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Labor Preemption: Striking Workers' Right to Collect Unemployment Benefits

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LABOR PREEMPTION: STRIKING WORKERS' RIGHT TO COLLECT UNEMPLOYMENT BENEFITS—*New York Telephone Co. v. New York State Department of Labor*, 566 F.2d 388 (1977).

I. INTRODUCTION

The payment of unemployment insurance benefits to strikers has long been a hotly contested political issue, with state legislatures producing a variety of statutory plans to resolve and regulate the area.[1] Some states flatly refuse to compensate employees who are direct participants in a strike,[2] while others condition benefits on the employer's continued operations during the strike[3] or on the employer's violation of the collective bargaining agreement.[4] Strikers qualify for benefits in some states only if they are protesting hazardous conditions,[5] have been laid off from a subsequent job,[6] or are not in the grade or class financing the dispute.[7]

The conflict has moved in recent years from the political arena to judicial forums, where state statutes which confer such benefits have been challenged on constitutional grounds. The challenges are premised on the contention that the payments, by providing strikers with an economic weapon, substantially disrupt the federal policy of free collective bargaining and thus are void under the supremacy clause.[8] Challengers maintain that state provisions for strikers conflict with and are preempted by the national mandate of neutrality in the bargaining process.[9]

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1. For a comprehensive discussion of state statutes and their application, see Shadur, *Unemployment Benefits and the "Labor Dispute" Disqualification*, 17 U. CHI. L. REV. 294 (1950), and Annot., 63 A.L.R.3d 94 (1975).

2. OHIO REV. CODE ANN. § 4141.29(D)(1)(a) (Page 1975).

3. HAW. REV. STAT. §§ 383-30(4) (1976).

4. W. VA. CODE § 21A-6-3(4) (1978).

5. ME. REV. STAT. ANN. tit. 26, § 1193(D) (West Supp. 1978).

6. MICH. COMP. LAWS ANN. §§ 421-29(8) (1978).

7. FLA. STAT. ANN. § 443.06 (West 1972).

8. U.S. CONST. art. VI, cl. 2, which provides that "Laws of the United States . . . shall be the supreme Law of the Land." Thus state laws are preempted if they conflict with federal policy, or if they touch areas wherein Congress intended to occupy the field to the exclusion of state regulation.

The federal policy of free collective bargaining is expressed in the National Labor Relations Act, 29 U.S.C. §§ 151-187 (1976) and in the Labor Management Relations Act, 29 U.S.C. §§ 141-144 (1976). Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337, 1352 (1976).

9. The preemption doctrine has thus been invoked to strike down Hawaii's compensation provision in Hawaiian Telephone Co. v. Hawaii Dep't of Labor and Industrial Relations, 405 F. Supp. 275 (D. Hawaii 1976); to order further proceedings in a dismissed challenge to Rhode Island's statute in Grinnell Corp. v. Hackett, 475 F.2d

The Court of Appeals for the Second Circuit responded to the challenge in *New York Telephone Co. v. New York State Department of Labor.*[10] The court found no evidence of preemption and thus upheld the constitutionality of New York's unemployment insurance provision for striking workers. In carving out an area of protected state activity, the decision reconciled a First Circuit formula for assessing the extent of preemption[11] with the rationale from a recent and arguably distinguishable Supreme Court case.[12] The result, which varies from the general pattern of preemption in labor-related areas and from prior cases overturning benefits to strikers, is indicative of a recent trend toward protecting state legislation which arguably falls within the federal purview.

Recent cases suggest a trend toward protection of state activity by the Court in areas other than labor preemption. In the area of labor preemption the Court has until recently tended to accord greater protection to federal policy. Whether a state unemployment compensation plan which includes striking workers conflicts with national labor policy will be decided by the Supreme Court, which has granted *certiorari* in *New York Telephone.*[13]

Even if the Court finds that New York's unemployment benefits statute is preempted by the federal policy, the Second Circuit's careful analysis will have served propitiously to frame for resolution a significant constitutional question. This note will analyze the reasoning underlying the *New York Telephone* decision, and other factors likely to be considered by the Court on review.

II. FACTS OF THE CASE

In July, 1971, The Communication Workers of America (CWA) called a nationwide strike against the Bell telephone system when contract settlements were not reached with representative pattern-setting companies.[14] A few days later, an agreement was reached, and the CWA recommended a return to work pending a ratification vote by mail. Some 38,000 CWA members employed by the New York Telephone Company refused to return to work, and remained on strike for seven months after all other Bell contracts were ratified.

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449 (1st Cir. 1973); and to deny summary judgment when Michigan's law was under attack in Dow Chemical Co. v. Taylor, 428 F. Supp. 86 (E.D. Mich. 1977).

10. 566 F.2d 388 (2d Cir. 1977), *cert. granted,* 435 U.S. 941 (1978).
11. Grinnell Corp. v. Hackett, 475 F.2d 449 (1st Cir. 1973).
12. Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471 (1977).
13. 435 U.S. 941 (1978).
14. Under this system of pattern-settlement, the contracts reached with selected companies would serve as standards for settlement throughout the Bell system.

Pursuant to New York's unemployment insurance law,[15] which allows striking workers to collect benefits after an eight week waiting period, the CWA members collected a total of $43,000,000 in unemployment compensation at an average rate of $75 per week per person. Like most state compensation systems, New York's is funded by employer contributions, so the benefits paid to strikers were debited to New York Telephone Company's account.

In a suit filed in district court, the telephone company sought to recover its contributions to the fund which were paid out because of the strike and to have the statute declared unconstitutional to the extent that it authorizes benefits to striking workers.

III. HOLDING OF THE COURT

The District Court for the Southern District of New York found the payment of benefits to be state interference on behalf of strikers, in conflict with the federal labor policy of free collective bargaining, and hence unconstitutional under the supremacy clause.[16]

The Court of Appeals for the Second Circuit reversed, finding that "Congress has not expressed an intent to preempt State unemployment compensation laws that provide benefits to strikers. . . . [I]t has evinced an intention to leave the States free to regulate in this area."[17] The court concluded that "the conflict between New York's statute and the broad federal policy of free collective bargaining . . . is one which Congress has decided to tolerate."[18]

The court stated that the crucial inquiry in a preemption case such as this one is whether Congress intended this field to be unregulated and left to be controlled by the free play of economic forces.[19] A finding that Congress did so intend would force a conclusion that New York's statutory regulation in this area is preempted. In its ensuing analysis of congressional intent, the court examined the legislative histories of the National Labor Relations Act[20] and Title IX of the Social Security Act,[21] and found evidence that Congress did not intend to forbid such benefits. That evidence consists largely of congressional

15. 17 N.Y. LAB. LAW §§ 590.9, 592.1 (McKinney 1977).
16. 434 F. Supp. 810 (S.D.N.Y. 1977).
17. 566 F.2d at 395.
18. *Id.*
19. 566 F.2d 388, 391, (quoting Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Commission, 427 U.S. 132 (1976) and NLRB v. Nash-Finch Co., 404 U.S. 138 (1971)).
20. Pub. L. No. 74-198, 49 Stat. 449 (1935) (current version at 29 U.S.C. §§ 151-169 (Supp. V 1975)).
21. Pub. L. No. 74-271, §§ 901-910, 49 Stat. 639-45 (1935) (now the Federal Unemployment Tax Act, 26 U.S.C. §§ 3301-3309 (Supp. V 1975)).

reluctance to define specifically the permissable scope of state legislation, despite congressional awareness of opposition to certain state unemployment benefits plans.[22]

The interpretation of congressional intent, which forms the basis of the court of appeals' decision, represents one element of a two-pronged standard developed in a previous labor preemption case[23] dealing with unemployment benefits.[24] The second element of that standard consists of a factual analysis of state impact on federal policy. The impact analysis had been relied on previously in finding federal preemption: courts will find preemption where the state activity has significant impact on the national policy favoring free collective bargaining. Some courts were persuaded that employers suffer a disadvantage at the negotiating table if their employees know they can rely on unemployment compensation.[25]

There was Supreme Court precedent, however, for using only the congressional intent approach,[26] and this approach enabled the court to uphold, in contrast to prior cases, the validity of New York's payments.

IV. ANALYSIS

A. *The Labor Preemption Pattern*

Since the passage of the major labor legislation in the 1930's and 1940's,[27] the Court has generally tended to expand the scope of federal

22. For a history of the state plans generally, see Fierst and Spector, *Unemployment Compensation in Labor Disputes*, 49 YALE L.J. 461 (1940), and Witte, *Development of Unemployment Compensation*, 55 YALE L.J. 21 (1945). The plans were formulated in order for states to qualify for credits under the Social Security Act, note 20 *supra*. State plans had to comply with the new national labor policy, and could not disqualify someone who refused new work if: a) the position was open due to a labor dispute, b) the wages or work conditions were substantially less favorable than those for similar work in that locality, or c) the individual would be required to join or resign a labor union as a condition to employment. There were no specific provisions for disqualifying strikers, although a model draft bill followed by several states contained such a provision.

23. Grinnel Corp. v. Hackett, 475 F.2d 449 (1st Cir. 1973).

24. The unemployment benefits cases are distinguished from those involving *welfare* payments to strikers; the decisions there have been founded on compelling state interest. *See* Super Tire Engineering Co. v. McCorkle, 412 F. Supp. 192 (D.N.J. 1976), *aff'd on other grounds*, 550 F.2d 903 (3d Cir. 1977), *cert. denied*, 45 U.S.L.W. 3791 (1977); and ITT Lamp Division v. Minter, 435 F.2d 989 (1st Cir. 1970), *cert. denied*, 402 U.S. 933 (1971).

25. Hawaiian Telephone Co. v. Hawaii Dep't of Labor and Industrial Relations, 405 F. Supp. 275 (D. Hawaii 1976).

26. Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471 (1977).

27. The National Labor Relations Act, 49 Stat. 449 (1935) (now codified at 29 U.S.C. §§ 151-169 (Supp. V 1975)), and The Labor Management Relations Act, 61 Stat. 136 (1947) (now at 29 U.S.C. §§ 183, 186 (Supp. V 1975)).

preemption in labor law. The result is a judicial approach which stresses the importance of national policy and the danger of state interference with national policy and which favors a finding of preemption of state law.[28]

The usual analysis in labor preemption cases is represented by *San Diego Building Trades Council v. Garmon*.[29] Union organizers were enjoined by a state court from picketing a lumber business, on the grounds that the union was not a properly designated collective bargaining unit. The court granted damages to the lumber company for the pickets' disruption of their business. Despite the fact that the National Labor Relations Board (NLRB) subsequently declined jurisdiction, the Supreme Court found that the state was prevented from regulating conduct arguably protected or prohibited by sections 7 or 8 of the National Labor Relations Act. Thus the picketing, which arguably fell within the NLRB's grant of jurisdiction could not be regulated in any way by the state, and California's award of damages was without force.

The rationale of the *Garmon* decision rests on the theory of primary jurisdiction. The Court asserted that potential conflicts of regulation were avoided by congressional delegation of jurisdiction to the NLRB;[30] state regulation of an activity even arguably within the NLRB's regulatory authority creates the possibility of conflict. The national policy is thus served only if states defer to NLRB adjudication, although there have been some exceptions carved out on a piecemeal basis.[31] *Garmon* represents a commitment to "an expansive concept of preemption" in labor cases.[32]

It was within this framework that the Second Circuit was faced with the attack on New York's unemployment benefit statute. The *Garmon* case, however, involved an overlap of state and federal regulation of labor activities.[33] The state provision in *New York Telephone* does not directly prohibit, restrain, sanction or encourage an arguably protected or prohibited activity. The Second Circuit was not confront-

28. 18A BUSINESS ORGANIZATIONS, Kheel, *Labor Law*, § 9.01 at 8 (1978).
29. 359 U.S. 236 (1958).
30. *Id.* at 242.
31. The states' ability to legislate in the following areas has been established: violence on the picket line, United Construction Workers v. Laburnum Construction Corp., 347 U.S. 656 (1954); mass picketing and the blocking of entrance to a factory, Allen-Bradley Local v. Wisconsin Employment Relations Board, 315 U.S. 740 (1942); defamation, Linn v. United Plant Guard Workers of America, 383 U.S. 53 (1966); picketing by employees outside the scope of the National Labor Relations Act, Hanna Mining Co. v. Marine Engineers Beneficial Ass'n, 382 U.S. 181 (1965).
32. Lesnick, *Preemption Reconsidered: The Apparent Reaffirmation of Garmon*, 72 COL. L. REV. 469, 470 (1972).
33. Grinnell Corp. v. Hackett, 475 F.2d 449, 452 (1973).

ing a statute which directly controls conduct in labor activities; rather the operation of the New York statute allegedly creates a situation which indirectly influences free collective bargaining. This difference permitted the Second Circuit to apply the formula developed in *Grinnel Corp. v. Hackett*.[34]

B. *The Grinnell Formula*

A two-pronged standard to resolve the preemption issue was articulated by the First Circuit in *Grinnell*. The district court had dismissed a suit challenging Rhode Island's statute which authorized unemployment compensation to strikers after a six-week waiting period. The district court relied on a welfare benefits case[35] in which the First Circuit had recommended a "balancing process . . . in which both the degree of conflict and the relative importance of the federal and state interests are assessed."[36]

The First Circuit, in remanding *Grinnell*, pointed out that the trial record was insufficient for assessing state interest in unemployment benefits, as distinguished from welfare benefits, and that there were other issues to be considered. Noting the distinction between this "unusual" preemption situation and the *Garmon* direct regulation cases,[37] the court outlined a two-pronged approach suitable for this type of case. The court said that it was necessary to consider the following: a) whether preemption can be discerned from congressional intent, absent any express indication; and b) whether in the absence of unambiguous intent, the state activity has such a significant impact on federal labor policy as to be preempted regardless of state interest.[38]

In order to assess congressional intent when there are conflicting indicators, the court recommended taking note of congressional awareness of the issue, opportunities to act, unsuccessful attempts to incorporate specific language into the relevant statutes, and comparisons with analogous areas where Congress may have specifically forbidden or permitted state activity.[39] As for the significance of the state statute's impact on federal policy, the court stressed the need for a well-developed factual record, comprised of hard data and expert testimony. To find preemption, the impact must be significant enough to outweigh any strong state interest in the challenged activity. The impact must be severe enough to discredit a claim that unemployment

34. 475 F.2d 449 (1973).
35. ITT Lamp Div. v. Minter, 435 F.2d 989 (1st Cir. 1970).
36. *Id.* at 992.
37. 475 F.2d at 461.
38. *Id.* at 457.
39. 475 F.2d at 454-57.

benefits, like welfare benefits, are a merely peripheral concern of the Labor Management Relations Act.[40] The court cautioned that a plaintiff would need to prove a causal relationship between the receipt of benefits and longer, costlier strikes. Proof of causation would require studies on statistically significant numbers of persons actually receiving unemployment benefits.[41]

The *Grinnell* formula was not, of course, binding on the Second Circuit, but it offered a pragmatic approach to this knotty area of preemption. The formula is applied as follows: a finding of clear congressional intent, to preempt or not, would be dispositive. If congressional intent is too ambiguous, a court would turn to probative evidence of the state activity's impact on the federally balanced labor policy. Proof of significant impact would generally compel a finding of preemption, subject to the mitigating effect of two variables included in the formula. First, a sufficiently strong state interest,[42] such as protecting the welfare of its citizens or preventing the secondary economic effects of labor disputes, could preclude a finding of infringement. Second, inferences drawn from congressional inaction could likewise preclude a finding of infringement. Thus, if a court finds infringement but also finds that the state and federal interests are closely balanced, it could properly decline to find preemption if it also finds congressional awareness of state regulations in the area along with a congressional failure to act.[43]

Most courts have bypassed the congressional intent aspect of the *Grinnell* formula, or concluded that the intent is at best ambiguous, and instead have looked to the evidence of impact. In *Hawaiian Telephone Co. v. State of Hawaii Department of Labor*,[44] a district court examined statistical data, attitudinal studies, and union leaflets before concluding that the benefits are an intrusion into the federal process of

40. 359 U.S. at 243. Such peripheral concerns, according to *Garmon*, provide exceptions to the preemption doctrine. *See* note 31 *supra*.

41. The court in *Grinnell* was presented with a study of welfare payments and food stamps for strikers. Only 17% of the strikers in the study received aid comparable to unemployment benefits, and the court declined to find that such a small group could influence the strike-related decisions of the majority. Additional evidence of causation consisted of six interviews with representatives from labor, management, and state agencies. The court found the interviews "oversimplistic . . . conclusory, and . . . expectable." 475 F.2d at 458-59.

42. The state interest must be one "so deeply rooted in local feeling and responsibility that . . . we could not infer that Congress had deprived the States of the power to act." 475 F.2d at 459, (quoting *Garmon*, 359 U.S. at 244). The weight given to states' interests "in the scheme of our federalism" is discussed in Teamsters v. Morton, 377 U.S. 252, 257 (1964).

43. 475 F.2d at 457.

44. 405 F. Supp. 275 (D. Hawaii, 1976).

free collective bargaining. In striking down Hawaii's statute, the court was especially concerned with the pressure brought to bear in forcing employers into premature settlements.[45] Similarly, the district court in *Dow Chemical v. Taylor*[46] rejected the notion that the issue could be decided on inferred congressional intent. "This court does not believe . . . that congressional inaction or failure to pass particular amendments to unemployment tax laws results in a definitive statement of congressional intent."[47]

The Supreme Court dismissed, for lack of a federal question, an employer's appeal in *Kimbell, Inc. v. Employment Security Commission of New Mexico*.[48] The dismissal let stand a state supreme court decision upholding limited benefits to strikers, but there is speculation that the dismissal was based on *Kimbell*'s poor evidentiary record and the Supreme Court's reluctance to decide the issue absent evidence of significant impact.[49]

The Second Circuit in *New York Telephone* made a threshold determination of congressional intent, and found no need to consider the impact of New York's compensation provision. The court carefully analyzed the factors[50] suggested by *Grinnell*, beginning with congressional awareness of the issue. Opposition to unemployment benefits for strikers was expressed in early congressional hearings, yet a Senate committee report not only recommended that the states be free to establish any system they wish, but also cited New York as having a plan worthy of congressional acceptance.[51]

Additionally, the court discussed the unsuccessful attempts to incorporate amendments specifically excluding strikers from any state plan. The House version of the Hartley Bill[52] recommended such an exclusion, but the exclusion was not contained in the final Senate ver-

45. *Id.* at 279-80. The court concluded that even an employer's perception of the benefits as disadvantageous is evidence of impact on the bargaining process.

46. 57 F.R.D. 105 (E.D. Mich. 1972).

47. *Id.* at 108.

48. 429 U.S. 804 (1976).

49. Brief for Appellee, New York Telephone Co. v. New York Dep't of Labor, 566 F.2d 388 (2d Cir. 1977). Whatever the grounds for dismissal, *Kimbell* has not generally been interpreted as dispositive of the preemption issue. *See* Dow Chemical Co. v. Taylor, 482 F. Supp. 86 (E.D. Mich. 1977); Hawaiian Telephone Co. v. Hawaii Dep't of Labor and Industrial Relations, 405 F. Supp. 275 (D. Hawaii 1976); and New York Telephone Co. v. New York Dep't of Labor, 566 F.2d 388 (1977). *Contra*, Super Tire Engineering Co. v. McCorkle, 550 F.2d 903 (3d Cir. 1977).

50. *See* text accompanying note 38, *supra*.

51. 566 F.2d at 392-93 (referring to S. Rep. No. 628, 74th Cong., 1st Sess. 13 (1935)).

52. 566 F.2d at 394 (referring to H.R. 3020, 80th Cong., 1st Sess. (1947), *reprinted in* 1 NLRB, *Legislative History of the Labor Management Relations Act, 1947*, at 158 (1948)).

sion. Similarly, President Nixon's proposal to discontinue payments to strikers was rejected.[53] The court inferred a reluctance to intrude into the states' chosen plans. Such an inference is proper according to *Grinnell*: "Congressional awareness of the problem and its ability to resolve it finally and specifically, may . . . in a closely balanced situation, be sufficient justification for upholding the state action."[54]

As recommended in *Grinnell*, the Second Circuit also considered the specificity of congressional action in other areas. *New York Telephone* pointed to several federal statutes,[55] including the Railroad Unemployment Insurance Act (which makes benefits specifically payable to participants in lawful strikes),[56] the Food Stamp Act of 1964[57] (which expressly prohibits the disqualification of strikers who are otherwise eligible), and the Aid to Families with Dependent Children program[58] (which allows states to determine whether to include strikers), as indicative of congressional ability to clearly express its intent in comparable areas when it so chooses.

This analysis led the court to conclude that there was no clear preemptive intent with regard to unemployment compensation laws that provide benefits to strikers.[59] To the contrary, the court inferred permission for the states to legislate as they choose in this area.

As support for its emphasis on congressional intent and for its conclusion that Congress did not intend to preempt, the Second Circuit turned to *Ohio Bureau of Employment Services v. Hodory*,[60] a Supreme Court case dealing with an Ohio statute which denied unemployment benefits. *Hodory* provided a strong rationale which helped the Second Circuit to decide *New York Telephone* on the basis of intent.

C. *The Hodory Rationale*

Plaintiff Hodory was an innocent victim of the secondary effects of a labor dispute. His place of employment, a U.S. Steel plant in Youngstown, was closed due to strikes at U.S. Steel owned coal mines

53. 115 CONG. REC. 1853 (1969). House Ways and Means Committee Chairman Mills explained that "there are two States which will pay unemployment benefits when employees are on strike . . . [T]hat is their privilege to do so. . . . They ought to be given latitude to enable them to write the program they want." 115 CONG. REC. 34106 (1969).

54. 475 F.2d at 454.

55. 566 F.2d at 395.

56. 45 U.S.C. § 354(a-2)(iii) (1976).

57. 7 U.S.C. § 2014(c) (1976).

58. 42 U.S.C. §§ 601-644 (1970).

59. 566 F.2d at 395.

60. 431 U.S. 471 (1977).

which supplied operating fuel to the Youngstown plant. The Ohio unemployment compensation statute disqualified persons from benefits if their unemployment was due to a strike at any factory owned or operated by the same employer, even if the factory on strike was not where the applicant worked.[61] Hodory sued the Ohio Bureau of Employment Services alleging that the Ohio statute conflicted with provisions of the Social Security Act[62] which he claimed entitled him to unemployment benefits.[63]

The Court determined that despite Hodory's unfortunate situation, "Congress did not intend to require that the States give coverage to every person involuntarily unemployed."[64] In fact, in reviewing the history of the pertinent legislation, the Court concluded that "involuntariness" of unemployment was not the key consideration in the Senate Finance Committee's Report on the Social Security Act.[65] The Court noted that while the report recognized that a federally defined scope of coverage would facilitate uniform administration of state compensation plans,

> it nonetheless recommended the form of . . . scheme that exists today . . . namely, federal involvement primarily through tax incentives to encourage state-run programs. . . . "The plan for unemployment compensation that we suggest contemplates that the States shall have broad freedom to set up the type of unemployment compensation they wish. We believe that all matters in which uniformity is not absolutely essential should be left to the States."[66]

The Court also notes, in the same Senate report, a section entitled "Suggestions for State Legislation" which asserted: "[S]tates should have freedom in determining their own waiting periods, benefit rates, maximum-benefit periods, etc."[67] Similarly, the Court noted that the cover page of the draft bills stated that it is the final responsibility and the right of each state to determine for itself just what type of legisla-

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61. OHIO REV. CODE ANN. § 4141.29(D)(1)(a) (Page 1973).

62. 42 U.S.C. § 503(a)(1) (1970).

63. 42 U.S.C. § 503(a)(1) conditions federal contributions on the state's intention to pay benefits "when due"; Hodory contended that "when due" meant when a person was involuntarily unemployed.

64. 431 U.S. at 483.

65. Plaintiff Hodory, in support of his interpretation of § 503(a)(1), quoted the REPORT OF THE COMMITTEE ON ECONOMIC SECURITY, *reprinted in* HEARINGS ON S. 1130 BEFORE THE SENATE COMMITTEE ON FINANCE, 74th CONG; 1ST SESS., 1311, 1328 (1935): "To serve its purpose, unemployment compensation must be paid only to workers involuntarily unemployed." 431 U.S. at 482.

66. 431 U.S. at 483 (quoting REPORT OF THE COMMITTEE ON ECONOMIC SECURITY, *reprinted in* HEARINGS, *supra* note 65, at 1326-27.

67. S. Rep., *supra* note 65, at 1327.

tion it desires.[68] Finally the Court asserted that when Congress wished to impose or forbid a condition for compensation, it was able to do so in explicit terms,[69] thus setting the stage for *New York Telephone's* comparison of analogous areas. The *Hodory* Court concluded that neither the Social Security Act nor the Federal Unemployment Tax Act was intended to restrict the States' freedom to legislate in this area.[70]

Although *New York Telephone* modeled its analysis of intent on *Hodory*, there are several distinctions which may restrict *Hodory's* usefulness in support of the Second Circuit decision. First, *Hodory* is distinguishable on its facts. The Ohio statute in *Hodory* refused unemployment benefits to a nonparticipant in a labor dispute and so could be argued as not directly interfering with free collective bargaining. In contrast, the New York statute authorizes strikers to collect benefits, regardless of their participation in the strike, after eight weeks.[71] That the *Hodory* case could be restricted to its facts is suggested by the Court: "Congress did not intend to restrict the ability of the States to legislate with respect to persons in appellee's position."[72] The qualification would allow the Court to find that Congress did intend to restrict the states' payments to strikers.

A further distinction is that *Hodory* expressly refused to decide whether the statute conflicted with the National Labor Relations Act; the Court limited its finding of no preemption to the Social Security Act (now the Federal Unemployment Tax Act).[73] The court points out in *New York Telephone*, however, that the National Labor Relations Act makes no mention of unemployment compensation and that the Act, like the Social Security Act, is one of several major legislative acts which embody the federal policy of free collective bargaining.[74]

The Second Circuit concluded, as did the Supreme Court in *Hodory*, that congressional intent was not ambivalent or unclear, that in fact Congress intended the states to enjoy legislative freedom in this area. With the decision based on this threshold determination, and with *Hodory* as the precedential model on which its analysis of intent was patterned, the court found it unnecessary to go further in applying the *Grinnell* two-pronged standard.

But if the Supreme Court distinguishes *Hodory* on its facts, or restricts its congressional intent analysis to the states' ability to formu-

68. 431 U.S. at 485 (quoting Soc. Sec. Board, Draft Bill for State Unemployment Compensation of Pooled Fund and Employer Reserve Account Type (1936)).
69. 431 U.S. at 488.
70. *Id.* at 488-89.
71. N.Y. LAB. LAW §§ 590.9, 592.1 (McKinney 1977).
72. 431 U.S. at 484.
73. *Id.* at 475, n.3.
74. 566 F.2d at 391.

late disqualifying provisions, the *New York Telephone* decision will be vulnerable to the vagaries of legislative interpretation. A rejection by the Court of *Hodory's* applicability to the strikers' benefits cases and a finding of ambiguous congressional intent will be likely to subject the issue to the factual impact analysis suggested by the second prong of *Grinnell*. And a narrow reading of *Hodory*, rejecting its applicability to *New York Telephone*, is not altogether unlikely despite the Court's recent trend toward protecting state autonomy.

V. POSSIBLE FACTORS IN THE SUPREME COURT'S TREATMENT

While the Supreme Court has not dealt directly with the situation presented in *New York Telephone*, there are some indications of factors likely to be considered.

A. *Impact on the Neutrality of the Bargaining Process*

Several cases speak to the Court's presentiments concerning the payment of unemployment benefits to strikers. *Hodory* reveals that the Court assumes some impact:[75] "The employer's costs go up with every laid-off worker who is qualified to collect unemployment."[76] Similarly, in deciding a mootness question in a case involving welfare benefits, the Court said, "It cannot be doubted that . . . state welfare assistance for striking workers . . . pervades every work stoppage, affects every existing collective-bargaining agreement, and is a factor lurking in the background of every incipient labor contract."[77]

Unless *Hodory* is distinguished or restricted, it would appear that the congressional intent analysis of that case would lead to a similar conclusion in *New York Telephone*. If Congress intended to afford states the discretion to disqualify certain persons from benefits, it may have also intended to provide states the discretion to include certain

75. Other courts have made the same assumption, although such a reference point is not compelled by the record. The district court in New York Telephone Co. v. New York Dep't of Labor prefaced its factual analysis with a statement indicating a less than impartial approach: "I regard it as a fundamental truism that the availability to, or expectation or receipt of a substantial weekly tax-free payment of money by, [sic] a striker is a substantial factor affecting his willingness to go on strike or . . . to remain on strike. . . . This being a truism, one . . . would expect to find confirmation of it everywhere." 434 F. Supp. at 813-14. Despite *Grinnell*'s warning to build an evidentiary record on relevant figures and statistical data, to be weighted depending on "the extent to which they [the statisticians] considered and controlled for other factors potentially responsible for any disparities," 475 F.2d at 459, the district court found confirmation of its "truism" in a random-digit phone survey of 1200 persons, only eight of whom had ever been on strike. 434 F. Supp. at 816; *see* Brief for Appellee, New York Telephone Co. v. New York Dep't of Labor, 566 F.2d 388 (2d Cir. 1977).

76. 431 U.S. at 492.

77. Super Tire Engineering Co. v. McCorkle, 416 U.S. 115, 124 (1974).

persons in their plans. If the Court is disinclined to view the benefits benignly, but cannot fashion a congressional intent rationale which would deny state unemployment benefits to strikers, it may well turn to the impact analysis.

The assumption that the payment of benefits is bound to impact on the bargaining process presupposes that a neutrality consistent with federal policy exists when the benefits are not paid. The counterargument is that the employer is usually financially capable of greater endurance than his workers and that the payment of unemployment benefits merely adjusts the unequal balance between the parties closer to neutrality.[78]

The denial of benefits, then, may be construed as a negotiating advantage to employers. The majority of the working population is eligible for compensation when unemployed; disqualifications are the exception. Arguments that the prospect of benefits forces employers into undesirable settlements are no more forceful than contentions that the denial of benefits is coercive on employees.[79] National policy has long recognized striking as a legitimate economic weapon to effect desirable changes or to protect rights given employees by legislation or by contract.[80]

Impact analysis, if undertaken by the Court in deciding *New York Telephone*, might consider whether the $75 per week in benefits is large enough to motivate workers both to strike and to prolong the strike beyond the time they would otherwise have returned to work. For the Court to decide on the facts of the *New York Telephone* case, however, would only invite litigation to determine what amount is too minimal to have an impact and would not settle the more compelling general issue of whether or not all state unemployment benefits interfere with the federal policy of free collective bargaining.

B. *Economic Weapons*

An optional approach would be to view the unemployment compensation as simply another economic weapon available to one of the parties and thus consistent with the federal policy of collective bargaining based on the free play of economic forces. The district court in

78. Fierst and Spector, *Unemployment Compensation in Labor Disputes*, 49 YALE L.J. 461, 465 (1940). There is evidence that the government's policy is not one of absolute neutrality. Labor legislation which comprises the "balance" struck by Congress is subject to substantial flex and change particularly in areas such as workmen's compensation and minimum wage. Teamsters v. Morton, 377 U.S. 252, 259 (1964); Shadur, *supra* note 1, at 297.

79. *Id.* at 297-98.

80. *Id.* at 299.

New York Telephone spent considerable time establishing what should be obvious: that strikers used the money, were generally thankful to have it, and attached some importance to its usefulness.[81] But economic weapons are not anathema to the federal policy of free collective bargaining. In fact, such weapons are part of the congressional scheme whereby it outlawed some aspects of labor activities and left others free to operate.[82] In *Local 20 Teamsters Union v. Morton*,[83] the Court recognized that attempting to induce secondary boycotts is a legitimate economic weapon, and disallowed Ohio's attempt to restrict this weapon by awarding damages to the boycotted employer.

That the state made available the economic weapon in *New York Telephone* should not mandate its curtailment. The federal government already plays a vast role in structuring certain economic forces, and the states have not been altogether precluded from acting in the labor field. In *United Construction Workers v. Laburnum Construction Corp.*,[84] the Court upheld a state damages remedy for violence on the picket line. The Court thus allowed the state to provide an employer with an economic weapon, a damages remedy unavailable under federal law, pertaining to an area of conduct clearly within the federal jurisdiction. Further, New York's purpose in providing benefits is not to take sides in a labor dispute; the benefits are designed as a social remedy for the ills of unemployment and are generally available to all state citizens.

C. *The State's Interest*

The state's interest in providing unemployment benefits has not been thoroughly examined in *New York Telephone*, despite the importance attached to that variable in the *Grinnell* formula. The district court examined the legislative history of New York's compensation plan, and concluded that the coverage for strikers was included in the statute for administrative convenience.[85] The district court concluded that the state's interest was too inconsequential to be a factor in the decision.[86]

To assess the state's interest, *Grinnell* advised examining the empirical evidence and expert economic testimony of the nature of the strike's long-term impact on pricing and competitiveness and the short-term impact on consumer demand.[87] Also relevant are such secondary

81. 434 F. Supp. at 814-16.
82. Weber v. Anheuser-Busch, Inc., 348 U.S. 468, 480 (1955).
83. 377 U.S. 252 (1964).
84. 347 U.S. 656 (1954).
85. 434 F. Supp. at 818.
86. *Id.* at 819.
87. 475 F.2d at 461.

effects as violence caused by strikers' bitterness attendant upon the hardships of the strike, and avoidance of economic stagnation from the termination of income.[88] The Director[89] of the New York plan testified in the trial court that the state's benefits not only assist striking workers to pay essential living expenses, but also preserve the employer's labor force intact and ease the effects on local economy.[90] The Second Circuit, while noting the stated public policy of New York's labor law and the testimony of the Director as to the objectives of the statute,[91] did not incorporate these factors into its decision. Precedent for considering the state's interest is clearly present in *Grinnell* and in *Hodory*, and an analysis of New York's interest may be forthcoming on *certiorari*.

The Supreme Court in *Hodory* found that the Ohio statute bore a rational relation to a legitimate state interest, and was thus constitutionally sound.[92] Protection of the fund, the Court asserted, is a legitimate state interest, and the Ohio statute furthered that interest by disqualifying certain unemployed workers.

> Qualification for unemployment compensation thus acts as a lever increasing the pressures on an employer to settle a strike. The State has chosen to leave this lever in existence for situations in which the employer has locked out his employees, but to eliminate it if the union has made the strike move. Regardless of our views of the wisdom or lack of wisdom of this form of state "neutrality" in labor disputes, we cannot say that the approach taken by Ohio is irrational.[93]

In Ohio, the state interest sometimes favors the employer. In New York, the state has an interest in employees' welfare and in the community as a whole.[94] If the Court found the Ohio statute rational regardless of the statute's lack of neutrality toward strikers, the New York statute should withstand the same analysis.[95]

D. *Federalism Concerns*

Recent Court decisions have given greater deference to legitimate state interests. The Court in *National League of Cities v. Usery*[96] per-

88. *Id.*
89. Harold Kasper, Director of New York State Unemployment Insurance Division.
90. 566 F.2d at 393, n.5.
91. *Id.* at 393.
92. 431 U.S. at 489-93.
93. *Id.* at 492.
94. 566 F.2d at 393, n.5.
95. Such an analysis is not compelled in *New York Telephone*, however, as it was in *Hodory*, where the plaintiff alleged due process and equal protection violations.
96. 426 U.S. 833 (1976).

mitted a state to exclude certain state employees from the minimum wage provisions of the Fair Labor Standards Act,[97] despite congressional amendments extending the Act to such employees. The decision was founded on the power of the states to regulate their own internal affairs.[98] In a case dealing directly with labor preemption, the Court recently determined that state trespass laws are operative even when those charged are picketers whose conduct was subject to NLRB jurisdiction.[99]

Similarly, the Court in *Malone v. White Motor Corp.*[100] upheld Minnesota's right to compel bankrupt employers to fund employee pension plans as promised.[101] The case held that the National Labor Relations Act neither expressly nor impliedly forecloses state regulatory power over pension plans that may be the subject of collective bargaining.[102] In analyzing congressional intent regarding the regulation of pension plans, the Court noted that: "Congress was aware that the States had thus far attempted little regulation of pension plans. The federal act was envisioned as laying a foundation for future state regulation."[103] The same can be said of unemployment compensation plans. Congressional awareness and inaction, and congressional anticipation of varied state plans[104] can be construed as intent not to preempt.

VI. CONCLUSIONS

The *New York Telephone* decision draws on part of the formula supplied by *Grinnell* and *Hodory* to reach a threshold decision of no congressional intent to preempt. *New York Telephone* reinforced a trend toward protection of state activity by upholding the validity of unemployment benefits to strikers in New York, a result which is contrary to recent decisions which have overturned such benefits. The results are thus a significant departure from labor law preemption patterns, and would be supported by a favorable reading of *Hodory*.

Should *Hodory* be distinguished or restricted, the Supreme Court's treatment of the case on review may well involve an assessment of the

97. 29 U.S.C. §§ 201-219 (1970).

98. 426 U.S. at 845-51.

99. Sears Roebuck & Co. v. San Diego County District Council of Carpenters, 98 S. Ct. 1745 (1978).

100. 98 S. Ct. 1185 (1978).

101. The case developed before the passage of the Federal Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1381 (1976). ERISA expressly preempts states in the regulation of covered plans.

102. 98 S. Ct. at 1194.

103. *Id.* at 1193.

104. 566 F.2d at 391-92.

alleged impact of such benefits. It is unclear, however, whether neutrality would result from a denial of the benefits or the granting of them. A decision consistent with *Hodory's* finding of no preemption would help to provide a pragmatic solution to this knotty problem of state statutes which indirectly impact on federal labor regulation. Additionally, the states' legitimate police power interests in the welfare of their citizens would be accommodated. Such a result is not unlikely in light of the recent tendency of the Court to adopt a stance protective of state interests, even in the area of labor regulation, an area traditionally reserved for federal interests.

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