place of employment."

288. 7 U.S.C. § 2014(c) (1970). 7 C.F.R. § 271.3(e) (1973) expressly brings "a person who is not working because of a strike or lockout at his usual place of employment" within the work requirement. The work registration requirement is waived for able-bodied adults *working* at least thirty hours per week; a proposed regulation requiring only thirty hours of *employment* per week, 36 Fed. Reg. 7246 (1971),

will probably have only minimal impact for the same reasons that the work requirement in the welfare program has little impact: lack of available jobs, unwillingness of employers to hire temporary employees, and poor administration.²⁸⁹ Also, in determining whether available work is "suitable," the Department must consider whether it is in the "major field of experience" of the applicant,²⁹⁰ and must regard as unsuitable work offered at "a site subject to a strike or lockout at the time of the offer,"²⁹¹ or work which requires the applicant to join or resign from "any legitimate labor organization."²⁹² The food stamp program's financial eligibility criteria relating to income and asset level will not ordinarily disqualify strikers for the same reason that similar welfare standards do not.²⁹³ Furthermore, an Agriculture Department regulation exempts from the income and asset requirements any household in which "all members are included in a federally aided public assistance or general assistance grant."²⁹⁴ Thus it seems likely that the food stamp program, unless amended by Congress, will continue to be a source of government subsidy for strikers.²⁹⁵

In 1971 the battle over the provision of food stamps to strikers

was discarded to prevent striker avoidance of the registration requirement in light of decisions rendering strikers "employed" under the NLRA, *e.g.*, *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967); *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967). See 36 Fed. Reg. 20,147 (1971).

289. The Act excludes, in effect, college students and hippies from participation in the food stamp program by virtue of a provision limiting eligibility to households composed of individuals related to each other. 7 U.S.C. § 2012(e) (Supp. II, 1972). This section was held to create an unconstitutional classification in *United States Dep't of Agriculture v. Moreno*, 93 S. Ct. 2821 (1973). Students are also generally excluded by 7 U.S.C. § 2014(b) (Supp. II, 1972), which disqualifies households containing a person over eighteen who is claimed as a dependent for income tax purposes by a non-household member. This section was held unconstitutional in *United States Dep't of Agriculture v. Murry*, 93 S. Ct. 2832 (1973).

290. 7 C.F.R. § 271.3(e)(5)(iii) (1973). This provision may effectively eliminate the work requirement for strikers, since strikes may affect virtually all available work of a certain kind within a community. Although work outside the "major field of experience" must be accepted after "a reasonable period of time," *id.*, the majority of strikes are of relatively brief duration. The "major field of experience" exception is probably contrary to the intent of Congress. See 116 CONG. REC. 44,168 (1970) (remarks of Cong. Annunzio); *id.* at 44,164-65 (remarks of Cong. Poage).

291. 7 C.F.R. § 271.3(e)(3)(iv) (1973).

292. *Id.* § 271.3(e)(3)(iii). The work also must be reasonably near the applicant's residence. *Id.* § 271.3(e)(5)(iv).

293. See notes 39-43 *supra* and accompanying text.

294. 7 C.F.R. § 271.3(b) (1973).

295. See note 437 *infra*.

shifted from Congress to the courts. In *Russo v. Kirby*²⁹⁶ strikers sought to force the New York Commissioner of Social Services to permit them to purchase food stamps. Treating food stamps as a part of the welfare program—even though the programs are governed by completely different statutes and regulations—the district court ordered the Commissioner to make retroactive payment of food stamps to strikers whose applications had initially been accepted but later disqualified for their participation in a strike.²⁹⁷ In a subsequent decision, the court recognized that federal regulations forbid retroactive purchase of food stamps, but re-fashioned its remedy to permit such purchase by ordering future provision of food stamps to strikers wrongly denied them by the Commissioner.²⁹⁸ This order violated both the letter and the spirit of the Food Stamp Act by permitting households to receive stamps after the expiration of their eligibility, and after they had ceased to be low-income households which need such an adjustment “to purchase a nutritionally adequate diet.”²⁹⁹ The validity of the order was thrown into doubt by the Second Circuit’s reversal³⁰⁰ on the ground that the district court lacked jurisdiction.

IV. SUBSIDIES: THE MISLEADING ARGUMENTS

The debate over governmental subsidization of strikers has its origins in the Depression when initial proposals for unemployment compensation raised the question of striker eligibility.³⁰¹ Although the debate has continued for some forty years, its intellectual level, never high, has not been raised significantly. Indeed, it is a debate which has been characterized on both sides by strident emotionalism rather than cool-headed contemplation. This, of course, is not surprising. An examination of the costs of subsidies and a study of the impact of subsidies on the collective bargaining process indicate how important this issue is to the parties and, indirectly, to the country. Before examining the real implications of the debate on the provision of subsidies, however, it is necessary to examine some common arguments which have been raised in the course of the debate.

296. 78 L.R.R.M. 2533 (E.D.N.Y.), *rev'd*, 453 F.2d 548 (2d Cir. 1971).

297. *Id.* at 2540.

298. 335 F. Supp. 122, 124 (E.D.N.Y. 1971).

299. 7 U.S.C. § 2011 (1970).

300. 453 F.2d 548 (2d Cir. 1971). *See* notes 89-103 *supra* and accompanying text.

301. *See* notes 137-50 *supra* and accompanying text.

Perhaps the most common argument against the provision of subsidies to strikers is that the legislative bodies which established these subsidy programs did not intend that they be used to aid strikers.³⁰² This argument does not apply to the unemployment compensation program since all state statutes include some striker disqualification provision.³⁰³ If this argument originally had any validity with respect to the food stamp program it has none presently in view of Congress' repeated rejections of proposed striker disqualification amendments to the Food Stamp Act.³⁰⁴ Even with respect to the welfare programs there may be some question as to the current, if not the original, intent of Congress and the state legislatures regarding the use of these programs as subsidies to strikers. It should be recognized, however, that provision of subsidies under any of these programs to individuals whose temporary need is self-induced in an effort to improve their economic condition does not seem consistent with the basic rationale of the programs.³⁰⁵

A second common argument against the provision of subsidies to strikers is that this use of subsidies may exhaust the resources available for the programs.³⁰⁶ This consideration was particularly influential in the development of the labor dispute disqualification in unemployment compensation laws since the founders of unemployment compensation feared that the provision of benefits to strikers would place too heavy a burden on the unemployment fund.³⁰⁷ The significance of this consideration in the food stamp area is evidenced by the fact that providing stamps to strikers was partly responsible for the need for emergency supplemental appropriations in 1970.³⁰⁸ The usual an-

302. See Williams, *The Labor Dispute Disqualification—A Primer and Some Problems*, 8 VAND. L. REV. 338, 354 (1955) [hereinafter cited as Williams].

303. See notes 148-54 *supra* and accompanying text.

304. See notes 252-86 *supra* and accompanying text.

305. Some commentators have argued that the voluntary-involuntary rationale is not the theme of the unemployment compensation statute. See Bullitt, *Unemployment Compensation in Labor Disputes*, 25 WASH. L. REV. 50, 54 (1950); Fierst & Spector, *Unemployment Compensation in Labor Disputes*, 49 YALE L.J. 461, 464 (1940); Lesser, *supra* note 166, at 171; Shadur, *supra* note 147, at 296 n.8; Note, *Eligibility for Unemployment Benefits of Persons Involuntarily Unemployed Because of Labor Disputes*, 49 COLUM. L. REV. 550 (1949), cited in Williams 354 n.68. Obviously, there are exceptions to this concept in the statutes but the weakness of these commentators' claim is clear if one adopts their implicit position that the purpose of unemployment compensation is to benefit the voluntarily unemployed.

306. See Williams 354.

307. See Pribram, *supra* note 153.

308. See 116 CONG. REC. 38,902 (1970) (remarks of Sen. Brooke).

swer to this argument is simple: If the provision of benefits to strikers exceeds the resources allocable to these programs or depletes the reserves of the unemployment fund, the resources can be increased and employers can be required to pay more into the fund.³⁰⁹ As a practical matter the answer is not so easy, for there is obviously a limit beyond which the public cannot, or will not, support the idle. When this limit is reached, food provided the voluntarily unemployed is literally taken from the mouths of the genuinely poor.³¹⁰

A third argument against the provision of subsidies to strikers is that it violates a tradition of governmental neutrality in labor disputes.³¹¹ Some observers have argued sophistically, however, that to deny benefits to otherwise qualified individuals because of their participation in a labor dispute would be equally "unneutral."³¹² Although the claim that inaction, as well as action, affects the fortunes of the combatants has a certain philosophical merit, it tends to obscure the fact that provision, rather than denial, of subsidies to strikers represents a change in the status quo and thus, from an historical standpoint, constitutes a governmental intervention.³¹³ And even if it is impossible for the government to remain "neutral," the appearance of governmental neutrality may, in a democracy, be as significant as its reality, since the conviction that the government "unfairly" sides with one's adversaries undermines support for the government.³¹⁴ It should

309. See Lesser, *supra* note 166, at 176-77.

310. A number of states do not pay welfare benefits in amounts sufficient to meet one hundred percent of a family's need. See *Dandridge v. Williams*, 397 U.S. 471, 473 (1970); *Rosado v. Wyman*, 397 U.S. 397, 408-09 (1970); *Welfare for Strikers* 95-96. Possibly, striker disqualification in these states would enable the genuinely poor to receive welfare benefits commensurate with their need.

311. See *Brobston v. Employment Sec. Comm'n*, 94 Ariz. 371, 385 P.2d 239 (1963); *In re Steelman*, 219 N.C. 306, 13 S.E.2d 544 (1941); Haggart, *Unemployment Compensation During Labor Disputes*, 37 NEB. L. REV. 668, 688-89 (1958); *Williams* 354.

312. *E.g.*, C. SUMMERS & H. WELLINGTON, *supra* note 1, at 817.

313. *Williams* 356-57:

[W]e have tended to view government's role in the collective bargaining process as being no more than establishing a relative equality of bargaining power. Then the rest is left to the parties. Any attempt to establish a plan whereby government paid or withheld compensation benefits upon a determination as to which side ought to succeed in the labor dispute would certainly establish the government in an active role concerning what are fair and just working conditions. The unemployment compensation law does not seem to be the place where such a major shift in governmental policy should take place.

314. *Id.* at 357-58.

be noted that it is questionable whether the federal government has ever consistently practiced neutrality in labor-management relations.³¹⁵

A final argument against the provision of subsidies to strikers is the moral argument: It is unfair to take money from the public at large to subsidize any group. One problem with this argument is, of course, that it can be used against the entire welfare program. Even if one qualifies the argument by restricting it to groups which do not "deserve" such assistance, one still is faced with the fact that the government provides a series of unnecessary subsidies to farmers,³¹⁶ shipowners,³¹⁷ homeowners,³¹⁸ and other groups. Nevertheless, the increasing protest against such subsidization suggests a growing awareness in principle that governmental subsidization is wrong.

It seems, then, that the common arguments against the provision of public subsidies to strikers are not overwhelmingly persuasive. The legislative intent argument does not have much basis in fact; in any

315. For example, antitrust laws may prohibit certain union activities. *Ramsey v. United Mine Workers*, 401 U.S. 302 (1971) (conspiracy of union and major coal producers to impose collective bargaining agreement on all producers); *Allen Bradley Co. v. Local 3, IBEW*, 325 U.S. 797 (1945) (combination of union, contractors, and manufacturers). Strikes and lockouts which "will imperil the national health or safety" may be enjoined. LMRA §§ 206-10, 29 U.S.C. §§ 176-80 (1970). See *United Steelworkers v. United States*, 361 U.S. 39 (1959). An individual may not hold a position in federal government if he "participates in a strike, or asserts the right to strike against the Government of the United States . . ." 5 U.S.C. § 7311(3) (1970). Minor disputes arising from collective bargaining agreements in the railroad industry are subject to mandatory arbitration, *Railway Labor Act* § 3, 45 U.S.C. § 153 (1970), and strikes by railway workers may be enjoined despite the prohibition of the *Norris-LaGuardia Act* § 4, 29 U.S.C. § 104 (1970), against anti-strike injunctions. *Brotherhood of R.R. Trainmen v. Chicago R. & I.R.R.*, 353 U.S. 30 (1957). And it is an unlawful employment practice for a labor organization to "discriminate against any individual because of his race, color, religion, sex, or national origin," *Civil Rights Act of 1964* § 703(c), 42 U.S.C. § 2000e-2(c) (1970, Supp. II, 1972); unions may be enjoined from striking in an effort to interfere with a plan whose purpose is to correct the effects of racial discrimination. *United States v. Carpenters Local 169*, 457 F.2d 210 (7th Cir. 1972). For an example of a government attempt to prescribe the terms of labor-management relations, see *Sam Andrews' Sons v. Mitchell*, 457 F.2d 745 (9th Cir. 1972), in which the court struck down as exceeding the authority of the Attorney General a regulation issued under the *Immigration and Naturalization Act*, 8 U.S.C. § 1101 *et seq.* (1970), prohibiting migrant workers from working on any farm which is the situs of a labor dispute.

316. *E.g.*, 7 U.S.C. § 347(a) (1970) (assistance for disadvantaged agricultural areas); 12 U.S.C. §§ 2001-259 (Supp. II, 1972) (farm credit system).

317. *E.g.*, 46 U.S.C. § 1152(b) (1970) (subsidy for shipbuilders).

318. *E.g.*, 12 U.S.C. § 1715z-1 (1970, Supp. II, 1972) (mortgage assistance for

event it does not answer the basic question whether such subsidies *should* be provided. The financial limitation problem, the principle of governmental neutrality in labor disputes, and the anti-governmental subsidy principle suggest matters which should be considered in deciding, but do not resolve, whether subsidies should be paid, although these arguments place on proponents of subsidies the burden of making a convincing case that the provision of subsidies to strikers is in the public interest.

This the proponents of aid to strikers have failed to do. One common argument in favor of aid to strikers is that the strikers meet the technical eligibility requirements of the various programs and are consequently eligible for subsidies.³¹⁹ This argument may be true either as a matter of fact or law, but again does not answer the basic question whether subsidies should be provided to strikers. A more sophisticated version of this argument emphasizes that the purpose of the programs is to provide aid to the needy and since the strikers are needy, they are therefore rightful recipients of subsidies.³²⁰ This contention ignores the distinction between those whose need is not the result of their own doing and those whose need is self-induced, and does not deal with the basic question of the desirability of aiding strikers, except to the extent that it suggests a basic governmental principle of helping those in need.

A second common argument in favor of subsidies to strikers is that the strikers are entitled to subsidies because they are taxpayers.³²¹ Nothing in the Constitution gives citizens, whether taxpayers or not, the right to receive governmental subsidies. Also, the logic of the argument is weakened by the fact that aid eligibility is determined without regard to whether the applicant is, or has been, a taxpayer. Finally, the argument carried to its logical end would seem to make eligibility for all governmental programs dependent upon the applicant's status as a taxpayer, which obscures the more important policy considerations behind the selection of particular groups for participation.

319. See Andrus, *Welfare Payment to Strikers*, in COLLECTIVE BARGAINING: SURVIVAL IN THE '70's?, at 356 (R. Rowan ed. 1972).

320. See Schindler, *Collective Bargaining and Unemployment Insurance Legislation*, 38 COLUM. L. REV. 858 (1938).

321. E.g., U.S. NEWS & WORLD REP., Nov. 23, 1970, at 18 (comment of a General Motors striker): "I pay my taxes too. I'm entitled to something for my money. I don't go out and steal. I don't look for something for nothing. I want to go back to work."

A third common argument in favor of aid to strikers is the so-called "hardship" argument. Adherents to this argument agree, at least for the purpose of discussion, that strikers themselves should assume the risks of need while pursuing their economic advantage. They claim, however, that it is unfair to penalize families for the actions of the parents.³²² It is hardly possible, however, to separate a breadwinner from his family. Both will share in the benefits of a strike; accordingly, it would seem that both should share in the hardships. Moreover, inherent in the assumption of free collective bargaining is the idea that both sides suffer in a strike and that such suffering forces them to compromise. If a worker runs out of funds to support his family, he lowers his demands and reaches a compromise with his employer. Of course, before this compromise is reached, he and his family may suffer some hardship. But if the primary goal in collective bargaining is to prevent the striker and his family from suffering any hardship, it would be better accomplished not by providing subsidies to strikers but by outlawing strikes.³²³ Another version of the hardship argument is that disqualification of all strikers is unfair to the workers who opposed the strike.³²⁴ It must be recognized, however, that both proponents and opponents of the strike will benefit equally from the strike if it is successful; consequently, it would seem only fair that they should suffer equally the hardships of the strike. Moreover, if the real goal is to protect the minority opposing the strike, it is accomplished more directly by guaranteeing its right to continue working during a strike than by providing subsidies to all strikers because a minority is forced to stop work against its will.³²⁵

A fourth argument for subsidizing strikers is that failure to provide subsidies destroys the right to strike. It should be noted that this argument apparently contradicts the hardship argument by assuming that when most strikers find the hardships too burdensome they will terminate the strike rather than continue to suffer. In a descriptive sense this argument is completely false, since denial of subsidies does not abrogate the right to strike, although it makes the exercise of the right more costly. Historically, the argument is without basis. Although

322. See 114 CONG. REC. 24,586 (1968) (remarks of Cong. Saylor).

323. See THIEBLOT & COWIN 204-05.

324. See 114 CONG. REC. 24,586 (1968) (remarks of Cong. Saylor).

325. Labor leaders do not favor this concept. See *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967).

the right to strike has existed under national law since 1935,³²⁰ extensive provision of subsidies to strikers is a relatively new development. Finally, from a logical standpoint the argument is simply absurd. Refusal to compensate an activity does not necessarily destroy it,³²⁷ although removal of existing compensation can make the activity less attractive and thus affect future planning.

A fifth argument in favor of subsidizing strikers is that businesses which are being struck receive certain governmental "subsidies," including government contracts, tax deductions, and other specialized governmental "subsidies" such as the oil depletion allowance.³²⁸ To the extent that these benefits may be considered governmental "subsidies," however, they are analogous not to the striker's receipt of welfare benefits but rather to his receipt of veterans' benefits, in the sense that veterans' benefits are not provided because of the strike but without regard to it. In this sense government contracts and tax benefits are not true subsidies. Moreover, even if this argument were descriptively accurate it does not demonstrate that provision of subsidies to strikers is in the public interest.

A sixth argument in favor of subsidies is that the various state programs of welfare, unemployment compensation, and food stamps can be administered more easily and consistently without striker disqualifications.³²⁹ Of course, administration would be eased if all financial criteria or residence requirements were eliminated. Further, an examination of the cost of providing benefits to strikers compared with the cost of disqualifying them indicates the absurdity of the administrative convenience argument.

A final argument for the provision of subsidies to strikers is that it contributes to the peaceful settlement of economic disputes and discourages violation of the law by strikers.³³⁰ Far from compelling subsidization of strikers, this argument constitutes a ground for refusing aid, for experience has demonstrated the folly of acceding to the

326. NLRA § 7, 29 U.S.C. § 157 (1970). See note 91 *supra*.

327. See 114 CONG. REC. 28,005 (1968) (remarks of Cong. Belcher). When I exercise my right to write law review articles at the expense of engaging in gainful employment, I am not entitled to government subsidy on the theory that denying such benefits would "strangle an otherwise lawful activity," or "forfeit" my rights. *Strat-O-Seal Mfg. Co. v. Scott*, 72 Ill. App. 2d 480, 485, 218 N.E.2d 227, 230 (1966).

328. See THIEBLOT & COWIN 205-06.

329. See Fierst & Spector, *supra* note 305, at 489.

330. See THIEBLOT & COWIN 206-07.

threat of violence. On a descriptive level the argument is not valid because a number of strikes in which strikers received significant governmental subsidies were marked by violence.³³¹

Accordingly, it seems that the proponents of aid have also failed to show any compelling reason to extend such aid to strikers. Ironically, however, both proponents and opponents of aiding strikers have generally failed to consider the major disadvantage of such subsidies—the ultimate cost to the public. It is most difficult to determine the cost of public subsidies to strikers because of the failure of government officials to maintain statistics showing striker participation in the various subsidy programs.³³² But it has been estimated that in 1973 strikers will receive approximately \$238,826,000 in food stamps, \$62,640,000 in AFDC-U, and \$2,412,000 in general assistance.³³³ Although it is impossible to estimate the costs of unemployment insurance because by and large it plays a significant part in strikes only in New York and Rhode Island and in railroad strikes, it should be noted that the New York telephone strike alone cost approximately \$41 million.³³⁴ In addition, provision of benefits to strikers will increase the administrative costs of operating welfare programs in 1973 by approximately \$2,350,000.³³⁵ Finally, striker eligibility for aid in the School Lunch Programs and Medicaid will probably cost an additional \$24,650,000 in 1973.³³⁶ Thus the total direct cost to taxpayers of providing public subsidies to strikers in 1973 could amount to some \$330 million.³³⁷ And the indirect costs of subsidies are far greater than the direct costs.

V. LABOR ECONOMICS AND SUBSIDIES FOR STRIKERS

The impact of striker subsidies on labor policy is illustrated by an examination of the collective bargaining process. As contract negotiations commence between any employer and union, each seeks to maximize the financial return for the interests it represents by manipulation

331. See note 224 *supra*.

332. See *Welfare for Strikers* 101 n.133.

333. THIEBLOT & COWIN 190-96.

334. N.Y. Times, Feb. 18, 1972, at 34, col. 2.

335. THIEBLOT & COWIN 195.

336. *Id.* at 196.

337. *Id.* The cost of government subsidies could increase dramatically if unions cease payment of strike benefits. See *Welfare for Strikers* 103-04.

of the wage rate.³³⁸ Certain limitations, however, are imposed upon this manipulation. As illustrated in Graph I, as the employer's wage

GRAPH I



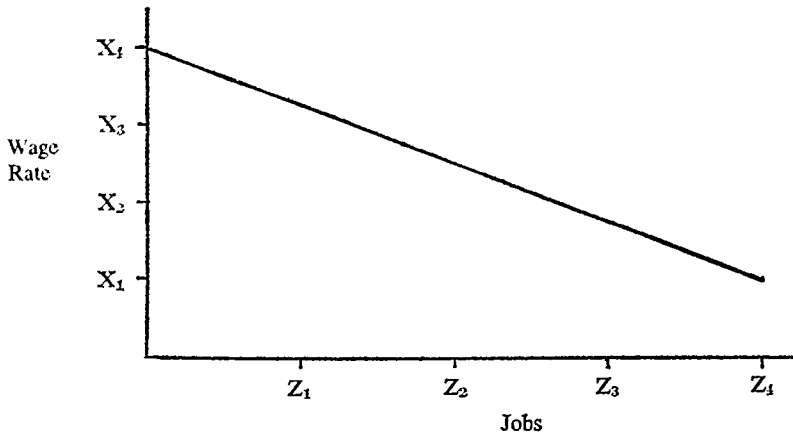
drops from X_3 —the maximum rate which he can pay and still make a profit—the labor supply drops correspondingly. When he forces the wage below X_2 , he loses some of his employees to more attractive employers. When he lowers the wage to X_1 , he loses all of his employees.³³⁹ Therefore, the lowest wage rate which the employer can

338. Wage rate must be understood to include not just the employee's regular hourly rate but total hourly employment costs. Implicit in this discussion is the assumption that all demands of either party have a cost which can be expressed in quantitative terms, even though the calculation of such cost in actual practice may be quite difficult. L. REYNOLDS, *LABOR ECONOMICS AND LABOR RELATIONS* 423-24 (5th ed. 1970) [hereinafter cited as REYNOLDS]. It should be noted that a concession by one party which costs it amount A may benefit the other party by amount B , which may be greater or less than A . When the demands of either party are "principled" demands designed to destroy or seriously impair the ability of the other to function, this assumption is not operable. Such demands are not economic proposals but guerilla tactics—a fact which goes far to explain the unsuccessful attempt of the NLRB in *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970), to order an employer to agree to a "substantive contractual provision in a collective bargaining agreement," *id.* at 102, on a finding that the employer was motivated solely by a "desire to frustrate agreement." *Id.* at 107. The court held that the NLRB had authority only to "referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties." *Id.* at 108.

339. The location of X_1 depends on the general demand for labor. In a company town it might be close to the survival wage—the wage adequate to maintain the minimum standard of living. It might even go below that point in a company town where the work force was exceedingly old and where employees who expected to receive a pension if they could work for several more years would accept less than a survival wage and live off their capital to avoid forfeiture of pension rights.

realistically offer is in the zone X_1 to X_2 .³⁴⁰ As illustrated by Graph II,

GRAPH II



the union cannot force the wage rate above X_1 without forcing the employer to dispense with some of his employees.³⁴¹ It cannot raise the wage rate above X_2 without forcing the employer to close his operation.³⁴² The highest wage rate which the union can demand of the employer lies in the zone X_1 to X_2 .³⁴³ Thus the upper and lower limits

340. The exact location within this zone would depend on the employer's marginal cost calculation.

341. In some cases, this point would be determined by the employer's marginal cost curve, which would necessitate the curtailment of marginal production when labor unit costs reached a certain height. In other cases, this point would be determined by the employer's ability to replace employees with machines (automation) when labor costs reached a certain height.

342. The location of X_2 depends on the amount of capital invested in the business and the salability of that capital. It might be possible for X_2 to be located so high that the employer would lose money yearly on the operation of the business but would continue operations because closure with a sale of capital assets at the market price would result in a bigger loss.

343. The exact location would depend on the union's desire to maximize employment. On occasion, unions make a deliberate choice to maximize wages of employees and minimize employment. For discussion of a studied attempt by the United Mine Workers to do this, see M. BARATZ, *THE UNION AND THE COAL INDUSTRY* 51-74, 138-51 (1955). There is strong evidence that the United Steel Workers (USW) made a similar choice in the context of the 1971 steel negotiations. See, e.g., *Pittsburgh Forum*, Aug. 6, 1971, at 18, which, reflecting the USW viewpoint, noted:

But the impact will be enormous. Over the next few years, the long term reduction in the steel work force will move at a faster pace. Perhaps marginal companies will fall by the wayside, perhaps others will merge, granting government permission. Obsolete mills will be closed down, including eventually some sections of J&L's Pittsburgh Works. The union strategists knew all of

of the wage rate are fixed not by collective bargaining, but by the operation of economic forces which are not within the direct control of the immediate parties.³⁴⁴

Although in theory both employer and employee desire a wage rate as near the end of their respective limits as possible, and should at least make initial offers approaching these limits, in practice the limits are not obtainable. The reason for this is simple: In most cases neither employer nor employee has true freedom of contract. An employer of any size cannot replace any significant portion of his work force; similarly, no large group of employees can expect to find other employment if it leaves its employer. In other words, the parties have no freedom *not* to contract; they must reach agreement with each other.³⁴⁵ This realization forces each party, even in his initial proposals, to restrict his demands not to the limits demonstrated by the above graphs, but to limits well inside of the contract zone—to limits determined by the expectations of both parties.³⁴⁶ Assuming, then, that the parties' demands³⁴⁷ fall well within the limits of the contract zone, there will still be a considerable difference between their positions. The question then arises as to what causes the compromise to

this even as they bargained, but they also knew the virtual impossibility of negotiating any less. You can persuade a few hundred workers to settle for less-than-pattern, but not 400,000. It was important, they felt, to the structure of the industry, the economies of the steel communities, and the future of the union that steel remain a high wage industry.

Of course, this raises the question whether union and industry are competent to make decisions of this nature in view of their impact on the national employment picture.

344. These economic factors are, however, subject to political regulation. Without the imposition of "voluntary" steel quotas on the Japanese and West European producers, the range X_1 to X_2 in the steel industry would be considerably lower, since the "natural" law of supply and demand would permit foreign steelmakers to sell more steel in the United States. The basis for this model may be found in A. PIGOU, *THE ECONOMICS OF WELFARE* 451-61 (4th ed. 1962).

345. See CHAMBERLAIN & KUHN 424-25.

346. REYNOLDS 435, notes that proposals not meeting these standards are not taken seriously by the other party, although certain demands which may be regarded initially as absurd may in the course of time be regarded seriously by both parties. Making demands completely out of line with community expectations may be evidence of a failure to comply with the good faith bargaining requirement of LMRA § 8, 29 U.S.C. § 159 (1970). See, e.g., *Diamond Constr. Co.*, 163 N.L.R.B. 161 (1967). One of the interesting effects of unionization upon community standards is the destruction of a wage decrease as an acceptable economic proposal. REYNOLDS 181.

347. Normally, one thinks of union demands and employer offers, the latter being a diminutive version of the former. The employer, however, may make demands which, if agreed to, will have the effect of lowering his costs. For the purpose of this discussion, I will consider an employer's counter-demands part of his offer.

occur at the precise point at which it does.³⁴⁸ The answer is essentially that the point of final agreement is the point at which the cost of one party's disagreeing with the other exceeds the cost of agreeing with the other.³⁴⁹

What are the costs of agreeing or disagreeing? They vary, of course, depending upon the parties and the circumstances. For the employer, the cost of agreeing or disagreeing is always measured in terms of lost profits. The cost of agreeing to the employer is the loss of profits due to increased labor costs and customer losses. Of course, the amount of profits lost will not equal the value to the employees of the employer's concessions because he will pass most of his increased labor costs on to his customers. The net cost of his agreement will thus be the total of his costs not passed on to his customers plus the total lost profits occasioned by his losing some of his customers as a result of his higher prices.³⁵⁰ When the employer is forced to make concessions to other employees which he would not have made but for his commitment to the first group of employees, the loss of profits incurred thereby must also be included as part of the cost of the employer's agreeing with the first group.³⁵¹ The cost of disagreeing to an employer is the loss of profits plus the incurrence of special costs which result from his employees' concerted action. These would include any direct losses suffered by him while such action was going on, loss of business in that period, and any future loss of profits attributable to the permanent loss of customers who turn to other suppliers.³⁵² The cost of disagreeing to the employer thus depends ulti-

348. This question was not answered by classical economists. REYNOLDS 425. For modern approaches, see N. CHAMBERLAIN, *A GENERAL THEORY OF ECONOMIC PROCESS* 80-82 (1955); J. HICKS, *THE THEORY OF WAGES* 149-58 (2d ed. 1966) [hereinafter cited as HICKS]; REYNOLDS 428-32.

349. N. CHAMBERLAIN, *supra* note 348, at 81.

350. If the employer has a monopoly or near monopoly so that he can pass on the cost of his agreement to his customers without diminution of profit or loss of business, his cost of agreeing is zero and he is likely to put up little resistance to union demands, as an examination of the construction industry bargaining in the last decade reveals.

351. CHAMBERLAIN & KUHN 182-87. Contrary to Chamberlain's and Kuhn's contention, the employer generally should not attempt to discount the future costs of such concessions (although as a practical matter it may be impossible not to continue them in the next contract) because these costs are not part of the contract being negotiated. The employer is calculating his costs not for the purpose of measuring a long-term situation, but solely to determine whether for the contractual period in question it would cost him more to agree with the union than to disagree with it.

352. An employer who stands in danger of permanently losing customers in the Washington University Open Scholarship

mately on the duration of the concerted action undertaken by the employees to obtain their demands.

The cost of agreeing to the employee is the value of the union's demands not granted by the employer, plus the cost of any employer counter-demands accepted by the union. The cost of disagreeing to the employee is the loss of income he sustains in the course of concerted action against the employer.³⁵³ This cost would not be as great as the amount of gross wages lost by him during concerted action because a portion of these wages would be taken by taxes and work expenses. Moreover, if an employee secures employment during a strike, his loss of income is reduced. Again, the cost of disagreeing to the employee depends ultimately on how long the employer is willing to endure the losses incurred by the concerted action of his employees.

Bargaining is a process by which one party convinces the other that the cost of disagreeing exceeds the cost of agreeing. There are three main tactics by which one party maneuvers the other into this position. The first might be termed "persuasion." One party seeks to convince the other that the costs of agreement are less than they appear because the concessions will not be costly, while the costs of disagreement are higher than they appear because the demanding party has greater ability and greater willingness to enforce his demands by means of economic action. The second tactic is "coercion." One party seeks to convince the principals of the other side, either by exerting economic pressure or by eliciting the support of the government or the public, that he is negotiating from a position of superior strength.³⁵⁴ The third tactic is "compromise"—reducing one's demands so as to reduce the cost of agreement for the other side.³⁵⁵

event of a labor dispute is in a very weak bargaining position. Sometimes, however, the union cannot take advantage of his weakness because his loss of customers will result in loss of jobs for union members. See Dunlop, *The Function of the Strike*, in *FRONTIERS OF COLLECTIVE BARGAINING* 103 (J. Dunlop & N. Chamberlain eds. 1967).

353. Since the employee's leisure time is of value to him, the real loss, particularly during a short strike, might be considerably less than the loss of income figure might suggest. Occasionally, the cost of disagreeing may be loss of a job because of replacement by another worker, replacement by a machine, or elimination of a job because the employer is a marginal producer. CHAMBERLAIN & KUHN 180. Unfortunately, it is seldom possible for an employee to predict this cost and thus take it into account.

354. To the extent that this tactic involves public or governmental pressure, it might be regarded as increasing the cost of disagreement for the other side. *Id.* at 181-82.

355. This may also reduce the cost of disagreeing by dissipating the other party's

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Since the cost of disagreeing almost always exceeds the cost of agreeing for one side, and often for both, when the deadline for action approaches a bargain will usually be reached. Normally, this bargain will represent a compromise between the last position of each party, the exact point of compromise between the two offers being determined by the parties' conception of the cost of agreeing versus the cost of disagreeing, as indicated in the following example.

One day before the date of expiration of their contract there is a ten-cent per hour differential between union and management. This differential may be capitalized at present values as \$10 million. Moreover, both employer and union will lose \$1 million for each week the strike goes on. The union has the economic capability of striking for six weeks. Under these circumstances the parties will compromise by adjusting their respective offers five cents in the direction of the other, since it is less expensive for the employer to grant a five-cent increase, at a cost of \$5 million, than to endure a six-week strike which will end with no increase in wage costs, but will cost \$6 million. Now let us assume that the union could strike for only four weeks. This would mean that at the end of four weeks the union would have to come back at the employer's terms without compromise. Meanwhile, however, the employer would have lost \$4 million. Under these circumstances, the employer will raise his offer three cents and the union will decrease its demand seven cents. But now let us assume that the union would lose only \$500,000 per week and could strike for ten weeks. Under these circumstances, the employer would have to raise his offer by 7.5 cents and the union decrease its demand by only 2.5 cents.

Why, then, do strikes occur? Sometimes they occur because the parties are engaged in economic warfare rather than collective bargaining.³⁵⁶ Often they occur because it is not politically possible for negotiators to accept an offer, even though the cost of disagreeing exceeds the cost of agreeing.³⁵⁷ A frequent cause of strikes is miscalculation

willingness to fight. *Id.* at 187-88. See generally Livernash, *The Relation of Power to the Structure and Process of Collective Bargaining*, 6 J. LAW & ECON. 10 (1963).

356. See REYNOLDS 441; note 338 *supra*.

357. Political infeasibility may result from the need to take action to maintain the negotiator's position or the position of his principal, from fear of rivals, from actual demands of the principals (union members or stockholders), or from the expectations of the community and the government. REYNOLDS 441. A negotiator may by his tactics make it politically infeasible for him to accept a given offer. *Id.* at 437.

of the cost of either agreeing or disagreeing—usually the latter, since it is less susceptible of exact calculation.³⁵⁸ Finally, the most frequent cause of strikes is the parties' failure to reveal by their demands their actual expectations.

For obvious reasons, the course of each strike will be determined by its cause. Strikes which are a form of warfare will continue until one side or the other has won its principle. Strikes which are politically oriented will continue until it is politically feasible for negotiators to accept a settlement which will probably not differ substantially from the settlement which would have occurred without a strike. Strikes which occur as a result of miscalculation will continue until a new and correct calculation is made.³⁵⁹ Strikes which result from a failure of negotiation will terminate once the parties honestly reveal their demands.³⁶⁰

It should be obvious from this discussion that the provision of public subsidies to strikers may drastically affect the ultimate result produced by the collective bargaining process, since such assistance will reduce the cost of the strike to the employees while simultaneously increasing their capability to continue the strike.³⁶¹ The impact of such benefits upon the cost to the average employee of continuing a strike is shown by the following example.

Joe Steelworker, his wife, and two children subsist fairly comfortably

358. HICKS 146-47:

If there is considerable divergence of opinion between the employer and the union representative about the length of time the men will hold out rather than accept a given set of terms, then the union may refuse to go below a certain level, because its leaders believe that they can induce the employer to consent to it by taking anything less; while the employer may refuse to concede it, because he does not believe the union can hold out long enough for a concession to be worth his while. Under such circumstances, a deadlock is inevitable and a strike will ensue, but it arises from the divergence of estimates and from no other cause.

See REYNOLDS 441-42. Theoretically, it is possible for a strike to occur because there is no contract zone.

359. REYNOLDS 430-31, 438.

360. HICKS 144-46. That the parties in the course of negotiation engage in a certain amount of bluffing as to their real demands makes this kind of mistake more likely. See REYNOLDS 438-39. Of course, the purpose of such bluffing is to obtain through skillful negotiation more than might be obtained through economic force.

361. The significance of this factor can hardly be overestimated. Prior to the provision of public subsidies to strikers, underlying every theory of bargaining power was the common recognition that the employer had more staying power than his employees. See HICKS 144-45.

in Pennsylvania on a gross weekly income of \$110 (\$2.75 per hour). Joe's net income is only \$87.93 because of the following deductions:

Municipal Wage Tax	\$1.10
FICA	6.50
State Income Tax	2.53
Social Security	6.44
Union Dues	5.50
	\$22.07

In the event of a strike, Joe's disposable income stops. Even though he may own a home, household furnishings, an automobile, and life insurance and have \$1,499 in a bank account, he will be eligible for food stamps.³⁶² If he has no income whatsoever, he can receive \$112 worth of food stamps per month at no charge.³⁶³ But he should not content himself with food stamps; instead, he should file an application for welfare benefits. He will be eligible for benefits even though he may own a house, car, and so forth, as long as his liquid assets do not exceed \$50. If he owns real estate, a lien will be placed on it to effectuate repayment. If he does not own real estate, no attempt will be made to recover the amount of welfare benefits.³⁶⁴ In Pennsylvania, Joe and his family would receive \$297 per month in welfare, but would then have to spend \$82 of it to purchase their \$112 worth of food stamps.³⁶⁵ Between welfare and food stamps, they would receive a public, non-taxable subsidy of \$327 per month, or approximately \$75 per week—only \$13 per week less than their normal income.

362. 7 C.F.R. § 271.3(c)(4) (1973) sets the maximum allowable resources of a household at \$1,500. Excluded from "resources" are "the home, automobile, household goods, cash value of life insurance policies, and personal effects." *Id.* § 271.3(c)(4)(iii).

363. See 36 Fed. Reg. 14,118 (1971). Food stamp purchase requirements are determined by reference to net monthly income. As a household's net income increases it has to pay more for the same value in stamps.

364. PA. STAT. ANN. tit. 62, § 1974 (1968). See *Charleston v. Wohlgenuth*, 332 F. Supp. 1175 (E.D. Pa. 1971) (three-judge court), *aff'd*, 405 U.S. 970 (1972). For discussion of state repayment provisions, see Graham, *Public Assistance: The Right to Receive; the Obligation to Repay*, 43 N.Y.U.L. REV. 451, 475-94 (1968).

365. 7 C.F.R. § 271.3(c)(1)(i)(g) (1973) requires that "payments received from federally aided public assistance programs, general assistance programs, or other assistance programs based on need" be included in computing a household's income for purposes of eligibility in the food stamp program. Thus, when Joe's family increases its "income" with the state welfare grant of \$297, it must pay more to receive the same food stamp value. See note 363 *supra*.

If Joe lived in New York, he would be entitled to receive \$55 per week in unemployment compensation after the strike had gone on for seven weeks. Receipt of unemployment compensation would, however, render Joe's family ineligible for AFDC-U.³⁶⁶ In New York he would receive \$308 per month in welfare benefits as compared with \$297 per month in Pennsylvania. Accordingly, in New York his total subsidy would amount to \$334 per month or almost \$77 per week—only \$11 per week less than his normal income.

In this connection it should be noted that Joe would probably be permitted to receive welfare and food stamps even if his assets exceeded the allowable amount because the asset limitations are rarely enforced against strikers.³⁶⁷ Further, although the amount of any strike benefits made available to Joe by his union should, by state regulation, be offset against the welfare benefits payable to him, in actual practice this probably does not occur. If these benefits amounted to \$13 per week and were not offset, Joe would be in no worse financial position striking than working if he lived in Pennsylvania, and would be in better position if he lived in New York.³⁶⁸

It is now incontrovertible that the provision of public subsidies to strikers in the form of welfare benefits, unemployment compensation, and food stamps has enhanced the ability of the striker to sustain a long strike.³⁶⁹ As one of the participants in the 1970 General Motors strike observed, "They can't starve us out now that we're getting these food stamps. We can go on forever."³⁷⁰ Indeed, the impact of such subsidies was visible in the ratification vote on the settlement agreement which ended the General Electric strike of 1969. The New York employees who were receiving unemployment compensation voted against ratification; the agreement was ratified only because the overwhelming majority of non-New York strikers who did not receive unemployment compensation voted for it.³⁷¹ Officials of unions whose members have been the beneficiaries of strike subsidies have been quite open in admitting the significance of their impact.³⁷²

366. See note 226 *supra*.

367. See note 43 *supra* and accompanying text.

368. For discussion of the impact of subsidies on strikers' families during the 1970 General Motors strike, see U.S. NEWS & WORLD REP., Nov. 23, 1970, at 15.

369. For the best compilation of empirical evidence, see THIEBLOT & COWIN 49-185.

370. 116 CONG. REC. 36,604 (1970) (remarks of Cong. Goodling).

371. See N.Y. Times, Mar. 17, 1970, at 42, col. 2.

372. E.g., 77 AM. FEDERATIONIST, July, 1970, at 1, 5-6 (Chairman of the AFL-
https://openscholarship.wustl.edu/law_lawreview/vol1973/iss3/1

By enhancing the economic ability of the striker to endure a long strike, the provision of public subsidies inevitably results in higher settlements.³⁷³ This impact has led the AFL-CIO's Community Services group to redouble its efforts.³⁷⁴ It has become customary in many communities for union officials to arrange with local welfare officials for the expedited processing of welfare applications by striking union members;³⁷⁵ some union officials even assist in such processing.³⁷⁶ Not surprisingly, this situation has led to widespread fraud.³⁷⁷ Moreover, the use of subsidies by strikers is likely to increase in the future as the possibility of receiving such aid becomes better known and worker resistance to taking advantage of welfare decreases.³⁷⁸

This analysis indicates that the provision of public subsidies to strikers imposes additional costs on society beyond the basic expense of the subsidies. One of these additional costs is that of the strike itself. Admittedly, the provision of subsidies does not ordinarily cause strikes, since the parties take subsidies into account in calculating the cost of

CIO's Coordinated Bargaining Committee credited public subsidization as a "key contribution" to the duration of the 1969-1970 General Electric strike).

373. See THIEBLOT & COWIN 218. It must be noted that on occasion strikers receive private charity. See note 11 *supra*. The provision of private charity will have the same effect on the collective bargaining process as the provision of public subsidies. It is doubtful, however, that private charity has ever been given in sufficient amounts to have any major effect on other than small strikes. The provision of private union strike benefits has been a more commonplace method of supporting strikers. Because a striker's receipt of strike benefits is included in income for purposes of determining eligibility for welfare and food stamp benefits, unions frequently distribute strike benefits selectively to families otherwise ineligible for public subsidization. See *Welfare for Strikers* 103-05. Since strike benefits are derived from employee contributions, they do not lower the cost of striking to the employees. But by enabling the strikers to stay out longer they may increase the employer's cost of disagreeing and thus raise the ultimate cost of settlement. Neither private charity nor union strike benefits, however, is open to the basic objection of unfairness which attaches to public expenditures to support a small group whose members are capable of supporting themselves.

374. See THIEBLOT & COWIN 38, 40-42. It has been assisted in this task by the National Welfare Rights Organization. *Id.* at 47.

375. *Id.* at 49-185.

376. See *Welfare for Strikers* 94.

377. Striking Teamsters in Illinois obtained some \$230,000 in food stamps by fraud, and another \$121,000 under "questionable circumstances." Chicago Daily News, Nov. 1, 1971, at 4, col. 1. Approximately twenty percent of General Motors strikers who received welfare benefits in Flint, Michigan, did so by misrepresentation. *Welfare for Strikers* 95. For other examples, see THIEBLOT & COWIN 155, 174.

378. See THIEBLOT & COWIN 3; *Welfare for Strikers* 79-80.

disagreeing versus the cost of agreeing, but it does insure that when strikes occur they will go on longer because the union, which is usually the weaker party, now has more staying power. Statistics demonstrate a steady increase in the durability of strikes in the 1960's. In the period from 1960 to 1966, idle man-days due to strikes averaged .135 percent of working time. The statistics thereafter show a sharp increase: 1967, .250; 1968, .280; 1969, .240; and 1970, .370.³⁷⁹ The loss to society, as measured by the gross national product, resulting from the increased duration of strikes is another cost of providing public subsidies to strikers.³⁸⁰

The most important cost of strike subsidies may be summed up in a word: inflation.³⁸¹ It is self-evident that increases in wage costs will have some impact on prices. The extent of this impact varies, depending on the relationship between labor costs associated with the product and the total cost of the product.³⁸² Of course, it should be recognized that labor unions are by definition "inflating" in the sense that a major objective of unionism is to raise the price of labor beyond the level reached by the normal laws of supply and demand—a goal accomplished through exploitation of the monopolistic or oligopolistic position of the employee.³⁸³ Historically, in the United States labor unions have had the general effect of inflating wages and consequently prices, though less by the mechanism of forcing wage increases when demand is high than by resisting wage decreases when demand is low.³⁸⁴ Until fairly recently unions were restrained from exercising their monopoly power to the utmost. One restraint was imposed by competition among employers.³⁸⁵ Obviously, if increased wage levels force unionized producers to raise prices significantly they will be driven out of business by non-unionized producers.³⁸⁶ Unions have always recognized this fact and have often eliminated this restraint by unionizing an entire major industry, thus eliminating "wage-competition."³⁸⁷ Of

379. Bureau of Labor Statistics, *Current Labor Statistics*, 96 MONTHLY LAB. REV. 102, 133 (Aug. 1973) (Table 32: Work stoppages, 1946 to date).

380. REYNOLDS 447-48.

381. For empirical evidence, see THIEBLOT & COWIN 49-185.

382. *Id.*

383. See REYNOLDS 611-14, 638-40.

384. See H. LEWIS, *UNIONISM AND RELATIVE WAGES IN THE UNITED STATES* (1963); REYNOLDS 181, 187-88.

385. See CHAMBERLAIN & KUHN 375-84.

386. See REYNOLDS 611.

387. See *id.* at 622-23.

course, there remains the threat of competition from new entries in the market employing non-union labor, particularly if the effect of unionism is to create substantial unemployment.³⁸⁸ This threat, however, is insignificant in most industries because of the high level of entry costs. Although another threat of competition comes from foreign employers, unions seem to have the political power in most cases to limit such competition when it becomes serious.³⁸⁹ Finally, there is the possibility of competition from substitute products. There is often a real limit, however, on the extent to which one product may be substituted for another. The major restraint on union exercise of monopoly power was the resistance of the employer to increases in wages.³⁹⁰ Even though the employer may be able to utilize his position by passing on some of the costs of increased wages to his customers, his profits will still suffer to some extent from increased wage costs. This fact forces him to oppose the union's demands as long as the cost of agreeing to such demands exceeds the cost of disagreeing with them. The provision of subsidies to strikers has, of course, the result of increasing the employer's cost of disagreeing in many cases, sapping his will to resist, and, therefore, removing the main restraint on the union's exercise of monopoly power.

Removal of this restraint results in abnormally high wage increases reflected ultimately in price increases and inflation. It is not surprising, then, that the major expansion of the food stamp program—the major source of subsidies for strikers—in 1966 was followed by an unparalleled period of inflation. While the Consumer Price Index rose 4.2 percent in 1968, 5.4 percent in 1969, and 5.9 percent in 1970,³⁹¹ unemployment rose from 3.6 million in 1968 to 4.9 million in 1970.³⁹² The inflation which characterized the beginning of this period was the traditional demand-pull inflation which resulted from the Johnson Ad-

388. As a result of a decision by the United Mine Workers to maximize wages in the coal industry and hence to force inefficient producers out of business, one-fourth of all coal mined in the United States in 1962 came from non-unionized mines. See CHAMBERLAIN & KUHN 371.

389. Witness the steel quotas, the ten-percent import surcharge, and the general demand for quotas and tariffs by unions in any industry threatened by foreign competition.

390. See CHAMBERLAIN & KUHN 380-81.

391. Bureau of Labor Statistics, *Current Labor Statistics*, 96 MONTHLY LAB. REV. 102, 120 (Aug. 1973) (Table 24: Consumer and Wholesale Price Indexes, annual averages and changes, 1951-72).

392. *Id.* at 106 (Table 7: Unemployment rates, by age and sex, seasonably adjusted), and earlier issues of the *Monthly Labor Review*.

ministration's refusal to finance the Vietnam War by means of increased taxes. In 1968, however, war expenditures were being curtailed and the unemployment rate began to rise. The Consumer Price Index continued not only to rise, but to rise at an even faster rate. The novel phenomenon of increasing unemployment and rising prices³⁹³ indicated the presence of cost-push inflation,³⁹⁴ resulting from the elimination of the major restraint on union exercise of monopoly power.

Another indirect cost of providing public subsidies to strikers is unemployment. Of necessity, any union-secured increase in the wage level is likely to result in loss of jobs in the particular employer's locale since a change in the employer's marginal cost curve causes a decrease in production and often a decrease in the number of individuals employed.³⁹⁵ Moreover, at some point an increase in the cost of labor will result in the replacement of individuals by machines as the cost of labor increases relative to the cost of capital.³⁹⁶ Thus the provision of public subsidies to strikers, by accelerating the rate of wage increase, causes greater unemployment.

A final indirect cost of public subsidies to strikers is distortion of the pattern of foreign trade. In general, as prices increase the United States is less able to export products and more likely to import. The increase in domestic prices resulting from increased wages is a major cause of the failure to maintain a favorable balance of trade in this country.³⁹⁷ To the extent that this increase results from exaggerated wage increases fostered by public subsidies to strikers, problems with the balance of trade must be attributed to a policy of providing subsidies to strikers.

393. In Samuelson & Solow, *Analytical Aspects of Anti-Inflation Policy*, 50 AM. ECON. REV. 177 (May 1960) (Papers & Proceedings of the 72d Annual Meeting of the American Economic Ass'n), the authors assert that application of a Phillips curve in the United States suggests that the mathematical relationship between unemployment and price increase is such that five to six percent unemployment results in price stability, while three percent unemployment results in four to five percent inflation. The occurrence of high unemployment with significant inflation presages a sharp shift to the left in the American Phillips curve. See also REYNOLDS 191-92.

394. For discussion of cost-push inflation, see H. WELLINGTON, *LABOR AND THE LEGAL PROCESS* 303, 378-79 n.11 (1968).

395. See REYNOLDS 630.

396. *Id.* at 211.

397. Of course, devaluation may erase this effect.

VI. UNANSWERED QUESTIONS

The provision of public subsidies to strikers gives rise to a basic legal question: Does providing state subsidies to strikers interfere with the federal regulatory scheme governing labor-management relations? Preemption is a unique doctrine of American law designed to deal with the potential conflict between federal and state legislation which results from the creation under the Constitution of a federal system of government. In theory, of course, this conflict is easily resolvable by the supremacy clause;³⁹⁸ in the event of direct conflict between federal and state law, federal law will prevail,³⁹⁹ assuming, of course, that the federal government has power to legislate in the area in question. The real problem, however, arises with indirect conflict between federal and state regulation. It is here that application of the doctrine of preemption is most difficult.

The doctrine of preemption in the interstate commerce area can be invoked pursuant to two different rationales. First, the doctrine may be invoked on the theory that an area regulated or affected by state action must be regulated by—and only by—the federal government. Secondly, the doctrine may be invoked on the theory that the existence of federal regulation in an area precludes *per se* state regulation.⁴⁰⁰ It seems clear that preemption, to the extent it applies to labor-management relations, is appropriate under the second theory and not the first. The Supreme Court has recognized that the existence of federal regulation of some aspects of labor-management relations does not preclude all state regulation.⁴⁰¹ A problem arises when a state attempts to regu-

398. U.S. CONST. art. VI, cl. 2:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding.

399. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

400. See Note, *Federal Preemption in Labor Relations*, 63 NW. U.L. REV. 128, 129-30 (1968).

401. *E.g.*, *Weber v. Anheuser Busch, Inc.*, 348 U.S. 468, 480 (1955): "By the Taft-Hartley Act, Congress did not exhaust the full sweep of legislative power over industrial relations given by the Commerce Clause." See *Vaca v. Sipes*, 386 U.S. 171 (1967); *Hanna Mining Co. v. District 2, Marine Eng'rs Beneficial Ass'n*, 382 U.S. 181 (1965); *Allen-Bradley Local No. 1111 v. Wisconsin Empl. Relations Bd.*, 315 U.S. 740 (1942). Some federal labor legislation expressly leaves to the states areas of regulation not specifically taken from them, *e.g.*, Labor-Management Reporting and Disclosure Act § 603, 29 U.S.C. § 523(a) (1970).

late an aspect of labor-management relations which is not expressly reserved to the federal government by statute,⁴⁰² but which arguably falls within the federal regulatory scheme.

Among the employee activities protected by the NLRA is "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of [his] own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection"⁴⁰³ While the NLRA explicitly makes it an "unfair labor practice" for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157,"⁴⁰⁴ including the right to bargain collectively, this prohibition is applied judicially to states as well.⁴⁰⁵ Along with restricting state interference with NLRA "protected activities" such as collective bargaining, courts have confined the jurisdiction for adjudicating federally prescribed "unfair labor practices" to the National Labor Relations Board (NLRB).⁴⁰⁶ In the leading case, *Garner v. Teamsters Local 766*,⁴⁰⁷ the state was enjoined from applying state laws which prohibited certain unfair practices in striking and picketing.

402. *E.g.*, NLRA § 9(c)(1)(A), 29 U.S.C. § 159(c)(1)(A) (1970), grants exclusive authority to the NLRB to investigate complaints by employees that their employer refuses to recognize their collective bargaining representative. *See Algoma Plywood & Veneer Co. v. Wisconsin Empl. Relations Bd.*, 336 U.S. 301 (1949).

403. NLRA § 7, 29 U.S.C. § 157 (1970). *See NLRB v. Insurance Agents Int'l*, 361 U.S. 477, 490 (1960):

[I]f the [National Labor Relations] Board could regulate the choice of economic weapons that may be used as a part of collective bargaining, it would be in a position to exercise considerable influence upon the substantive terms on which the parties contract. As the parties' own devices became more limited, the Government might have to enter even more directly into the negotiation of collective agreements. Our labor policy is not presently erected on a foundation of government control of the results of negotiations. . . . Nor does it contain a charter for the National Labor Relations Board to act at large in equalizing disparities of bargaining power between employer and union.

See also American Ship Bldg. Co. v. NLRB, 380 U.S. 300 (1965).

404. NLRA § 8(a)(1), 29 U.S.C. § 158(a)(1) (1970).

405. *Hill v. Florida ex rel. Watson*, 325 U.S. 538 (1945) (Florida statute prohibiting union and its representative from acting as collective bargaining agents without complying with prescribed conditions declared invalid). *See generally Cox, supra* note 117.

406. *See Cox, supra* note 117, at 1341-48.

407. 346 U.S. 485 (1953). *See also Teamsters Local 24 v. Oliver*, 358 U.S. 283 (1959) (state antitrust law may not prevent execution of collective bargaining agreement).

In *San Diego Building Trades Council v. Garmon*⁴⁰⁸ the Supreme Court avoided categorizing the activities of a union in attempting to unionize an unorganized shop as either a protected activity or an unfair labor practice, and established a new preemption test which has endured to the present: If the activities which a state attempts to regulate are *arguably* protected or prohibited by the NLRA, state jurisdiction must yield to the NLRB's exclusive determination.⁴⁰⁹ The rationale for the test is that leaving states free "to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by the Congress and requirements imposed by state law."⁴¹⁰ The Court made it clear that the test was not the intention of the state in enacting the legislation, but rather its impact on the federal regulatory scheme.⁴¹¹

The *Garmon* rule was extended by *Teamsters Local 20 v. Morton*⁴¹² to cover state regulation of activities which were *not* arguably regulated or protected by the NLRA, but which must be left to exclusive federal disposition to protect the congressionally established balance in labor-management relations. *Morton* thus recognized that the purpose of federal regulation of labor-management relations is not simply to protect or prohibit specified activities, but to establish a system under which there is a "balance . . . between the conflicting interests of the union, the employees, the employer and the community."⁴¹³ Although there is

408. 359 U.S. 236 (1959).

409. *Id.* at 245.

410. *Id.* at 244.

411. *Id.*:

Nor has it mattered whether the States have acted through laws of broad general application rather than laws specifically directed towards the governance of industrial relations. Regardless of the mode adopted, to allow the States to control conduct which is the subject of national regulation would create potential frustration of national purposes.

412. 377 U.S. 252 (1964).

413. *Id.* at 259. See *Cox, Labor Decisions of the Supreme Court at the October Term, 1957*, 44 VA. L. REV. 1057, 1068-69 (1958):

[T]he federal law does not deal only with extreme cases of misconduct leaving debatable instances to the states. Within the field of labor-management relations the NLRA is a comprehensive code of regulation. The heart of national labor policy is the private adjustment of conflicts over wages, hours, and terms and conditions of employment by the negotiation and administration of collective bargaining agreements The progress of unionization and the balance of power affects the way collective bargaining works. . . . At each point, formulating the national labor policy involved balancing the interests of management, union, employees, and public in union organization and collective bargaining as methods for establishing terms and conditions of employment.

Any state law which affects the balance is inconsistent with the national labor

some question as to the future viability of the *Garmon* rule,⁴¹⁴ and although the extension of the rule under *Morton* is subject to a number of exceptions,⁴¹⁵ preemption is still determined largely by reference to the “arguably protected or prohibited” and federal balancing scheme tests.⁴¹⁶

Federal maintenance of free collective bargaining has been protected against state interference by application of these rules. Perhaps the most common example of state interference is the attempt to force the parties in a labor dispute to settle the dispute on terms which are, in effect, dictated by the state. In *Street Employees Division 998 v. Wisconsin Employment Relations Board*⁴¹⁷ the Supreme

policy embodied in the LMRA and, under the supremacy clause, cannot be applied in situations affecting interstate commerce.

414. In *Amalgamated Ass'n of Street Employees v. Lockridge*, 403 U.S. 274 (1971), the *Garmon* rule was applied to preempt state court consideration of an employee's complaint that his union had violated its own constitution in successfully requesting the employer to discharge him for failing to pay union dues. The four dissenting justices raised serious questions as to the validity of the *Garmon* rule. Two of the five-man majority (Justices Black and Harlan) are no longer on the Court. Nevertheless, although *Garmon* may be interpreted somewhat more strictly—even by changing “arguably” to “probably” or “actually,” see Longshoreman's Local 1416 v. Ariadne Shipping Co., 397 U.S. 195, 201 (1970) (White, J., concurring)—the principle will probably remain.

415. E.g., *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959) (activities which are “a merely peripheral concern of the Labor Management Relations Act,” or which touch interests “deeply rooted in local feeling and responsibility,” such as “conduct marked by violence and imminent threat to public order”). See *United Constr. Workers v. Laburnum Constr. Corp.*, 347 U.S. 656 (1954).

416. *Cox*, *supra* note 117, at 1365:

Virtually all the decisions conform to the proposition deduced from *Morton*: unless the conduct is actually protected against employer interference by sections 7 and 8(a)(1), a state's jurisdiction within the field of labor-management relations depends upon whether it is seeking to apply substantive or remedial law whose formulation or application would involve weighing the same competing interests of employers, employees, labor unions, and the public among which Congress struck a balance in establishing a national legal framework for the conduct of organizational activity, collective bargaining, and labor disputes.

Justification for protecting this congressional “balance” was offered by Justice Harlan in *Amalgamated Ass'n of Street Employees v. Lockridge*, 403 U.S. 274, 286 (1971):

The course of events that eventuated in the enactment of a comprehensive national labor law, entrusted for its administration and development to a centralized, expert agency, as well as the very fact of that enactment itself, reveals that a primary factor in this development was perceived incapacity of common-law courts and state legislatures, acting alone, to provide an informed and coherent basis for stabilizing labor relations conflict and for equitably and delicately structuring the balance of power among competing forces so as to further the common good.

Court invalidated a Wisconsin statute which prohibited strikes by employees of public utilities and provided for compulsory arbitration of disputes. In *General Electric Co. v. Callahan*⁴¹⁸ the Massachusetts Board of Conciliation and Arbitration was enjoined from advising the parties to a labor dispute and from making available to the public its written findings and recommendation. Although the Board had little direct power, the court believed that "the indirect coercive effect of its actions upon the parties to a labor dispute is by no means insubstantial,"⁴¹⁹ citing the probable effect of government hearings on the bargaining positions of the parties, and the pressures of public opinion following publication of the Board's findings.⁴²⁰ In *John Hancock Mutual Life Insurance Co. v. Commissioner of Insurance*⁴²¹ a state court invalidated under the preemption doctrine a Massachusetts statute which granted owners of debit life insurance policies an added grace period for payment of premiums during strikes by collecting agents of an insurance company. Although the court recognized that the statute was intended not to regulate the activities of the parties to a dispute but to protect policy holders against forfeitures, it ruled that "in determining whether it conflicts with the National Labor Relations Act, it is irrelevant that the state statute was enacted for purposes not related to labor relations."⁴²² The test, according to the *John Hancock* court, is whether the state statute has an effect on the federal

417. 340 U.S. 383 (1951).

418. 294 F.2d 60 (1st Cir. 1961), *cert. denied*, 369 U.S. 832 (1965).

419. *Id.* at 67.

420. In *Hawaii Tribune-Herald, Ltd. v. Kimura*, 272 F. Supp. 175 (D. Hawaii 1967), the court refused to invoke preemption to enjoin government officials from withdrawing advertising from a newspaper during a strike by the newspaper's employees. It was unclear from the evidence, however, whether the purpose of the withdrawing was to exert pressure on the newspaper to capitulate to the union's demands.

In factual situations similar to *General Electric*, attempts by state agencies to investigate labor disputes were enjoined in *Oil Workers Local 5-783 v. Arkansas Louisiana Gas Co.*, 332 F.2d 64 (10th Cir. 1964), and *Grand Rapids City Coach Lines v. Howlett*, 137 F. Supp. 667 (W.D. Mich. 1955). In *Delaware Coach Co. v. Public Serv. Comm'n*, 265 F. Supp. 648 (D. Del. 1967), the Delaware Public Service Commission was enjoined from conducting a hearing to decide whether to revoke a bus company's charter during a labor dispute between the bus company and its employees, on the ground that the hearing would constitute "outside coercive pressure" which might "imperil the freedom of collective bargaining." In *Cab Operating Corp. v. City of New York*, 243 F. Supp. 550 (S.D.N.Y. 1965), the city was enjoined from conducting mock elections for selection of cab drivers' representatives on the ground that the NLRB has exclusive authority to conduct representation elections.

421. 349 Mass. 390, 208 N.E.2d 516 (1965).

422. *Id.* at 400, 208 N.E.2d at 523.

scheme. The court concluded that free collective bargaining is essential to that scheme, and that the state law affected the bargaining between the insurance company and the agents' union by "reinforc[ing] the power of the strike weapon in the hands of the agents."⁴²³ Thus state acts which affect the economic strengths of the parties and thereby upset the balance of power in collective bargaining are within the preemption doctrine.⁴²⁴

Despite the protests of the *Minter* court⁴²⁵ concerning the difficulties of applying the preemption doctrine in non-*Garmon* situations, it is clear that other courts frequently apply the doctrine in cases in which state regulation outside the "arguably protected or prohibited" class threatens the system of collective bargaining. The *Minter* court asserted that the provision of welfare benefits to strikers

is not an invasion by the state into an area of conduct regulated by a national instrumentality but a tangential frustration of the national policy objective of unfettered collective bargaining by state economic sustenance of some of the individuals who participate in federally protected, concerted activity.⁴²⁶

For a "tangential frustration" to come within the preemption doctrine under this analysis, the balance of "degree of conflict" between federal and state regulation and the "relative importance of the federal and state

423. *Id.* The court found the right to "free collective bargaining" of central importance to federal regulation:

"Collective bargaining, with the right to strike at its core, is the essence of the federal scheme." Division 1287, *Amalgamated Assn. of St. Elec. Ry. & Motor Coach Employees of America v. State of Missouri*, 374 U.S. 74, 82. . . . Although the term "free collective bargaining" does not appear in the National Labor Relations Act, it is found in the legislative history. Sen. Rep. No. 105, 80th Cong., 1st Sess. 2, 13 (1947); 93 Cong. Rec. 3835 (1947) (remarks of Senator Taft). The courts have assumed it is basic to the Federal labor laws. See *National Labor Relations Bd. v. American Natl. Ins. Co.*, 343 U.S. 395, 401-403. . . .

Id.

424. See note 420 *supra*. Cf. *Nash v. Florida Indus. Comm'n*, 389 U.S. 235 (1967), in which the Court held that a state agency's interpretation of Florida's unemployment insurance statute conflicted with the supremacy clause. The agency had ruled that by filing an unfair labor practice charge against her employer during a lay-off, an employee became ineligible for unemployment benefits on the ground that her "unemployment" was "due to a labor dispute." *Id.* at 237, citing FLA. STAT. ANN. § 443.06 (1966). The Court reasoned that the state should not be permitted to withdraw state benefits from employees "simply because they cooperate with the Government's constitutional plan." 389 U.S. at 239. See also *International Auto. Workers v. O'Brien*, 339 U.S. 454 (1950).

425. See notes 113-25 *supra* and accompanying text.

426. 435 F.2d at 992.

interests" must swing heavily in favor of preserving the federal scheme.⁴²⁷ The court concluded that, despite a paucity of evidence, it is doubtful that "a significant frustration of federal collective bargaining policy is effected by the granting of welfare benefits to indigent strikers," and that even if so affected, the state's interest in its citizens' social welfare is "so insubstantial compared to the federal interest that Congress must be supposed to have deprived the state of such power to serve that interest."⁴²⁸

The analysis in *Minter* is assailable on two grounds. First, it misconstrues precedent in the labor-management preemption field. Courts which have applied the preemption doctrine to non-*Garmon* situations have not balanced the importance of the state interest with federal labor policy. Indeed, they have in some instances ignored the state's objectives and examined only the practical effect of the state's activities on the federally protected balance of negotiating power. The state's objectives are relevant only within the "local feeling and responsibility" exception to *Garmon*, and there preemption is inapplicable only in cases in which the state is exercising its traditional power to maintain law and order and to prevent violence.⁴²⁹ There is no basis in precedent for assuming that the state has a "deeply rooted" interest in subsidizing strikers, or that the state subsidizes strikers to maintain law and order. Secondly, the court's conclusion that subsidization of strikers has no "significant impact" on labor-management relations is demonstrably false.⁴³⁰

To suggest that the *Minter* court erred in not invoking the preemption doctrine does not imply that all subsidies to strikers are precluded. Obviously, preemption has no application in purely federal subsidies such as the food stamp program. Preemption should not be precluded, however, merely because the federal government underwrites part of the costs of state subsidization programs such as unemployment compensation and AFDC-U, so long as the states retain the power to determine the eligibility requirements for these programs.⁴³¹

427. *Id.*

428. *Id.* at 994.

429. See note 415 *supra*.

430. See notes 338-97 *supra* and accompanying text. If there were no significant impact, a certain amount of conflict would be blended. See Mandelker, *supra* note 173, at 511-18.

431. In *Nash v. Florida Indus. Comm'n*, 389 U.S. 235 (1967), see note 424 *supra*, the Court, in invoking the preemption doctrine, did not consider whether federal-state

Application of the preemption doctrine to the payment of welfare benefits (although not unemployment compensation) is probably more questionable today than at the time of *Minter* in view of a recent HEW regulation⁴³² which specifically leaves to the states the question of striker eligibility by permitting states to exclude from the definition of "unemployed father" a father who is unemployed as a result of his participation in a labor dispute. Although the regulation obviously does not constitute an expression of congressional intent which would clearly preclude application of the preemption doctrine in the welfare area, it does constitute an expression of opinion by the federal executive that state provision of welfare benefits to strikers does not unduly interfere with the federal regulatory scheme for labor-management relations.⁴³³ Hopefully, the Supreme Court will ultimately resolve the question.⁴³⁴

VII. POSTSCRIPT: SUBSIDIES AND DEMOCRACY

It seems clear that the provision of public subsidies to strikers has a detrimental effect on the public as a whole which far outweighs the benefit it confers on the strikers. Although I have emphasized judicial attacks on the provision of these subsidies, it should be recognized that the question is essentially a political one which inevitably must be resolved by the elected branches of the government rather than the judiciary. Unfortunately, the American political process seems presently incapable of resisting the organized efforts of determined minorities to enact legislation which promotes special interests in proportion to the extent it damages the public interest. Indeed, the legislative battle over the anti-striker amendment to the Food Stamp Act⁴³⁵ is typical of the "democratic" solution to political prob-

funding of the unemployment compensation program constituted some sort of congressional blessing of state policies on eligibility requirements and payment of benefits. *But see* cases discussed notes 179-237 *supra* and accompanying text.

432. 38 Fed. Reg. 18,549 (1973), *revising* 45 C.F.R. § 233.100(a)(1) (1972).

433. The mere possession of power by the federal government to regulate eligibility criteria for welfare benefits under the Social Security Act may, although unexercised, invoke application of the preemption doctrine. If the legislature specifically leaves the matter to the states, however, the doctrine is precluded. It is questionable that HEW's delegation, by itself, renders preemption inapplicable.

434. The *Minter* court indicated that the preemption question would be best resolved by Congress. 435 F.2d at 993-94. This position ignores the fact that Congress is frequently incapable of legislating in the labor-management relations area, and that preemption is basically a judicially developed doctrine.

435. *See* notes 252-86 *supra* and accompanying text.

lems. In that instance, urban congressmen who are normally aligned with labor interests combined with rural congressmen to pass a farm subsidy-food stamp bill which benefits labor and farming interests, although arguably not the interests of the country. Similarly, a "conservative" administration ostensibly opposed to the interests of labor unions nevertheless refuses to take decisive action to eliminate subsidies to union members who support its foreign policy. It seems clear that the provision of subsidies to strikers, like the provision of subsidies to a number of other special interest groups, cannot and will not be resolved until fundamental reforms are made in the electoral process which, by making legislators less dependent for campaign finances on those groups with ample financial resources, will make it more feasible for legislators to eliminate the special privileges given to such groups in exchange for their electoral support. Even the accomplishment of this reform, however, will not necessarily mean elimination of strike subsidies, for the influence of labor unions depends not only on the money which they contribute to the campaigns of favored candidates, but also upon the voting strength of their members. Thus it is possible that even with a reformed electoral system the interests of a numerically significant and cohesive minority will be advanced at the expense of the public at large. It could be argued that such a situation is the price of democracy.⁴³⁶ History, however, suggests that democracy can price itself out of the market place.⁴³⁷

436. See R. DAHL, *supra* note 243.

437. It is, of course, possible that the provision of subsidies to strikers will be curtailed, though not completely eliminated, within the context of a comprehensive revision of the welfare system. Both a negative income tax system and the proposed Family Assistance Plan would replace the present system of providing benefits based on a family's income in a given month with a system which would make eligibility for benefits depend on a family's annual income, a more realistic measure of need. See *Welfare for Strikers* 110-14. See generally *Hearings on Income Maintenance Programs Before the Joint Economic Comm.*, 90th Cong., 2d Sess. (1968). For an attempt to clarify the relationship between the Family Assistance Plan and the food stamp program, see *Hearings on Nutrition & Human Needs of the Select Comm. on Nutrition & Human Needs*, 90th Cong., 2d Sess., pt. 12 (1969). Either system would presumably provide benefits only to the most impoverished strikers because the annual income of many workers, even making allowance for the loss of income resulting from a strike, would still exceed the eligibility criteria for either program.

