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Preemption: A Judicial Headache

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I. INTRODUCTION

In 1947 the United States Congress passed the Labor Management Relations Act (Taft-Hartley Act),[1] setting forth basic federal labor policy in the noncarrier field.[2] The various states, of course, already had statutes that dealt with different aspects of labor-management relations. Thus the question arose: to what extent did the federal labor laws pre-empt those of the states? This article will outline judicial attempts to respond to that question, analyze the ultimate answer given by the Supreme Court and comment on the present status of the pre-emption doctrine.

II. EARLY DEVELOPMENT

The right of the federal government to exclude state law in this area derives from the supremacy clause[3] of the Constitution. Also, the cases concerning the pre-emption problem involve industries that effect commerce,[4] therefore where there is no direct or indirect connection with interstate commerce, state power remains unaffected by the federal pre-emption doctrine.

Three types of activities under the NLRA have directly confronted this doctrine:

1. 61 Stat. 136 (1947) (codified at 29 U.S.C. § 141 *et seq.* (1970)) hereinafter cited as LMRA .

2. The initial federal labor laws were passed to police railroad disputes. *See* The Arbitration Act, 25 Stat. 501 (1888); Endman Act, 30 Stat. 424 (1898); The Newlands Act, 38 Stat. 103 (1913); Adamson Act, 39 Stat. 721 (1916); Title III of The Transportation Act (Esch-Cummins Law), 41 Stat. 456 (1920); The Railroad Labor Act of 1926, 45 U.S.C. §§ 151-63, became the basic legislation for the railroads and in 1936 was extended to cover interstate air carriers. In the noncarrier field the initial effort of the federal government was the Clayton Act, 38 Stat. 730 (1914), §§ 6, 20; 15 U.S.C. § 17. It attempted to free unions of state injunctive procedures and antitrust actions, but was largely ineffective. The Norris-LaGuardia Act, 47 Stat. 70 (1932); 29 U.S.C. §§ 101-15, deprived federal courts of the power to issue labor injunctions and declared that the individual should have full freedom of association and self-organization. The National Labor Relations Act (Wagner Act) was enacted in 1935, and the statute declared that the policy of the United States was to encourage collective bargaining and full freedom of worker self-organization. 49 Stat. 449, *as amended by* 61 Stat. 136 *and* 73 Stat. 519, 29 U.S.C. § 141 *et seq.* (1970) [hereinafter cited as NLRA]. *See also* Labor-Management Reporting and Disclosure Act, 73 Stat. 519, 29 U.S.C. §§ 141, 153, 158-60, 164, 187 (1970) [hereinafter cited as LMRDA].

3. U.S. CONST. art. VI; *see* Gibbons v. Odgen, 22 U.S. (9 Wheat) 1 (1824).

4. *See* NLRB v. Reliance Fuel Oil Corp., 371 U.S. 224 (1963); Amalgamated Meat Cutters v. Fairlain Meats, Inc., 353 U.S. 20 (1957); Howell Chevrolet Co. v. NLRB, 346 U.S. 482 (1953); NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675 (1951).

(1) Protected activities under Section 7, which guarantee employees "the right to self-organization, to form, join, or assist 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. . . ."[5]

Accordingly, Section 8(a)(1) makes it an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of Section 7 rights.[6] Section 8(a)(1) would therefore prevent employers from retaliating against employees engaged in "concerted activities" under Section 7.

(2) Prohibited activities under Section 8(b),[7] which outlawed certain unfair union practices, including the refusal to bargain collectively with an employer, forcing others to cease doing business with the employer, and causing an employer to discriminate against an employee for non-membership in a union.

(3) Activities that are neither protected under Section 7 and Section 8(a)(1) nor prohibited under Section 8(b), such as mass picketing, threats, violence, and related actions.

In *Hill v. Florida*[8] the Court had held that a state may not impose a licensing and reporting requirement on union business agents and labor organizations, and enforce it by an injunction against the exercise of federally established collective bargaining rights. The federal law was deemed the primary substantive law because of the supremacy clause. Using this same rationale the Court ruled that state law could not be used to restrict employees' exercise of the right to engage in "concerted activities", thus the state could not interfere with peaceful primary strikes and picketing in support of normal collective bargaining objectives.[9] In general, protected activities under Section 7 and Section 8(a)(1) were given an early exemption from state interference.

Prohibited activities received the same exemption, but through somewhat different means. In *Plankinton Packing Co. v. Wisconsin Employment Relations Bd.*[10] the Court ruled that the State of Wisconsin could not grant remedies for employer conduct that violated local law when the same conduct was also an unfair labor practice under the NLRA. A similar situation arose in *Garner v. Teamsters Local 776*,[11] except in that case the unfair labor practice was unlawful picketing by a

5. 29 U.S.C. § 157 (1970).
6. 29 U.S.C. § 158(a)(1) (1970).
7. 29 U.S.C. § 158(b) (1970).
8. 325 U.S. 538 (1945).
9. Street Emp. Div. 998 v. Wisconsin Emp. Rel. Bd., 340 U.S. 383 (1951).
10. 338 U.S. 953 (1950), *rev'g per curiam* 255 Wis. 285, 38 N.W.2d 688 (1949).
11. 346 U.S. 485 (1953).

union. It was held that a state court could not enjoin peaceful picketing that is subject to the jurisdiction of the NLRB to prevent unfair labor practices, even if the state court was applying a substantive rule of law identical to the federal law. In short, the NLRA pre-empted similar state law. In an often quoted passage from *Garner* the Court stated:

> Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies . . . .[12]

The Supreme Court thus stated its belief that the use of a variety of procedures and courts would lead to conflicting results, even though based upon the same substantive law. State courts were also not allowed to proceed with state remedies pending action by the NLRB,[13] and it made no difference whether the state law was regulatory in nature or concerned with the adjudication of private rights.[14]

The most significant potential conflict feared by the Court was probably in the area of remedies. States can order temporary injunctions more quickly than the NLRB; and since the LMRA authorizes only preventive relief (except for specific union unfair labor practices),[15] a state remedy in the form of damages would definitely conflict with the federal policy. The Court thus deemed it in the best interest of all concerned to let the federal administrative body handle such matters.

Jurisdiction problems of exclusive or concurrent jurisdiction and federal pre-emption remain where state law covers an activity neither protected by Sections 7 and 8(a)(1) nor prohibited by Section 8(b), e.g. "quickie strikes,"[16] slow-downs[17] and some attacks upon the employers' product.[18]

In *International Union, UAW v. Wisconsin Employment Relations Board*[19] (the Briggs-Stratton case) the union called unannounced meetings during working hours, which the members would leave work to attend, while collective negotiations were in process. The Wisconsin

12. *Id.* at 490-91.

13. *See* Building Trades Council v. Kinard Const. Co., 346 U.S. 933 (1954), *rev'g per curiam* 258 Ala. 500, 64 So. 2d 400 (1953).

14. 346 U.S. at 500-01.

15. 29 U.S.C. § 187(b) (1970).

16. *See, e.g.*, International Union, UAW v. Wisconsin Emp. Rel. Bd., 336 U.S. 245 (1949).

17. *See* Elk Lumber Co., 91 N.L.R.B. 333, 336-39 (1950); Phelps Dodge Copper Prod. Corp., 101 N.L.R.B. 360, 367-69 (1952).

18. *See, e.g.*, NLRB v. IBEW Local 1229, 346 U.S. 464 (1953) (discharge of employees for attacking the quality of the employer's television broadcasts not an unfair labor practice).

19. 336 U.S. 245 (1949).

Employment Relations Board ordered the union to cease and desist. The Supreme Court reviewed the language of § 7 of *NLRA*, decided that the conduct was neither protected nor prohibited, and held, five to four, that the state could exert jurisdiction over this area, even though the NLRB had jurisdiction over other areas of labor-management relations involving Briggs-Stratton (the employer).

The Court saw no conflict between federal and state law, stating that the NLRB had "no authority either to investigate, approve or forbid the union conduct in question. This conduct is governable by the state or it is entirely ungoverned."[20] Thus, the impression was left that if Congress had not expressly exerted authority over labor activities, those activities were to be governed by the states.

In *International Association of Machinists v. Gonzales*,[21] the respondent (Gonzales) claimed that he had been unlawfully expelled from his union and brought suit in the Superior Court of California for restoration of membership and damages. The court ordered reinstatement and awarded him back wages and damages for physical and mental suffering. On appeal, the petitioners did not argue that California did not have the power to reinstate him, but did argue that the state could not award damages. The Supreme Court agreed that the state could reinstate Gonzales:

> As *Garner v. Teamsters Union* . . . could not avoid deciding, the Taft-Hartley Act undoubtedly carries implications of exclusive federal authority. Congress withdrew from the States much that had therefore rested with them. But the other half of what was pronounced in *Garner*—that the Act leaves much to the states,—is no less important.[22]

The Court also held that the state could award the damages, noting that there was no federal law protecting union members from arbitrary conduct by unions. If federal law was to prevail, the Court argued, the wrongfully ousted union member would be denied restoration of union rights. Also, since the Court had previously held that certain state causes of action sounding in tort are not displaced[23] simply because there is a possible, but remote, chance of an NLRB proceeding, it had little difficulty in finding that a contract right should also not be displaced when a conflict with federal policy was remotely possible. As the Court stated:

> The possibility of conflict from the court's award of damages in the present case is no greater than from its order that respondent be re-

20. 336 U.S. at 254.
21. 356 U.S. 617 (1958).
22. *Id.* at 619.
23. United Constr. Workers v. Laburnum Constr. Corp., 347 U.S. 656 (1954).

> stored to membership. In either case the potential conflict is too contingent, too remotely related to the public interest expressed in the Taft-Hartley Act, to justify depriving state courts of jurisdiction to vindicate the personal rights of an ousted union member.[24]

The *Briggs-Stratton* and *Gonzales* cases seem to conflict with *Garner*. The former cases imply that activities not claimed by the federal policy are to be governed by the states exclusively, or at least until Congress decides that the NLRA should be amended to include them. *Garner*, on the other hand, implies that federal law should pre-empt state law in such areas because the NLRB would be in a better position to weigh the delicate balance between labor, management and the public interest. After all, the *Garner* decision was based on the fear of potential conflict between different courts using the same law. However, the confusion that existed was soon to be cleared up, or so the Court thought.

III. THE *GARMON* DECISION

In *San Diego Building Trades Council v. Garmon*[25] the petitioning unions demanded that the employer retain only those workers who were already members of the unions or who applied for membership within thirty days. When the respondent employer refused, the unions began peacefully picketing his place of business. The respondent brought an action in the California Superior Court asking for an injunction and damages. Upon finding that the unions' sole purpose was to compel execution of the proposed contract, and not to educate and persuade the employees to become members, the trial court granted the injunctions and awarded $1,000 in damages.

The respondents had also started a representation proceeding before the NLRB, but the Regional Director had declined jurisdiction, presumably because the amount of interstate commerce did not meet NLRB standards.[26] Basically because the NLRB had declined jurisdiction, the California Supreme Court sustained the judgment of the Superior Court and held that the state had power over the dispute.[27]

On certiorari to the United States Supreme Court, heard with two companion cases,[28] the Court held that the refusal of the NLRB to assert jurisdiction did not give the state power over activities it otherwise

24. 356 U.S. at 621.
25. 359 U.S. 236 (1959).
26. *Id.* at 238; *see* NLRB Press Release No. R-576, Oct. 2, 1958.
27. Garmon v. San Diego Bldg. Trades Council, 49 Cal. 2d 595, 320 P.2d 473 (1958).
28. Guss v. Utah Labor Relations Board, 353 U.S. 1 (1957) and Amalgamated Meat Cutters v. Fairlawn Meats, Inc., 353 U.S. 20 (1957).

would be pre-empted from regulating.[29] Therefore, the Court reversed the injunction but remanded to the state court for consideration of the issue of damages.[30] The California court sustained the award of damages,[31] and another writ of certiorari was granted.[32]

The question presented was whether state courts could award damages arising from conduct which they did not have the power to enjoin. The Court noted that when state powers interfered with clearly indicated federal policy, it was necessary to preclude state action, except in areas of peripheral concern[33] to the LMRA. If it be unclear whether a particular activity is protected by Sections 7 and 8(b)(1) or prohibited by Section 8(b)(2), or outside both of these sections, the NLRB should first decide this issue:

> It is not for us to decide whether the National Labor Relations Board would have or should have, decided these questions in the same manner (as the California courts). When an activity is arguably subject to § 7 or § 8 of the Act, the state (courts) as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with the National policy is to be averted.[34] (emphasis added)

Therefore, since the NLRB had not decided the status of the conduct by the union, and since the conduct was arguably within the realm of Section 7 or Section 8 of the Act, the state's jurisdiction to award damages was pre-empted. Distinguishing earlier decisions that allowed states to award damages for conduct marked by violence[35] and imminent threats to the public order,[36] and that allowed state injunctions of such activity,[37] the majority opinion stated that in those decisions a compelling state interest was present that was paramount to federal policy. In *Garmon* there was no compelling state interest; therefore, the state was pre-empted.

Garmon was not consistent with *Briggs-Stratton* (state law to control conduct neither protected nor prohibited by federal regulation) because it did not matter whether the conduct was protected, prohibited, or neither, and the Court also refused to make that determination itself.

29. 353 U.S. 10 (1957). This holding was repealed by 29 U.S.C. § 164(c)(2) (1970).
30. 353 U.S. 29 (1957).
31. Garmon v. San Diego Bldg. Trades Council, 49 Cal. 2d 595, 320 P.2d 473 (1958).
32. 357 U.S. 925 (1958).
33. International Assoc. of Mach. v. Gonzales, 356 U.S. 617 (1958).
34. San Diego Unions v. Garmon, 359 U.S. 236, 245 (1959).
35. UAW v. Russell, 356 U.S. 634 (1958).
36. United Constr. Workers v. Laburnum, 347 U.S. 656 (1954).
37. Youngdahl v. Rainfair, 355 U.S. 131 (1957); UAW v. WERB, 351 U.S. 266 (1956).

If it arguably fell within the power of the NLRB, state law was pre-empted. The *Garner* decision (emphasizing the primary jurisdiction of federal policy because of the need to avoid potential conflicts) is more closely aligned. As the Court stated:

> . . . The governing consideration is that to allow the States to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy.[38]

In a concurring opinion Justices Harlan, Clark, Whittaker and Stewart wanted to narrow the ruling to hold that since the activity could fairly be considered protected under the Taft-Hartley Act (thus a determination made by the Court), the state action should be precluded until the NLRB has made a contrary decision.[39] These justices also argued that the state should have power to award damages for conduct prohibited by the NLRA, and to regulate activities neither arguably protected nor actually prohibited by the NLRA.

Nevertheless, because the *Garmon* formula was easily applied by the courts and sounded like "good hornbook law,"[40] it was regarded as the final word in the question of federal pre-emption of the field of strikes, boycotts, and picketing.[41] The formula did not, however, decide whether states could control activities that clearly are neither protected nor prohibited by the NLRA.

IV. THE PRE-EMPTION DOCTRINE SINCE *Garmon*

Teamsters Local 20 v. Morton[42] presented the issue of whether a state could apply its laws in areas that might upset the congressional balance between labor-management relations when the activities to be regulated were neither arguably protected nor arguably prohibited by the NLRA. The Court held that the state could not exert such power.

Local 20 represented employees of Morton. During a strike over terms of a new collective bargaining agreement, the union persuaded one of Morton's customers to discontinue business with Morton during the strike. No threats were made to the customer, so the activity to persuade him to boycott was not even arguably an unfair labor practice under 8(b);[43] and the union apparently agreed that it was not protected by Section 7. However, under Ohio law, the activity was illegal, and the lower federal court awarded damages.

The Supreme Court noted that the activity of non-coercive self-help

38. 359 U.S. at 246.
39. *Id.* at 249.
40. Cox, *Labor Law Pre-emption Revisited*, 85 HARV. L. REV. 1337, 1350 (1972).
41. *Id.*
42. 377 U.S. 252, 256-61 (1964).
43. *See* NLRB v. Servette, Inc., 377 U.S. 46 (1964).

was not within the *Garmon* rule, but added that such activity had been permitted by federal law,[44] and was part of the balance struck by Congress between competing interests in the labor relations field.[45] It went on to state:

> If the Ohio law of secondary boycott can be applied to proscribe the same type of conduct which Congress focused upon but did not proscribe when it enacted § 303, the inevitable result would be to frustrate the congressional determination to leave this weapon of self-help available, and to upset the balance of power between labor and management expressed in our national labor policy. 'For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for the purposes or by methods which the federal Act prohibits.' (Citation Omitted)[46]

But the Court knew from the legislative history of the 1959 amendments to the NLRA[47] that Congress had decided to allow noncoercive persuasion of customers in a labor dispute.[48] Other activities were not as easily known, but the basic principle was that states should not upset the balance of freedom and restraint that Congress established for self-organization and collective bargaining.

The *Garmon* rule subsequently became susceptible to exceptions in areas that were arguably protected or arguably prohibited. Since the NRLA prohibits mass picketing and forceful coercion,[49] under the *Garmon* rule the NLRB should have exclusive jurisdiction of noncoercive activity, but it does not. States can order compensatory and punitive damages[50] and issue injunctions.[51] States can hear claims for alleged breach of a labor contract even though an unfair labor practice may be asserted.[52] They can also issue remedies for breach of the union bargaining representative's violation of the duty of fair representation even though the claim could have been brought before the NLRB.[53] In *Linn v. United Plant Guard Workers*[54] a libel action against a labor union was allowed to stand, without considering whether the statement was prohibited under Section 7 or Section 8(a)(1). Similarly, *Morton*

44. Carpenters Local 1976 v. Labor Board, 357 U.S. 93, 99 (1958).
45. *See* Electrical Local 761 v. Labor Board, 366 U.S. 667, 672 (1960).
46. Teamsters Local 20 v. Morton, 377 U.S. 252, 259-60 (1964).
47. *See generally* Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 MINN. L. REV. 257 (1959).
48. Teamsters Local 20 v. Morton, 377 U.S. 252, 259-60 (1964).
49. 29 U.S.C. § 158(b)(1) (1970).
50. United Const. Workers v. Laburnum Constr. Corp., 347 U.S. 656 (1954).
51. International Union, UAW v. Wisconsin Emp. Rel. Bd., 351 U.S. 266 (1956).
52. International Harv. Co., 138 N.L.R.B. 923, 927 (1962); Smith v. Evening News Ass'n, 371 U.S. 195 (1962).
53. Vaca v. Sipes, 386 U.S. 171, 177-88 (1967).
54. 383 U.S. 53 (1966).

revealed that federal law will pre-empt state authority in areas that are neither protected nor prohibited, i.e., areas that had previously been thought to be controlled by the states.[55] So the *Garmon* rule hardly seemed ironclad.

In *Longshoremen's Local 1416 v. Aridne Shipping Co.*[56] the *Garmon* rule was re-evaluated and doubts still lingered when the decision was announced. The Court declared that the state was pre-empted of jurisdiction to enjoin a peaceful strike protesting substandard wages paid American longshoremen who worked on foreign ships in Florida ports. In Justice White's concurring opinion he stated:

> So long as employers are effectively denied determinations by the NLRB as to whether 'arguably protected' picketing is actually protected except when an employer is willing to threaten or use force to deal with picketing, I would hold that only labor activity determined to be actually, rather than arguably, protected under federal law should be immune from state judicial control. To this extent *San Diego Building Trades Council v. Garmon* (Citation Omitted), should be reconsidered.[57]

The Justice had realized a basic flaw of *Garmon*—the remedy. Although the rule prevents conflicts between state and federal authority, and prevents potential judicial errors in determining what activity is and what is and what is not within Section 7 and 8, it does not allow relief in another forum or guarantee a timely NLRB ruling to the party who may be entitled to relief. Where activity is arguably protected within Sections 7 and 8, the employer is effectively barred from a swift determination, and is doomed to suffer the consequences of the activity even though the conduct may in fact be outside the realm of Sections 7 and 8(a)(1). By the time the NLRB has decided who should exercise jurisdiction, itself or the state, the relief may be too late.

This matter reached the boiling point in *Amalgamated Association of Street Employees v. Lockridge.*[58] Lockridge was a Greyhound bus driver and long time union member. He failed to pay his monthly dues on Oct. 1, 1959. On November 2, Amalgamated requested that Greyhound dismiss Lockridge in accordance with a union shop clause,[59] and Greyhound promptly discharged him. On November 10 Lockridge paid his October and November dues.

Although Lockridge could have filed an unfair labor practice charge against both Greyhound and Amalgamated, because a union is prohibit-

55. *See* note 20 *supra.*
56. 397 U.S. 195 (1970).
57. *Id.* at 202.
58. 403 U.S. 274 (1971).
59. *Id.* at 277-78.

ed from seeking an employee's discharge because he is not a union member,[60] and the employer is prohibited from discharging him upon the union's request,[61] he chose instead to sue Amalgamated in the state court of Idaho. It was suggested that this was done because a similar charge filed by a Greyhound employee had been rebuffed by the NLRB Regional Director.[62] The state court found a breach of contract by Amalgamated, ordered Lockridge reinstated to membership in the union, restored his seniority rights with Greyhound, and ordered compensation for loss of wages.[63]

The Supreme Court reversed. It stated that the *Garmon* rule of "arguably protected or prohibited" activity should apply, even though this case involved a member-union contest and *Garmon* involved labor-management relations. *Gonzales*[64] was not overruled by the Court, but that case had stated:

> . . . the protection of union members in their rights as members from arbitrary conduct by unions and union officers has not been undertaken by federal law, and indeed the assertion of any such power has been expressly denied. . . . Thus, to preclude a state court from exerting its traditional jurisdiction to determine and enforce the rights of union membership would in many cases leave an unjustly ousted member without remedy for the restoration of his important union rights. Such a drastic result, on the remote possibility of some entanglement with the Board's enforcement of the national policy, would require a more compelling indication of congressional will than can be found in the interstices of the Taft-Hartley Act.[65]

Justice Harlan attempted to explain this anomaly on the basis that *Gonzales* only required the state court to analyze the union's constitution and by-laws, but *Lockridge* required the state to construe the union security clause,[66] "a matter as to which . . . federal concern is pervasive. . . ."[67] One commentator has suggested that this rationale fails for two reasons: (1) state and federal courts are as competent as the NLRB to interpret the security clause, and (2) in order to interpret the clause it is necessary to look back to the constitution and by-laws to which the clause refers.[68]

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60. 29 U.S.C. § 158(a)(3) (1970).
61. 29 U.S.C. § 158(b)(2) (1970).
62. 403 U.S. at 280, n.3.
63. Lockridge v. Amalgamated Ass'n of Street Employees, 93 Idaho 294, 460 P.2d 719 (1969).
64. 356 U.S. 617 (1958).
65. *Id.* at 620.
66. 403 U.S. at 296.
67. *Id.*
68. *See* Cox, *supra* note 42, at 1376.

Another commentator has viewed the unavailability of remedial measures not as a gap or failing that the states may redress, but as "a conscious congressional judgment, creating a balance which state 'supplementation' may not upset",[69] and states that Chief Justice Warren's dissent (arguing against the availability of state relief) in *Gonzales* is now the prevailing view.[70]

It should be remembered that the rationale behind the *Garmon* rule is the attempt to avoid state interference with a national plan for balancing the seperate interests of labor, management and the public. To say that a breach of contract rights between a union and a union member will upset that balance, just because the activity is arguably within the province of the national labor laws, seems harsh and unfair especially since *Lockridge* would appear to apply not only to arguably prohibited activity but also to activity that is arguably protected under Section 7. Thus, where the activity is arguably protected, for the petitioner to get a hearing before the Board he would have to commit an unfair labor practice.[71] An example of this situation would arise where a union is engaged in a peaceful strike not prohibited by Section 8. The state court cannot enjoin the activity[72] as a trespass because it is arguably protected by Section 7. There is no unfair labor practice; therefore, the only way to get a Board ruling is to expel the strikers, force them to file an unfair labor practice and raise the status of picketing as a defense.[73]

V. CONCLUSION

The *Lockridge* decision reaffirmed the arguably protected or prohibited rule of *Garmon*, but it also revealed the inequities and doubts that surround the rule. Professor Archibald Cox has suggested that *Garmon*'s basic premise is correct, that states should be pre-empted when there is a possibility of interference with national labor policy, but he wants the Court to amend *Garmon* and expand on the theory of *Morton*[74] which would preclude state court jurisdiction in areas where Congress intended a free exchange between labor and management, even though such is neither protected nor prohibited by Sections 7 and 8.

Cox argues that Congress developed the labor law within the larger body of state law "creating rights of property, bodily security, and

69. Lesnick, *Pre-emption Reconsidered: The Apparent Reaffirmation of Garmon*, 72 COLUM. L. REV. 469, 477 (1972).

70. *Id.*

71. *See* 403 U.S. 274, 326 (1971) (White, dissenting).

72. *But see* Taggart v. Weinackers, Inc., 397 U.S. 223 (1970).

73. *See* Come, *Federal Pre-emption of Labor-Management Relations: Current Problems in the Application of Garmon*, 56 VA. L. REV. 1435, 1444 (1970).

74. *See* Cox, *supra* note 40, at 1335.

personality (sic), preserving public order, and promoting public health and welfare."[75] These laws apply to the public in general without regard to the status of the individual (i.e. employer, union, or employee), and do not interfere with federal labor policy because they are not concerned with balancing special interests. He states:

> The likelihood that the collateral impact of such laws upon management or labor will upset the national balance is small enough to permit their operation *unless interference with a specific federal right can be affirmatively demonstrated.*[76] (emphasis added)

Professor Cox's formula deserves significant analysis by the Court, as should any theory that can aid in the interpretation of the pre-emption doctrine. Under the present rule, unless one of the limited exceptions applies, the states will continue to be precluded from areas in which the potential of interference is remote. However, the basic premise of *Garmon* and of all federal legislation is the postulate that the state courts should be pre-empted only where there is a serious threat of conflict with national policy. It was and is assumed that a national law can more adequately balance the delicate interplay between competing forces in labor relations, and do so for the betterment of society as a whole. But when there is no absolute need for federal intervention, a rule that imposes it on a theory of potential interference is a harmful rule. It does not better society. It does not balance interests in a fair manner.

Garmon left to the states the power to regulate any matter of "peripheral concern" to the NLRA or that conduct that touches interests "deeply rooted in local feeling or responsibility."[77] As of now those terms have not been fully defined by the Court. Hopefully, when judicial attempts are made to expound on them, those phrases will be given liberal interpretations so that state courts may exercise jurisdiction over areas of remote potential interference with federal labor law.

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75. *Id.* at 1356.
76. *Id.* at 1345.
77. San Diego Building Trades Council v. Garmon, 359 U.S. 236, 243-44 (1959).