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The National Labor Relations Act (the "NLRA") sets up an extensive scheme regulating the collective bargaining relationship between an employer and a union. Although the government establishes procedures for collective bargaining under the NLRA, it has absolutely no authority to mandate the terms of a collective bargaining agreement. Such control "would violate the fundamental premise on which the Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract."[1] Moreover, in the seminal case of *NLRB v. Insurance Agents International Union*,[2] the Supreme Court held that unless proscribed by Congress, the NLRA generally grants both the employer and the union freedom to use their economic weapons in collective bargaining.[3]

This collective bargaining scheme is controversial. Various interest groups believe the "balance of power" in collective bargaining has tilted too far towards the employer.[4] Moreover, strikes, lockouts, and the like engender substantial economic and social hardship. Labor history, union violence, presidential politics, the 80s takeover mania, and even religious needs influenced recent attempts by government to alter collective bargaining. To protect the collective bargaining process from such governmental action, the Supreme Court developed *Machinists* preemption.

Part I of this article sets forth the three major types of preemption found under the federal labor acts, the theoretical basis for *Machinists* preemption, and the major limitations on *Machinists* preemption enunciated by the Supreme Court. Part II reviews the recent—and sometimes surprisingly expansive—application given *Machinists* preemption by the lower courts. An excellent example of this later dynamic is the use of *Machinists* preemption to enjoin President Clinton's Executive Order debarring federal contractors who hire permanent replacement workers for strikers. Finally, Part III analyzes from an employer's perspective how *Machinists* preemption may be applied in various contexts to specific Louisiana statutes.

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1. H.K. Porter Co. v. NLRB, 397 U.S. 99, 108, 90 S. Ct. 821, 826 (1970). *See also* Section 8(d) of the NLRA, 29 U.S.C. § 158(d) (West 1997).

2. 361 U.S. 477, 80 S. Ct. 419 (1960).

3. *Id.* at 486-501, 80 S. Ct. at 425-33.

4. For example, unions and their supporters have sought to overturn an employer's right to hire permanent replacement workers because it allegedly upsets the balance of power in bargaining between labor and management. *See, e.g.*, S. Rep. No. 110, 103d Cong., 1st Sess. 20-25 (1993).

I. BACKGROUND

A. Preemption Applicable to Collective Bargaining

The federal labor acts provide for three basic types of preemption related to collective bargaining: *Garmon* and *Machinists* preemption under the NLRA and Section 301 preemption under the Labor Management Relations Act ("LMRA").[5] *Garmon* preemption arises from the structure of the NLRA, which not only provides substantive rules but also creates an administrative agency, the National Labor Relations Board (the "NLRB"), to implement the NLRA through detailed procedures and proscribed remedies.[6] *Garmon* preemption is thus based on a "primary jurisdiction" theory, that determination of whether conduct is an "unfair labor practice" under the NLRA is for the NLRB. Accordingly, both state and federal courts are "preempted"[7] from considering conduct that is either "arguably protected or arguably proscribed" under the NLRA.[8] Moreover, *Garmon* preemption prohibits states from adding to the remedies provided under the NLRA.[9] Under the "compelling local interest" exception to *Garmon* preemption, however, states are allowed to regulate egregious misconduct such as violence and threats,[10] defamation (under an "actual malice" standard),[11] and the intentional infliction of emotional distress.[12]

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5. *Codified at* 29 U.S.C. § 185 (West Supp. 1997).

6. *See* §§ 3-6 & 8-11 of the NLRA, 28 U.S.C.A. §§ 153-56 & 158-161 (West 1993 & Supp. 1998).

7. Because "preemption" is based on the Constitution's Supremacy Clause, this term is normally applied only in the context of limiting governmental action by the states. However, as at least one court has noted, "preemption" under the NLRA is used as a "shorthand" for conflict analysis and is applied to both state and federal action. *See* Chamber of Commerce v. Reich, 83 F.3d 439, 442 (D.C. Cir. 1996).

8. If protected, the state cannot proscribe the conduct; if proscribed as an unfair labor practice, then the state cannot supplement the remedial scheme set forth in NLRA. The "arguable standard" is used because it is for the NLRB to decide the issue in the first instance. For articulation of this "primary jurisdiction" theory, *see, e.g.*, San Diego Building Trades Council v. Garmon, 359 U.S. 236, 79 S. Ct. 773 (1959); Garner v. Teamsters Local 776, 346 U.S. 485, 490-91, 74 S. Ct. 161, 166 (1953). For articulation of the distinction between the "primary jurisdiction" basis for the "arguably proscribed" prong and the additional constitutional supremacy basis for the "arguably protected" prong, *see, e.g.*, Sears, Roebuck & Co. v. San Diego, 436 U.S. 180, 181, 98 S. Ct. 1745, 1749 (1978).

9. *See, e.g.*, Wisconsin Dept. of Indus. v. Gould, Inc., 475 U.S. 282, 106 S. Ct. 1057 (1986) (preempting state debarment statute that prohibited state from purchasing from companies found to have committed unfair labor practices).

10. *E.g.*, Auto Workers v. Russell, 356 U.S. 634, 643-46, 78 S. Ct. 932, 937-39 (1958); United Constr. Workers v. Laburnum Constr. Corp., 347 U.S. 656, 663-64, 74 S. Ct. 833, 837 (1954).

11. *E.g.*, Linn v. United Plant Guard Worker of Am. Local 114, 383 U.S. 53, 61-65, 86 S. Ct. 657, 662 (1966).

12. *E.g.*, Farmer v. United Broth. of Carpenters and Joiners of Am. Local 25, 430 U.S. 290, 97 S. Ct. 1056 (1977). *See generally* Patrick Hardin, The Developing Labor Law 1654-73, 1678-97 (BNA 3d ed. 1992) (collecting cases on "compelling local interest" exception).

As detailed below, *Machinists* preemption is based on the notion that Congress preempted the field to leave certain areas of labor-management relations to "the free play of economic forces."[13] Unlike *Garmon* preemption, this is a substantive right "akin to a personal liberty"[14] enforceable under Section 1983.[15] In the *Boston Harbor* case,[16] the Supreme Court concisely described the difference between these two preemption doctrines: "When we say the NLRA preempts state law, we mean that the NLRA prevents a state from regulating within a protected zone, whether it be a zone protected and reserved for market freedom, see *Machinists*, or for NLRB jurisdiction, see *Garmon*."[17]

Finally, Section 301 preemption is based on the principle that interpretation of a collective bargaining agreement ("CBA") is a matter of federal common law; thus, state law is displaced with federal common law in order to achieve uniformity.[18] The standard is whether resolution of the state law claim is substantially dependent upon the meaning of the terms of a CBA—and thus preempted—or is resolved without having to interpret the CBA, and thus "independent."[19] Analyzed from a slightly different perspective, a state law claim is preempted under Section 301 when the legal duty to act arises from the CBA.[20] Because virtually all CBAs have a grievance and arbitration procedure,[21] a finding of Section 301 preemption often results in dismissal of the claim for failure to exhaust those procedures.[22]

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13. *See infra* notes 23-42 and accompanying text.

14. *See infra* note 15.

15. *See* Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103, 110-13, 110 S. Ct. 444, 451-52 (1989) (*Golden State II*).

16. Building & Constr. Trades Council of the Metro. Dist. v. Associated Builders and Contractors of Mass./R.I., Inc., 507 U.S. 218, 113 S. Ct. 1190 (1993) [hereinafter "*Boston Harbor*"].

17. *Id.* at 228, 113 S. Ct. at 1196.

18. *E.g.*, Textile Workers Union of Am. v. Lincoln Mills of Ala., 353 U.S. 448, 456-57, 77 S. Ct. 912, 918-19 (1957).

19. *E.g.*, Allis Chalmers Corp. v. Lueck, 471 U.S. 202, 220, 105 S. Ct. 1904, 1916 (1985) (bad faith insurance claim based on insurance provided by CBA preempted); *compare* Lingle v. Magic Chef, Norge Div., 486 U.S. 399, 407-10, 108 S. Ct. 1877, 1882 (1988) (retaliatory discharge claim not preempted). *See generally* Hardin, *supra* note 12, at 1697-1706 (collecting cases on Section 301 preemption).

20. *See, e.g.*, United Steelworkers of Am. v. Rawson, 495 U.S. 362, 368, 110 S. Ct. 1904, 1909 (1990); *Allis-Chalmers*, 105 S. Ct. at 1911.

21. *See Lingle*, 486 U.S. at 411, 108 S. Ct. at 1884 n.11 (noting 99% of sampled CBAs contain an arbitration provision).

22. Section 301 preemption often arises in the context of an employer asserting it as a defense to a suit brought by an individual in state court under state law. Because Section 301 provides "complete preemption," e.g., Avco Corp. v. Aero Lodge No. 735, Intern. Ass'n of Machinists & Aerospace Workers, 390 U.S. 557, 558, 88 S. Ct. 1235, 1236 (1968), the employer may remove the case to federal court and assert that the suit must be dismissed because the plaintiff failed to exhaust the CBA's grievance and arbitration procedures. *See, e.g.*, Reece v. Houston Lighting & Power Co., 79 F.3d 485, 486 (5th Cir. 1996).

B. *The Theory of* Machinists *Preemption*

Machinists preemption originated in *Lodge 76, International Association of Machinists and Aerospace Workers v. Wisconsin Employment Relation Commission.*[23] In *Machinists*, during collective bargaining negotiations, the union members engaged in a concerted refusal to work overtime. The NLRB refused unfair labor practice charges because it found the conduct was permissible; however, the state board found it was not protected and enjoined.[24] The Supreme Court reversed, concluding Congress had "preempted the field" so as to leave the conduct involved "to the free play of economic forces."[25] The *Insurance Agents* case provided the doctrinal underpinning for this preemption—other than for certain specific proscribed activities (e.g., secondary boycotts) Congress meant for the parties to be able to use economic weapons to resolve labor disputes:[26]

> "[R]esort to economic weapons should more peaceful measures not avail" is the right of the employer as well as the employee, and the State may not prohibit the use of such weapons or "add to an employer's federal legal obligations in collective bargaining" any more than in the case of employees. Whether self-help economic activities are employed by employer or union, the crucial inquiry regarding preemption is the same: whether "the exercise of plenary state authority to curtail or entirely prohibit self-help would frustrate effective implementation of the Act's processes."[27]

The Court also emphasized that the NLRA prevents states or other governmental entities from imposing their view of "properly balanced" bargaining power:

> [N]either States nor the Board is "afforded flexibility in picking and choosing which economic devices of labor and management shall be branded as unlawful. Rather, both are without authority to attempt to "introduce some standard of properly 'balanced' bargaining power, or to define "what economic sanctions might be permitted negotiating parties in an 'ideal' or 'balanced' state of collective bargaining." To sanction state regulation of such economic pressure deemed by the

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23. 427 U.S. 132, 96 S. Ct. 2548 (1976) [hereinafter *Machinists*]. For a more recent example of the Court's application of *Machinists* preemption, see Golden State Transit v. City of Los Angeles, 475 U.S. 608, 106 S. Ct. 1395 (1986) (*Golden State I*). In *Golden State I*, the city council conditioned renewal of a cab franchise on settlement of a strike. *Id.* at 610-11, 106 S. Ct. at 1396-97. The Court held that this action was preempted because it interfered with "the free play of economic forces"—i.e., it limited the employer's ability to hold to its position by withstanding the strike. *Id.* at 615-20, 106 S. Ct. at 1398-1401.

24. *Machinists*, 427 U.S. at 135-36, 96 S. Ct. at 2550-51.

25. *Id.* at 140, 96 S. Ct. at 2553.

26. *Id.* at 136-51, 96 S. Ct. at 2551-58.

27. *Id.* at 147-48, 96 S. Ct. at 2556-57 (citations omitted).

> federal Act "desirabl[y] left for the free play of contending economic forces, . . . is not merely [to fill] a gap [by] outlaw[ing] what federal law fails to outlaw; it is denying one party to an economic contest a weapon that Congress meant him to have available."[28]

As noted, the doctrinal basis for *Machinists* is the *Insurance Agents* case—the "economic warfare" view of collective bargaining. Under this view, Congress left a zone of activity to the "free play of economic forces" unless the activity is specifically proscribed by Congress (such as secondary boycotts by unions).[29] Some examples of the type of conduct "permitted"—though not necessarily "protected"[30]—by the NLRA include an employer's ability to lockout employees[31] or hire permanent replacements for economic strikers,[32] and a union's ability to engage in work slowdowns.[33] In *Insurance Agents* itself, the union, during bargaining negotiations, implemented a "work without a contract" program, which consisted of harassing activity such as (i) work slowdowns; (ii) temporary sit-ins; (iii) picketing and passing out leaflets; and (iv) demonstrations at the home office.[34] The NLRB held that, since this conduct was not a protected strike under the NLRA, it constituted the failure to engage in "good faith" bargaining and was thus proscribed.[35]

The Court reversed, holding that the union's tactics are part of the free play of economic forces allowed by the NLRA.[36] The Court based this holding on four principles underlying the NLRA: (i) Congress in Section 8(d) of the NLRA explicitly provided that neither party to a CBA can be compelled to agree to a proposal or to make a concession;[37] (ii) collective bargaining is premised on the

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28. *Id.* at 148-50, 96 S. Ct. at 2557-58 (citations omitted).

29. *See* Section 8(b)(4) of the NLRA, 29 U.S.C.A. § 158(b)(4) (West 1993) and Section 303 of the LMRA, 29 U.S.C. § 187 (West 1997) (providing a private cause of action against unions for secondary boycotts).

30. As explained in the text above, the *Machinists* case arose out of the need to prevent regulation in an area Congress meant to leave unregulated as either "protected" or "proscribed" conduct under the NLRA. *See Machinists*, 427 U.S. at 141-47, 96 S. Ct. at 2554-57. Thus, this type of conduct, although not "protected" under the NLRA, is nonetheless "permitted." This is more than a difference in semantics. If the conduct were "protected" under the NLRA, then any adverse action taken in response (e.g., firing a worker who engaged in a work slowdown) may be an unfair labor practice. *See* Section 8(a)(1) & (b)(1) of the NLRA, 29 U.S.C.A. § 158(a)(1) & (b)(1) (West 1993).

31. *E.g.*, American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 85 S. Ct. 955 (1965).

32. *E.g.*, NLRB v. Mackay Radio, 304 U.S. 333, 345-46, 58 S. Ct. 904, 911-12 (1938); Chamber of Commerce v. Reich, 74 F.3d 1322, 1332 (D.C. Cir. 1996) (collecting cases).

33. NLRB v. Insurance Agents Int'l Union, 361 U.S. 477, 80 S. Ct. 419 (1960). *See generally* Hardin, *supra* note 12, at 685-691 (setting forth economic weapons employers and unions can use in collective bargaining).

34. *Insurance Agents*, 361 U.S. at 480-82, 80 S. Ct. at 422-23.

35. *Id.* at 480-84, 80 S. Ct. at 422-24.

36. *Id.* at 499-500, 80 S. Ct. at 432-33.

37. *Id.* at 485-87, 80 S. Ct. at 425-26.

use of economic weapons by the parties to pressure agreement;[38] (iii) activities can be unprotected by the NLRA while not proscribed as an unfair labor practice—either party is able to use economic pressure in this zone (e.g., work stoppages, fire or discipline workers) to resolve;[39] and (iv) government is not allowed to regulate this conduct based on some notion of the proper "balance of power" in collective bargaining.[40] In *Insurance Agents*, the Court also articulated the basis for the "economic warfare" view of collective bargaining:

> It must be realized that collective bargaining, under a system where the Government does not attempt to control the results of negotiations, cannot be equated with an academic collective search for the truth—or even with what might be thought to be the ideal of one. The parties—even granting the modification of views that may come from a realization of economic interdependence—still proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest. The system has not reached the ideal of the philosophic notion that perfect understanding among people would lead to perfect agreement among them on values. The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized. Abstract logical analysis might find inconsistency between the command of the statute to negotiate toward an agreement in good faith and the legitimacy of the use of economic weapons, frequently having the most serious effect upon individual workers and productive enterprises, to induce one party to come to terms desired by the other. But the truth of the matter is that at the present statutory stage of our national labor relations policy, the two factors—necessity for good-faith bargaining between parties, and the availability of economic pressure devices to each to make the other party incline to agree to one's terms—exist side by side.[41]

Economic theorists and those engaged in the practical aspects of collective bargaining also realize the wisdom of this "no governmental interference/economic warfare" approach to collective bargaining. Economic theory suggests as long as the legal rules allow the parties to determine the ultimate terms of the contract, the bargainers will achieve economic efficiency through bargaining by maximizing their relative preferences.[42] Economic theory also teaches, however, that strategic behavior such as posturing and the like can

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38. *Id.* at 487-92, 80 S. Ct. at 426-28.

39. *Id.* at 492-95, 80 S. Ct. at 429-30.

40. *Id.* at 492-500, 80 S. Ct. at 428-33.

41. *Id.* at 488-89, 80 S. Ct. at 426-27.

42. *See, e.g.*, Stewart J. Schwab, *Collective Bargaining and the Coase Theorem*, 72 Cornell L. Rev. 245, 257-61 (1987).

interfere with this efficiency by hiding the true preferences of the parties.[43] The costs associated with economic warfare helps to force disclosure of these preferences. And, when the parties have a good understanding of each other's relative strengths and weaknesses (as is often the case in collective bargaining), the credible threat of economic warfare may itself be enough to disclose those preferences.

C. *Limitations on* Machinists *Preemption*

Machinists preemption read to its logical limit would be broad indeed. The rule that parties may set the terms of the CBA free of governmental interference could be construed to preempt the myriad state laws setting minimum standards for employment. Likewise, the notion that parties are free to engage in economic warfare could be read to mean general state contract and tort law cannot be allowed to interfere with this process. The Court did not so rule. In subsequent cases, the Court recognized three major limitations on *Machinists* preemption: "minimum labor standards," "background law," and "market participant."[44]

1. "Minimum Labor Standards" Exception

In *Metropolitan Life Insurance Co. v. Massachusetts*,[45] the Court considered a state statute setting forth minimum terms of insurance for employer health plans.[46] The insurance companies argued that the NLRA left the parties free to set contract terms; thus, a state statute setting those terms ought to be preempted by *Machinists*. The Court agreed there was "a surface plausibility" to this argument, but nonetheless rejected it. First, the Court noted that the NLRA is primarily concerned with the *process*, not the *substance*, of collective bargaining.[47] Second, the Court observed that the NLRA has never been construed to restrict the application of federal laws setting minimum labor standards.[48] The Court then concluded that there was generally no reason to treat state minimum labor standards differently:

> Minimum state labor standards affect union and nonunion employees equally, and neither encourage nor discourage the collective-bargaining processes that are the subject of the NLRA. Nor do they have any but the most indirect effect on the right of self-organization established in the Act. Unlike the NLRA, mandated-benefit laws are not laws designed to encourage or discourage employees in the promotion of

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43. *Id.* at 269-71.
44. *See infra* notes 45-72 and accompanying text.
45. 471 U.S. 724, 105 S. Ct. 2380 (1985).
46. *Id.* at 725-28, 105 S. Ct. at 2382-83.
47. *Id.* at 754, 105 S. Ct. at 2396.
48. *Id.* at 754-55, 105 S. Ct. at 2397.

> their interests collectively; rather, they are in part "designed to give specific minimum protections to *individual* workers and to ensure that *each* employee covered by the Act would receive" the mandated health insurance coverage.[49]

The Court followed up on the "minimum labor standards" exception in the "opt out" cases of *Fort Halifax Packing Co. v. Coyne*[50] and *Livadas v. Bradshaw*.[51] In *Fort Halifax*, a Maine statute required a one-time severance payment upon closing of a plant unless the parties have "opted out" by having their own severance plan in a CBA.[52] Applying the reasoning of *Metropolitan Life*, the Court found this statute easily passed muster: "If a statute that permits *no* collective bargaining on a subject escapes NLRA pre-emption, see *Metropolitan Life*, then one that permits such bargaining cannot be pre-empted."[53] In *Livadas*, however, the Court recognized "minimum labor standards" legislation is not *per se* lawful but instead requires individualized review of the statute's effect on collective bargaining.[54] In this case the state statute required prompt payment of wages upon discharge. The state administrative policy, however, excluded from coverage any employees who were covered by a CBA having an arbitration provision.[55] The Court held that this policy was preempted because it interfered with collective bargaining by requiring a "harsh choice" by employees of protection of minimum standards legislation or entering into collective bargaining.[56] The Court distinguished *Fort Halifax* because there the statute (like virtually all opt-out statutes) required agreement on the terms at issue to "opt out" of the minimum standards.[57]

2. The "Background Law" Exception

The "minimum labor standards" exception addresses state laws designed to regulate the workplace. States, of course, also have a large body of general tort and contract laws that can impact the workplace and collective bargaining. The Court addressed how *Machinists* preemption applies to these types of laws in *Beknap v. Hale*.[58] In this case strike replacements brought misrepresentation and tort claims based on state law. They claimed the employer told them they were permanent replacements and would not be fired to make room for returning

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49. *Id.*
50. 482 U.S. 1, 107 S. Ct. 2211 (1987).
51. 512 U.S. 107, 114 S. Ct. 2068 (1994).
52. *Fort Halifax*, 482 U.S. at 3-4, 107 S. Ct. at 2213-14.
53. *Id.* at 23, 107 S. Ct. at 2223.
54. *See infra* notes 55-57 and accompanying text.
55. *Livadas*, 512 U.S. at 110, 114 S. Ct. at 2071.
56. *Id.* at 116-17, 114 S. Ct. at 2074-75.
57. *Id.* at 132, 114 S. Ct. at 2082.
58. 463 U.S. 491, 103 S. Ct. 3172 (1983).

strikers. In the strike settlement involving the NLRB, however, the employer had agreed to hire back strikers, which required the company to get rid of the replacement workers.[59] The employer argued, *inter alia*, that these claims were preempted under *Machinists* because they interfered with the employer's ability to hire replacement workers.[60] The Court disagreed:

> Arguments that entertaining suits by innocent third parties for breach of contract or for misrepresentation will "burden" the employer's right to hire permanent replacements are no more than arguments that "this is war," that "anything goes," and that promises of permanent employment that under federal law the employer is free to keep, if it so chooses, are meaningless. It is one thing to hold that the federal law intended to leave the employer and union free to use their economic weapons against one another, but is quite another to hold that either the employer or union is also free to injure innocent third parties without regard to the normal rules of law governing those relationships.[61]

The Court further observed that (i) the employer may protect itself from strike settlements by conditioning the offer of employment on settlement or NLRB order; and (ii) such conditioning should not negate these employee's status as "permanent replacements" under the NLRA.[62]

3. The "Market Participant" Exception

The Court first considered the "market participant" exception in a *Garmon* preemption case. In that case, *Wisconsin Department of Industry, Labor & Human Relations v. Gould, Inc.*,[63] Wisconsin had passed a "debarment" statute preventing the state from purchasing from companies found to have committed unfair labor practices.[64] The Court ruled that this statute was preempted under *Garmon* because the state was attempting to supplement the remedies provided by the NLRB under the NLRA.[65] Wisconsin nonetheless argued preemption should not apply when the state is merely acting in the role of a "market participant"—not a regulator—in purchasing goods. The Court held that, regardless of whether there is a "market participant" exception to NLRA preemption, it would not apply here because of (i) the state's unique position of

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59. *Id.* at 493-97, 103 S. Ct. at 3174-76.

60. *Id.* at 499, 103 S. Ct. at 3177.

61. *Id.* at 500, 103 S. Ct. at 3178. Many economists would also contend that *refusing* to enforce such contracts would create an even greater burden on the employer's right, because this would make the employer's contractual promise of permanent employment of no value to prospective employees.

62. *Id.* at 503-04, 103 S. Ct. at 3179 & n.8.

63. 475 U.S. 282, 106 S. Ct. 1057 (1986).

64. *Id.* at 283-85, 106 S. Ct. at 1059-60.

65. *Id.* at 286-88, 106 S. Ct. at 1061-62.

power; and (ii) the state's only reason for acting was to punish conduct.[66] "[F]or all practical purposes, Wisconsin's debarment scheme is tantamount to regulation."[67]

In the *Boston Harbor*[68] case, the Court subsequently held that the "market participant" exception does apply to preemption under the NLRA. In *Boston Harbor*, the state agency on a large construction project entered into a pre-hire project labor agreement requiring the use of only union labor with an attendant ten-year no-strike commitment. All contractors on this project had to agree to be bound by this project agreement.[69] A contractor group sued, arguing that the project agreement was preempted under *Garmon* and *Machinists*.

The Court disagreed, concluding first that there is a "market participant" exception to NLRA preemption.[70] The Court then distinguished this case from *Gould* by finding that the state had a legitimate, proprietary purpose for acting: to complete the project as quickly as possible by avoiding labor problems.[71] The Court also noted that the pre-hire agreement at issue was lawful under the NLRA when used by private actors; thus, the state was merely being allowed to participate freely in the marketplace to the same extent as other "market participants."[72]

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66. *Id.* at 286-90, 106 S. Ct. at 1061-63.

67. *Id.* at 288, 106 S. Ct. at 1062.

68. Building & Constr. Trades Council of the Metro. Dist. v. Associated Builders of Mass./R.I. Inc., 507 U.S. 218, 113 S. Ct. 1190 (1993).

69. *Id.* at 221, 113 S. Ct. at 1192-93.

70. *Id.* at 227, 113 S. Ct. at 1196.

71. *Id.* at 229-39, 113 S. Ct. at 1197-98.

72. *Id.* at 229-31, 113 S. Ct. at 1197-99. For some recent examples of the application of the "market participant exception" see Alameda Newspapers, Inc. v. City of Oakland, 95 F.3d 1406 (9th Cir. 1996) and Colfax Corp. v. Illinois State Toll Highway Auth., 79 F.3d 631 (7th Cir. 1996). In *Alameda Newspapers*, the city council, because of a bitter labor dispute between the newspaper and union, canceled its own subscriptions to and advertising in the newspaper and issued a resolution urging the public to boycott the paper. *Alameda Newspapers*, 95 F.3d at 1409-11. The Ninth Circuit held that the speech urging others to boycott the newspaper was not preempted; it was not regulatory or coercive but merely an expression of the city's views, a core feature of democracy. *Id.* at 1414-15. The Ninth Circuit held that the city's participation in a boycott by canceling subscriptions (total of 13) and advertising (about $40,000 a year) was, under these circumstances, also not preempted; the limited economic effect meant that the city action's were not "regulatory" nor would they affect the economic balance of power. *Id.* at 1416-18.

In *Colfax*, the state required the contractor on a construction project to enter into area-wide CBAs (not merely project CBAs) with unions in order to work on a state construction project. *Colfax*, 79 F.3d at 632-33. The Seventh Circuit held that this was not preempted under *Machinists* because it fell under the *Boston Harbor* "market participant" exception: The NLRA allows a private party in the construction industry to enforce "no non-union firms" agreements. *Id.* at 634-35. In addition, like in *Boston Harbor*, the state here had a legitimate interest as owner in maintaining labor peace on its projects and knew of the prior conflicts between Colfax and unions over Colfax's non-union status. *Id.* at 635.

II. APPLICATION BY LOWER COURTS

As noted, the "no governmental interference/economic warfare" scheme of collective bargaining set up by the NLRA is controversial. Because of this scheme's substantial effect on society, various governmental actors—from the President to local city councils—have tried directly and indirectly to affect collective bargaining. *Machinists* preemption has thus been called into action in numerous contexts, from blocking an executive order by the President, to allowing an employer to dock the wages of workers in a run-of-the-mill private dispute.[73] This section reviews how the lower courts have applied *Machinists* preemption in these different contexts.

A. The "No Permanent Replacement" Executive Order

The NLRA grants employers the right to hire permanent replacement workers for economic strikers.[74] Unions have fought repeatedly and unsuccessfully to have this right overturned. The most recent failure was the 1993 "Workplace Fairness Act," which Congress refused to pass.[75] Instead of another futile attempt to change the NLRA, the unions got President Clinton to attempt an "end run" around Congress by issuing an Executive Order debarring federal contractors who hire permanent replacements.[76] Fortunately for employers, in *Chamber of Commerce of the United States v. Reich*,[77] this Executive Order ran afoul of *Machinists* preemption.

In *Chamber of Commerce*, the court first observed that the Executive Order explicitly addressed labor policy, i.e., the order stated that the hiring of permanent replacement workers upsets the "balance" in collective bargaining. According to the Executive Order, this has deleterious effects on labor relations that adversely impact the employer's ability to provide goods and services to the federal government.[78] The court next noted the tremendous effect this Executive Order would have on labor policy: federal procurement exceeds $400 billion

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73. By its very nature *Machinists* preemption is routinely implicated in major labor disputes and in attempts to "correct" the balance of power in collective bargaining. For an interesting discussion of how *Machinists* preemption could have been used in the major league baseball strike, see Peter F. Giamporcaro, *No Runs, No Hits, Two Errors: How Maryland Erred in Prohibiting Replacement Players From Camden Yards During the 1994-95 Major League Baseball Strike*, 17 Loy. L.A. Ent. L.J. 123, 140-43 (1996) (arguing *Machinists* preemption would have preempted Maryland's anti-replacement players legislation).

74. *E.g.*, NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333, 345-46, 58 S. Ct. 904, 910-11 (1938); Chamber of Commerce of the U.S. v. Reich, 74 F.3d 1322, 1332 (D.C. Cir. 1996) (collecting cases).

75. *See Chamber of Commerce*, 74 F.3d at 1325.

76. *See, e.g., Resolutions Adopted by AFL-CIO Special Convention March 25, 1996*, BNA Daily Labor Rep. at E-4 (March 26, 1996).

77. 74 F.3d 1322 (D.C. Cir. 1996).

78. *Id.* at 1324.

a year and constitutes approximately 6.5% of the GNP; moreover, approximately 22% of the labor force works for federal contractors.[79] The court concluded that, based on these broad effects and stated purpose, this Executive Order was "tantamount to regulation" preempted under *Machinists* because of its interference with collective bargaining.[80] On panel rehearing, the court stated *Machinists* does not preempt any governmental action that may have an effect on the bargaining relationship; rather, it preempts governmental action (like this Executive Order) that is predicated on implementing a substantive policy regarding the proper balance in collective bargaining.[81] Over a dissent, the panel also concluded NLRA preemption is a shorthand for "conflict" analysis that may also be applied to federal action.[82]

B. "Minimum Labor Standards" Statutes in Context

The Court in *Metropolitan Life* made it clear that, as a general matter, *Machinists* preemption does not preempt state statutes establishing minimum labor standards.[83] Nonetheless, lower courts have found that in certain contexts state statutes and actions setting standards are either (i) not "minimum labor standards" statutes, or (ii) they may be preempted because of the unique context of the case.[84] An example of this first approach is *Bechtel Construction, Inc. v. United Brotherhood of Carpenters & Joiners of America*.[85] In *Bechtel*, the company and union negotiated a 15% cut in apprentice wages, which brought those wages below rates established by a state agency.[86] The court held that these state apprentice wage rates were preempted. First, they did not constitute a "state minimum" standard because the statute itself provided wages shall be in accordance with those in the CBA. Second, enforcing them would unduly harm the collective bargaining process because it would involve the state agency in approval of the negotiated rates.[87]

The *Pitta* and *Barnes* cases demonstrate that even "minimum labor standards" statutes may be preempted when they interfere with the "heart" of the collective bargaining process.[88] In *Pitta v. Hotel Waldorf-Astoria*

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79. *Id.*

80. *Id.* at 1332-39.

81. Chamber of Commerce of the U.S. v. Reich, 83 F.3d 439, 440-41 (D.C. Cir. 1996).

82. *Id.* at 441. *Cf. id.* at 442-43 (Wald, J., dissenting from denial of en banc consideration) (observing that preemption analysis is logically and legally based on the Supremacy Clause; thus it should apply only to federal-state relations, not federal-federal).

83. *Metropolitan Life*, 471 U.S. at 754-55, 105 S. Ct. at 2397.

84. *See infra* notes 85-96 and accompanying text.

85. 812 F.2d 1220 (9th Cir. 1987).

86. *Id.* at 1221-22.

87. *Id.* at 1222-26.

88. Courts also, however, have upheld these types of statutes based on the rationales in *Metropolitan Life* and the "opt out" cases of *Fort Halifax* and *Livadas*. *See, e.g.*, Contract Servs. Network, Inc. v. Aubry, 62 F.3d 294, 297-99 (9th Cir. 1995) (California law requires employers to

Corp.,[89] employees at the direction of the union engaged in a partial work stoppage by each day refusing to clean two rooms. In response, the employer docked their wages and an arbitrator upheld this action.[90] The union filed suit seeking to overturn this decision because it violated a state wage statute preventing any docking of wages.[91] The court held that application of this statute was preempted under *Machinists* because it interfered with the "self-help" remedy by the employer:

> The ability of an employer to deny payment to an employee who is a mixed piece-rate/time worker, for work willfully not done at the direction of his union, must be considered to be an activity meant to be unregulated and left to the control of the free play of economic forces.[92]

In *Barnes v. Stone Container Corp.*,[93] Montana had a "wrongful discharge" statute that prohibited a discharge unless it was for "good cause" with an "opt out" for those covered by a CBA.[94] After the CBA terminated and while bargaining was ongoing, an employee allegedly engaged in harassment of replacement workers and was terminated.[95] The employee subsequently filed suit under the statute. The court held that this statute was preempted under *Machinists* because it interfered with the bargaining of the parties by imposing a key term on the employer during bargaining; the "minimum labor standards" exception was not applied because of the importance of the term involved to the collective bargaining process:

> Unlike the unemployment compensation in *New York Telephone* and the health benefits in *Metropolitan Life*, we view the imposition of a just cause term by the WDA on the parties negotiating a contract as meddling at the heart of the employer-employee relationship at a time when such interference is most harmful. Issues of hiring and firing are often central to CBA negotiations and the NLRA, as interpreted in

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provide worker's compensation coverage through a separately administered employee benefit plan; Held not preempted under *Machinists* because it was simply "minimum standards" legislation—backdrop of legal protections against which collective bargaining occurs); Viceroy Gold Corp. v. Aubry, 75 F.3d 482, 485-89 (9th Cir. 1996) (California statute prohibited mine workers from working more than eight hours a day, with limited "opt out" for CBA to allow negotiated terms of up to twelve hours a day; Held under *Livadas* narrow opt-out provision allowed under NLRA and *Machinists* doctrine); NBC Inc. v. Bradshaw, 70 F.3d 69, 71-73 (9th Cir. 1995) (state overtime statute had opt-out for CBA but was applied during impasse period; Held regular minimum standards legislation with approved CBA type opt-out).

89. 644 F. Supp. 844, 845 (S.D.N.Y. 1986).
90. *Id.*
91. *Id.* at 847.
92. *Id.* at 849.
93. 942 F.2d 689 (9th Cir. 1991).
94. *Id.* at 690-93.
95. *Id.* at 690.

Machinists, intended to allow parties to resolve these matters without the unsettling effect of state regulation.[96]

C. *"No Police Involvement" Statutes and Policies*

The "economic warfare" of strikes, lockouts, and the like has a long history of violence. This economic warfare and violence is also a highly-charged issue politically, with local and federal government at various times throughout history becoming heavily involved in supporting one side or the other to the labor dispute. This involvement led to substantial restrictions on a court's ability to enjoin conduct involved in "labor disputes" through passage of the Norris-LaGuardia Act for the federal government[97] and the "Little Norris-LaGuardia Acts" for various states.[98] Because of this history and the political atmosphere created, police also have sometimes been hesitant to get involved in labor disputes. This "hands off" approach came to a head in the *Rum Creek I*[99] and *Rum Creek II*[100] cases addressing state statutes and policies enacted in response to the notorious mine worker labor disputes in West Virginia.

In *Rum Creek I* and *Rum Creek II*, the court addressed West Virginia's "Trespass Statute," which provided that the state's trespass law does not apply to labor disputes,[101] and West Virginia's "Neutrality Statute," which as interpreted under official state policy meant that police could not get involved in preventing trespasses and blockades on private property.[102] The union blockaded the private access road to the plant and engaged in various forms of violence, which the police refused or were unable to stop because of these statutes and policies.[103]

The employer brought suit to enjoin enforcement of these statutes and policies. In *Rum Creek I*, the court found that the Trespass Statute was preempted under *Machinists*. The court concluded that part of the right to engage in the free play of economic forces includes that the state will neutrally enforce its laws—the Trespass Statute's exemption for labor disputes negated an employer's ability to resist a strike by allowing the union to engage in violence and criminal trespass during a strike.[104] In *Rum Creek II*, the court concluded that the "Neutrality Statute" as interpreted was also preempted and issued a

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96. *Id.* at 693.

97. *Codified at* 29 U.S.C.A. §§ 101-15 (West 1993).

98. Louisiana's "Little Norris-LaGuardia Act" is codified at La. R.S. 23:841-849 (1985).

99. Rum Creek Coal Sales, Inc. v. Caperton, 926 F.2d 353 (4th Cir. 1991) [hereinafter "*Rum Creek I*"].

100. Rum Creek Coal Sales, Inc. v. Caperton, 971 F.2d 1148 (4th Cir. 1992) [hereinafter "*Rum Creek II*"].

101. *Rum Creek I*, 926 F.2d at 355.

102. *Rum Creek II*, 971 F.2d at 1150-51.

103. *Rum Creek I*, 926 F.2d at 356-57.

104. *Id.* at 364-66.

strong proclamation of an employer's right under *Machinists* to neutral enforcement of the law:

> The equal playing field of labor disputes must effectively include the reasonable protection of law and order by a disinterested and neutral referee. Without that neutral enforcement agent, and without the prevention of wholesale unlawful and violent activity, the free zone of economic forces required by federal law is also an impossibility.
>
> Accordingly, to the extent that the Neutrality Statute, as actually interpreted, prevented the State Police from doing anything significant in the way of enforcing the law, particularly aspects of the law involving appellant's use of its own property, essential to a business owner's rights to stay in business and withstand a strike, we find that the statute is preempted by protections established in the *Machinists* and *Golden State* opinions.[105]

D. "Successor" Statutes

The NLRA, as interpreted by the Supreme Court and the NLRB, sets up a complicated scheme for determining the extent of an acquirer's obligations to employees who were represented by a union at the acquired company.[106] One thing that is clearly *not* required, however, is that the acquiring company assume the CBA of the acquired company.[107] Economic dislocation and the takeover-and-dismantle mania of the 1980s caused several states to pass "successor" statutes in an attempt to overturn this rule and hold the acquirer bound by the predecessor company's CBA.[108] In *United Steelworkers of America v. St. Gabriel's Hospital*[109] and *Commonwealth Edison Co. v. International Brotherhood of Electrical Workers Local Union No. 15*,[110] the courts found that these statutes were preempted under the NLRA.

In *St. Gabriel's Hospital*, the hospital sold its kidney dialysis unit, but the purchaser refused to agree to honor the CBA with prior unions. Minnesota's successor statute required the purchaser to honor any CBA that has a successor-

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105. *Rum Creek II*, 971 F.2d at 1154.

106. For the major Supreme Court cases addressing "successorship" doctrine under the NLRA, see NLRB v. Burns Int'l Sec. Servs., Inc., 406 U.S. 272, 92 S. Ct. 1571 (1972); John Wiley & Sons v. Livingston, 376 U.S. 543, 84 S. Ct. 909 (1964); Howard Johnson Co. v. Detroit Local Joint Executive Bd. Hotel Employees, 417 U.S. 249, 94 S. Ct. 2236 (1974); Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 107 S. Ct. 2225 (1987).

107. *E.g.*, *Burns*, 406 U.S. at 280-90, 92 S. Ct. at 1580-84.

108. *See* United Steelworkers of Am. v. St. Gabriel's Hosp., 871 F. Supp. 335, 338 n.3 (D. Minn. 1994) (collecting statutes).

109. *St. Gabriels Hosp.*, 871 F. Supp. 335.

110. 961 F. Supp. 1169 (N.D. Ill. 1997).

ship clause.[111] The court held that this statute was preempted under *Garmon* and *Machinists*. By forcing the CBA upon the acquiring company, the statute violated Section 8(d) of the NLRA and was thus preempted under *Garmon*—the state's asserted "local interest" in stability of employment had already been considered in federal successorship law.[112] The statute was also preempted under *Machinists* because it interfered with the free play of economic forces in bargaining by adding substantive requirements and affecting the balance of power—e.g., it required the new employer to accept the union as the bargaining representative.[113] The court applied virtually identical reasoning in *Commonwealth Edison Co.* to conclude that Illinois' successor statute was likewise preempted under *Garmon* and *Machinists*.[114]

The District of Columbia took a different tack for protecting employees when businesses are transferred, one that was ultimately upheld in a split decision by the District of Columbia Court of Appeals. The District enacted a statute requiring service contractors to hire the predecessor's employees when they took over a contract.[115] Under the NLRA's "successorship" doctrine, this could force the new employer to have to bargain with the union.[116] In addition, the NLRA grants a successor employer "the right not to hire any of the former . . . employees, if it so desired."[117] The majority of the court held that this statute was nonetheless not preempted under *Machinists* because it was simply "employee protective legislation" that may or may not have an effect on bargaining.[118] The dissent believed that the statute was preempted under *Machinists* because the employer has a successorship right under the NLRA to hire who they want; thus, the statute interfered with an area that was meant to be left to the free play of economic forces.[119]

E. Miscellaneous Statutes

The dislocation and harm caused by economic warfare can be more than financial. As the "Burial Rights Act" case illustrates, even religious needs can be adversely and substantially affected by this warfare. This act arose out of a 1992 labor dispute between a gravediggers union and twenty-six Chicago-area cemeteries.[120] In this dispute, the gravediggers went on strike and the cemeter-

111. *St. Gabriel's Hospital*, 871 F. Supp. at 336-38.
112. *Id.* at 341-42.
113. *Id.* at 342-44.
114. *Commonwealth Edison Co.*, 961 F. Supp. at 1178-84.
115. D.C. Code Ann. §§ 36-1501 to 1503 ("District of Columbia Displaced Workers Protection Act").
116. *Washington Serv. Contractors*, 54 F.3d at 813, 816-17.
117. Howard Johnson Co. v. Hotel Employees, 417 U.S. 249, 262, 94 S. Ct. 2236, 2243 (1974).
118. Washington Serv. Contractors Coalition v. D.C., 54 F.3d 811, 816-18 (D.C. Cir. 1995).
119. *Id.* at 819-20 (Sentelle, J., dissenting).
120. *See* Cannon v. Edgar, 33 F.3d 880, 881-82 (7th Cir. 1994).

ies locked out the strikers, which prevented burials at those cemeteries.[121] Judaism, Islam, and Zoroastrianism, however, require burial within a day or two of death.[122] In response, the state passed the "Burial Rights Act" requiring parties to agree to provide workers during labor disputes to bury those whose religious faith requires their prompt burial.[123] The union filed suit to protect their right to strike and the court held that the act was clearly preempted under *Garmon* and *Machinists*. The Act did not fall into *Garmon*'s "local interest" exception because it directly invaded the bargaining process by setting terms of the agreement.[124] Likewise, the Act violated *Machinists* by restricting the self-help remedy of strikes and lockouts.[125]

In *Greater Boston Chamber of Commerce v. City of Boston*,[126] a court made short work of a "public safety" ordinance prohibiting the hiring of replacement workers if a threat to public safety was likely. This ordinance provided the threat was established either if police were deployed to the scene of a labor dispute, or if the police commissioner determined that a threat was likely.[127] The court held that this statute was clearly preempted under *Machinists*: it directly interfered with an employer's right under the NLRA to hire replacement workers. The city's "local interest" in labor peace could not justify acting in an area Congress meant to be unregulated.[128]

III. *MACHINISTS* PREEMPTION AND LOUISIANA LAW

Machinists preemption can be a powerful tool to protect an employer's freedom to act in collective bargaining. It may be used offensively, by bringing a Section 1983 suit against the governmental actor to stop the interference.[129] It may also be used defensively, to prevent an employee from bringing a claim under state law because that claim is preempted. Unlike *Garmon* preemption, *Machinists* preemption also *may* provide a basis for removal of this type of claim

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121. *Id.*
122. Cannon v. Edgar, 33 F.3d 880, 881 (7th Cir. 1994).
123. *Id.* at 881.
124. *Id.* at 884-85.
125. *Id.* at 885-86.
126. 778 F. Supp. 95 (D. Mass. 1991).
127. *Id.* at 96.
128. *Id.* at 97-98.
129. *See* Golden State Transit Corp. v. City of Los Angeles (*Golden State II*), 493 U.S. 103, 112, 110 S. Ct. 444, 452 (1989). Of course, Section 1983 suits against governmental entities or officials often raise difficult issues regarding, for example, the Eleventh Amendment and "qualified immunity." *See, e.g.*, Quern v. Jordan, 440 U.S. 332, 99 S. Ct. 1139 (1979) (Section 1983 does not negate the Eleventh Amendment); Clark v. Tarrant County, 798 F.2d 736 (5th Cir. 1986) (same); Saldana v. Garza, 684 F.2d 1159 (5th Cir. 1982) (official protected by "qualified immunity" unless shown he violated a "clearly established" right), *cert. denied*, 460 U.S. 1012, 103 S. Ct. 1253 (1983). Analysis of the various issues raised by Section 1983 litigation is beyond the scope of this article.

to federal court.[130] This section analyzes, from an employer's perspective, how *Machinists* preemption may be applied to specific Louisiana statutes.

A. Replacement Workers Act[131]

This act is the easy case for preemption. This act makes criminal (i) the hiring of replacement workers by out-of-state recruitment firms or in-state firms if they specialize in this area and (ii) importation of replacement workers by any recruitment firm from out of state.[132] As cases such as *Greater Boston Chamber of Commerce* illustrate, this constitutes clear and direct interference with an employer's *Machinists* right to hire replacement workers. Fortunately, the state itself appears to agree. In the only reported case that mentioned this act, *Warren v. State Dept. of Labor*,[133] the court noted, and the attorney general conceded, that this act was unconstitutional because of the federal labor laws.

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130. To make the case removable to federal court, the preemption at issue must be "complete preemption"—i.e., the preemptive force of the federal statute must be so "extraordinary" that it converts the state law claim to a federal one. *E.g.*, Caterpillar, Inc. v. Williams, 482 U.S. 386, 393, 107 S. Ct. 2425, 2430 (1987). Because *Garmon* preemption is based on a "primary jurisdiction" rationale, the courts addressing this issue have held *Garmon* preemption does not provide "complete preemption." *E.g.*, Hayden v. Reickerd, 957 F.2d 1506, 1512 (9th Cir. 1992); Ethridge v. Harbor House Restaurant, 861 F.2d 1389, 1395-1401 (9th Cir. 1988). In contrast, *Machinists* preemption provides a federal claim based on a federal right to be free from interference in collective bargaining. *E.g.*, *Golden State II*, 493 U.S. at 112-13, 110 S. Ct. at 451-52. The "complete preemption" argument would be that this federal claim supplants the state law claim, converting the complaint into one raising a "federal question." There is dicta in the Court's *Caterpillar* opinion that suggests this may not always be so, *see Caterpillar*, 482 U.S. at 397-98, 107 S. Ct. at 2432, and at least one district court has applied this dicta to conclude removal was not proper under the NLRA preemption doctrines. *See* Baldwin v. Pirelli Armstrong Tire Corp., 927 F. Supp. 1046, 1052 (M.D. Tenn. 1996). If decision by a federal forum is of sufficient importance to the employer, the employer may be able to avoid the uncertainty over removal jurisdiction by bringing a separate Section 1983 action in federal court for declaratory and injunctive relief. For examples of cases in which employers have used this approach, see Commonwealth Edison Co. v. International Broth. of Elec. Workers, 961 F. Supp. 1169, 1172-73 (N.D. Ill. 1997) (separate suit and removal of original claim—cases then consolidated); NBC, Inc. v. Bradshaw, 70 F.3d 69, 69-70 (9th Cir. 1995) (separate suit while claims were before state administrative agency); Bechtel Constr., Inc. v. United Broth. Carpenters & Joiners of Am., 812 F.2d 1220, 1221-22 (9th Cir. 1987) (same).

131. La. R.S. 23:900-04 (1985).

132. Section 900 provides definitions for "strikes," "lockouts," and similar terms. Section 901 provides that firms not involved in the labor dispute cannot recruit replacement workers for strike or lockout unless (i) the recruitment firm does not specialize in recruiting replacement workers; and (ii) that firm has been located in Louisiana for at least one year. Section 902 provides that firms not involved in the labor dispute cannot bring replacement workers in from out of state. Section 904 exempt agricultural activities from the Act. Finally, Section 903 provides for penalties for violations of the Act which include fines up to $1,000 or imprisonment up to one year. *See* La. R.S. 23:900-04 (1985).

133. 313 So. 2d 6, 8-9 (La. App. 1975). Under *Garmon*'s "local interest" exception to prevent violence, the court upheld Louisiana Revised Statutes 23:898, which prohibits bringing in persons with the purpose to use force or threats to prevent picketing. *Id.*

B. Apprentice Act[134]

This act sets up a scheme for state regulation of apprentice agreements, including requiring such agreements to be approved by the state director:

- Apprenticeship agreements must include terms and conditions of employment, such as number of hours of work and wages;[135]
- Director must approve "if in his opinion approval is for the best interest of the apprentice" or inform in writing why not approved;[136] and
- The CBA can set higher standards.[137]

The *Bechtel* case suggests that this Act may be preempted in certain applications. Like in *Bechtel*, this Act does not appear to constitute "minimum standards" legislation because of the director's discretion regarding approval and the setting of standards. Again, like in *Bechtel*, requiring this approval would itself unduly interfere with the bargaining process by directly involving the state in the setting of the terms of a CBA.[138]

C. "Payment" Statutes

Title 23 of the Louisiana Revised Statutes at sections 631 to 653 provide for various statutes regulating the payment of wages and benefits. These statutes are "minimum labor standards" statutes that, under *Metropolitan Life*, are generally not considered to raise significant preemption issues under *Machinists*. For example, the "prompt payment" statute requires payment of wages within three days of termination or fifteen days of resignation, unless the CBA provides otherwise.[139] This is the type of "opt out" provision found acceptable in *Fort Halifax*: "If a statute that permits [no] collective bargaining on a subject escapes NLRA pre-emption, see *Metropolitan Life*, surely one that permits such bargaining cannot be pre-empted."[140]

Cases such as *Pitta* and *Barnes* teach, however, that even these "minimum labor standards" statutes may be preempted as applied. For example, the "no fines" statute prohibits the assessment of "fines" against employees or deduction of fines from wages.[141] "Fines" have been construed under Louisiana law to

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134. La. R.S. 23:381-92 (1985).

135. La. R.S. 23:387(4) & (6) (1985).

136. La. R.S. 23:384(B)(2) & 388(A) (Supp. 1998).

137. La. R.S. 23:391 (1985).

138. *Cf.* Bechtel Constr. Co. v. United Broth. of Carpenters & Joiners of Am., 812 F.2d 1220, 1225-26 (9th Cir. 1987).

139. La. R.S. 23:631 (Supp. 1998).

140. Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 21, 107 S. Ct. 2211, 2223 (1987).

141. La. R.S. 23:635 (1985). The penalty for violation is criminal—i.e., a $25 to $100 fine or thirty days to three months imprisonment. La. R.S. 23:636 (1985). The "no fines" issue typically

be a penalty for violation of a work rule or the like.[142] It is not difficult to envision a situation during a labor dispute in which the employer, like the employer in *Pitta*, docks an employee's wages for participation in a union work slowdown. In this context, the employer would have a strong argument that application of the fines statute would interfere with the employer's right to engage in economic self-help:

> The ability of an employer to deny payment to an employee who is a mixed piece-rate/time-worker, for work wilfully not done at the direction of his union, must be considered to be an activity meant to be unregulated and left to the control of the free play of economic forces.[143]

D. "Whistleblower" Act

Louisiana recently enacted a "whistleblower" statute that prohibits retaliation against an employee who, in good faith and after advising the employer of the alleged violation of law, (i) discloses this violation or (ii) "objects to or refuses to participate in an employment act or practice that is in violation of law."[144] Again, it is easy to envision a situation in which a union member asserts a "good faith" belief the law requires him to follow a union's order to engage in a work slowdown. *Pitta* and *Barnes* would suggest that the employer retains his right under *Machinists* to engage in self-help by suspending or terminating the recalcitrant employee.

IV. CONCLUSION

The cases reviewed here illustrate that social, political, and economic pressures are continually pushing government to interfere in the collective bargaining scheme envisioned by Congress in the NLRA and the Court in *Insurance Agents*. This pressure is unlikely to abate. As these cases further illustrate, however, *Machinists* preemption remains a powerful tool to prevent this type of government interference and to protect an employer's freedom to act under the NLRA.

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arises, however, in the civil context, where the employee asserting a claim for wages argues an employer's deduction was invalid as an impermissible "fine."

142. *E.g.*, Brown v. Navarre Chevrolet, Inc., 610 So. 2d 165 (La. App. 3d Cir. 1993); Stell v. Caylor, 223 So. 2d 423 (La. App. 3d Cir. 1989).

143. Pitta v. Hotel Waldorf-Astoria Corp., 644 F. Supp. 844, 849 (S.D.N.Y. 1986).

144. La. R.S. 23:967 (Supp. 1998).