

## THE GARMON CASE: DECLINE AND THRESHOLD OF "LITIGATING ELUCIDATION"

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*This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding.*

*Article VI, clause 2 of the United States Constitution*

"A political society cannot endure without a supreme will somewhere. Sovereignty is never held in suspense."<sup>1</sup> These words of Mr. Justice Sutherland, while stating an essential truth, have caused much argument in lands of considerable size where parochial interests insist upon the right to solve their own problems. There is little doubt that there are some problems which will always be local in their nature. Difficulties begin to arise, however, when the body politic attempts to create a balance or some sort of cut-off point where the local governments may rule in a manner reconcilable to the above quotation. When the nation moves in the direction of a supreme will, many will say that we are embarking upon a surrender to the Leviathan in order to escape chaos. On the other hand, a swing toward an opposite direction will set off charges that government is abdicating its duty to govern—a duty that must exist in order that our lives be not "nasty, brutish and short." Few want Leviathans or chaos.

Perhaps the remarks of Mr. Justice Holmes, spoken in another context, are applicable to the ticklish problems of adjustment that are peculiar to questions of federal-state jurisdiction:

All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached.<sup>2</sup>

The doctrine of federal preemption—the question of when the federal government shall be considered to have extensively regulated or dominated a particular area so that the states will be precluded from acting—has presented the Supreme Court with a polarization of claims and interests, all clamoring to be heard at once. The past two decades have witnessed the

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1. *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 316-17 (1936).

2. *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355 (1908).

accentuation of tensions in preemption cases involving labor relations.<sup>3</sup> Most recently, the Court, sensing the sterility of previous approaches, has entered into an uneasy state of reconciliation. Careful analysis of the problems presented seems to have motivated compromise by some members of the Court. At the same time, however, a retention of certain values by both appeasing elements is manifest. That school of thought which finds discomfort in "active judicial participation in the realm" of the executive and legislative branches will be well adjusted to the second *Garmon* decision's<sup>4</sup> bestowal of a limited scope of inquiry on the courts. On the other hand, that case's receptiveness to the presumption of federal jurisdiction, albeit bearing concomitant concessions to the states' regulation of peace and order, will be welcomed in quarters where the dangers of competing provincialisms have been consistently warned against.

## I

The doctrine of preemption finds its roots in both the supremacy clause and the commerce clause<sup>5</sup> of the United States Constitution. The founding fathers knew full well the troubles that existed in a loosely knit group of nation-states. Frustrated by the Articles of Confederation and its divisive influences, they propagandized a new system of government which they intended to be free from internal economic warfare and the inability to act as one nation. *The Federalist* was a prime stimulant in this nation's acceptance of this idea.

James Madison wrote that "a local spirit will infallibly prevail much

3. The literature dealing with this area is already voluminous. See Cox, *Federalism in the Law of Labor Relations*, 67 HARV. L. REV. 1297 (1954); Meltzer, *The Supreme Court, Congress and State Jurisdiction over Labor Relations: I*, 59 COLUM. L. REV. 6 (1959); Isaacson, *Federal Preemption Under the Taft-Hartley Act*, 11 IND. & LAB. REL. REV. 391 (1957); Gregory, *Federal or State Control of Concerted Union Activities*, 46 VA. L. REV. 539 (1960); Merrifield, *Federal-State Jurisdiction in Labor Relations Law*, 29 GEO. WASH. L. REV. 318 (1960); Wellington, *Labor and the Federal System*, 26 U. CHI. L. REV. 542 (1959).

The scope of this article does not include section 301 of the Taft-Hartley Act, 61 Stat. 156 (1947), 29 U.S.C. § 185 (1958), and its preemptive potentialities. See *Charles Dowd Box Co. v. Courtney*, 49 L.R.R.M. 2619 (1962); see Meltzer, *The Supreme Court, Congress and State Jurisdiction over Labor Relations II*, 59 COLUM. L. REV. 269 (1959). Nor does this paper concern itself with the difficult characterizations that must be made in distinguishing breaches of contract from unfair labor practices and resulting interplay of suits in district courts for violations of labor contracts and the exclusive jurisdiction accorded the NLRB to deal with unfair labor practices. See *Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp.*, 348 U.S. 437, 443-44 n.2 (1955); *Camerson Iron Works v. International Ass'n of Machinists*, 257 F.2d 467 (5th Cir.), cert. denied, 358 U.S. 880 (1958); see also Jenkins, *The Peacemakers*, 47 GEO. L.J. 435 (1959).

4. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959).

5. Article I, clause 8. The national Congress has power "to regulate commerce among the several states" and "to make all Laws which shall be necessary and proper for carrying into execution the foregoing powers."

more in the members of Congress than a national spirit will prevail in the legislatures of the particular States."<sup>6</sup>

The statement that the framers' concern for needed federal intrusions was congressionally orientated is, of course, valid.<sup>7</sup> But the use of that statement as a justification for a narrowing of judicial review in preemption cases would appear to be without merit. Outcries against judicial usurpation in this area theoretically beg the question. Primarily, this is because the Court is, according to the preemption doctrine, enforcing a congressional intent to keep their enactments inviolate from the potentiality of frustrating state action.

Chief Justice John Marshall moved quickly to protect the federal government through judicial review<sup>8</sup> in stating that the Constitution and laws of Congress were to be the law of every state.<sup>9</sup> In *McCulloch v. Maryland*<sup>10</sup> he asserted that:

[T]he States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared.<sup>11</sup>

Again in *Gibbons v. Ogden*<sup>12</sup> Marshall admonished the states for interfering in the realm of federal instrumentalities.

The history of the Supreme Court's attitude toward preemption is at times confusing.<sup>13</sup> It seems to be agreed that preemption is a question of congressional intent. How then does one recognize this intent? It has been held that state law cannot be voided unless there is no reconciliation with that of the federal government,<sup>14</sup> and that the intent to preempt is not to be implied unless the act of Congress is in actual conflict with state law.<sup>15</sup> How may one recognize conflict? The Court will be prone to discover conflict

6. THE FEDERALIST No. 23 (Madison).

7. See WECHSLER, PRINCIPLES, POLITICS & FUNDAMENTAL LAW 78-82 (1961); Cramton, *Pennsylvania v. Nelson: A Case Study in Federal Preemption*, 26 U. CHI. L. REV. 85 (1958).

8. *Marbury v. Madison*, 5 U.S. (1 Cranch) 368 (1803).

9. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 562 (1816).

10. 17 U.S. (4 Wheat.) 415 (1819). In this case a state tax upon notes issued by a branch of the Bank of United States was held to be void. Marshall anticipated this holding in *United States v. Fisher*, 6 U.S. (2 Cranch) 496 (1805), where he upheld a law asserting United States priority of claims over those of the states.

11. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 415, 439 (1819).

12. 22 U.S. (9 Wheat.) 1 (1824). Here the court held statutes of New York, granting exclusive right to use steam navigation on waters of the state, void insofar as they applied to vessels licensed by the United States to engage in coastwise trade.

13. See Note, 32 TEXAS L. REV. 225 (1953).

14. *Missouri, K. & T. Ry. v. Haber*, 169 U.S. 613 (1898); *Sinnot v. Davenport*, 63 U.S. (22 How.) 227 (1859).

15. *Carey v. South Dakota*, 250 U.S. 118 (1919).

where Congress has enacted extensive legislation<sup>16</sup> so as to occupy that particular field.<sup>17</sup> Detailed legislation, however, has not always necessarily superseded state law on the subject if a part of that legislation is separate and distinct. Nevertheless, it is axiomatic that state law cannot be applied in coincidence with federal law.<sup>18</sup> Once the occupation has been established the state is without power.<sup>19</sup> There may be no division of regulation.<sup>20</sup>

*Pennsylvania v. Nelson*<sup>21</sup> emphatically declares the occupation-of-the-field test in relation to a most controversial topic. In this case the Smith Act, which prohibits the knowing advocacy of the overthrow of the government by force and violence, was held to preempt the Pennsylvania Sedition Act which proscribed the same conduct. The Court reasoned that regulation was so thorough that Congress left no room for the states to enact supplemental legislation. Political reactions were severely critical.<sup>22</sup>

In *San Diego Bldg. Trades Council v. Garmon*,<sup>23</sup> the Court set aside a California judgment for an injunction and damages against a labor union for "tortious" picketing because of preemption, even though the National Labor Relations Board had declined jurisdiction. On remand, the California Supreme Court sustained the award of damages.<sup>24</sup> The Supreme Court again granted certiorari, this time to determine whether the California court had jurisdiction to award damages arising out of the same union activity which the California court had already been declared unable to enjoin. The opinion of the Court on the matter of damages<sup>25</sup> is declarative of a divided Court's<sup>26</sup> present disposition to align itself with the occupation-of-the-field test rather

16. *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148 (1942); *McDermott v. Wisconsin*, 228 U.S. 115 (1913).

17. The occupation-of-the-field test is vividly exemplified in *Oregon-Washington Ry. & Nav. Co. v. Washington*, 270 U.S. 87 (1926). In this case the Court struck down the Washington plant quarantine regulation. Congress had precluded state action because a previous congressional statute on the same subject was of such immensity as to indicate that Congress intended to occupy the field.

Compare *Mintz v. Baldwin*, 289 U.S. 346 (1933), which upheld a New York statute on the grounds that congressional legislation was specific as to ground that it would not cover.

18. *Hines v. Davidowitz*, 312 U.S. 399 (1940); see also the statement by Mr. Justice Holmes in *Charleston & W. C. Ry. v. Varnville*, 237 U.S. 597, 604 (1914). "[W]hen Congress has taken the particular subject-matter in hand coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go." (Emphasis added.)

This idea is pushed to its logical conclusion in *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947).

19. *Southern Ry. v. Railroad Comm'r of Indiana*, 236 U.S. 439 (1915).

20. *Erie R.R. v. New York*, 233 U.S. 671 (1914).

21. 350 U.S. 497 (1956).

22. See H.R. 3, 85th Cong., 2d Sess. (1958).

23. 353 U.S. 26 (1957).

24. 49 Cal. 2d 595, 320 P.2d 473 (1958).

25. 359 U.S. 236 (1959).

26. See the concurring opinion of Mr. Justice Harlan in the *Garmon* case in which Justices Whittaker, Clark, and Stewart join. *Ibid.*

than plunging itself into *ad hoc* determinations as to the conflict of state action with the National Labor Relations Act. Justice Frankfurter, speaking for the majority, apparently swept away growing doubts about the Court's adherence to a broad application of the preemption rule. Carefully couching his reasoning in terms of a judicial inability to cope with the peculiarities involved in labor cases, he wrote the following:

Our task is confined to dealing with classes of situations. To the National Labor Relations Board and to Congress must be left those precise and closely limited demarcations that can be adequately fashioned only by legislation and administration. We have necessarily been concerned with potential conflict of two law-enforcing authorities, with the disharmonies inherent in two systems, one federal the other state, of inconsistent standards of substantive law and differing remedial schemes. But the unifying consideration of our decisions has been in regard to the fact that Congress has entrusted administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience. . . .<sup>27</sup>

An attempt has thus been made to canalize labor controversies and to attain a plateau of certainty. Indulging in the arduous task of codifying preemption labor law, Justice Frankfurter further stated that:

It is not for us to decide whether the National Labor Relations Board would have, or should have, decided these questions in the same manner. When an activity is arguably subject to § 7 and § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted. . . . The governing consideration is that to allow the States to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy.<sup>28</sup>

*Garmon* is a vast improvement over the Court's previous pronouncements in this area. The exceptions carved out of the above-stated approach by the Court—violence, threats to public order and apparently the infamous *Gonzales* case<sup>29</sup>—are indicative of statesmanship which "perceives the transcendent importance of fidelity to structure and process above attachment

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27. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. at 242. For a similar approach by the Court in labor arbitration cases, see *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); See also Gould, *The Supreme Court and Labor Arbitration*, 12 LABOR L.J. 331 (1961).

28. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 245-46 (1959).

29. *International Ass'n of Machinists v. Gonzales*, 356 U.S. 617 (1958). Here an individual sued the union for damages for illegal expulsion and for restoration of union membership.

to the claims sponsored by the immediately contending parties."<sup>30</sup> Yet these exceptions will emphasize the problem of compliance by the state judiciary. Parenthetically, it should be noted that state evasion of federal regulation is usually a fact to be reckoned with,<sup>31</sup> as witnessed by judicial enforcement of desegregation in public education. The problems may be largely practical and of an institutional nature. It is submitted that *Garmon* will also open the door to matters which had been previously considered to be settled against the vigorous preemptionists. The process of "litigating elucidation,"<sup>32</sup> a practice indulged in, in days that were more uncertain, will continue.

Of special interest is Justice Frankfurter's change of heart in labor preemption cases. At one time he chastised the Court for summarily impairing traditional state sovereignty by precluding its action with regard to protected union activity unrelated to employer interference.<sup>33</sup> Subsequently, he warned against curtailment of the states by according to Congress "generous judicial implications": "Any indulgence in construction should be in favor of the States, because Congress can speak with drastic clarity whenever it chooses to assure full federal authority, completely displacing the States."<sup>34</sup>

Justice Frankfurter also exhibited a pronounced distaste for the occupation-of-the-field test in *Amalgamated Ass'n v. Wisconsin Employment Relations Bd.*<sup>35</sup> In that case he wrote that the proper test for preemption was whether or not the state regulation in question could be reconciled with the act: "The adjustment thus called for between State and National interests is not attained by reliance on uncritical generalities or rhetorical phrases unnourished by the particularities of specific situations."<sup>36</sup> Thus he kept faith with his previously enunciated theory that state policy must be inconsistent with the national law in order to be declared unconstitutional.<sup>37</sup>

30. FREUND, *THE SUPREME COURT OF THE UNITED STATES* 180 (1961).

31. Michelman, *State Power to Govern Concerted Employee Activities*, 74 HARV. L. REV. 641 (1961).

32. *International Ass'n of Machinists v. Gonzales*, 356 U.S. 617, 619 (1958).

33. *Hill v. Florida*, 325 U.S. 538, 559 (1945) (dissenting opinion). See *DeVeau v. Braisted*, 363 U.S. 144 (1960). For an example of state evasion in the preemption area, see *Florida v. Smith*, 123 So. 2d 700 (Fla. 1960).

34. *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767, 780 (1947) (dissenting opinion).

35. 340 U.S. 383 (1951) (dissenting opinion); See also *International Union, UAW v. O'Brien*, 339 U.S. 454 (1956).

*General Elec. Co. v. Callahan*, 48 L.R.R.M. 2929 (1961). This would seem to be an area where the states have a legitimate interest in acting where there is an imminent threat to public health and safety. Local utility strikes are of an emergency nature and are properly within the domain of state jurisdiction. Congress could specifically provide for such authority through a provision in existing national labor legislation. Of course, undue compulsion and encroachment upon the statutory right to strike should be guarded against in drawing such a provision. See Cox, *Federalism in the Law of Labor Relations*, 67 HARV. L. REV. 1297 (1954).

36. *Amalgamated Ass'n v. Wisconsin Employment Relations Bd.*, 340 U.S. at 403.

37. *Algoma Plywood Veneer Co. v. Wisconsin Employment Relations Bd.*, 336 U.S. 301, 314 (1949).

*Weber v. Anheuser-Busch, Inc.*<sup>38</sup> seemed to indicate that Justice Frankfurter was undergoing a period of reflective reappraisal. At this point he embarked upon a far-flung approval of preemption by holding that if the complaint in state court alleged practices which might be reasonably construed as protected or prohibited by the act, the state must decline jurisdiction in favor of the National Labor Relations Board. Subsequently, the Justice's career in this area became more checkered when he rejected federal preemption of a suit for lost wages and physical and mental suffering by an individual against his union, such individual having been expelled from union membership. He deprecated the union's assertion of preemption in characterizing these claims as justifiable "as a matter of wooden logic. . ."<sup>39</sup> In view of the above, it is quite evident that Justice Frankfurter decided to pull together the multitude of loose strands that had developed over the years and to make labor preemption less Delphic in nature. The most fascinating element of this behavior is that Justice Frankfurter himself was responsible for many of the strands.

## II

The need for *Garmon* can be more easily understood when one considers the conglomeration of holdings that had preceded it.

*The Briggs-Stratton* case,<sup>40</sup> which came before the Supreme Court in 1949, involved the adjudication of the power of the Wisconsin Employment Relations Board to order a labor union in interstate commerce to cease and desist from certain activities. The state courts had upheld the Wisconsin board's order as a valid one. The union's activities that were objected to were intermittent and unannounced work stoppages in the employer's plant. Union meetings were called on company time. The employer was not informed of union demands although it was obvious that such activity was intended to harass him and subject him to a position of relative economic weakness.

Could a state enjoin this activity when the business establishment was in interstate commerce? The Court answered affirmatively. Mr. Justice Jackson, writing for the majority, based his opinion on the particular activity involved. He said that the federal government could not exercise jurisdiction over it as it was neither protected or prohibited. Thus the states were free to act in this sort of case. He stated that:

Congress made in the National Labor Relations Act no express delegation of power to the Board to permit or forbid this particular

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38. 348 U.S. 468 (1955).

39. 356 U.S. 617, 619 (1958).

40. *International Union, Local 232, UAW, AFL v. Wisconsin Employment Relations Bd.*, 336 U.S. 245 (1949).

union conduct, from which an exclusion of state power could be implied . . . . Policing of such conduct is left wholly to the states. In this case there was also evidence of considerable injury to property and intimidation of other employees by threats and no one questions the States' power to police coercion by those methods.<sup>41</sup>

As authority for the latter sentence the Court cited the *Allen-Bradley* decision<sup>42</sup> in which violent union activities had been held subject to state jurisdiction. The union's contentions that the state order infringed upon protected activity and the right to strike, as stated in sections 7 and 13 of the act, were dismissed.<sup>43</sup> This case is important as a demonstration of the manner in which the Court approached the preemption problem. The majority opinion, as also the minority, concerned itself with the merits of this case. The Court, rather than the Board, made the initial determination of how that case would be decided. That this approach was an unsatisfactory one can best be exhibited by the Board's subsequent holding that activity similar to that which was complained of in this case was unfair under the act.<sup>44</sup> In a sense the Court had usurped the Board's function in preemption cases. If the protected-or-prohibited standard had found this particular activity to be protected, then the Supreme Court would have found itself in the position of having made the Board's decision before the Board heard the case.

The landmark decision of *Garner v. Teamsters Union*<sup>45</sup> invoked a radical departure from this procedure. This case arose when an employer sought to enjoin orderly, peaceful, minority picketing because his business had fallen off as a result of the refusal by drivers to cross the picket lines. The union objected to an injunction on the ground that section 8(b)(2) of the act had removed this kind of activity from the authority of the states when interstate commerce was involved, and preempted it for the federal government. The Supreme Court agreed. In an opinion that brought forth no dissent, the Court held that the legislation enacted by Congress in this field gave the federal government exclusive jurisdiction. The Court said that union activity like that in *Allen-Bradley* and in *Briggs-Stratton* was still within the grasp

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41. *Id.* at 253.

42. *Allen-Bradley, Local 1111, United Elec. Workers v. Wisconsin Employment Relations Bd.*, 315 U.S. 740 (1942). Mr. Justice Douglas speaking for the Court, wrote the following: "We will not lightly infer that Congress by the mere passage of a federal act has impaired the traditional sovereignty of the several states in that regard." *Id.* at 749.

43. 336 U.S. 245 (1949); see also Mr. Justice Brennan's majority opinion in *NLRB v. Insurance Agents Union*, 45 L.R.R.M. 2704 (1960), wherein he writes that *Briggs-Stratton* represents an approach that is no longer of general application because of *Garmon*: "Therefore to view *Briggs-Stratton* as controlling on the § 8 issue here would be to compound the defects of a now discarded approach to pre-emption . . . ." *Id.* at 2710 n.23.

44. *Textile Workers*, 108 N.L.R.B. 743 (1954), *enforcement denied*, 227 F.2d 409 (D.C. Cir. 1955), *cert. granted*, 350 U.S. 1004, *cert. vacated*, 352 U.S. 864 (1956).

45. 346 U.S. 485 (1953).

of the states, but the *Briggs-Stratton* approach was gone. There was no longer any primary decision by the Court in regard to the merits of the case. The Court said: "It is not necessary or appropriate for us to surmise how the National Labor Relations Board might have decided this controversy had petitioners presented it to that body. The power and duty of primary decision lies with the Board, not with us."<sup>46</sup>

A distinction, urged upon the Court, between public and private rights was rejected. Even assuming the validity of such a distinction, the Court expressed the view that the same distinction would apply to both the federal and state acts: "The conflict lies in remedies, not rights. The same picketing may injure both public and private rights. But when two separate remedies are brought to bear on the same activity, a conflict is imminent."<sup>47</sup>

*Garner* assumed landmark dimensions because it reestablished the federal government as a protector against state regulation. This was a role that had been accepted in *Thornhill v. Alabama*<sup>48</sup> in the context of protecting picketing as free speech. *Thornhill* was limited in *Giboney v. Empire Storage & Ice Co.*,<sup>49</sup> and virtually abandoned in *Teamsters Union v. Vogt*.<sup>50</sup> Now once again the Supreme Court was declaring state regulation of picketing to be unconstitutional, but the first amendment question was no longer at issue. The *Garner* decision demonstrated that the Taft-Hartley Act, with its provisions restricting activities of organized labor, could be, from a policy viewpoint, effective in encouraging the worker's freedom to picket.

The repercussions of *Garner* raised large problems. It was given a sound application in California where it was held that a state court could not issue an injunction to preserve the status quo pending an appeal to the National Labor Relations Board.<sup>51</sup> In Missouri it was given an extreme application where the court held that the rule of preemption foreclosed submission of an alleged unfair labor practice to private arbitration.<sup>52</sup>

The breadth of *Garner* became more apparent in 1954 when *Weber v. Anheuser-Busch, Inc.*<sup>53</sup> was decided. A dispute between the International Association of Machinists and the Millwrights was the seed from which this litigation sprung. The IAM went on strike and the employer charged them with a violation of section 8(b)(4)(D) of Taft-Hartley. The Board dis-

46. *Id.* at 489.

47. *Id.* at 498. See also *Plankington Packing Co. v. Wisconsin Employment Relations Bd.*, 338 U.S. 953 (1950), which previously had foreclosed state authority in this area with respect to an employer's unfair labor practice.

48. 310 U.S. 88 (1940).

49. 336 U.S. 490 (1949).

50. 354 U.S. 284 (1957).

51. *Dyer v. Teamsters Union*, 124 Cal. App. 2d 778, 269 P.2d 199 (1954).

52. *McAmis & Local 348, Oilworkers Internat'l Union, CIO v. Panhandle Eastern Pipe Line Co.*, 273 S.W.2d 789 (Mo. 1954).

53. 348 U.S. 468 (1954).

missed the complaint. The reasoning was that no "dispute" existed, within the meaning of the statute, as no particular work was actually being complained of. Subsequently an injunction was sought in the state court. The new complaint charged a secondary boycott violation under the common law of Missouri and violations of subsections (A), (B), and (D) of section 8(b)(4) of Taft-Hartley. A new injunction was entered and the Missouri Supreme Court affirmed.

Writing the Court's opinion was Mr. Justice Frankfurter. In a scholarly fashion he traced the labor law cases dealing with preemption. He made a special effort to clarify and codify the law when he said that

even if it were clear that no unfair labor practices were involved, it would not necessarily follow that the state was free to issue its injunction. If this conduct does not fall within the prohibitions of Section 8 of the Taft-Hartley Act, it may fall within the protection of Section 7, as concerted activities for the purpose of mutual aid or protection.<sup>54</sup>

Thus was the concept of *Garner* now made clearly applicable to protected activities. Justice Frankfurter admitted that determinations of protected and prohibited might prove to be difficult: "The penumbral area can be rendered progressively clear only by the course of litigation."<sup>55</sup> Justice Frankfurter was never more correct.

The cases following *Garner* were not always so pleasing to the unions as *Weber* was. *United Constr. Workers v. Laburnum Constr. Corp.*<sup>56</sup> heralded a clearcut inroad upon the exclusion of state authority as enunciated in *Garner*. The question in this case was whether the Taft-Hartley Act had given the National Labor Relations Board exclusive jurisdiction over labor relations when it was the subject matter of a common law tort action maintained in a state court and when the activity complained of was a federal unfair labor practice.

Section 8(b)(1)(A) of Taft-Hartley clearly covered the "rough-stuff" union activity present in this case. Nevertheless, the Supreme Court held that Virginia had the power to entertain a damage suit for compensatory and punitive damages for interference with prospective contracts. Mr. Justice Burton, writing the majority opinion, called attention to a difference in remedies:

In the *Garner* case, Congress had provided a federal administrative remedy, supplemented by judicial procedure for its enforcement, with which the state injunction procedure conflicted. Here Congress has neither provided nor suggested any substitute for the traditional

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54. *Id.* at 478-79.

55. *Id.* at 480-81.

56. 347 U.S. 656 (1954). For a discussion of this case see Note, 40 CORNELL L.Q. 156 (1954).

state court procedure for collecting damages for injuries caused by tortious conduct. For us to cut off the injured respondent from this right of recovery will deprive it of its property without recourse or compensation. To do so will, in effect, grant petitioners immunity from liability for their tortious conduct. We see no substantial reason for reaching such a result.<sup>57</sup>

Justice Burton was unable to see a conflict in the state procedure, a proposition for which he relied on Senator Taft as an authoritative Virgil.<sup>58</sup> Rather than view section 8(b)(1)(A) as preempting this activity he perceived it to be congressional insistence that such tortious conduct be punished.

Justice Douglas dissented, Black concurring; for, unlike Burton, he *was* able to see a substantial reason for immunizing this union. He realized that if the organizer had committed murder or was guilty of a criminal offense, there would be no preemption.<sup>59</sup> He admonished the Court for deviating from *Garner* and, having searched the history of preemption cases, he found in *Laburnum* what he viewed as injustice:

May a union not only institute proceedings before the National Labor Relations Board but sue the employer as well? Or, may it have a choice of remedies? I would think not. But if the union may not sue the employer for the tortious conduct, why may the employer sue the union?<sup>60</sup>

The core of Justice Douglas' dissent dealt with the practical effect of state damage suits in labor relations. He realized that Congress had written the act in the hope of creating industrial peace in this sensitive area. He warned that

if the parties not only have the remedy Congress provided but the right to sue for damages as well, the controversy is not settled by what the federal agency does. It drags on and on in the courts,

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57. *United Constr. Workers v. Laburnum Constr. Corp.*, 347 U.S. 656, 663-64 (1954).

58. Senator Taft said:

But suppose there is duplication in extreme cases; suppose there is a threat of violence constituting violation of the law of the state. Why should it not be an unfair labor practice? It is on the part of the employer. If an employer proceeds to use violence as employers once did, if they use the kind of goon-squad tactics labor unions are permitted to use—and they once did—if they threaten men with physical violence if they join a union, they are subject to state law, and they are also subject to be proceeded against for violating the National Labor Relations Act. *There is no reason in the world why there should not be two remedies for an act of that kind.* (Emphasis Burton's.)

93 CONG. REC. 4024 (1947).

59. For a labor preemption case involving a criminal statute see *General Teleradio, Inc. v. Manuti*, 131 N.Y.S.2d 365 (App. Div. 1954), *reversing* 129 N.Y.S.2d 757 (Sup. Ct. 1954). For a discussion of this case see Note, 68 HARV. L. REV. 550 (1954).

60. *United Constr. Workers v. Laburnum Constr. Corp.*, 347 U.S. 656, 670 (1954).

keeping old wounds open, and robbing the administrative remedy of the healing effects it was intended to have.<sup>61</sup>

In extricating himself from this case's emotional context of violence, Mr. Justice Douglas had written a logical and sound dissent.

Justice Douglas' strong feelings about the role of the federal government in regulating picketing carried over into the next major preemption case that faced the Court. This one grew out of the bitter strike conducted by the United Automobile Workers against Kohler in Wisconsin.<sup>62</sup> The parties had been unable to agree on a new collective bargaining agreement and as a result, the workers struck and picketed the premises. Kohler filed a complaint with the Wisconsin board charging unfair labor practices under the Wisconsin Employment Peace Act. He charged the UAW with, among other things, mass picketing, coercion, and threats of physical injury. The state board found these allegations to be true. For the purposes of this case, however, the union neither denied nor admitted the charges, but based its claim on preemption. Citing *Allen-Bradley* and Senator Taft, once again,<sup>63</sup> the Court held that the states had the authority to act. Although there was no remedial distinction here, as in *Laburnum*, nevertheless there was violence, and this was held to be traditionally within the jurisdiction of the states. The Court said :

The States are the natural guardians of the public against violence. It is the local communities that suffer most from the fear and loss occasioned by coercion and destruction. We would not interpret an act of Congress to leave them powerless to avert such emergencies without compelling direction to that effect.<sup>64</sup>

Of course Justice Douglas could not concur in this opinion, and this time he brought not only Justice Black to his side, but also a new dissenter, Chief Justice Warren. It is submitted that Justice Douglas' dissent in *Kohler* helped add to much of the confusion that was rapidly developing in this area. He wrote :

Today we depart from *Garner* and allow a state board to enjoin action which is subject to an unfair labor proceeding before the federal board. We sanction a precise duplication of remedies which is pregnant with potentialities of clashes and conflicts.

Of course the States may control violence. They may make arrests and invoke their criminal law to the hilt. They transgress only when

61. *Id.* at 671.

62. *UAW-CIO v. Wisconsin Employment Relations Bd.*, 351 U.S. 271 (1956).

63. Senator Taft said: "The Senator from Oregon awhile ago said that the enactment of this proposed legislation will result in duplication of some of the State laws. It will duplicate some of the State laws only to the extent, as I see it, that actual violence is involved in the threat or in the operation." 93 CONG. REC. 4437 (1947).

64. *UAW-CIO v. Wisconsin Employment Relations Bd.*, 351 U.S. 271, 274-75 (1956).

they allow their administrative agencies or their courts to enjoin the conduct that Congress has authorized the federal agency to enjoin. We retreat from *Garner* and open the door to unseemly conflicts between state and federal agencies when we sustain what Wisconsin has done here.<sup>65</sup>

Unfortunately Justice Douglas had narrowed his plan of battle considerably. He now wished to demonstrate that remedial distinctions which existed in *Laburnum* were not present here. More serious was his emphasis on the duplication of administrative function. Certainly this emphasis made Wisconsin's action more conceptually clear as an infringement of federal authority, but this emphasis evaded the heart of the problem. Whether the state was acting as administrative agency, entertaining a tort action, or trying a criminal case mattered little. Even if it indicted under a criminal statute, there was no guarantee that it did not do so as a mere subterfuge to deal with picketing.<sup>66</sup> Wisconsin might well have enacted a criminal law to do the precise thing that they did in *Kohler* with an administrative statute. Justice Douglas would have been more correct had he simply adhered to his broad dissent in *Laburnum* and shown the disturbing results that might ensue from state interference when at the same time the intent of the federal act was to pacify. Instead he succumbed to the temptation of exhibiting how *Kohler* was a better case to argue than *Laburnum*.

Justice Douglas did, however, do labor law students a favor when he pointed out in a footnote<sup>67</sup> that *Allen-Bradley* was no longer in point. The Taft-Hartley Act had not then been enacted and thus section 8(b)(1)(A), which the union would have been charged with under the federal act, was non-existent. That this point was for the benefit of labor law students only can best be demonstrated by the Court's willingness to cite this case ad infinitum.

*Youngdahl v. Rainfair, Inc.*<sup>68</sup> removed doubts as to whether or not Justice Douglas would be bound to his language in *Kohler*. The *Youngdahl* case did not involve an administrative agency. The action protested was the injunction of a state court; and Douglas, Black, and Warren dissented, claiming that the NLRB had exclusive authority to handle the case.

This case involved substantially the same story of mass picketing, coercion, and threats present in *Allen-Bradley*. A novelty, however, crept into the Court's opinion in this case. The Court restricted Arkansas' authority

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65. *Id.* at 275-76.

66. Professor Cox is prone to accept the distinction of labor relations statutes and general laws. Not only did Justice Douglas accept this in *Kohler*, but he also conceded the right of the states to act without inhibitions in this realm in *Laburnum*. See Cox, *Federalism in the Law of Labor Relations*, 67 HARV. L. REV. 1297 (1954).

67. *UAW-CIO v. Wisconsin Employment Relations Bd.*, 351 U.S. 271, 276 (1956).

68. 355 U.S. 131 (1957).

to picketing that was "enmeshed" in violence. In doing this, they employed the *Giboney* doctrine.<sup>69</sup> Peaceful picketing was still preempted, said the Court—jurisdiction was to be divided.

This variation is interesting in that it allowed the Court to reach into the union's activity and pick and choose as to what was protected, and thus preempted a'la *Briggs-Stratton*. Here violence itself was not enough for state rule. The Court was thus in the position of making close judgments on protected activities, and, more than ever, it was slipping into the pattern of *Briggs-Stratton*.

The worst blow that preemption cases could render to the labor movement was yet to come. This was *UAW-CIO v. Russell*.<sup>70</sup> This was an action brought in an Alabama state court for malicious interference with lawful occupation. The United Automobile Workers, of which the petitioner was not a member, was the bargaining agent in the plant where he was employed. The union struck and engaged in mass picketing. Russell was said to have been threatened with bodily harm and damage to his property, in addition to being prevented by the pickets from reaching work.<sup>71</sup> He made a claim for compensatory damages and punitive damages plus mental anguish, and he was awarded \$10,000.<sup>72</sup>

Did the National Labor Relations Board have exclusive power to decide this case in that the conduct complained of was a violation of section 8(b)(1)(A) of Taft-Hartley? Remedial distinctions were talked of again. The UAW argued that Russell could have been awarded back pay by the NLRB under section 10(c). The Court assumed this to be correct for the purposes of this case.<sup>73</sup> Was there, then, a significant distinction between this case and *Laburnum*?

69. 312 U.S. 287 (1941).

70. 356 U.S. 634 (1958).

71. These facts seem to be disputable. See Troy, *The Supreme Court and the Picket Line*, *The Reporter*, June 26, 1958. Mr. Troy writes the following:

On the first day, when he (Russell) drove up to the picket line, he was halted by the patrolling strikers. As far as anyone can reconstruct the episode, there was an argument but nothing ominous or desperate, and no violence. It seemed to be a more peaceful exchange than could be realistically expected in such a situation. But, when Russell edged toward the entrance, someone near the picket line called out "He's trying to go through!" and others yelled, "Turn him over!" Although no one tried to turn his car over, his forward motion was effectively blocked. After an hour and a half, when Russell became convinced that he could not get through the picket line without running over somebody or getting turned over he went home. So far as is known, nothing further happened to Russell except that he lost \$500.00 in wages.

Of course the Court is always loathe to reexamine the fact situation as given to it by the state court. The Supreme Court's opinion states that there was a conflict in testimony and the jury believed Russell.

72. Russell's loss in wages having been \$500, the punitive damages and mental anguish covered \$9,500.

73. The Board had held that an award of back pay was in order where the union wrongfully caused a termination in employee status, but not where a union, as here,

The majority did not think that 10(a) was meant to be the sole manner of an employee's recovery. They held that this section was far from being an express grant of exclusive jurisdiction superseding common law actions, by either an employer or an employee, to recover damages caused by the tortious conduct of a union.<sup>74</sup> The Court saw no general scheme established by Congress for compensatory damages and they hinted at a distinction between public and private rights—a distinction discarded in *Garner* and *Weber*. In support of this argument, visions were conjured of Russell's recovery had he been hurt physically:

The situation may be illustrated by supposing in the instant case, that Russell's car had been turned over resulting in damage to the car and personal injury to him. Under state law presumably he could have recovered medical expenses, pain and suffering and property damages. Such items of recovery are beyond the scope of present Board remedial orders.<sup>75</sup>

Thus did the Court indicate that the UAW had put itself outside the Board's remedial powers by their type of activity.<sup>76</sup> If *Laburnum* placed an imprimatur upon the right of the states to entertain damage suits against unions for activity in violation of Taft-Hartley, then *Russell* was the *nihil obstat*—the second stamp of approval. *Garner* was becoming a memory in the distant past.

Chief Justice Warren dissented from the result arrived at in *Russell*, an opinion in which Mr. Justice Douglas concurred.<sup>77</sup> The Chief Justice asserted that there was a valid demarcation between damage suits like this one and

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interferes with access to work of one who remained an employee. *In re* United Furniture Workers of America, CIO, 84 N.L.R.B. 563, 565 (1949); *Progressive Mine Workers v. Labor Bd.*, 187 F.2d 298 (7th Cir. 1951). The UAW argued that the Board's interpretation of its powers conflicted with the rationale of *Phelps Dodge Corp. v. Labor Bd.*, 313 U.S. 177 (1941), and *Virginia Elec. Co. v. Labor Bd.*, 319 U.S. 533 (1943).

74. *UAW-CIO v. Russell*, 356 U.S. 634, 642 (1958).

75. *Id.* at 645-46. For similar arguments presented in support of the majority position see Lynch & Mandelkes, *Private Enforcement of Taft-Hartley: A New Horizon in Federal Preemption*, 11 OKLA. L. REV. 406 (1958). The Board's lack of exclusive power is demonstrated by the possibility of Russell's being killed on the picket line and his survivors instituting an action under statute for recovery measured by his earning capacity. It is also argued that if Russell had been incapacitated permanently he would have had a similar cause of action. There would be no reemployment in either case and consequently the Board's remedies would be unavailable. Thus, goes the argument, state action does not depend upon happenstance of the injury—the states should not be precluded from acting merely because the injury to the plaintiff is not as severe.

76. *Fitzgerald v. Pan American World Airways, Inc.*, 229 F.2d 449 (2d Cir. 1956), seems to stand for the proposition that a federal regulatory act may not always compensate for violations of the act. Here Ella Fitzgerald, jazz vocalist, alleged a carrier violation of an anti-discrimination provision in the Civil Aeronautics Act. The Court held that the statute does not confer power on the regulatory agency for statutory misconduct.

77. Mr. Justice Black took no part in this case.

suits for active physical injury or criminal violation.<sup>78</sup> He noted a strong distinction and refused to brush aside the difference between the two factual settings as mere happenstance:

But the power to award damages for personal injuries does not necessarily imply a like power for other forms of monetary loss. The unprovoked infliction of personal injuries during a period of labor unrest is neither to be expected nor to be justified, but economic loss inevitably attends work stoppages. Furthermore, damages for personal injuries may be assessed without regard to the merits of the labor controversy, but in order to determine the cause and fix the economic loss a court must consider the whole background and status of the dispute. As a consequence, precedents or examples involving personal injuries are inapposite when the problem is whether a state court may award damages for economic losses sustained from conduct regulated by the Federal Act.<sup>79</sup>

Chief Justice Warren's dissent was reminiscent of Justice Douglas' criminal distinctions statute. Yet, it focused attention on the fact that *Russell* had never been touched and that the suppositions posed by the majority did not exist. Of primary importance was the Chief Justice's warning of dominant state interests—a warning made emphatic by the hostility of some states to labor. He did not base his argument on the remedy question<sup>80</sup> when he stated the following:

Differing attitudes toward labor organizations will inevitably be given expression in verdicts returned by jurors in various localities. *The provincialism this will engender in labor regulation is in direct opposition to the care Congress took in providing a single body of nationwide jurisdiction to administer its code of labor regulation.*<sup>81</sup> (Emphasis added.)

Having joined in *Laburnum*, Warren sought to distinguish it from *Russell*. He did so on three grounds. Here the unfair labor practice was

78. In this opinion Chief Justice Warren joined the multitude of Taft quoters: I may say further that one of the arguments has suggested that in case this provision covered violence it duplicated state law. I wish to point out that the provisions agreed to by the committee covering unfair labor practices on the part of labor unions also might duplicate to some extent that State law. Secondary boycotts, jurisdictional strikes, and so forth may involve some violation of state law respecting violence which may be criminal, and so to some extent the measure may be duplicating the remedy existing under state law. But that, in my opinion, is no valid argument. (Emphasis Warren's.)

93 Cong. Rec. 4437 (1947).

79. UAW-CIO v. *Russell*, 356 U.S. 634, 649-50 (1958).

80. Here the jury was informed that it could award "smart" money to make the defendant "smart." Warren stated the following:

The parties to labor controversies have enough devices for making one another "smart" without this court putting its stamp of approval upon another. I can conceive of nothing more disruptive of congenial labor relations than assuring employee, union, and management with the potential for smarting one another with exemplary damages. *Id.* at 653.

81. *Id.* at 651.

inherent in the wrong complained of whereas in *Laburnum* the tortfeasor could not be allowed to immunize himself for a wrong bearing no relation to the federal law by choosing to effect the wrong by transgressing a federal regulation. Secondly, this controversy grew out of a labor dispute in which the union was the certified bargaining agent. In *Laburnum* the defendant was a total stranger to the collective bargaining contract and thus beyond the general concern of the act to continue peaceful labor relationships. Thirdly, it was pointed out that the union faced a series of judgments against it that could well deplete its treasury. In *Laburnum* there could be only one judgment against the union—that of the employer.

Professor Meltzer has criticized these distinctions, partially, for their non-legal rationale.<sup>82</sup> But I would differ with his conclusions. It is clear that the union's position in *Russell* was far more meritorious than in *Laburnum*. Its activity, as the certified union, was activity that will often take place on the picket line in order that the union's effort not be supine, but rather that it remain vigorously in support of the strike. The inability of the dissent to create fine legal distinctions does not detract from the realities of this situation.

Professor Meltzer has found the opinions of Justices Douglas, Black, and Warren distasteful and encouraging to union violence.<sup>83</sup> It is submitted that neither the majority nor the minority opinions would do much to alter emotional reactions, which are the rule rather than the exception on the picket line. The majority opinion was, however, a threat to the existence of concerted activity in some areas.<sup>84</sup> Union treasuries might be raided every-time there was the slightest trouble in connection with picketing,<sup>85</sup> rather than recourse being had to the NLRB.

No matter how careful union leaders are about maintaining discipline on the picket line there is always the possibility that the irresponsible action of a few union members will create tort liability resulting in large punitive recoveries. The way will be open for unscrupulous employers to give sub rosa financial support to litigants in such situations—not for the purpose of seeing justice done, but with the aim of breaking the local union treasury. This situation will be most apparent in areas hostile to union activity and may develop into a formidable weapon whenever more than a token picket line is maintained.<sup>86</sup>

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82. Meltzer, *The Supreme Court, Congress, and State Jurisdiction over Labor Relations*: I, 59 COLUM. L. REV. 6, 34 (1959).

83. *Id.* at 33.

84. See Isaacson, *Federal Pre-emption Under the Taft-Hartley Act*, 11 IND. & LAB. REL. REV. 391, 398 (1957).

85. For a discussion of the *Russell* case see Note, 44 CORNELL L.Q. 263 (1959). The note writer emphasizes the large award given in this case—\$10,000 against the UAW for loss of five weeks work. In addition, the strike resulted in thirty suits by workers demanding \$1,500,000 in relief. *Id.* at 270.

86. Note, 44 CORNELL L.Q. 263, 268 n.36 (1959).

The attitudes of *Russell* and *Gonzales* were entirely different from *Garner* and *Weber*. In the latter, clear intent by Congress was needed to provide state remedies. Now clear intent by Congress was necessary to indicate the exclusiveness of federal jurisdiction. The Court seemed to have accepted the proposition that Justice Frankfurter had adopted in his *Hill v. Florida* dissent—preemption only when a conflict in remedies existed.<sup>87</sup>

Justice Frankfurter, writing the opinion in *Weber*, realized that there would be much confusion that could be solved only by litigation.<sup>88</sup> At that time the Court had done little to clarify *Garner* and *Weber*. Now that there had been much litigation and many distinctions created, there existed even more confusion and Justice Frankfurter was the first to admit it: "The statutory implications concerning what has been taken from the States and what has been left to them are of a Delphic nature, to be translated into concreteness by the process of litigating elucidation."<sup>89</sup>

Numerous Delphic Oracles began to speak in many different tongues and the result was chaos. Some state courts relied on the distinction of damages and injunction as derived from *Laburnum* and proceeded to apply this concept to conduct totally different from *Laburnum*.<sup>90</sup> Following the same analysis, other courts refused to award damages to employees against unions under state law on the ground that the NLRB was empowered to give substantially the same relief under federal law by a back pay order.<sup>91</sup> Some courts singled out violence as the critical factor in giving damages under state law.<sup>92</sup> Another basis for distinction was common law as distinguished from statutory torts.<sup>93</sup> Needless to say, it was difficult to point to one factor as decisive.<sup>94</sup>

The *Garmon* rule returns us to the broad principles promulgated in *Garner* and particularly in *Weber*.<sup>95</sup> The exceptions to the rule relate to

87. 325 U.S. 538 (1945).

88. *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468 (1955).

89. *International Ass'n of Machinists v. Gonzales*, 356 U.S. 617, 619 (1958).

90. See *Benz v. Compania Naviera Hidalso, S.A.*, 233 F.2d 62, 65-66 (9th Cir. 1956), *rev'd on other grounds*, 353 U.S. 138 (1957); *Denver Bldg. & Const. Trades Council v. Shose*, 132 Colo. 187, 287 P.2d 267 (1955); *Benjamin v. Foidi*, 379 Pa. 540, 109 A.2d 300 (1954); *Dallas General Drivers v. Waimicx, Inc.*, 281 S.W.2d 738 (Tex. Civ. App. 1955).

91. See *Born v. Laube*, 213 F.2d 407 (9th Cir.), *rehearing denied*, 214 F.2d 349 (9th Cir. 1954), *cert. denied*, 348 U.S. 855 (1954); *Sterling v. Local 438, Liberty Ass'n of Steam & Power Pipe Fitters*, 207 Md. 132, 113 A.2d 389 (1955), *cert. denied*, 350 U.S. 875 (1955), *motion for leave to file petition for writ of prohibition denied*, 351 U.S. 1917 (1956).

92. *International Longshoremen's & Warehousemen's Union, CIO v. Hawaiian Pineapple Co.*, 226 F.2d 875 (9th Cir. 1955), *cert. denied*, 351 U.S. 963 (1956); *Tallman Co. v. Latal*, 365 Mo. 553, 284 S.W.2d 547 (1955).

93. *Friendly Society of Engravers & Sketchmakers v. Calico Engraving Co.*, 238 F.2d 521 (4th Cir. 1956).

94. See *Garmon v. San Diego Bldg. Trades Council*, 49 Cal. 2d 595, 320 P.2d 473 (1958). See especially Judge Traynor's dissenting opinion.

95. The standard in *Weber* for preemption was "reasonably" within federal regulation. See *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 481 (1955).

cases of violence and intimidation which threaten peace and order, and to a "peripheral" dichotomy of which *Gonzales* is apparently representative. The former cases declare that the states will retain traditional jurisdiction. Injunctions, damage suits, and criminal penalties may be employed.

Joining Justice Frankfurter are Chief Justice Warren, Justices Douglas, Black, and Brennan. Consequently, this case heralds the surrender for Warren, Douglas, and Black of distinctions drawn between administrative injunctions and criminal statutes, between personal injuries and threats of injury. Obliterated is Justice Douglas' fine dissent in *Laburnum* regarding damage suits which keep open old wounds.

Naturally, this case's ardent return to a policy of vigorous preemption involves retreats from previously developed majority opinions. Gone are distinctions between public and private rights, and between supplementary and parallel remedies. Gone also is the *Russell* presumption against exclusive jurisdiction for the federal government.

The *Garmon* decision is a disputed one. Justice Harlan, writing for Justices Clark, Stewart, and Whittaker, concurs with the result reached, but on far narrower grounds. They see this union picketing as protected and thus within the scope of preemption. According to their views, however, prohibited activity will be left to the states to deal with. They do not regard violence to be the correct distinction which empowers the states to act, and they call *Laburnum* and *Russell* to witness as authority for the proposition that violence was *only instrumental* in determining that activity to be unprotected.

The minority's analysis of case authority would seem to be the superior one. The majority opinion must be frankly recognized for what it is—an attempt at codification. The singling out of violence as a justification for previous state jurisdiction smacks of rationalization rather than analysis.

It should be noted that Justice Harlan's opinion indicates that he will afford himself greater discretion in determining what is protected under the act. To paraphrase Professor Gregory, he appears to desire an occasional guess.<sup>96</sup>

With the advent of new labor legislation prohibiting minority picketing, the concurring opinion in *Garmon* is today a dissent.<sup>97</sup> This opinion's importance cannot be underestimated because some of the younger members of the Court are parties to it, and they will deal with this problem, presumably, for years to come.

The majority opinion has, interestingly enough, made it unclear as to

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96. Gregory, *Federal or State Control of Concerted Union Activities*, 46 VA. L. REV. 539, 559 (1960).

97. Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519 (1959). In regard to more recent applications of the minority opinions, compare *DeVries v. Baumgartner's Elec. Constr. Co.*, 359 U.S. 498 (1959), with *Grocery Drivers Local 848 v. Seven-Up Bottling Co.*, 359 U.S. 434 (1959).

whether or not activity which is neither protected nor prohibited, as in *Briggs-Stratton*, will be handed over to the states. On this point the Court wrote that "the Board may decide that an activity is neither protected nor prohibited, and thereby raise the question whether such activity may be regulated by the states."<sup>98</sup> This is a most puzzling aspect of an opinion which seems to base federal jurisdiction on conduct which is arguably protected or prohibited under the act. Perhaps the Court is saying that self-help and economic warfare of the in-between variety are as important to a proper administration of the national labor policy as are sections 7 and 8.

For the present, however, the second *Garmon* case returns the preemption question to a principle of greater certainty and order.<sup>99</sup> It is a most refreshing answer to the rampant confusion that has heretofore existed, and yet candor about the complexities of litigation may well dictate the "confession that there is no clear line to draw."<sup>100</sup>

### III

The possibility that the intent of *Garmon* may be frustrated is well-evidenced by the rule that a state has jurisdiction to determine its own jurisdiction.<sup>101</sup> Institutions, like individuals, do not ordinarily accord self-abnegation an isolated priority. Many courts may not be favorably disposed to rule that they have no authority to act. Thus mischief may be done to the national labor policy through state court injunctions. Such injunctions may often be granted without a hearing and without any genuine inquiry into the facts. In some state courts they may be interlocutory orders and not appealable in state courts. At the present, it appears that no direct attack may be made on such a proceeding in federal court.<sup>102</sup>

In *Capital Service, Inc. v. NLRB*,<sup>103</sup> the Court said that where a state enjoined picketing which the NLRB requested the federal district court to enjoin under the act, the latter court might stay state proceedings in aiding its own jurisdiction.<sup>104</sup> Noting that Congress had enumerated certain exceptions to the normal rule that federal courts may not enjoin state proceedings,<sup>105</sup> the Court stated the following:

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98. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 245 (1959).

99. For an excellent discussion of this case see Note, 45 CORNELL L.Q. 384 (1960). See also Note, 58 MICH. L. REV. 282 (1959), for a slightly different viewpoint.

100. Gregory, *supra* note 96; For a post-*Garmon* labor preemption decision, see Superior Court v. State *ex rel.* Yellow Cab Serv., Inc., 361 U.S. 373 (1960).

101. *Retail Clerks Local 1364 v. California Superior Court*, 52 Cal. 2d 232, 339 P.2d 839, *cert. denied*, 361 U.S. 864 (1959).

102. Comment, 27 U. CHI. L. REV. 738, 744 (1960).

103. 347 U.S. 501 (1947).

104. The Board sought an injunction under § 10(1) of the Act.

105. 62 Stat. 968 (1948), 28 U.S.C. § 2283 (1958). For a more thorough analysis of this provision of the Code, see Comment, *Federal Power to Enjoin State Court Proceedings*, 74 HARV. L. REV. 726 (1961); Comment, 27 U. CHI. L. REV. 738 (1960).

We do not stop to consider the many questions which have been propounded under this newly worded provision of the Code. One alone suffices for this case. For we conclude that the injunction issued by the District Court was "necessarily in aid of its jurisdiction" and thus permitted under the exceptions specifically allowed by Congress.<sup>106</sup>

Subsequently the Court ruled in *Richman Brothers*<sup>107</sup> that a union could not enjoin a state court proceeding before a complaint was entertained by the NLRB. Justice Frankfurter took an approach at odds with *Garmon* when he said that the ascertainment of preemption under Taft-Hartley would not be easy and that initial determination rested with the Court.<sup>108</sup> Pointing to provisions of the act permitting the Board to obtain injunctive relief in district court, the Court was persuaded that exclusive authority for such relief was vested in the Board.<sup>109</sup> As a practical justification for the end result the Court said:

Neither the course of this case, nor the history of state court actions since the decision in *Garner v. Teamsters Union*, 346 U.S. 485, demonstrates recalcitrance on the part of state courts to recognize the rather subtle line of demarcation between exclusive federal and allowable state jurisdiction over labor problems.<sup>110</sup>

Berating this emasculation of federal remedies, Justices Douglas, Black, and Warren viewed the majority opinion as permission to circumvent preemption.

It is respectfully submitted that, statutory interpretations aside, the dissent exhibited a greater awareness of the facts of life. Although this writer has undertaken no statistical survey, it has been his experience to witness a definite inclination on the part of state courts, in areas inhospitable to organized labor, to give injunctions to employers on the slightest pretext—and this despite *Garmon*! By the time that an appeal is taken through the state and, perhaps, federal courts, the strike or picket line is broken and the final judicial disposition becomes irrelevant. Congressional alteration of Board procedures, empowering the Board with broad injunctive authority against state proceedings and establishing a priority for such cases would be welcome. Of course, if the Board were to take the position that the filing of a complaint in state court alleging conduct arguably subject to sections 7 and 8 was, in and of itself, an unfair labor practice, the situation would be improved.<sup>111</sup>

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106. *Capital Serv., Inc. v. NLRB*, 347 U.S. 501, 505 (1947).

107. *Amalgamated Clothing Workers v. Richman Bros.*, 348 U.S. 511 (1955).

108. *Id.* at 515.

109. *Id.* at 517.

110. *Id.* at 518-19.

111. See W. T. Carter and Brother, 90 N.L.R.B. 2020 (1950), for the requirement of employer bad faith.

Yet the time element would still curtail employee rights considerably. It is also possible that section 10(1) of the act might furnish authority for injunctive relief without the filing of an unfair labor practice charge.<sup>112</sup> This is, however, highly doubtful.<sup>113</sup>

It has been suggested that the NLRB devise a speedy advisory opinion procedure pursuant to its section 6 rule-making power, so as to save the employer time in getting into state court to deal with unprotected union activity.<sup>114</sup> It should be noted that the act gives the employer quick injunctive relief when he goes before the Board in a number of situations involving union activity. Congress has been mindful of those areas that require a rapid adjustment. Furthermore, *Garmon* may possibly leave some activity that is neither protected nor prohibited beyond the grasp of state courts. In any event, it is submitted that the complex considerations involved are not well adapted to adjudication through rapid advisory opinions. Although this may be normal Board practice in other situations, looming state interference, with the potentiality of large damage suits, makes this problem atypical.

It should be pointed out that a union could not invoke this Board-created procedure to enjoin state proceedings. Its one-sidedness is demonstrated by the fact that it would be utilized solely by employers to discover their freedom to proceed with state action.

Another area of importance is the power of state courts to enforce contempt decrees even after federal courts have held them to be preempted and thus without jurisdiction. The spectre of state courts' issuing doubtful injunctions in response to employer complaints places workers in something of a quandary. Obedience may mean the inhibition of protected rights. On the other hand, courts must act with authority and protect the competing interest of irreparable harm to the employer. The Court has denied certiorari in two cases in which lower courts held, in accordance with the *Mineworkers* decision,<sup>115</sup> that the contempt decree will stand.<sup>116</sup>

The traditional equity rule is, however, that a court order issued without jurisdiction is so completely void as to leave disobedience unpunished.<sup>117</sup> Assuming that the Court applies federal law to this problem, frees itself from

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112. Comment, *Federal Power to Enjoin State Court Proceedings*, 74 HARV. L. REV. 726, 738 (1961).

113. NLRB v. Swift, 233 F.2d 226 (8th Cir. 1956).

114. Note, *State Regulation of Unprotected Union Activity: By passing the "Arguable Subject" Test with N.L.R.B. Advisory Opinions*, 70 YALE L.J. 441 (1961).

115. *United States v. UMW*, 330 U.S. 258 (1947). This decision upheld criminal contempt convictions for disobedience of a temporary restraining order of a federal court.

116. *McCrary v. Alladin Indus.*, 361 U.S. 385 (1959); *Bogle v. Jakes Foundry*, 362 U.S. 401 (1960). *Contra*, *Town & Country Motors v. Local Union 328*, 355 Mich. 26, 94 N.W.2d 442 (1959).

117. Comment, 27 U. CHI. L. REV. 738 (1960).

the *Mineworkers* precedent, and accepts the traditional equity rule, the position of the workers remains precarious. Indeed, the state may resort to arrest and imprisonment.<sup>118</sup> This is another vivid example of devices for evasion and frustration of the *Garmon* principle.

The question of defining violence and an imminent threat to public order, especially in reviewing state court orders, may find the Court impaled on the horns of numerous dilemmas. Suppose that pickets take pictures of individuals who dare cross the picket line. May this be viewed as a form of intimidation? Naturally the states are in the best position to make a determination of factual happenstance. Yet indications are that the Court will be zealous in reviewing such holdings and will not hesitate to reverse when the occasion demands.<sup>119</sup>

Suppose that pickets indulge in name-calling? Will the decisions protecting peace and order turn on the words used and the sensitive nature of the target? The drawing of such fine lines, as is done in tort law, will leave the Court hard pressed to ascertain the difference between state compliance and state frustration.

Suppose a group of workers engage in mass picketing once a week, but interfere with no one who attempts to enter or leave the plant. Can the employer be granted an injunction on the basis of violence or a threatened disorder? All these factual situations, with the multitude of variations that may be present, point up the fact that we are not yet completely beyond the days of "litigating elucidation." Indeed, it is hard to envisage when we ever will be.

One further example of the close factual circumstances that may influence the result reached is given to us by a recent decision<sup>120</sup> in the Illinois Supreme Court. The court held that Illinois had jurisdiction to enforce the state's criminal trespass statute against union organizers who continued to distribute union leaflets on a retail store's parking lot after being ordered by the store to leave. The court held that the state's interest in protecting domestic peace justified state action. Sometimes the right for an outsider to be on company property is protected by the act; it is an *ad hoc* determination.<sup>121</sup> However, the state court might have been unable ever to discover the existence of federal jurisdiction. The employer could not trigger a section 8(a)(3) proceeding through discharges as these people were not his

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118. *Id.* at 751.

119. *Teamsters Union v. Newell*, 356 U.S. 341 (1958); *reversing on Thornhill grounds*, 181 Kan. 898, 317 P.2d 817 (1957); see also *Hotel Employees v. Sax*, 358 U.S. 270 (1959), which indicates the Court's willingness to scrutinize the state court record with regard to the existence of violence.

120. *State v. Goduto*, 48 L.R.R.M. 2126 (1961); see also *Cranston Print Works Co.*, 117 N.L.R.B. 25 (1957).

121. *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956).

employees. (It should be noted here that even a dismissal of such charges would not normally be dispositive of the pertinent question.)

The initiative thus rested with the organizers to assert their rights by alleging interference in union activities in a section 8(a)(1) proceeding. It is the consequential helplessness of the employer which lends validity to the decision reached.

But suppose the organizers' right to be on company property was of a more absolute nature. Would the state then be justified in answering the employer's call to deal with this disorder? Would actual violence (not present in the above-mentioned case) alter the picture? Suppose also that the state had acted in a more grandiose and sweeping manner, issuing a declaratory judgment or a permanent injunction against the organizers. It is submitted that in this case, the state would have had more difficulty in supporting its stand.

#### IV

As mentioned before, *Garmon* may extend preemption to new and previously foreclosed vistas. A barrage has now begun against the Court's holdings in *Gonzales*. There, it will be recalled, a divided Court held that state power to award a wrongfully expelled union member damages for loss of wages and suffering was not displaced by the National Labor Relations Act.<sup>122</sup> More specifically, the union failed in maintaining that the complaint alleged possible union discrimination, thus falling within section 8(b)(2) of the act.

Justice Frankfurter, speaking for the Court, disagreed. He stated that the section 8(b)(1) proviso<sup>123</sup> protecting unions in dealing with their membership would leave the individual without a remedy. He wrote that the "crux of the claim" involved a breach of contract. It is submitted that this characterization was a mistaken one, in that the individual was undoubtedly much more concerned with a wrongful interference with employment (he sued for wages lost), rather than union membership.<sup>124</sup> *Garmon* would appear to have left *Gonzales* intact by speaking of the conduct involved as of "peripheral" concern. However, some of the state courts are distinguishing *Gonzales* by stating that their cases concern employment interference, and some view that decision as limited to its facts by *Garmon*.<sup>125</sup> Thus the real

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122. Chief Justice Warren and Justice Douglas dissented.

123. (b) It shall be an unfair labor practice for a labor organization or its agents to restrain or coerce (A) employees in the exercise of rights guaranteed in section 7: Provided, that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein. (Emphasis added.)

124. Chief Justice Warren viewed Justice Frankfurter's approach as a "comforting irrelevance." *International Ass'n of Machinists v. Gonzales*, 356 U.S. 617, 631 (1958).

125. *Baker v. Shopmen's Local 755*, 47 L.R.R.M. 2748 (1961); *Wax v. Mailers Union*, 46 L.R.R.M. 2400 (1960); *Bailor v. Local 470*, 46 L.R.R.M. 2405 (1960);

possibility exists that the Supreme Court will soon be haunted by the *Gonzales* precedent in a new case involving individual rights or the so-called duty of fair representation.<sup>126</sup>

Recently in *Local 248, UAW v. Wisconsin Employment Relations Bd.*,<sup>127</sup> the Wisconsin Supreme Court has ruled, in what might be viewed as a weaker case than *Gonzales*, that union disciplinary action was preempted by the act. In this case certiorari was denied by the United States Supreme Court last spring. Here the union fined individuals for crossing a picket line. Employees sought to have the Wisconsin board declare such conduct to be unlawful coercion. The Wisconsin court held the state board to be without jurisdiction essentially because their interference might damage the union's bargaining power and section 7-protected rights, thereby, in this case, diluting union efforts to obtain solidarity. *Gonzales* was distinguished as more remotely concerned with the public interest sought to be protected by the act. Yet the specific unfair labor practice possibility in *Gonzales* argues more strongly for preemption, in that section 8(b) arguments are not so patent in *Local 248*. Admittedly, I am here slipping into an adoption of the Harlan opinion in *Garmon*, perhaps out of a sense of irritation with the inherent vagueness of the Frankfurter approach.

Another factor which would appear to make *Local 248* less compatible with preemption than *Gonzales* is the veritable no-man's-land that individuals in the former case found themselves in. The fact would seem to protect such union disciplinary action through the proviso to 8(b)(1). Thus, once within the act's penumbra, individuals find that the applicable proviso indicates that such conduct is beyond NLRB jurisdiction.<sup>128</sup>

*Garmon* may ultimately have a bearing on preemption in the increasingly publicized agency shop contract.

Thus far it appears to have been assumed that the states are free to prohibit such provisions.<sup>129</sup> The energy spent by the Kansas Supreme Court

Consumer-Farmer Milk Cooperative, Inc. v. Milk Drivers and Dairy Employees, 46 L.R.R.M. 3137 (1960); Dempsey v. Great Atlantic & Pacific Tea Co., 47 L.R.R.M. 2248 (1960); Fullerton v. Sound Technicians, 48 L.R.R.M. 3013 (1961); Wagner v. Hartnett, 44 L.R.R.M. 2960 (1959).

126. Professor Cox has written that the union's conduct in this area could be a failure of the duty to bargain and thus preempted as a violation of § 8(b)(3). See Cox, *The Duty of Fair Representation*, 2 VILL. L. REV. 151, 172 (1957); *Accord*, Honegger v. O'Connell, 49 L.R.R.M. 2330 (1961).

127. 46 L.R.R.M. 3056 (1960), *cert. denied*, 365 U.S. 878 (1961). Here the union fined members who crossed the picket line during a strike and who continued to work for the company. *Accord*, Wisconsin Employment Relations Bd. v. Lodge 78, 46 L.R.R.M. 3062 (1960).

128. This may have aided the Board's motivations in issuing a recent complaint involving union disciplinary fines directed against members who exceeded their production quotas. See Cases No. 13-CB-1059, complaint issued Dec. 1, 1961, against Local 283, UAW, AFL-CIO.

129. Note, 71 YALE L.J. 330, 341 (1961); Note, 62 COLUM. L. REV. 538 (1962).

in the recently decided *Higgins*<sup>130</sup> case, indicates that the question may not be so simple. In that case the Kansas court held that their constitutional right-to-work amendment prohibiting compulsory union membership was meant also to legalize contracts which required the mere payment of dues to the union. The preemption question arose when the court noted that Congress had specifically ceded jurisdiction to the states to prohibit "the execution or application of agreements requiring membership in a labor organization. . . ." <sup>131</sup> The court noted also that Congress, speaking through legislative history, seemed to be permitting the states to deal with all forms of "compulsory unionism." With this in mind, the court concluded that "membership in a labor organization embraced the . . . forced payments to unions of dues, fees and other charges regardless of the appellation applied thereto."<sup>132</sup> In issuing injunctive relief against the application of the contract, at the request of non-union employees seeking a declaratory judgment, the case of *Algoma Plywood Co. v. Wisconsin Employment Relations Bd.*<sup>133</sup> was utilized as precedent. In the *Algoma* case the United States Supreme Court upheld the authority of the state to issue a cease and desist order against giving effect to a maintenance-of-membership agreement under which an employee had been discharged. Kansas analogized *Algoma* to *Higgins*, stating that they both involved the application of agreements rather than protected or prohibited conduct, thereby eluding the scope of *Garmon*. Since *Algoma* is so heavily relied upon, its continuing validity is worthy of some examination.

In *Algoma*, the Court said, without qualification, that "Section 8(3) merely disclaims a national policy hostile to the closed shop or other forms of union security agreement."<sup>134</sup> That disclaimer approach to section 8(b)(3) is, at the least, now slightly clouded by the NLRB's decision in *General Motors Corp.*<sup>135</sup> In that case, there was a right-to-work law, but the issues with regard to the validity of the agency shop were framed solely on the basis of federal law. Thus the Board, expressly not reaching the question of state law, and assuming that membership was open to all employees, held that the agency shop was a "permissible form of union security within the meaning of Sections 7 and 8(a)(3) of the Act."<sup>136</sup> The Board further stated the following:

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130. *Higgins v. Cardinal Mfg. Co.*, 188 Kan. 11, 360 P.2d 456, *cert. denied*, 368 U.S. 829 (1961).

131. Section 14(b) of the act.

132. *Higgins v. Cardinal Mfg. Co.*, 188 Kan. 11, 360 P.2d 456, *cert. denied*, 368 U.S. 829 (1961).

133. 336 U.S. 301 (1949).

134. *Id.* at 307. Although this case was decided under the Wagner Act, § 8(a)(3) has undergone no pertinent changes in Taft-Hartley.

135. 133 N.L.R.B. 21, 48 L.R.R.M. 1659 (1961).

136. 48 L.R.R.M. 1659, 1660 (1961).

The basic problem, simply stated, is whether this form of union-security, the agency-shop, is, and was intended by Congress to be, embraced within the Section 8(a)(3) proviso. The question is answered in the precedents . . . .

. . . .

[S]uch a proposal fully comports with the Congressional intention in Section 8(a)(3) for the allowance of union-security contracts and, therefore, is a mandatory subject, as to which the Respondent is obliged to bargain.<sup>137</sup>

The Court will, of course, have the last word.<sup>138</sup> But the Board's present writings seem to be a shift away from a negative interpretation of 8(a)(3).

Of course, it will be argued that since the Board has now read section 8(a)(3) with reference to membership as merely permissive, why should not the same argument apply to section 14(b). The answer is going to have to be that section 14(b) is *sui generis* in that it involves a cession of jurisdiction. Thus it must be read narrowly in the light of *Garmon* and that case's reaffirmance of *Garner* and *Weber*.

This thought leads to another consideration which may dilute *Algoma*. That decision appears to find assurance in the conflict school of preemption thinking rather than the occupation-of-the-field test.<sup>139</sup> *Algoma*, written by Justice Frankfurter, was decided in pre-*Weber-Garmon* days.

The Court made this further observation. They viewed this action as the application of an agreement, rather than conduct, and thus not within the purview of sections 7 and 8 as *Garmon* apparently requires. The union countered with the proposition that the negotiation of such a contract would set into action conduct arguably violative of the act.<sup>140</sup> However, inasmuch as the act views the entering into of certain contracts, such as hot cargo<sup>141</sup>

137. *Id.* at 1661-62.

138. See the Court's remarks in *Radio Officers Union v. NLRB*, 347 U.S. 17, 40-41 (1954):

Lengthy legislative debate preceded the 1947 amendment to the Act which thus limited permissible employer discrimination. Thus legislative history clearly indicates that Congress intended to prevent utilization of union-security agreements for any purpose other than to compel payment of union dues and fees. Thus Congress recognized the validity of unions concern about "free riders," *i.e.*, employees who receive the benefits of union representation but are unwilling to contribute their share of financial support to such union, and gave unions the power to contract to meet that problem while withholding from unions the power to cause the discharge of employees for any other reason.

Congressional interest in a subject is, as we have learned, a strong argument for preemption.

139. *Algoma Plywood Co. v. Wisconsin Employment Relations Bd.*, 336 U.S. 301, 315 (1949).

140. *Higgins v. Cardinal Mfg. Co.*, 47 L.R.R.M. 2782, 2792 (1961); See *Teamsters v. Oliver*, 358 U.S. 283 (1958); *Local 1976 United Bhd. of Carpenters, AFL v. NLRB*, 357 U.S. 93 (1958).

141. See § 8(e) of the act; see also *American Feed Co.*, 48 L.R.R.M. 1622 (1961).

agreements and illegal union-security clauses,<sup>142</sup> as conduct constituting unfair labor practices, the foregoing statement loses its persuasiveness.

Certainly this question will return to plague the Court.

The Court has thus far resisted state court attacks on picketing to obtain a union-security agreement where these attacks are illegal.<sup>143</sup> Some quarters have roundly criticized the Court for these results, which are viewed as the creation of an artificial dichotomy between consummated arrangements and antecedent pressure.<sup>144</sup> The practical problem with many of these cases, however, consists of the fact that the union may be picketing for a number of reasons. Should an injunction issue because one of the union's demands is illegal? Unfortunately, we cannot do as we did in *Youngdahl*, *i.e.*, divide our injunctions, so that that aspect which is illegal will be enjoined. *Garmon* mirrors the congressional choice of almost total federal regulation of wages, hours, and working conditions. Congress could clear up existing conflicts by the total repeal of section 14(1). At this date that section is a deviation from the national labor policy.

## V

One cannot conclude a discussion of preemption in the wake of *Garmon* without mention of the so-called no-man's-land problem in labor law.

It was early established that the National Labor Relations Board might extend its jurisdiction over interstate commerce to its maximum limits.<sup>145</sup> The courts and the Board wasted little time in attempting to define such limits.<sup>146</sup> Jurisdiction was held to exist over a local link in a transportation system carrying interstate goods intrastate to their ultimate destination.<sup>147</sup> A local transportation system which rendered service in transporting employees of interstate businesses was covered.<sup>148</sup> The courts considered groups or associations of employers collectively for purposes of interstate commerce, whereas individually they would not have qualified.<sup>149</sup> When an employer received goods from out of state through a local supplier and sold to local

142. This could constitute violations of §§ 8(b) (2) and 8(a) (3) of the act.

143. *E.g.*, *Farnsworth & Chambers Co. v. Local Union*, 353 U.S. 969 (1959); *Youngdahl v. Rainfair*, 355 U.S. 131 (1957); *DeVries v. Baumgartner's Elec. Constr. Co.*, 359 U.S. 498 (1959).

144. Meltzer, *The Supreme Court, Congress, and State Jurisdiction Over Labor Relations*: I, 59 COLUM. L. REV. 6, 13 (1959); Comment, 27 U. CHI. L. REV. 134 (1959).

145. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *NLRB v. Fainblatt*, 306 U.S. 301 (1939); *Polish Nat'l Alliance v. NLRB*, 322 U.S. 643 (1944).

146. For a discussion of this subject, see Comment, 7 KAN. L. REV. 185 (1958).

147. *Philadelphia Terminal Auctions Co.*, 44 N.L.R.B. 454 (1944).

148. *NLRB v. Baltimore Transit Co.*, 149 F.2d 51 (4th Cir. 1944).

149. *Katz v. NLRB*, 196 F.2d 411 (9th Cir. 1952); *Insulation Contractors of Cal., Inc.*, 110 N.L.R.B. 638 (1954).

customers who then shipped in interstate commerce, the act was held to govern.<sup>150</sup>

It was recognized that the states might exercise jurisdiction over businesses which affected interstate commerce only slightly—*de minimus*.<sup>1</sup> However, the federal courts have been most zealous in protecting the jurisdiction of the Board, and they have allowed the act to govern when the percentage of the business affecting commerce was extremely small.<sup>151</sup>

What would happen when the Board could not occupy this broad field because of a lack of appropriation?<sup>152</sup> Could the states assert authority over that which was vacated? Justice Frankfurter, dissenting in the *Bethlehem Steel Co.* case, prophesied an answer when he wrote that because of the Court's decision in that case he was "unable to see how State authority can revive because Congress has seen fit to put the Board on short rations."<sup>153</sup>

*Guss v. Utah Labor Relations Bd.*<sup>154</sup> proved him to be a reliable Cassandra. Chief Justice Warren, writing for the majority, held that the National Labor Relations Board had exclusive jurisdiction over all cases that they declined to handle and had not ceded. The Court said: "we hold that the proviso to Section 10(a) is the exclusive means whereby States may be enabled to act concerning the matters which Congress has entrusted to the National Labor Relations Board."<sup>155</sup>

The result of this holding was the creation of a no-man's-land where employers, unions, and employees could seek no redress. Few states could qualify to have jurisdiction ceded to them under the uniformity requirements of section 10(a). The Court did, however, acknowledge Congress' power to alter this situation at will. In 1959 Congress did so.

The Democratic majority among Senate conferees felt that one uniform labor law should apply to all businesses. The NLRB, under this scheme, was the preferred administrator but by way of compromise the states would

150. *NLRB v. Superior Tanning Co.*, 117 F.2d 881 (7th Cir. 1940) (indirect receipt and direct shipment); *NLRB v. Cleveland-Cliffs Iron Co.*, 133 F.2d 295 (6th Cir. 1943) (indirect shipment).

151. *NLRB v. Green, Inc.*, 125 F.2d 485 (4th Cir. 1942) (less than 1%); *NLRB v. Schmidt Baking Co.*, 122 F.2d 162 (4th Cir. 1941) (.001%); *NLRB v. J. L. Brandeis & Sons*, 142 F.2d 977 (8th Cir. 1944) (.0024%).

152. The Board has claimed budgetary deficiencies to be the reason for declination. However, Board Member Murdock has indicated that the real motivation may have been a desire to decrease the area of federal regulation while increasing the potentialities of state regulation. See his dissent in *Breeding Transfer Co.*, 110 N.L.R.B. 493 (1954).

153. 330 U.S. 767, 779 (1947) (dissenting opinion).

154. 353 U.S. 1 (1957). See also the *Guss* companion cases: *Amalgamated Meat Cutters, Local 427 v. Fairlawn Meats, Inc.*, 353 U.S. 20 (1957); *San Diego Bldg. Trades Council v. Garmon*, 353 U.S. 26 (1957). For attempts to narrow the "no-man's-land" see *Office Employees Local 11 v. NLRB*, 353 U.S. 313 (1957); *Hotel Employees Local 255 v. Leedom*, 358 U.S. 99 (1958).

155. *Guss v. Utah Labor Relations Bd.*, 353 U.S. 1, 9 (1957).

apply federal law when the NLRB declined jurisdiction. The House bill wanted to give the states authority to hear cases and apply state law whenever the NLRB declined jurisdiction.<sup>156</sup> Congress compromised these two views in favor of the Senate's position when it enacted into statute a proviso requiring that the Board decline no more than the standards of August 1, 1959 allowed—the widest jurisdiction in the Board's history.<sup>157</sup> Thus the Board will hear most of the important cases and may expand its jurisdiction, but not diminish it below present levels. The states will regulate everything below the Board's standards. Some commentators have expressed the view that they will apply state law.<sup>158</sup>

The Prouty Amendment,<sup>159</sup> which included a provision requiring the states to apply federal law, was defeated; but the sight of federal rights denied to unions and employers who are, by chance, below the Board's jurisdictional standards cannot but influence the Court in filling in the gaps where the statute is silent.<sup>160</sup> Confusion would be the order of the day if the Board extended its jurisdictional yardsticks and, in doing so, encountered parties who had previously relied on state law. It is possible that under an "accordion theory" (so named for potential NLRB extension and retraction of jurisdiction) the Court might take the position that the Board has never relinquished any of its jurisdiction.<sup>161</sup> This would, however, ignore relevant legislative history.<sup>162</sup> The final resolution could well be a combination of federal and state law.<sup>163</sup> However, it should be recognized that any substantial deviations from federal law will be

a reversal, not only of the *Guss* holding, but also of the entire line of Supreme Court preemption cases. . . . By their inapplicability the States may now, among other things, apparently restrict union organizers, attack unions under anti-trust laws, hold unions liable for damages in situations other than violence, and provide for compulsory arbitrations.<sup>164</sup>

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156. For an exhaustive study of legislative proposals see McCoid, *Notes on a "G-String": A Study of the "No Man's Land" of Labor Law*, 44 MINN. L. REV. 205 (1959).

157. Labor-Management Reporting and Disclosure Act of 1959, § 701, 73 Stat. 519 (1959).

158. See Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 MINN. L. REV. 257, 262 (1959). See also Note, 45 CORNELL L.Q. 384, 389-90 (1960).

159. 86th Cong., 1st Sess. § 601(9) (1959).

160. See Papps, *Section 701 and the State Courts: What Law to be Applied?* 48 GEO. L.J. 316 (1959).

161. Kagel & Smith, *Chief Justice Warren and Labor Law*, 49 CALIF. L. REV. 126 (1961).

162. Aaron, *The Labor-Management Reporting and Disclosure Act*, 73 HARV. L. REV. 1086, 1098 (1960).

163. *Id.* at 1098.

164. Cohen, *Congress Clears The Labor No Man's Land: A Long-Awaited Solution Spawns a Host of New Problems*, 56 NW. U.L. REV. 331, 376 (1961).

The Court will undoubtedly be mindful of the import of *Garmon* when it decides this question.<sup>165</sup>

The *Garmon* case indicates a realization by the Supreme Court and Congress that this area's inherent sensitivities cry out for a uniform policy to serve national interests.

However, as has been shown, sovereignty continues to hover in suspense. But the parties that must litigate under the labor law owe the Court thanks for some intelligible guideposts. Of course, some critics may say that this is a policy judgment which the Court has no business making. But who would deny that policy inclinations enter into judicial decisions to some degree? Furthermore, as I have attempted to demonstrate, the doctrine of preemption as enunciated through the years has given the Court comfortable boundaries within which to operate.

And to the extent that *Garmon* may be viewed as a policy decision, it was a wise one. Let us not be ashamed of it.

The founding fathers would be scornful of the divergent state attitudes which have recently caused discord in labor-management relations. Professor Cox had this fact in mind when he wrote the following:

Governor Byrnes asked the South Carolina legislature to outlaw closed and union shop contracts so that South Carolina could compete with other Southern states in attracting Northern industry. In 1789 the federal government was formed, and Congress was given power to regulate interstate commerce in order to eliminate competition between the states based upon tariff and navigation laws. Now national control is required to eliminate competition in attracting business through repressive labor legislation.<sup>166</sup>

It is imperative that unions and employers not be governed by inconsistent policies in an age when America's expanding economy necessitates the entry of the federal government into the realm of domestic needs. For better or worse, we have left the agricultural society with its priorities of local interests and economic individualism. This nation would do well to discourage policies that accentuate the division of state against state and region against region. It is in this manner that we may best proceed to find answers and solutions in our quest for the good society.

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165. For other literature dealing with Landrum-Griffin and the problems of the No Man's Land, see Merrifield, *Federal-State Jurisdiction in Labor Relations Law*, 29 GEO. WASH. L. REV. 318 (1960); Comment, *Federal Preemption and Section 701 of the Taft-Hartley Amendment*, 37 U. DET. L.J. 400 (1960); Note, 6 VILL. L. REV. 80 (1960); Note, 108 U. PA. L. REV. 587 (1960).

166. Cox, *Federalism in the Law of Labor Relations*, 67 HARV. L. REV. 1297, 1303 (1954).