CONSTITUTIONAL LAW—FEDERAL PREEMPTION—NEW JERSEY'S CASINO CONTROL ACT NOT PREEMPTED BY NLRA—*Brown v. Hotel & Restaurant Employees International Union Local 54*, 104 S. Ct. 3179 (1984).

Fitting the ever-expanding body of Federal labor regulation into judicial paradigms of an effective federalism has created constant problems of accommodation and conflict.[1] Just how far the extensive "radiations of national regulation"[2] should impinge upon state legislative efforts to supervise local affairs remains a problematic issue defying predictable resolution.[3] This conundrum was once again exemplified in *Brown v. Hotel & Restaurant Employees International Union Local 54*,[4] where the United States Supreme Court addressed the issue of whether the broad Federal statutory scheme of labor regulations, as established in the National Labor Relations Act[5] (NLRA or Wagner Act), preempted certain key provisions of the New Jersey Casino Control Act[6] (Casino Act).

Passed in 1977[7] after extensive public and legislative debate,[8] the Casino Act sought to tap a viable source of state reve-

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[1] Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623, 623-24 (1975).

[2] Summers, *Preemption and the Labor Reform Act—Dual Rights and Remedies*, 22 OHIO ST. L.J. 119, 119 (1961).

[3] *See generally* Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337 (1972) (discussing development of labor law preemption from 1945-1972); Hirsch, *Toward a New View of Federal Preemption*, 1972 L.F. 515 (examining preemption problems and tests and standards Supreme Court has used). One commentator has analogized the effort to accommodate permanently Federal and state legislation to "trying to keep a saddle on a jellyfish." Comment, *Labor Law Preemption After* Sears—*Problems in Concurrent Jurisdiction*—Wiggins & Co. v. Retail Clerks Local 1557, 47 TENN. L. REV. 373, 373 (1980).

[4] 104 S. Ct. 3179 (1984).

[5] 29 U.S.C. §§ 151-169 (1976).

[6] N.J. STAT. ANN. §§ 5:12-1 to -152 (West Cum. Supp. 1984-1985).

[7] The Casino Act was passed pursuant to a 1976 referendum to the New Jersey Constitution, which allowed for the establishment of casinos in Atlantic City. N.J. CONST. art. IV, § 7, ¶ 2D. For a good discussion of prior gambling law in New Jersey, see Cohen, *The New Jersey Casino Control Act: Creation of a Regulatory System*, 6 SETON HALL LEGIS. J. 1, 2-5 (1982).

[8] *See* Hotel & Restaurant Employees Int'l Union Local 54 v. Danziger, 709 F.2d 815, 846-47 (3d Cir. 1983) (Becker, J., dissenting), *rev'd sub nom.* Brown v. Hotel & Restaurant Employees Int'l Union Local 54, 104 S. Ct. 3179 (1984). The Casino Act was the culmination of a report by the State Commission of Investigation, months of study by a Staff Policy Group on Casino Gambling designated by the Attorney General and the State Treasurer at the Governor's request, and much debate and discussion in the New Jersey Legislature. *See* Hotel & Restaurant Int'l Union Local 54 v. Danziger, 536 F. Supp. 317, 322 (D.N.J. 1982), *rev'd*, 709 F.2d

nue[9] while curtailing the influx and influence of criminal elements naturally attracted to the cash-rich casino industry.[10] Recognizing this potential criminal problem and perceiving the need to bolster public confidence in the industry,[11] the New Jersey Legislature designed the Casino Act to establish a strict and extensive regulatory scheme, which severely limits the participation in the industry of persons with known criminal records, habits, or associations.[12]

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815 (3d Cir. 1983), *rev'd sub nom.* Brown v. Hotel & Restaurant Employees Int'l Union Local 54, 104 S. Ct. 3179 (1984).

9 Hotel & Restaurant Employees Int'l Union Local 54 v. Danziger, 709 F.2d 815, 847 (3d Cir. 1983), *rev'd sub nom.* Brown v. Hotel & Restaurant Employees Int'l Union Local 54, 104 S. Ct. 3179 (1984). Under the Casino Act, the state imposes an annual tax of eight percent on gross casino revenues, *see* N.J. STAT. ANN. § 5:12-144, all of which is to be used to provide for "reductions in property taxes, rentals, telephone, gas, electric, and municipal utilities charges of eligible senior citizens and disabled residents, in accordance with such formulae as the Legislature may by law provide." N.J. CONST. art. IV, § 7, ¶ 2D.

10 The nexus between gambling and organized crime has been widely recognized. At the Federal level, Congress acknowledged the problem when it noted:

> [O]rganized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitations; . . . this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions. . . .

Hotel & Restaurant Employees Int'l Union Local 54 v. Danziger, 536 F. Supp. 317, 323 (D.N.J. 1982), *rev'd*, 709 F.2d 815 (3d Cir. 1983), *rev'd sub nom.* Brown v. Hotel & Restaurant Employees Int'l Union Local 54, 104 S. Ct. 3179 (1984).

This attitude has also been reflected at the state level. *See, e.g.*, Niglio v. New Jersey Casino Comm'n, 158 N.J. Super. 182, 188, 385 A.2d 925, 928 (App. Div. 1978) ("The undesirability of an association between those previously convicted of a crime or those in affinity with such a person and . . . legalized gambling . . . is too apparent to justify extended discussion."); Nevada Tax Comm'r v. Hicks, 73 Nev. 115, 119, 310 P.2d 852, 854 (1957) ("Throughout this country, . . . gambling has necessarily surrounded itself with an aura of crime and corruption."); *see also* Santaniello, *Casino Gambling: The Elements of Effective Control*, 6 SETON HALL LEGIS. J. 23 (1982) (discussing problems of criminal infusion into casino industry).

11 The Casino Act lists several public policy considerations which served as the social underpinnings of the legislation's provisions, including:

> An integral and essential element of the regulation and control of such casino facilities by the State rests in the public confidence and trust in the credibility and integrity of the regulatory process and of casino operations. . . .
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> . . . Continuity and stability in casino gaming operations cannot be achieved at the risk of permitting persons with unacceptable backgrounds and records of behavior to control casino gaming operations contrary to the vital law enforcement interests of the State.

N.J. STAT. ANN. § 5:12-1b(6), (15).

12 Hotel & Restaurant Employees Int'l Union Local 54 v. Danziger, 536 F. Supp. 317, 322 (D.N.J. 1982), *rev'd*, 709 F.2d 815 (3d Cir. 1983), *rev'd sub nom.* Brown v. Hotel & Restaurant Employees Int'l Union Local 54, 104 S. Ct. 3179 (1984). The

To achieve these goals, the Casino Act created a Casino Control Commission (Commission) with broad regulatory power over gambling institutions and related industries.[13] The Casino Act also directs the Division of Gaming Enforcement in the Department of Law and Public Safety to investigate all applicants for licenses, certificates, or permits, and to prosecute violations of the Act and its promulgated regulations either before the Commission or in the state criminal courts.[14]

The Casino Act provides detailed licensing criteria for the various groups involved directly or indirectly in the casino industry.[15] For labor unions and their agents, these requirements are listed in section 93a.[16] Overarching this licensing scheme is a set of disqualification criteria, enumerated in section 86, which, if met, preclude the applicant from participating in the industry.[17]

In 1978, the Hotel and Restaurant Employees and Bartenders International Union Local 54 (Union)[18] filed its annual regis-

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state's intent to expand the scope of the Casino Act's control to those institutions and individuals ancillary to the casino industry is made manifest in the Act itself. N.J. STAT. ANN. § 5:12-1b(6) provides that "the regulatory provisions of this act are designed to extend strict State regulation to all persons, locations, practices and associations related to the operation of licensed casino enterprises and all related services industries as herein provided."

13 Hotel & Restaurant Employees Int'l Union Local 54 v. Danziger, 709 F.2d 815, 817-18 (3d Cir. 1983), *rev'd sub nom.* Brown v. Hotel & Restaurant Employees Int'l Union Local 54, 104 S. Ct. 3179 (1984). A primary obligation of the Commission is to ensure that only persons of honesty, integrity, and good reputation participate within the casino industry. N.J. STAT. ANN. §§ 5:12-63 to -75.

14 N.J. STAT. ANN. § 5:12-76a.

15 *See, e.g., id.* § 5:12-89 (licensing of casino key employees); *id.* § 5:12-90 (licensing of other casino employees); *id.* § 5:12-92 (licensing of casino service industries).

16 *Id.* § 5:12-93a.

17 *Id.* § 5:12-86. Such criteria include convictions of the applicant of any one of several enumerated crimes listed in the statute. *Id.* Additional disqualification criteria include the following:

> The identification of the applicant or any person who is required to be qualified under this act as a condition of a casino license as a career offender or a member of a career offender cartel or an associate of a career offender or career offender cartel in such a manner which creates a reasonable belief that the association is of such a nature as to be inimical to the policy of this act and to gaming operations. For purposes of this section, career offender shall be defined as any person whose behavior is pursued in an occupational manner or context for the purpose of economic gain, utilizing such methods as are deemed criminal violations of the public policy of this State.

Id. § 5:12-86f.

Section 86 disqualification criteria are made explicitly applicable to the labor unions and their agents through section 93b of the Act. *Id.* § 5:12-93b.

18 The Union is composed of approximately 12,000 members, 8000 of whom are hotel service employees working for establishments licensed to operate casinos.

tration statement with the Commission in compliance with section 93a of the Casino Act.[19] Following an investigation of the applicants, the Division of Gaming Enforcement recommended to the Commission that Frank Gerace, the Union's President, Robert Lumino, its Secretary-Treasurer, and Frank Materio, its Grievance Manager, be disqualified under section 86 criteria.[20] On August 17, 1981, the Union and Mr. Gerace filed a complaint asserting that sections 86 and 93 of the Casino Act were preempted by the NLRA, the Labor Management Reporting and Disclosure Act of 1959[21] (LMRDA), and the Employee Retirement Income Security Act of 1974[22] (ERISA).[23] Accordingly, the plaintiffs sought a declaratory judgment that both sections of the Casino Act were void, and they requested temporary and permanent injunctive relief against the enforcement of section 93.[24]

The United States District Court for the District of New Jersey, doubting the ability of the plaintiffs to succeed on the merits, denied the motion for a preliminary injunction.[25] Consequently, the Commission held a hearing on the Division's report on September 28, 1982, at which time the Division's position was adopted.[26] The Commission decided to bar the Union's collection of dues from members working in the casino industry.[27] Thereafter, the district court enjoined the Commission from en-

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Brown, 104 S. Ct. at 3184. None of the Union members are employed in direct gambling operations. *Id.*

19 *Id.* Section 93 requires in part that "[e]ach labor organization, union or affiliate seeking to represent employees licensed or registered under this act and employed by a casino hotel or a casino licensee shall register with the commission annually." N.J. STAT. ANN. § 5:12-93.

20 *Brown*, 104 S. Ct. at 3185.

21 29 U.S.C. §§ 401-531 (1976).

22 29 U.S.C. §§ 1001-1381 (1976).

23 Hotel & Restaurant Employees Int'l Union Local 54 v. Danziger, 709 F.2d 815, 819 (3d Cir. 1983), *rev'd sub nom.* Brown v. Hotel & Restaurant Employees Int'l Union Local 54, 104 S. Ct. 3179 (1984). The complaint also alleged that section 86f of the Casino Act is unconstitutionally overbroad and vague, violating the first, fifth, and fourteenth amendments to the Constitution. *Id.* The Third Circuit decision did not consider these latter issues because it viewed its holding on the statutory supremacy issues as dispositive. *Id.* at 883. The Supreme Court likewise declined to consider those challenges. *Brown*, 104 S. Ct. at 3185 n.8.

24 *Brown*, 104 S. Ct. at 3184. The plaintiffs supported their allegation by claiming that the Union would be irreparably injured by being forced to participate in the Commission's proceedings, in violation of section 7 of the NLRA. *Id.*

25 *Id.*

26 *Id.* at 3185. Gerace and Matero, having been associated with members of organized crime, were disqualified under section 86f of the Casino Act. *Id.*

27 *Id.*

forcing this decision, pending an appeal to the Third Circuit.[28] A divided panel of the court of appeals held that section 93 of the Casino Act is preempted by section 7 of the NLRA insofar as it grants the Commission power to disqualify elected union officials.[29]

On appeal to the Supreme Court, a plurality reversed, holding that section 93 of the Casino Act is not preempted by section 7 of the NLRA merely because it imposes certain limitations on who may serve as the casino industry employees' elected representatives.[30] The Court, however, remanded the case to the court of appeals with instructions to remand to the district court to determine whether the imposition of the dues collection ban would, in effect, prevent the Union from serving as a bargaining representative for its members; if it did, the Court concluded, then that particular sentence would be preempted.[31]

The supremacy clause of the United States Constitution[32] deals with the problem of defining or accommodating the ranges of legislative power at the Federal and state levels. Since the Supreme Court is the final authority on matters of constitutional interpretation, that tribunal has the task of applying the supremacy clause to the questions of federalism brought before it. Preemption, one of the primary judicial tools the Court has used for shaping intergovernmental relations, is the invalidation of state legislation due to its incompatibility with a constitutional provision or a Federal regulatory scheme.[33]

Traditionally, the preemption doctrine has been viewed as divisible into two general branches: instances where congressional design to "occupy the field" displaces state action in the same area, and situations in which a conflict between Federal and state statutes nullifies the latter.[34] Under the "occupation" branch, state action is precluded even though it may not directly

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28 *Id.*

29 *Id.* The appeals court also found section 93 of the Casino Act preempted by ERISA. *Id.*

30 *Id.* at 3192.

31 *Id.* The Court also vacated the Third Circuit's holding that ERISA preempted section 93 of the Casino Act. *Id.* at 3191.

32 U.S. CONST. art. VI, § 2 provides: "This Constitution, and the Laws of the United States which shall be made in pursuance thereof shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any thing in the Constitution or Laws of any state to the contrary notwithstanding."

33 Note, *Pre-emption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208, 209 (1959).

34 *See generally* Note, *supra* note 1, at 625-28.

impair the operation of Federal law.[35] Therefore, this branch has rarely been invoked in the absence of either evidence of a clear and manifest purpose of Congress to exclusively control the field, or the existence of a regulated subject matter which by nature demands national uniformity and Federal primacy.[36] In contrast, under the "conflict" branch, even if Congress has not completely displaced state regulations in a specific area, the Court construes the scope of both Federal and state legislation and decides whether an actual conflict exists.[37] Despite the clarity of theory inherent in these two approaches, in practice the problem of ascertaining congressional intent, and the difficulty in determining the quantum of conflict necessary to find the state's statute repugnant to its Federal counterpart, often force the Court to rely upon its own notions of an effective federalism.[38]

With the advent of the New Deal period and its plethora of national regulations, the balancing of Federal and state interests proved increasingly difficult; the power of states to protect the health and welfare of their citizens and to administer their common law often collided with Federal regulatory advances.[39] As a result, the Supreme Court struggled to accommodate these competing interests.[40]

This judicial effort is well illustrated by the litigation that arose after the enactment of the NLRA and its progeny. Before Congress enacted the Wagner Act in 1935, labor strife was rampant because employees could not compete on an equal footing with employers.[41] Efforts to organize unions and other collective units were successfully resisted by management, which profited by the imbalance,[42] as well as by hostile state courts, which viewed organized union activity as either "tortious conspiracies

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35 Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

36 *See* Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta, 458 U.S. 141, 152-53 (1982); Jones v. Ratz Packing Co., 430 U.S. 519, 525 (1977).

37 Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta, 458 U.S. 141, 153 (1982); Free v. Bland, 369 U.S. 663, 666 (1962).

38 Note, *supra* note 1, at 630-33; Note, *supra* note 33, at 224.

39 *See* Note, *supra* note 1, at 624.

40 *See* Hines v. Davidowitz, 312 U.S. 52, 67 (1941) ("In the final analysis, there can be no one crystal clear distinctly marked formula. Our primary function is to determine whether under the circumstances of this particular case, [the state] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.").

41 *See* United Constr. Workers v. Laburnum Constr. Corp., 347 U.S. 656, 670 (1964) (Douglas, J., dissenting) ("For years the law of the jungle applied, victory going to the strongest.").

42 *See* Hill v. Florida, 325 U.S. 538, 558 (1945) (Frankfurter, J., dissenting).

or restraints of trade" that violated antitrust laws.[43] The pervasiveness of labor/management conflict convinced Congress that state courts and legislatures were not able to create the uniform system of regulations essential to stabilize labor relations.[44] Accordingly, in section 7 of the Wagner Act, Congress sought to mitigate the raging conflict by providing workers with the rights to "self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[45] Moreover, section 8 lists employer "unfair labor practices" and prohibits interference by employers and labor organizations with the section 7 rights of union employees.[46] The National Labor Relations Board (NLRB) was established[47] and given exclusive authority to administer this complex regulatory scheme and to serve as the prime interpreter of Federal labor policy.[48]

Early attempts by the Supreme Court to interpret this new legislation revealed the lines of debate that would develop in the future. In *Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Board*,[49] a union picketed a Wisconsin manufacturer after it had cancelled the union's employment contract.[50] During the controversy, threats of personal injury to strikebreakers and of property damage to the employees' homes were made.[51] The state labor board, pursuant to state legislation prohibiting certain unfair labor practices, issued a cease and desist order.[52] The Union, arguing that the state's action interfered with the jurisdiction of the NLRB, petitioned the Supreme Court to declare the legislation unconstitutional.[53]

In refusing to find the state action preempted, the Supreme Court noted that the NLRA was not designed to preclude states

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43 Sears Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180, 217 (1978) (Brennan, J., dissenting); Comment, *supra* note 3, at 373.

44 Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees v. Lockridge, 403 U.S. 274, 287 (1971).

45 29 U.S.C. § 157 (1976).

46 *Id.* § 158(a)(1).

47 *Id.* § 160.

48 *See* Bethlehem Steel Co. v. New York Labor Relations Bd., 330 U.S. 767, 774-76 (1947).

49 315 U.S. 740 (1942).

50 *Id.* at 742.

51 *Id.* at 743.

52 *Id.*

53 *Id.* at 746.

from enacting legislation that prohibited or regulated activity involving threats of violence.[54] According to the Court, a state was not prevented from exerting its police power unless Congress clearly manifested such an intent.[55] Sustaining the order of the state board, the Court concluded that such an intent was absent in the instant case.[56]

Three years later, in *Hill v. Florida*,[57] the Supreme Court was confronted with another state statute that regulated labor union activities. The conflict in *Hill* involved a Florida statute that required business agents of all labor unions to be licensed.[58] The statute prevented, however, the licensing of, and thereby the union representation by, anyone who had not been a United States citizen for more than ten years, who had been convicted of a felony, or who was not considered by the state to be a person of good moral character.[59] Furthermore, it required every labor union operating in Florida to file with the Secretary of State a written report that disclosed certain information concerning the union's management and membership.[60] Finally, the statute treated any violation of its provisions as a misdemeanor.[61]

In refusing to uphold the state statute, the Supreme Court focused on the "full freedom" of workers to select their representatives, as expressly guaranteed by the Wagner Act.[62] The majority explained that " '[f]ull freedom' to choose an agent means freedom to pass upon that agent's qualifications."[63] Insofar as the Florida legislation limited a union's choice of an agent, the Court believed that it substituted the state's wisdom for the workers' judgment and, consequently, was preempted by section 7 of the NLRA.[64] In addition, the statute's filing requirement was

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54 *Id.* at 748.

55 *Id.* at 751.

56 *Id.* at 749.

57 325 U.S. 538 (1945).

58 *Id.* at 540.

59 *Id.* (citing FLA. STAT. ANN. § 481:04 (1941)).

60 *Id.* (citing FLA. STAT. ANN. § 481:06 (1941)).

61 *Id.* (citing FLA. STAT. ANN. § 481:14 (1941)).

62 *Id.* at 541. Although the NLRA was explicitly directed toward management abuses and infringements of employees' rights, the Court extended this prohibition to the state acts as well. *Id.* at 546. It is a point that was not discussed at length, but one that has been followed by the Court. *See* Cox, *supra* note 3, at 1345.

63 *Hill*, 325 U.S. at 541.

64 *Id.* at 542. Specifically, the Court noted that the statute "as applied . . . 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *Id.* (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

In a dissenting opinion, Justice Frankfurter rejected the notion that Congress

not upheld because the sanction imposed for failure to comply was inconsistent with the federally protected process of collective bargaining.[65]

The rationale of the *Hill* majority appeared again, two years later, in *Bethlehem Steel Co. v. New York State Labor Relations Board*.[66] New York had adopted a labor statute essentially identical to the NLRA, its Federal counterpart.[67] In determining the units of representation for bargaining purposes, however, the state law was more liberal insofar as it recognized foremen as a separate and distinct bargaining unit; consequently, its constitutionality was challenged.[68] The Supreme Court, in striking down the state law, reasoned that Congress had intended to occupy the field and that state action in the area therefore was preempted.[69] The majority stated that where Congress had left the employer/employee relation free of regulation, Federal policy was indifferent toward state intrusion.[70] The *Bethlehem Steel* Court concluded, however, that where the Federal government had, as here, made comprehensive regulations governing the subject matter under dispute, state regulation could not supplement that scheme, even if the Federal statute had not yet dealt with the particular matter.[71] A presumption arose, according to the Court, that the national legislation consciously kept some areas unregulated, to the exclusion of state interference.[72]

In 1947, the same year that *Bethlehem Steel* was decided, Congress once again made a foray into the labor field by passing the Labor Management Relations Act[73] (LMRA). Experience had shown that unions were capable of equally pernicious behavior

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had intended to occupy the field, arguing that the mere presence of the Federal government did not give rise to an inference of exclusivity. *Id.* at 552 (Frankfurter, J., dissenting). According to the dissent, unless Congress manifested an unambiguous purpose to this effect, preemption would only be invoked where the conflict with valid state power was direct and irreconcilable. *Id.* at 554 (Frankfurter, J., dissenting).

65 *Id.* at 543.

66 330 U.S. 767 (1947).

67 *Id.* at 769.

68 *Id.* at 770.

69 *Id.* at 776-77.

70 *Id.* at 772.

71 *Id.* The Court also argued that two administrative bodies created a potential conflict which was enough to trigger preemption since action by the state board necessarily denied the discretion of the other. *Id.* at 774. The Court recognized that if the state board followed the NLRB, its actions would be of no real value; yet, if it did not, it would create an unconstitutional conflict. *Id.* at 776.

72 *Id.* at 774.

73 29 U.S.C. §§ 141-144, 171-187 (1976).

toward both employers and employees.[74] Consequently, the rights of employees established in the NLRA were qualified and regulated by the LMRA. Although a union's right to strike was upheld in this legislation, certain prerequisites were established for strikes involving contract termination or modification.[75] In addition, section 303 of the LMRA specifically prohibited certain concerted activities, including "secondary strikes."[76] Furthermore, the LMRA amended section 10(a) of the NLRA, allowing the Board to cede its jurisdiction, in most cases, to any state agency.[77]

One of the first cases to examine the effect of the amended labor scheme upon the actions of states was *International Union of United Automobile, Aircraft & Agricultural Implement Workers v. O'Brien*.[78] At issue in *O'Brien* was the constitutionality of a Michigan labor mediation law that forbade strikes or lockouts.[79] A peaceful strike, instituted by the Union, complied with the relevant provisions of the LMRA but violated the Michigan statute; the appellants, therefore, faced criminal prosecution.[80] In a unanimous decision, the Supreme Court held that the LMRA preempted the state law. Examining the LMRA, the Court concluded that none of its provisions could be read as allowing concurrent state regulations.[81] Instead, the Court determined Congress had chosen to occupy the field, closing it to state intervention.[82]

In distinguishing *Allen-Bradley*, the *O'Brien* Court noted that labor violence, which was subject to state police control, was

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74 Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees v. Lockridge, 403 U.S. 274, 321 (1971).

75 29 U.S.C. § 158(d). One of the prerequisites is the submission of disputes to the newly created Federal Mediation and Conciliation Service to assist in dispute resolution. *Id.* § 158(d)(3).

76 *Id.* § 187. A "secondary strike" has been defined as any combination if its purpose and effect are to coerce customers or suppliers through fear of loss or bodily harm to withdraw their business relations from an employer who is under attack. Wright v. Teamsters Union Local 690, 370 U.S. 613, 620 (1950).

77 29 U.S.C. § 160(a). The amendment was made in response to the *Bethlehem Steel* decision. *See* Guss v. Utah Labor Relations Bd., 353 U.S. 1, 7 (1957).

78 339 U.S. 454 (1950).

79 *Id.* at 455.

80 *Id.* at 456 n.2.

81 *Id.* at 457.

82 *Id.* Even if conflict analysis were used, however, the Court concluded that it still would have prohibited the state act since the strike vote provisions adopted by the state had been specifically rejected by Congress. *Id.* at 458. Consequently, the state statute was "at war" with the Federal law and could not survive. *Id.* at 458-59.

outside the occupied field of Federal regulation.[83] Additionally, the Court suggested that, when the NLRB " 'has no authority either to investigate, approve, or forbid the union conduct in question,' " there is no existing or possible conflict between state and Federal action—" '[the] conduct is governable by the state or it is entirely ungoverned.' "[84]

Until 1953, the majority of the Supreme Court decisions in the labor preemption area were concerned with restrictions on the employees' section 7 rights to associate, to choose bargaining representatives, and to use concerted activities to settle disputes concerning wages, hours, and working conditions. In *Garner v. Teamsters Local Union No. 776*,[85] however, the Court shifted its focus to state power to regulate prohibited activities. In *Garner*, a union picketed the premises of a trucking firm whose workers were not members of the Teamsters local.[86] In seeking injunctive relief, the employer alleged that the activity was a secondary strike prohibited under the NLRA and under Pennsylvania law.[87] In concluding that the state injunction had to be denied, the Court emphasized the apparent purpose of Congress—to create a uniform system of regulation—and it stressed the primary jurisdiction of the NLRB.[88] The majority further stated that, in matters covered by section 8, the possibility of conflict with Federal legislation precluded multiple tribunals.[89]

Despite the Court's emphasis on the need for uniformity of jurisdiction in order to avoid possible conflicting administrations of Federal labor policy, it was forced to limit that principle one year later in *United Construction Workers v. Laburnum Construction Corp.*[90] Justice Burton, speaking for the majority, saw the issue before the Court as whether the LMRA gave the NLRB such "exclusive jurisdiction over the subject matter of a common-law tort action for damages as to preclude an appropriate state court

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83 *Id.* at 459.

84 *Id.* (citing International Union UAW Local 232 v. Wisconsin Bd., 336 U.S. 245, 254 (1949)).

85 346 U.S. 485 (1953).

86 *Id.* at 486-87.

87 *Id.*

88 *Id.* at 490.

89 *Id.* at 490-91; *accord* Capital Serv. v. NLRB, 347 U.S. 501, 504 (1954) ("But where Congress[] . . . vested a federal agency with exclusive jurisdiction over a subject matter and the intrusion of a state would result in conflict of functions, the federal court may enjoin the state proceeding in order to preserve the federal right.").

90 347 U.S. 656 (1954).

from hearing and determining its issues where such conduct constitutes an unfair labor practice under the Act."[91] The Justice determined that the LMRA had not.[92] The majority distinguished *Garner* because, there, the LMRA had provided a Federal administrative remedy supplemented by judicial procedures for its enforcement, whereas the only remedy available in the instant case was the traditional state court procedure.[93] Denial of the construction company's right of recovery would have given the Union immunity from liability.[94] Additionally, the Court noted that the legislative history of section 8 suggested that Congress intended that the section's prohibitions of violence and threats of physical harm would supplement state law.[95] Accordingly, although the activity which created the basis for recovery in the state action was also prohibited by section 8, the judgment was not preempted.[96]

The *Laburnum* Court's concern for a lost right of recovery was absent in the Court's treatment of *Guss v. Utah Labor Relations Board*.[97] In that case, the United Steelworkers of America, as bargaining agent for the employees of a local Utah manufacturer, filed charges of unfair labor practices with the NLRB.[98] Since the defendant company's operations were predominantly local in

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91 *Id.* at 657. The damages arose during the Union's efforts to force the construction company to recognize that organization as the sole bargaining agent for its employees. *Id.* at 658. Threats of violence compelled the company to abandon its work projects. Consequently, it lost profits. The state trial court upheld a jury verdict of compensatory and punitive damages amounting to approximately $275,000. *Id.* The Union's activity was assumed by the Court to violate section 8 prohibitions. *Id.* at 660-61.

92 *Id.* at 657.

93 *Id.* at 663.

94 *Id. Compare* International Ass'n of Machinists v. Gonzales, 356 U.S. 617 (1958) (reinstatement of expelled union member and damage award for violation of rights conferred by union constitution upheld on rationale that state tribunal was competent to "fill out" reinstatement remedy by utilizing "comprehensive relief of equity" which NLRB did not fully possess) *with* Local 24 of the Int'l Bhd. of Teamsters v. Oliver, 358 U.S. 283 (1959) (application of state antitrust law to collective bargaining agreement denied because it would wholly defeat congressional purpose of promoting collective bargaining).

95 *Laburnum*, 347 U.S. at 668.

96 *Id.* at 669. In a dissent, Justice Douglas argued that since the subject conduct is "the stuff out of which labor-management strife has been made," the Federal labor legislation precluded state action. In addition, because the purpose of the legislation is to provide the means for orderly settlement of controversies, on a basis of equality, prolonged litigation in the state courts would disrupt that balance by "keeping old wounds open, and robbing the administrative remedy of the healing effects it was intended to have." *Id.* at 670-71. (Douglas, J., dissenting).

97 353 U.S. 1 (1957).

98 *Id.* at 5.

character, the National Director of the NLRB declined jurisdiction under recently revised standards.[99] Nevertheless, the Board did not cede jurisdiction to Utah, as it could have pursuant to section 10(a) of the NLRA.[100] Having been denied relief at the Federal level, the union turned to the Utah Labor Relations Board and obtained an injunction.[101]

The *Guss* majority examined section 10(a) of the NLRA and, interpreting the legislative history of that provision, determined that it was the sole means by which states, otherwise excluded under the *Garner* analysis, could act in a field occupied by the NLRB.[102] Although this view worked a hardship upon the Union, the Court reasoned that Congress had demonstrated that it knew how to cede jurisdiction to the states; accordingly, any resulting difficulties were a matter of congressional, not judicial, concern.[103]

The development of the labor preemption doctrine went one step further in the pivotal case of *San Diego Building Trades Council v. Garmon*.[104] Respondents, partners in a lumber business, were requested by a union to retain only those employees who were members of its organization.[105] The employer refused, claiming that the union had not been designated by the employees as a collective bargaining agent.[106] Peaceful picketing by the rejected union followed.[107] The respondents sought relief from both a California state court and the NLRB.[108] Because the amount of interstate commerce involved did not meet Board standards, the Regional Director denied jurisdiction.[109] The California court, however, granted monetary damages and enjoined the union's conduct.[110] The union sought to set aside the judg-

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99 *Id.* The Director also commented that it did not appear that further proceedings "would effectuate the policies of the Act." *Id.*

100 *Id.* at 6.

101 *Id.* at 5.

102 *Id.* at 10-11. Chief Justice Warren, writing for the Court, noted that Congress had considered the possibility of no jurisdiction being exercised, but did not adjust the section 10(a) amendments to eliminate this "no-man's land." *Id.*

103 *Id.* at 9-10. This problem was subsequently ameliorated by section 14(c) of the Labor Management Reporting and Disclosure Act, 29 U.S.C. §§ 401-531 (1976).

104 359 U.S. 236 (1959).

105 *Id.* at 237.

106 *Id.*

107 *Id.*

108 *Id.* at 238.

109 *Id.*

110 *Id.* at 237-38.

ment, claiming that the Wagner Act precluded the state from regulating its conduct.[111]

In finding the state act preempted, Justice Frankfurter, writing for the majority, stated that the essential judicial concern in labor preemption cases was to avoid potential conflict between Federal and state regulation concerning rules of law, of remedy, and of administration of labor policy.[112] The *Garmon* Court held that the state action was preempted since the exercise of state power threatened to impinge upon national labor policy.[113] Accordingly, in the absence of a "clear determination" by the NLRB that the activity is neither protected nor prohibited by the NLRA, the conduct sought to be controlled cannot be regulated by a state if "such activity is arguably within the compass of § 7 or § 8 of the Act."[114] Nevertheless, the Court determined that an exception to this rule arose when either the regulated activity was "a merely peripheral concern of the [Federal labor legislation] . . . [o]r [it] touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, [the Court] could not infer that Congress had deprived the States of the power to act."[115] Since the picketing involved in *Garmon* was neither "arguably prohibited" nor "arguably protected,"[116] and none of the exceptions applied, the California judgment was vacated.[117]

The same year *Garmon* was handed down, Congress turned its attention once again to the field of labor relations. This time it sought to control internal union affairs by regulating the rights and responsibilities of union members by enacting the Labor-Management Reporting and Disclosure Act[118] (LMRDA). Title I of the Act provides a bill of rights which sets out the fundamental

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111 *Id.* at 244. The Supreme Court granted certiorari twice. The first time, it decided that the *Guss* rationale denied exercise of the state's injunctive powers since the violative activity constituted an unfair labor practice. Because of uncertainty of the viability of the judgment for damages under state law, though, the case was remanded. On remand, the California court sustained the damage award. The opinion discussed herein is pursuant to a second certiorari. *Id.* at 238-39.

112 *Id.* at 241-42.

113 *Id.* at 246.

114 *Id.*

115 *Id.* at 243-44.

116 *Id.* at 244. At the time of the decision, there was doubt about whether picketing activity by stranger unions was considered protected by section 7, prohibited under section 8, or outside both sections. *See* Cox, *supra* note 3, at 1348-49.

117 *Garmon*, 359 U.S. at 246.

118 29 U.S.C. §§ 401-531 (1976).

rights enjoyed by a union member within his organization.[119] Concern for the potential preemptive effect of the bill upon state remedies prompted Congress to include a savings provision in section 103.[120] Title IV contains certain restrictions and qualifications for union officers, including the prohibition of certain ex-felons from serving a union in an official capacity.[121] Despite these provisions, the Act nevertheless preserves state jurisdiction of criminal actions.[122] This deference to state criminal remedies is also reflected in section 603(a), which preserves state law concerning the fiduciary obligations of union officers.[123]

One of the first opportunities for the Court to examine the effect of the LMRDA on its labor preemption doctrine arose in *DeVeau v. Braisted*.[124] Due to the prevalent problem of corruption in the waterfront area between New York and New Jersey, those states made a concerted effort to remedy the worsening situation.[125] After extensive investigations on the problem were completed, the states entered into an interstate compact, which established a bi-state agency, the Waterfront Commission of New York Harbor, with power to license, register, and regulate waterfront employees.[126] In conjunction with the bi-state agreement, New York enacted legislation that prohibited convicted felons

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119 *Id.* §§ 411-414. These rights include: "equal rights," *id.* § 411(a)(1), and "the right to meet and assemble freely." *Id.* § 411(a)(2).

120 *Id.* § 413. This section provides that "[n]othing contained in this subchapter shall limit the rights and remedies of any member of a labor organization under any state or federal law or before any court or other tribunal or under the constitution and by-laws of any labor organization."

121 *Id.* § 524(a). This section provides that:

> No person . . . who has been convicted of, or served any part of a prison term resulting from his conviction of a group of serious felonies . . . shall serve . . . (1) as an officer, director, trustee, member of any executive board or similar governing body, business agent, manager, organizer or other employee . . . other than as an employee performing exclusively clerical or custodial duties of a labor organization . . . for five years after . . . such conviction or after the end of such imprisonment.

Id.

122 *Id.* § 524. "Nothing in this chapter shall be construed to impair or diminish the authority of any state to enact and enforce general criminal laws. . . ." *Id.*

123 *Id.* § 523(a). This section provides in pertinent part: "Except if explicitly provided to the contrary, nothing in this chapter shall reduce or limit the responsibilities of any labor organization or any officer, agent, shop steward, or other representative of a labor organization . . . under the laws of any State. . . ." *Id.*

124 363 U.S. 144 (1960).

125 *Id.* at 147.

126 *Id.* at 149. The enabling interstate compact received congressional approval in accordance with U.S. CONST. art. I, § 10.

from acting as union officials.[127]

The state restriction on convicted felons was challenged in *DeVeau* by a union official and others who argued, relying in part upon *Hill*, that the legislation was preempted by sections 1 and 7 of the NLRA and section 504(2) of the LMRDA.[128] In refusing to strike New York's provision, Justice Frankfurter, in a plurality opinion,[129] felt that the relevant inquiry was whether the Court could "fairly infer a congressional purpose incompatible with the very narrow and historically explained restrictions upon the choice of a bargaining representative embodied in § 8 of the New York Waterfront Commission Act."[130]

In finding no inference of incompatibility between the state enactment and Federal labor policy, Justice Frankfurter discussed the extensive proceedings leading up to the interstate compact.[131] Moreover, he emphasized the problem of criminal elements on the waterfront, noting that Congress had approved both the bi-state compact and the mutual reform effort in general.[132] The plurality therefore concluded that the state's restrictions were not preempted by the NLRA.[133] The *Hill* decision was distinguishable from the one at bar, according to Justice Frankfurter, because, in the former, Congress had not approved a state legislative program, nor was there the same "legitimate and compelling state interest . . . in combating local crime infesting a particular industry"[134] as was present in *DeVeau*.

In *DeVeau*, the union official also argued that since section 504(a) of the LMRDA had already established restrictions on holding union office, states were impliedly barred from varying or supplementing it.[135] The Court was not persuaded by this argument, however, and reasoned that section 504(a) demonstrated that the preclusion of ex-felons from serving as union officers was not contrary to Federal labor policy.[136] According to Justice Frankfurter, the fact that Congress had explicitly pre-

127 *DeVeau*, 363 U.S. at 145.

128 *Id.* at 151.

129 Justices Whittaker, Stewart, and Clark joined Justice Frankfurter. Justice Brennan concurred, and Justice Douglas, joined by Chief Justice Warren and Justice Black dissented. Justice Harlan took no part in the decision.

130 *DeVeau*, 363 U.S. at 153.

131 *Id.* at 153-55.

132 *Id.* at 155.

133 *Id.*

134 *Id.*

135 *Id.*

136 *Id.*

cluded state interference in two of the LMRDA's provisions was a clear demonstration that when Congress intended to preempt state action it did not leave that conclusion to inference.[137] Congress's sensitivity to preemption problems was further demonstrated, the plurality felt, by sections 603(a) and 604, which explicitly preserved the state criminal laws.[138] It concluded, therefore, that no inference could possibly arise that section 8 was impliedly preempted by section 504(a).[139]

Four years later, *Local 20, Teamsters v. Morton*[140] presented an issue to the Court which *Garmon* had failed to resolve: whether or not a state act that was arguably neither protected nor prohibited by section 7 of the NLRA might nevertheless be preempted. In *Morton*, an employer brought an action against a union for alleged secondary activities used during a contract dispute between the parties.[141] The United States District Court for the Northern District of Ohio found that the respondent's union employees had encouraged the employees of certain suppliers to force their management to cease doing business with the respondent, in violation of section 303 of the LMRA.[142] Furthermore, the same union had directly convinced the management of other companies to stop dealing with the employer.[143] This action, while not a violation of section 303, was nevertheless prohibited by Ohio law.[144] The Federal court therefore awarded damages for both violations, and the union challenged this decision.[145]

The majority opinion upheld the district court's finding regarding the section 303 violation,[146] but the state law award of damages by the Federal district court was the real issue of contention.[147] The employer had argued that the application of the *Garmon* rule would not preclude the state judgment since the vio-

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137 *Id.* at 156. Justice Frankfurter was referring to sections 205(c) and 403 of the LMRDA. *Id.* at 157 n.2.

138 *Id.* at 157.

139 *Id.* Justice Douglas, dissenting, insisted that Congress did not intend to infringe upon the full freedom afforded by section 7 of the NLRA. *Id.* at 161-62 (Douglas, J., dissenting). In fact, he felt that section 2(a) of the NLRA explicitly preserved the employees' freedom of choice against interference by state regulation. *Id.* at 164 (Douglas, J., dissenting).

140 377 U.S. 252 (1964).

141 *Id.* at 253.

142 *Id.* at 256.

143 *Id.* at 255.

144 *Id.*

145 *Id.* at 255-56.

146 *Id.* at 256.

147 *See id.* at 257.

lative act was not arguably protected or arguably prohibited by the NLRA.[148] The Court, however, refused to adopt this logic and found that, although the activity was originally outside the scope of either sections 7 or 8, it was still necessary to determine whether, by enacting section 303, Congress had intended to occupy the field to the exclusion of state regulations.[149] The ultimate determination, therefore, was "whether the application of state law in this kind of case would operate to frustrate the purpose of the federal legislation."[150] Concluding that state intrusion here would so frustrate Federal labor policy, the *Morton* Court noted that Congress had used section 303 to strike a balance between the interests of management and labor; accordingly, weapons of self-help not prohibited were intended to remain available to achieve either party's goals.[151] The Ohio law, the majority observed, impermissibly affected the congressionally imposed balance.[152]

The *Garmon* doctrine again was discussed in *Linn v. United Plant Guardworkers Local 114*.[153] At issue was the applicability of a state's common law rule of defamation to certain hostile and vituperative verbal exchanges that had occurred during a collective bargaining campaign.[154] The Supreme Court noted that section 8(c) of the NLRA, which specifically discusses self-expression in the context of unfair labor practices, provides that any expressions of opinions or ideas " 'shall not constitute or be evidence of an unfair labor practice . . . if such expression[s] contain no threat of reprisal or force or promise of benefit.' "[155] Despite this manifest intent of Congress to encourage free debate, the majority held that the parties are not permitted to injure each other intentionally by making false and insulting statements.[156] While recognizing that not all defamation was per se actionable, since due deference had to be given to the intent of Congress to provide an open forum, the *Linn* Court nevertheless concluded

148 *Id.* at 258.

149 *Id.*

150 *Id.* (citation omitted).

151 *Id.* at 259-60.

152 *Id.* at 260; *cf.* Hanna Mining Co. v. MEBA, 382 U.S. 181 (1965) (state court injunction of peaceful picketing activities, which violated state law but was determined by NLRB to be legal, upheld by Court since union representing supervisors was outside protection of NLRA).

153 383 U.S. 53 (1966).

154 *Id.* at 55.

155 *Id.* at 58 n.3 (quoting 29 U.S.C. § 158(c) (1964)).

156 *Id.* at 61.

that an overriding state interest in protecting its residents from malicious libel should be recognized.[157]

Despite recurring criticism of the *Garmon* doctrine,[158] the Supreme Court continued to uphold it as dispositive in the labor preemption area. The debate over its viability was discussed again at length in *Amalgamated Association of Street, Electric Railway and Motor Coach Employees v. Lockridge*.[159] There, the Court was confronted with a situation in which a union had breached a contractual obligation in a manner that was arguably an unfair labor practice under section 8 of the NLRA.[160] The Supreme Court of Idaho had upheld a judgment for compensatory damages, arguing that the state common law of contracts was not displaced by the Federal labor legislation.[161] The Supreme Court, in reversing, reestablished the applicability of the *Garmon* principles to the controversy and sought to clarify the jurisprudential basis upon which that doctrine rests.[162] The majority emphasized that the primary role of national labor law was to give a basis for stabilizing labor disputes by providing a "delicately [structured] balance of power among competing forces," a task that the Court thought common law courts and state governments were "ill-equipped to perform."[163]

While conceding that the *Garmon* doctrine was not perfect, the majority stated that it did provide a reasoned principle which incorporated the essential aims of Congress.[164] Accordingly, insofar as *Lockridge* involved activities within the "arguably prohibited" branch, the state court's decision upholding the application of contract law to the facts had to be vacated.[165]

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157 *Id.* The Court adopted by analogy the malice test of New York Times Co. v. Sullivan, 376 U.S. 254 (1964), to effectuate the statutory design with respect to preemption. *Linn*, 383 U.S. at 65.

158 *See, e.g.*, International Longshoremen's Local 1416 v. Ariadne Shipping Co., 397 U.S. 195, 201-02 (White, J., concurring).

159 403 U.S. 274 (1971).

160 *Id.* at 282-83.

161 *Id.* at 282.

162 *Id.* at 285-86.

163 *Id.* at 287.

164 *Id.* at 302.

165 *Id.* at 305. An extensive dissenting opinion criticized the *Garmon* rule, questioning especially the majority's stress upon a need for uniformity of forum in order to avoid " 'incompatible or conflicting adjudications.' " *Id.* at 315 (White, J., dissenting) (quoting *Garner*, 346 U.S. at 490-91). The dissent argued that certain factors served to demonstrate that the principle of uniformity, perceived by the majority as a manifestation of congressional intent is "at best a tattered [rule], and at worst little more than a myth." *Id.* at 319 (White, J., dissenting). These factors included: (1) the deference to the arbital forum in section 301(a) of the LMRA;

Even though the *Lockridge* Court had concluded that "the basic tenets of *Garmon* should not be disturbed,"[166] the Court once again re-examined the rule five years later in *Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission*.[167] The petitioner Union and the respondent, its employer, failed to agree upon the renewal terms of an employment contract.[168] After the original contract had expired, the employer demanded some changes in working hours, provoking the Union to strike.[169] The employer subsequently filed charges with the NLRB, later dismissed by the regional director, claiming unfair labor practices.[170] Shortly thereafter the employer turned to the Wisconsin Employment Relations Commission, seeking an injunction.[171] Since the Union's activity was neither arguably protected nor arguably prohibited by the NLRA, the Commission applied state law, which treated such conduct as an unfair labor practice, and granted an injunction.[172] The state's highest court upheld the order, and the Supreme Court reversed.[173]

In the majority opinion, Justice Brennan found that two distinct branches of labor preemption law had emerged from earlier decisions. First, he noted those cases that had based preemption upon the need for uniformity of administration through the NLRB—the *Garmon* line.[174] Second, the majority perceived a separate line of analysis that focused upon whether or not the conduct in question was intended by Congress to remain unfettered by state action, so as to promote the labor balance struck by the legislature.[175] The activity in *Lodge 76* was outside the scope

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(2) Congress's grant of a Federal cause of action for parties injured by secondary union activity under section 8(b), even though subject to parallel and possibly inconsistent NLRB determinations; (3) the rejection by Congress of the holding in *Guss* which created a jurisdictional no-man's land in the name of uniformity of law and administration; and (4) other exceptions carved out by the *Garmon* rule, such as in *Linn* and *Laburnum*. *Id.* at 314-16 (White, J., dissenting).

Furthermore, the dissent maintained that it is wrong to exclude state jurisdiction over activity that is arguably protected by section 7, since a hearing on such activity is virtually impossible unless one deliberately commits an unfair labor practice. *Id.* at 327 (White, J., dissenting).

166 *Id.* at 303.

167 427 U.S. 132 (1976).

168 *Id.* at 135.

169 *Id.*

170 *Id.* at 135-36.

171 *Id.* at 136.

172 *Id.* at 136-37.

173 *Id.* at 136.

174 *Id.* at 138.

175 *Id.* at 146.

of *Garmon* insofar as the NLRB had determined that it did not violate section 8 provisions and thus was not arguably prohibited; nor was the activity in *Lodge 76* arguably protected by section 7.[176] Nevertheless, the state's attempt to impose its own concepts of unfair labor practice on the parties in conflict was disallowed by the *Lodge 76* Court, which determined that Congress had intended to preserve the coercive economic measures that were not explicitly prohibited in section 8.[177] Thus, according to the Court, even if a state act avoids exclusion under the *Garmon* rule, it still may be displaced if it limits or extends the economic "self-help" weapons that Congress intended to remain unregulated.[178]

Another exception to the *Garmon* rule was created in *Farmer v. United Brotherhood of Carpenters Local 25*,[179] in which a union member was awarded compensatory damages by a California trial court because his union had intentionally inflicted severe emotional distress upon him.[180] After the California Court of Appeals reversed the trial court's decision, the Supreme Court granted certiorari.[181]

Even though the activity in question was within the scope of *Garmon*, the *Farmer* Court saw the dispute as fitting into the category of cases where a strong local state interest was present.[182] Analogous to state court actions redressing injuries caused by violence or threats of violence, actions involving a strong local state interest, the Court determined, could be decided without looking at the merits of the underlying labor controversy because there would be no undue interference with the effective administration of the Federal scheme.[183] The majority did note, however, that in order to avoid a realistic threat of interference, "proof that defendant intentionally engaged in outrageous conduct" was necessary to support the tort action; whether a union "discriminated or threatened to discriminate" against an employee should not be considered.[184] Because the trial court had

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176 *Id.* at 153.
177 *Id.* at 148-49.
178 *Id.* at 150-51.
179 430 U.S. 290 (1977).
180 *Id.* at 293-94. In his charge to the jury, the trial judge failed to give the requested instruction to ignore any evidence pertaining to discrimination in employment opportunities or hiring procedures. *Id.*
181 *Id.* at 295.
182 *See id.* at 305.
183 *Id.* at 301 (citation omitted).
184 *Id.* at 305.

not made this distinction when it charged the jury, the matter was remanded for further consideration.[185]

Before 1978, state acts that infringed upon a union's right to picket were preempted unless there was violence or such a threat to public safety so as to take the conduct out of the scope of the *Garmon* rule.[186] It was significant, then, that in *Sears Roebuck & Co. v. San Diego County District Council of Carpenters*,[187] the Supreme Court sustained a state court injunction that barred peaceful picketing on the respondent's premises.[188]

Justice Stevens, writing for the plurality, noted that the state law violation that prompted the litigation was not the picketing activity, which would be under NLRB jurisdiction, but was instead the *location* of the activity.[189] The Court rejected a strict and mechanical application of *Garmon*, preferring instead to examine the interests involved and the effect of upholding state jurisdiction upon the administration of national labor policy.[190] Because the controversy that the petitioner could have brought before the NLRB was different from that presented to the state court, Justice Stevens concluded that the state trespass claim would create no realistic risk of interference with the Board's primary authority over unfair labor practices.[191]

The decision of *Local 926, International Union of Operating Engineers v. Jones*[192] provided a recent example of the labor preemption approach that has been utilized by the Supreme Court.[193]

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185 *Id.* at 307-08.

186 *See, e.g.*, Garner v. Teamsters, Local Union No. 776, 346 U.S. 485 (1953).

187 436 U.S. 180 (1978).

188 *Id.* at 184.

189 *Id.* at 185-86.

190 *Id.* at 188-89.

191 *Id.* at 198. In a dissenting opinion, Justice Brennan rejected what he saw as an abridgement of the *Garmon* rule. Because both the objective and the location of the peaceful pickets were arguably protected under section 7, the dissent insisted that an appropriate application of *Garmon* would render the state court powerless to enjoin the Union's efforts. *Id.* at 215-17 (Brennan, J., dissenting); *cf.* Pacific Gas & Elec. v. State Energy Resources Conservation & Dev. Comm'n, 103 S. Ct. 1715 (1983) (California statute that conditions construction of nuclear plants on adequacy of nuclear waste storage facilities not preempted by Atomic Energy Act of 1954 because, while Federal Act exclusively regulates construction safety, focus of state act was on economic viability of nuclear plants).

192 103 S. Ct. 1453 (1983).

193 The case involved a supervisor who filed charges with the NLRB against his union, alleging that an agent of the organization had " 'maliciously and with full intent, intimidated and coerced' " the worker's employer into breaching his employment contract. *Id.* at 1457 (citation omitted). The regional director rejected the claim; instead of appealing, the supervisor sought and received a judgment from the state court, which the Supreme Court vacated. *Id.* at 1463.

The *Local 926* majority first determined whether the conduct regulated by the state was actually or arguably protected or prohibited by the NLRB.[194] If so, the Court explained, the state action was prohibited unless the conduct was only of peripheral concern to the Act or "touche[d] on interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, it could not be inferred that Congress intended to deprive the state of the power to act."[195] In applying this standard to a state regulation, the Court weighed the harm to the Federal labor scheme—caused because the state act negated the exclusive jurisdiction of the Board or because the state's substantive rules conflicted with those of the NLRA—with the significance of the state action.[196]

The Supreme Court decisions not only illustrate the efforts of that tribunal to administer the dictates of the supremacy clause in the field of labor regulations, but also represent the judicial precedents that were to guide the Court in its decision in *Brown*. Examining the governing principles of Federal preemption, the *Brown* Court stated that state action is displaced where Congress has explicitly or impliedly occupied a field of regulation[197] or where a state's efforts actually conflict with those of its Federal counterpart.[198]

These principles, the Court explained, were equally controlling in the field of labor law.[199] Focusing on section 7 of the NLRA, Justice O'Connor, writing for the plurality, maintained that that provision is void of either express preemptive language or of any other language that would indicate a congressional intent to occupy the entire field of labor-management relations.[200] Nevertheless, the Justice continued, where state action interferes with the exercise of the federally protected rights created by section 7, it constitutes an actual conflict and consequently is pro-

194 *Id.* at 1458.

195 *Id.* at 1459.

196 *Id.*

197 *Brown*, 104 S. Ct. at 3185-86. The Court cited Shaw v. Delta Airlines, Inc., 103 S. Ct. 2890 (1983), in support of this proposition. *Brown*, 104 S. Ct. at 3185-86. In *Shaw* the Court determined that New York's human rights law, which prohibited discrimination in employment, was preempted with respect to benefit plans regulated by ERISA only insofar as it prohibited practices that are lawful under Federal law. *Shaw*, 103 S. Ct. at 2906.

198 *Brown*, 104 S. Ct. at 3186.

199 *Id.*

200 *Id.*

hibited by the supremacy clause.[201]

The plurality distinguished preemption effected on these grounds from preemption that is based upon the primacy of the NLRB acting as the chief administrator and interpreter of Federal labor policy.[202] Only in the latter context, Justice O'Connor insisted, may the Court balance the related interests of the Federal government and the deeply rooted concerns of the states.[203] Consideration of states' interests, however, is inappropriate where state law regulates substantive rights that are actually protected by Federal law.[204] The proper framework for analysis in this case, the plurality concluded, was the determination of whether the Casino Act actually conflicted with the section 7 rights of the casino industry employees.[205]

Turning to the analysis of the court of appeals, the plurality rejected that court's assertion that section 7 gave employees an unfettered right to choose their collective bargaining representatives; Justice O'Connor felt that the *Hill* decision, upon which the court of appeals had relied heavily, was no longer dispositive, in view of Congress's subsequent actions—chiefly the enactment of the LMRDA—which manifested an intent to allow some state regulation to touch upon the specific rights of employees in certain instances.[206] Specifically, the plurality reasoned, section 603(a) of the LMRDA preserved the operation of state laws as they pertained to the responsibilities and qualifications of union representatives.[207] Justice O'Connor saw a further demonstration of this intent in the fact that the disqualification criteria of section 504 are predicated on state criminal law.[208] In addition, a review of the underlying purpose of the LMRDA—to control rampant union crime and corruption—convinced the Court that Congress would permit the states to effect different and stricter

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201 *Id.*

202 *Id.* at 3186-87.

203 *Id.* at 3187.

204 *Id.* The plurality noted that the Court, in Free v. Bland, 369 U.S. 663 (1962), had observed that " '[t]he relative importance to the State of its own law is not material . . . for the Framers of our Constitution provided that the Federal law must prevail.' " *Brown*, 104 S. Ct. at 3187 (quoting *Free*, 369 U.S. at 666). In *Free*, the Court invalidated a state community property law that, in effect, prohibited a married couple from taking advantage of the survivorship benefit incident to their United States Savings Bonds, as provided by a treasury regulation. *Free*, 369 U.S. at 670-71.

205 *Brown*, 104 S. Ct. at 3187.

206 *Id.* at 3188.

207 *Id.* (citing *DeVeau*, 363 U.S. at 157).

208 *Id.*

requirements, consistent with the Federal design, for union officers.[209] The Court decided that the congressional approval of the bi-state compact at issue in *DeVeau*, in addition to the *DeVeau* decision to uphold New York's provisions regulating union officials, supported the conclusion that "New Jersey's regulation of the qualifications of casino industry union officials does not actually conflict with § 7 and so is not preempted by the NLRA."[210]

Notwithstanding this conclusion, the plurality insisted that New Jersey's imposition of a collection ban might nonetheless be preempted if the trial court had found that the ban effectively prevented Local 54 from serving as the employees' elected bargaining representatives.[211] Because this factual determination had not been made by the district court, however, the Court remanded the case to the lower Federal court to make the requisite findings.[212] In a final word of direction, the plurality suggested that even if the dues collection ban were found to conflict impermissibly with section 7 rights, an alternative sanction might nevertheless be properly employed to enforce New Jersey's disqualification criteria, provided that, in regulating the union officials, the state did not "so incapacitate Local 54 as to prevent it from performing its functions as the employees' chosen collective-bargaining agent."[213]

Justice White, writing for the dissent, agreed with the plurality that Congress's enactment of the LMRDA demonstrated that Federal labor law does not preclude states from limiting the class of individuals eligible to serve as union representatives.[214] However, because the New Jersey scheme directly sanctions the Union and not the offending bargaining representatives, Justice White maintained that the state statute effectively prevented Local 54 from operating as a collective bargaining unit, thus nullifying the employees' exercise of their section 7 rights.[215] It was not necessary, Justice White insisted, to remand for factual findings since, as a matter of law, section 93b impermissibly impaired the Union's functioning as a representative body and therefore

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209 *Id.* at 3188-89.
210 *Id.* at 3189-90.
211 *Id.* at 3190-91.
212 *Id.* at 3191-92.
213 *Id.*
214 *Id.* at 3192 (White, J., dissenting).
215 *Id.* The dissent suggested that if New Jersey were to impose sanctions directly upon the union officers who violate section 86 criteria—such as fines or criminal penalties—the state action would not be preempted. *Id.* at 3192 n.1 (White, J., dissenting).

should be stricken.[216]

The Supreme Court's treatment of *Brown* heralds a significant but unexplained departure from the line of cases developed under the rubric of Federal labor preemption. Although the Court draws upon traditional Federal preemption principles in reaching the *Brown* decision, the Court's rigid analysis in *Brown* not only ignores prior Supreme Court holdings, but also is inherently inconsistent within its own terms.

It is well understood that ascertaining the intent of Congress regarding the range and scope of its labor regulation is a difficult, if not impossible, task; the sheer expanse and complexity of the Federal labor scheme,[217] coupled with the conflicting inferences which arise from its provisions,[218] have left the Court with a woeful lack of guidance.[219] Consequently, the Court has had to fashion constitutional standards from its own perceptions of congressional purpose; not surprisingly, it has been wrong on occasion.[220]

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216 *Id.* at 3193 (White, J., dissenting).

217 *See Garmon*, 359 U.S. at 240 (discussing difficulty of assimilating "new and complicated" legislation).

218 Congressional silence has been viewed both as evidence of an intent to preempt, and, alternatively, as an indication that displacement is not appropriate. For example, in Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees v. Wisconsin Employment Relations Bd., 340 U.S. 383 (1951), the decision turned, in part, upon the failure of Congress to cede jurisdiction to the state courts in matters concerning public utilities. *Amalgamated Ass'n*, 340 U.S. at 397-98. The *Amalgamated Ass'n* Court reasoned that Congress's failure to reverse prior Supreme Court decisions, which had preempted state action under similar facts, indicated that the Federal legislature wholly supported the Court's preemption analysis in those prior cases. *Id.* The opposite approach was taken in *DeVeau*, in which the plurality refused to infer preemption from section 504 of the LMRDA because "when Congress meant pre-emption to flow from the 1959 Act it expressly so provided." *DeVeau*, 363 U.S. at 156.

At least one commentator has criticized the Court for reading too much into congressional silence. *See* Cox, *supra* note 3, at 1376-77. Professor Cox suggests that congressional inaction may simply result from an unwillingness to make controversial changes in the absence of strong public opinion. *Id.*

219 *See Garner*, 346 U.S. at 488 ("The [LMRA] . . . leaves much to the states, though Congress has refrained from telling us how much. We must spell out from conflicting indications of congressional will the area in which state action is still permissible."); *see also Linn*, 383 U.S. at 58 ("Our task is rendered more difficult by the failure of Congress to furnish precise guidance in either the language of the Act or its legislative history.").

220 *See, e.g., Lockridge*, 403 U.S. at 315-16 (White, J., dissenting). After the Court in *Guss* created a jurisdictional "no-man's" land by holding that states were powerless to intervene in labor disputes where the NLRB possessed jurisdiction, even if the NLRB declines to assert its jurisdiction, *see supra* note 102 and accompanying text, Senator Ervin referred to that holding as " 'a stench in the nostrils of justice.' " *Lockridge*, 403 U.S. at 316-17 (quoting 105 CONG. REC. 6544 (1959)). The

Over time, the presumed intent of Congress concerning labor policy essentially has been reduced to judicially-created standards.[221] Out of this effort to fashion effective standards, the *Garmon* rule was created. When established, it was, in the view of the Court, an approach that best accommodated the goals of the NLRA and the traditional police powers vested in the states.[222] The *Garmon* rule, as such, was not simply another alternative analysis briefly entertained by the Court, but was instead the definitive standard of preemption concerning the relationship between state law and Federal labor policy.[223]

The *Brown* Court referred to the *Garmon* rule as being exclusively applicable to that strand of labor preemption analysis that is based on the primary jurisdiction of the NLRB; in so doing, it greatly diminishes the role that *Garmon* has played in the Court's labor preemption decisions. As announced by previous holdings, *Garmon* has been used to include situations involving *actual* conflict as well. As recently as 1983, the Court, in *Local 926*, reaffirmed the *Garmon* standard as the definitive and well-settled approach to the labor preemption issue.[224]

Because the *Garmon* rule is workable but imperfect,[225] the Court has refrained from applying it "in a literal, mechanical fashion."[226] The cases have demonstrated that, generally, as long as the doctrine is consistent with the underlying purpose of the NLRA—to strike a balance between the conflicting and often hostile interests of unions and employers[227]—the *Garmon* rule has been strictly applied; however, when its application is contrary to Federal labor policy, the Court has adjusted the doctrine. In *Lodge 76*, for example, the activity in question was not arguably within sections 7 or 8 because the NLRB had declined to treat the

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NLRA was amended to correct the *Guss* decision by providing for state jurisdiction over certain matters the NLRB declines to adjudicate. *See id.* at 317.

221 *See Garmon*, 359 U.S. at 241 (" '[T]he 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 [litigation].' ") (quoting International Ass'n of Machinists v. Gonzales, 356 U.S. 617, 619 (1958)); *Lockridge*, 403 U.S. at 303 (labor preemption is "largely of judicial making").

222 *See Lockridge*, 403 U.S. at 290-91; *Garmon*, 359 U.S. at 242.

223 *See Sears*, 436 U.S. at 189; *Lockridge*, 403 U.S. at 292.

224 See *supra* notes 192-96 and accompanying text for a discussion of *Local 926*.

225 *See Lockridge*, 403 U.S. at 303.

226 *Sears*, 436 U.S. at 188; *see also* Farmer v. United Bhd. of Carpenters, Local 25, 430 U.S. 290, 302 (1977) ("Our cases indicate, however, that inflexible application of the doctrine is to be avoided, especially where the State has a substantial interest in regulat[ing] the conduct at issue. . . .").

227 *See Morton*, 337 U.S. at 260.

union activity as an unfair labor practice.[228] Nevertheless, because of the exclusive control of the NLRA over the subject area, the Court determined that a state cause of action should be precluded because allowing the labor practice was essential to the "balance struck by Congress between the conflicting interests [of labor and management]."[229]

Whenever the *Garmon* rule created an unreasonable hardship upon individuals because its strict application denied them access to a tribunal, the rule has been criticized.[230] Additionally, the exceptions to *Garmon* have been sufficiently flexible to reflect the Court's changing attitude towards states in the federal balance.[231] Instead of changing the rule, the Court has widened the scope of the "merely peripheral" and "deeply rooted" exceptions.[232] Thus, the *Garmon* rule has been fashioned not only to accommodate the jurisdictional primacy of the NLRB, as the *Brown* Court suggests, but also to address what constitutes an actual conflict between state and Federal substantive rules, and to assess the degree of conflict necessary to tip the constitutional balance in favor of either the Federal or state interest.

It is somewhat disingenuous of the *Brown* Court, then, to ignore the flexible *Garmon* standard when determining whether the New Jersey legislation should be preempted by section 7 of the NLRA. This is especially made clear by the Court's subsequent analysis of the LMRDA. The plurality extensively examines the legislative history of that act, as well as the trail of inferences left by Congress in the LMRDA's provisions, in order to reach the conclusion that section 7 of the NLRA does not necessarily and obviously conflict with state regulation.[233] This effort to ferret congressional intent from the underlying labor legislation is precisely the judicial task that generated the *Garmon* rule after an arduous, lengthy litany of precedents.[234]

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228 *Lodge 76*, 427 U.S. at 136-37.

229 *Id.* at 147 (citing Local 20, Teamsters v. Morton, 377 U.S. 252, 258-59 (1964)).

230 *See, e.g.*, International Longshoremen's Local 1416 v. Ariadne Shipping Co., 397 U.S. 195, 202 (1970).

231 *See* Note, *supra* note 1, at 636-39.

232 Although the state's interest in preserving the public from violence and threats of violence has been long recognized, the degree of imminent peril to a state's citizens required to invoke an exception to the *Garmon* rule has been lowered. *Id.* In *Linn*, intentionally false statements were enough, *Linn*, 383 U.S. at 62; in Farmer v. United Bhd. of Carpenters, Local 25, 430 U.S. 290 (1977), the infliction of emotional stress sufficed. *Farmer*, 430 U.S. at 305.

233 *Brown*, 104 S. Ct. at 3190.

234 The Court in *Garmon* concluded that it was judicially impossible to devine

By ignoring *Garmon* principles, however, the Court raises questions as to the future of Federal labor preemption under the aegis of *Garmon*. Whether or not an actual conflict[235] exists between section 7 rights and the Casino Act's sanctions on union officials, it appears that the New Jersey legislation at least affects the arguably protected rights of the unions to choose their own bargaining representatives. Accordingly, even if some direct conflict with the substantive provisions of section 7 were not found, the Court should have nevertheless engaged in the *Garmon* analysis to determine whether the state's sanctions encroached upon the jurisdiction of the NLRB.

The plurality's decision to remand the case to the district court in order to determine whether the dues collection ban "will so incapacitate"[236] Local 54 as to prevent it from performing its functions as the employees' chosen collective-bargaining agent leaves the result of this decision in question.[237] More significantly, however, the *Brown* Court's apparent narrowing of the *Garmon* rule's importance in adjudicating preemption issues involving the NLRA raises serious doubts as to the direction and future of the Court's labor preemption doctrine.

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legislative purpose from the "new and complicated legislative scheme" that the NLRA had promulgated. *Garmon*, 359 U.S. at 240; *see* Note, *supra* note 1, at 635-36. To delve once again into the murky waters of congressional intent, as the *Brown* Court apparently did, is to ignore the import of *Garmon* and its progeny.

235 The *Brown* Court did not make clear whether "actual conflict" refers to a conflict with the NLRA's purpose, the NLRB's jurisdiction, or some substantive right arising from the Federal scheme. This unclarity further clouds the Court's standard. *See Brown*, 104 S. Ct. at 3185-87.

236 *Id.* at 3191.

237 There is some indication that the New Jersey Division of Gaming Enforcement will ask the Casino Control Commission to proceed directly against the Local 54 officials who fail to meet section 86 criteria instead of resorting to the dues collection ban, *see* Star-Ledger, Aug. 7, 1984, at 1, col. 4; thus, the *Brown* decision will not result in a final disposition of the constitutional issue. *Id.*