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Federal Labor Law Preemption and Right to Hire Permanent Replacements: Belknap, Inc. v. Hale

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CASENOTES

Federal Labor Law Preemption and Right to Hire Permanent Replacements: *Belknap, Inc. v. Hale*[1] — The Supreme Court has created two doctrines for analyzing preemption problems when state law conflicts with federal labor law.[2] The first, the *Garmon*[3] doctrine, applies to disputes over conduct regulated by the National Labor Relations Act ("NLRA" or "Act").[4] Under the *Garmon* doctrine state action regulating conduct also regulated by federal labor law is preempted.[5] The second, the *Machinists*[6] doctrine, applies to state action concerning conduct related to labor disputes but not arguably regulated by the NLRA.[7] If the conduct subject to state action appears to have been intentionally left unregulated by Congress the state regulation is preempted under the *Machinists* doctrine.[8]

Whichever doctrine is applied to a labor action filed in state court, the result has been either to allow the state jurisdiction over the action or to preempt it completely.[9] In the recent case of *Belknap, Inc. v. Hale*,[10] however, the Supreme Court fashioned a middle ground when it permitted state action regulating an employer's hiring of strike replacements to go forward but then proceeded to change the federal common law concerning such hiring so that employers could avoid future liability in those state actions.[11] The Court attempted to preserve both a state's ability to regulate and the labor activity.[12] In reaching this result the Court altered the *Machinists* doctrine.[13] Previously, under *Machinists*, if the Court found that Congress intended the challenged conduct to remain unregulated, neither state nor federal regulation was permitted.[14] In *Belknap*, the Court deviated from its prior articulation of the *Machinists* doctrine by introducing a balancing test to its analysis. This balancing test was used to determine whether a state action regulating an employer's economic weapon would be permitted despite Congress's intent that such conduct be left unregulated.[15] While sustaining the state action the *Belknap* Court also altered the terms under which the employer could hire replacement workers.[16]

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[1] 103 S. Ct. 3172 (1983).

[2] Belknap, Inc. v. Hale, 103 S. Ct. at 3176-77.

[3] San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959).

[4] *Belknap*, 103 S. Ct. at 3176-77; National Labor Relations Act, § 1, 29 U.S.C. §§ 151-69 (1982).

[5] *Belknap*, 103 S. Ct. at 3176-77.

[6] Lodge 76, International Association of Machinists & Aerospace Workers v. Wisconsin Employment Relations Comm'n, 427 U.S. 132 (1976) [hereinafter cited as *Machinists*].

[7] *Id.* at 141. *See also Belknap*, 103 S. Ct. at 3176-77.

[8] *Machinists*, 427 U.S. at 141.

[9] *See, e.g.*, Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180 (1978) (state action for trespass held not preempted); *Machinists*, 427 U.S. 132 (1976) (state action to enjoin union and its members from continuing to refuse to work overtime pursuant to union policy to put economic pressure on the employer held preempted); *Garmon*, 359 U.S. 236 (1959) (state action against peaceful picketing preempted).

[10] 103 S. Ct. 3172 (1983).

[11] *Id.* at 3176-82.

[12] *Id.*

[13] *Id.*

[14] 427 U.S. at 141.

[15] 103 S. Ct. at 3176-82. The economic weapon at issue was the employer's right to hire permanent replacements. *Id.*; *see also id.* at 3191 (Brennan, J. dissenting). In *Machinists* the Court recognized that Congress intended economic weapons "to be 'unrestricted by *any* governmental power to regulate.'" 427 U.S. at 141 (emphasis in the original).

[16] *Id.* at 3180-81 & n.9.

In *Belknap* the Court stated that the employer could avoid reinstating strikers by making conditioned offers of employment rather than permanent offers to replacements.[17]

The controversy in *Belknap* began on January 31, 1978 when the Teamsters Local Union No. 89 ("Union"), the exclusive bargaining representative of Belknap's warehouse and maintenance workers, called a strike at Belknap, Inc.[18] Belknap and the Union began negotiating a new contract shortly before the expiration of the existing contract, but then reached impasse.[19] When the existing agreement between Belknap and the Union expired on January 31, 1978 approximately 400 Belknap employees went on strike the following day.[20]

In response to the strike, Belknap granted a wage increase the same day to any employees who remained on the job.[21] Belknap also began advertising for permanent replacements for the striking union employees.[22] Belknap issued a letter to all the hired replacements which stated that Belknap would not discharge the permanent replacements to provide jobs for the striking employees when the strike ended.[23] One month later, the permanent replacements received another letter reassuring them that there would be no change in their employment status.[24] The Union filed charges with the National Labor Relations Board ("NLRB" or "Board") on March 7, 1978 claiming that the wage increase offered union employees who did not participate in the strike constituted an unfair labor practice.[25] Belknap countered with its own unfair labor practice charges against the Union.[26]

The Board's Regional Director issued a complaint against Belknap asserting that the wage increase violated the National Labor Relations Act.[27] A settlement conference was

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[17] *Id.* Under the rule set forth in NLRB v. Mackay Radio and Telegraph Co., 304 U.S. 333, 345-47 (1983), an employer had to make permanent offers of employment to replacements to avoid the requirement of reinstating strikers. *See also* NLRB v. Mars Sales & Equipment Co., 626 F.2d 567 (7th Cir. 1980).

[18] 103 S. Ct. at 3174.

[19] Brief for Petitioner, at 4, *Belknap*, 103 S. Ct. 3172 (1983). The International Brotherhood of Teamsters Local No. 89 was certified by the NLRB as the workers' exclusive bargaining representative on October 10, 1974. *Id.*

[20] 103 S. Ct. at 3174.

[21] *Id.*

[22] *Id.* The advertisement read:

> Permanent Employees Wanted. Belknap, Inc., 111 East Main Street, Louisville, Kentucky.
>
> Openings available for qualified persons looking for employment to permanently replace striking warehouse and maintenance employees.
>
> Excellent earnings, fringe benefits and working conditions with steady year-round employment.
>
> Minimum starting rate $4.55 per hour. Top rate $5.85, depending on skill, ability and experience. Plus incentive earnings over hourly rate for most jobs. Apply in person at the Belknap Office located at 111 East Main Street between 9:00 a.m. and 2:30 p.m., Monday thru Friday. Park in company lot at 1st and Main.
>
> We are an equal opportunity employer.

103 S. Ct. at 3174-75 n.1.

[23] *Id.* at 3174-76. The replacement employees signed a form stating they were hired to replace permanently the employee whose name appeared on the form. *Id.* at 3175-76.

[24] *Id.*

[25] *Id.* The Union's charges were filed after some of the replacements were hired but before Belknap issued its letter reassuring replacements of their permanent status. *Id.*

[26] *Id.*

[27] *Id.* The complaint asserted that Belknap violated sections 8(a)(1), 8(a)(3), and 8(a)(5) of the NLRA, which provide in relevant part:

convened by the Regional Director shortly before the unfair labor practice hearing scheduled for July 19.[28] At this conference Belknap and the Union settled the strike and the NLRB dropped the unfair labor practice charges.[29] As part of the settlement Belknap agreed to recall all the striking employees at a minimum rate of thirty-five persons per week.[30] Consequently, Belknap discharged all the replacements, including the twelve respondents, to make room for the returning strikers.[31]

After being discharged by Belknap, twelve of the replacements sued Belknap in Kentucky Circuit Court for misrepresentation and breach of contract.[32] Their complaint alleged that Belknap knowingly and falsely stated that it was hiring the replacements as permanent employees and that Belknap knew the replacements would rely on those statements to their detriment.[33] Alternatively, the replacements claimed that Belknap breached its contract with the replacements by firing them as a result of its settlement with the Union.[34]

In response to the suit, Belknap moved for summary judgment on the grounds that the respondent's causes of action were preempted by the NLRA.[35] The Circuit Court allowed Belknap's motion.[36]

The replacements appealed the Circuit Court's decision and the Kentucky Court of Appeals reversed, finding no cause for preemption.[37] Preemption was inappropriate, the appeals court held, because Belknap's actions, the firing of the replacements, were not unfair labor practices and therefore not subject to the exclusive jurisdiction of the NLRB.[38] The appeals court also held that the contract and misrepresentation claims should be sustained because they are deeply rooted in local law and of only peripheral concern to the federal labor law.[39] The United States Supreme Court granted Belknap's petition for certiorari.[40]

(a) It shall be an unfair labor practice for an employer

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title; . . .

(3) 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; . . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

29 U.S.C. §§ 158(a)(1), 158(a)(3), 158(a)(5) (1982).

[28] *Belknap*, 103 S. Ct. at 3175-76.

[29] *Id.*

[30] *Id.* at 3176.

[31] *Id.*

[32] *Id.* The Kentucky Circuit Court is the state trial court. *Id.*

[33] *Id.*

[34] *Id.* Each of the Respondents asked for $250,000 in compensatory damages and $250,000 in punitive damages. *Id.*

[35] *Id.* Belknap had first sought removal to federal court, but its motion was denied. *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.* The Court of Appeals found that Belknap's actions were not unfair labor practices prohibited by 29 U.S.C. § 158(a)(3), which prohibits discrimination in personnel decisions for the purpose of encouraging or discouraging membership in a particular union, since the replacements did not seek membership in any labor organization. *Id.* The Kentucky Supreme Court granted discretionary review, but later vacated its own order which it determined to have been improvidently granted. *Id.*

[39] *Id.*

[40] *Id.* The United States Supreme Court found it had jurisdiction because the judgment of the

In a six-to-three decision[41] the Court affirmed the ruling of the Kentucky Court of Appeals and held that the NLRA does not preempt state causes of action for misrepresentation and breach of contract by strike replacements who are later fired.[42] Testing the state regulation of the employer's economic weapon under both the *Garmon* and *Machinists* doctrines, the Court held that neither doctrine preempted the state court suit.[43] The *Garmon* doctrine did not apply, the Court found, because the state causes of action were not identical to an action which could have been brought before the NLRB.[44] Applying the *Machinists* doctine, the Court found that although the hiring of replacements met the traditional *Machinists* test of being conduct Congress intentionally left unregulated, it would not preempt the state suit.[45] Instead, the Court found that when applying the *Machinists* doctrine courts should also weigh the impact on "innocent third parties."[46] Under this modified *Machinists* doctrine the Court held that the state actions were not preempted.[47] The majority concluded that allowing the replacement employees' claims to proceed in state court would not alter or hinder the employer's right under federal law to hire permanent replacements during an economic strike.[48] Finally, the majority held that even if the employer's conduct constituted an unfair labor practice the state court suit would not interfere with the ability of the Board to adjudicate the dispute and provide remedies.[49]

Belknap v. Hale is significant as the first case to assert the rights of third parties to a labor dispute. Applying the *Machinists* and *Garmon* preemption doctrines, the *Belknap* Court sustained state court actions concerning an employer's job offers to the replacement workers. Therefore, an employer who lawfully uses an economic weapon in a labor dispute may be liable for the effect on neutral third parties.[50] In the process of reaching this decision the Court altered the *Machinists* preemption doctrine by introducing a new test which requires the courts to balance state and federal interests.[51] Adding this test opens the door for increased state causes of action in labor disputes. The *Belknap* Court made another important change in the law when it stated that an employer could lawfully refuse reinstatement to strikers if it makes conditional job offers to the replacements.[52]

Kentucky Court of Appeals was final regarding its determination of the preemption issue. 103 S. Ct. at 3175-76 n.5. A reversal by the Supreme Court, the Court reasoned, would have terminated the state court action. *Id.* The Court noted, moreover, that to permit state court proceedings to continue without resolving the preemption issue would risk interference with the federal statutory policy of requiring the Board, not the state courts, to hear the subject matter of the respondents' cause. *Id.* at 3176 n.5.

[41] Justice White authored the opinion of the Court in which Chief Justice Burger, and Justices Rehnquist, Stevens, and O'Connor joined. Justice Blackmun filed a concurring opinion. Justice Brennan wrote a dissenting opinion which Justices Marshall and Powell joined. *Id.* at 3174.

[42] *Id.* at 3174, 3184-86.

[43] *Id.* at 3172, 3174-78.

[44] *Id.* at 3177.

[45] *Id.*

[46] *Id.* at 3178.

[47] *Id.* at 3181.

[48] *Id.* at 3177-79.

[49] *Id.* at 3184-85.

[50] *Id.* at 3177-78.

[51] The Court considered the state's interest in protecting innocent third parties from misrepresentations. *Id.* at 3177-82.

[52] *Id.* at 3177-82, 3180-81 n.9.

Permitting conditional offers leaves the employer with greater flexibility and strengthens its position in a strike.[53]

This casenote will first present an overview of federal labor law governing the regulation of labor preemption and economic weapons generally.[54] Next it will set forth the reasoning of the various opinions in *Belknap*.[55] To evaluate the reasoning of *Belknap*, the Court's use of the *Garmon* and *Machinists* preemption doctrines in *Belknap* will then be analyzed.[56] The casenote will focus on the ineffectiveness of the *Garmon* doctrine, as restricted by later decisions, in preempting state actions which conflict with federal labor policy.[57] Also given particular attention will be the Court's alteration of the *Machinists* doctrine by introducing the state and federal interests balancing test to that doctrine.[58] Finally, the effect of *Belknap* on an employer's right to hire permanent replacements will be examined.[59] The Court's decision preserves both the employer's economic weapon and the replacement workers' remedies in state court instead of choosing between them. This casenote concludes that the Courts' action has resulted in dilution of the effectiveness of the *Machinists* doctrine and an unwarranted adjustment in the balance of power between labor and management.

I. Federal Labor Law Preemption and Regulation of Economic Weapons

Belknap involved the question of whether certain state actions were preempted by federal labor law. The Supremacy Clause provides that federal laws supersede any conflicting provision of a state constitution or state law.[60] A state law which regulates or infringes on a federally created right, therefore, falls to the superior federal law.[61] Federal law also preempts state law in any area where federal regulation is so pervasive that it precludes any state regulation.[62] With the passage of the National Labor Relations Act in 1935, Congress established such comprehensive regulation of the labor law field that state regulation is preempted in this area.[63] The stated purpose of the Act is the elimination of obstructions to the flow of interstate commerce caused by labor-management disputes.[64] As part of its effort to accomplish this objective the NLRA encourages collective bargaining and self-organization by workers.[65]

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[53] *Id.* "The Court's change in the law of permanency weakens the rights of strikers and undermines the protection afforded those rights by the Act." *Id.* at 3198 (Brennan, J., dissenting).

[54] *See infra* notes 69-131 and accompanying text.

[55] *See infra* notes 136-250 and accompanying text.

[56] *See infra* notes 261-74 and accompanying text.

[57] *See infra* notes 273-75 and accompanying text.

[58] *See infra* notes 275-90 and accompanying text.

[59] *See infra* notes 292-315 and accompanying text.

[60] *See infra* notes 316-23 and accompanying text.

[61] U.S. Const. art. VI. "This Constitution, and the Laws of the United States which shall be made in pursuance thereof; . . . shall be the supreme law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or laws of any State to the contrary notwithstanding." *Id. See also* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 17 (1824) ("[N]or should the states encroach on ground which the public good, as well as the constitution, refers to the exclusive control of Congress.").

[62] *Id.*

[63] State v. McHorse, 85 N.M. 753, 757, 517 P.2d 75, 79 (1973).

[64] National Labor Relations Act, § 1, 29 U.S.C. § 151 (1982). *See also* Garner v. Teamsters, Chauffeurs, and Helpers Local Union, 346 U.S. 485, 488-91 (1953).

[65] National Labor Relations Act, § 1, 29 U.S.C. § 151 (1982):

In enacting this statute, Congress also established the National Labor Relations Board and vested it with exclusive jurisdiction over cases arising under the NLRA.[66] Both federal and state courts are, therefore, precluded from intervening in disputes over conduct regulated by the NLRA.[67] The exclusive jurisdiction of the Board prevents conflicting or incompatible adjudications and remedies resulting in cases involving the same type of activity.[68]

As indicated previously, the Supreme Court uses two doctrines to evaluate preemption problems arising when state and federal labor law conflict.[69] Preemption issues emanating from conduct regulated by the NLRA are analyzed according to the principles set forth by the Court in *San Diego Building Trades Council v. Garmon*.[70] Questions presented by conduct which Congress intended to be unregulated by both federal and state law are decided by using the test the Court established in *Lodge 76, International Association of Machinists and Aerospace Workers v. Wisconsin Employment Relations Commission*.[71] The next two subsections of this casenote will discuss the *Garmon* and the *Machinists* doctrines in turn. These two doctrines will then be examined as applied to the right of employers to hire permanent replacements during a strike.

A. *Preemption and Conduct Covered By the NLRA — The* Garmon *Cases*

The foundation of the *Garmon* doctrine was laid by an early Supreme Court labor case, *Garner v. Teamsters, Chauffeurs, and Helpers Local Union*.[72] In *Garner* the Court held that the NLRA preempted a state court from enjoining union picketing which violated a state law.[73] Later cases extended this preemption doctrine. In *San Diego Building Trades Council v. Garmon*[74] the Court held that where an activity is at least arguably protected or prohibited by the NLRA state action is preempted.[75] In *Garmon* the California Supreme Court had sustained an award of damages for union picketing which it found to be in violation of section 8 of the NLRA.[76] The violation had not been adjudicated by the Board as it had declined to exercise its jurisdiction.[77] The United States Supreme Court re-

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> It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

[66] *Id.* Section 7 of the Act guarantees employees the right to self-organization, to choose and bargain collectively through representatives, and to engage in concerted activities for mutual aid and protection. 29 U.S.C. § 157 (1982). Section 8 of the Act makes it an unfair labor practice to interfere with an employee's exercise of his section 7 rights, to encourage or discourage union membership, or to refuse to bargain collectively with a union representative. 29 U.S.C. § 158 (1982). *See also Sears*, 436 U.S. at 190-91.

[67] National Labor Relations Act § 3, 29 U.S.C. § 153 (1982). *See also Garner*, 346 U.S. at 490-91.

[68] *Garner*, 346 U.S. at 490-91.

[69] *Id.*

[70] *See supra* notes 2-7 and accompanying text.

[71] 103 S. Ct. at 3177-78; *see Garmon*, 359 U.S. at 236, 244-45; *see also Sears*, 436 U.S. at 197.

[72] *Belknap*, 103 S. Ct. at 3177-78. *See Machinists*, 427 U.S. at 148-51.

[73] 346 U.S. 485 (1953).

[74] *Id.* at 498-501.

[75] 359 U.S. 236 (1959).

[76] *Id.* at 245.

[77] *Id.* at 238-39.

versed, holding that the state court was not free to regulate this activity even if the NLRB had failed to assert its jurisdiction.[78] In explanation the Court maintained that to allow the states to control activities potentially subject to federal regulation involved too great a danger of conflict with national labor policy.[79]

The *Garmon* Court, however, did identify some exceptions to the preemption rule.[80] When the activity is only of peripheral concern to the Act, the Court commented, the state power to regulate is not preempted.[81] State regulation is also allowed where the regulated conduct touches interests of great local concern and responsibility.[82] The Court reasoned that in such local matters it could not infer that Congress had deprived the state of power to act.[83]

In a more recent case, *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*,[84] the Supreme Court modified the *Garmon* test of arguably protected or prohibited conduct and expanded the potential area of state regulation.[85] The *Sears* Court stated that the test for deciding when a state cause of action is preempted is whether the controversy presented to the state court is identical to the dispute which could have been presented to the NLRB.[86] Sears Roebuck had brought a trespass action against the Carpenters Union after the union picketed on Sears property to protest Sears' use of non-union carpenters.[87] The California Supreme Court, relying on *Garmon*, ruled that the state trespass action was preempted by the NLRA.[88] The United States Supreme Court reversed, stating that only when the stated cause of action is identical to an action which could be adjudicated by the Board is the action preempted.[89] Exercise of jurisdiction over the action by the state court, the Court explained, would not conflict or interfere with the NLRB's jurisdiction.[90]

The *Sears* Court articulated the new preemption test after reviewing the numerous cases in which the Court had found exceptions to *Garmon* and had sustained state action which met the *Garmon* arguably-regulated test.[91] In the cases following *Garmon*, the Court noted, it had refused to apply the *Garmon* rule in a literal, mechanical fashion.[92] Instead,

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[78] *Id.*

[79] *Id.* at 246.

[80] *Id.*

[81] *Id.* at 243-44.

[82] *Id. See also* Int'l Ass'n of Machinists v. Gonzales, 356 U.S. 617, 620 (1958).

[83] 359 U.S. at 244.

[84] The Court stated that:

> [D]ue regard for the presuppositions of our embracing federal system, . . . has required us not to find withdrawal from the States of power to regulate where the activity regulated was a merely peripheral concern of the Labor Management Relations Act . . . . Or where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act.

Id. at 243-44 (citations omitted).

[85] 436 U.S. 180 (1978).

[86] *See* Comment, *State Actions for Wrongful Discharge: Overcoming Barriers Posed by Federal Labor Law Preemption*, 71 CAL. L. REV. 942, 954 (1983) [hereinafter cited as Comment, *Wrongful Discharge*]; *see also infra* notes 91-96 and accompanying text.

[87] 436 U.S. at 197, 209.

[88] *Id.* at 182-83.

[89] *Id.* at 183-84.

[90] *Id.* at 197.

[91] *Id.*

[92] *Id.* at 188-89.

the *Sears* Court noted, the Court had balanced the nature of the interests asserted and the effect of the state court adjudication upon the administration of national labor policy.[93]

By restricting the inquiry to whether a direct conflict exists with the Board's jurisdiction, the Supreme Court, in *Sears*, cut back on the arguably-regulated *Garmon* test.[94] State actions which might have been preempted under *Garmon* as being arguably under the NLRA and therefore potentially within the Board's jurisdiction may be sustained under *Sears*.[95] Under the *Sears* test the conduct must be definitely within the Board's jurisdiction before the state cause of action will be preempted.[96]

B. *Preemption and Conduct Not Regulated by the NLRA*

Garmon and *Sears* only created rules to analyze conduct regulated by the NLRA.[97] Other activities, though unregulated by the NLRA, may be an integral part of federal labor policy.[98] The Supreme Court originally stated that state regulation of such activity was not preempted but later abandoned this approach deciding that federal labor policy prohibited state regulation of such conduct.[99] The Supreme Court first discussed the preemption of state regulation of conduct related to a labor dispute but not regulated by the NLRA in the so-called *Briggs-Stratton*[100] case, which arose before the Court had established any labor preemption doctrines.[101] In *Briggs-Stratton* the Wisconsin Employment Relations Board ordered a union to cease its "quickie" strikes.[102] Because the strikes were neither protected nor prohibited by the NLRA, the Court upheld the state board action[103] and ruled that the state action was not preempted.[104] The Court explained that the strikes could be regulated by the state because they would be entirely unregulated in the absence of state regulation.[105] Accordingly, the state was allowed to apply its laws to restrict the strikes.[106]

Several years later, the Supreme Court abandoned the *Briggs-Stratton* approach in *Lodge 76, International Association of Machinists and Aerospace Workers v. Wisconsin Employment Relations Commission*.[107] In that case the Supreme Court reversed the Wisconsin Employment Relations Board's injunction against a union's refusal to work overtime pursuant to its policy to put economic pressure on an employer during contract negotiations.[108] The *Machinists* Court found that certain labor activities, typically economic weapons, were intentionally left unregulated by Congress.[109] State regulation of such weapons, the Court

[93] *Id.* at 188.

[94] *Id.* at 188-89.

[95] *Id.*

[96] *Id.* at 197.

[97] *Id.*

[98] *See supra* notes 69-96 and accompanying text.

[99] *See infra* notes 109-14 and accompanying text.

[100] *See infra* notes 100-110 and accompanying text.

[101] International Union, UAW, Local 232 v. Wisconsin Employment Relations Bd., 336 U.S. 245 (1949). This case is named for the Briggs & Stratton Corporation at which the work stoppages at issue took place. *Id.* at 248.

[102] Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1338, 1346 (1972) [hereinafter cited as Cox].

[103] 336 U.S. at 248. These strikes were intermittent, unannounced work stoppages. *Id.*

[104] *Id.* at 254.

[105] *Id.*

[106] *Id.*

[107] *Id.* at 265.

[108] 427 U.S. 132 (1976).

[109] *Id.* at 133.

concluded, is therefore preempted by a federal labor policy against any regulation in the area.[110]

In the case before it the *Machinists* Court found that the union's application of economic pressure by refusing to work overtime was a form of economic self-help that was "part and parcel of the process of collective bargaining" which Congress intentionally left unregulated.[111] This economic weapon, the Court noted, was to be governed by the free play of economic forces.[112] The *Machinists* Court found that Congress has been specific when it has outlawed the use of particular economic weapons by unions.[113] The availability of economic weapons permitted by federal law, the Court commented, should not be dependent on the forum in which the opponent presses his claims.[114] A party affected by a labor dispute, the Court stated, is not without recourse if the state law is preempted.[115] In *Machinists*, the Court observed, the employer could have employed its own form of economic pressure.[116] Because self-help was available, the Court explained, depriving the employer of its state court remedy was not unjust.[117] For these reasons, the Court held that activities not covered by federal law may not be regulated by state law if Congress intentionally failed to regulate the activity as part of federal labor law policy.[118]

C. *Preemption and the Economic Weapon of Hiring Replacement Workers*

In *Belknap* the Court addressed the issue of whether a state could regulate an employer's hiring of replacement workers during a strike. Because the right to hire replacements is recognized as an employer's economic weapon under federal labor law the Court employed both the *Garmon* and *Machinists* preemption doctrines to resolve the issue.[119] Under the *Garmon* doctrine the Court considered whether Belknap's conduct in hiring the replacements was arguably regulated by the NLRA.[120] Under the *Machinists* doctrine the Court considered whether a state could regulate the hiring of replacements, conduct intentionally left unregulated by Congress.[121] Before analyzing the application of either the *Garmon* or *Machinists* doctrines to Belknap's hiring of permanent replacements the nature of this economic weapon must first be examined. The employer who uses its right to hire replacements releases himself from the obligation of reinstating strikers whose jobs have been filled.[122] By hiring permanent replacements, therefore, the employer pressures the union to end the strike quickly while jobs remain open.[123]

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[110] *Id.* at 136, 141, 149 n.10. Between the labor activities protected by the NLRA and the unfair labor practices prohibited by the NLRA lies a gap in which labor and management are free to fight out their differences with economic weapons unrestricted by federal law. Economic weapons include conduct such as slowdowns, quickie strikes, and lockouts. Cox, *supra* note 97, at 1346. In *Belknap* the economic weapon was the hiring of permanent replacements.

[111] 427 U.S. at 140 & n.4.

[112] *Id.* at 149 (quoting NLRB v. Insurance Agents, 361 U.S. 477, 495 (1960)). *See also* New York Tel. Co. v. New York State Dept. of Labor, 440 U.S. 519, 531 (1979).

[113] 427 U.S. at 149-50.

[114] *Id.* at 143.

[115] *Id.* at 153.

[116] *Id.* at 152-53.

[117] *Id.* For example, the employer could have fired the union employees. *Id.*

[118] *Id.*

[119] *Id.* at 140-41 & n.4.

[120] 103 S. Ct. 3176-86.

[121] *Id.* at 3182-84.

[122] *Id.* at 3177-81.

[123] 427 U.S. at 152-53.

The Court first recognized the right to hire permanent replacements during an economic strike in *NLRB v. Mackay Radio & Tel. Co.*[124] In finding this action permissible, the *Mackay* Court balanced the employer's interest in hiring workers to continue its business operations against the negative impact of the hires on union activity and strikers' rights under the NLRA.[125] The Court determined that the need to entice workers to take the replacement positions so the business could continue to operate was a sufficient business justification for permanently replacing strikers.[126] Such permanent replacements need not be discharged, the Court maintained, to make room for economic strikers who request reinstatement.[127] Replacements hired on a temporary basis, the Court noted, must be discharged if strikers make an unconditional offer to return to work or the strike is settled.[128]

Although the *Mackay* Court found that the employer could hire permanent replacements because it had a substantial business reason, the NLRB has treated the hiring of permanent replacements as a legal right of the employer.[129] A court will not inquire into the motive of the employer or require the employer to show that the only way it could obtain replacements was through an offer of permanent employment.[130] Rather, hiring permanent replacements is viewed as an economic weapon available for use by the employer in resisting a union's use of economic pressure.[131]

In *Belknap v. Hale* Belknap used the economic weapon of hiring permanent replacement workers during the strike by the Union.[132] Although Belknap's action might have

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[124] *Id.*

[125] 304 U.S. 333, 345-47 (1938). The right may only be used in an economic strike, a strike to gain economic benefits. An employer may not exercise this right to hire permanent replacements in an unfair labor practice strike, a strike in protest of or caused by an employer's violation of the NLRA. *Id.* at 345; *see also* Giddings & Lewis, Inc. v. NLRB, 675 F.2d 926, 929 n.8 (7th Cir. 1982) ("By restricting this right to employers 'guilty of no act denounced by the statute,' the Court limited its analysis to economic strike replacements."); Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 278 (1956) (in the event of an unfair labor practice strike, an employer must offer reinstatement to all strikers).

[126] 304 U.S. at 345-46. *See also* Giddings & Lewis, Inc. v. NLRB, 675 F.2d 926, 929 (7th Cir. 1982). The Court stated:

> Subsequent cases have read *Mackay* as employing a balancing test in arriving at the conclusion that the hiring of replacement workers was permissible under the Act. This balancing test weighed the inevitable negative impact on union activity of hiring permanent replacement workers against the business justification for doing so.

Id.

[127] 304 U.S. at 345-46. The Court stated:

> [I]t does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue this business by supplying places left vacant by strikers and he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them.

Id.

[128] *Id.*

[129] *Id.* at 346-47. *See also* NLRB v. Mars Sales & Equipment Co., 626 F.2d 567 (7th Cir. 1980).

[130] *E.g.*, Hot Shoppes, Inc., 146 N.L.R.B. 802, 805, 55 L.R.R.M. 1419, 1420 (1964).

[131] *Id.* "[T]he motive for such replacements is immaterial, absent evidence of an independent, unlawful purpose." *Id.* For an example of failure to inquire into the motives or reasons for the employer's hires, see American Optical Co., 138 N.L.R.B. 681, 689, 50 L.R.R.M. 1332, 1332-33 (1962).

[132] Penn. Glass Sand Corp., 172 N.L.R.B. 514, 70 L.R.R.M. 1281 (available in L.R.R.M. in summary form only) (1968). The Board stated:

been found lawful had the NLRB adjudicated the strike to be an economic strike, Belknap agreed to reinstate all the strikers as part of the settlement agreement between Belknap and the Union.[133] As a result of agreeing to reinstatement, however, Belknap found it necessary to lay off its newly hired permanent replacements.[134] These replacements brought state court actions against Belknap for breach of contract and misrepresentation.[135] In defense, Belknap sought to have the Court find that federal labor law preempted the replacement workers suit. Both the *Garmon* and *Machinists* doctrines were used by the *Belknap* Court to analyze whether a state cause of action which impacted on an employer's *Mackay* right to hire permanent replacements should be preempted.

II. THE *BELKNAP* DECISION

In the *Belknap* decision the Supreme Court held that the NLRA does not preempt state misrepresentation and breach of contract actions brought against an employer by permanent strike replacements who are displaced by reinstated strikers.[136] Guided by the preemption doctrines in *Machinists*, the Court considered whether the replacements' state claims regulated the hiring of permanent replacements, an unregulated economic weapon, and must therefore, be preempted.[137] Introducing a balancing test to *Machinists*, the Court found that Congress could not have intended injuries to innocent third parties to go unremedied, so *Machinists* did not preempt the state actions.[138] According to the Court, application of the *Garmon* doctrine also sustained the state cause of action.[139] Although the state claims regulated the hiring of permanent replacements, the same conduct which caused unfair labor practice charges to be before the NLRB, the Court concluded that the state claims were not identical to the claims which might have been presented to the NLRB and so were not preempted.[140] The Court also found that an employer could make conditioned offers of employment and still refuse to reinstate strikers thus changing the *Mackay* economic weapon rule.[141]

Writing for the majority, Justice White began the Court's analysis by reviewing current labor preemption law as set forth in *Garmon* and *Machinists*.[142] Under *Garmon*, the Court recognized, state regulation is presumptively preempted if it concerns conduct that is actually or arguably regulated by the Act.[143] The Court stated, however, that if the conduct is of great local concern and only peripherally related to the Act, the state's interest must be balanced against any interference with the NLRB's function and the risk

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In *Hot Shoppes* there was a certified union and the strike occurred in the course of contract negotiations. The strikers were warned in advance that they would be permanently replaced if they went on strike. *Hot Shoppes* thus presented a classically simple case of economic warfare; with the employer using established means of resisting the union's economic pressure in support of its demands.

172 N.L.R.B. at 535.

[133] *See supra* notes 22-35 and accompanying text.

[134] *See supra* notes 22-35 and accompanying text.

[135] *See supra* notes 22-35 and accompanying text.

[136] *See supra* notes 22-35 and accompanying text.

[137] 103 S. Ct. at 3174-78.

[138] *Id.*

[139] *Id.*

[140] *Id.*

[141] *Id.*

[142] *Id.*

[143] *Id.* at 3177-78.

that the state will sanction conduct permitted by the Act.[144] The *Machinists* doctrine, the Court found, would operate to proscribe state regulation of conduct Congress intended to leave unregulated as part of the self-help remedies for combatants in labor disputes.[145]

After reviewing the preemption doctrines the Court addressed Belknap's arguments for preemption under the *Machinists* doctrine.[146] Belknap argued that both of the replacements' state actions impermissably regulated and burdened the employer's economic weapon of hiring permanent replacement workers and should be preempted by the *Machinists* doctrine.[147] This economic weapon, Belknap asserted, was intentionally left unregulated by Congress.[148] The Court acknowledged that federal law permits an employer to hire permanent replacements and to retain such replacements over economic strikers,[149] but rejected Belknap's argument that the state court suits were impermissible attempts to regulate the hire of permanent replacements.[150] Federal law, the Court declared, could not insist on permanent offers on the one hand and forbid damage suits for breach of such promises on the other hand.[151] Moreover, while federal law intended to leave the employer and union free to use their economic weapons against one another, the Court stated, federal law did not intend to allow either party to injure innocent third parties without penalty.[152] On the basis of this analysis the Court found that the *Machinists* doctrine should not preempt a state cause of action which protects or remedies the rights of third parties and has only minimal impact on the employer's economic weapon.[153] The Court also rejected Belknap's argument that the federal labor policy of encouraging settlement of labor disputes could preempt a state cause of action protecting third parties.[154]

Having generally dismissed Belknap's arguments under *Machinists*, the Court then considered Belknap's arguments that permitting state suits would weaken the employers' position during a strike.[155] Belknap argued that if the Court permitted the replacements' state actions employers would be deterred from making offers of permanent employment or would be forced to condition the offers by stating the circumstances under which replacements must be fired.[156] Refuting Belknap's contention that conditioning the offers would considerably weaken the employer's position, the Court stated that under the

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[144] *Id.*

[145] *Id.*

[146] *Id.*

[147] *Id.* at 3177-78.

[148] *Id.*

[149] *Id.*

[150] *Id.*

[151] *Id.* "It is asserted . . . that entertaining the action against Belknap was an impermissible attempt by the Kentucky courts to regulate and burden one of the employer's primary weapons during an economic strike, that is, the right to hire replacements . . . . We are unpersuaded." *Id.*

[152] *Id.*

[153] *Id.* The Court stated, "[w]e cannot agree with the dissent that Congress intended such a lawless regime." *Id.*

[154] *Id.*

[155] The Court observed:

> We do not think the normal contractual rights and other usual legal interests of the replacements can be so easily disposed of by broad-brush assertions that no legal rights may accrue to them during a strike because federal law has privileged the "permanent" hiring of replacements and encourages settlement.

Id.

[156] *Id.* at 3178-79.

present NLRB interpretation of federal labor law, offers of permanent employment to replacements were subject to implied conditions.[157] *Belknap* and the NLRB had argued that, as a matter of federal law, an employer may terminate replacements without liability in the event of a settlement or an NLRB finding of an unfair labor practice strike.[158] The Court maintained that if this interpretation was correct future replacement offerees would be likely to assume the impermanency of their positions, and many might refuse the offers of employment.[159]

Thus the Court found, under the Board's interpretation of the law, offers to permanent replacements would, as a matter of law, be no more permanent than if they were expressly conditioned on settlement with the Union.[160] The Court suggested that the employer make its offers of permanent employment expressly conditioned upon settlement with the union or upon an NLRB finding of an unfair labor practice strike.[161] Such offers would avoid misrepresentation problems, and would not, in the Court's view, make obtaining replacements any more difficult than impliedly conditional offers like those in *Belknap*.[162] The state regulation, the Court reasoned, does not infringe on the employer's economic weapon because the employer can easily avoid such infringement by conditioning its offers. Therefore, the Court reasoned, preempting the state causes of action is unnecessary.[163]

The majority concluded that *Belknap* had not offered any substantial case authority to justify preemption under the *Machinists* doctrine.[164] The Court proceeded to analyze the *Belknap* facts under the *Garmon* doctrine.[165] According to this doctrine, the Court explained, state regulations and causes of action are presumptively preempted if they concern conduct that is arguably regulated by the NLRA.[166] The Court reemphasized the doctrine from *Sears* that the critical inquiry in applying the *Garmon* rules is whether the controversy presented to the state court is identical to that which could be presented to the NLRB.[167] Under *Garmon*, the Court stated, a balancing test may be applied which sustains the action where the regulated conduct is deeply rooted in local interests and is of only peripheral concern to federal labor law.[168]

Addressing Belknap's argument that the replacements' misrepresentation action regulated conduct also regulated by the NLRA and should be preempted under the *Garmon* doctrine, the Court held that this state cause of action should be sustained.[169]

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[157] *Id.*

[158] *Id.* The NLRB expressed its interpretation in an amicus brief on behalf of Belknap. *Id.* at 3177-78.

[159] *Id.*

[160] *Id.*

[161] *Id.* at 3179 ("Belknap's promises, although in a form assuring permanent employment, would as a matter of law be non-permanent to the same extent as they would be if expressly conditioned on the eventuality of settlement requiring reinstatement of strikers and on its obligation to reinstate unfair labor practice strikers.").

[162] *Id.* at 3177-78.

[163] *Id.* at 3178-79, 3179 n.7.

[164] *Id.* at 3178-79. The Court also commented that conditional offers would promote the NLRB's policy of encouraging settlement because an employer that did not fear liability from discharged replacements would be more willing to reinstate strikers and settle the strike. *Id.*

[165] *Id.*

[166] *Id.*

[167] *Id.* at 3180-86.

[168] *Id.* at 3182-84.

[169] *Id.*

Although, as the Court recognized, the NLRB could have determined that the Belknap employment offers were unfair labor practices, the Court found that the matter as presented to the NLRB would not be identical to the issue before the state court.[170] The NLRB, the Court explained, would focus only on whether the rights of the strikers had been harmed.[171] The state court, in contrast, the Court noted, would be able to offer the replacements relief for the harm resulting from the misrepresentation.[172] The state action, the Court concluded, would not infringe on the NLRB's exclusive jurisdiction.[173] In addition, the Court noted that the state had a substantial interest in protecting its citizens from harmful misrepresentations.[174] The *Belknap* Court concluded that the state interests outweighed any federal concern for interference with the NLRB's function.[175]

The Court then proceeded to apply *Garmon* to the breach of contract action.[176] Belknap argued that the *Garmon* doctrine preempted this cause of action.[177] According to Belknap, had the NLRB found it guilty of unfair labor practices, it could have ordered it to reinstate all the strikers.[178] This reinstatement would have left no room for the replacements.[179] Although the Court recognized this possibility it stated that, in its view, the replacements' suit for damages could be maintained without interfering with the NLRB's power to decide any unfair labor practice claims.[180] Since the replacements' suit for breach of contract would not infringe on the rights of either the strikers or the employer, nor would it frustrate any federal labor law policy, the Court concluded that no basis for preemption existed and the replacements' breach of contract action must be sustained.[181]

The *Belknap* Court, in conclusion, sustained the replacements' misrepresentation and breach of contract actions because the Court found no grounds for preemption under *Machinists* or *Garmon*.[182] Furthermore, the Court suggested that in future labor disputes employers could avoid liability to replacement employees by conditioning their offers of permanent employment on either a failure to settle with the union or the failure of the NLRB to find an unfair labor practice strike.[183] Finally, the Court indicated that such conditional offers would be considered sufficiently permanent to allow the employer to refuse reinstatement to strikers if the employer is not found guilty of unfair practices, does not settle with the union, or settles without a promise to reinstate strikers.[184]

In a concurring opinion, Justice Blackmun agreed with the majority's conclusion that the replacements' causes of action were not preempted under federal law.[185] Justice Blackmun disagreed, however, with the majority's suggestions that employers could make

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[170] *Id.*
[171] *Id.*
[172] *Id.*
[173] *Id.*
[174] *Id.*
[175] *Id.*
[176] *Id.*
[177] *Id.* at 3183-85.
[178] *Id.* at 3183-84.
[179] *Id.*
[180] *Id.*
[181] *Id.*
[182] *Id.* at 3184.
[183] *Id.*
[184] *Id.* at 3179-81.
[185] *Id.* at 3178-80, 3180 n.8.

conditional offers of employment in the future which would allow the employer to refuse to reinstate stikers in an economic strike.[186] According to Justice Blackmun, if the employer made conditional offers there would be no business justification for refusing to reinstate strikers.[187]

Justice Blackmun reviewed in detail the problem of offers to the replacements.[188] He noted that, under federal labor law, an employer may only deny reinstatement to an economic striker by showing legitimate and substantial business justification.[189] The employer may refuse reinstatement if it has promised permanent employment to the replacements, Justice Blackmun explained, because such promises may be necessary to entice workers to accept employment.[190] Offers of conditional employment, suggested by the majority, would not in Justice Blackmun's view, be a sufficient business justification to deny reinstatement to a striker.[191] In addition, Justice Blackmun commented, retaining the replacements instead of reinstating strikers when the employer has not promised to do so would be an unfair labor practice.[192]

According to Justice Blackmun, the majority's change in the rules respecting permanent offers to sustain the state action was unnecessary.[193] Rather, Justice Blackmun suggested that the state causes of action complemented rather than conflicted with federal law.[194] Justice Blackmun explained that the employer's offers of permanent employment must be enforceable under state law to be credible and thus serve to entice workers to take the jobs.[195] The employer's potential liability to the replacements, Justice Blackmun reasoned, provides another business justification to refuse to reinstate strikers.[196] The potential liability under the contractual obligation to the replacements, concluded Justice Blackmun, supports the rationale for permitting *Mackay* offers of permanent employment to be used to avoid reinstating strikers.[197]

Finally, Justice Blackmun recognized that the NLRB, in an unfair labor practice action, could require an employer to reinstate strikers and discharge replacements.[198] Justice Blackmun stated, however, that this fact should not preempt the replacements' state causes of action.[199] Federal labor policy did not intend, Justice Blackmun reasoned, that an employer's unfair labor practices should shield it from a state cause of action for damages.[200]

In conclusion, Justice Blackmun agreed with the majority that the respondent's claims were not preempted.[201] Justice Blackmun disagreed with the majority's finding that

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[186] *Id.* at 3186-87 (Blackmun, J., concurring).
[187] *Id.* at 3184-85 (Blackmun, J., concurring).
[188] *Id.* at 3185-86 (Blackmun, J., concurring).
[189] *Id.* at 3184-89 (Blackmun, J., concurring).
[190] *Id.* at 3185-86 (Blackmun, J., concurring).
[191] *Id.*
[192] *Id.* at 3184-88 (Blackmun, J., concurring).
[193] *Id.* at 3186-88 (Blackmun, J., concurring).
[194] *Id.*
[195] *Id.* at 3187 (Blackmun, J., concurring) ("[I]t is difficult to explain the employer's power to prefer permanent strike replacements over returning strikers unless, through the promise of permanent employment, the employer has incurred an obligation to those replacements.").
[196] *Id.* at 3187-88 (Blackmun, J., concurring).
[197] *Id.*
[198] *Id.* at 3188-89 (Blackmun, J., concurring).
[199] *Id.*
[200] *Id.*
[201] As Justice Blackmun explained:

conditional offers could be considered to provide a business justification for refusing reinstatement to strikers.[202] To so hold, Justice Blackmun argued, would be inconsistent with the rationale behind considering permanent offers a substantial business justification for failing to reinstate strikers.[203]

Justice Brennan, joined by Justices Marshall and Powell, dissented, arguing that the state causes of action were preempted by federal labor law.[204] The dissent asserted that the replacements' claims were preempted because the claims had the potential of subjecting the employer to conflicting state and federal regulation if the NLRB found Belknap committed unfair labor practices. The claims should also be preempted, the dissent found, because they threatened the efficient administration of the NLRA, and altered the balance of the economic weapons provided by Congress.[205]

To explain its position, the dissent conducted its own analysis of *Belknap* under both *Garmon* and *Machinists*.[206] The dissent chose to begin with an analysis of the replacements' breach of contract claim under the *Garmon* doctrine.[207] Belknap arguably committed an unfair labor practice, the dissent stated, when it raised the wages of non-striking union employees.[208] Therefore, according to the dissent, federal law could have required Belknap to reinstate all strikers and incidentally to breach its contracts with the replacements.[209] If Belknap could be found liable in state court for breach of contract, the dissent asserted, then Belknap potentially would be subject to conflicting state and federal regulation.[210] Thus, the dissent concluded, because the state action would be regulating conduct which could also be regulated under the NLRA, the replacements' claim must be preempted.[211]

The dissent also criticized the Court's application of the *Garmon* doctrine to the replacements' misrepresentation claims.[212] Because making misrepresentations is not an activity even arguably regulated by the NLRA, the dissent asserted, the *Garmon* doctrine should not be applied.[213] Instead, the dissent explained, activity left unregulated by the NLRA should be analyzed under the *Machinists* doctrine.[214] The activity of concern in *Belknap*, the hiring of permanent replacements, the dissent claimed, is an economic weapon Congress left unregulated as part of the balance of power between labor and management established by the Act.[215] Therefore, the dissent concluded, *Machinists* is

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> Federal law did not require the employer to make the promise or to commit unfair labor practices . . . . If federal law recognizes that the employer voluntarily has undertaken an obligation to the replacements, the fact that the employer commits an unfair labor practice making it impossible for him to fulfill that obligation should not shield the employer from compensating the replacement employees.

Id.

[202] *Id.* at 3188-89 (Blackmun, J., concurring).
[203] *Id.* at 3186-88 (Blackmun, J., concurring).
[204] *Id.*
[205] *Id.* at 3190-3200 (Brennan, J., dissenting).
[206] *Id.* at 3190-91 (Brennan, J., dissenting).
[207] *Id.* at 3190-3200 (Brennan, J., dissenting).
[208] *Id.* at 3192 (Brennan, J., dissenting).
[209] *Id.*
[210] *Id.*
[211] *Id.* at 3192-95 (Brennan, J., dissenting).
[212] *Id.*
[213] *Id.* at 3192-97 (Brennan, J., dissenting).
[214] *Id.*
[215] *Id.*

applicable.[216] According to the dissent, potential liability under a state claim could cause an employer to forego hiring permanent replacements except when it was absolutely clear there was no possibility of forced reinstatement of strikers in NLRB proceedings.[217] Allowing replacements' claims, the dissent stated, would burden the employer's use of an economic weapon and distort the "delicate balance struck by the Act between the rights of labor and management in a labor dispute."[218]

The dissent also criticized the majority's suggestion that employers make conditional offers of employment to replacements.[219] This action would, the dissent stated, upset the balance of power between unions and management as established by the NLRA.[220] Under the majority's rule, the dissent observed, the employer need no longer show the business justification that permanent offers were necessary to obtain employees.[221] Allowing conditional offers, the dissent found, would weaken the strikers' position.[222] The conditional offers, the dissent noted, could also weaken the usefulness of the employers' right to hire permanent replacements.[223] If the employer conditioned its offers, the dissent explained, they would be less attractive to workers.[224] The pre-*Belknap* definition of permanency, the dissent contended, dealt with these problems more adequately.[225] Under that definition, the dissent asserted, replacements were permanent unless the union pressured the employer into a settlement including reinstatement or the NLRB forced reinstatement of strikers in an unfair labor practice proceeding.[226]

The dissent addressed the Court's concern for the rights of the replacement workers under the traditional rules of permanency.[227] In the dissent's view, the reality that a replacement's employment status is tenuous is probably understood by most replacements.[228] While protecting replacements might make a better world, the dissent concluded, such protection is inappropriate if accomplished by altering the balance of power between labor and management.[229] The replacements' claims should be preempted, the dissent argued, because such claims subject employees to conflicting federal and state regulations and interfere with the administration of the NLRA.[230] The majority's suggestion of conditional offers must be rejected, the dissent stated, because such offers upset the balance of power between labor and management as established in the NLRA.[231]

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[216] *Id.* at 3195-97 (Brennan, J., dissenting).

[217] *Id.*

[218] *Id.*

[219] *Id.* at 3195-98 (Brennan, J., dissenting).

[220] *Id.* at 3197-98 (Brennan, J., dissenting).

[221] *Id.*

[222] *Id.*

[223] *Id.*

[224] To avoid misrepresentation claims, an employer might decide not to hire replacements on a permanent basis or to hire permanent replacements only in cases in which it is absolutely clear that the strike is an economic one. Either of these developments would mean that the employers were being inhibited by state law from making full use of an economic weapon available to them under federal law. Moreover, if an employer decided not to hire replacements on a permanent basis, its ability to hire replacements might be affected adversely. *Id.* at 3196-97 (Brennan, J., dissenting).

[225] *Id.* at 3196-98 (Brennan, J., dissenting)

[226] *Id.* at 3197-3200 (Brennan, J., dissenting).

[227] *Id.* at 3199-3200 (Brennan, J., dissenting).

[228] *Id.*

[229] *Id.* at 3200 (Brennan, J., dissenting) (quoting NLRB v. Remington Rand, Inc., 94 F.2d 862, 871 (2d Cir. 1938) (Learned Hand, J.)).

[230] *Id.*

[231] *Id.*

In summation, the dissent found that the labor law preemption doctrines required the replacements' breach of contract and misrepresentation claims to be preempted.[232] The breach of contract claim, the dissent found, was preempted by the *Garmon* doctrine because the claim subjected the employer to conflicting state and federal regulation in the event of an unfair labor practice adjudication.[233] The dissent found the replacements' misrepresentation claim to be preempted under the *Machinists* doctrine.[234] Such claims had the potential, the dissent observed, for inhibiting the employer's hiring of permanent replacements, an economic weapon which Congress intended to leave unregulated, and thus must be preempted.[235]

In the *Belknap* decision the majority and dissent differed both in their method of applying the *Garmon* and *Machinists* preemption doctrines and their results.[236] Applying the *Machinists* doctrine, the Court considered not only whether the state action would have a regulatory effect on an employer's economic weapon but also weighed the state's interest in protecting its citizens.[237] In addition, the Court examined the extent of the burden of the state's regulation on the economic weapon.[238] After consideration of all these factors the Court determined that the replacements' state claims should not be preempted by the *Machinists* doctrine.[239] The Court then took additional action to insure that the employer's economic weapon and the state claims could coexist.[240] In the future, the Court stated, employers could make conditional offers of employment to replacement workers and refuse to reinstate strikers during an economic strike.[241]

In contrast, the dissent strictly applied the *Machinists* doctrine to the replacements' misrepresentation claims.[242] The dissent found that the misrepresentation claim regulated the employers' economic weapon and so must be preempted under that doctrine.[243] Unlike the majority, the dissent did not weigh the state's interest in its analysis. Furthermore, the dissent criticized the majority's conclusion that in the future conditional offers of permanent employment could permit the employer to refuse reinstatement to strikers.[244]

The majority and dissent also differed in their analysis under the *Garmon* doctrine. Applying the narrowed *Garmon* doctrine as expressed in *Sears*, the majority found that neither of the replacements claims could be preempted.[245] Because the replacements claims were not identical to those which could be presented before the NLRB, the Court stated, preemption was not required.[246]

The dissent applied the *Garmon* doctrine only to the breach of contract action having found that only this cause of action regulated conduct also regulated by the NLRA. Because the NLRB had the potential power to order reinstatement of strikers and

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[232] *Id.*
[233] *See supra* notes 204-31 and accompanying text.
[234] *See supra* notes 207-12 and accompanying text.
[235] *See supra* notes 212-31 and accompanying text.
[236] *See supra* notes 212-31 and accompanying text.
[237] *See supra* notes 152-54 and accompanying text.
[238] *See supra* notes 155-59 and accompanying text.
[239] *See supra* notes 163-64 and accompanying text.
[240] *See supra* notes 160-63 and accompanying text.
[241] *See supra* notes 160-63 and accompanying text.
[242] *See supra* notes 213-18 and accompanying text.
[243] *See supra* notes 215-17 and accompanying text.
[244] *See supra* notes 219-26 and accompanying text.
[245] *See supra* notes 169-81 and accompanying text.
[246] *See supra* notes 169-81 and accompanying text.

indirectly cause the replacements to be fired, the dissent found that the *Garmon* doctrine required preemption.[247] In reaching this conclusion, the dissent chose not to apply the narrow test set forth in *Sears* but rather applied the general policy underlying *Garmon* of avoiding conflicting state and federal regulation.

III. Application of Labor Preemption Doctrines in *Belknap*

The dispute in *Belknap* concerned Belknap's offers of permanent employment to replacements and the company's subsequent discharge of those replacements.[248] The replacements brought misrepresentation and breach of contract actions against Belknap in state court which Belknap challenged by claiming the actions were preempted by federal labor law.[249] When a court is presented with a labor law preemption problem, its first task is to classify the conduct involved in the dispute. If the conduct is at least arguably covered by the NLRA, the *Garmon* doctrine is applied to the facts of the case to determine if preemption is warranted.[250] If the activity is related to a labor dispute, but is not covered by the NLRA, the *Machinists* doctrine is used to test whether preemption is required.[251] In *Belknap*, the Court examined the conduct regulated by the state claims, the hiring of permanent replacements, and found that this conduct required using both the *Garmon* and *Machinists* doctrines.[252] When the Court used the *Garmon* doctrine it adjudged whether the state actions wrongly regulated the unfair labor practice of hiring replacements during an unfair labor practice strike, conduct already regulated under the NLRA.[253] In contrast, in applying the *Machinists* doctrine the Court considered whether the state actions impermissably regulated the economic weapon of hiring replacements in an economic strike, an area Congress left unregulated.[254] Applying the *Garmon* doctrine, as modified by *Sears*, the Court correctly found that the state causes of action did not impermissably regulate conduct also regulated by the NLRA because the state claims did not meet the test of being identical to actions which could have been brought before the NLRB.[255] In finding that *Garmon* did not preempt the replacements' claims, however, the Court ignored a risk of subjecting employers to conflicting state and federal regulation, a risk the *Garmon* test was created to avoid.[256] Thus, the Court missed an opportunity to correct the deficiencies inherent in the *Garmon* doctrine as modified by *Sears*.[257] The Court's analysis of *Belknap* under the *Machinists* doctrine, in contrast, modified that preemption test to include a balancing of state and federal interests.[258] While analyzing the state's regulation of the economic weapon of hiring replacements the Court weighed the state's interest in protecting third parties against the federal labor policy of leaving this conduct unregulated.[259] Introduction of this balancing test should lead to an increase in permissible state regulation of economic weapons. Finally, in sustaining the replace-

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[247] *See supra* notes 208-11 and accompanying text.
[248] 103 S. Ct. at 3175-76.
[249] *Id.*
[250] *Id.* at 3177-78.
[251] *Id.*
[252] *Id.* at 3180-84.
[253] *Id.*
[254] *Id.*
[255] *See infra* notes 261-69 and accompanying text.
[256] *See infra* notes 269-74 and accompanying text.
[257] *See infra* notes 269-74 and accompanying text.
[258] *See infra* notes 274-90 and accompanying text.
[259] *See infra* notes 274-90 and accompanying text.

ments' claims the *Belknap* Court strengthened the employer's economic weapon of hiring replacements when it found that conditional rather than permanent offers were sufficient to permit an employer to refuse reinstatement to strikers.[260]

A. Garmon *and* Sears

The Court applied the *Garmon* doctrine to both the misrepresentation and breach of contract claim because the conduct underlying those claims was arguably regulated by the NLRA.[261] Hiring the replacements and offering permanent employment would have been prohibited by the Act if the NLRB had found an unfair labor practice strike.[262] By contrast, had the NLRB found that the employer committed unfair labor practices, the breach of contract and the discharge of the replacements would have been required by federal labor law.[263]

Having found that the conduct was arguably regulated by the NLRA, the Court then applied the *Garmon* test as modified by *Sears*, to determine the preemption question.[264] Under this mechanical test, the Court found that the state cause of action was not identical to the action the NLRB could adjudicate and, therefore, the state claims should be sustained.[265] In *Belknap*, the Board action, had it not been settled in conference, would have focused on the protection of strikers' rights against unfair labor practices by the employer.[266] The state court, however, would adjudicate the rights of the replacement workers.[267] Having found no conflict in the two adjudications, the Court, correctly applying *Sears*, sustained the state causes of action.[268] The policy behind *Sears*, to protect the exclusivity of the Board's jurisdiction was not violated by this result.[269]

Deciding the preemption question by the *Sears* test, however, ignores the conflict of the state action with federal labor policy. The *Sears* requirement that the controversy be identical to the action that would have been presented to the NLRB prevents the Court from preempting the state action because of an indirect impact on the actors in a labor dispute. This indirect impact, though accomplished by a third party suit as it was in *Belknap*, could detrimentally affect the rights given to labor and management through federal labor policy. Such a result is at odds with the *Garmon* doctrine developed by the Court to prevent such dual and conflicting regulation. In *Belknap* the employer was potentially subject to dual regulation of its activities.[270] Under federal regulation the

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[260] *See infra* notes 287-90 and accompanying text.

[261] *See infra* notes 287-90 and accompanying text.

[262] 103 S. Ct. at 3180-82.

[263] *Id.*

[264] *Id.* at 3182-84.

[265] *Id.*

[266] *Id.*

[267] *Id.*

[268] *Id.*

[269] 436 U.S. at 197.

> The critical inquiry, therefore, is . . . whether the controversy presented to the state court is identical to . . . or different from . . . that which could have been, but was not, presented to the Labor Board. For it is only in the former situation that a state court's exercise of jurisdiction necessarily involves a risk of interference with the unfair labor practices jurisdiction of the Board which the arguably prohibited branch of the *Garmon* doctrine was designed to avoid.

Id.

[270] 103 S. Ct. at 3192 (Brennan, J., dissenting).

Board in *Belknap* could have found that the Union's strike was in protest of an unfair labor practice.[271] The offers to replacements would then have been unfair labor practices and to remedy those practices the NLRB would have required the discharge of replacements to make room for returning strikers.[272] Discharging the replacements, however, would have subjected, as the replacements state claims illustrate, the employer in *Belknap* to state law claims for damages.[273] As recognized by the dissent, such conflicting regulation of conduct is unfair to the employer and contradicts the policy underlying the *Garmon* doctrine.[274] In choosing to follow the narrow test set forth in *Sears* the Court seems to have lost sight of the *Garmon* policy of avoiding conflict between federal and state regulation. The *Belknap* Court apparently failed to recognize the deficiencies of the *Sears* test and so missed an opportunity to reinstate the *Garmon* policy of preventing conflicts between state and federal labor policy.

B. Machinists

The *Belknap* Court also analyzed the replacements' claims under *Machinists*.[275] Under *Machinists* conduct not covered by the NLRA may nonetheless be immune to state regulation if the conduct is part of the economic warfare between a union and an employer left unregulated by the NLRA.[276] Congress intended to leave these forms of self-help unregulated and subject to the play of economic forces.[277] In *Machinists* the Court recognized the necessity of prohibiting regulation of economic weapons to avoid disrupting the balance of power between union and management established by federal labor law.[278]

Belknap involved the economic weapon of hiring permanent replacements.[279] The Supreme Court recognized the employer's right to hire permanent replacements as a legitimate weapon in *Mackay*.[280] *Machinists* recognized that Congress intended no regulation of economic weapons.[281] Belknap, therefore, should have been able to use this weapon without fear of state interference. Strictly applied, *Machinists* would appear to require preemption of the replacements' claim.[282]

Nevertheless, the Court did not preempt the state action in *Belknap*.[283] Instead, the

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[271] *See supra* notes 207-11 and accompanying text.

[272] *See supra* notes 207-11 and accompanying text.

[273] 103 S. Ct. at 3193-97.

[274] As Justice Brennan stated in his dissent, "[r]espondents' breach of contract claim seeks to regulate activity that may well have been required by federal law. Petitioner may have to answer in damages for taking such an action. This sort of conflicting regulation is intolerable." *Id.* at 3192 (Brennan, J., dissenting). *See also Garmon*, 359 U.S. at 241-42 ("In determining the extent to which state regulation must yield to subordinating federal authority, we have been concerned with delimiting areas of potential conflict; potential conflict of rules of law, of remedy, and of administration.").

[275] 103 S. Ct. at 3178-79.

[276] *Id.* at 140 & n.4. Economic weapons are activities used by either union or management to exert economic pressure on each other; examples include strikes, lockouts, and hiring replacements. *See* Cox, *supra* note 101, at 1346.

[277] *Machinists*, 427 U.S. at 140 & n.4.

[278] *Id.* at 148-51. *See also* Comment, *supra* note 85, at 955.

[279] 103 S. Ct. at 3178-79.

[280] 304 U.S. at 345-46.

[281] 427 U.S. at 148-51.

[282] *Id. See also Belknap*, 103 S. Ct. at 3196-97 (Brennan, J., dissenting).

[283] 103 S. Ct. at 3178-79.

Court introduced a new factor into the *Machinists* analysis, by considering whether Congress could have intended to permit the economic weapon to impact on "innocent third parties."[284] Such an inquiry is similar to the balancing test the Court employed in the *Garmon* analysis.[285] Under *Garmon*, the Court will permit state regulation of conduct arguably protected or prohibited under the Act if the state action concerns conduct having great local concern and having only peripheral impact on the Act.[286] This exception to the *Garmon* test has permitted the Court to allow increased state regulation of strikers' activities; state causes of action for and injunctions against mass picketing and violence,[287] intentional infliction of emotional distress,[288] and trespass[289] have been sustained under the balancing test. Introduction of this type of balancing to the *Machinists* analysis may lead to a similar increase in the permissible state regulation of economic warfare.

The consideration of state interests by the Court is new to *Machinists* preemption analysis. Previously, if the conduct was intended to be unregulated state action was preempted.[290] In *Belknap*, however, the Court recognized the activity as an unregulated economic weapon but permitted state regulation because the state interest in protecting the replacement workers appeared to outweigh any harm to federal labor policy.[291] If the Court continues or expands upon the precedent established in *Belknap*, it may allow increasing degrees of state regulation. *Belknap* has the potential for opening the door for increased state regulation in areas previously protected from state regulation under the theory that Congress left the area unregulated.

IV. The Implications of *Belknap* on the Right to Hire Permanent Replacements

Had the *Belknap* Court chosen to preempt the replacements' state actions, it would have maintained the NLRB's interpretation of the law and the existing interpretation of *Machinists*.[292] The employer would be free to hire permanent replacements in an economic strike and to refuse to reinstate replaced strikers.[293] Offers of permanent rather than expressly temporary jobs would enable the employer to attract workers more easily.[294] This economic weapon could be used to put pressure on the strikers to end their strike.[295] Under the NLRB's interpretation of the law the replacements' jobs were perma-

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[284] *Id.* at 3177-78.

[285] *See supra* notes 69-96 and accompanying text.

[286] 359 U.S. at 243-44.

[287] UAW v. Russell, 356 U.S. 634 (1958).

[288] Farmers v. United Board of Carpenters & Joiners, Local 25, 430 U.S. 290 (1977).

[289] *Sears*, 436 U.S. 180.

[290] 427 U.S. at 148-51. *See also Belknap*, 103 S. Ct. at 3196-97 (Brennan, J., dissenting).

[291] 103 S. Ct. at 3177-78.

[292] *Id.* at 3197-98 (Brennan, J., dissenting).

[293] *Mackay*, 304 U.S. at 345-47; Administrative Ruling of NLRB General Counsel No. F-188, 41 L.R.R.M. 1024 (1958).

[294] NLRB v. Mars Sales & Equipment Co., 626 F.2d 567, 572 (7th Cir. 1980). "The rationale for . . . this . . . is that the employer's interest in continuing his business during a strike and the needed inducement of permanent employment to obtain replacements is a sufficient business justification overcoming protection for economic strikers." *Id.* This business reason is assumed by the courts and need not be proved in each case. Hot Shoppes, Inc., 146 N.L.R.B. 802, 805, 55 L.R.R.M. 1419, 1420 (1964).

[295] Penn. Glass Sand Corp., 172 N.L.R.B. 514, 535 (1968).

nent unless the employer was forced to reinstate strikers by the economic pressure of the strike or an unfair labor practice adjudication by the NLRB.[296]

The Court changed this law to permit an employer to refuse to reinstate strikers during an economic strike even though the employer had conditioned its offers of employment upon failure to settle the strike with the union or failure of the NLRB to find an unfair labor practice strike. If, instead, the Court had chosen merely to sustain the state actions without changing the law regarding the hiring of permanent replacements the utility of the employer's economic weapon would have been substantially reduced.[297] Cautious employers would hesitate to employ the weapon because of the potential future liability.[298] The employer could have unexpected liability, for example, if the strikers were able to apply sufficient economic pressure to force the employer to agree to reinstatement.[299] Given the uncertain nature of most strikes, moreover, the employer could be faced with an unexpected unfair labor practice adjudication and potential liability to replacements if it were required to discharge them to make room for strikers.[300] Rather than risk such liability the employer would likely forego the economic weapon and hire only temporary replacements.[301] Since temporary replacements must be discharged in every case to make room for returning strikers such positions would be less attractive to workers and therefore harder to fill.[302] By merely sustaining the state action without introducing the notion of conditional offers, the Court would have weakened the usefulness to employers of this economic weapon approved in *Mackay*.

Sustaining the state action also negatively affects the strikers' position. In the instances in which the employer did make permanent offers the employer would be able to resist more strongly a strike settlement requiring reinstatement.[303] The employer's potential liability to the replacements would permit the employer to extract great concessions from the union for agreeing to reinstate the strikers or perhaps cause the employer to resist reinstatement.[304]

The *Belknap* Court sustained the replacements' state actions but altered the potentially harsh results of that decision.[305] The Court preserved and strengthened the employ-

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[296] 103 S. Ct. at 3199-3200 (Brennan, J., dissenting). Any potential liability to the replacements has not been used as a business justification. The NLRB and the courts' lack of concern for employer liability may be explained by the existence of the at will employment doctrine. Under the at will employment doctrine courts have ruled that an employee cannot claim damages for dismissal from a permanent position. This rule applies even if the job was advertised as a permanent vacancy. *See, e.g.*, Campion v. Boston & M.R.R., 259 Mass. 579, 169 N.E. 499, 500 (1930).

[297] 103 S. Ct. at 3196-97 (Brennan, J., dissenting).

[298] *Id.*

[299] *Id.*

[300] *Id.*

[301] *Id.*

[302] *Id.*

[303] The dissent stated:

> The force of these observations is apparent in this case. If an employer is confronted with potential liability for discharging workers he has hired to replace striking employees, he is likely to be much less willing to enter into a settlement agreement calling for the dismissal of unfair labor practice charges and for the reinstatement of strikers. Instead, he is much more likely to refuse to settle and to litigate the charges at issue while retaining the replacements.

Id. at 3193-95 (Brennan, J., dissenting).

[304] *Id.*

[305] *Id.* at 3177-82.

er's *Mackay* weapon by suggesting that employers make conditional offers to replacements in the future.[306] These offers could still be used, the *Belknap* Court determined, to justify refusing reinstatement to a striker.[307] The Court accomplished this change by reinterpreting the definition of permanency under *Mackay*.[308] Under the *Belknap* Court's definition an employer can offer permanent positions subject to its unilateral decision to discharge.[309] Previously, the offers were subject to disfeasance only upon an unfair labor practice adjudication or the application of economic pressure by the strikers.[310] The *Belknap* majority's interpretation negates the business purpose stated in *Mackay* which justified the use of this weapon. If the employer can now retain replacements who had no expectation of a permanent position the Court has rejected the rationale in its *Mackay* decision. In *Mackay* the Court reasoned that the employer's need to keep its business operating by making attractive, permanent offers outweighed any infringement on the strikers' rights.[311]

By changing the permanency requirement so that it is subject to the unilateral decisions of the employer, the Court has strengthened the employer's position. Under the Court's interpretation of *Mackay* the employer who conditions its offers to replacements is in a very good position at a strike settlement conference. The employer can apply pressure to the strikers by lawfully refusing reinstatement or, if it is to the employer's economic advantage, the employer can discharge the replacement. The fate of both strikers and replacements is clearly in the employer's hands.

The *Belknap* Court's decision and suggestions implicitly change the definition of permanency under *Mackay*.[312] By directly addressing the *Mackay* issue the Court could have avoided this result. The Court could have overruled *Mackay*, deciding that the need to hire replacements was not a sufficient business justification to refuse reinstatement to strikers. With such a decision, the Court could then have decided that since no economic weapon was intended, no reason existed to preempt under *Machinists*.[313] Eliminating the right to hire replacements would have been only reassessing the *Mackay* Court's judgment of what activities Congress intended to be unregulated economic weapons.[314] Or, as the dissent suggested, the Court could have recognized the *Mackay* right to hire permanent replacements as an economic weapon and, under the *Machinists* doctrine,[315] preempted the replacements' state actions.[316] Either of these options would have been less disruptive to the balance of power established between employers and unions by *Mackay* than the action taken by the Court which altered the rules governing the employer's economic weapon. In addition, neither of these options would have detrimentally affected the pre-*Belknap* status of replacement workers.

Conclusion

The *Belknap* Court, faced with the question of whether the replacement workers could bring state actions for misrepresentation and breach of contract against an em-

[306] *See supra* notes 182-84 and accompanying text.
[307] *See supra* notes 182-84 and accompanying text.
[308] 103 S. Ct. at 3197-98 (Brennan, J., dissenting).
[309] *Id.* at 3197-98, 3198 n.13 (Brennan, J., dissenting).
[310] *Id.* at 3199-3200 (Brennan, J., dissenting).
[311] *See supra* notes 125-28 and accompanying text.
[312] 103 S. Ct. at 3198 (Brennan, J., dissenting).
[313] *See supra* notes 125-28 and accompanying text.
[314] *See supra* notes 124-28 and accompanying text.
[315] *See supra* notes 107-18 and accompanying text.
[316] 103 S. Ct. at 3196-97 (Brennan, J., dissenting).

ployer, decided that the actions were not preempted.[317] To reach this result the Court altered the *Machinists* doctrine.[318] A strict application of *Machinists* would have required holding that hiring permanent replacements is an economic weapon and therefore state actions regulating that weapon are preempted.[319] The Court, however, introduced a balancing test to supplement the *Machinists* test which allowed the Court to sustain the state action.[320] In an attempt to alleviate the impact of sustaining the state action on the employer's right to hire replacements the Court reinterpreted the permanency requirement of *Mackay* to permit conditioned offers of employment.[321] The Court eliminated the need for an employer to have a business justification to hire replacements and thus strengthened the position of the employer vis à vis striking workers.[322] The Court's action seems inappropriate because it changes the balance of power between labor and management established by Congress.[323]

The action taken by the Court in *Belknap* enabled it to avoid making the difficult choice between either overruling *Mackay* and eliminating the right to hire permanent replacements or retaining the weapon and recognizing its cost to replacements.[324] Either of these choices, however, would have been preferable to the manipulation of federal labor law necessary to reach the Court's result. Given that the Court found little credibility in the employers' need to offer permanent employment to entice applicants for replacement jobs, the logical choice for the Court would have been to overrule that part of *Mackay* which recognized this economic weapon.[325] While this result would have altered the present balance of power between labor and management this change is preferable because it would have preserved rather than altered the *Machinists* doctrine as the *Belknap* Court did. The *Machinists* doctrine is important to labor law policy because it prevents the states from interfering with the economic warfare between labor and management, conduct Congress intended to be unregulated.[326]

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[317] *See supra* note 136 and accompanying text.
[318] *See supra* notes 283-90 and accompanying text.
[319] *See supra* note 282 and accompanying text.
[320] *See supra* notes 279-82 and accompanying text.
[321] *See supra* notes 283-89 and accompanying text.
[322] *See supra* notes 304-10 and accompanying text.
[323] *See supra* notes 304-10 and accompanying text.
[324] *See supra* notes 312-16 and accompanying text.
[325] *See supra* notes 125-26, 155-59 and accompanying text.
[326] *See supra* notes 96-97, 113-16 and accompanying text.