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## THE CONFRONTATION OF FEDERAL PREEMPTION AND STATE RIGHT-TO-WORK LAWS

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*That Congress in enacting section 14(b) of the National Labor Relations Act authorized the states to adopt "right-to-work" laws banning forms of compulsory unionism otherwise permissible under federal law has never been seriously questioned. In this article the author discusses the more difficult problem of the extent to which section 14(b) does, or should, enable the states to deal with union-security issues irrespective of an elaborate federal regulatory scheme which touches identical or related subject matter.*

### THE DIMENSIONS OF THE PROBLEM

**T**WENTY YEARS have passed since Congress, in section 14 (b) of the Taft-Hartley amendments to the National Labor Relations Act,<sup>1</sup> confirmed state power to prohibit compulsory union membership by the adoption of "right-to-work" acts.<sup>2</sup> It should be clear to

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<sup>1</sup> The National Labor Relations Act (Wagner Act), 49 Stat. 449 (1935), was amended and supplemented by the Labor Management Relations Act (Taft-Hartley Act), 29 U.S.C. §§ 141-87 (1964). Section 14 (b) appears at 29 U.S.C. § 164 (b) (1964). Further amendments, as well as new provisions, were added by the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. §§ 401-531 (1964). Unless otherwise indicated, all references herein to the NLRA will include amendments to date.

<sup>2</sup> Although such laws contain a wide variety of provisions and follow no fixed pattern, the essential feature of a right-to-work law is the prohibition of the requirement of union membership as a condition of employment. At present nineteen states have such laws, either in the form of a statute or constitutional provision: Alabama, Arizona, Arkansas, Florida, Georgia, Iowa, Kansas, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wyoming. See 4 LAB. REL. REP. 1:16-17 (1967) for a table summary and specific references. Louisiana presently has a law which applies only to agricultural workers. LA. REV. STAT. ANN. §§ 23:831-88 (1964). Several states have enacted legislation which restricts, without outlawing, union-security arrangements. *E.g.*, COLO.

even the casual observer of this period that right-to-work laws have failed to occupy the labor-management field to the degree expected by their proponents. Nor is it likely that the influence of these laws will increase in the foreseeable future.<sup>3</sup> This state of affairs exists largely because right-to-work legislation is unable to co-exist effectively with a national labor system which enjoys preeminence by reason of the doctrine of federal preemption.<sup>4</sup> The extent to which state and private interests embraced within the concept of right-to-work laws must defer to federal regulatory policies is but one aspect of the problem. Another aspect involves the broad question of whether the present distribution of power in the right-to-work area can be defended from the standpoint of a workable labor system. This question is prompted by the observation that, aside from general guidelines which seek to reconcile federal and state power, the practical impact of right-to-work laws upon national policy cannot be lightly ignored.

It would appear useful to indicate at the outset the general direction this discussion will take. Though the right-to-work controversy is emotionally still very much alive, no attempt will be made here to describe or reconcile the respective positions of the participants in the conflict.<sup>5</sup> By the same token, the wisdom of the decision to generally exclude state labor law in areas subject to federal regula-

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REV. STAT. ANN. § 80-4-6 (1) (d) (1963); WIS. STAT. ANN. § 111.06 (1) (c) (1) (1957). For general background see F. MEYERS, *RIGHT TO WORK IN PRACTICE* (1959); Pollitt, *Right to Work Law Issues: An Evidentiary Approach*, 37 N.C.L. REV. 233 (1959); Teple, *A Closer Look at "Right to Work" Legislation*, 9 W. RES. L. REV. 5 (1957).

<sup>3</sup> The efforts of the National Right-to-Work Committee to secure the adoption of right-to-work acts in other states have generally not been successful in recent years. The last state to enact a right-to-work law was Wyoming in 1963. WYO. STAT. ANN. §§ 27-245.1-8 (Supp. 1965). The most recent state legislative activity with respect to the right-to-work issue is the repeal by Indiana of its law in 1965. IND. ACTS OF 1965, ch. 1, § 1. The real flood of state legislation restricting compulsory unionism occurred in the immediate post-war years, particularly 1947. See H. MILLIS & E. BROWN, *FROM THE WAGNER ACT TO TAFT-HARTLEY* 326-29 (1950).

<sup>4</sup> The constitutional basis of federal regulation of labor relations is the commerce clause. U.S. CONST. art. I, § 8. Laws enacted by Congress pursuant to this authority are declared, by the supremacy clause, to be "the supreme law of the land . . . , anything in the constitution or laws of any state to the contrary notwithstanding." U.S. CONST. art. VI, § 2. The doctrine of federal preemption, therefore, rests on the simple proposition that once Congress enacts legislation which expressly or impliedly covers a subject, state authority must yield. See generally Cox, *Federalism in the Law of Labor Relations*, 67 HARV. L. REV. 1297, 1298-1300 (1954). See notes 25-29 *infra* and accompanying text.

<sup>5</sup> The merits of the right-to-work issue are analyzed in P. SULTAN, *RIGHT-TO-WORK LAWS; A STUDY IN CONFLICT* (1958).

tion is not in issue.<sup>6</sup> The contemporary scheme of labor regulation may not constitute the best of all possible worlds, but it is at least a possible one. More importantly, there is little evidence that the movement toward national control of the labor-management relation will be either reversed or diverted. Thus one of the basic premises upon which this discussion proceeds is that Congress has established a national labor policy which carries obvious implications of exclusive federal authority. Nevertheless, the most meaningful objection to a comprehensive application of federal power is that state power is obliterated without regard to whether state intervention actually obstructs federal policy in a concrete case.<sup>7</sup> If in fact the content and application of right-to-work legislation entails a substantially high risk of derangement of basic federal objectives, the argument for a balancing of federal-state interests on a case-by-case basis loses much of its appeal. The effect of right-to-work acts must therefore be tested against the backdrop of national purposes and objectives inferable from federal legislation.

The enlargement of the power of one regulatory system inevitably creates jurisdictional tensions with competing systems. In the enactment of the NLRA in 1935 Congress took firm hold of the processes of employee organization and collective bargaining<sup>8</sup> and thereby established a legislative pattern in the direction of nationalization of labor relations. The Supreme Court at an early date left little doubt about congressional power to superimpose federal upon state law in the labor-management field.<sup>9</sup> Consequently, the trend of national control was accelerated in the major legislative revisions

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<sup>6</sup> The policy considerations underlying preemption of state competence to act in labor matters are discussed in Cox, *Labor Decisions of the Supreme Court at the October Term, 1957*, 44 VA. L. REV. 1057 (1958); Gregory, *Federal or State Control of Concerted Union Activities*, 46 VA. L. REV. 539 (1960); Meltzer, *The Supreme Court, Congress, and State Jurisdiction Over Labor Relations* (pt. I), 59 COLUM. L. REV. 6 (1959); and Wollett, *State Power to Regulate Labor Relations—Major Developments During the Supreme Court's 1957-58 Term*, 33 WASH. L. REV. 364 (1958).

<sup>7</sup> See, e.g., Michelman, *State Power to Govern Concerted Employee Activities*, 74 HARV. L. REV. 641, 650-51 (1961). See notes 25-29 *infra* and accompanying text.

<sup>8</sup> Section 7 of the Wagner Act expressly recognized the right of employees to organize into unions, bargain collectively, and "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ." 29 U.S.C. § 157 (1964). Certain practices of employers thought to interfere with the exercise of employee rights were condemned in § 8. 29 U.S.C. § 158 (1964).

<sup>9</sup> The constitutionality of the Wagner Act was upheld in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), which broadly defined congressional power to legislate with respect to local labor activities which disturb interstate commerce. Cf. *NLRB v. Fainblatt*, 306 U.S. 601 (1939).

of the NLRA in 1947 and 1959, revisions which swept federal power into virtually every aspect of collective bargaining.<sup>10</sup> The rough guarantees of employee organizational rights contained in the original NLRA were accordingly transformed into a vast and comprehensive code of rights and duties<sup>11</sup> directed in part toward concerted employee activities, an area traditionally subject to local control.<sup>12</sup> The result was a recurring series of disputes as to which system, federal or state, should regulate the highly volatile subject of union economic power.

Defining the limits of state power generated by right-to-work statutes is merely one phase of the continuous process of gauging the extent to which federal presence displaces local authority. In the area of "union security,"<sup>13</sup> however, additional difficulties exist because Congress chose not to be consistent in its over-all objective of a uniform labor policy. The failure of the NLRA to either sanction or prohibit the closed shop or the union shop was understandably

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<sup>10</sup> Twelve years after the 1947 Taft-Hartley amendments, Congress added the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 73 Stat. 519 (1959). The principal significance of the LMRDA is that it represents the first congressional effort at regulating internal union government. In addition, the LMRDA made a number of important amendments to the NLRA, primarily in connection with union unfair labor practice provisions.

<sup>11</sup> In its present amended form, § 8 of the NLRA enumerates specific unfair labor practices by unions as well as employers, and spells out the affirmative duties of collective bargaining. See 29 U.S.C. § 158 (1964). Section 7 presently provides: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities . . ." 29 U.S.C. § 157 (1964).

<sup>12</sup> Not until the Taft-Hartley Act did federal law attempt to regulate the exercise of union economic pressures on employees and employers. Strikes, boycotts, and picketing, if regulated at all prior to 1947, were subjects of state concern exclusively. See generally Smith, *The Taft-Hartley Act and State Jurisdiction over Labor Relations*, 46 MICH. L. REV. 593 (1948).

<sup>13</sup> The term "union-security" describes a variety of arrangements, usually contractual, whereby union membership is made a condition of employment. The traditional types of clauses include: (1) the closed shop, which permits the hiring only of members of the appropriate union; (2) the full union shop, under which all employees must join the union within a certain period, typically within 90 days of hiring; (3) the modified union shop, which allows new members to withdraw from membership at stated periods, or exempts old employees who are not members; (4) maintenance of membership, which imposes no membership requirement, but does require employees who join the union to continue their membership; and (5) the agency shop, which requires non-union employees to pay to the union a sum equal to fees and dues paid by members. Hiring arrangements designed to protect or favor union members in securing jobs are often referred to as forms of union-security, as is the "checkoff," a device whereby the employer makes a deduction from the paychecks of employees and transmits amounts so deducted to the union. See generally LAB. REL. REP. (LRX) 643 (1967).

accepted as federal recognition that compulsory unionism was a matter of state law.<sup>14</sup> It was therefore not unexpected that a number of states, beginning with Florida in 1944, should proceed to regulate union-security through the enactment of right-to-work laws,<sup>15</sup> or that such laws would successfully resist challenge on federal as well as state grounds.<sup>16</sup>

The federal attitude toward union-security, however, was drastically altered in the Taft-Hartley Act. Rather than restricting all forms of union-security arrangements, Congress in section 8 (a) (3) expressly permitted agreements conditioning employment upon union membership in specified situations.<sup>17</sup> The effect was to outlaw the closed shop, but approve the union shop which complies with federal standards.<sup>18</sup> Simultaneously, the power of a union to use the membership obligation as a basis for affecting employment was narrowly circumscribed.<sup>19</sup> Yet having entered the union-security area,

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<sup>14</sup> Section 8 (3) of the Wagner Act left open state power to prohibit or regulate union-security agreements by declaring that nothing in federal law shall preclude the making of such agreements so long as the union was a proper representative of a group of employees. Act of July 5, 1935, ch. 372, § 8 (3), 49 Stat. 452, *as amended*, 29 U.S.C. § 158 (a) (3) (1964).

<sup>15</sup> Laws banning any and all forms of union-security contracts had been enacted in twelve states by the time of the Taft-Hartley amendments. A summary of the status of state legislation on union-security at that time appears at 21 L.R.R.M. 66-68 (1948).

<sup>16</sup> The constitutionality of state right-to-work laws was sustained against due process objections in *Plumbers Local 10 v. Graham*, 345 U.S. 192 (1953); *AFL v. American Sash & Door Co.*, 335 U.S. 538 (1949); and *Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949). Such laws have usually been found not to offend state constitutions. *E.g.*, *Finney v. Hawkins*, 189 Va. 878, 54 S.E.2d 872 (1949).

<sup>17</sup> Section 8 (a) (3) declares that it is an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . ." 29 U.S.C. § 158 (a) (3) (1964). The first proviso to that section, however, permits union-security in the following circumstances: "Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9 (e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement . . ." *Id.*

<sup>18</sup> The ban of the closed shop results from the requirement of pre-existing union membership, whereas the membership obligation in a union shop clause is incurred subsequent to the securing of employment. See note 13 *supra*.

<sup>19</sup> The second proviso to § 8 (a) (3) reads as follows: "Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such member-

Congress did not commit the field exclusively to federal regulation. In section 14 (b) it gave express recognition to local interests and sought to preserve to the states an area within which right-to-work laws might operate:

Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.<sup>20</sup>

In enacting section 14 (b), Congress was free to preempt as much or as little of the subject matter of union-security as it desired.<sup>21</sup> That it authorized the states to ban any form of compulsory unionism which federal law might accept has never been seriously questioned.<sup>22</sup> Beyond this threshold premise, the dividing line between federal and state power becomes dim and obscure. If federal and state restrictions apply concurrently in businesses affecting commerce,<sup>23</sup> the Taft-Hart-

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ship was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership . . . ." 29 U.S.C. § 158 (a) (3) (1964). If a labor organization or its agent attempts to cause an employer to discriminate against an employee in violation of § 8 (a) (3), this constitutes an unfair labor practice under § 8 (b) (2). 29 U.S.C. § 158 (b) (2) (1964). The practical effect of these provisions is to limit the burdens of membership upon which employment may be conditioned to the payment of initiation fees and monthly dues. In other words, as long as an employee subject to a union shop agreement tenders required dues and fees, he may ignore all other union-imposed obligations and still not be discharged for non-membership even though he is not a formal member. See *Radio Officers' Union v. NLRB*, 347 U.S. 17 (1954); *Kingston Cake Co.*, 97 N.L.R.B. 1445 (1952); *Union Starch & Ref. Co. v. NLRB*, 87 N.L.R.B. 779 (1949), *enforced*, 186 F.2d 1008 (7th Cir.), *cert. denied*, 342 U.S. 815 (1951). Section 8 (b) (5) further protects employees subject to a union-shop agreement by prohibiting excessive or discriminatory membership fees. 29 U.S.C. § 158 (b) (5) (1964).

<sup>20</sup> 29 U.S.C. § 164 (b) (1964).

<sup>21</sup> In 1951 Congress amended the Railway Labor Act to permit union shop agreements in the railroad and airline industries "notwithstanding any . . . provisions" of state law. Railway Labor Act § 2, 45 U.S.C. § 152 (1964). As a result, right-to-work laws have no validity in industries subject to that Act. *Railway Employees' Dep't v. Hanson*, 351 U.S. 225 (1956).

<sup>22</sup> See H.R. REP. No. 510, 80th Cong., 1st Sess. (1947). The Supreme Court, in the first case dealing with § 14 (b), construed that section as leaving the states "free to pursue their own more restrictive policies in the matter of union-security agreements." *Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Bd.*, 336 U.S. 301, 313-14 (1949).

<sup>23</sup> It is generally understood that the jurisdiction of the National Labor Relations Board (NLRB) over industries "affecting" commerce is coextensive with congressional power to legislate under the commerce clause. *NLRB v. Reliance Fuel Oil Corp.*,

ley alteration of federal policy relating to the union-security issue would be nullified. The source of the difficulty is that having abandoned the policy of uniformity in favor of one of shared authority, Congress afforded little guidance as to the nature of state power that is to exist alongside an increasingly dynamic federal power.<sup>24</sup> The mere fact that in section 14 (b) Congress approved state competence in union-security matters is not conclusive of its legislative purposes. The meaningful question is the extent to which section 14 (b) does or should enable the states to deal with union-security irrespective of the elaborate and predominant federal scheme which touches identical or related subject matter. The device for resolving this question is the one employed to accommodate federal and state jurisdiction of any subject of labor relations, namely, the doctrine of preemption.

According to the blackletter law of preemption as articulated by the landmark 1959 decision in *San Diego Building Trades Council v. Garmon*, "[w]hen an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board . . . ."<sup>25</sup>

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371 U.S. 224, 226 (1963). The Board, however, primarily for budgetary reasons, has declined to act in cases where the effect on commerce is minimal or remote. The decision to exercise jurisdiction is currently based on monetary standards or "yardsticks," stated in terms of the dollar volume of sales and purchases of specific enterprises, announced by the Board in 1958. See 23 NLRB Ann. Rep. 8 (1958). Under § 14 (c) of the NLRA, added by the 1959 LMRDA amendments, the states are permitted to assume jurisdiction over disputes which the Board, pursuant to authority granted by that section, declines to hear because of an insubstantial effect on commerce. 29 U.S.C. § 164 (c) (1964). State right-to-work laws are therefore clearly applicable in cases where commerce is not affected, as well as in cases which affect commerce but not sufficiently to satisfy the Board's jurisdictional standards. See *Radio Technicians Local 1264 v. Broadcast Serv., Inc.*, 380 U.S. 255 (1965); Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 HARV. L. REV. 1086, 1097-98 (1960). The unsettled question is the extent to which § 14 (b) permits right-to-work laws to operate in cases over which the Board would customarily exercise jurisdiction. In discussing state decisional law herein, some cases not within NLRB jurisdiction will be included since they are descriptive of state regulatory trends and are therefore relevant to the matter of preemption. Primary emphasis, however, will be given state right-to-work decisions which directly confront preemption doctrine.

<sup>24</sup> Even though the implications of preemption became obvious shortly after the enactment of § 14 (b), Congress has addressed itself to only one narrow aspect of preemption since Taft-Hartley, namely, the § 14 (c) question of whether the states may act with respect to labor disputes over which the NLRB has, but declines to assert, jurisdiction. And in treating this problem, the net effect of congressional action was to stamp with approval the line of Supreme Court decisions calling for a general retreat of state power in the labor field. Aaron, *supra* note 23, at 1094.

<sup>25</sup> 359 U.S. 236, 245 (1959). The extensive *Garmon* litigation involved a state court injunction and award of damages growing out of the peaceful picketing of an inter-

The rationale of *Garmon* is readily apparent: the broad powers conferred upon the Labor Board to interpret and enforce the complex federal law of labor relations necessarily imply that potentially conflicting rules, remedies, or administrative practices cannot be permitted to operate because of the danger of impairment of national labor policy.<sup>26</sup> Hence, with few exceptions,<sup>27</sup> neither state nor federal

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state employer for purposes alleged by the picketing unions to be organizational in nature. When the case first reached the Supreme Court, injunctive relief was struck down on the theory that a state may not enjoin conduct subject to the exclusive jurisdiction of the NLRB. 353 U.S. 26 (1957); cf. *Meat Cutters Local 427 v. Fairlawn Meats, Inc.*, 353 U.S. 20 (1957); *Guss v. Utah Labor Relations Bd.*, 353 U.S. 1 (1957). When the case came back to the Court two years later for consideration of the question of power to award damages for economic injuries resulting from the picketing, state jurisdiction was required to yield because of the danger of conflict with federal policy-making power. 359 U.S. at 247. The principal significance of *Garmon* is that it elevated preemption rules of earlier cases into a self-contained doctrine of sweeping deference to federal policy. The importance of the decision is indicated by the large body of literature it has engendered. E.g., Gould, *The Garmon Case: Decline and Threshold of "Litigating Elucidation,"* 39 U. DET. L.J. 539 (1962); Gregory, *supra* note 6; Hanley, *Federal-State Jurisdiction in Labor's No Man's Land: 1960*, 48 GEO. L.J. 709 (1960); McCoid, *Notes on a "G-String": A Study of the "No Man's Land" of Labor Law*, 44 MINN. L. REV. 205 (1959); Michelman, *supra* note 7; Wellington, *Labor and the Federal System*, 26 U. CHI. L. REV. 542 (1959). A summary of preemption cases preceding *Garmon* appears in the Court's opinion in *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 474-77 (1955).

<sup>26</sup> Perhaps the best statement of the reasoning which ultimately produced *Garmon* is to be found in *Garner v. Teamsters Local 776*, 346 U.S. 485, 490-91 (1953): "Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision . . . . Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules . . . . A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law."

<sup>27</sup> It should not be overlooked that preemption does contemplate some degree of diffusion of power. In *Garmon* the Supreme Court recognized that preemption would be inoperative where labor activity is merely of "peripheral concern" of the NLRA or touches interests "deeply rooted in local feeling and responsibility." 359 U.S. at 243-44. An overriding state interest has traditionally been found to exist in cases involving intimidation, violence, or a threat to public order. E.g., *UAW v. Russell*, 356 U.S. 634 (1958); *Youngdahl v. Rainfair, Inc.*, 355 U.S. 131 (1957); *Electrical Workers Local 111 v. Wisconsin Employment Relations Bd.*, 315 U.S. 740 (1942). Other than cases having some relation to domestic peace, however, the judicial exceptions to preemption have not been extensive. For example, state remedies have been permitted in connection with such varied subjects as a union's breach of its statutory duty of fair representation, *Vaca v. Sipes*, 386 U.S. 171 (1967); malicious libel, *Linn v. United Plant Guard Workers Local 114*, 383 U.S. 53 (1966); and wrongful expulsion from union membership, *Machinists Union v. Gonzales*, 356 U.S. 617 (1958). See also *Hanna Mining Co. v. District 2, Marine Eng'rs Ass'n*, 382 U.S. 181 (1965); *Ingres S.S. Co. v. Maritime Workers Union*, 372 U.S. 24 (1963).

Congress has, in addition, carved out some specific exceptions to exclusive NLRB



courts may assert jurisdiction over labor activity which reasonably appears within the coverage of the NLRA, either as protected or prohibited conduct.<sup>28</sup> In order to insure that matters subject to federal law actually reach the specialized hands of the Labor Board without state interference, initial and exclusive jurisdiction to determine whether conduct falls within preempted categories is entrusted to the Board itself.<sup>29</sup>

Since Congress has undertaken explicit regulation of union-security in section 8 (a) (3), labor activities involving the conditioning of employment upon union membership may be "arguably subject" to the protections or prohibitions of the NLRA. Yet section 14 (b) gives express recognition to state power to deal with such matters.

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jurisdiction. For example, section 301 (a) of the NLRA provides that suits for breach of a collective bargaining agreement may be brought in a federal court without regard to diversity of citizenship or the amount in controversy. 29 U.S.C. § 185 (a) (1964). Preemption doctrine has been held not to preclude a suit in a state court under § 301 where the contract breach is concededly within the unfair labor practice jurisdiction of the NLRB. *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962). The application of preemption to suits on collective agreements is analyzed in *Sovern, Section 301 and the Primary Jurisdiction of the NLRB*, 76 HARV. L. REV. 529 (1963). In addition to § 301, violations of the secondary-boycott provisions of § 8 (b) (4) are expressly made subject to damage actions in the courts by § 303 of the NLRA even though such practices are subject to Board jurisdiction. 29 U.S.C. § 187 (1964).

<sup>28</sup> The broad language of § 7 of the NLRA protects from employer reprisals a wide range of concerted employee activities. 29 U.S.C. § 157 (1964); *see, e.g., NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962). Similarly, it has long been established that a state may not impose restrictions upon labor activities protected by federal law. *Hill v. Florida ex rel. Watson*, 325 U.S. 538 (1945). The guarantees of § 7 are in turn federally implemented by specific prohibitions of employer and union conduct in § 8. 29 U.S.C. § 158 (1964). In addition to conduct arguably protected or prohibited by federal law, *Garmon* made clear that certain activity may in fact be "neither protected nor prohibited" and still not subject to state regulation. 359 U.S. at 245. *But see UAW Local 232 v. Wisconsin Employment Relations Bd.*, 336 U.S. 245 (1949). The Supreme Court has recently confirmed that state regulation of activities neither federally protected nor prohibited is ousted where circumstances warrant the application of preemption doctrine. *Teamsters Local 20 v. Morton*, 377 U.S. 252, 258-60 (1964). Given the mechanics of the "arguably subject" test, few preemption cases can be expected to arise in which there is a clear determination by the NLRB that an activity is neither protected nor prohibited. *But see Hanna Mining Co. v. District 2, Marine Eng'rs Ass'n*, 382 U.S. 181 (1965).

<sup>29</sup> The crux of preemption doctrine is that the NLRB is entitled to the first opportunity to regulate a labor dispute which appears within the coverage of federal law. The judicial function is therefore limited: "We need not and should not now consider whether the . . . activity in this case was federally protected or prohibited, on any of the theories suggested above or on some different basis. It is sufficient . . . to find, as we do, that it is reasonably 'arguable' that the matter comes within the Board's jurisdiction." *Plumbers' Local 100 v. Borden*, 373 U.S. 690, 696 (1963). If a case presents a situation where "essentially undisputed facts" are subject to "compelling precedent," *Garmon* indicated that a court may act in the absence of a prior Labor Board determination. 359 U.S. at 246; *cf. Ex parte George*, 371 U.S. 72 (1962).

Nevertheless, assuming that preemption does not oust the states of power under section 14 (b) to prescribe and enforce their own policies of union-security, these local policies must still be reconciled with federal policies which explain the necessity for a doctrine of preemption in the first place.

In 1963 the Supreme Court for the first time elected to engage in a discussion of the unique problems posed by the application of preemption to state jurisdiction arising from section 14 (b). The case of *Retail Clerks Local 1625 v. Schermerhorn*,<sup>30</sup> in which the Court wrote two opinions (*Schermerhorn I* and *Schermerhorn II*), presented the question of whether Florida courts had jurisdiction to enjoin the enforcement of a union-security agreement prohibited by the Florida right-to-work act.<sup>31</sup> As a result of section 14 (b), the Supreme Court acknowledged that "there will arise a wide variety of situations presenting problems of accommodation of state and federal jurisdiction in the union-security field."<sup>32</sup> In making the accommodation in the immediate case, it was decisive to the Court that Congress, by the inclusion of section 14 (b), had left the states free to legislate with respect to union-security even to the extent of outlawing arrangements which satisfied federal standards.<sup>33</sup> Since state policy was accorded such a high priority, the Court concluded that state tribunals possessed jurisdiction to implement that policy,<sup>34</sup> at least to the extent of enjoining an executed union-security clause.

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<sup>30</sup> The first opinion appears at 373 U.S. 746 (1963) [hereinafter referred to as *Schermerhorn I*], and the second is reported at 375 U.S. 96 (1963) [hereinafter referred to as *Schermerhorn II*].

<sup>31</sup> The Florida Supreme Court had found that an agency shop clause in a collective agreement was forbidden by the right-to-work provision of the state constitution, and that the Florida courts could enforce the prohibition in an injunction proceeding. *Schermerhorn v. Retail Clerks Local 1625*, 141 So. 2d 269 (Fla. 1962). In *Schermerhorn I* the Supreme Court agreed that the union-security agreement in question was within § 14 (b) and therefore subject to prohibition by Florida law. 373 U.S. at 752. The issue left for consideration in *Schermerhorn II* was "whether the Florida courts, rather than solely the National Labor Relations Board, are tribunals with jurisdiction to enforce the State's prohibition" of a union-security agreement. 375 U.S. at 97-98.

<sup>32</sup> 375 U.S. at 105.

<sup>33</sup> "Yet even if the . . . agreement clears all federal hurdles, the States by reason of § 14 (b) have the final say and may outlaw it. There is thus conflict between state and federal law; but it is a conflict sanctioned by Congress with directions to give the right of way to state laws . . ." *Id.* at 102-03.

<sup>34</sup> The union had taken the position that the execution or application of a union-security agreement in violation of a right-to-work law is arguably an unfair labor practice under the NLRA, and therefore only the NLRB may afford relief. 375 U.S. at 103. The argument assumes that the only effect of § 14 (b) is to remove the protection of the § 8 (a) (3) proviso in right-to-work states, with the result that the conditioning of

Having already found in *Schermerhorn I* that section 14 (b) subjected the agreement in question to state substantive law,<sup>35</sup> the conclusion that Congress must have intended that the states have jurisdiction to enforce the prohibitions of local law was practically irresistible. To have concluded otherwise would give credence to the somewhat startling proposition that preemption demands greater uniformity in the area of union-security, section 14 (b) notwithstanding, than in the general field of labor relations. It would have also meant that the Labor Board is required to effectuate the diverse policies reflected in the complex pattern of right-to-work legislation. Thus, by way of analogy, the Court reinforced the principle of non-uniformity in section 14 (b) by reaffirming its previous holding in *Algoma Plywood & Veneer Company v. Wisconsin Employment Relations Board*,<sup>36</sup> to the effect that a state may reinstate with back pay an employee discharged pursuant to a collective agreement which violates a local union-security law.

The effect of the *Schermerhorn* litigation is to confirm that section 14 (b) shelters state right-to-work laws from the full impact of preemption. The facts of that case, however, afforded the Supreme Court little more than an opportunity to sketch the boundaries of the immunity in broad outline. The controlling factor was the existence of a written union-security agreement which by its terms was subject to state prohibition. Absent such an agreement, conduct arguably proscribed by the NLRA, even though involving union-security, would be a matter exclusively for the Labor Board under standard preemption doctrine.<sup>37</sup> This result obtains because the regulatory scheme designed by Congress contemplates that "state power, recognized by § 14 (b), begins *only with actual negotiation and execution of the type of agreement described by § 14(b)*."<sup>38</sup> Thus, activities occurring prior to actual execution of a union-security agreement, whether or not they violate a right-to-work law, lie exclusively in the federal domain.

It should be apparent at this point that the effectiveness of a

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employment upon membership is an unfair labor practice under §§ 8 (a) (1), 8 (a) (3), and 8 (b) (2). The Court rejected the argument on the basis of the wording and legislative history of § 14 (b). 375 U.S. at 103. The incorporation of § 14 (b) into § 8 (a) (3) is urged in 17 STAN. L. REV. 158 (1964).

<sup>35</sup> See notes 82-83 *infra* and accompanying text.

<sup>36</sup> 336 U.S. 301 (1949).

<sup>37</sup> 375 U.S. at 105.

<sup>38</sup> *Id.* (emphasis in original).

labor policy of union-security is in large measure dependent upon the manner in which state courts reconcile preemption doctrine with state enforcement powers claiming legitimacy under section 14 (b). Although *Schermerhorn II* does recognize state jurisdiction in a situation where, absent section 14 (b), preemption would control, it should be emphasized that the decision is in fact authority for an extremely narrow breach in the wall of preemption. More importantly, it must be recognized that *Schermerhorn II* does not purport to chart a dividing line between federal and state power which will resolve all questions arising from right-to-work laws.<sup>39</sup> Unless the distribution of union-security power is understood and accepted, a duplication and conflict of remedies will result. But even assuming that controlling legal principles can be further clarified, there still remain a number of practical impediments to the orderly implementation of the concept of concurrent jurisdiction reflected in section 14 (b). To these matters, which crystallize the critical role of state courts, we now turn.

#### FEDERALISM AND THE REALITIES OF SECTION 14 (b)

Underlying the theory of preemption in the labor field is the basic assumption that courts are ill-equipped to engage in an ad hoc inquiry into the precise nature and degree of federal-state conflict in each labor dispute. Thus, as *Garmon* made clear, the function of preemption is to delimit "areas of potential conflict" by dealing with "classes of situations" rather than to attempt to balance relative interests in the circumstances of a given case.<sup>40</sup> As a matter of mechanics, the "arguably subject" test simply reflects the judgment that it is desirable to leave to the National Labor Relations Board initial determination of the status of doubtful conduct under federal law. Aside from the stated ground rules of preemption, however, the sheer proximity of a state court to a labor dispute has always entailed the risk that local courts will assert the power to categorize activity on the merits in order to decide whether they have jurisdiction.<sup>41</sup> If

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<sup>39</sup> The Supreme Court has decided only one preemption case involving right-to-work issues since *Schermerhorn*, and on that occasion the Court failed to enlarge upon the limited nature of state power under § 14 (b). See note 101 *infra*.

<sup>40</sup> 359 U.S. at 242.

<sup>41</sup> See Hays, *State Courts and Federal Preemption*, 23 Mo. L. Rev. 373, 374-76 (1958). The risk of premature state action permeates the whole labor field. Even since *Garmon* there have been a substantial number of occasions on which state courts have acted with respect to conduct arguably subject to exclusive NLRB jurisdiction. *E.g.*, *Liner*

courts decide for themselves whether or not the subject matter of a lawsuit has been withdrawn from state concern, as a practical matter they are resolving the question of preemption in the first instance.

When the assertion of state jurisdiction is grounded on a right-to-work law, the preemptive rule of self-restraint operates in a somewhat different fashion. The *Schermerhorn* litigation illustrates the point. The highest court of Florida ruled that its courts could deal with the question of the status of an agency shop clause under section 14 (b) without prior Board action.<sup>42</sup> Although the opinion of the United States Supreme Court articulated express limitations on the permissible area of state jurisdiction, inherent in the actual holding of *Schermerhorn I* is the proposition that a state court may initially determine whether a particular union-security agreement complies with state substantive law enacted pursuant to section 14 (b).<sup>43</sup> Moreover, if the agreement is found to violate state law, *Schermerhorn II* in effect says that a local court is empowered to enforce the law and afford a remedy for the violation. It follows that where section 14 (b) is concerned, the power of a state court to initially assess activity relating to union-security arrangements is not confined to the "arguably subject" standard of *Garmon*. Even

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v. *Jafco, Inc.*, 375 U.S. 301 (1964). In the right-to-work area, courts have frequently adjudicated a labor controversy in the face of preemption argument. *E.g.*, *Carpenters Local 225 v. Briggs*, 218 Ga. 742, 130 S.E.2d 707 (1963). The temptation to explore the question of actual conflict between federal and state law is apparently difficult to resist. *See, e.g.*, *Kimbrell v. Jolog Sportswear, Inc.*, 239 S.C. 415, 123 S.E.2d 524 (1962). The approach which results in hasty state action is suggested by the following statement: "When a suit upon a matter of labor relations is brought in a state court and the court's jurisdiction is denied, the court must determine the question for itself. It cannot stop and refer the question to the board . . ." *Farnsworth & Chambers Co. v. Electrical Workers Local 429*, 201 Tenn. 329, 334, 229 S.W.2d 8, 10, *rev'd per curiam*, 353 U.S. 969 (1957). For a clear statement of the procedure to be followed with respect to the preemption defense see *Mitcham v. Ark-La. Constr. Co.*, 239 Ark. 1162, 397 S.W.2d 789 (1965).

<sup>42</sup> *Schermerhorn v. Retail Clerks Local 1625*, 141 So. 2d 269 (Fla. 1962). The preemption argument was made in the trial court, but the action was dismissed on the ground that the agreement on its face was not in conflict with the right-to-work law. *Schermerhorn v. Retail Clerks Local 1625*, 47 L.R.R.M. 2300 (Fla. Cir. Ct. 1960). The preemption argument was renewed in the Florida Supreme Court, but expressly rejected. 141 So. 2d at 274-75.

<sup>43</sup> Although the Supreme Court held that the legality of the clause in question "is governed by the decision of the Florida Supreme Court under review here," 373 U.S. at 757, the Court did concede that "in all probability the preemption issue was entitled to different treatment than it received in the Florida courts . . ." *Id.* at 755. The Court did not press the issue since, in the interim, both the Court and the Board had taken positions on the status of an agency shop under § 14 (b) consistent with the disposition made by the Florida Supreme Court. 373 U.S. at 755-57.

though the arrangement is clearly or potentially subject to federal law, the states may apparently decide for themselves whether section 14 (b) subordinates federal law to local policy.

The enlargement of state power to assess union-security arrangements facilitates the application of state law in situations not contemplated by section 14 (b). Where commerce is affected, state jurisdiction is solely dependent upon this section of the NLRA. It should not be surprising, then, that the state decisions reveal a tendency to lift section 14 (b) from its federal context, isolate it from preemption doctrine, and pursue primarily the question whether the conduct at hand is governed by the letter or spirit of local law.<sup>44</sup> Preoccupation with the fact that Congress left the states free to legislate with respect to union-security tends to obscure the total framework of federal law.<sup>45</sup> As a result, the attention of a state court is likely to be diverted from the threshold issue of whether conduct falls within a preempted category, section 14 (b) notwithstanding. That this risk is more than theoretical is evidenced by state decisions which fail even to reach the preemption issue,<sup>46</sup> or do so only after establishing a basis for state jurisdiction.<sup>47</sup> Aside from the sound-

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<sup>44</sup>The importance placed on the issue of whether conduct actually violates right-to-work policy is evidenced by the extensive treatment it receives in many state court opinions as compared to the preemption issue. See, e.g., *Minor v. Building & Constr. Trades Council*, 75 N.W.2d 139 (N.D. 1956) (one of the earlier cases raising preemption in a right-to-work setting). See also *Alabama Highway Express, Inc. v. Teamsters Local 612*, 268 Ala. 392, 399-400, 108 So. 2d 350, 356-57 (1959); *Taylor v. Engineers Local 101*, 189 Kan. 137, 368 P.2d 8 (1962); *J.A. Jones Constr. Co. v. Electrical Workers Local 755*, 246 N.C. 481, 98 S.E.2d 852 (1957); *Texas State Fed'n of Labor v. Brown & Root, Inc.*, 246 S.W.2d 938 (Tex. Civ. App. 1952).

<sup>45</sup>In *Scherer & Sons, Inc. v. Ladies' Garment Workers Local 415*, 142 So. 2d 290, 295 (Fla. 1962), the court alluded to the preemption problem, but dismissed it with the following statement: "In the area of protecting state policy under right-to-work provisions the Congress has expressly ceded initial jurisdiction to the states." Cf. *Mitcham v. Ark-La. Constr. Co.*, 239 Ark. 1162, 1175-77, 397 S.W.2d 789, 796-97 (1965) (dissenting opinion).

<sup>46</sup>For example, in *Branham v. Miller Elec. Co.*, 237 S.C. 540, 118 S.E.2d 167 (1961), the preemption argument was raised in the trial court, but the action was dismissed on another ground. The state supreme court reversed upon finding the complaint stated a violation of a right-to-work act, but refused to consider the issue of exclusive federal jurisdiction because it had not been passed on below. The treatment of the issue of jurisdiction on a motion for a temporary restraining order under a right-to-work law is illustrated in *Houston Chapter, Associated Gen. Contractors of America, Inc. v. Hod Carriers Local 18*, 49 L.R.R.M. 2187 (Tex. Dist. Ct. 1961). Compare *NLRB v. Houston Chapter, Associated Gen. Contractors of America, Inc.*, 349 F.2d 449 (5th Cir. 1965), cert. denied, 382 U.S. 1026 (1966).

<sup>47</sup>See, e.g., *J.A. Jones Constr. Co. v. Electrical Workers Local 755*, 246 N.C. 481, 98 S.E.2d 852 (1957); *Kimbrell v. Jolog Sportswear, Inc.*, 239 S.C. 415, 123 S.E.2d 524 (1962); *Pruitt v. Lambert*, 41 L.R.R.M. 2369 (Tenn. Ch. 1957).

ness of such determinations, the opportunities for effectuation of right-to-work policy at the earliest stages of a labor controversy are indeed real.<sup>48</sup> And since a right-to-work dispute rarely begins in any tribunal other than a state court, the cumulative impact of state decisions on the issue of who should regulate is considerable.

On the one hand, the *Schermerhorn* formula prescribes a limited range of competence within which a state court may decide to intervene in a labor dispute on the basis of a right-to-work law.<sup>49</sup> On the other hand, the content of right-to-work legislation pulls in the opposite direction without regard to the limited phrasing of section 14(b), or the narrow construction placed on that section by the Supreme Court. In terms, section 14(b) authorizes the states to prohibit "the execution or application of agreements requiring membership in a labor organization as a condition of employment."<sup>50</sup> Yet a reading of the various right-to-work laws compels the conclusion that the states have used the authority conferred by this section to make labor policy that reaches far beyond the mere prohibition of membership agreements.<sup>51</sup> In fact, the subject of agreement would

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<sup>48</sup> The timing of state intervention is significant because injunctive relief is frequently sought in right-to-work cases. As one commentator has observed, "even the temporary quelling of concerted activity may have a conclusive practical effect on the denouement of a labor dispute, an effect which cannot be corrected by a subsequent discovery that the sanction was erroneously imposed." Michelman, *supra* note 7, at 649.

<sup>49</sup> State jurisdiction, recognized by § 14(b), "begins *only with actual negotiation and execution*" of the type of agreement described therein. 375 U.S. at 105 (emphasis in original).

<sup>50</sup> 29 U.S.C. § 164(b) (1964). Most right-to-work statutes are applicable to instances of discrimination on account of union membership as well as non-membership. *See, e.g., Willard v. Huffman*, 250 N.C. 396, 109 S.E.2d 233, *cert. denied*, 361 U.S. 893 (1959), which sustains a damage award for a discharge resulting from a failure to abstain from union organizational activities.

<sup>51</sup> See notes 55-57 *infra* and accompanying text. The degree to which a right-to-work law regulates labor relations as such is indicated by provisions which appear to make individual bargaining superior to collective bargaining. *E.g., ARK. STAT. ANN. § 81-201* (1960) provides: "Freedom of organized labor to bargain collectively, and freedom of unorganized labor to bargain individually is declared to be the public policy of the State . . ." The Texas act declares that the "inherent right of a person to work and bargain freely with his employer, individually or collectively, for terms and conditions of his employment shall not be denied or infringed by law, or by any organization of whatever nature." *TEX. CIV. STAT. ANN. art. 5207a(1)* (1962). The federal principle of exclusiveness of a bargaining agent is also put in doubt in states with laws stating that "[t]he right of persons to work shall not be denied or abridged on account" of union membership, and then declaring that "all contracts in negotiation or abrogation of such rights" are illegal. *N.D. CENT. CODE § 34-01-14* (1960). One court, construing the word "abridged" to mean "diminished, reduced, curtailed or shortened," has held an exclusive recognition clause in a collective agreement to violate a right-to-work

appear to operate as merely a point of departure for the supervision of a wide range of labor practices.<sup>52</sup> A recurring pattern in the statutes is to phrase prohibitions in such broad and vague terms that almost any practice inconsistent with right-to-work policy is covered.<sup>53</sup> A common provision, for example, outlaws any "combination" whereby a union acquires an "employment monopoly."<sup>54</sup> A further technique is to insert clauses which expressly regulate the organizational activities of unions<sup>55</sup> and the use of the strike and boycott weapons<sup>56</sup> without regard to the framing of section 14 (b) in terms of "agreements." The extent to which right-to-work laws attempt to insulate employment from union influence is demon-

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law. *Piegts v. Amalgamated Meat Cutters*, 228 La. 131, 81 So. 2d 835 (1955). Such vague provisions as those contained in the above mentioned North Dakota act potentially conflict with federal legislation at various points, such as the § 8 (e) restrictions and exemptions relating to "hot-cargo" agreements added by the LMRDA amendments, 29 U.S.C. § 158 (c) (1964). With respect to hot cargo agreements, at least one right-to-work law contains express restrictions. S.C. CODE ANN. § 40-46.6 (1) (1962).

<sup>52</sup> The checkoff, for example, is usually regarded as a form of union-security even though, standing alone, it does not typically condition employment upon membership. Yet right-to-work statutes frequently regulate checkoff arrangements in ways more restrictive than federal law. *E.g.*, GA. CODE ANN. § 54-906 (1961); IOWA CODE ANN. § 736A.5 (1950); *cf.* National Labor Relations Act § 302 (c) (4), 29 U.S.C. § 186 (c) (4) (1964). Checkoff clauses have been held unenforceable under a right-to-work law. *E.g.*, *United Steelworkers Union v. Knoxville Iron Co.*, 162 F. Supp. 366 (E.D. Tenn. 1958).

<sup>53</sup> In order to conclusively outlaw union-security arrangements, the South Dakota act states that: "Any agreement relating to employment . . . which by its stated terms, or by implication, interpretation, or effect thereof, directly or indirectly denies, abridges, interferes with, or in any manner curtails the free exercise of the right to work . . ." is a violation. S.D. CODE § 17.1101 (2) (Supp. 1960). Any "understanding or practice which is designed to cause or require, or has the effect of causing or requiring" a violation of the right-to-work act is illegal. UTAH CODE ANN. § 34-16-5 (1966). The phrase "illegal conspiracy against public policy" frequently appears in such laws. *E.g.*, MISS. CODE ANN. § 6984.5 (b) (Supp. 1966).

<sup>54</sup> *E.g.*, ALA. CODE tit. 26, § 375 (2) (1958). This clause has proved highly flexible in reaching union activities. *See, e.g.*, *Branham v. Miller Elec. Co.*, 237 S.C. 540, 118 S.E.2d 167 (1961).

<sup>55</sup> "It shall be unlawful . . . to compel or force, or to attempt to compel or force, any person to join or refrain from joining any labor union. . . ." UTAH CODE ANN. § 34-16-7 (1953). "Any solicitation or request to join a labor organization . . . accompanied by threats of injury . . . , or damage to property, or loss or impairment of present or future employment of such employee, shall be deemed a violation of this section . . ." S.D. CODE § 17.1101 (4) (Supp. 1960).

<sup>56</sup> For example, the Nevada act, without mentioning an agreement conditioning employment upon membership, in one section provides: "It shall be unlawful . . . to compel or attempt to compel any person . . . to strike against his will or to leave his employment by any threatened or actual interference with his person, immediate family or property." NEV. REV. STAT. § 613.270 (Supp. 1965). Arizona has a nearly identical provision. ARIZ. REV. STAT. ANN. § 23-1304 (1956). The South Carolina statute contains broad restrictions on union economic weapons. S.C. CODE ANN. § 40-46.6 (1962).



strated by a clause which declares illegal the requirement that an employee "have any connection with" a union as a condition of employment.<sup>57</sup>

The protracted reach of right-to-work legislation creates a series of obstacles to enlightened administration of labor law on the local level. To begin with, the concept of right-to-work is in many respects inconsistent with the principles of free choice, majority rule, and exclusive representation upon which the federal philosophy of labor relations is constructed.<sup>58</sup> The organization of employees, even on the basis of the political principle of majority support, obviously restricts the freedom of the individual worker.<sup>59</sup> Nevertheless, national policy reconciles group and individual interests on the theory that self-organization promotes private adjustment of the labor-management relation through orderly collective bargaining.<sup>60</sup> A right-to-work act runs counter to this objective in that it seeks, in absolute terms, to clear away every restriction which collectivism imposes upon individual choice.<sup>61</sup> Hence when state legislatures

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<sup>57</sup> "No person is required to have any connection with, or be recommended or approved by, or be cleared through, any labor organization as a condition of employment or continuation of employment." WYO. STAT. ANN. § 27-245.5 (Supp. 1965). The Supreme Court of Wyoming, reasoning that a bargaining agent must necessarily have some "connection" with non-union employees in the unit, has struck down this section as conflicting with the exclusive representation provisions of § 9(a) of the NLRA. *Electrical Workers Local 415 v. Hanson*, 400 P.2d 531 (Wyo. 1965).

<sup>58</sup> "National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions. The policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees." *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967).

<sup>59</sup> It should be noted that the exclusive bargaining agent's statutory authority to represent all workers in the unit does carry with it a statutory obligation to fairly represent the interests of non-members as well as members. See *Syres v. Local 23, Oil Workers*, 350 U.S. 892, *rev'g per curiam* 223 F.2d 739 (5th Cir. 1955); *Steele v. Louisville & N. R.R.*, 323 U.S. 192 (1944). Although a union's breach of its duty of fair representation constitutes an unfair labor practice under § 8(b), *United Rubber Workers v. NLRB*, 368 F.2d 12 (5th Cir. 1966), *cert. denied*, 36 U.S.L.W. 3144 (U.S. Oct. 10, 1967) (No. 194); *Miranda Fuel Co.*, 140 N.L.R.B. 181 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963); Note, 1967 DUKE L.J. 1037, preemption doctrine does not defeat state power to adjudicate fair representation matters. See *Vaca v. Sipes*, 386 U.S. 171 (1967).

<sup>60</sup> See the congressional statement of findings and declaration of policy contained in the preamble of the NLRA, 29 U.S.C. § 151 (1964); *cf. J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944).

<sup>61</sup> Since a right-to-work act restricts the freedom of a majority union and an employer to negotiate a union-security agreement as a part of the collective bargaining

exercise the authority granted by section 14 (b) to regulate labor activities ranging beyond membership agreements, the chances of conflict between already conflicting policies are markedly intensified.

The effects of unwarranted statutory breadth are readily apparent in right-to-work decisional law. Since state judges are accustomed to disposing of disputes in accordance with local law, the mere existence of a state statutory provision covering the case at hand, coupled with a concession of its violation, may be sufficient to tip the scales against the preemption argument.<sup>62</sup> Federal labor statutes afford little guidance either as to the nature of state power or the standards to be used in determining whether it is applicable. If a judge turns to state law, the sweeping pronouncements of public policy contained in a right-to-work act have substantial appeal.<sup>63</sup> The failure of such legislation to be explicit about jurisdictional limitations would also appear to reduce the persuasiveness of preemption defenses.<sup>64</sup> Jurisdictional issues are not easily separated from the merits of a labor dispute. Substantive standards of conduct, especially when legislatively declared in strong language, create a hostile environment for the argument that a state may not apply those standards where they are clearly violated.<sup>65</sup>

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process, the practical effect is to curtail the exercise of rights which §7 purports to further in the national interest. It has been argued that this basic inconsistency in philosophy cannot be defended on the basis of an overriding state interest. See Cox, *Federalism in the Law of Labor Relations*, 67 HARV. L. REV. 1297, 1334-39 (1954); Wellington, *supra* note 25, at 548-49.

<sup>62</sup> There is much evidence in the cases that a finding of a violation of state law is given substantial weight in determining the issue of jurisdiction. See cases cited note 44 *supra*.

<sup>63</sup> See, for example, the discussion of the "high policy" of a "sovereign state" in *Hattiesburg Bldg. & Trades Council v. Broome*, 247 Miss. 458, 489-94, 153 So. 2d 695, 709-11, *rev'd per curiam*, 377 U.S. 126 (1963).

<sup>64</sup> Right-to-work laws generally fail to even faintly suggest that they might be inapplicable where commerce makes federal law controlling. The following provision in the Arizona act illustrates the all-inclusive approach of such laws: "Any act or any provision in any agreement which is in violation of this Act shall be illegal and void." ARIZ. REV. STAT. ANN. § 23-1303 (A) (1956). The prohibitions of the Wyoming act are declared applicable "notwithstanding any other law to the contrary." WYO. STAT. ANN. § 27-245.7 (Supp. 1965).

<sup>65</sup> The simple fact that a right-to-work law frequently appears as a constitutional provision, or in a statute pitched in terms of constitutional guarantees of due process, would appear to encourage state enforcement in the face of doubtful jurisdiction. After exploring several possible bases of jurisdiction, one court concluded that "the Kansas courts should have jurisdiction over the present case . . . as a means of enforcing the state constitution if for no other reason . . ." *Taylor v. Engineers Local 101*, 189 Kan. 137, 143, 368 P.2d 8, 12 (1962); cf. *Kitchens v. Doe*, 194 So. 2d 258, 259-60 (Fla. 1966) (dissenting opinion).

The difficulties of perceiving the role of section 14 (b) in a world of subordinating federal authority can by no means be attributed solely to the excesses of legislative draftsmanship. The judiciary has also demonstrated considerable reluctance to surrender the means of controlling union economic power supplied by a right-to-work law.<sup>66</sup> This attitude is reflected in decisions which read section 14 (b) as leaving to the states exclusive and unfettered power to act in union-security matters,<sup>67</sup> as well as decisions which sustain state jurisdiction by purporting to distinguish preemption precedents on grounds which are in fact insignificant or illusory.<sup>68</sup> Further evidence of a disposition to prefer right-to-work policy can be seen in decisions which seek to enlarge federally recognized exceptions to preemption.<sup>69</sup> Resistance to preemption may also in part explain the relatively large number of right-to-work injunctions issued by trial courts.<sup>70</sup> A number of appellate court judges have openly confessed that they do not subscribe to the view that a state is wholly without

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<sup>66</sup> An interesting subject of speculation in the right-to-work area is whether employers have experienced relatively greater success than unions in raising the preemption defense. Compare *Burris v. Electro Motive Mfg. Co.*, 247 S.C. 579, 148 S.E.2d 687 (1966), with *Branham v. Miller Elec. Co.*, 237 S.C. 540, 118 S.E.2d 167 (1961), and *Friendly Soc'y of Engravers v. Calico Engraving Co.*, 238 F.2d 521 (4th Cir. 1956), cert. denied, 353 U.S. 935 (1957). See also *Collins v. Merritt-Chapman & Scott*, 91 Ga. App. 856, 87 S.E.2d 337 (1955).

<sup>67</sup> E.g., *Mitcham v. Ark-La. Constr. Co.*, 239 Ark. 1162, 1175-77, 397 S.W.2d 789, 796-97 (1965) (dissenting opinion); *Scherer & Sons v. Ladies' Garment Workers' Local 415*, 142 So. 2d 290 (Fla. 1962); *Pruitt v. Lambert*, 201 Tenn. 291, 298 S.E.2d 795 (1957); cases cited note 44 *supra*.

<sup>68</sup> E.g., *Sheet Metal Workers Ass'n v. Nichols*, 89 Ariz. 187, 360 P.2d 204 (1961); *Machinists Local 924 v. Goff-McNair Motor Co.*, 223 Ark. 30, 264 S.W.2d 48 (1954); *Taylor v. Engineers Local 101*, 189 Kan. 137, 368 P.2d 8 (1962); *Hattiesburg Bldg. & Trades Council v. Broome*, 247 Miss. 458, 153 So. 2d 695, *rev'd per curiam*, 377 U.S. 126 (1963).

<sup>69</sup> E.g., *Kimbrell v. Jolog Sportswear, Inc.*, 239 S.C. 415, 123 S.E.2d 524 (1962); *Farusworth & Chambers Co. v. Electrical Workers Local 429*, 201 Tenn. 329, 299 S.W.2d 8, *rev'd per curiam*, 353 U.S. 969 (1957).

<sup>70</sup> The granting of injunctions in right-to-work cases within NLRB jurisdiction, so prevalent in earlier years, has not ceased since the Supreme Court clarified state power in *Schemmerhorn*. See *Hodcarriers Local 1282 v. Cone-Huddleston, Inc.*, 241 Ark. 140, 406 S.W.2d 366 (1966); *Mitcham v. Ark-La. Constr. Co.*, 239 Ark. 1162, 397 S.W.2d 789 (1965). Even where an injunction is denied in the trial court on preemption grounds, a considerable number of appellate courts have given controlling importance to right-to-work policy. See *Alabama Highway Express, Inc. v. Teamsters Local 612*, 268 Ala. 392, 108 So. 2d 350 (1959); *Hescom, Inc. v. Stalvey*, 155 So. 2d 3 (Fla. Dist. Ct. App. 1963). With respect to the general labor field, one commentator has observed: "[A]dding up the effects of ignorance and misunderstanding of the preemption doctrine, and what in some cases seems to be a deliberate determination to grant injunctions in spite of it, there is still, in practice, a large body of labor activity which is subjected to state power." *Hays, supra* note 41, at 382.

authority to vindicate interests embodied in local law.<sup>71</sup> Indeed, the simplified test of state power set forth by the Supreme Court in *Schermerhorn II*, and the limited sphere of state jurisdiction which it produces, may be a direct attempt to counter the lack of sympathy with preemption evidenced by state courts. The Court on at least one occasion in recent years has strained its appellate jurisdiction in order to deal with a right-to-work decision rendered in defiance of preemption doctrine.<sup>72</sup>

If in fact the states are disposed to employ right-to-work statutes as a vehicle for softening the impact of federal control, it becomes increasingly important that Congress and the Supreme Court establish firm guidelines for the exercise of state power. The purpose of Congress is reputed to be the "ultimate touchstone" in arriving at a decision to preempt or not.<sup>73</sup> Nevertheless, in light of the fact that the Taft-Hartley Act was enacted at a time when the seeds of preemption had only begun to take root, it cannot seriously be urged that Congress foresaw the variety of jurisdictional problems that have arisen under section 14 (b) as a result of the vigorous application of federal law.<sup>74</sup> The phrasing of this section, read in connection with its legislative history, does, however, afford some valuable guidance.

Because the first proviso to section 8 (a) (3) of the NLRA expressly validates agreements conditioning employment upon union membership,<sup>75</sup> it was necessary that Congress add section 14 (b) in order to achieve even the limited objective of permitting the states to touch the subject of compulsory unionism in plants in commerce.<sup>76</sup> As

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<sup>71</sup> See *Mitcham v. Ark-La. Constr. Co.*, 239 Ark. 1162, 1174, 397 S.W.2d 789, 795 (1965) (dissenting opinion). At least one state supreme court judge has taken the position that *Schermerhorn* contains little logic and is primarily dictum. *Kitchens v. Doe*, 194 So. 2d 258, 259-60 (Fla. 1967) (dissenting opinion).

<sup>72</sup> In *Construction Local 438 v. Curry*, 371 U.S. 542 (1963), the Court reviewed a state order directing the issuance of a temporary injunction on the theory that, under the particular circumstances, the temporary order was equivalent to a final order. See notes 143-46 *infra* and accompanying text.

<sup>73</sup> 375 U.S. at 103. The inference that Congress intended exclusive NLRB jurisdiction to lie is usually drawn on the basis of the nature of the particular interests being asserted and "the effect upon the the administration of national labor policies of concurrent judicial and administrative remedies." *Vaca v. Sipes*, 386 U.S. 171, 180 (1967).

<sup>74</sup> The Court in *Garmon* observed that many preemption problems "could not have been, at all events were not, foreseen by the Congress. Others were only dimly perceived and their precise scope only vaguely defined." 359 U.S. at 240.

<sup>75</sup> Section 7 also contains an exemption for membership agreements "as authorized in section 8 (a) (3)." 29 U.S.C. § 157 (1964).

<sup>76</sup> The House Report on the section that eventually became § 14 (b) makes it clear

far as federal law was concerned, Congress was willing to accept a compromise philosophy of union-security which outlawed the most serious abuse of compulsory unionism, the closed shop, yet preserved union-security to the extent of permitting arrangements which condition employment upon financial support of the bargaining agent.<sup>77</sup> The statutory pattern followed by Congress suggests that its primary concern in section 14 (b) was to make clear that the states were not obligated to accept even the limited form of compulsory unionism preserved in federal law. Rather, the states were given the option to decide for themselves whether the federal solution was palatable as a matter of policy. This analysis is supported by the manner in which Congress addressed section 14 (b) to the permissive language of the section 8 (a) (3) proviso.<sup>78</sup> Congress simply invited the states, if they so desired, to enact provisions more restrictive of union-security than federal law.

It should be clear, therefore, that the federal standards embodied in section 8 (a) (3) are highly relevant to a determination of the nature of state power contemplated by section 14 (b). An "agency shop" clause—one that requires as a condition of continued employment that non-members pay to a union sums equal to fees and dues paid by union members—has proved a useful device for exploring the connection between the two sections. Until 1963 it was unclear whether the payment of initiation fees and monthly dues in lieu of actually joining the union constituted "membership" within the section 8 (a) (3) proviso.<sup>79</sup> The Supreme Court, in *NLRB v. Gen-*

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that Congress was aware that its regulation of union-security agreements might be understood to put such matters beyond state control: "Since by the Labor Act Congress preempts the field that the act covers insofar as commerce . . . is concerned, and since when this report is written the courts have not finally ruled upon the effect . . . of State laws dealing with compulsory unionism, the committee has provided expressly . . . that laws . . . of any State that restrict the right of employers to require employees to become or remain members of labor organizations are valid, notwithstanding any provision of the National Labor Relations Act." H.R. REP. No. 245, 80th Cong., 1st Sess. 44 (1947). See also H.R. REP. No. 510, 80th Cong., 1st Sess. (1947).

<sup>77</sup> See the review of relevant legislative history in *Radio Officers' Union v. NLRB*, 347 U.S. 17, 40-41 (1954), and *NLRB v. General Motors Corp.*, 373 U.S. 734, 740-43 (1963). See also note 19 *supra*.

<sup>78</sup> See generally Smith, *The Taft-Hartley Act and State Jurisdiction Over Labor Relations*, 46 MICH. L. REV. 593, 598-99 (1948).

<sup>79</sup> The NLRB has never subscribed to the view that Congress intended the § 8 (a) (3) proviso to validate only the union shop. Rather, the Board has read the proviso as protecting lesser forms of union-security. *American Seating Co.*, 98 N.L.R.B. 800 (1952); *Public Serv. Co.*, 89 N.L.R.B. 418 (1950).

eral Motors Corporation,<sup>80</sup> answered the question in the affirmative, reasoning that the conditioning of employment upon the payment of dues and fees is the "practical equivalent" of "membership" within the meaning of the proviso to section 8 (a) (3).<sup>81</sup> At the same term, the Court went the next step in *Schermerhorn I*, and held that an agency shop agreement is within the scope of section 14 (b) and therefore subject to prohibition by a state right-to-work law.<sup>82</sup> The rationale of the decision was simply that "the agreements requiring 'membership' in a labor union which are expressly permitted by the proviso are the same 'membership' agreements expressly placed within the reach of state law by § 14 (b)."<sup>83</sup>

On the surface, the broad principles set out in *General Motors* and *Schermerhorn I* would appear to operate as a major limitation on state power to regulate union-security; *i.e.*, section 14 (b) subjects to state law only those agreements, or their equivalent, which are permitted by section 8 (a) (3). One obvious consequence of this test is that state courts, in determining whether a right-to-work law is applicable, are to be guided by federal standards. The state decisions to date, however, strongly suggest that primary importance has been given to internal standards when preemption is raised in the context of a right-to-work law.<sup>84</sup> So long as right-to-work acts retain their present form, attempts to apply such legislation in accordance with federal criteria are likely to result in frequent instances of improper state action and, consequently, a waste of judicial resources.

The practical implications of a failure to evaluate section 14 (b) in its federal setting can be demonstrated in connection with hiring

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<sup>80</sup> 373 U.S. 734 (1963).

<sup>81</sup> *Id.* at 743. This result was predictable in light of the Court's earlier indication that forms of union-security other than the closed shop were congressionally included in the predecessor to the § 8 (a) (3) proviso. *Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Bd.*, 336 U.S. 301, 307 (1949).

<sup>82</sup> 373 U.S. at 746. A number of states had previously construed right-to-work laws to prohibit agency shop clauses. The authorities are collected in *Electric Ry. Employees, Division 1225 v. Las Vegas-Tonopah-Reno Stage Line, Inc.*, 202 F. Supp. 726 (D. Nev. 1962), *aff'd*, 319 F.2d 783 (9th Cir. 1963). One of the best state discussions of the issue appears in *Higgins v. Cardinal Mfg. Co.*, 188 Kan. 11, 360 P.2d 456, *cert. denied*, 368 U.S. 829 (1961). See also *Meade Elec. Co. v. Hagberg*, 129 Ind. App. 631, 159 N.E.2d 408 (1959).

<sup>83</sup> 373 U.S. at 751. For a discussion of the types of agreements, in addition to the union shop and the agency shop, which are encompassed within § 14 (b) see Grodin & Beeson, *State Right-to-Work Laws and Federal Labor Policy*, 52 CALIF. L. REV. 95, 100-06 (1964).

<sup>84</sup> See notes 44-47 *supra* and accompanying text.

hall arrangements. As a matter of federal law, a non-discriminatory hiring hall agreement—one that calls for referrals irrespective of union membership—is valid in the absence of evidence of actual discrimination in the operation of the hall.<sup>85</sup> Conversely, many right-to-work acts expressly or impliedly outlaw hiring halls without regard to whether they are in fact discriminatory.<sup>86</sup> For example, Arkansas prohibits the denial of employment for failure or refusal to “affiliate with” a union.<sup>87</sup> The courts of that state have held that a hiring hall agreement which makes a union the sole and exclusive source of referrals violates the statute on the ground that a non-union member who registers at the union hall is thereby required to “affiliate” with the union.<sup>88</sup> South Carolina would reach the same result on the theory that any attempt to affect employment through clearance or referral by a union necessarily contravenes right-to-work policy.<sup>89</sup>

The reasoning of these decisions is significant when assessed in conjunction with the proposition that section 14 (b) can prohibit only what the section 8 (a) (3) proviso allows. As a matter of federal law, the validity of a hiring hall agreement, non-discriminatory on its face, does not depend on compliance with the requirements of that proviso.<sup>90</sup> Thus it should be appreciated that state regulation of hiring halls in commerce amounts to a bold enlargement of section 14 (b).

The first occasion for a federal court to consider the problem arose from the refusal of a multi-employer group to bargain about a hiring hall proposal. The employers took the position that such a clause was illegal under the Texas right-to-work law.<sup>91</sup> A state

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<sup>85</sup> *Teamsters Local 357 v. NLRB*, 365 U.S. 667 (1961).

<sup>86</sup> See, for example, the Wyoming provision on hiring halls set out in note 57 *supra*. As a practical matter, nearly every right-to-work act is phrased in sufficiently broad terms to encompass hiring hall arrangements.

<sup>87</sup> *ARK. STAT. ANN.* § 81-202 (1960).

<sup>88</sup> *Kaiser v. Price-Fewell, Inc.*, 235 Ark. 295, 359 S.W.2d 449 (1962), *cert. denied*, 371 U.S. 955 (1963). A proposal that a union will supply workmen “at the request” of a contractor apparently does not constitute “affiliation” within the meaning of the Arkansas statute. *Williams v. Arthur J. Arney Co.*, 240 Ark. 157, 398 S.W.2d 515 (1966).

<sup>89</sup> *Branham v. Miller Elec. Co.*, 237 S.C. 540, 118 S.E.2d 167 (1961). Other state courts have interpreted hiring hall proposals as designed to accomplish objectives forbidden by right-to-work policy. *E.g.*, *Building Trades Council v. Bonito*, 71 Nev. 84, 280 P.2d 295 (1955); *Sheet Metal Workers Local 175 v. Walker*, 236 S.W.2d 683 (Tex. Civ. App. 1951).

<sup>90</sup> Since a non-discriminatory hiring hall does not, by definition, require union membership as a condition of referral, and thus employment, it is not a form of union-security within the § 8 (a) (3) proviso.

<sup>91</sup> The Texas act prohibits the denial of employment “on account of membership

court found the proposed clause unlawful and enjoined a strike called by the union in support of its contract demands,<sup>92</sup> even though the case was clearly within the jurisdiction of the NLRB. The union thereupon filed with the Board a section 8 (a) (5) refusal-to-bargain charge, which was sustained on two theories: (1) federal law makes a non-discriminatory hiring hall a mandatory subject of bargaining, and (2) such an arrangement is not a form of union-security under the section 8 (a) (3) proviso, and hence is not subjected to state regulation by section 14 (b).<sup>93</sup>

The Court of Appeals for the Fifth Circuit affirmed the Board on both theories.<sup>94</sup> As to the second ground of decision, the court relied on the *General Motors* and *Schermerhorn* cases for the principle that section 14 (b) contemplates "only those forms of union security which are the practical equivalent of compulsory unionism."<sup>95</sup> Although the result reached is not exceptional,<sup>96</sup> a portion of the court's opinion typifies the confusion which surrounds this entire area. The analysis of the Fifth Circuit builds from the premise that the clause in question does not constitute compulsory unionism because actual union membership is not prescribed. Although the agreement by its very nature may encourage membership, the court reasoned that it still was not equivalent to compulsory unionism "so long as the arrangement is not employed in a discriminatory manner."<sup>97</sup> The inference is clear that if the agreement is administered in such a way as to discriminate against non-members, it would be practically equivalent to compulsory unionism. If so, it arguably follows that the green light is given state power under section 14 (b).

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or nonmembership" in a union and prohibits contracts which require "applicants for employment" to become or remain union members. TEX. REV. CIV. STAT. ANN. arts. 5207a (2), (3) (1962).

<sup>92</sup> The court issued a temporary restraining order pending final hearing. *Houston Chapter, Associated Gen. Contractors of America, Inc. v. Hod Carriers Local 18, 49 L.R.R.M. 2187* (Tex. Dist. Ct. 1961).

<sup>93</sup> *Houston Chapter, Associated Gen. Contractors of America, Inc., 143 N.L.R.B. 409* (1963).

<sup>94</sup> *NLRB v. Houston Chapter, Associated Gen. Contractors of America, Inc., 349 F.2d 449* (5th Cir.), cert. denied, 382 U.S. 1026 (1965).

<sup>95</sup> *Id.* at 453.

<sup>96</sup> The Ninth Circuit has subsequently held that a state right-to-work act cannot be so broadly construed as to regulate a non-discriminatory hiring hall proposal. *NLRB v. Tom Joyce Floors, Inc., 353 F.2d 768* (9th Cir. 1965). The decision turns on the general theory that a non-discriminatory referral arrangement, even though it contemplates a union as the exclusive referral agency, is not the type of agreement which was left to state regulation by virtue of § 14 (b). *Id.* at 771.

<sup>97</sup> 349 F.2d at 453.



Should this line of reasoning ever gain wide acceptance, state jurisdiction under section 14 (b) would be extended into areas subject to the exclusive remedial powers of the NLRB.<sup>98</sup> If the states attempt to duplicate NLRB jurisdiction, the basic purposes underlying the decision to avoid conflict by the creation of an expert administrative agency would be frustrated. That the potential for conflict is real is evidenced by the number and variety of occasions in which the states have drawn on a right-to-work law to regulate alleged discriminatory practices.<sup>99</sup> If the working rule is to be that the content of section 14 (b) is determined by reference to arrangements which are federally acceptable under the section 8 (a) (3) proviso, then perhaps the descriptive test of the "practical equivalent" of compulsory unionism is unfortunate in that it lends itself to expansive application.<sup>100</sup> Given the failure of right-to-work statutes to reflect the prevailing philosophy of federal-state labor relations, coupled with the slowness of state courts to adjust to preemption teachings, predictability in the handling of section 14 (b) requires that rules of general application be fairly precise.

#### PRE-AGREEMENT ACTIVITIES

A policy of concurrent right-to-work jurisdiction is subject to greatest stress in connection with concerted economic pressure, usually in the form of peaceful picketing, which is allegedly calculated to compel an employer to adopt employment policies contrary to local law. *Schermerhorn II* reaffirms the view that picketing to induce an employer to hire all-union labor is exclusively a federal

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<sup>98</sup> See notes 168-73 *infra* and accompanying text. The possibility that state intrusions into the area of NLRB jurisdiction can or will be corrected on appeal offers little assurance that the resulting harm to federal policy will in fact be undone. The record of state appellate courts in right-to-work cases subject to preemption reveals many inconsistencies. Case-by-case review by the Supreme Court is simply not feasible, and involves a fragmentary "rear guard" kind of process. See Gregory, *Federal or State Control of Concerted Union Activities*, 46 VA. L. REV. 539, 560-62 (1960).

<sup>99</sup> See Grodin & Beeson, *supra* note 83, at 107-08. Since right-to-work is essentially a problem of discrimination, and § 8 (a) (3) and § 8 (b) (2) are primarily concerned with discriminatory practices, conflict between federal and state law is inescapable.

<sup>100</sup> Difficulties in administering the *Schermerhorn I* test of state power may be encountered by reason of the broad language used by the Court to sustain a narrow exception to preemption doctrine. For example, the Court envisioned § 14 (b) as manifesting congressional intent to "abandon any search for uniformity" and to "suffer a medley of attitudes and philosophies" on the subject of union-security. 375 U.S. at 104-05. At another point the Court stated "we can only assume that it [Congress] intended to leave unaffected the power to enforce those laws." 375 U.S. at 102; *accord*, *Kitchens v. Doe*, 194 So. 2d 258, 260 (Fla. 1966) (dissenting opinion).

matter even though the activity clearly violates a right-to-work law.<sup>101</sup> Hence state courts are preempted of jurisdiction to enjoin such conduct under section 14 (b), or award damages for consequential harm,<sup>102</sup> but must defer to the primary jurisdiction of the NLRB. The denial of state power to regulate antecedent pressures has been criticized as being inconsistent with the policy and legislative history of section 14 (b).<sup>103</sup> Since that section in terms preserves state laws proscribing union-security agreements, it is argued that the grant of power is meaningless unless the states are free to deal with economic pressure designed to produce unlawful agreements.<sup>104</sup> Such criticism has merit only if the record of state regulation of concerted activity relating to union-security warrants a conclusion that dominant federal objectives can be realized when the states are free to apply their own laws to antecedent pressures.

The unevenness of state regulation of concerted employee activity stems primarily from a failure to grasp the idea that the involvement

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<sup>101</sup> Any thought that *Schermerhorn II* is merely dictum on the issue of state power to regulate picketing under § 14 (b) has subsequently been put to rest by the Court in *Hattiesburg Bldg. & Trades Council v. Broome Co.*, 377 U.S. 126 (1964). In that case picketing was employed to force a contractor to execute an agreement whereby only workers referred by defendant unions would be hired. The Supreme Court of Mississippi affirmed an injunction against the picketing on the ground it was designed to attain an objective forbidden by the right-to-work act. *Hattiesburg Bldg. & Trades Council v. Broome*, 247 Miss. 458, 153 So. 2d 695 (1963). The Supreme Court reversed, per curiam, on the theory that, since the union's activities were arguably an unfair labor practice, the state court had no jurisdiction under *Garmon*. The effect of the decision is that peaceful picketing designed to secure agreements violating right-to-work laws is placed beyond the reach of state cognizance.

<sup>102</sup> See note 121 *infra* and accompanying text.

<sup>103</sup> E.g., Meltzer, *The Supreme Court, Congress, and State Jurisdiction Over Labor Relations* (pts. I & II), 59 COLUM. L. REV. 6, 269 (1959). Rather than permitting the states to enjoin coercive picketing aimed at instituting a union-security agreement, it has been suggested that state courts should be permitted to award damages after the NLRB has determined that the picketing is an unfair labor practice. Michelman, *State Power to Govern Concerted Employee Activities*, 74 HARV. L. REV. 641, 679-80 (1961). The impact of a state damage remedy on national labor policy is discussed in Cox, *Labor Decisions of the Supreme Court at the October Term, 1957*, 44 VA. L. REV. 1057, 1064-69 (1958). A major consideration bearing on state power to award damages under right-to-work acts should be the heroic proportions of such verdicts. For example, in one case compensatory damages of \$15,000 and punitive damages of \$35,000 were awarded an employee who claimed he was denied employment by reason of compulsory unionism. *Sheet Metal Workers Union v. Nichols*, 89 Ariz. 187, 188, 360 P.2d 204, 205 (1961). The judgment was later reversed for failure to prove a conspiracy to affect his employment. *Id.* Another court awarded \$3177.84 actual and \$20,000 punitive damages. *Baumgartner's Elec. Constr. Co. v. DeVries*, 77 S.D. 273, 91 N.W.2d 663 (1958), *rev'd per curiam*, 359 U.S. 498 (1959).

<sup>104</sup> Comment, *Per Curiam Decisions of the Supreme Court: 1958 Term*, 27 U. CHI. L. REV. 128, 140-41 (1959); 49 MINN. L. REV. 307, 308-09 (1964).

of interstate commerce in a labor dispute operates as a major limitation upon the regulatory power made available to the states by section 14 (b). The confusion originates in a group of Supreme Court decisions which, as a matter of history, mark a retreat from the sweeping constitutional protections accorded peaceful picketing by the *Thornhill v. Alabama*<sup>105</sup> decision. Beginning with *Giboney v. Empire Storage & Ice Company*,<sup>106</sup> the Court over a number of years decided a series of cases which upheld the power of a state to enjoin peaceful picketing aimed at preventing effectuation of some state public policy announced by either the judiciary or the legislature.<sup>107</sup> Although set in the context of constitutional limitations upon state power to enjoin peaceful picketing, these decisions generally incorporated the broad "unlawful purpose" theory; *i.e.*, a state may enjoin labor conduct designed to accomplish a purpose declared unlawful by state law.<sup>108</sup> A right-to-work law was assimilated into this line of cases in *Local 10, Plumbers v. Graham*,<sup>109</sup> wherein the Court sustained an injunction against peaceful picketing on the ground that the fourteenth amendment does not preclude a state from enjoining conduct carried on "with at least one of its substantial purposes in conflict" with a right-to-work law.<sup>110</sup>

In reality, what this group of decisions really said was that the states may constitutionally regulate peaceful picketing in areas open to state regulation. Nevertheless, a considerable number of courts read these opinions as allowing the states wide discretion in the formulation and implementation of domestic labor policy. When the expression of public policy took the form of a right-to-work statute, the scope of which was seldom questioned because of the enabling effect of section 14 (b), the result was a flood of state decisions sustain-

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<sup>105</sup> *Thornhill v. Alabama*, 310 U.S. 88 (1940), is generally read as equating peaceful picketing to constitutional guarantees of free speech.

<sup>106</sup> 336 U.S. 490 (1949).

<sup>107</sup> *E.g.*, *Teamsters Local 695 v. Vogt, Inc.*, 354 U.S. 284 (1957); *Building Serv. Employees, Local 262 v. Gazzam*, 339 U.S. 532 (1950); *Teamsters Union v. Hanke*, 339 U.S. 470 (1950); *Hughes v. Superior Court*, 339 U.S. 460 (1950).

<sup>108</sup> The theory of an illegal or unlawful purpose has a long history in the common law of labor relations. *See Plant v. Woods*, 176 Mass. 492, 57 N.E. 1011 (1900). The application of the theory to right-to-work cases is illustrated in *Powers v. Courson*, 213 Ga. 20, 96 S.E.2d 577 (1957), and *Woodward v. Callier*, 210 Ga. 239, 78 S.E.2d 526 (1953).

<sup>109</sup> 345 U.S. 192 (1953).

<sup>110</sup> *Id.* at 201. The illegal objective of the picketing was found to be the elimination of non-union employees from a construction project. A work stoppage resulted when a single picket appeared with a sign reading "This is Not a Union Job." *Id.* at 195.

ing injunctions on a finding that the purpose of picketing was unlawful.<sup>111</sup> The critical point is that the line of Supreme Court authority followed by many of these injunction decisions did not involve the doctrine of preemption at all. Since interstate commerce was not involved in such cases as *Graham*, the issue of the preemptive effect of federal regulation of picketing was never raised,<sup>112</sup> although the process of foreclosing state regulation of the subject matter of labor relations was well underway by the early fifties.<sup>113</sup>

With the *Garner v. Teamsters Local 776*<sup>114</sup> decision in 1953, the Supreme Court supplied a rationale for the ouster of state jurisdiction with respect to the peaceful picketing of an employer in commerce. Although the basis of the state injunction was not a right-to-work law, the Court made clear that primary and exclusive jurisdiction to adjudicate recognitional picketing was vested in the NLRB in order to insure uniform application of federal policy and to avoid the "conflicts likely to result from a variety of local procedures and attitudes toward labor controversies."<sup>115</sup>

Undoubtedly the failure of Congress and the Court, at an early date, to define preemption in the context of injunctions against concerted activities based on right-to-work laws contributed to the analytical unsoundness of many state decisions. Yet the far-reaching pronouncements of *Garner* concerning the necessity for uniformity in the regulation of labor relations should have had some impact upon the right-to-work states.<sup>116</sup> A theoretical basis for the applica-

<sup>111</sup> *E.g.*, *Self v. Taylor*, 217 Ark. 953, 235 S.W.2d 45 (1950); *Local 519, Plumbers v. Robertson*, 44 So. 2d 899 (Fla. 1950); *Texas State Fed'n of Labor v. Brown & Root, Inc.*, 246 S.W.2d 938 (Tex. Civ. App. 1952).

<sup>112</sup> In *Minor v. Building & Constr. Trades Council*, 75 N.W.2d 139, 152 (N.D. 1956), the court construed *Graham* to mean that § 14 (b) leaves the states free to enjoin peaceful picketing regardless of whether interstate commerce is involved.

<sup>113</sup> *Amalgamated Ass'n of Street Elec. Ry. Employees v. Wisconsin Employment Relations Bd.*, 340 U.S. 383 (1951); *UAW v. O'Brien*, 339 U.S. 454 (1950); *LaCrosse Tel. Corp. v. Wisconsin Employment Relations Bd.*, 336 U.S. 18 (1949); *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767 (1947); *Hill v. Florida*, 325 U.S. 538 (1945).

<sup>114</sup> 346 U.S. 485 (1953).

<sup>115</sup> *Id.* at 490. The thrust of *Garner* was that state jurisdiction of picketing was totally foreclosed without regard to whether the form of state regulation actually conflicted with or merely paralleled the federal scheme. *Id.* at 490-91.

<sup>116</sup> *Machinists Union v. Goff-McNair Motor Co.*, 223 Ark. 30, 264 S.W.2d 48 (1954), a case involving an economic strike during contract negotiations, found both *Garner* and the NLRA inapplicable to a situation where peaceful picketing was carried on for a purpose in conflict with a right-to-work act. Compare *Gulf Shipyards Storage Corp. v. Moore*, 35 L.R.R.M. 2669 (La. 1955), with *Pruitt v. Lambert*, 41 L.R.R.M. 2369 (Tenn. Ch. 1957).

tion of the preemption doctrine to section 14 (b) was supplied a few years later in *Electrical Workers Local 429 v. Farnsworth & Chambers Company*.<sup>117</sup> After an interstate employer had rejected a demand to employ union labor, stranger pickets appeared at his establishment. A state court immediately enjoined the picketing. The Supreme Court of Tennessee, finding the picketing in violation of the right-to-work law, affirmed state jurisdiction to issue an injunction on the theory that Congress had failed to manifest a sufficiently clear intent to withdraw such "matters of local concern" from state control.<sup>118</sup> The Supreme Court granted certiorari, and without argument or opinion, reversed the injunction by simply citing the preemption cases of *Garner* and *Weber v. Anheuser-Busch, Incorporated*.<sup>119</sup>

Since neither of the authorities cited by the Court in *Farnsworth & Chambers Company* involved a right-to-work law, the precedential value of the case may have been impaired. The inconsistent response of state courts to the decision lends support to such an evaluation.<sup>120</sup> Yet the case can only be explained on the ground that section 14 (b) does not permit the states to regulate pre-agreement activities otherwise subject to the preemption doctrine. Whatever doubts that may have lingered after *Farnsworth & Chambers Company* should have been put to rest by the 1959 decision in *Baumgartner's Electric Construction Company v. DeVries*,<sup>121</sup> wherein the Court explicitly

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<sup>117</sup> 353 U.S. 969 (1957).

<sup>118</sup> *Farnsworth & Chambers Co. v. Electrical Workers Local 429*, 207 Tenn. 329, 335, 299 S.W.2d 8, 10 (1957). The court failed to see that the case involved conduct which amounted to an arguable violation of § 8 (b) (2) of the NLRA.

<sup>119</sup> 348 U.S. 468 (1955). The *Weber* case involved a jurisdictional dispute with secondary boycott aspects. The principal significance of the case is that a state intervened on the basis of a restraint of trade statute rather than a law dealing expressly with labor relations. Preemption was held to apply irrespective of the ground of intervention. See also *Teamsters Local 20 v. Morton*, 377 U.S. 252 (1964).

<sup>120</sup> A number of contemporary state decisions failed to even mention *Farnsworth*. E.g., *Alabama Highway Express, Inc. v. Teamsters Local 612*, 268 Ala. 392, 108 So. 2d 350 (1959). Other courts found it indistinguishable and therefore controlling in picketing cases. E.g., *Asphalt Paving, Inc. v. Teamsters Local 795*, 181 Kan. 775, 317 P.2d 349 (1957); *Douglas Aircraft Co. v. Electrical Workers Local 379*, 247 N.C. 620, 101 S.E.2d 800 (1958); *Wood Lathers Local 345 v. Babcock Co.*, 132 So. 2d 16 (Fla. Dist. Ct. App. 1961). Still other courts remained unconvinced that *Farnsworth* precluded effectuation of right-to-work policy. E.g., *Sheet Metal Workers International v. Nichols*, 89 Ariz. 187, 360 P.2d 204 (1961); *Hattiesburg Bldg. & Trades Council v. Broome*, 247 Miss. 458, 153 So. 2d 695, *rev'd per curiam*, 377 U.S. 126 (1964).

<sup>121</sup> 359 U.S. 498 (1959). In a case involving picketing designed to coerce an interstate contractor into executing a union agreement, the Supreme Court of South Dakota held that *Garmon* precluded equitable relief, but not an award of damages for economic loss resulting from picketing. *Baumgartner's Elec. Constr. Co. v. DeVries*, 77 S.D. 273,

extended the theoretical underpinnings of *Garmon* to a damage remedy imposed by a state court under the authority of section 14 (b). In effect, *DeVries* declared that picketing which is not enjoined by the states because of the operation of the preemption doctrine, cannot provide a basis for damages in tort.

One obvious lesson of this brief sketch of the development of preemption in relation to section 14 (b) is that the *Schermerhorn* delineation of state power does not erect novel doctrine. A further lesson is that Supreme Court decisions spelling out that preemption preempts, even where section 14 (b) is concerned, have not controlled state decisional law with respect to concerted employee activities. Even since 1957, the year *Farnsworth & Chambers Company* was decided, there have been numerous state decisions awarding preventive relief against picketing on the authority of right-to-work legislation.<sup>122</sup>

Considerations of policy and administration would appear to tip the scales in favor of the restrictive view of state power formulated in *Schermerhorn*. Antecedent pressures directed at securing a union-security arrangement encounter federal law at a number of crucial points. Stranger and minority picketing by a union to compel an employer to agree to a union-security contract is arguably a violation of section 8 (b) (2).<sup>123</sup> Alternatively, the conduct may come within the comprehensive restrictions imposed on organizational and recognition picketing by section 8 (b) (7).<sup>124</sup> If the picketing

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91 N.W.2d 663 (1958). The Supreme Court, without argument or opinion, reversed citing only *Garmon*.

<sup>122</sup> Even though an appellate court may deny injunctive relief, as was the case in *Baumgartner's Elec. Constr. Co. v. DeVries*, 77 S.D. 273, 91 N.W.2d 663 (1958), *rev'd*, 359 U.S. 498 (1959), the fact remains that a large number of injunctions are still being issued by state trial courts. See, e.g., *Hodcarriers Local 1282 v. Cone-Huddleston, Inc.*, 241 Ark. 140, 406 S.W.2d 366 (1966); *Mitcham v. Ark-La. Constr. Co.*, 239 Ark. 1162, 397 S.W.2d 789 (1965); *Douglas Aircraft Co. v. Electrical Workers Local 379*, 247 N.C. 620, 101 S.E.2d 800 (1958); *Wood Lathers Local 345 v. Babcock Co.*, 132 So. 2d 16 (Fla. Dist. Ct. App. 1961).

<sup>123</sup> Section 8 (b) (2) makes it an unfair labor practice for a union to cause or attempt to cause an employer to discriminate against an employee in violation of § 8 (a) (3). 29 U.S.C. § 158 (b) (2) (1964). This section clearly reaches minority picketing to secure a union-security agreement. *Meat Cutters Union v. Fairlawn Meats*, 353 U.S. 20 (1957). The degree to which peaceful picketing involves the NLRA was indicated by the Supreme Court in *Construction Local 438 v. Curry*, 371 U.S. 542, 547-48 (1963). See notes 143-46 *infra* and accompanying text.

<sup>124</sup> It is an unfair labor practice under § 8 (b) (7) for a union: "to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization . . . or forcing or requiring the employees of an employer to accept or

encompasses neutrals, it draws into question the unfair labor practice provisions of section 8 (b) (4).<sup>125</sup> Assuming a union has majority status, the use of economic weapons to support demands for a union-security contract prohibited by state law may constitute a refusal to bargain in violation of section 8 (b) (3).<sup>126</sup> On the other hand, an inquiry into the facts might indicate that a federal unfair labor practice was not committed under any of these sections, but rather the conduct was protected concerted activity within the meaning of section 7 of the NLRA.<sup>127</sup>

Were courts permitted to make this kind of determination, a real possibility exists that the states would restrict the exercise of picketing rights guaranteed by federal law.<sup>128</sup> Particularly is this so where the basis of injunctive relief is a right-to-work law. As a source of substantive law, such legislation draws heavily on common law and equity principles which federal labor legislation long ago rejected as incompatible with the continuing labor-management relation.<sup>129</sup>

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select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees: (A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under section 9 (c) of this Act, (B) where within the preceding twelve months a valid election under section 9 (c) of this Act has been conducted, or (C) where such picketing has been conducted without a petition under section 9 (c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: . . . Provided further, that nothing in this subparagraph (c) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services." 29 U.S.C. § 158 (b) (7) (1964). See generally Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 HARV. L. REV. 1086, 1099-1111 (1960); Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 MINN. L. REV. 257, 262-70 (1959).

<sup>125</sup> 29 U.S.C. § 158 (b) (4) (1964). See *Hattiesburg Bldg. & Trades Council v. Broome Co.*, 377 U.S. 126 (1963); *Plumbers Union v. Door County*, 359 U.S. 354, 356-57 (1959).

<sup>126</sup> Section 8 (b) (3) imposes on a union the obligation to bargain collectively with an employer. 29 U.S.C. § 158 (b) (3) (1964). Insistence upon a union-security contract prohibited by state law would apparently violate § 8 (b) (3). See 17 STAN. L. REV. 158, 162 n.27 (1964). The applicable theory is that since there is no duty to bargain about an illegal proposal, insisting on such a proposal is itself a refusal to bargain collectively. See *NLRB v. Bricklayers Union*, 378 F.2d 859 (6th Cir. 1967).

<sup>127</sup> See *Journymens Local 100 v. Borden*, 373 U.S. 690, 694-95 (1963); *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 475 (1955).

<sup>128</sup> The greatest threat against which preemption doctrine apparently guards is that a state will prohibit activity that the NLRA indicates must remain unhampered. *Hanna Mining Co. v. District 2, Marine Engr's Ass'n*, 382 U.S. 181, 193 (1965); *UAW v. Russell*, 356 U.S. 634, 644 (1958).

<sup>129</sup> The test of injunctive relief under a right-to work statute may solely be injury

Hence a right-to-work law expands the area of enjoined activity on the basis of criteria in conflict with federal standards. In fact, the basic attitude of a right-to-work law toward unions in general,<sup>130</sup> and the use of such economic weapons as the picket line in particular,<sup>131</sup> assures that the consequences of picketing will vary between a state court and the NLRB. Many right-to-work provisions, for example, condemn picketing with a broad stroke wherever an effect of such conduct, whether direct or indirect, is the application of pressure in almost any form.<sup>132</sup>

More importantly, it is doubtful that state courts are equipped to assess the sensitive problems of picketing where it is alleged that a

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or threatened injury by reason of any act in conflict with right-to-work policy. *E.g.*, ARIZ. REV. STAT. ANN. § 23-1307 (1956). The broad scope of injunctive provisions in right-to-work legislation is illustrated by the South Carolina act: "Any person whose rights are adversely affected by any . . . assemblage or other act or thing done or threatened to be done and declared to be unlawful or prohibited by this chapter shall have the right to apply to any court having general equity jurisdiction for appropriate relief. The court, in any such proceeding, may grant and issue such restraining, and other, orders as may be appropriate, including an injunction restraining and enjoining the performance, continuance, maintenance or commission of any such contract, agreement, assemblage, act or thing . . . . The provisions of this section are cumulative and are in addition to all other remedies now or hereafter provided by law." S.C. CODE ANN. § 40-46.8 (1962). Since most right-to-work acts provide expressly for injunctive relief, a prima facie showing of a violation of the statute may be a sufficient basis for the issuance of an injunction. *See, e.g.*, Ringelberg v. Local 525, Journeymen, 297 P.2d 1079 (Nev. 1965).

<sup>130</sup> The degree of anti-union sentiment reflected in right-to-work legislation is indicated by the rather harsh remedial relief made available by such laws. The plaintiff, in any proceeding to enforce a violation, is frequently entitled to costs and attorney's fees, as well as actual damages. *E.g.*, GA. CODE ANN. § 54-908 (1961). South Carolina expressly provides for an award of punitive damages. S.C. CODE ANN. § 40-46.8 (1962). Many of the acts declare violations to be misdemeanors, subject to fines ranging up to \$1000 and imprisonment of not more than one year. *E.g.*, TENN. CODE ANN. § 50-212 (1966). The Tennessee act, in addition, provides that "[e]ach day that any person . . . remains in violation of any of the provisions of [this Act] shall be deemed to be a separate and distinct offense . . ." *Id.* Arkansas similarly makes each day of a violation a separate offense subject to a fine of not more than \$5000 for each offense. ARK. STAT. ANN. § 81-204 (1960). Enforcement of penal provisions is generally made the responsibility of the local district attorney. *E.g.*, S.D. CODE § 17.9914 (Supp. 1960).

<sup>131</sup> Picketing is subject to express restrictions in several right-to-work acts. *E.g.*, UTAH CODE ANN. § 34-16-6 (1966); VA. CODE ANN. § 40-74.2 (Supp. 1966).

<sup>132</sup> The Wyoming act provides that "[a]ny person injured or threatened with injury by any action or conduct prohibited by this act" is entitled to injunctive relief. WYO. STAT. ANN. § 27-245.7 (Supp. 1965). The act then declares that: "Any person who directly or indirectly places upon any other person any requirement or compulsion prohibited by this act . . . or who engages in any lock-out, lay-off, strike, work stoppage, slow down, picketing, boycott or other action or conduct, a purpose or effect of which is to impose upon any person, directly or indirectly, any requirement or compulsion prohibited by this act" is guilty of a violation. WYO. STAT. ANN. § 27-245.6 (Supp. 1965).



union seeks to force adherence to a union-security arrangement. In terms of work load, the general experience of state courts with labor matters is at best *de minimis*. It should therefore not be unexpected that state judges, when faced with a complex labor case, frequently tend to search for familiar ground by resort to general principles of law or equity.<sup>133</sup> If injunctive relief is sought, this tendency finds expression in the application of such generalized tests as "balancing the equities" or "comparative injury."<sup>134</sup> This kind of technique not only has little relation to the balance struck by Congress between the competing interests of employee, union, and management, but it encourages provincialism in labor regulation. This is especially true in the controversial area of union organizing practices, where the legitimacy of picketing, under both federal and state law, depends primarily upon a determination of the object or purpose of the picketing. Such standards lead inevitably to a subjective examination of motives prompting the decision to engage in coercive practices. The era of the labor injunction demonstrates the risks of leaving courts at large to determine the lawfulness of labor objectives. A numerical count of the picketing cases reveals that such risks still survive. Only occasionally have state courts failed to find picketing not designed to achieve an objective forbidden by right-to-work legislation.<sup>135</sup>

The problems involved in permitting the right-to-work states to concurrently regulate peaceful picketing are perhaps most clearly illustrated in cases where a union seeks to protect area labor standards. It has long been recognized that a central aim of collective bargaining is the elimination of competition based on labor costs. Thus a union may legitimately be concerned that a particular employer is undermining area standards of employment by maintaining sub-standard

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<sup>133</sup> The effect of mixing common law tests with right-to-work legislation is demonstrated in *Taylor v. Engineers Local 101*, 189 Kan. 137, 368 P.2d 8 (1962), where damages were awarded in a case clearly governed by *Garmon*.

<sup>134</sup> In *Electrical Workers Local 1925 v. O'Brien*, 202 Tenn. 38, 302 S.W.2d 60 (1957), the court viewed the issue as one of "threatened irreparable damage" to a contractor in permitting the picketing to continue, as opposed to "very little damage" to the union in halting the picketing. By applying the "balance of convenience rule," the court concluded that the chancellor had not abused his discretion in issuing a restraining order. *Id.* at 44, 302 S.W.2d at 63.

<sup>135</sup> A lawful purpose was found in *Carpenters Local 857 v. Todd L. Storms Constr. Co.*, 84 Ariz. 120, 324 P.2d 1002 (1958); *McDaniel v. Tolbert*, 228 Ark. 555, 309 S.W.2d 326 (1958); and *Self v. Wisener*, 226 Ark. 58, 287 S.W.2d 890 (1956).

wages or working conditions.<sup>136</sup> When picketing is employed to protest such conditions, cases falling within NLRB jurisdiction require the Board to apply the delicate balances struck in section 8 (b) (7).<sup>137</sup> Since picketing generally encompasses multiple objectives,<sup>138</sup> and an ultimate objective of any union is to organize an unorganized shop, it should be apparent that the problems experienced by the Board in administering this section have been both numerous and complicated.<sup>139</sup> The difficulty, of course, lies in resolving the question of fact as to a union's purpose or object in picketing.<sup>140</sup>

Right-to-work statutes make no express provision for "area-standards" picketing, and rarely are explicit about informational objectives. They simply are not oriented in terms of the federal policy of prohibiting organizational picketing only in specified situations. Consequently, the argument that the sole purpose in picketing is to publicize that an employer maintains sub-standard terms and conditions of employment frequently receives a hostile reception in lower state courts.<sup>141</sup> Once evidence is presented which, standing alone,

<sup>136</sup> *E.g.*, *Centralia Bldg. & Constr. Trades Council v. NLRB*, 363 F.2d 699, 701 (D.C. Cir. 1966).

<sup>137</sup> See note 124 *supra* for the text of § 8 (b) (7). The section is applicable only if picketing has an organizational or recognitional objective. If such an objective is found, the picketing is still not prohibited unless it comes within one of three categories specifically described. Should the picketing satisfy the terms of the third category, sub-section (c), it may still be lawful under the "informational proviso" regardless of the existence of an organizational or recognitional objective. See generally *Smitley v. NLRB*, 327 F.2d 351 (9th Cir. 1964).

<sup>138</sup> Picketing may be designed to accomplish a variety of objectives: to compel an employer to recognize and bargain with a union, to solicit the membership of the employer's employees, to publicize the facts of a labor dispute, to compel the employer to assign work to a particular union, to apply pressure in support of union contract demands, or to protest the commission of an unfair labor practice or breach of contract.

<sup>139</sup> See generally Meltzer, *Organizational Picketing and the NLRB: Five on a Seesaw*, 30 U. CHI. L. REV. 78 (1962).

<sup>140</sup> "Usually, the union's real motives are not articulated; only the consequences of its actions can be accurately ascertained." Aaron, *supra* note 124, at 1106. The type of fine distinctions emerging under § 8 (b) (7) are suggested by the Board's present position that picketing to protect area labor standards is not subject to the section because it does not have recognition or organization as an immediate object, whereas picketing to compel an employer to sign an agreement to pay wages equal to those paid under union contracts is recognitional in purpose. See *Centralia Bldg. & Constr. Trades Council v. NLRB*, 363 F.2d 699 (D.C. Cir. 1966); *Houston Bldg. & Constr. Trades Council*, 136 N.L.R.B. 321 (1962). As to how far a union may go in dictating specific area labor standards see *Retail Clerks Local 899*, 1967 CCH LAB. L. REP. ¶ 21,663.

<sup>141</sup> An injunction was granted by a trial court despite the area standards argument, and then reversed in *Hod Carriers Local 1282 v. Cone-Huddleston, Inc.*, 241 Ark. 140, 406 S.W.2d 366 (1966).

would support a finding that the picketing objective is condemned by a right-to-work act, the trend in the cases is to end the search for the existence of possible lawful objectives.<sup>142</sup> In practice, the fact-finding process is largely one of evaluating the conduct in question in the narrow context of the terms and policies of the right-to-work act without regard to federal criteria.

The treatment of *Construction Local 438 v. Curry*<sup>143</sup> in the state courts suggests the dangers inherent in leaving the process to inexperienced tribunals. An "open shop" employer undertook performance of a construction contract which required the payment of wages commensurate with those being paid on similar projects in the area. There was evidence that the contractor was paying wages below the area standard, and that he had refused a request by various trade unions to employ union workers on the job. A single picket appeared at the construction site with a sign stating that the contractor was violating his contract with respect to wages. When subcontractors honored the picket line, the contractor petitioned the local court for injunctive relief. The trial judge refused to enjoin the picketing. On appeal, the Supreme Court of Georgia reversed on the ground that the picketing was for a purpose made unlawful by the right-to-work act.<sup>144</sup> The finding of the trial judge that the contractor was in fact paying non-conforming wages carried little weight with the upper court. That court read the record as "demanding" a finding that the real purpose behind the picketing was to force the contractor to employ exclusively union labor.<sup>145</sup> As to informational objectives, the Georgia court adopted the startling theory that picketing a construction site as a means of imparting information is necessarily unlawful because it precipitates work stoppages.<sup>146</sup>

The contrast between the decisional process represented in this

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<sup>142</sup> See, e.g., *Hescom, Inc. v. Stalvey*, 155 So. 2d 3 (Fla. Dist. Ct. App. 1963). Where at least one objective has been found to conflict with a right-to-work law, the existence of other valid objectives has been held immaterial. *Construction Local 688 v. Stephenson*, 148 Tex. 434, 225 S.W.2d 958 (1950).

<sup>143</sup> 371 U.S. 542 (1963).

<sup>144</sup> *Curry v. Construction Local 438*, 217 Ga. 512, 123 S.E.2d 653 (1962).

<sup>145</sup> *Id.* at 513-14, 123 S.E.2d at 655.

<sup>146</sup> The court apparently thought the picketing was designed to "signal" economic pressure from organized labor. The difficulty with this analysis is that the court failed to indicate any circumstances under which informing the public might be permissible. See *Electrical Workers Local 3*, 144 N.L.R.B. 5 (1963), for an example of the Board's treatment of the "signal" picketing problem under § 8 (b) (7) (C).

opinion and that of the NLRB is indeed striking, in technique as well as selection of controlling legal principles.<sup>147</sup> The interest of every union in ultimately organizing a group of employees is a fact of labor life, to be weighed with other evidence bearing upon the question of fact as to union objectives. This same factor, however, when weighed by a state court, may be a sufficient basis for invoking a right-to-work law even though a picketing union has made no demand for immediate recognition, let alone a union-security clause.<sup>148</sup> In fact, whenever picketing follows on the heels of a union demand that an employer grant recognition, observe union standards, or employ union labor, it is likely that a state will construe the picketing to be a disguised attempt to secure an agreement prohibited by state law. The impact of these decisions on national policy would appear to vindicate the *Schermerhorn* allocation of exclusive jurisdiction of antecedent pressures to the NLRB. Since the risks of improper action are great where an unorganized employer is the target of picketing, the practical significance of *Schermerhorn* is that it minimizes these risks by limiting state intervention to the ascertainable standard of a consummated agreement.

One consequence of applying preemption doctrine to pre-agreement activities is that employers are deprived of quick injunctive relief against harassing union tactics. Because relief from the Board may be slow in forthcoming, or the General Counsel may refuse to issue a complaint,<sup>149</sup> or there is no way in which an employer may elicit from the Board a clear-cut determination of whether employee

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<sup>147</sup> As a matter of federal law, area-standards picketing is permissible unless the record in its entirety warrants a finding of a present demand for immediate recognition. See, e.g., *Raymond F. Schweitzer, Inc.*, 65 L.R.R.M. 1367 (NLRB 1967).

<sup>148</sup> Picketing is frequently enjoined under a right-to-work law in the absence of evidence that the union actually seeks recognition as the exclusive bargaining agent, or demands an immediate contract. For example, in *Farnsworth & Chambers Co. v. Electrical Workers Local 429*, 201 Tenn. 329, 299 S.W.2d 8, *rev'd per curiam*, 353 U.S. 969 (1957), the union's sole demand, prior to picketing, was apparently that union labor be used on a construction project. See also *Burgess v. Daniel Plumbing & Gas Co.*, 225 Ark. 792, 285 S.W.2d 517 (1956). For a case representative of the manner in which state courts handle the matter of picketing objectives in a right-to-work setting see *Blue Boar Cafeteria v. Hotel Employees Union*, 31 L.R.R.M. 2339 (Ky. Ct. App. 1952).

<sup>149</sup> The public interest in effectuating the policies of the federal labor laws, rather than the injury to a particular individual, is of principal concern in remedying alleged unfair labor practices. See *Vaca v. Sipes*, 386 U.S. 171, 182 n.8 (1967). The decision of the General Counsel not to issue an unfair labor practice complaint is not reviewable by the federal courts. *Balanyi v. Electrical Workers Local 1031*, 374 F.2d 723 (7th Cir. 1967).

conduct is protected by federal law,<sup>150</sup> it has been urged that pre-emption affords an employer inadequate protection from coercive conduct designed to force him into a violation of a right-to-work law.<sup>151</sup> These arguments, though meritorious, do not appear sufficiently persuasive to justify state jurisdiction. In the first place, they are generally applicable to all employment relations affected by pre-emption. The displacement of state power to regulate, in many instances, permits unions to engage in, or prolong, practices never intended to be immune from prohibition or control.<sup>152</sup> The question is whether this development outweighs the harm to federal labor policies likely to result by granting the states greater immediate control of labor activity. If the union-security area is a reliable guide, the objective of a uniform code of industrial relations cannot be realized by permitting concurrent state power to survive. Moreover, it is somewhat ironic that right-to-work laws should be urged as a means of protecting employers from union power when the avowed policy underlying such laws is to insulate the free choice of the individual worker. Although in actual practice employers have invoked right-to-work sanctions more frequently than employees, it would appear unwise to further enlarge the arsenal of employers by means of legislation not primarily concerned with that objective.

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<sup>150</sup> Although the states may now assume jurisdiction under § 14(c), see note 23 *supra*, there still must be "a proper determination of whether the case is actually one of those which the Board will decline to hear," *Radio Technicians Local 1264 v. Broadcast Serv., Inc.*, 380 U.S. 255, 256 (1965). Since the General Counsel may dispose of a charge without clearly defining the nature of the activity in question under federal law, there is a risk that a "proper determination" will not be made in all cases. See *Hanna Mining Co. v. Dist. 2, Marine Engr's Ass'n*, 382 U.S. 181 (1965). As a practical matter, the states are assuming jurisdiction in cases where, on the basis of available evidence, it appears the Board would decline jurisdiction. *E.g.*, *Vegas Franchises, Ltd. v. Culinary Workers Local 226*, 427 P.2d 959 (Nev. 1967). In order to facilitate the exercise of state jurisdiction in appropriate cases, the Board has established a procedure for rendering advisory opinions to state courts and agencies on jurisdictional questions. The procedure is discussed in *Aaron*, *supra* note 124, at 1095-96. It appears to be almost never used, undoubtedly because state courts are not inclined to consult the Board as to the limits of state jurisdiction. *But see Cox's Food Center, Inc. v. Retail Clerk's Local 1653*, 64 L.R.R.M. 2042 (Idaho 1966).

<sup>151</sup> See *Kitchens v. Doe*, 194 So. 2d 258, 260 (Fla. 1967) (dissenting opinion).

<sup>152</sup> Upon the issuance of an unfair labor practice complaint, § 10(j) of the NLRA authorizes the Board to petition a federal district court for appropriate temporary relief or a restraining order pending disposition of the matter. 29 U.S.C. § 160(j) (1964). This procedure is apparently rarely used. If the complaint issues under §§ 8(b)(4)(A), (B), or (C), 8(b)(7), or 8(e), a district court suit for a preliminary injunction is mandatory. See *National Labor Relations Act § 10(l)*, 29 U.S.C. § 160(l) (1964).

The point should not be overlooked that the new balance struck by federal labor legislation represents an almost total rejection of state ability to regulate the labor-management relation.<sup>153</sup> In striking and preserving that balance, Congress was surely aware that effectuation of federal policy could only be achieved at the expense of state regulatory power. The argument that the states should be free to experiment in the right-to-work area has little, if any, appeal. Legislative experimentation simply has not occurred.<sup>154</sup> Perhaps the strongest argument against increasing state competence to deal with picketing by means of right-to-work laws is that the states lack the machinery to handle such matters on any basis other than a temporary one.<sup>155</sup> To simply enjoin picketing does not develop acceptable standards for resolving the underlying issues in a labor dispute. Additional employer protections may be necessary; but the answer does not appear to lie in the direction of state court injunctive relief.

#### THE RELEVANCE OF AN AGREEMENT

Section 14 (b) expressly places within the reach of state law "agreements" which require union membership "as a condition of employment." *Schermerhorn II* interprets state regulatory power authorized by this section to begin "*only with actual negotiation and execution of the type of agreement described by § 14(b).*"<sup>156</sup> If a right-to-work law may be applied only in cases which have reached the stage of "agreement," it is essential that some fairly precise understanding of that concept be achieved. Otherwise, by expanding or contracting general tests of contract formation, one court might invoke a right-to-work statute in circumstances which the Board or another court would consider premature. The intrusion into NLRB jurisdiction

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<sup>153</sup> See Ratner, *New Developments in Federal-State Jurisdiction*, 15 N.Y.U. CONF. ON LAB. 47, 49-50 (1962).

<sup>154</sup> Once a right-to-work statute is enacted, the pattern is to leave it intact regardless of changed labor-management practices or developing case law. As to state labor experimentation in general, one commentator has concluded: "The fact remains . . . that for the past two decades at least, social experimentation in labor-relations law has been meager, unimaginative, and ineffective in the states, most of which lack any statutory controls or procedures with respect to labor-management disputes." Aaron, *supra* note 124, at 1095. Recent legislative trends at the state level are discussed in Smith & Clark, *Reappraisal of the Role of the States in Shaping Labor Relations Law*, 1965 WIS. L. REV. 411.

<sup>155</sup> Practically none of the right-to-work states have a comprehensive labor code comparable to § 7 or § 8 of the NLRA. For a summary of state labor relations legislation see Smith & Clark, *supra* note 154, at 421-57.

<sup>156</sup> 375 U.S. at 105 (emphasis in original).

that would result is likely to be most pronounced with respect to practices that occur independent of actual written agreements.

Congress has not been explicit about the nature or type of agreements subjected to state power by section 14 (b). Nor has the Supreme Court undertaken analysis of the matter, largely because the cases reaching the Court, aside from the picketing cases, have involved consummated union-security agreements in written form. The question is a critical one because most right-to-work acts prohibit oral as well as written agreements, and many are phrased to reach any "implied agreement, understanding or practice" which discriminately ties employment to union membership.<sup>157</sup> To permit the states to exercise jurisdiction in such cases creates a substantial danger of interference with the federal program.<sup>158</sup> The risks of non-uniformity in the assessment of factual evidence are as real with respect to implied arrangements as they are in connection with pre-agreement activities. Moreover, if state courts are free to resolve questions of proof of present agreement, the flexibility of judicial standards, plus the differences in the content and application of the various right-to-work laws, produces an atmosphere in which legal structure offers little guidance as to the consequences of concerted activity.

The risks of inconsistent application of the concept of agreement in section 14 (b) are most acute in cases where an employee seeks damages in a state court on the theory that employment was denied or terminated because of an "agreement" in violation of a right-to-work act. Such cases in reality arise out of discriminatory practices arguably subject to federal regulation irrespective of the finding of an agreement.<sup>159</sup> The element of agreement, however, affords right-

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<sup>157</sup> E.g., UTAH CODE ANN. § 34-16-5 (1953). The South Dakota act illustrates the broad area such laws attempt to occupy: "Any agreement relating to employment, whether in writing or oral, which by its stated terms, or by implication, interpretation, or effect thereof, directly or indirectly denies, abridges, interferes with, or in any manner curtails the free exercise of the right-to-work . . . shall be deemed a violation of this section." S.D. CODE § 17.1101 (2) (Supp. 1960).

<sup>158</sup> The inconsistencies likely to result from a sharing of jurisdiction in the area of discriminatory practices is described in Grodin & Beeson, *State Right-to-Work Laws and Federal Labor Policy*, 52 CALIF. L. REV. 95, 106-08 (1964).

<sup>159</sup> Except as its provisos regarding union-security permit, § 8 (a) (3) forbids any employer discouragement or encouragement of union membership "by discrimination in regard to hire or tenure of employment," and § 8 (b) (2) makes it a union unfair labor practice "to cause or attempt to cause" an employer violation. Discriminatory conduct unilaterally practiced is within the prohibitions of these sections. *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963); cf. *Iron Workers Local 207 v. Perko*, 373 U.S. 701 (1963); *Journeymens Local 100 v. Borden*, 373 U.S. 690 (1963).

to-work states a basis for asserting jurisdiction over a wide variety of activities which allegedly interfere with employment relations.<sup>160</sup> Seldom is such jurisdiction premised on proof of a written union-security agreement. Indeed, the mere allegation that plaintiff "is informed and believes" that a union and employer have made an arrangement conditioning employment upon membership is generally sufficient.<sup>161</sup> Even where commerce is admittedly affected, and the court concedes an arguable violation of federal law, state jurisdiction has been hinged on vague allegations of a "conspiracy" to enforce compulsory unionism.<sup>162</sup> Use of the conspiracy label to accommodate state and federal jurisdiction is particularly disturbing because it unduly enlarges the fact-finding process and leaves to the courts enormous flexibility in defining the content of the legal means and ends of unionism.<sup>163</sup>

In view of the fact that discrimination cases require expert assessment of evidence of motivation and effect on employee rights, federal policy can best be effectuated by limiting state power under section 14 (b) to written union-security agreements.<sup>164</sup> The language of the section reasonably bears such a construction. Section 14 (b), with obvious reference to section 8 (a) (3), is addressed to the "execution or application" of membership "agreements," while the section 8 (a) (3) proviso is phrased in terms of "making" specific agreements. This suggests that something more formal than oral arrangements or factual practices is contemplated by section 14 (b). Moreover, the history of the integrated collective agreement, and its relation to union status in the industrial unit, would suggest that the limitation

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<sup>160</sup> For example, in *Building Trades Council v. Bonito*, 71 Nev. 84, 280 A.2d 295 (1955), unions were enjoined from placing the name of a motel on a "we do not patronize list" on the theory that the real objective of the unions was to secure an agreement not permitted by the right-to-work act. See also *St. John v. Building Trades Council*, 76 Nev. 290, 352 P.2d 820 (1960); *Flatt v. Barbers' Union*, 202 Tenn. 345, 304 S.W.2d 329, cert. denied, 355 U.S. 904 (1957).

<sup>161</sup> E.g., *Branham v. Miller Elec. Co.*, 237 S.C. 540, 542, 118 S.E.2d 167, 168 (1961).

<sup>162</sup> *Sheet Metal Workers Union v. Nichols*, 89 Ariz. 187, 360 P.2d 204 (1961); *Taylor v. Engineers Local 101*, 189 Kan. 137, 368 P.2d 8 (1962); cf. *Boilermakers Union v. Lester*, 62 L.R.R.M. 2797 (Ga. Ct. App. 1966).

<sup>163</sup> The use of a right-to-work statute to reinforce common-law principles relating to the lawfulness of labor objectives is demonstrated in *Large v. Dick*, 207 Tenn. 664, 343 S.W.2d 693 (1960). See also *Kimbrell v. Jolog Sportswear, Inc.*, 239 S.C. 415, 123 S.E.2d 524 (1962).

<sup>164</sup> See *Grodin & Becson*, *supra* note 158, at 108-09. One practical advantage in such a restriction of state competence is that jurisdictional issues are more manageable by local courts.



of state power to written agreements is consistent with the over-all policies of federal law.<sup>165</sup> The *General Motors Corporation* and *Schermerhorn* decisions, construing section 14 (b) to subject to state law only agreements federally permitted, provide a theoretical basis for such an interpretation.<sup>166</sup> The basic difficulty with permitting state action whenever an "executed" agreement, in whatever form, is shown to exist is that it leaves to each state court the factual question of whether execution has occurred.<sup>167</sup>

Aside from the area of potential conflict created by the pliability of the concept of "agreement," there remains unanswered a number of questions about the exercise of state jurisdiction even in cases involving a union-security agreement clearly within section 14 (b). Is federal law irrelevant once it is determined that activity involves a consummated agreement reachable by state power through section 14 (b)? The question is significant because the execution or application of a union-security agreement may violate federal as well as state law.<sup>168</sup> For example, the effectuation of a closed shop, either by express contract or discriminatory practices, is banned by both the NLRA<sup>169</sup> and right-to-work acts. The states have on numerous occasions applied a right-to-work law on the ground that a closed shop was being practiced or sought.<sup>170</sup> A union may, in addition, be a

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<sup>165</sup> The NLRA in § 8 (d), for example, imposes a bargaining duty to reduce to writing any agreements reached "if requested by either party." 29 U.S.C. § 158 (d) (1964).

<sup>166</sup> At least one state court has construed *Schermerhorn* to preclude state jurisdiction until a union-security agreement is actually signed by a union and employer. *Painters Local 567 v. Tom Joyce Floors, Inc.*, 81 Nev. 1, 398 P.2d 245 (1965). This approach is evident in some of the earlier state decisions. *E.g.*, *Higgins v. Cardinal Mfg. Co.*, 188 Kan. 11, 360 A.2d 456, *cert. denied*, 368 U.S. 29 (1961).

<sup>167</sup> In *Sheet Metal Workers Union v. Nichols*, 89 Ariz. 187, 360 P.2d 204 (1961), the court treated an alleged oral agreement as executed, and distinguished Supreme Court picketing precedents on that basis.

<sup>168</sup> That this point is not fully understood is evidenced by the recent case of *McDowell v. Clement Bros.*, 260 F. Supp. 817, 819 (N.D. Ga. 1966), which seems to say that the execution of a union-security agreement can never constitute a violation of federal law.

<sup>169</sup> *See* *Boilermakers Local 6*, 94 N.L.R.B. 1590 (1951); *Meat Cutters Union*, 81 N.L.R.B. 1052 (1949). The NLRB has traditionally taken a restrictive view of federal union-security requirements contained in the § 8 (a) (3) provision. *See, e.g.*, *Argo Steel Constr. Co.*, 122 N.L.R.B. 1077 (1959).

<sup>170</sup> *E.g.*, *Baldwin v. Arizona Flame Restaurant*, 82 Ariz. 385, 313 P.2d 759 (1957); *Kaiser v. Price-Fewell, Inc.*, 235 Ark. 295, 359 S.W.2d 449 (1962), *cert. denied*, 371 U.S. 955 (1963); *Burgess v. Daniel Plumbing & Gas Co.*, 225 Ark. 792, 285 S.W.2d 517 (1956); *Self v. Taylor*, 224 Ark. 524, 275 S.W.2d 21 (1951). *Contra*, *McDaniel v. Tolbert*, 228 Ark. 555, 309 S.W.2d 326 (1958); *Local 802, Hotel Employees v. Asimos*, 216 Ark. 694, 227 S.W.2d 154 (1950).

party to area or nation-wide agreements which are subject to federal law yet indirectly involve right-to-work policy.<sup>171</sup> A given case may also involve both an executed agreement subject to state regulation and independent conduct which is arguably protected or made an unfair labor practice by federal law. This situation could arise where a union-security agreement is supplemented by an employment-referral arrangement which in fact practices discrimination. Union economic weapons, such as a strike to protest employer practices, might also be employed quite independently of a collective agreement.

If the right-to-work states are permitted to regulate any conduct once a section 14 (b) agreement is found to exist, and state power supercedes federal in all such cases, the result is to remove from the operation of the preemption doctrine activity which violates federal law. It is difficult to find in either the language or legislative history of section 14 (b) support for the view that the states may govern conduct which is federally proscribed as an unfair labor practice.<sup>172</sup> To say that the states may prohibit agreements which are federally permissible is entirely consistent with the objective of preserving the local option to reject traditional forms of compulsory unionism. That objective can obviously be realized without according the states a position of full equality with federal power. Moreover, the limited phrasing of section 14 (b), when considered in relation to the comprehensive detail of federal law, simply does not suggest that Congress intended that parity be achieved between state and federal regulation in union-security matters. Rather, federal law manifests a clear intent to leave unfair labor practices to the expertise of the NLRB rather than the courts.

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<sup>171</sup> For example, an agreement between a union and an employer association may contain "hot cargo" provisions which are construed to indirectly affect the freedom of choice of employees of employers not a party to the arrangement. See the related cases of *Scherer & Sons v. Ladies' Garment Workers' Union*, 142 So.2d 290 (Fla. 1962); *Ladies' Garment Workers' Union v. Scherer & Sons*, 188 So. 2d 380 (Fla. Dist. Ct. App. 1966). Nationwide collective agreements have collided with right-to-work acts on a number of occasions. See, e.g., *Lewis v. Hixson*, 174 F. Supp. 241 (W.D. Ark. 1959); *Lewis v. Fentress Coal & Coke Co.*, 160 F. Supp. 221 (M.D. Tenn. 1958), *aff'd*, 264 F.2d 134 (6th Cir. 1959). The question of exclusive NLRB jurisdiction was expressly dealt with in such a setting in *Martin v. Dealers Transp. Co.*, 46 L.R.R.M. 2901 (Tenn. Ct. App. 1960).

<sup>172</sup> The legislative history of § 14 (b) reflects little awareness of the problem of enforcement of state union-security laws in such situations. See notes 76-78 *supra* and accompanying text.

Practical considerations reinforce the denial of state power in situations involving a potential violation of federal law. It is unlikely that employers and unions in right-to-work states will put obviously illegal union-security agreements in writing. Thus the conditioning of employment upon membership will occur in the form of informal arrangements or practices, or by the discriminatory application of otherwise lawful agreements.<sup>173</sup> Since the essence of federal labor law is the regulation of discriminatory practices, the Board has wide experience in such matters, as well as established machinery and procedures. Moreover, to allow state jurisdiction with respect to the hard factual issues of discrimination, yet deny it where an agreement states on its face that it is not discriminatory, as in hiring halls, would not appear to constitute a very rational allocation of power.

The decisions of the Supreme Court applying section 14 (b) have never envisioned broad state enforcement power in union-security matters. Numerous state courts, however, have read the Court's opinion in *Algoma Plywood & Veneer Company v. Wisconsin Employment Relations Board*<sup>174</sup> as establishing the proposition that once state power is activated by section 14 (b), it displaces federal regulation.<sup>175</sup> Although the opinion in the *Algoma Plywood & Veneer Company* case describes state power in broad language, the actual holding affords limited recognition of state union-security jurisdiction. A state labor board, with subsequent approval of Wisconsin courts,<sup>176</sup> had ordered reinstatement with back pay for an employee discharged pursuant to a union-security agreement forbidden by state law. The Supreme Court upheld state jurisdiction to afford such a remedy on the theory that federal policy, as expressed in the Wagner and Taft-Hartley Acts, was not so exclusive as to preclude a state from remedying a discharge in an area left open to state regulation.<sup>177</sup> The fact that applicable state law imposed more restrictive requirements on union-security than federal law, rather than merely pro-

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<sup>173</sup> Grodin & Beeson, *supra* note 158, at 107-08.

<sup>174</sup> 336 U.S. 301 (1949).

<sup>175</sup> Preemption arguments were rejected on the basis of *Algoma Plywood & Veneer Co.* in *Alabama Highway Express, Inc. v. Teamsters Local 612*, 268 Ala. 392, 108 So. 2d 350 (1959), and *Sheet Metal Workers Union v. Nichols*, 89 Ariz. 187, 360 P.2d 204 (1961).

<sup>176</sup> *Wisconsin Employment Relations Bd. v. Algoma Plywood & Veneer Co.*, 252 Wis. 549, 32 N.W.2d 417 (1948).

<sup>177</sup> Since the discharge was expressly based on a state union-security statute, rather than conduct independently discriminatory, the result was consistent with the policy of effectuation of more restrictive local attitudes towards compulsory unionism.

hibiting such arrangements, was apparently of little significance. The relevant factor, for present purposes, was that the agreement in question did not offend federal standards. Commerce was involved, but the preemption issue was not pressed upon the Court, undoubtedly because preemption as yet had not achieved the level of doctrine.

In the year following *Algoma Plywood & Veneer Company*, the Supreme Court demonstrated the effect of preemption on state jurisdiction to grant relief in union-security matters. The Court, per curiam, in *Plankington Packing Company v. Wisconsin Employment Relations Board*<sup>178</sup> reversed a reinstatement order by the same state board where the discharge was presumably in violation of federal as well as state law. The underlying theory of the decision, as later explained by the Court, was simply that since the NLRB was given exclusive jurisdiction to enforce employment rights protected by federal law, the field was closed to state regulation regardless of the applicability of a right-to-work law.<sup>179</sup> The subject matter of union-security was therefore brought into the mainstream of Supreme Court decisions employing preemption as the basis of foreclosure of state regulation of labor relations in the interest of a national system of jurisdiction. The cases before and since *Schermerhorn* have not departed from the position that section 14 (b) represents a narrow departure from the prevailing theme of federalism. As in *Algoma Plywood & Veneer Company*, the *Schermerhorn* agreement was valid as a matter of federal law. And in light of the Court's insistence that, absent "actual negotiation and execution of the type of agreement described by § 14 (b)," conduct arguably an unfair labor practice is governed by preemption principles, it is difficult to rationalize the applicability of right-to-work legislation to conduct or agreements proscribed by federal law.<sup>180</sup>

Assuming that federal standards are utilized, the law in its present posture indicates that relatively few cases within NLRB jurisdiction

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<sup>178</sup> 338 U.S. 953 (1950), *rev'g per curiam* 255 Wis. 235, 38 N.W.2d 688 (1949).

<sup>179</sup> "Since the N.L.R.B. was given jurisdiction to enforce the rights of the employees, it was clear that the Federal Act had occupied this field to the exclusion of state regulation. Plankington . . . show[s] that states may not regulate in respect to rights guaranteed by Congress in § 7." *Bus Employees Division 998 v. Wisconsin Employment Relations Bd.*, 340 U.S. 383, 390 n.12 (1951).

<sup>180</sup> If conduct arguably an unfair labor practice is not subject to state jurisdiction in the absence of a § 14 (b) agreement, policy considerations would not appear to change because of the presence of such an agreement. In either case, the controlling factor is a violation of federal law.

will arise in which state regulation on the basis of a right-to-work law is proper.<sup>181</sup> It must first be determined that the arrangement in question involves an agreement *requiring*<sup>182</sup> union membership, or its equivalent, which satisfies the federal standards of section 8 (a) (3). If such an agreement is found, it is still not subject to state power under section 14 (b) unless "actual negotiation and execution" has occurred. Presumably this means integration in the form of a written contract. The existence of a written contract, however, does not conclusively establish the applicability of a right-to-work law. If such an agreement, either on its face or in its application, raises a doubt as to its validity under federal law, the states must defer action because of traditional preemption doctrine. In short, the states may act only in cases free of factual issues bearing on the question of validity of a written agreement under federal law.

If a union-security agreement clears all these hurdles, the remedial powers of a right-to-work state are still governed by the congressional regulatory scheme. Under *Algoma Plywood & Veneer Company* and *Schermerhorn*, a state court may declare a union-security agreement illegal under state law, enjoin its application, and reinstate with back pay an employee discharged under such an agreement. Absent the necessary agreement, state injunctive and damage relief is apparently not available.<sup>183</sup> The theoretical impact of these limitations is to make surplusage of a substantial portion of a right-to-work law

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<sup>181</sup> This development, in light of the broad scope of right-to-work acts, would appear to underscore the desirability of congressional action with respect to the limited nature of state jurisdiction under § 14 (b). If the present balance of federal-state power in the area of union-security is to continue, some explicit guidance from Congress would alleviate the judicial burdens in administering that balance.

<sup>182</sup> It should be noted that the scope of most right-to-work acts is not limited to agreements which require membership in a labor organization as a condition of employment. For example, the South Dakota act outlaws any agreement which "directly or indirectly, denies, abridges, interferes with, or in any manner curtails" the so-called "right to work." S.D. CODE § 17.1101 (2) (Supp. 1960).

<sup>183</sup> Since state power is not activated until "actual negotiation and execution," it would seem to follow that the right-to-work states may not enjoin union demands to negotiate a union-security agreement. Cf. *NLRB v. Atlanta Coca-Cola Bottling Co.*, 295 F.2d 300, 303 (5th Cir. 1961); *NLRB v. White Constr. & Eng'r Co.*, 204 F.2d 950, 953 (5th Cir. 1953). A difficult question that remains unsettled is whether a state may enjoin economic action allegedly designed to secure compliance with a written agreement clearly subject to state prohibition. If the union objective appears to be solely the enforcement of an illegal agreement, the denial of state jurisdiction would be difficult to support. However, if there exists a disputed factual issue as to the purposes underlying a strike or picketing, the mere fact that an agreement within § 14 (b) exists would not, standing alone, justify state preventive relief.

in the area of NLRB jurisdiction. Whether state courts share this view remains to be seen.

#### CONCLUSION

Congress, with rare exceptions, has been content to leave to the Supreme Court the task of defining the extent to which the states may concurrently regulate areas of labor relations already subject, in whole or in part, to federal control. The Court in a long line of decisions has exercised that authority in a manner which confirms the power of the federal government to establish and apply a uniform and exclusive national law of labor relations. The Court's narrow reading of the legislative purpose of section 14 (b) is consistent with that trend. As a matter of policy, the decision to restrict state jurisdiction under that section undoubtedly rests on the judgment that central interests served by preemption doctrine are endangered by right-to-work laws. If the risk of actual or potential interference with federal labor policy justifies the use of preemption doctrine, experience with right-to-work laws would appear to vindicate that judgment.

One's final judgment about the value of right-to-work laws must depend to a great extent upon considerations as to whether these laws redistribute union power in any significant way. These are matters beyond this discussion. For present purposes, however, it would appear permissible to make the observation that if there is no real alternative to collective bargaining, the attempt of right-to-work doctrine to supply such an alternative only serves to agitate the competitive struggle for power between labor and management. This friction is in turn manifested in federal-state relations with respect to the issue of division of responsibility in labor matters.

Any attempt to resolve the right-to-work issue in terms of legal structure must surely take into account the degree to which these laws are currently out of step with national labor policy. So long as right-to-work laws purport to regulate conduct which preemption reserves for federal regulation, state courts will find it difficult to identify and accommodate respective state and federal interests. The fact remains that withdrawal from the states of most aspects of compulsory unionism has not been easy to accomplish in fact. The number of reported decisions to date which resist federal standards of union-security would, at the very least, leave open the possibility

that the states are prematurely invoking right-to-work laws to a considerable extent in unreported litigation. The crux of the problem is that federal law decrees a complex set of principles to govern an area in which the states, at the invitation of section 14 (b), have made a firm policy decision to reject federal control. In addition, the right-to-work states enjoy the practical advantage of being in a position to apply, in the first instance, their own standards of conduct. The containment of state power, under such conditions, depends primarily upon the exercise of judicial restraint. Restraint may not achieve the level of broad doctrine in right-to-work states until Congress is more explicit about residual areas of state power. Such considerations would appear relevant to current discussions concerning the ultimate fate of section 14 (b).