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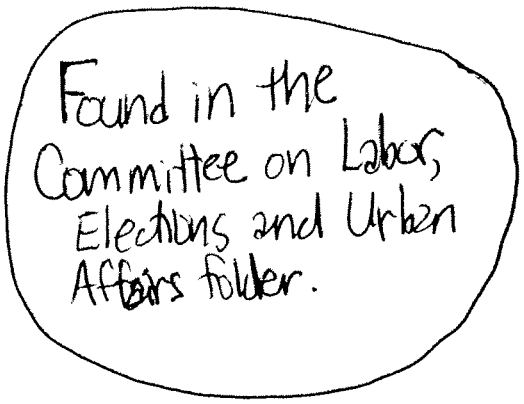

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RESPONSE: THE NON-VIABILITY OF STATE REGULATION OF WORKPLACE CAPTIVE AUDIENCE MEETINGS: A RESPONSE TO PROFESSOR SECUNDA

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BIO:

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SUMMARY:
... By contrast, Garmon preemption "has its greatest force when applied to state laws regulating the relations between employees, their union, and their employer" because primary jurisdiction over such relations lies with the NLRB, not the states. ... Despite this admitted conflict with federal law, Professor Secunda concludes that there is no preemption because "captive audience meetings generally are neither arguably protected nor prohibited by the Act, . . . and the NLRA's policy of employee free choice runs counter to permitting employers to force employees to attend these meetings." ... But like captive audience meetings, those are managerial rights sourced in the NLRA, not state property law, and like state regulation of captive audience meetings, the NLRA preempts state regulation of those federally-sourced managerial rights. ... Thus, whether state regulation of captive audience meetings is preempted under Garmon should turn on whether Congress delegated to the Board the discretionary authority to regulate captive audience meetings.

TEXT:
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I. INTRODUCTION

In his recent article entitled Toward the Viability of State-Based Legislation to Address Workplace Captive Audience Meetings in the United States, n1 Professor Secunda argues that state "Worker Freedom Act" legislation n2 - legislation currently pending in numerous state legislatures that would prohibit an employer from holding captive audience meetings about unionization with its employees n3 -should not be held preempted by the **[*192]** National Labor Relations Act ("NLRA" or "Act"). n4 In this response, I argue that state regulation of workplace captive audience meetings about unionization should be held preempted by the Act. To understand how I reached that conclusion, it is first necessary to briefly review the structure of the Act, its treatment of captive audience meetings, and the policies driving the two recognized NLRA preemption doctrines.

The NLRA is an integrated scheme of rights, protections, and prohibitions governing employee, employer, and union conduct during organizing drives and collective bargaining. n5 In enacting the NLRA, "Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties." n6 Rather, "[i]t went on to confide primary interpretation and application of its rules" to the National Labor Relations

Board ("Board" or "NLRB"), "a specific and specially constituted tribunal." n7 The centerpiece of this comprehensive scheme that nearly all of the other statutory provisions are designed to effectuate is § 7. n8 It provides employees with the right "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing" and "to refrain from any or all such activities." n9 Section 8 protects that right by enumerating a network of prohibitions on employer and union "unfair labor practices," n10 and § 9 "entrust[s] to the Board alone" n11 the regulation of procedures that determine whether or not employees desire to bargain collectively. n12 Section 9 **[*193]** authorizes the Board to regulate conduct that it deems to be prejudicial to employee free choice, n13 even if § 8 does not prohibit that conduct. n14

Non-coercive speech about unionization-whether pro-union or anti-union-is immune from prohibition as an unfair labor practice under § 8(c). n15 However, such speech is subject to the Board's § 9 "time, place, and manner" rules designed to safeguard employee free choice. n16 Pursuant to its § 9 regulatory authority, the Board has determined that employer captive audience meetings are permissible in response to union organizing campaigns except if held within the 24- hour period immediately preceding a representation election. n17 Thus, state "Worker Freedom Act" legislation would prohibit precisely what the Board has held the NLRA permits.

The Supreme Court has developed two distinct but complementary NLRA preemption doctrines to effectuate the Act's combination of prescriptive rules reserved for the Board and market freedom rules immune **[*194]** from Board regulation. n18 "Garmon preemption"-articulated in San Diego Building Trades Council v. Garmon n19 -displaces state law that regulates conduct that Congress committed to the Board's primary jurisdiction. n20 "Machinists preemption"-articulated in Lodge 76, International Ass'n of Machinists v. Wisconsin Employment Relations Commission n21 -displaces state regulation of conduct that Congress precluded the Board from regulating. n22

In Part II of this response, I argue that Garmon preemption, properly understood, extends to the Board's regulatory authority under § 9, and that Professor Secunda misapplied the overarching policy driving Garmon preemption by limiting that doctrine's scope to §§ 7 and 8 only. n23 In Part III, I argue that captive audience meetings are neither a peripheral concern of the NLRA nor deeply rooted in state law, and thus do not fall within the recognized exception to Garmon preemption. n24 In Part IV, I dispute Professor Secunda's assertion that state regulation of captive audience meetings should not be preempted because states may lawfully enact minimum employment standards. n25 I argue that such state laws only escape preemption if they regulate conduct in a manner that is not inconsistent with the NLRA. n26 In Part V, I refute Professor Secunda's argument that state regulation of captive audience meetings should survive a preemption challenge on the basis that states may lawfully modify their respective property laws to remove an employer's state law right to exclude non-employees from its property. n27 I argue that Professor Secunda's reliance on state property law is misplaced because the source of an employer's right to **[*195]** hold captive audience meetings is federal labor law, not state property law. n28 Finally, in Part VI, I conclude that state regulation of captive audience meetings should be held preempted under Garmon.

II. Garmon Preemption Properly Understood Extends to § 9

Garmon preemption is designed to protect the primary jurisdiction of the NLRB by displacing state regulation of conduct that Congress delegated to the Board. n29 It "is intended to preclude state interference with the National Labor Relations Board's interpretation and active enforcement of the 'integrated scheme of regulation' established by the NLRA.'" n30 As the Supreme Court itself explained in Garmon, "[w]e have been concerned with conflict in its broadest sense, conflict with a complex and interrelated federal scheme of law, remedy, and administration." n31 Thus, "[w]hen the exercise of state power over a particular area of activity threatened interference with the clearly indicated policy of industrial relations, it has been judicially necessary to preclude the States from acting." n32

While Garmon is often recited as preempting state regulation of conduct protected or arguably protected by § 7 or prohibited or arguably prohibited by § 8, n33 the Supreme Court has taught that it is wrong "to apply the Garmon guidelines in a literal, mechanical fashion." n34 This is because "the decision to pre-empt . . . state court jurisdiction over a given class of cases depends upon the nature of the particular interests being asserted and the effect upon the administration of national labor policies of permitting the state court to proceed." n35 Thus, the Supreme Court has expressed its "rejection of an inflexible pre-emption approach" to Garmon preemption in favor of a more elastic doctrine that adequately safeguards the Board's administration of national labor policy. n36 "To this end, Garmon preemption forbids States to 'regulate activity that the NLRA protects, prohibits, or **[*196]** arguably protects or prohibits.'" n37 While it is true that § 7 protects certain employee conduct and § 8 prohibits certain employer and union conduct, Garmon's rationale logically extends to conduct that is regulated by other sections of the NLRA, as interpreted and enforced by the Board.

With these principles in mind, I do not think that the Supreme Court, in articulating its Garmon rule, intended to tether the Board's primary jurisdiction to only those subjects regulated by §§ 7 and 8. Rather, I believe that state regulation of conduct delegated to Board regulation in § 9 invokes precisely the same concerns for "conflict with a complex and interrelated federal scheme of law, remedy, and administration" n38 as state regulation of conduct delegated to Board regulation in §§ 7 and 8.

My broader reading of Garmon is supported by the Supreme Court's own explanation in Garmon that the rule it was laying down operates to displace state regulation of conduct "[a]rguably subject to the subject of [union] regulation" by the Board. n39 While the "case before [the Court]" in Garmon happened to "concern[] . . . the multitude of activities regulated by §§ 7 and 8," n40 the Court did not limit the preemptive scope to any particular conduct regulated by the Board or to any specific statutory provision(s) of the NLRA. To the contrary, the Court articulated a broad preemption principle: states may not regulate conduct "plainly within the central aim of federal regulation" by the Board. n41 Thus, as the Court subsequently explained, Garmon prompts state regulation of "any conduct subject to the regulatory jurisdiction of the NLRB," n42 and I cannot believe that state regulation escapes preemption solely because it regulates conduct that Congress delegated to Board regulation in § 9 and not in §§ 7 or 8.

Indeed, in Weber v. Anheuser-Busch, Inc., n43 which the Court in Garmon stated "guide[s] this day's decision," n44 the Court recounted that state regulation of conduct regulated by the Board in § 9 is preempted. n45 Other pre-Garmon Supreme Court cases similarly gave preemptive effect to the Board's § 9 determinations, n46 as have some more recent cases decided by **[*197]** federal appellate courts. n47 The Garmon Court specifically relied on Weber in explaining that "the areas that have been pre-empted by federal authority and thereby withdrawn from state power are not susceptible of delimitation by fixed metes and bounds. Obvious conflict, actual or potential, leads to easy judicial exclusion of state action." n48 Tellingly, the Garmon Court reaffirmed that "conflict" with "federal authority" should "lead[] to easy" preemption, and specifically instructed that the preemption rule it was articulating should not be applied rigidly to preempt only those "conflict[s]" within certain "fixed metes and bounds" of that "federal authority." n49

My understanding that Garmon applies to § 9 in addition to §§ 7 and 8 is also supported by the structure of the NLRA. Sections 7, 8, and 9 form an integrated scheme to effectuate the policies of the NLRA. Like the statutory prohibitions enumerated in § 8, Board regulation of the union organizing process under § 9 is designed to effectuate § 7. n50 In § 9 Congress delegated to the Board "armed with its own procedures, and equipped with its specialized knowledge and cumulative experience" n51 the sole authority to establish "the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." n52 Moreover, only bargaining representatives that achieve majority status within the meaning of § 9(a) are entitled to the protections afforded by §§ 8(a)(5) and 8(d), n53 and the question of whether an employer has refused to bargain in violation of § 8(a)(5) often turns on the Board's decisions in a § 9 proceeding. n54 Given **[*198]** the degree to which §§ 7, 8, and 9 interrelate, I think it is implausible to conclude that the Board has primary jurisdiction over §§ 7 and 8 but not § 9.

My conclusion is further supported by the Supreme Court's decision in Wisconsin Department of Industry v. Gould, Inc. n55 In Gould, the Supreme Court struck down a state statute that debarred recidivist NLRA violators from contracting with the state. n56 The state statute did not by its terms regulate conduct prohibited or arguably prohibited by § 8, and thus there was no risk that the state and the Board would reach conflicting results on the merits of the conduct alleged to be prohibited. n57 The statute merely barred employers that were repeat NLRA violators-as determined by final orders of the Board that had been enforced by a federal court of appeals-from doing business with the state. n58 Nevertheless, the Supreme Court found Garmon preemption applicable because the state's debarment sanction supplemented the Board's § 10 remedial powers. n59 In finding Garmon applicable to § 10 of the Act, n60 the Court reasoned that "to allow the State to grant a remedy which has been withheld from the National Labor Relations Board only accentuates the danger of conflict, because the range and nature of those remedies that are and are not available is a fundamental part of the comprehensive system established by Congress." n61

Accordingly, given the overriding principle of Garmon preemption to displace state regulation of conduct regulated by the Board, the fact that Congress codified the Board's discretionary authority to regulate captive audience meetings in § 8 (c) but in §§ 7 or 8, should not render Garmon preemption inapplicable, just like Congress's codification of the Board's remedial powers in § 10 did not save the state statute in Gould from Garmon preemption. Professor Secunda's wooden application of Garmon-that state regulation of captive audience meetings does not intrude into the Board's primary jurisdiction because captive audience meetings are not protected or arguably protected by § 7 or prohibited or arguably prohibited by § 8 n62 -would "elevate form over substance." n63 This view cannot be reconciled with **[*199]** Garmon's animating and flexible principle to preempt state regulation of all conduct subject to the Board's regulatory jurisdiction, irrespective of the statutory provision that is the source of that regulation.

III. Captive Audience Meetings About Unionization are Neither a Peripheral Concern of the NLRA nor Deeply Rooted in State Law

Conduct that is a "peripheral concern" of the NLRA or that is "deeply rooted in local feeling and responsibility" does not fall within the Board's primary jurisdiction and, therefore, state regulation of such conduct is not preempted under Garmon's primary jurisdiction rationale. n64 By contrast, Garmon preemption "has its greatest force when applied to state laws regulating the relations between employees, their union, and their employer" because primary jurisdiction over such relations lies with the NLRB, not the states. n65

Workplace captive audience meetings about unionization are-and have been-a central concern of the NLRA. Since at least its 1946 decision in Clark Bros. Co., Inc., n66 the Board has grappled with how they should be regulated. The Board initially took the position that they were prohibited by § 8. n67 However, in 1947 Congress enacted § 8(c), which specifically sought to overturn Clark Bros. n68 A year later, in deference to this new provision of the Act, the Board held that captive audience meetings are not prohibited by § 8. n69 In 1951 the Board further refined its regulation of captive audience meetings and held that unless an employer gives the union an opportunity to reply, captive audience meetings are an unfair labor practice. n70 Two years later, the Board reversed itself. n71 That same year the Board announciated its current rule expressly allowing employers to hold captive audience meetings, provided that the meeting is not held within 24 hours before the election. n72 Accordingly, as demonstrated by this lengthy history, captive audience meetings have been anything but a peripheral concern of the NLRA. n73

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However, it could be argued that because Board regulation of captive audience meetings has historically been in the election context, Garmon should not preclude state regulation of captive audience meetings outside of the election context. That argument misconceives the nature of the Board's regulation of captive audience meetings as well as the proper scope of Garmon preemption. The Board has interpreted the NLRA to permit captive audience meetings at anytime, irrespective of whether an election petition has been filed with the Board, with the sole exception being the 24-hour period immediately preceding a Board election. n74 That the Board's prohibition on captive audience meetings is in the election context does not operate to limit the Board's express allowance of captive audience meetings at all other times. n75 Accordingly, state restrictions on captive audience meetings outside of the election context would conflict with the Board's interpretation of the NLRA, and for that reason should be found preempted under Garmon's animating principle. n76

Nor are workplace captive audience meetings about unionization deeply rooted in state law. In each of the Supreme Court cases applying that [*201] exception to Garmon preemption, the conduct being regulated by the state-defamatory speech, violence, trespass, obstruction of access to property, intentional infliction of emotional distress-was tortious or criminal conduct that constitutes a traditional concern of state law. n77 By contrast, captive audience meetings are not- and have not historically been-torts or crimes under existing state law or subject to state regulation in any other manner. n78

IV. States may not Lawfully Regulate Captive Audience Meetings as a Minimum Employment Standard

In Metropolitan Life Insurance Co. v. Massachusetts, n79 the Supreme Court held that a state law requiring insurers to provide minimum health care benefits was not preempted by ERISA n80 or Machinists. n81 Professor Secunda relies on this case in support of his argument that states may likewise lawfully prohibit captive audience meetings as a "minimal working condition." n82 However, Metropolitan Life does not support Professor Secunda's argument.

As a preliminary matter, unlike state regulation of captive audience meetings, Massachusetts's mandated-benefit law concededly did not "regulate or prohibit any conduct subject to the regulatory jurisdiction of the NLRB." n83 Therefore, Garmon preemption was inapplicable. n84

Furthermore, and more fundamentally, the Court upheld the Massachusetts law precisely because the law was "not incompatible" with the NLRA. n85 "When a state law establishes a minimal employment standard not inconsistent with the general legislative goals of the NLRA, it conflicts with none of the purposes of the Act." n86 As Professor Secunda acknowledges, state laws prohibiting captive audience meetings are [*202] inconsistent with the Act "because the Board has expressly concluded that employers are allowed to require employees to attend captive audience meetings." n87

Despite this admitted conflict with federal law, Professor Secunda concludes that there is no preemption because "captive audience meetings generally are neither arguably protected nor prohibited by the Act, . . . and the NLRA's pol-

icy of employee free choice runs counter to permitting employers to force employees to attend these meetings." n88 The former argument is based on a misapplication of Garmon, as discussed above, n89 and the latter argument is wholly irrelevant because a state's disagreement with the Board's interpretation of the Act is not a defense to Garmon preemption. Indeed, as the Court in Metropolitan Life reiterated, "Garmon pre-emption accomplishes Congress's purpose of creating an administrative agency in charge of creating detailed rules to implement the Act, rather than having the Act enforced and interpreted by the state or federal courts." n90 For this reason, it is irrelevant that states may think, in disagreement with the Board, that "the very exercise of an employer's legally-sanctioned right to hold such captive audience meetings . . . is a manifestation of coercive power and domination," n91 or that "[t]he captive audience speech is diametrically opposed to the 'free and open discussion' the Board professes to promote." n92 As the Court itself explained in Garmon:

[C]ourts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board. What is outside the scope of this Court's authority cannot remain within a State's power and state jurisdiction too must yield to the exclusive primary competence of the Board. n93

Accordingly, while states may have the authority under their police powers to enact minimum employment standards to protect workers within the state, n94 contrary to Professor Secunda's conclusion, they have no authority "to protect workers from being harassed and intimidated by employers at work through929394929394 captive audience meetings as a minimal working condition" n95 because the Board-the "specific and specially constituted **[*203]** tribunal . . . confide[d] primary interpretation and application" of national labor policy n96 -has determined that captive audience meetings are in most instances permissible under the NLRA. n97

V. State Property Law has no Application to Captive Audience Meetings

Professor Secunda lastly argues that state regulation of captive audience meetings is not preempted "based on the powers of the state to regulate property interests that are not displaced by the NLRB." n98 He reads Lechmere Inc. v. NLRB n99 as shielding state regulation of captive audience meetings from preemption. n100 In Lechmere, the Supreme Court held that it was not an unfair labor practice for an employer to exclude non-employee union organizers from its property because the union had other available channels to communicate with the employees. n101 As the Supreme Court subsequently explained its holding in Lechmere, "[t]he right of employers to exclude union organizers from their private property emanates from state common law, and while this right is not superseded by the NLRA, nothing in the NLRA expressly protects it." n102

Professor Secunda correctly concludes from this statement that "Lechmere and its progeny stand for nothing less than the proposition that the NLRA does not supersede the ability of states to regulate common law rights of property." n103 But all that means is that states may lawfully modify their respective property laws to remove an employer's state law right to exclude non-employees from its property. n104 That "Congress did not confer upon employers a federal right to fence out [union] organizers" n105 means nothing more than that states can lawfully take away an employer's state law property right to exclude non- employee union organizers. n106 It does not **[*204]** follow that states can lawfully modify an employer's federal labor law right to hold captive audience meetings in response to a union organizing campaign. n107

The flaw in Professor Secunda's reasoning is that the source of an employer's right to hold captive audience meetings is not state property law, but federal labor law. n108 Indeed, as the Supreme Court clarified in Eastex, Inc. v. NLRB, n109 state property law is not a source of employer rights vis-a-vis employees who are lawfully on the employer's property. n110 In rejecting an employer's argument that it had a property right to prohibit non-organizational distribution by employees in non-working areas during non-working time, the Supreme Court stated:

In the first place, petitioner's reliance on its property right is largely misplaced. . . . [P]etitioner's employees are "already rightfully on the employer's property," so that in the context **[*205]** of this case it is the "employer's management interests rather than property interests" that primarily are implicated. n111

Thus, Lechmere is inapposite because it involved non-employee union organizers that were trespassing on the employer's property, n112 not employees that were lawfully on the employer's property as in Eastex. n113 The Supreme Court has made clear "that there is a distinction 'of substance' between 'rules of law applicable to employees and those applicable to nonemployees.'" n114 The difference is generally that the NLRA applies to the former, n115 whereas state property law applies to the latter. n116 Because captive audience meetings involve employees who are lawfully on the employer's property, Professor Secunda's reliance on Lechmere and state property law is misplaced. n117

In short, captive audience meetings implicate management rights governed by the NLRA, not property rights governed by state law. Were it otherwise, states could lawfully prohibit a host of federally-sourced employer rights based on the states' authority to control an employer's use of its property. For example, under Professor Secunda's theory, states could lawfully prohibit employer lockouts or the hiring of strike replacements under the guise of regulating the employer's use of its property. But like captive audience meetings, those are managerial rights sourced in the NLRA, not state property law, n118 and like state regulation of captive audience meetings, the NLRA preempts state regulation of those federally-sourced managerial rights. n119

VI. Conclusion

Contrary to the conclusion of Professor Secunda, I believe that state regulation of workplace captive audience meetings about unionization should be held preempted by the NLRA. The preemptive scope of Garmon, properly **[*206]** understood, extends to all conduct that Congress delegated to the Board's primary jurisdiction, not just conduct that is protected or arguably protected by § 7 or prohibited or arguably prohibited by § 8. Thus, whether state regulation of captive audience meetings is preempted under Garmon should turn on whether Congress delegated to the Board the discretionary authority to regulate captive audience meetings. The specific statutory provision in which Congress elected to codify that delegation of authority should be irrelevant to the preemption analysis.

In § 9, Congress delegated to the Board the authority to regulate the union organizing process. The Board has exercised that delegated authority with respect to captive audience meetings to the extent that the Board, in its discretion, has deemed appropriate under the Act. The Board's exercise of its delegated authority should be entitled to preemptive effect.

Professor Secunda's arguments that state regulation of captive audience meetings escapes preemption because states may lawfully enact minimum employment standards and because states may lawfully modify their property laws do not withstand scrutiny. As to the former, the Supreme Court has upheld such laws precisely because the standard imposed by the state-unlike the standard in "Worker Freedom Act" legislation-was not inconsistent with the NLRA. As to the latter, while it is true that states may lawfully modify their property laws to remove an employer's right to exclude non-employees from its property, that is largely irrelevant to the preemption analysis because an employer's right to hold captive audience meetings derives from federal labor law, not state property law. Therefore, state "Worker Freedom Act" legislation should be held preempted under Garmon.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawSeparation of PowersPrimary JurisdictionLabor & Employment LawCollective Bargaining & Labor RelationsFederal PreemptionLabor & Employment LawCollective Bargaining & Labor RelationsUnfair Labor PracticesGeneral Overview

FOOTNOTES:

n1 Paul M. Secunda, Toward the Viability of State-Based Legislation to Address Workplace Captive Audience Meetings in the United States, *29 Comp. Lab. L. & Pol'y J. 209 (2008).*

n2 For an overview of state "Worker Freedom Act" legislation, see *id. at 226-29.*

n3 A "captive audience meeting" is a mandatory meeting at which "employers require employees to listen to the employer's anti-union message . . . during work time." *Id. at 214-15.*

n4 National Labor Relations Act, *29 U.S.C. §§ 151*-169 (2000).

n5 See *English v. Gen. Elec. Co., 496 U.S. 72, 86 n.8 (1990)* ("[T]he NLRA . . . comprehensively deals with labor- management relations from the inception of organizational activity through the negotiation of a collective-bargaining agreement.").

n6 *Garner v. Teamsters, Local Union No. 776, 346 U.S. 485, 490 (1953).*

n7 Id. ("Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies.").

n8 *29 U.S.C. § 157* (2000). This statute will be referred to as "§ 7" throughout this response because it refers to § 7 of the Wagner Act, the pre-codification version of the NLRA. See Secunda, supra note 1, at 216.

n9 *29 U.S.C. § 157.*

n10 *29 U.S.C. §§ 158*(a), (b) (2000). This statute will be referred to as "§ 8" throughout this response because it refers to § 8 of the Wagner Act, the pre-codification version of the NLRA. See Secunda, supra note 1, at 216.

n11 *NLRB v. Waterman S.S. Corp., 309 U.S. 206, 226 (1940).*

n12 *29 U.S.C. § 159* (2000). This statute will be referred to as "§ 9" throughout this response because it refers to § 9 of the Wagner Act, the pre-codification version of the NLRA. See Secunda, supra note 1, at 216. Section 9(a) provides that unions may be "designated or selected" by a majority of employees. *29 U.S.C. § 159*(a). The Supreme Court has interpreted this to mean that unions may become a bargaining representative either by winning an NLRB-conducted secret ballot election or by persuading an employer to voluntarily recognize the union based on authorization cards showing majority employee support. *NLRB v. Gissel Packing Co., 395 U.S. 575, 595-600 (1969).* However, under current law, employers faced with a recognition demand from a union claiming majority employee support may lawfully insist on a Board-conducted secret ballot election. *Linden Lumber Div., Summer & Co. v. NLRB, 419 U.S. 301, 310 (1974).* The Employee Free Choice Act, H.R. 800, 110th Cong. § 2(a) (2007), currently pending in Congress, would overturn Linden Lumber.

n13 *NLRB v. Wyman-Gordon Co., 394 U.S. 759, 767 (1969)* ("We have held in a number of cases that [in § 9] Congress granted the Board a wide discretion to ensure the fair and free choice of bargaining representatives.") (citing *NLRB v. Waterman S.S. Corp., 309 U.S. 206, 226 (1940) & NLRB v. A.J. Tower Co., 329 U.S. 324, 330 (1946)).*

n14 *General Shoe Corp., 77 N.L.R.B. 124, 126 (1948)* ("Conduct that creates an atmosphere which renders improbable a free choice will sometimes warrant invalidating an election, even though that conduct may not constitute an unfair labor practice.").

n15 *29 U.S.C. § 158*(c) (2000); *Babcock & Wilcox Co., 77 N.L.R.B. 577, 578 (1948).* Professor Secunda notes that the Supreme Court commented that § 8(c) "merely implements the First Amendment." Secunda, supra note 1, at 218 n.51 (quoting *NLRB v. Gissel Packing Co., 395 U.S. 575, 617 (1969)).* However, it is clear from the context in which that comment was made that it was not intended to mean that § 8(c) serves no independent purpose, but instead to mean that § 8(c)'s scope of protected speech is consistent with the First Amendment. The comment was made in response to the employer's argument that its First Amendment rights were violated when the Board found its coercive speech to be an unfair labor practice. In rejecting this argument, the Court noted that "so long as such expression contains 'no threat of reprisal or force or promise of benefit' in violation of § 8(a)(1)," § 8(c) "firmly establishe[s]" that "an employer's free speech right to communicate his views to his employees . . . cannot be infringed by . . . the Board." *Gissel, 395 U.S. at 617.* "Thus, § 8(c) . . . merely implements the First Amendment . . ." in the sense that it does not protect coercive speech which is also "without the protection of the First Amendment." See *id. at 617-18.* Moreover, if § 8(c) is interpreted as doing nothing more than codifying the First Amendment in the NLRA, then the statute is rendered superfluous contrary to the "cardinal

principle of statutory construction." *TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001)* (citing *Duncan v. Walker, 533 U.S. 167, 174 (2001)).*

n16 E.g., *Milchem, Inc., 170 N.L.R.B. 362, 362-63 (1968)* (prohibiting electioneering in the vicinity of the polls); *Sewell Mfg. Co., 138 N.L.R.B. 66, 71-72 (1962)* (distinguishing between truthful and germane discussion of racial issues and appeals to racial bigotry in an inflammatory manner); *Peerless Plywood Co., 107 N.L.R.B. 427, 429-30 (1953)* (holding that either party to an organizing campaign may deliver captive audience speeches to employees, provided that the speech is non-coercive and does not take place within 24 hours of a Board election).

n17 *Peerless Plywood, 107 N.L.R.B. at 429-30.* Of course, the speech must not be coercive speech prohibited by § 8(a)(1), *29 U.S.C. § 158*(a)(1). *Id. at 430.*

n18 *Bldg. & Constr. Trades Council v. Associated Builders & Contractors (Boston Harbor), 507 U.S. 218, 226-27 (1993).*

n19 *San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959).*

n20 *Id. at 242-44.*

n21 *Lodge 76, Int'l Ass'n of Machinists v. Wis. Employment Relations Comm'n, 427 U.S. 132 (1976).* I do not argue that state regulation of captive audience meetings should be found preempted under Machinists because the fact that the Board has the authority to regulate captive audience meetings necessarily means that it is not conduct that Congress precluded the Board from regulating.

n22 *Id. at 140.* Professor Secunda implies that Machinists is inapplicable if Congress has regulated the conduct outside of the NLRA. See Secunda, supra note 1, at 236 & n.156. However, Machinists is an NLRA-specific principle that implicitly limits the regulatory authority of the Board, not Congress. It originates from *NLRB v. Ins. Agents' Int'l Union, 361 U.S. 477, 488 (1960),* in which the Court held that the Board impermissibly attempted to regulate conduct that Congress intended to leave free from Board regulation. Subsequently, in Machinists, the Court held that, in light of the NLRA's implied limitations on the Board's regulatory authority, parallel limitations apply to the states by operation of the *Supremacy Clause. 427 U.S. at 146.* That remains the case even if Congress has regulated the conduct elsewhere.

n23 See infra notes 29- 63 and accompanying text.

n24 See infra notes 64- 78 and accompanying text.

n25 See infra notes 79- 97 and accompanying text.

n26 See infra notes 79- 97 and accompanying text.

n27 See infra notes 98- 119 and accompanying text.

n28 See infra notes 98- 119 and accompanying text.

n29 *Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724, 748 (1985)* (explaining that Garmon "protects the primary jurisdiction of the NLRB to determine in the first instance what kind of conduct is either prohibited or protected by the NLRA").

n30 *Chamber of Commerce of the U.S. v. Brown, 128 S. Ct. 2408, 2412 (2008)* (quoting *Golden State Transit Corp. v. Los Angeles, 475 U.S. 608, 613 (1986)).*

n31 *San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 243 (1959)* (emphasis added).

N32 Id. (emphasis added).

n33 E.g., *Healthcare Ass'n of N.Y. State, Inc. v. Pataki, 471 F.3d 87, 94 (2d Cir. 2006)* ("Garmon preemption addresses actual or arguable conflicts between state law and sections 7 or 8 of the NLRA.").

n34 *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180, 188 (1978).*

n35 *Id. at 188-89* (quotation and citation omitted).

n36 *Id. at 189 n.13.*

n37 *Chamber of Commerce v. Brown, 128 S. Ct. 2408, 2412 (2008)* (quoting *Wis. Dep't of Indus. v. Gould, Inc., 475 U.S. 282, 286 (1986)* (emphasis added)).

n38 *San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 243 (1959).*

n39 *Id. at 244.*

n40 *Id. at 241.*

n41 *Id. at 244.*

n42 *Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724, 749 (1985)* (emphasis added).

n43 *Weberv. Anheuser-Busch, Inc., 348 U.S. 468 (1955).*

n44 *Garmon, 359 U.S. at 240.*

n45 *Weber, 348 U.S. at 476* ("The federal Board's machinery for dealing with certification problems also carries implications of exclusiveness.").

n46 *La Crosse Tel. Corp. v. Wis. Employment Relations Bd., 336 U.S. 18, 25-26 (1949)* (holding that a state may not certify a union where the NLRA governs certification procedures); *Bethlehem Steel Co. v. N.Y. State Labor Relations Bd., 330 U.S. 767, 774 (1947)* (holding that a state may not certify a union where the NLRB has refused certification).

n47 *Mich. Cmty. Servs., Inc. v. NLRB, 309 F.3d 348, 361 (6th Cir. 2002)* (holding that Board assertion of jurisdiction over a question concerning representation ousts state board of jurisdiction); *Pa. Nurses Ass'n v. Pa. State Educ. Ass'n, 90 F.3d 797, 802-03 (3d Cir. 1996)* (applying Garmon preemption to state tort claims that involved "core activities" committed to Board regulation under §§ 8 and 9); *NLRB v. Comm. of Interns & Residents, 566 F.2d 810, 814-16 (2d Cir. 1977)* (following Bethlehem Steel and holding that where the Board had concluded that bargaining would be contrary to national labor policy, the state was precluded from requiring bargaining).

n48 *Garmon, 359 U.S. at 240* (quoting *Weber, 348 U.S. at 480).*

n49 Id.

n50 See *General Shoe Corp., 77 N.L.R.B. 124, 126 (1948)* ("In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of employees.").

n51 *Garmon, 359 U.S. at 242.*

n52 *NLRB v. A.J. Tower Co., 329 U.S. 324, 330 (1946);* see also *NLRB v. Wyman-Gordon Co., 394 U.S. 759, 767 (1969); NLRB v. Waterman S.S. Corp., 309 U.S. 206, 226 (1940).*

n53 See *29 U.S.C. § 158*(a)(5) (2000) (stating that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of employees, subject to provisions of section 9(a)").

n54 E.g., *NLRB v. Ky. River Cmty. Care, Inc., 532 U.S. 706, 712 (2001).* Indeed, Board certification of a union as the employees' collective bargaining representative at the conclusion of a § 9 proceeding is not directly reviewable, but can be reviewed indirectly when the dispute concerning the correctness of the certification eventuates in a finding that an unfair labor practice as defined in § 8-such as a refusal to bargain-has been committed. See *Boire v. Greyhound Corp., 376 U.S. 473 (1964); AFL v. NLRB, 308 U.S. 401 (1940).*

n55 *Wis. Dep't of Indus. v. Gould, Inc., 475 U.S. 282 (1986).*

n56 *Id. at 291.*

n57 *Id. at 283-84.*

n58 Id.

n59 *Id.at 287* (citations and quotation marks omitted).

n60 *29 U.S.C. § 160* (2000).

n61 *Gould, 475 U.S. at 287* (citations and quotation marks omitted).

n62 Secunda, supra note 1, at 232-34. Some courts of appeals have similarly misread *Garmon. E.g., Chamber of Commerce of the U.S. v. Lockyer, 463 F.3d 1076, 1090-96 (9th Cir. 2006)* (en banc), rev'd sub nom., *Chamber of Commerce of the U.S. v. Brown, 128 S. Ct. 2408 (2008)* (reversed on Machinist grounds).

n63 *Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 211 (1985).* While this case concerned the preemptive scope of § 301 of the Labor Management Relations Act, codified at *29 U.S.C. § 185,* it is instructive in determining the scope of Garmon preemption because both § 301 preemption and Garmon preemption are aimed at protecting the uniformity of federal law from local variance. Compare *Allis-Chalmers, 471 U.S. at 209-10,* with *Garner v. Teamsters, Local Union No. 776, 346 U.S. 485, 490 (1953).* Employing the Court's logic in Allis-Chalmers, "[i]f the policies that animate [Garmon] are to be given their proper range . . . the pre-emptive effect of [Garmon] must extend beyond [§§ 7 and 8]." *471 U.S. at 210.*

n64 *San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 243-44 (1959).*

n65 *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180, 193 (1978).*

n66 *Clark Bros. Co., Inc., 70 N.L.R.B. 802 (1946).*

n67 *Id. at 805.*

n68 S. Rep. No. 105, 80th Cong., 1st Sess. 23 (1947).

n69 Babcock & Wilcox Co., 77N.L.R.B. 577, 578 (1948).

n70 *Bonwit-Teller, Inc., 96 N.L.R.B. 608, 612 (1951).*

n71 *Livingston Shirt Corp., 107 N.L.R.B. 400, 409 (1953).*

n72 *Peerless Plywood Co., 107 N.L.R.B. 427, 429-30 (1953).* 20272027

n73 Cf. *Int'l Ass'n of Machinists v. Gonzales, 356 U.S. 617, 620 (1958)* (finding no preemption because the conduct being regulated by the state "has not been undertaken by federal law").

n74 *Peerless Plywood, 107 N.L.R.B. at 429-30.* The Board held that "[a]lso implicit in the rule is our judgment that non- coercive speeches made prior to the proscribed period will not interfere with a free election, inasmuch as our rule will allow time for their effect to be neutralized by the impact of other media of employee persuasion." *Id. at 430.*

n75 In Peerless Plywood the Board explained: This rule will not interfere with the rights of unions or employers to circulate campaign literature on or off the premises at any time prior to an election, nor will it prohibit the use of any other legitimate campaign propaganda or media. It does not, of course, sanction coercive speeches or other conduct prior to the twenty-four hour period, nor does it prohibit an employer from making (without granting the union an opportunity to reply) campaign speeches on company time prior to the twenty-four hour period, provided, of course, such speeches are not otherwise violative of Section 8 (a) (1). Moreover, the rule does not prohibit employers or unions from making campaign speeches on or off company premises during the twenty-four hour period if employee attendance is voluntary and on the employees' own time. Id.

n76 See supra Part I. Professor Secunda reasons that "[t]o the extent that a state were to pass a law somehow interfering with all non-coercive speech to employees prior to twenty-four hours before a union election, that law would be rightly preempted under Garmon preemption as something that would be prohibited under Section 8." Secunda, supra note 1, at 244. Such a state law would be preempted under Machinists, not Garmon, because

in § 8(c) Congress exempted non-coercive speech from Board regulation. See *Chamber of Commerce v. Brown, 128 S. Ct. 2408, 2413-14 (2008)* (finding state regulation of non-coercive speech preempted under Machinists); *UAW-Labor Employment and Training Corp. v. Chao, 325 F.3d 360, 364-65 (D.C. Cir. 2003)* ("Fitting a Garmon claim under the language of § 8(c) is awkward."). While some courts have reasoned that § 8(c) can provide a basis for Garmon preemption, see *Healthcare Ass'n of N.Y. State, Inc. v. Pataki, 471 F.3d 87, 100 (2d Cir. 2006),* such reasoning runs counter to the Supreme Court's teaching that Garmon preempts conduct subject to the Board's regulatory jurisdiction, while Machinists preempts conduct immune from Board regulation. See *Bldg. & Constr. Trades Council of the Metro. Dist. v. Assoc. Builders (Boston Harbor), 507 U.S. 218, 226-27 (1993).*

n77 See *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180, 207 (1978); Farmer v. United Bhd. of Carpenters, 430 U.S. 290, 302-06 (1977); Linn v. United Plant Guard Workers, Local 114, 383 U.S. 53, 63-64 (1966); United Auto Workers v. Russell, 356 U.S. 634, 644-46 (1958); Youngdahl v. Rainfair, Inc., 355 U.S. 131, 139-40 (1957).*

n78 *Sears, Roebuck & Co., 436 U.S. at 188* (explaining that Garmon does not preempt "state-court jurisdiction over conduct traditionally subject to state regulation").

n79 *Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985).*

n80 Employee Retirement Income Security Act of 1974, *29 U.S.C. §§ 1001*-1461 (2000).

n81 *Lodge 76, Int'l Ass'n of Machinists v. Wis. Employment Relations Comm'n, 427 U.S. 132 (1976).*

n82 Secunda, supra note 1, at 237.

n83 *Metro. Life Ins. Co., 471 U.S. at 749;* see also *N.Y. Tel. Co. v. N.Y. State Dep't of Labor, 440 U.S. 519, 545 (1979)* (plurality opinion) (upholding state statute precisely because "New York has not sought to regulate private conduct that is subject to the regulatory jurisdiction of the National Labor Relations Board").

n84 *Metro. Life Ins. Co., 471 U.S. at 749.*

n85 *Id. at 754-55.*

n86 *Id. at 757* (emphasis added).

n87 Secunda, supra note 1, at 238 n.165.

n88 Id.

n89 See supra Part I.

n90 *Metro. Life Ins. Co., 471 U.S. at 749 n.26.*

n91 Alan Story, Employer Speech, Union Representation Elections, and the First Amendment, *16 Berkeley J. Emp. & Lab. L. 356, 422 (1995)* (citations omitted).

n92 Craig Becker, Democracy in the Workplace: Union Representation Elections and Federal Labor Law, *77 Minn. L. Rev. 495, 559 (1993)* (quoting *Mead-Atlanta Paper Co., 120 N.L.R.B. 832, 834 (1975)).*

n93 *San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244-45 (1959).*

n94 See *Metro. Life Ins. Co., 471 U.S. at 756.*

n95 Secunda, supra note 1, at 237.

n96 *Garner v. Teamsters, Local Union No. 776, 346 U.S. 485, 490 (1953).*

n97 I make no argument either in support of or in opposition to the Board's treatment of captive audience meetings because the correctness of the Board's determination as a policy matter is outside the scope of this response. However, I note that my argument would be the same if the policies were reversed and the issue was whether the NLRA preempted state "Employer Freedom Act" legislation that conflicted with Board law prohibiting captive audience meetings.

n98 See Secunda, supra note 1, at 238.

n99 *Lechmere Inc. v. NLRB, 502 U.S. 527 (1992).*

n100 Secunda, supra note 1, at 238-39.

n101 *Lechmere, 502 U.S. at 540-41.*

n102 *Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 217 n.21 (1994).*

n103 Secunda, supra note 1, at 239.

n104 The right to exclude is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979).*

n105 Michael H. Gottesman, Rethinking Labor Law Preemption: State Laws Facilitating Unionization, 7 Yale J. on Reg. 355, 417 (1990).

n106 An employer that excludes non-employee union organizers from its property without a state law property right to do so commits an unfair labor practice. See *Glendale Assocs., Ltd. v. NLRB, 347 F.3d 1145, 1154 (9th Cir. 2003)* (enforcing Board's order finding employer committed unfair labor practice because employer "did not have a sufficient property interest [under state law] to exclude the union representatives from distributing handbills" on its property); *Bristol Farms, Inc., 311 N.L.R.B. 437, 438 (1993)* ("In cases arising under the Act, although employers' property rights must be given appropriate respect, an employer need not be accorded any greater property interest than it actually possesses. . . . [A]n employer that possesses only a property right that, under the law that creates and defines the employer's property rights, would not allow the employer to exclude the individuals," commits an unfair labor practice by excluding union organizers.).

n107 Contrary to Professor Secunda's characterization, see Secunda, supra note 1, at 244, federal labor law is not "silent" on an employer's right to hold captive audience meetings and "federal interests" are "implicated."

The Board has interpreted the NLRA as permitting employers to hold captive audience meetings except within the 24-hour period immediately preceding an election. *Peerless Plywood Co., 107 N.L.R.B. 427, 429 (1953).*

n108 *Peerless Plywood Co., 107 N.L.R.B. at 429.* Professor Secunda incorrectly assumes that a captive audience meeting is an exercise of an employer's state law property rights. See Secunda, supra note 1, at 239 ("And just as a state may permit employers to exclude non-employee organizers as part of the employer's property rights, just as surely states can seek to limit those same property rights and refuse to allow employers to harass or intimidate their employees during mandatory meetings discussing the employer's anti-union views."); see also id. at 243-44 ("The Worker Freedom Act legislation that out-and-out prohibits employer captive audience speech on labor-oriented topics would be just another way for states to modify existing property interests in a way that facilitates unionization.").

n109 *Eastex, Inc. v. N.L.R.B., 437 U.S. 556 (1978).*

n110 *Id. at 572-73.* The Board's recent decision in The Register-Guard is not to the contrary. *351 N.L.R.B. No. 70* (Dec. 16, 2007) (holding that it was not an unfair labor practice for an employer to prohibit employees from using its e-mail system for organizational purposes). While the Board predicated its holding on an employer's property right in employer-purchased equipment, the Board conceded that only managerial rights-and not property rights-would have been implicated had no employer-owned equipment been involved. Id. at 7. Query whether the Board would have reached a different result if the applicable state property law did not give the employer the right to exclude employees from using its equipment for non-work purposes. I suspect that it would have. See supra note 106.

n111 *Eastex, 437 U.S. at 572-573* (discussing *Hudgens v. NLRB, 424 U.S. 507, 521 n.10 (1976));* see also *Beth Israel Hosp. v. NLRB, 437 U.S. 483, 504-05 (1978).*

n112 *Lechmere Inc. v. NLRB, 502 U.S. 527, 540-41 (1992).*

n113 *Eastex, 437 U.S. at 570-72.*

n114 *Id. at 571* (quoting *NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 113 (1956));* see also *Lechmere, 502 U.S. at 537.*

n115 E.g., *Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945).*

n116 E.g., *Babcock, 351 U.S. 105.*

n117 *Eastex, 437 U.S. at 572-73.*

n118 See *American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 310-13 (1965)* (holding that NLRA permits employers to lockout employees in labor dispute with union); *NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 345-46 (1938)* (holding that NLRA permits employers to hire permanent replacements during an economic strike).

n119 See *Golden State Transit Corp. v. Los Angeles, 475 U.S. 608, 614-15 (1986)* (recounting that states are "prohibited from imposing additional restrictions on . . . lockouts" under Machinists); 520 *S. Mich. Ave. Assocs., Ltd. v. Devine, 433 F.3d 961, 965 (7th Cir. 2006)* (holding state law restricting an employer's ability to hire replacement workers during a strike preempted under Machinists). That these cases involved Machinists preemp-

tion and not Garmon preemption is immaterial; the salient point is that the employer rights were sourced in the NLRA and thus could not be regulated by the states.

Topic:
FIRST AMENDMENT ISSUES; LABOR RELATIONS; LEGISLATION; POLITICAL ADVERTISING; STATE BOARDS AND COMMISSIONS; SUPREME COURT DECISIONS;
Location:
LABOR RELATIONS;

OLR RESEARCH REPORT

March 24, 2006 2006-R-0204

CAPTIVE AUDIENCE PROHIBITIONS AND FEDERAL PREEMPTION

By: Christopher Reinhart, Senior Attorney

You asked whether the "captive audience" bill is preempted by federal labor relations law.

The Office of Legislative Research is not authorized to give legal opinions and this should not be considered one.

SUMMARY

sHB 5030 prohibits an employer or its agent, representative, or designee from requiring employees to attend an employer-sponsored meeting with the employer or its agents or representatives when the primary purpose is to communicate the employer's opinion about religious or political matters. Political matters are political party affiliation or the decision to join or not join a lawful, political, social, or community group or activity or labor organization. The bill provides certain exceptions to its "captive audience" provisions. The Labor Committee sent the bill to the Judiciary Committee on March 7 as a joint favorable change of reference.

The National Labor Relations Act (NLRA) generally governs labor-management relations in the private sector. Regarding employer speech, section 8(c) of the NLRA states: "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this act, if such expression contains no threat of reprisal or force or promise of benefit. "

The NLRA does not have an express preemption provision but courts have found preemption when a state attempts to regulate (1) activities the NLRA arguably protects or prohibits, in order to prevent conflict between state regulation and Congress' integrated scheme of regulation or (2) areas left to the control of the free play of economic forces, which protects against unsettling the balance of interests set by the NLRA.

We could not find a case on this precise issue. Thus we cannot provide a definitive

answer. But it appears likely that, based on the history of the NLRA and court rulings, that the NLRA would preempt the bill's provisions as they relate to labor organizing. We discuss some of the arguments below. It appears that the preemption analysis would focus on whether the bill is viewed as interfering with employer speech and the balance struck by the NLRA or as a general provision on employee rights which is not expressly prohibited by the language of the NLRA and which provides greater protection than the "floor" set by the NLRA.

If the NLRA does not preempt state legislation, the bill could also face a First Amendment challenge. U. S. Supreme Court cases have established that an employer has First Amendment rights in this context. Proponents of the bill argue that employees have certain First Amendment rights because they are a "captive audience" and the Court has upheld government regulation of speech in other circumstances where the audience was considered "captive. " Because we have not found any cases specifically on this issue, it is unclear how a court would rule. We discuss these First Amendment arguments below.

Because the NLRA generally governs labor-management relations, it appears unlikely that it would preempt the bill's other provisions on speech on religious or political matters. But the employer could assert First Amendment rights and the same First Amendment arguments could also apply to those provisions. We did not conduct extensive research on what other First Amendment issues may arise in those circumstances, such as whether the regulation would be considered content-based or not and what legal standard would apply to that analysis.

BACKGROUND ON THE NLRA AND CAPTIVE AUDIENCES

The NLRA generally governs labor-management relations in the private sector. In response to rulings by the National Labor Relation Board (NLRB) and courts on captive audiences (see *Clark Bros. Co. Inc.* , 70 NLRB 802 (1946); *NLRB v. Clark Bros. Co. , Inc.* , 163 F. 2d 373 (2d Cir. 1947)), Congress amended the NLRB in 1947 with the Taft-Hartley Act. The act added section 8(c) which states:

"The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this act, if such expression contains no threat of reprisal or force or promise of benefit. "

Since this change, the NLRB has imposed only one limitation on captive audience meetings: an employer cannot make an election speech "on company time to massed assemblies of employees within 24 hours before the scheduled time for conducting an election" (*Peerless Plywood Co.* , 107 NLRB 427 (1953)). This does not prohibit speeches if they are voluntary and on the employees own time. Speeches to individual employees at their workstations are not necessarily prohibited (*Associated Milk Producers, Inc.* , 237 NLRB 879 (1978)).

NLRA PREEMPTION OF STATE REGULATION

The NLRA does not have an express preemption provision but the interaction of the NLRA with state laws has been the subject of many preemption cases. Two lines of

preemption cases appear relevant.

One line of preemption cases is based on the ruling in *San Diego Trades Council v. Garmon* (359 U. S. 236 (1959)). *Garmon* preemption is based on the primary jurisdiction of the NLRB. This prohibits regulating activities the NLRA arguably protects or prohibits to prevent conflict between state regulation and Congress' integrated scheme of regulation, which includes the choice of the NLRB rather than state or federal courts as the body to implement the act. The courts have upheld a number of exceptions to the rule including state laws on violence, trespass, defamation, and emotional distress (Drummonds, "The Sister Sovereign States: Preemption and the Second Twentieth Century Revolution in the Law of the American Workplace," 62 Fordham L. Rev. 469 (1993); *Healthcare Associates v. Pataki*, 388 F. Supp. 2d 6 (N. D. N. Y. 2005)).

Another line of preemption cases is based on the ruling in *Machinists v. Wisconsin Employment Relations Commission* (427 U. S. 132 (1976)). *Machinists* preemption prohibits state regulation of areas left to the control of the free play of economic forces. This preempts state laws about conduct Congress intended to leave unregulated. It protects against unsettling the balance of interests set by the NLRA and preserves the intentional balance between management and labor. States cannot deny one party to an economic contest a weapon that Congress meant him to have available (Drummonds, "The Sister Sovereign States: Preemption and the Second Twentieth Century Revolution in the Law of the American Workplace," 62 Fordham L. Rev. 469 (1993); *Healthcare Associates v. Pataki*, 388 F. Supp. 2d 6 (N. D. N. Y. 2005)).

Arguments that the NLRA Preempts

A court might view the bill as preempted by the NLRA as an interference with employer speech and the balance struck between employees and employers in the NLRA. Under this view, the NLRA regulates employer and employee speech and the tools available to them in the decisions regarding labor relations. States cannot disrupt that balance and the NLRA prevents them from recalibrating the "rules of engagement" between employers and unions in the context of collective bargaining. Changing the balance also curtails an employer's ability to effectively communicate the advantages or disadvantages of unionization.

It could also be argued that the bill regulates employer speech that Congress intended to leave free from regulation, in furtherance of policies implicated by the NLRA. Employer speech contributes to the marketplace of ideas during representative elections and Congress has an interest in encouraging employer free speech in the area of labor relations. It could be argued that a contrary state law impermissibly substitutes its own policy for federal law.

Arguments that the NLRA Does Not Preempt

A court might view the bill as not preempted by the NLRA. Under the NLRA, captive audience speeches cannot be an unfair labor practice unless they are coercive. The NLRA does not prohibit these speeches and does not give the employer a right to hold them. It could be argued, therefore, that states can step in to regulate this area. And

the bill does not prohibit employer speech in all circumstances but only prohibits

captive audiences. It still leaves avenues for an employer to express its views. It could also be argued that the NLRA does not preempt states from providing employees greater protection from employers in organizing campaigns. Federal law sets minimum standards for workers' rights and the NLRA provides a "floor" that allows states to add greater protections.

Because the bill applies broadly to religious and political matters and not just in the labor organizing context, it could be viewed as an employee welfare and employee rights regulation or a minimum labor standard that is not preempted by the NLRA. The bill could also be viewed like other types of statutes that have been upheld such as false imprisonment claims arising in labor disputes.

Two Recent Preemption Cases

Two recent cases considered state statutes prohibiting organizations that receive state funds from using the money to encourage or discourage union organization. The context of these cases is different from that of Connecticut's bill because the statutes are tied to state funding and require employer neutrality. But the courts in both cases discussed NLRA preemption and found the statutes preempted.

In the New York case, the federal district court found that, under the *Machinists* doctrine, the NLRA preempted the state law from regulating pro- or anti-union advocacy because it interfered with the process protected by NLRA. The court discussed the NLRA's system for promoting or deterring union organization and the jurisprudence emphasizing open and robust advocacy by both employers and employees (*Healthcare Associates v. Pataki*, 388 F. Supp. 2d 6 (N. D. N. Y. 2005)).

The New York case relied heavily on the 9th Circuit Court of Appeals which ruled on a similar California statute (*Chamber of Commerce of the U. S. v. Lockyear*, 422 F. 3d 973, (9th Cir. 2005)). The value of these opinions may be limited as the New York case is currently on appeal to the 2nd Circuit and the 9th Circuit officially withdrew its opinion and ordered an en banc hearing.

FIRST AMENDMENT

In *NLRB v. Gissel Packing Co.* , the U. S. Supreme Court discussed an employer's First Amendment rights under the NLRA. The Court stated:

"But we do note that an employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the board. Thus, section 8(c) merely implements the First Amendment...Any assessment of the precise scope of employer expression, of course, must be made in the context of its labor relations setting. Thus, an employer's rights cannot outweigh the equal rights of the employees to associate freely, as those rights are embodied in section 7 and protected by section 8(a)(1) and the proviso to section 8(c). And any balancing of those rights must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily

dismissed by a more disinterested ear" (395 U. S. 575, 616-618 (1969)).

First Amendment Arguments

The bill could face a First Amendment challenge based on the employer's free speech rights. Proponents of the bill argue that employees have certain First Amendment rights when they are a "captive audience. " "The First Amendment permits the government to prohibit offensive speech as intrusive when the captive audience cannot avoid the objectionable speech" (*Frisby v. Schultz*, 487 U. S. 474, 487 (1988)). The Court has upheld government regulation of speech in other circumstances where the audience was "captive" but we have not found any cases specifically in this labor-management context.

Marcy Strauss, in a law review article, states that:

"Despite numerous Supreme Court decisions invoking the captive audience doctrine, the Court has failed to shed any meaningful light on the definition of captivity and on the precise burden placed on individuals to avoid the message. Perhaps the only clear conclusions one can draw is that the captive audience doctrine is more likely to be used to restrict speech when the individual is viewed as a 'captive in the home' than simply on the street, and individuals are more likely to be viewed as captive when speech is spoken, rather than written. Even within those categories, the Court has not consistently defined what is meant by captive" ("Redefining the Captive Audience Doctrine, 19 Hastings Const. L. Q. 85 (1992)).

Examples of cases where the Court upheld regulations under the captive audience doctrine include a city ordinance against picketing at an individual's residence or dwelling (*Frisby v. Schultz*, 487 U. S. 474, 487 (1988)), unwilling listeners and sound trucks (*Kovacs v. Cooper*, 336 U. S. 77 (1949)), and passengers on a municipal bus forced to see advertisements (*Lehman v. Shaker Heights*, 418 U. S. 298 (1974)).

One commentator, Elizabeth Masson, recently argued for a captive audience exception in the labor-management setting as valid under the First Amendment. She argues as follows.

1. The NLRA proclaims that protecting employee rights and promoting industrial equality are important and regulating speech that threatens those goals advances the First Amendment.

2. The captive audience doctrine is premised in part on the right to choose what information to receive and to make one's own choices based on that information. In balancing the right of free speech with the right to choose what one hears, courts consider the burden the listener should bear to avoid the speech, such as walking away.

3. If the choice not to hear speech cannot be made freely, the burden is unreasonable. The greatest justification for regulating expression based on the captive audience doctrine is when the speech is highly intrusive on the right to choose not to listen and the burden of avoiding the speech is extreme. In the case of captive audiences in the labor organizing context, workers can be fired for refusing to

attend a captive audience meeting.

4. Some courts have recognized the captive nature of employees at work in cases where employers or third parties targeted workers with objectionable speech (Masson cites *Robinson v. Jacksonville Shipyards, Inc.* , 760 F. Supp. 1468 (M. D. Fla. 1991) (holding female employees were captive audience to speech creating a hostile work environment) and *Resident Advisory Bd. v. Rizzo*, 503 F. Supp. 383 (E. D. Penn. 1980) (holding employees at jobsite were captive audience as only measure they could take to avoid speech was to quit their jobs)).

(Masson, "Captive Audience Meetings in Union Organizing Campaigns: Free Speech or Unfair Advantage?," 56 Hastings L. J. 169 (2004).

It is unclear how a court would rule on these arguments.

These First Amendment arguments could also apply to the bill's provisions on captive audiences for speech on topics of religion or political matters other than labor organizing. But we did not conduct extensive research on how the First Amendment might apply to these categories.

CR: ts

*[359 US 236]

*SAN DIEGO BUILDING TRADES COUNCIL, MILLMEN'S UNION, LOCAL 2020, BUILDING MATERIAL AND DUMP DRIVERS, LOCAL 36, Petitioners

v

J. S. GARMON, J. M. Garmon, and W. A. Garmon

359 US 236, 3 L ed 2d 775, 79 S Ct 773

[No. 66]

Argued January 20, 1959. Decided April 20, 1959.

SUMMARY

A judgment of the Supreme Court of California, affirming a judgment enjoining, and awarding damages against, a union which had engaged in peaceful picketing found to be tortious under California law, and as to which the National Labor Relations Board had declined to exercise jurisdiction, had been vacated by the United States Supreme Court and the cause remanded on the ground that the case was governed, in its major aspects, by other Supreme Court rulings, in cases involving state relief of an equitable nature, to the effect that refusal of the National Labor Relations Board to assert jurisdiction did not leave the states with power over activities they otherwise would be pre-empted, by the amended National Labor Relations Act, from regulating (353 US 26, 1 L ed 2d 618, 77 S Ct 607). On remand, the California Supreme Court set aside the injunction but sustained the award of damages (49 Cal 2d 595, 320 P2d 473).

On certiorari, the United States Supreme Court reversed the judgment below. FRANKFURTER, J., speaking for five members of the Court, held that, because it was arguable that the union activity involved in the instant case fell within the compass of the protected "concerted activities" provision of § 7 of The Federal Labor Relations Act, or was an unfair labor practice under § 8 of the act, state jurisdiction, either to award an injunction or damages, was displaced.

HARLAN, J., joined by CLARK, WHITTAKER, and STEWART, JJ., concurred in the result, but stated that they did so only on the ground that the union activity for which California awarded damages might fairly be considered protected under the federal labor relations statute. But, it was said, if it were clear that union conduct was not so protected, the state would be barred only from enjoining, and not from awarding damages respecting, the activity, even if the activity might be deemed to be federally prohibited.

SUBJECT OF ANNOTATION

Beginning on page 1932, infra

State power to enjoin picketing as affected by federal labor relations acts

HEADNOTES

Classified to U.S. Supreme Court Digest, Annotated

Commerce § 91 — federal power — labor relations.

1. By the Labor Management Relations Act Congress has not exhausted the full sweep of legislative power over industrial relations given by the commerce clause.

[*See annotation reference* 1]

Commerce § 129 — labor relations — state power.

2. Both as to labor activities outlawed and those left free for the operation of economic forces by the amended National Labor Relations Act, the areas that have been preempted by the act and thereby withdrawn from state power are not susceptible of delimitation by fixed metes and bounds.

[*See annotation references* 1, 2, *and annotation, p.* 1932, *infra*]

Labor §§ 47, 94 — federal law — purpose and extent.

3. Sections 7 and 8 of the amended National Labor Relations Act (29 USC §§ 157, 158), governing protected "concerted activities" and unfair labor practices, regulate the vital, economic instruments of the strike and the picket line, and impinge on the clash of unsettled claims between employers and labor unions.

[*See annotation reference* 3]

Commerce § 129 — labor relations — state power.

4. The statutory implications concerning what the amended National Labor Relations Act has taken from the states and what has been left to them are to be translated into concreteness by the process of litigating elucidation.

[*See annotation reference* 1]

Commerce § 129 — labor relations — state power — judicial function.

5. In determining the extent to which state regulation must yield to the subordinating federal authority represented by the amended National Labor Relations Act, the United States Supreme Court is concerned with delimiting areas of potential conflict of rules of law, of remedy, and of administration; the nature of the judicial process precludes an ad hoc judicial inquiry into the special problems of labor-management relations involved in a particular set of occurrences in order to ascertain the precise nature and degree of federal-state conflict there involved, and more particularly what exact mischief such a conflict would cause.

[*See annotation reference* 1]

Courts § 142; Labor § 91 — federal policy — review.

6. It is for the National Labor Relations Board and Congress, and not the courts, to make determinations which depend upon judgments as to the impact of particular labor-management conflicts on the entire scheme of federal labor policy and administration.

Commerce § 129 — federal labor law — enforcement — local variations.

7. In the Federal Labor Relations Act Congress has not merely laid down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the public, but has expressed its intention that centralized administration of specially designed procedures is necessary to

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ANNOTATION REFERENCES

1. National Labor Relations Act and Labor Management Relations Act as excluding state action, 93 L ed 470, 94 L ed 984, 95 L ed 384, 98 L ed 245, 99 L ed 559, 100 L ed 1174. See also 173 ALR 1401.

2. State power to enjoin picketing as affected by federal labor relations acts, 2 L ed 2d 1630 and 3 L ed 2d 1932. See also 32 ALR2d 1026.

3. Rights of collective action by employees as declared in § 7 of National Labor Relations Act, 6 ALR2d 416.

4. The doctrine of primary administrative jurisdiction, 94 L ed 806 and 1 L ed 2d 1596.

obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies.

Commerce § 129 — labor relations — state power.

8. When the exercise of state power over a particular area of activity threatens interference with the clearly indicated policy of industrial relations embodied in the amended National Labor Relations Act, it is judicially necessary to preclude the states from acting; but due regard for the presuppositions of the federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy, requires that it be found that there is no withdrawal from the states of power to regulate where the activity regulated is a merely peripheral concern of the federal labor relations statute, or where the regulated conduct touches interests so deeply rooted in local feeling and responsibility that in the absence of compelling congressional direction it cannot be inferred that Congress deprived the states of the power to act.

[*See annotation reference* 1]

Commerce § 129 — labor relations — state power — method of regulation.

9. Where it is clear or may clearly be assumed that activities which a state purports to regulate are "concerted activities" which are protected by § 7 of the amended National Labor Relations Act (29 USC § 157), or constitute an unfair labor practice under § 8 of the act (29 USC § 158), due regard for the federal enactment requires that state jurisdiction must yield, regardless of whether the state acts through laws of broad general application rather than through laws specifically directed toward the governance of industrial relations.

[*See annotation references* 1, 3]

Administrative Law § 322; Commerce § 129; Labor § 82 — primary jurisdiction — judicial relief — state action.

10. The courts are not primary tribunals to adjudicate the question whether a particular labor activity which a state seeks to regulate is governed by § 7 or § 8 of the amended National Labor Relations Act (29 USC §§ 157, 158) or lies outside both these sections; it is essential to the administration of the act that these determinations be left in the first instance to the National Labor Relations Board.

[*See annotation references* 1, 4]

Administrative Law § 322; Commerce § 129; Labor § 82 — primary jurisdiction — state action.

11. State power and state jurisdiction, as much as authority of the United States Supreme Court, must yield to the exclusive primary competence of the National Labor Relations Board to determine whether a particular labor-management controversy lies within the jurisdiction of the Board; when an activity is arguably subject to § 7 or § 8 of the amended National Labor Relations Act (29 USC §§ 157, 158); 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.

[*See annotation references* 1, 4]

Commerce § 129 — labor relations — state power.

12. Upon a determination by the National Labor Relations Board, subject to appropriate federal judicial review, that particular conduct is protected by § 7 of the amended National Labor Relations Act (29 USC § 157), or is prohibited by § 8 of the act (29 USC § 158), the states are ousted of all jurisdiction respecting such conduct.

[*See annotation reference* 1]

Commerce § 129 — labor relations — state power.

13. The failure of the National La-

bor Relations Board to define the significance under the amended National Labor Relations Act of a particular activity does not give to the states the power to act with respect to that activity.

[*See annotation reference* 1]

Commerce § 129 — labor relations — state power.

14. When the National Labor Relations Board has not clearly determined that an activity is neither protected nor prohibited by the amended National Labor Relations Act, such activity is withdrawn from possible state regulation, the governing consideration being that to allow the state to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy.

[*See annotation reference* 1]

Commerce § 129 — labor relations — state power — arguable points.

15. When the National Labor Relations Board has not adjudicated the status of particular labor conduct, and such conduct is arguably within the compass of § 7 or § 8 of the amended National Labor Relations Act (29 USC §§ 157, 158), a state is barred from enjoining such conduct or giving a remedy in damages therefor; hence, a state may not give an employer a remedy in damages against a union which is engaged in nonviolent picketing where it is arguable that the picketing is an unfair labor practice under § 8(b)(2) of the amended National Labor Relations Act.

[*See annotation references* 1, 2, *and annotation, p.* 1932, *infra*]

Commerce § 129 — labor relations — state power.

16. The states' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme embodied in the amended National Labor Relations Act.

[*See annotation reference* 1]

APPEARANCES OF COUNSEL

Charles P. Scully, of San Francisco, California, argued the cause for petitioners.

Marion B. Plant, of San Francisco, California, argued the cause for respondents.

Briefs of Counsel, p 1900, infra.

OPINION OF THE COURT

Mr. Justice **Frankfurter** delivered the opinion of the Court.

This case is before us for the second time. The present litigation began with a dispute between the petitioning unions and respondents, co-partners in the business of selling lumber and other materials in California. Respondents began an action in the Superior Court for the County of San Diego, asking for an injunction and damages. Upon hearing, the trial court found the following facts. In March of 1953 the unions sought from respondents an agreement to retain in their employ only those workers who were already members of the unions, or who applied for membership within thirty days. Respondents refused, claiming that none of their employees had shown a desire to join a union, and that, in any event, they could not accept such an arrangement until one of the unions had been designated by the employees as a collective bargaining agent. The unions began at once peacefully to picket the respondents' place of business, and to exert pressure on customers and suppliers in order to persuade them to stop dealing with respondents. The sole purpose of these pressures was to compel execu-

tion of the proposed contract. The unions contested this finding, claiming that the only purpose of their activities was to educate the workers and persuade them to become members. On the basis of its findings, the court enjoined the unions from picketing and from the use of other pressures to force an agreement,

*[359 US 238]

until one of *them had been properly designated as a collective bargaining agent. The court also awarded $1,000 damages for losses found to have been sustained.

At the time the suit in the state court was started, respondents had begun a representation proceeding before the National Labor Relations Board. The Regional Director declined jurisdiction, presumably because the amount of interstate commerce involved did not meet the Board's monetary standards in taking jurisdiction.

On appeal, the California Supreme Court sustained the judgment of the Superior Court, 45 Cal 2d 657, 291 P2d 1, holding that, since the National Labor Relations Board had declined to exercise its jurisdiction, the California courts had power over the dispute. They further decided that the conduct of the union constituted an unfair labor practice under § 8(b)(2) of the National Labor Relations Act, and hence was not privileged under California law. As the California court itself later pointed out this decision did not specify what law, state or federal, was the basis of the relief granted. Both state and federal law played a part but, "[a]ny distinction as between those laws was not thoroughly explored." Garmon v San Diego Bldg. Trades Council, 49 Cal 2d 595, 602, 320 P2d 473, 477.

We granted certiorari, 351 US 923, 100 L ed 1453, 76 S Ct 782, and decided the case together with Guss v Utah Labor Relations Board, 353 US 1, 1 L ed 2d 601, 77 S Ct 598, 609, and Amalgamated Meat Cutters v Fairlawn Meats, Inc. 353 US 20, 1 L ed 2d 613, 77 S Ct 604, 609. In those cases, we held that the refusal of the National Labor Relations Board to assert jurisdiction did not leave with the States power over activities they otherwise would be pre-empted from regulating. Both Guss and Fairlawn involved relief of an equitable nature. In vacating and remanding the judgment of the California court in this case, we pointed out that those cases controlled this one, "in its major aspects." 353 US, at 28. However, since it was not clear whether the

*[359 US 239]

*judgment for damages would be sustained under California law, we remanded to the state court for consideration of that local law issue. The federal question, namely, whether the National Labor Relations Act precluded California from granting an award for damages arising out of the conduct in question, could not be appropriately decided until the antecedent state law question was decided by the state court.

On remand, the California court, in accordance with our decision in Guss, set aside the injunction, but sustained the award of damages. Garmon v San Diego Bldg. Trades Council, 49 Cal 2d 595, 320 P2d 473 (three judges dissenting). After deciding that California had jurisdiction to award damages for injuries caused by the union's activities, the California court held that those activities constituted a tort based on an unfair labor practice under state law. In so holding the court relied on general tort provisions of the California Civil Code, §§ 1677, 1708, as well as state enactments dealing specifically with labor relations, Calif. Labor Code,

§ 923 (1937); ibid., §§ 1115–1118 (1947).

We again granted certiorari, 357 US 925, 2 L ed 2d 1369, 78 S Ct 1371, to determine whether the California court had jurisdiction to award damages arising out of peaceful union activity which it could not enjoin.

The issue is a variant of a familiar theme. It began with Allen-Bradley Local, U. E. R. M. W. v Wisconsin Employment Relations Board, 315 US 740, 86 L ed 1154, 62 S Ct 820, was greatly intensified by litigation flowing from the Taft-Hartley Act, and has recurred here in almost a score of cases during the last decade. The comprehensive regulation of industrial relations by Congress, novel federal legislation twenty-five years ago but now an integral part of our economic life, inevitably gave rise to difficult problems of federal-state relations. To be sure, in the abstract these problems came to us as ordinary questions of statutory construction. But they involved a more complicated

*[359 US 240]

*and perceptive process than is conveyed by the delusive phrase, "ascertaining the intent of the legislature." Many of these problems probably could not have been, at all events were not, foreseen by the Congress. Others were only dimly perceived and their precise scope only vaguely defined. This Court was called upon to apply a new and complicated legislative scheme, the aims and social policy of which were drawn with broad strokes while the details had to be filled in, to no small extent, by the judicial process. Recently we indicated the task that was thus cast upon this Court in carrying out with fidelity the purposes of Congress, but doing so by giving application to congressional incompletion. What we said in Weber v Anheuser-Busch, Inc. 348 US 468, 99 L ed 546, 75 S Ct 480, deserves repetition, because the considerations there outlined guide this day's decision:

"By the Taft-Hartley Act, Congress did not exhaust the full sweep of legislative power over industrial relations given by the Commerce Clause. Congress formulated a code whereby it outlawed some aspects of labor activities and left others free for the operation of economic forces. As to both categories, the areas that have been preempted by federal authority and thereby withdrawn from state power are not susceptible of delimitation by fixed metes and bounds. Obvious conflict, actual or potential, leads to easy judicial exclusion of state action. Such was the situation in Garner v Teamsters Union, supra. But as the opinion in that case recalled, the Labor Management Relations Act 'leaves much to the states, though Congress has refrained from telling us how much.' 346 US, at 488. The penumbral area can be rendered progressively clear only by the course of litigation." 348 US at 480, 481.

Headnote 1 Headnote 2

*[359 US 241]

*The case before us concerns one of the most teasing and frequently litigated areas of industrial relations, the multitude of activities regulated by §§ 7 and 8 of the National Labor Relations Act. 61 Stat 140, 29 USC §§ 157, 158. These broad provisions govern both protected "concerted activities" and unfair labor practices. They regulate the vital, economic instruments of the strike and the picket line, and impinge on the clash of the still unsettled claims between employers and labor unions. The extent to which the variegated laws of the several States are displaced by a single, uniform, national rule has been a matter of frequent and re-

Headnote 3

curring concern. As we pointed out the other day, "the statu-
Headnote 4 tory 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." International Asso. of Machinists v Gonzales, 356 US 617, 619, 2 L ed 2d 1018, 1021, 78 S Ct 923.

In the area of regulation with which we are here concerned, the process thus described has contracted initial ambiguity and doubt and established guides for judgment by interested parties and certainly guides for decision. We state these principles in full realization that, in the course of a process of tentative, fragmentary illumination carried on over more than a decade during which the writers of opinions almost inevitably, because unconsciously, focus their primary attention on the facts of particular situations, language may have been used or views implied which do not completely harmonize with the clear pattern which the decisions have evolved. But it may safely be claimed that the basis and purport of a long series of adjudications have "translated into concreteness" the consistently applied principles which decide this case.

In determining the extent to which state regulation must yield to subordinating federal au-
*[359 US 242]
Headnote 5 thority, we have *been concerned with delimiting areas of potential conflict; potential conflict of rules of law, of remedy, and of administration. The nature of the judicial process precludes an ad hoc inquiry into the special problems of labor-management relations involved in a particular set of occurrences in order to ascertain the precise nature and degree of federal-state conflict there involved, and more particularly what exact mischief such a conflict would cause. Nor is it our business to attempt this. Such determinations inevitably depend upon judgments on the impact of these particular conflicts on the entire scheme of federal labor policy and administration. Our task is confined to dealing with classes of situations. To
Headnote 6 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 the 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 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:

"Congress did not merely lay down a substantive rule of law to be enforced by any tribunal
Headnote 7 competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of spe-
*[359 US 243]
cially designed procedures *was necessary to obtain uniform application of its substantive rules and to avoid

these diversities and conflicts likely to result from a variety of local procedures and attitudes towards labor controversies. . . . A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law. . . ." Garner v Teamsters C. & H. Local Union, 346 US 485, 490, 491, 98 L ed 228, 239, 240, 74 S Ct 161.

Administration is more than a means of regulation; administration is regulation. We have been concerned with conflict in its broadest sense; conflict with a complex and interrelated federal scheme of law, remedy, and administration. Thus, judicial concern has necessarily focused on the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted. When the exercise of state power over a particular area of activity threatened interference with the clearly indicated policy of industrial relations, it has been judicially necessary to preclude the States from acting.[1] However, due regard for the presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy, has required us not to find withdrawal from the States of power to regulate where the activity regulated was a merely peripheral concern of the Labor Management Relations Act.

Headnote 8

*[359 US 244]

See International *Asso. of Machinists v Gonzales, 356 US 617, 2 L ed 2d 1018, 78 S Ct 923. Or where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act.[2]

When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law. Nor has it mattered whether the States have acted through laws of broad general application rather than laws specifically directed towards the governance of industrial relations.[3] Regardless of

Headnote 9

1. E. g., Guss v Utah Labor Relations Board, 353 US 1, 1 L ed 2d 601, 77 S Ct 598, 609; Youngdahl v Rainfair, 355 US 131, 2 L ed 2d 151, 78 S Ct 206; Local Union No. 25, I. B. T. C. W. H. v New York, N. H. & H. R. Co. 350 US 155, 100 L ed 166, 76 S Ct 227; Weber v Anheuser-Busch, Inc. 348 US 468, 99 L ed 546, 75 S Ct 480; Garner v Teamsters C. & H. Local Union, 346 US 485, 98 L ed 228, 74 S Ct 161; International Union, etc. Workers v O'Brien, 339 US 454, 94 L ed 978, 70 S Ct 781; Amalgamated Asso. S. E. R. M. C. E. v Wisconsin Employment Relations Board, 340 US 383, 95 L ed 364, 71 S Ct 359; Hill v Florida, 325 US 538, 89 L ed 1782, 65 S Ct 1373. The cases up to that time are summarized in Weber v Anheuser-Busch, Inc. 348 US 468, 99 L ed 546, 75 S Ct 480.

2. International Union, U. A. A. & A. I. W. v Russell, 356 US 634, 2 L ed 2d 1030, 78 S Ct 932; Youngdahl v Rainfair, 355 US 131, 2 L ed 2d 151, 78 S Ct 206; United Auto, A. & A. I. W. v Wisconsin Employment Relations Board, 351 US 266, 100 L ed 1162, 76 S Ct 794; United Constr. Workers v Laburnum Constr. Corp. 347 US 656, 98 L ed 1025, 74 S Ct 833.

3. See Weber v Anheuser-Busch, Inc. 348 US 468, 99 L ed 546, 75 S Ct 480, in which it was pointed out that the state

the mode adopted, to allow the States to control which is the subject of national regulation would create potential frustration of national purposes.

At times it has not been clear whether the particular activity regulated by the States was governed by § 7 or § 8 or was, perhaps, outside both these sections. But

Headnote 10 courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first

*[359 US 245]

instance to the National *Labor Relations Board. What

Headnote 11 is outside the scope of this Court's authority cannot remain within a State's power and state jurisdiction too must yield to the exclusive primary competence of the Board. See, e.g., Garner v Teamsters C. & H. Local Union, 346 US 485, especially at 489–491, 98 L ed 228, 238–240, 74 S Ct 161; Weber v Anheuser-Busch, Inc. 348 US 468, 99 L ed 546, 75 S Ct 480.

The case before us is such a case. The adjudication in California has throughout been based on the assumption that the behavior of the petitioning unions constituted an unfair labor practice. This conclusion was derived by the California courts from the facts as well as from their view of the Act. 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 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted. Ibid.

To require the States to yield to the primary jurisdiction of the National Board does not ensure Board adjudication of the status of a disputed activity. If the

Headnote 12 Board decides, subject to appropriate federal judicial review, that conduct is protected by § 7, or prohibited by § 8, then the matter is at an end, and the States are ousted of all jurisdiction. Or, 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.[4] However, the Board may also fail to determine the status of the disputed conduct by declining to assert jurisdiction, or by refusal of the General

*[359 US 246]

Counsel to file *a charge, or by adopting some other disposition which does not define the nature of the activity with unclouded legal significance. This was the basic problem underlying our decision in Guss v Utah Labor Relations Board, 353 US 1, 1 L ed 2d 601, 77 S Ct 598, 609. In that case we held that the failure of the National Labor Relations Board to assume jurisdiction did not leave the States free to regulate activities they would otherwise be precluded from regulating.

Headnote 13 It follows that the failure

Headnote 14 of the Board to define the legal significance under the Act of a particular activity does not give the States the

court had relied on a general restraint of trade statute. Cf. United Auto., A. & A. I. W. v Wisconsin Employment Relations Board, 351 US 266, 100 L ed 1162, 76 S Ct 794. The case before us involves both tort law of general application and specialized labor relations statutes. See pp. 779, 780, supra.

4. See International Union, U. A. W. v Wisconsin Employment Relations Board, 336 US 245, 93 L ed 651, 69 S Ct 516. The approach taken in that case, in which the Court undertook for itself to determine the status of the disputed activity, has not been followed in later decisions, and is no longer of general application.

power to act. In the absence of the Board's clear determination that an activity is neither protected nor prohibited or of compelling precedent applied to essentially undisputed facts, it is not for this Court to decide whether such activities are subject to state jurisdiction. The withdrawal of this narrow area from possible state activity follows from our decisions in Weber and Guss. 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.[5]

In the light of these principles the case before us is clear. Since the National Labor Relations Board has not adjudicated the status of the conduct for which the State of California seeks to give a remedy in damages, and since such activity is arguably within the compass of § 7 or § 8 of the Act, the State's jurisdiction is displaced.

Headnote 15

Nor is it significant that California asserted its power to give damages rather than to enjoin what the Board may restrain though it could not compensate. Our concern is with delimiting areas of conduct which must be free from state regulation if national policy is to be left

*[359 US 247]

unhampered. *Such regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy. Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme. See Garner v Teamsters C. & H. Local Union, 346 US 485, 492–497, 98 L ed 228, 240–243, 74 S Ct 161. It may be that an award of damages in a particular situation will not, in fact, conflict with the active assertion of federal authority. The same may be true of the incidence of a particular state injunction. To sanction either involves a conflict with federal policy in that it involves allowing two lawmaking sources to govern. In fact, since remedies form an ingredient of any integrated scheme of regulation, to allow the State to grant a remedy here which has been withheld from the National Labor Relations Board only accentuates the danger of conflict.

Headnote 16

It is true that we have allowed the States to grant compensation for the consequences, as defined by the traditional law of torts, of conduct marked by violence and imminent threats to the public order. United Auto. Workers v Russell, 356 US 634, 2 L ed 2d 1030, 78 S Ct 932; United Constr. Workers v Laburnum Corp. 347 US 656, 98 L ed 1025, 74 S Ct 833. We have also allowed the States to enjoin such conduct. Youngdahl v Rainfair, 355 US 131, 2 L ed 2d 151, 78 S Ct 206; United Auto. A. & A. I. W. v Wisconsin Employment Relations Board, 351 US 266, 100 L ed 1162, 76 S Ct 794. State jurisdiction has prevailed in these situations because the compelling state interest, in the scheme of our federalism, in the maintenance of domestic peace is not overriden in the absence of clearly expressed congressional direction. We

5. "When Congress has taken the particular subject-matter in hand coincidence is as ineffective as opposition . . . ." Charleston & W. C. R. Co. v Varnville Furniture Co. 237 US 597, 604, 59 L ed 1137, 1140, 35 S Ct 715, Ann Cas 1916D 333.

recognize that the opinion in United Constr. Workers v Laburnum Corp. 347 US 656, 98 L ed 1025, 74 S Ct 833, found support in the fact that the state remedy had no federal

*[359 US 248]

counterpart. But that decision *was determined, as is demonstrated by the question to which review was restricted, by the "type of conduct" involved, i. e., "intimidation and threats of violence." [6] In the present case there is no such compelling state interest.

The judgment below is Reversed.

SEPARATE OPINION

*[359 US 249]

*Mr. Justice Harlan, whom Mr. Justice Clark, Mr. Justice Whittaker and Mr. Justice Stewart join, concurring.

I concur in the result upon the narrow ground that the Unions' activities for which the State has awarded damages may fairly be considered protected under the Taft-

6. The conduct involved in Laburnum was so characterized in United Auto. Workers v Russell, 356 US 634, 640, 2 L ed 2d 1030, 1035, 78 S Ct 932, in an opinion by Mr. Justice Burton, who also wrote the opinion of the Court in Laburnum. When this very case was before us for the first time we noted that "Laburnum sustained an award of damages under state tort law for violent conduct. We cannot know that the California court would have interpreted its own state law to allow an award of damages in this situation." 353 US at 29.

In Laburnum this Court itself expressly phrased its grant of certiorari to include only the limited question of the State's jurisdiction to award damages "[i]n view of the type of conduct found by the Supreme Court of Appeals of Virginia to have been carried out by Petitioners . . . ," 346 US 936, 98 L ed 425, 74 S Ct 374, despite the fact that petitioners had urged upon us a question not limited to the particular conduct involved. Petition for certiorari, p. 6.

Throughout, the opinion of the Court makes it clear that the holding in favor of state jurisdiction was limited to a situation involving violence and threats of violence. Thus the findings of the Virginia court as to the flagrant and violent activities of petitioners were set out at length. 347 US, at 660–662, note 4. The Court relies on statements by Senator Taft, the Act's sponsor, and from a Senate Report which point out that "mass picketing," "violence," "threat[s] of violence," may be a violation of state law, as well as unfair labor practices under the Act. 347 US, at 668.

The Court in Laburnum points out that it would be inconsistent with the provisions of the Act which allow recovery for damages caused by secondary boycotts, not to allow an injured party "to recover damages caused more directly and flagrantly through such conduct as is before us." 347 US 666. The Court also placed reliance on a quotation from International Union, U. A. W. v Wisconsin Employment Relations Board, 336 US 245, 253, 93 L ed 651, 662, 69 S Ct 516, which points out that the "[p]olicing of . . . conduct . . . ," which consists of "actual or threatened violence to persons or destruction of property," is left to the States. In its concluding paragraph the Court again stresses that Virginia has jurisdiction over "coercion of the type found here . . . ."

The damages awarded were extensive, consisting primarily of loss of profits caused by the disruption of respondents' business resulting from the violence. These damages were restricted to the "damages directly and proximately caused by wrongful conduct chargeable to the defendants . . ." as defined by the traditional law of torts. United Constr. Workers v Laburnum, 194 Va 872, 887, 75 SE2d 694, 704. Thus there is nothing in the measure of damages to indicate that state power was exerted to compensate for anything more than the direct consequences of the violent conduct.

All these factors make it plain that our decision in Laburnum rested on the nature of the activities there involved, and the interest of the State in regulating them. The case has been so interpreted in later decisions of this Court. See Weber v Anheuser-Busch, Inc. 348 US 468, 477, 99 L ed 546, 555, 75 S Ct 480, and the phrases quoted from Russell, supra. In Russell we again allowed the State to award damages for injuries caused by "mass picketing and threats of violence . . . ," 356 US, at 638. That opinion also continually

Hartley Act, and that therefore state action is precluded until the National Labor Relations Board has made a contrary determination respecting such activities. As the Court points out, it makes no difference that the Board has declined to exercise its jurisdiction. See Guss v Utah Labor Relations Board, 353 US 1, 1 L ed 2d 601, 77 S Ct 598, 609; Amalgamated Meat Cutters & B. W. v Fairlawn Meats, Inc. 353 US 20, 1 L ed 2d 613, 77 S Ct 604, 609, and our earlier opinion in the present case when it was first before us, 353 US 26, 1 L ed 2d 618, 77 S Ct 607, 609.

*[359 US 250]

*Were nothing more than this particular case involved, I would be content to rest my concurrence at this point without more. But as today's decision will stand as a landmark in future "pre-emption" cases in the labor field, I feel justified in particularizing why I cannot join the Court's opinion.

If it were clear that the Unions' conduct here was unprotected activity under Taft-Hartley, I think that United Constr. Workers v Laburnum Constr. Corp. 347 US 656, 98 L ed 1025, 74 S Ct 833, and International Union, U. A. A. & A. I. W. v Russell, 356 US 634, 2 L ed 2d 1030, 78 S Ct 932, would require that the California judgment be sustained, even though such conduct might be deemed to be federally prohibited. In both these cases state tort damage judgments against unions were upheld in respect of conduct which this Court assumed was prohibited activity under the Federal Labor Act. The Court now says, however, that those decisions are not applicable here because they were premised on violence, which the States could also have enjoined, United Auto., A. & A. I. W. v Wisconsin Employment Relations Board, 351 US 266, 100 L ed 1162, 76 S Ct 794, whereas in this case the Unions' acts were peaceful. In this I think the Court mistaken.

The threshold question in every labor pre-emption case is whether the conduct with respect to which a State has sought to act is, or may fairly be regarded as, federally protected activity. Because conflict is the touchstone of pre-emption, such activity is obviously beyond the reach of all state power. Hill v Florida, 325 US 538, 89 L ed 1782, 65 S Ct 1373; International Union, etc. Workers v O'Brien, 339 US 454, 94 L ed 978, 70 S Ct 781; Motor Coach Employees v Wisconsin Employment Relations Board, 340 US 383, 95 L ed 364, 71 S Ct 359. That threshold question was squarely faced in the Russell case, where the Court, at page 640, said: "At the outset, we note that the union's activity in this case clearly was not protected by federal law." The same question was, in my view, necessarily faced in Laburnum.

In both cases it was possible to decide that question without prior reference to the National Labor Re-

*[359 US 251]

lations *Board because the union conduct involved was violent, and as such was of course not protected by the federal Act. Thus in Laburnum, the pre-emption issue was limited to the "type of conduct" before the Court. 347 US, at 658. Similarly in Russell, which was decided on Laburnum principles, the Court stated that the union's activity "clearly was not protected," and immediately went on to say (citing prior "violence" cases[1]) that "the strike was

stresses the violent nature of the conduct and limits its decision to the "kind of tortious conduct" there involved. 356 US, at 646. See also 356 US, at 642; and 356 US, at 640, where the Court points out that Alabama could have enjoined the activities of the union.

1. Youngdahl v Rainfair, Inc. 355 US 131, 2 L ed 2d 151, 78 S Ct 206; United Auto., A. & A. I. W. v Wisconsin Employ-

conducted in such a manner that it could have been enjoined" by the State. 356 US, at 640. In both instances the Court, in reliance on former "violence" cases involving injunctions,[2] might have gone on to hold, as the Court now in effect says it did, that the state police power was not displaced by the federal Act, and thus disposed of the cases on the ground that state damage awards, like state injunctions, based on violent conduct did not conflict with the federal statute. The Court did not do this, however.

Instead the relevance of violence was manifestly deemed confined to rendering the Laburnum and Russell activities federally unprotected. So rendered, they could then only have been classified as prohibited or "neither protected nor prohibited." If the latter, state jurisdiction was beyond challenge. International Union, U. A. W. v Wisconsin Employment Relations Board, 336 US 245, 93 L ed 651, 69 S Ct 516.[3] Conversely, if the activities could have been considered prohibited, primary decision by the Board would have been necessary, if state damage awards were inconsistent with federal prohibitions. Garner v Teamsters, C. & H. Local Union, 346 US 485, 98 L ed 228, 74 S Ct 161. To determine the need for initial reference to the Board, the Court assumed that the activities were unfair labor practices prohibited by the

*[359 US 252]

*federal Act. Laburnum, supra (347 US at 660–663); Russell, supra (356 US at 641). It then considered the possibility of conflict and held that the state damage remedies were not pre-empted because the federal Act afforded no remedy at all for the past conduct involved in Laburnum, and less than full redress for that involved in Russell. The essence of the Court's holding, which made resort to primary jurisdiction unnecessary, is contained in the following passage from the opinion in Laburnum, supra (347 US at 665) (also quoted in Russell, supra (356 US at 644)):

"To the extent that Congress prescribed preventive procedure against unfair labor practices, that case [Garner v Teamsters, C. & H. Local Union (US) supra,] recognized that the Act excluded conflicting state procedure to the same end. To the extent, however, that Congress has not prescribed procedure for dealing with the consequences of tortious conduct already committed, there is no ground for concluding that existing criminal penalties or liabilities for tortious conduct have been eliminated. The care we took in the Garner case to demonstrate the existing conflict between state and federal administrative remedies in that case was, itself, a recognition that if no conflict had existed, the state procedure would have survived."

Until today this holding of Laburnum has been recognized by subsequent cases. See Weber v Anheuser-Busch, Inc. 348 US 468, 477, 99 L ed 546, 555, 75 S Ct 480; International Union, U. A. I. & A. I. W. v Russell, supra (356 US at 640, 641, 644); International Asso. of Machinists v Gonzales, 356 US 617, 621, 2 L ed 2d 1018, 1022, 78 S Ct 923, similarly characterizing Russell; see also the dissenting opinion in Gonzales, especially at 624–626.[4]

*[359 US 253]

*The Court's opinion in this case

ment Relations Board, 351 US 266, 100 L ed 1162, 76 S Ct 794.

2. See Allen-Bradley Local v Wisconsin Employment Relations Board, 315 US 740, 86 L ed 1154, 62 S Ct 820; cases cited at Note 1, supra.

3. See text at p. 788, infra.

4. The same view is taken of Laburnum and Russell in the amici briefs filed in the present case by the Government and the American Federation of Labor and Congress of Industrial Organizations, the

cuts deeply into the ability of States to furnish an effective remedy under their own laws for the redress of past nonviolent tortious conduct which is not federally protected, but which may be deemed to be, or is, federally prohibited. Henceforth the States must withhold access to their courts until the National Labor Relations Board has determined that such unprotected conduct is not an unfair labor practice, a course which, because of unavoidable Board delays, may render state redress ineffective. And in instances in which the Board declines to exercise its jurisdiction, the States are entirely deprived of power to afford any relief. Moreover, since the reparation powers of the Board, as we observed in Russell, are narrowly circumscribed, those injured by nonviolent conduct will often go remediless even when the Board does accept jurisdiction.

I am, further, at loss to understand, and can find no basis on principle or in past decisions for, the Court's intimation that the States may even be powerless to act when the underlying activities are clearly "neither protected nor prohibited" by the federal Act. Surely that suggestion is foreclosed by International Union, U. A. W. v Wisconsin Employment Relations Board, 336 US, supra,[5] as well as by the approach taken to federal pre-emption in such cases as Allen-Bradley Local v Wisconsin Employment Relations Board, 315 US 740, 86 L ed 1154, 62 S Ct 820, supra, Bethlehem Steel Co. v New York State Labor Relations Board, 330 US 767, 773, 91 L ed 1234, 1245, 67 S Ct 1026, and Algoma Plywood & Veneer Co. v Wisconsin Employment Relations Board, 336 US 301, 93 L ed 691, 69 S Ct 584, not to mention Laburnum and Russell and the primary ju-

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risdiction *doctrine itself.[6] Should what the Court now intimates ever come to pass, then indeed state power to redress wrongful acts in the labor field will be reduced to the vanishing point.

In determining pre-emption in any given labor case, I would adhere to the Laburnum and Russell distinction between damages and injunctions and to the principle that state power is not precluded where the challenged conduct is neither protected nor prohibited under the federal Act. Solely because it is fairly debatable whether the conduct here involved is federally protected, I concur in the result of today's decision.

NOTE

An annotation on "State power to enjoin picketing as affected by federal labor relations acts" appears p. 1932, infra.

latter stating that "[w]e hope to argue in an appropriate case that the Russell decision should be overruled."

5. The Court may be correct in stating that "the approach taken in that case, in which the Court undertook for itself to determine the status of the disputed activity, has not been followed in later decisions, and is no longer of general application." That, however, has nothing to do with the vitality of the holding that there is no preemption when the conduct charged is in fact neither protected nor prohibited. To the contrary, that holding has remained fully intact, and, as already noted, underlay the decisions in Laburnum and Russell.

6. If the "neither protected nor prohibited" category were one of pre-emption, there would be no point in referring any injunction case initially to the Board since the pre-emption issue would be plain however the challenged activities might be classified federally. The same is true of damage cases under the Court's premise of conflict. State power would thus be confined to activities which were violent or of merely peripheral federal concern, see International Asso. of Machinists v Gonzales, 356 US 617, 2 L ed 2d 1018, 78 S Ct 923.

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WISCONSIN DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS, et al., Appellants

v

GOULD INC.

475 US 282, 89 L Ed 2d 223, 106 S Ct 1057

[No. 84-1484]

Argued December 9, 1985. Decided February 26, 1986.

Decision: Wisconsin statute debarring certain repeat violators of National Labor Relations Act (NLRA) from doing business with state held pre-empted by NLRA.

SUMMARY

A Wisconsin statute debars persons or firms who have violated the National Labor Relations Act (NLRA) three times within a 5-year period from doing business with the state, the debarment lasting for 3 years. A corporation thus debarred filed a suit in the United States District Court for the Western District of Wisconsin for injunctive and declaratory relief, claiming that the statute was pre-empted by the NLRA. The District Court granted summary judgment for the corporation. The United States Court of Appeals for the Seventh Circuit affirmed (750 F2d 608).

On appeal, the United States Supreme Court affirmed. In an opinion by BLACKMUN, J., expressing the unanimous view of the court, it was held that the NLRA pre-empted the Wisconsin statute, where: (1) the manifest purpose and inevitable effect of the statute was to enforce the requirements of the NLRA, thereby coming into conflict with the National Labor Relations Board's comprehensive regulation of industrial relations; and (2) in prohibiting state purchases from labor law violators, Wisconsin was not functioning as a private purchaser of services, its debarment scheme being tantamount to regulation.

Briefs of Counsel, p 1043, infra.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Commerce § 129 — labor relations — federal pre-emption of state statute

1a-1d. A state statute debarring certain repeat violators of the National Labor Relations Act (NLRA) from doing business with the state is pre-empted by the NLRA, where (1) the manifest purpose and inevitable effect of the statute is to enforce the requirements of the NLRA, thus bringing the statute into conflict with the National Labor Relations Board's comprehensive regulation of industrial relations, and (2) the state, under the statute, is not functioning simply as a private purchaser of services but for all practical purposes is engaged in regulation.

Commerce § 129 — labor relations — state remedies

2. States may generally not regulate activity that the National Labor Relations Act (NLRA) protects, prohibits, or arguably protects or prohibits, and this rule prevents states not only from setting forth stan-

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15A Am Jur 2d, Commerce §§ 33-35; 48A Labor and Labor Relations §§ 1729, 2003; 2004

USCS, Constitution, Article I, Section 8, Clause 3

RIA Employment Coordinator ¶¶ LR-12,261-LR-12,342, Pre-emption of State Laws

US L Ed Digest, Commerce §§ 129, 144, 157, 237

Index to Annotations, Business and Commerce; Labor and Employment; Pre-emption

Veralex™: Cases and annotations referred to herein can be further researched through the **Veralex™** electronic retrieval system's two services, **Auto-Cite®** and **SHOWME™**. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references. Use SHOWME to display the full text of cases and annotations.

ANNOTATION REFERENCES

State court jurisdiction as pre-empted by National Labor Relations Act (29 USCS §§ 141 et seq.)—Supreme Court cases. 75 L Ed 2d 988.

National Labor Relations Act and Labor Management Relations Act as excluding state action. 93 L Ed 470, 94 L Ed 984, 95 L Ed 384, 98 L Ed 245, 99 L Ed 559, 100 L Ed 1174.

dards of conduct inconsistent with the substantive requirements of the NLRA but also from providing their own regulatory or judicial remedies for conduct prohibited or arguably prohibited by the Act.

Commerce § 129 — labor relations — federal pre-emption of state statute

3. The National Labor Relations Act (NLRA) prevents a state from forbidding private parties within the state from doing business with repeat labor violators, because such a prohibition would interfere with Congress' integrated scheme of regulation by adding a remedy to those prescribed by the NLRA.

Commerce § 157 — state participation in market

4. State action in the nature of market participation is not subject to the restrictions placed on state regulatory power by the Commerce Clause of the Federal Constitution.

Commerce §§ 144, 237 — state regulation and taxation — state free market operations

5. The Commerce Clause of the Federal Constitution restricts state taxes and regulatory measures impeding free private trade in the national marketplace, but there is no indication of a constitutional plan to limit the ability of the states themselves to operate freely in the free market.

SYLLABUS BY REPORTER OF DECISIONS

A Wisconsin statute debars persons or firms who have violated the National Labor Relations Act (NLRA) three times within a 5-year period from doing business with the State. The debarment lasts for three years. After appellee was debarred in 1982, it filed an action for injunctive and declaratory relief in Federal District Court, claiming, inter alia, that the Wisconsin statute was pre-empted by the NLRA. The court agreed and granted summary judgment for appellee. The Court of Appeals affirmed.

Held: The NLRA pre-empts the Wisconsin debarment statute. Pp 4-9.

(a) States are prevented not only from setting forth standards of conduct inconsistent with the NLRA's substantive requirements, but also from providing their own regulatory or judicial remedies for conduct prohibited or arguably prohibited by the NLRA. Because the Wisconsin debarment statute functions as a supplemental sanction for violations of the NLRA, it conflicts with the National Labor Relations Board's comprehensive regulation of industrial relations in precisely the same way as would a prohibition against private parties within the State doing business with repeat labor law violators. That Wisconsin has chosen to use its spending power rather than its police power in enacting the debarment statute does not significantly lessen the inherent potential for conflict when two separate remedies are brought to bear on the same activity.

(b) Although state action in the nature of "market participation" is not subject to the restrictions placed on state regulatory power by the Commerce Clause, Wisconsin by prohibiting state purchases from repeat labor law violators is not functioning as a private purchaser; its debarment scheme is tantamount to regulation. In any event, the "market participant" doctrine reflects the

particular concerns underlying the Commerce Clause, not any general notion regarding the necessary extent of state power in areas where Congress has acted, as it has here in enacting the NLRA. This is not a case where a State's spending policies address conduct that is of such "peripheral concern" to the NLRA or that implicates "interests so deeply rooted in local feeling and responsibility" that pre-emption should not be inferred. Nor is it a case where spending determinations that bear on labor relations were intentionally left to the States by Congress. The manifest purpose and inevitable effect of the Wisconsin debarment scheme is to enforce the requirements of the NLRA.

750 F2d 608, affirmed.

Blackmun, J., delivered the opinion for a unanimous Court.

APPEARANCES OF COUNSEL

Charles D. Hoornstra argued the cause for petitioner.

Columbus R. Gangemi, Jr., argued the cause for respondent.

Briefs of Counsel, p 1043, infra.

OPINION OF THE COURT

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Justice **Blackmun** delivered the opinion of the Court.

[1a] The question in this case is whether the National Labor Relations Act (NLRA), 29 USC § 151 et seq. [29 USCS §§ 151 et seq.], preempts a Wisconsin statute debarring certain repeat violators of the Act from doing business with the State. We hold that it does.

I

Wisconsin has directed its Department of Industry, Labor and Human Relations to maintain a list of every person or firm found by judicially enforced orders of the National Labor Relations Board to have violated the NLRA in three separate cases within a 5-year period. See Wis Stat § 101.245 (1983-1984).[1] State procurement agents are statutorily

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forbidden to purchase "any product known to be manufactured or sold by any person or firm included on the list of labor law violators." § 16.75(8).[2] A name remains on the

1. Section 101.245 provides in relevant part:

"(1) The department [of industry, labor and human relations] shall maintain a list of persons or firms that have been found by the national labor relations board, and by 3 different final decisions of a federal court within a 5-year period as determined under sub. (1m), if the 3 final decisions involved a cumulative finding of at least three separate violations, to have violated the national labor relations act, 29 USC 151 et seq. [29 USCS §§ 151 et seq.], and of persons or firms that have been found to be in contempt of court for failure to correct a violation of the national labor relations act on 3 or more occasions by a court within a 5-year period as determined under sub. (1m) if the 3 contempt findings involved a cumulative total of at least 3 different violations.

"(1m) On or before July 1 of each year the department shall compile the list required under sub. (1) based upon the 5-year period which ended on September 30 of the year preceding.

"(2) This list may be compiled from the records of the national labor relations board.

"(3) Whenever a new name is added to this list the department shall send the name to the department of administration for actions as provided in s. 16.75(8).

"(4) A name shall remain on the list for 3 years."

The statute was enacted as 1979 Wis Laws, ch 340, § 3. It became effective May 21, 1980.

2. Section 16.75(8) provides in relevant part:

"The department [of administration] shall

violators' list for three years. § 101.245(4).

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Appellee Gould Inc. is a Delaware corporation with its principal place of business in Illinois. In 1982, Wisconsin placed Gould on its list of labor law violators following the judicial enforcement of four Board orders against various divisions of the company, none of which was located in Wisconsin and none of which Gould still owned at the time of its debarment. The State informed Gould that it would enter into no new contract with the company until 1985. The State also announced that it would continue its current contracts with Gould only as long as necessary to avoid contractual penalties, and that while Gould was on the list the State would not purchase products containing components produced by the company. At the time, Gould held state contracts worth over $10,000, and had outstanding bids for additional contracts in excess of $10,000.

Gould filed this action for injunctive and declaratory relief, arguing that the Wisconsin debarment scheme was preempted by the NLRA and violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[3] The United States District Court for the Western District of Wisconsin granted Gould summary judgment on the preemption claim, and did not reach the arguments pertaining to the Fourteenth Amendment. 576 F Supp 1290 (1983). The court enjoined the defendant state officials from refusing to do business with Gould, from refusing to purchase products with Gould components, and from including Gould on the list of labor law violators. Id., at 1299; App to Juris Statement

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86, 87.[4] The Court of Appeals for the Seventh

not purchase any product known to be manufactured or sold by any person or firm included on the list of labor law violators compiled by the department of industry, labor and human relations under s. 101.245. The secretary may waive this subsection if maintenance, repair or operating supplies are required to maintain systems or equipment which were purchased by the state from a person or firm included on the list prior to the date of inclusion on the list, or if the secretary finds that there exists an emergency which threatens the public health, safety or welfare and a waiver is necessary to meet the emergency."

We are advised that the statutory ban applies only to purchases by the State and not to purchasing decisions of counties, municipalities, or other political subdivisions of the State. Tr of Oral Arg 4.

In addition to disqualifying repeat violators of the NLRA, Wisconsin provides statutory preferences to bids from Wisconsin companies, minority businesses, employers of disabled workers, and prison industries. See Wis Stat §§ 16.75(1)(a), (3m)(b), (3s)(a), and (3t)(c) (1983-1984).

3. The original complaint also sought monetary damages, but Gould apparently abandoned this request in its motion and briefs for summary judgment. See 576 F Supp 1290, 1293, n 3 (WD Wis 1983).

Although Gould's debarment was scheduled to end in 1985, Wisconsin does not contend that the case is moot. At a minimum, the problem presented is "capable of repetition, yet evading review." E.g., Dunn v Blumstein, 405 US 330, 333, n 2, 31 L Ed 2d 274, 92 S Ct 995 (1972); Moore v Ogilvie, 394 US 814, 816, 31 L Ed 2d 274, 92 S Ct 995 (1969); Southern Pacific Terminal Co. v ICC, 219 US 498, 515, 55 L Ed 310, 31 S Ct 279 (1911).

4. The complaint named as defendants three state agencies, including the Department of Industry, Labor and Human Relations, and four state officials. The District Court dismissed the agency defendants under the Eleventh Amendment but, pursuant to Ex parte Young, 209 US 123, 52 L Ed 714, 28 S Ct 441 (1908), allowed the suit to proceed against the state officials. 576 F Supp, at 1293. Gould did not appeal the dismissal of the agency defendants, and they appear in this Court only as nominal parties under the Court's Rule 10.4.

Circuit affirmed in relevant part. 750 F2d 608 (1984). We noted probable jurisdiction, 471 US 1115, 86 L Ed 2d 257, 105 S Ct 2356 (1985). As did the District Court and the Court of Appeals, we find it necessary to reach only the pre-emption issue.

II

[2] It is by now a commonplace that in passing the NLRA Congress largely displaced state regulation of industrial relations. Although some controversy continues over the Act's pre-emptive scope, certain principles are reasonably settled. Central among them is the general rule set forth in San Diego Building Trades Council v Garmon, 359 US 236, 3 L Ed 2d 775, 79 S Ct 773 (1959), that States may not regulate activity that the NLRA protects, prohibits, or arguably protects or prohibits. Because "conflict is imminent" whenever "two separate remedies are brought to bear on the same activity," Garner v Teamsters, 346 US 485, 498-499, 98 L Ed 228, 74 S Ct 161 (1953), the Garmon rule prevents States not only from setting forth standards of conduct inconsistent with the substantive requirements of the NLRA, but also from providing their own regulatory or judicial remedies for conduct prohibited or arguably prohibited by the Act. See 359 US, at 247, 3 L Ed 2d 775, 79 S Ct 773. The rule is designed to prevent "conflict in its broadest sense" with the "complex and interrelated federal scheme of law, remedy, and administration," id., at 243, 3 L Ed 2d 775, 79 S Ct 773, and this Court has recognized that "[c]onflict in technique can be fully as disruptive to the system Congress erected as conflict in overt policy." Motor Coach Employees v Lockridge, 403 US 274, 287, 29 L Ed 2d 473, 91 S Ct 1909 (1971).

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[3] Consequently, there can be little doubt that the NLRA would prevent Wisconsin from forbidding *private parties* within the State to do business with repeat labor law violators. Like civil damages for picketing, which the Court refused to allow in Garmon, a prohibition against in-state private contracts would interfere with Congress' "integrated scheme of regulation" by adding a remedy to those prescribed by the NLRA. 359 US, at 247, 3 L Ed 2d 775, 79 S Ct 773. Nor does it matter that a supplemental remedy is different in kind from those that may be ordered by the Board, for "judicial concern has necessarily focused on the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted." Id., at 243, 3 L Ed 2d 775, 79 S Ct 773; Lockridge, 403 US, at 292, 29 L Ed 2d 473, 91 S Ct 1909. Indeed, "to allow the State to grant a remedy . . . which has been withheld from the National Labor Relations Board only accentuates the danger of conflict," Garmon, 359 US, at 247, 3 L Ed 2d 775, 79 S Ct 773, because "the range and nature of those remedies that are and are not available is a fundamental part" of the comprehensive system established by Congress. Lockridge, 403 US, at 287, 29 L Ed 2d 473, 91 S Ct 1909.

Wisconsin does not assert that it could bar its residents from doing business with repeat violators of the NLRA. It contends, however, that the statutory scheme invoked against Gould escapes pre-emption because it is an exercise of the State's spending power rather than its regulatory power. But that seems to us a distinction without a difference, at least in this case, because on its face the debarment statute

serves plainly as a means of enforcing the NLRA. The State concedes, as we think it must, that the point of the statute is to deter labor law violations and to reward "fidelity to the law." Tr of Oral Arg 4, 6; Brief for Defendants in Support of Motion for Summary Judgment in No 83-C-1045, (WD Wis), p 18. No other purpose could credibly be ascribed, given the rigid and undiscriminating manner in which the statute operates: firms adjudged to have violated the

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NLRA three times are automatically deprived of the opportunity to compete for the State's business.[5]

[1b] Because Wisconsin's debarment law functions unambiguously as a supplemental sanction for violations of the NLRA, it conflicts with the Board's comprehensive regulation of industrial relations in precisely the same way as would a state statute preventing repeat labor law violators from doing any business with private parties within the State. Moreover, if Wisconsin's debarment law is valid, nothing prevents other States from taking similar action against labor law violators. Indeed, at least four other States already have passed legislation disqualifying repeat or continuing offenders of the NLRA from competing for state contracts.[6] Each additional statute incrementally diminishes the Board's control over enforcement of the NLRA and thus further detracts

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from the "integrated scheme of regulation" created by Congress.

That Wisconsin has chosen to use its spending power rather than its police power does not significantly lessen the inherent potential for conflict when "two separate remedies are brought to bear on the same activity," Garner, 346 US, at 498-499, 98 L Ed 228, 74 S Ct 161. To uphold the Wisconsin penalty simply because it operates through state purchasing decisions therefore would make little sense. "It is the conduct being regulated, not the formal description of governing legal standards, that is the proper focus of concern." Lockridge, 403 US, at 292, 29 L Ed 2d 473, 91 S Ct 1909.

III

[1c, 4] Wisconsin notes correctly

5. The conflict between the challenged debarment statute and the NLRA is made all the more obvious by the essentially punitive rather than corrective nature of Wisconsin's supplemental remedy. The regulatory scheme established for labor relations by Congress is "essentially remedial," and the Board is not generally authorized to impose penalties solely for the purpose of deterrence or retribution. Republic Steel Corp. v NLRB, 311 US 7, 10-12, 85 L Ed 6, 61 S Ct 77 (1940). Wisconsin's debarment sanction, in contrast, functions as punishment and serves no corrective purpose. Punitive sanctions are inconsistent not only with the remedial philosophy of the NLRA, but also in certain situations with the Act's procedural logic. For example, the Board's certification of a bargaining representative is not subject to direct judicial appeal. An employer who believes that the Board erred in approving an election or defining a bargaining unit thus may obtain administrative and judicial review only by refusing to bargain and awaiting an enforcement action by the Board for violation of the Act. See Magnesium Casting Co. v NLRB, 401 US 137, 139, 27 L Ed 2d 735, 9 S Ct 599 (1971); AFL v NLRB, 308 US 401, 84 L Ed 347, 60 S Ct 300 (1940). One of Gould's violations in fact occurred in precisely this manner. See Gould, Inc., Elec. Components Div. v NLRB, 610 F2d 316 (CA5 1980). An unsuccessful challenge of this sort, if pursued in good faith, will generally present an especially inappropriate occasion for punitive sanctions.

6. See Conn Gen Stat § 31-57a (1985); Md. State Finance & Procurement Code Ann § 13-404 (1985); Mich Comp Laws §§ 423.322, .323, and .324 (Supp 1985); Ohio Rev Code Ann § 121.23 (1984).

that state action in the nature of "market participation" is not subject to the restrictions placed on state regulatory power by the Commerce Clause. See White v Massachusetts Council of Constr. Employers, Inc. 460 US 204, 75 L Ed 2d 1, 103 S Ct 1042 (1983); Reeves, Inc. v Stake, 447 US 429, 65 L Ed 2d 244, 100 S Ct 2271 (1980); Hughes v Alexandria Scrap Corp., 426 US 794, 49 L Ed 2d 220, 96 S Ct 2488 (1976). We agree with the Court of Appeals, however, that by flatly prohibiting state purchases from repeat labor law violators Wisconsin "simply is not functioning as a private purchaser of services," 750 F2d, at 614; for all practical purposes, Wisconsin's debarment scheme is tantamount to regulation.

[5] In any event, the "market participant" doctrine reflects the particular concerns underlying the Commerce Clause, not any general notion regarding the necessary extent of state power in areas where Congress has acted. In addition to authorizing congressional action, the Commerce Clause limits state action in the absence of federal approval. The Clause restricts "state taxes and regulatory measures impeding free private trade in the national marketplace," but "[t]here is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market." Reeves, 447 US, at 437, 65 L Ed 2d 244, 100 S Ct 2271. The NLRA, in contrast, was designed

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in large part to "entrus[t] administration of the labor policy for the Nation to a centralized administrative agency." Garmon, 359 US, at 242, 3 L Ed 2d 775, 79 S Ct 773; see also, e.g., NLRB v Nash-Finch Co., 404 US 138, 145, 30 L Ed 2d 328, 92 S Ct 373 (1971) ("The Board is the sole protector of the 'national interest' defined with particularity in the Act") (footnote omitted). What the Commerce Clause would permit States to do in the absence of the NLRA is thus an entirely different question from what States may do with the Act in place. Congressional purpose is of course " 'the ultimate touchstone' " of pre-emption analysis, see, e.g., Allis-Chalmers Corp. v Lueck, 471 US 202, 208, 85 L Ed 2d 206, 105 S Ct 1904 (1985), quoting Retail Clerks v Schermerhorn, 375 US 96, 103, 11 L Ed 2d 179, 84 S Ct 219 (1963), and we cannot believe that Congress intended to allow States to interfere with the "interrelated federal scheme of law, remedy, and administration," Garmon, 359 US, at 243, 3 L Ed 2d 775, 79 S Ct 773, under the NLRA as long as they did so through exercises of the spending power.

Nothing in the NLRA, of course, prevents private purchasers from boycotting labor law violators. But government occupies a unique position of power in our society, and its conduct, regardless of form, is rightly subject to special restraints. Outside the area of Commerce Clause jurisprudence, it is far from unusual for federal law to prohibit States from making spending decisions in ways that are permissible for private parties. See, e.g., Elrod v Burns, 427 US 347, 49 L Ed 2d 547, 96 S Ct 2673 (1976); Perry v Sindermann, 408 US 593, 33 L Ed 2d 570, 92 S Ct 2694 (1972). The NLRA, moreover, has long been understood to protect a range of conduct against state but not private interference. See, e.g., Machinists v Wisconsin Employment Relations Comm'n, 427 US 132, 148-151, 49 L Ed 2d 396, 96 S Ct 2548 (1976); Teamsters v Mor-

ton, 377 US 252, 259-260, 12 L Ed 2d 280, 84 S Ct 1253 (1964); Cox, Labor Law Preemption Revisited, 85 Harv L Rev 1337, 1346, 1351-1359 (1972). The Act treats state action differently from private action not merely because they frequently take different forms, but also because in our system States simply are different from private parties and have a different role to play.

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[1d] We do not say that state purchasing decisions may never be influenced by labor considerations, any more than the NLRA prevents state regulatory power from ever touching on matters of industrial relations. Doubtless some state spending policies, like some exercises of the police power, address conduct that is of such "peripheral concern" to the NLRA, or that implicates "interests so deeply rooted in local feeling and responsibility," that pre-emption should not be inferred. Garmon, 359 US, at 243-244, 3 L Ed 2d 775, 79 S Ct 773; see also, e.g., Belknap, Inc. v Hale, 463 US 491, 498, 77 L Ed 2d 798, 103 S Ct 3172 (1983). And some spending determinations that bear on labor relations were intentionally left to the States by Congress. See New York Tel. Co. v. New York State Labor Dept, 440 US 519, 59 L Ed 2d 553, 99 S Ct 1328 (1979). But Wisconsin's debarment rule clearly falls into none of these categories. We are not faced here with a statute that can even plausibly be defended as a legitimate response to state procurement constraints or to local economic needs, or with a law that pursues a task Congress intended to leave to the States. The manifest purpose and inevitable effect of the debarment rule is to enforce the requirements of the NLRA. That goal may be laudable, but it assumes for the State of Wisconsin a role Congress reserved exclusively for the Board.

The judgment of the Court of Appeals is affirmed.

It is so ordered.