University of Pennsylvania Carey Law School

Penn Law: Legal Scholarship Repository

Faculty Scholarship at Penn Law

1972

Preemption Reconsidered: The Apparent Reaffirmation of *Garmon*

Howard Lesnick

University of Pennsylvania Carey Law School

Follow this and additional works at: https://scholarship.law.upenn.edu/faculty_scholarship

Part of the [Constitutional Law Commons](#), [Jurisdiction Commons](#), and the [Labor and Employment Law Commons](#)

Repository Citation

Lesnick, Howard, "Preemption Reconsidered: The Apparent Reaffirmation of *Garmon*" (1972). *Faculty Scholarship at Penn Law*. 815.

https://scholarship.law.upenn.edu/faculty_scholarship/815

This Article is brought to you for free and open access by Penn Law: Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship at Penn Law by an authorized administrator of Penn Law: Legal Scholarship Repository. For more information, please contact PennlawIR@law.upenn.edu.

PREEMPTION RECONSIDERED: THE APPARENT REAFFIRMATION OF *GARMON*

HOWARD LESNICK*

INTRODUCTION

It is a rare pleasure to be given the opportunity to participate in this way in honoring Judge Hays. I will leave to others any expression of thoughts regarding his overall contributions to the law, to the Columbia Law School or, indeed, to the larger society; for myself, I recall him as a wise and gentle teacher, who contributed as much as anyone on the faculty to the reinforcement of my desire to study, practice and teach law—in particular, labor law.

It is entirely appropriate to use this occasion to examine the continuing evolution of the “preemption” doctrine.¹ Many who received their legal education at Columbia fifteen to twenty-five years ago will recall that one of Professor Hays’ most prescient insights was his early recognition that the Taft-Hartley amendments² would have perhaps their greatest impact in a totally unanticipated and, in a sense, perverse way. He referred to the 1947 Act as the Magna Carta of the labor movement; what he meant—if one can credit a former student’s recollection long after his class notes have been forever mislaid—was that the statute would ultimately free unions from the restrictions of state law and state courts, and that such a result would prove far more significant than the limited strictures newly enacted into federal law.

I. FROM *Garmon* TO *Lockridge*

To a substantial degree such has indeed been the denouement, although in a very episodic and uncertain way. To speak very generally, the period until the 1959 decision in *San Diego Bldg. Trades Council v. Garmon*³ was one of great vacillation, as the Court groped for an acceptable response. Some decisions suggested broad-ranging preemptive rationales;⁴ others emphasized the preclusive effect of federal law on state power, but on more limited grounds;⁵ still others manifested a great reluctance to find in Taft-Hartley any meaningful interference with state regulation.⁶ *Garmon* appeared to resolve this un-

* Professor of Law, University of Pennsylvania. This article is based on a paper delivered at the Eighteenth Annual Institute on Labor Law of the Southwestern Legal Foundation, Dallas, Texas, published in the Proceedings of the Institute by Matthew Bender & Co., Inc.

1. The “preemption” doctrine deals with the effect of federal law on state regulation of labor-management relations.

2. Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified at 29 U.S.C. §§ 141 *et seq.* (1970)).

3. 359 U.S. 236 (1959).

4. *E.g.*, *Garner v. Teamsters Local 776*, 346 U.S. 485 (1953).

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

6. *E.g.*, *International Ass’n of Machinists v. Gonzales*, 356 U.S. 617 (1958); *International Union, UAW v. Wisconsin Employment Relations Bd.*, 336 U.S. 245 (1949).

certainty. Arising on review of a state court judgment against minority-union picketing for recognition and a closed shop, the decision reflected a commitment—albeit by a bare majority of the justices—to an expansive concept of preemption. Specifically, it set to rest the contention that state law could supplement federal remedies and strongly espoused what one might call a “primary jurisdiction” rationale for preemption:

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. . . . 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. . . .⁷

The decade following witnessed a consolidation of the mandate of *Garmon* and an articulation of the scope and limits of its principles, but the sense of vacillation persisted. There was strong fidelity to its core concept of discouraging state regulation of strikes, boycotts and picketing,⁸ and state court resistance to preemption appeared to ease, thereby lessening the need for active Supreme Court involvement in the area.⁹ At the same time, a series of new issues arose which the Court consistently distinguished from *Garmon*;¹⁰ some of these issues were important, others rather trivial, but the impression grew that the Court was retrenching. This feeling was crystallized in 1970 by the call, from within the Court, for reexamination and narrowing of the preemption doctrine.¹¹ With a substantial minority of the justices joining in

7. 359 U.S. at 244-45.

8. See, e.g., *Teamsters Local 20 v. Morton*, 377 U.S. 252 (1964); *Marine Eng'rs Benevolent Ass'n v. Interlake S.S. Co.*, 370 U.S. 173 (1962); cf. *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969).

9. A contributing factor was doubtless the enactment, in the same year as the *Garmon* decision, of new federal legislative restrictions on organizational picketing and secondary boycotts. Pub. L. No. 86-257, 73 Stat. 541 (1959), amending 29 U.S.C. §§ 151 *et seq.* (1970). While the reception accorded these provisions by the Board and the courts has generated continuing controversy, it is clear that they provide some significant employer access to a federal remedy for practices that formerly could be proceeded against only in state courts.

10. E.g., *Vaca v. Sipes*, 386 U.S. 171 (1967) (fair representation); *Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53 (1966) (defamation); *Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261 (1964) (arbitration); *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962) (breach of contract).

11. *Taggart v. Weinacker's, Inc.*, 397 U.S. 223 (1970), involved the picketing of a retail store on a portion of sidewalk that was privately owned. The Court did not decide the case (raising preemption and First Amendment issues) on the merits. In concurring in the dismissal of the writ of certiorari, Chief Justice Burger volunteered his view that the Court should assimilate “trespass” to the body of decisions allowing states to regulate violence and defamation. *Id.* at 228. In *International Longshoremen's Ass'n, Local 1416 v. Ariadne Shipping Co.*, 397 U.S. 195 (1970), the Court routinely reversed a state-court injunction against the picketing of a foreign-flag ship which used American longshoremen to load the vessel. Justice White, with the concurrence of Justices Stewart and Burger, urged that state power should not be preempted simply because the union conduct was “arguably” protected; the state court should be precluded from acting only if it (or the Supreme Court on direct review) would hold that the action complained of was “actually” protected. *Id.* at 202.

the expression of skeptical views, real doubts were generated whether *Garmon* would survive the imminent reexamination.

In *Amalgamated Ass'n of Street Ry. Employees v. Lockridge*,¹² preemption made a goal-line stand, and held: *Garmon* lives (four justices dissenting)! Lockridge was one of a number of Greyhound drivers, employed under a union-security agreement, who revoked their check-off authorizations and promptly forgot to pay their union dues directly at the first of the month. The union constitution was a curious one. It provided that a member lost his good standing but remained a member if the dues were not paid by the fifteenth of the month in which they were due; and that he was deemed suspended from membership if they were not paid by the end of the next month. But it also stipulated that, if an applicable collective bargaining agreement required the maintenance of membership in good standing as a condition of employment, a member might be suspended from membership (and discharged) after only one month. The Greyhound agreement simply required continued membership, rather than membership in good standing; nevertheless, the union treasurer erroneously notified Lockridge of his suspension from membership when he was in arrears one day beyond one month, simultaneously advising Greyhound of the action and requesting that Lockridge be discharged. Lockridge was away on vacation when the suspension notice arrived, and his wife immediately tendered a check for two months' dues, which was refused. Greyhound removed Lockridge from the payroll promptly after receiving the notice of suspension.

No labor lawyer would feel uncomfortable arguing in support of a charge of unfair labor practices on these facts. Discharge could lawfully be sought or implemented under the National Labor Relations Act only if Lockridge's membership was terminated because of his "failure to tender the periodic dues . . . uniformly required as a condition of . . . retaining membership . . ."¹³ But Lockridge had not yet failed to tender the dues required to retain membership, and had simply lost his good standing. Moreover, the circumstances reek of suspicion that the delinquency was merely a pretext, that "the Union insisted on what it thought was a technically valid position because it was piqued by Lockridge's obtaining his release from the checkoff."¹⁴ Nevertheless, Lockridge did not file charges with the NLRB. Perhaps his failure to do so resulted from the Board's dismissal of charges filed by a fellow employee similarly suspended from membership and discharged. The regional director had there refused to issue a complaint, giving only the boilerplate ground that "there is insufficient evidence of violations . . ."¹⁵ Nearly a year after

12. 403 U.S. 274 (1971).

13. 29 U.S.C. § 158(b)(2) (1970). See *id.* at § 158(a)(3).

14. 403 U.S. at 280. The Court so characterized the "likely" facts, in the absence of formal findings by the trial court.

15. *Id.* at 280 n.3. Review by the General Counsel was not sought.

the regional director's refusal, Lockridge brought suit against the union in state court and recovered a judgment reinstating him to membership and awarding him over \$30,000 in lost pay.

Speaking for a five-man majority, Justice Harlan characterized the case as a "routine and simple"¹⁶ one for preemption; but, recognizing the "understandable confusion, perhaps in a measure attributable to the previous opinions of this Court, . . . over the jurisprudential bases"¹⁷ of *Garmon*, he thought it appropriate to write at length. Rather than attempt here a summary of the analyses of Court and dissenters, I prefer to draw on them as appropriate in the context of the thesis that I would like to present: *Lockridge* makes clear that the time has long since come to eschew entirely the traditional "primary jurisdiction" rationale implicit in the "protected or prohibited" aphorism which has served as the guiding wisdom in the area.

II. THE "PRIMARY JURISDICTION" RATIONALE

The traditional approach may be stated in these terms: (1) If conduct is protected under section 7¹⁸ or prohibited under section 8,¹⁹ there is preemption because federal law regulates the conduct and concurrent state regulation is not permitted; (2) if the conduct is neither protected nor prohibited, there is no preemption because the conduct is not federally regulated; *but* (3) if the conduct is "arguably" protected or prohibited, there is preemption because only the NLRB (subject to appellate review) can adjudicate questions under the Act, and thus determine whether the conduct in fact falls within proposition 1 or proposition 2.²⁰

A. "Arguably Protected": The Irrelevance of Section 7

Virtually every aspect of this rubric is analytically disquieting, doctrinally misleading, or both. Thus—to begin with the "arguably protected" category—on what basis can the law hold not only that federal rights may be asserted defensively in a suit based on state law,²¹ but that the state court may not then decide whether there is merit in the assertion? It has always seemed fairly evident to me (and, I would guess, to most labor lawyers) that the real reason for this position is nothing more nor less than a pervasive mistrust of state court fact-finding and law-finding processes in labor cases. Such cynicism would be well warranted by history, but judicial acceptance of its implications would be rather startling, and one would not expect to find explicit Supreme Court *ratio* in support of such a position.

16. *Id.* at 282.

17. *Id.* at 285.

18. 29 U.S.C. § 157 (1970).

19. 29 U.S.C. § 158 (1970).

20. *See, e.g.,* C. MORRIS, *THE DEVELOPING LABOR LAW* 788-93 (1971).

21. All agree that if union conduct is "actually protected," state law may not make it actionable.

One can, of course, shift the focus from the failings of state law in protecting federal rights to the inadequacies of Supreme Court certiorari review to meet the problem. From that perspective our traditional notion that the appellate jurisdiction of the Supreme Court safeguards the vindication of federal law in state courts is perceived to fail us. Justice Harlan said as much in *Lockridge*:

Nor can we proceed on a case-by-case basis to determine whether each particular final judicial pronouncement does, or might reasonably be thought to, conflict in some relevant manner with federal labor policy. This Court is ill-equipped to play such a role and the federal system dictates that this problem be solved with a rule capable of relatively easy application, so that lower courts may largely police themselves in this regard.²²

But surely more needs to be said. In other instances in which it is thought appropriate to assure a litigant a federal forum for the trial of issues of federal law—the removal jurisdiction of the district courts is probably the most common example²³—a federal forum is in fact provided. But a union seeking to abort a state-court proceeding on the ground that federal law “arguably” protects its conduct need not invoke a federal tribunal, whether by removal or otherwise. Indeed, the employer may not, on his own initiative, present to federal adjudicators his contention that the conduct is *not* protected, for the NLRB (the sole initial expositor of rights under the Act) has no substantive declaratory-judgment jurisdiction.²⁴ The question whether conduct is unprotected is faced by the Board only in proceedings against employers, when an allegedly illegal discharge is sought to be justified on the ground that the conduct for which the employee was discharged was not protected under section 7.

In my judgment, such difficulties bespeak the irrelevance of section 7, and the concept of protected and unprotected conduct, to the preemption problem. To say that an act is protected under section 7 is to say that an employer commits an unfair labor practice by punishing or threatening an employee for engaging in such an act. The issue cannot even be framed in most cases of picketing—as in organizing situations or many varieties of secondary boycotts—where “strangers” to the employer are involved. Of course the Court has held since *Hill v. Florida*²⁵ that the rights conferred by section 7 may be asserted against state regulation as well as against employer discipline. But (to take the setting of *Ariadne* as an example)²⁶ were a state to provide by statute that no union may picket a foreign-flag ship in any port within the

22. 403 U.S. at 289-90. See also *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 390-93 (1969).

23. See 28 U.S.C. § 1441 (1970).

24. Justice White relied on this point to support his contention that there should be no preemption simply on the claim of “arguably protected.” See his dissent in *Lockridge*, 403 U.S. at 325-32, and his concurring opinion in *Ariadne*, 397 U.S. at 201.

25. 325 U.S. 538 (1945).

26. See note 11 *supra*.

state, the Court would strike it down—without any talk about exclusive NLRB competence, impracticability of Supreme Court review, or conduct “arguably protected”—on the ground that, although the state court had jurisdiction over a case based on the violation of state law, that law was an “actual,” not an “arguable,” infringement of federally protected rights.²⁷ Such a case, in which the Court decides what is federally protected, is a far cry from the use of “arguably protected” to exclude the plaintiff from any forum in which he may seek to establish that the conduct is in fact not protected. If an acceptable basis for so excluding him is to be found, it would be better to search for it unencumbered by the deceptive appeal of resort to section 7.

B. “Prohibited” or “Arguably Prohibited”: The Relevance of Section 8

The remaining aspects of the traditional primary-jurisdiction aphorism are no more compelling on initial critical examination than the “arguably protected” element. As to “prohibited” acts, it is of course clear that only the NLRB may enforce the unfair practice provisions of the Act. A state-court plaintiff, however, relies on a state-created cause of action, and it is not immediately apparent why the existence of a similar wrong under section 8 of the federal law should displace state law. To speak of the “arguably prohibited” quality of conduct as grounds for preemption implies that, if the challenged acts are “actually” prohibited, they may be redressed by the NLRB, and that therefore plaintiff must seek adjudication there. This implication leads to the absurd spectacle of a union defendant, charged with violations of state law, defending on the ground that it has violated federal law as well, while the employer rebuts by earnestly asserting the complete propriety of the union’s acts under federal standards. Furthermore, the obverse of the implication is false, for—to come to the final theme in the primary-jurisdiction rubric—the notion that there is no preemption if unprotected conduct is also not prohibited is simply not the law. The decision in *Teamsters Local 20 v. Morton*²⁸ is squarely dispositive of the point that the inquiry is not so easily set to rest:

[E]ven though it may be assumed that at least some of the secondary activity here involved was neither protected nor prohibited, it is still necessary to determine whether by enacting § 303, “Congress occupied this field and closed it to state regulation.” . . . The basic question . . . is whether “in a case such as this, incompatible doctrines of local law must give way to principles of federal labor law. . . .” The answer to that question ultimately depends upon whether the application of state law in this kind of case would operate to frustrate the purpose of the federal legislation.²⁹

27. *E.g.*, *Amalgamated Ass’n of Street Employees, Div. 1287 v. Missouri*, 374 U.S. 74 (1963); *Amalgamated Ass’n of Street Employees, Div. 998 v. Wisconsin Employment Relations Bd.*, 340 U.S. 383 (1951); *International Union, UAW v. O’Brien*, 339 U.S. 454 (1950).

28. 377 U.S. 252 (1964).

29. *Id.* at 258. *See also* *Hanna Mining Co. v. Marine Eng’rs Benevolent Ass’n*, 382 U.S. 181, 187, 189 (1965).

I believe, however, that the instant questions—why state power should be preempted where conduct is prohibited or is arguably prohibited—are pertinent ones. I will attempt in what follows to suggest the contours of answers that, in my judgment, do lend strong support to what the Supreme Court has done, and much of what it has said, in this field.

1. *Federally Prohibited Conduct.* It is difficult to find non-conclusory, non-metaphoric discussions of the reasons that the existence of section 8 violations—redressable, to be sure, only through federal administrative proceedings—should displace state-created causes of action embodying identical condemnations. Justice Jackson spoke to this issue in an oft-cited passage in *Garner v. Teamsters Local 776*:

Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. 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. . . . 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. The same reasoning which prohibits federal courts from intervening in such cases, except by way of review or on application of the federal Board, precludes state courts from doing so.³⁰

It is worth noting that Justice Jackson was addressing himself to the question why state courts were not given concurrent jurisdiction to apply *federal* law, thus assuming, presumably, that the underlying state law was displaced by the mere enactment of federal substantive regulation. In *Lockridge*, Mr. Justice Harlan, after quoting from this portion of *Garner*, added his own perceptions:

Conflict in technique can be fully as disruptive to the system Congress erected as conflict in overt policy. As the passage from *Garner* indicates, in matters of dispute concerning labor relations a simple recitation of the formally prescribed rights and duties of the parties constitutes an inadequate description of the actual process for settlement Congress has provided. The technique of administration and the range and nature of those remedies that are and are not available is a fundamental part and parcel of the operative legal system established by the National Labor Relations Act. . . . The rationale for preemption, then, rests in large measure upon our determination that when it set down a federal labor policy Congress plainly meant to do more than simply to alter the then prevailing substantive law. It sought as well to restructure fundamentally the processes for ef-

30. 346 U.S. 485, 490-91 (1953).

fectuating that policy, deliberately placing the responsibility for applying and developing this comprehensive legal system in the hands of an expert administrative body rather than the federalized judicial system. Thus, that a local court, while adjudicating a labor dispute also within the jurisdiction of the NLRB, may purport to apply legal rules identical to those prescribed in the federal Act or may eschew the authority to define or apply principles specifically developed to regulate labor relations does not mean that all relevant potential for debilitating conflict is absent.³¹

Justice Harlan's analysis leads one to recall more precisely what Congress did when it defined specific conduct as an unfair labor practice. It "outlawed" the conduct, to be sure, and authorized the Board to "prevent any person" from engaging in it;³² in so doing, however, it hedged that substantive judgment with many critical procedural decisions. Thus, there is no private right of action whatever and aggrieved individuals must bear the burden of persuading a public official to seek redress;³³ action must be sought within the unusually short six-months limitation period;³⁴ the nagging problem of equitable relief pendente lite is made the subject of specific, complex regulation;³⁵ fact-finding is placed in the hands of an administrative body, subject to limited judicial review;³⁶ and remedies, for the most part equitable and prospective, are subject to the broad remedial discretion given the NLRB under a vague statutory criterion.³⁷ It was under these conditions that Congress proscribed certain practices and if, as the *Garner* and *Lockridge* passages suggest, they were deemed of the essence of the legislative decision to act, the assumption is that *all* enforcement machinery should function in full conformity to the regime constructed by Congress. State law, then, can never be said merely to parallel the federal act, for the enforcement apparatus is by hypothesis exclusively federal.

The evolution of the Court's response to the question of the availability of state remedies for conduct violative of both federal and state law illustrates this point. In *United Constr. Workers v. Laburnum Constr. Corp.*,³⁸ *International Ass'n of Machinists v. Gonzales*³⁹ and *International Union, UAW v.*

31. 403 U.S. at 287-88 (footnote omitted).

32. "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice . . ." 29 U.S.C. § 160(a) (1970).

33. 29 U.S.C. §§153(c), 160 (1970).

34. 29 U.S.C. § 160(b) (1970).

35. Section 10(l) of the NLRA, 29 U.S.C. § 160(l) (1970), does not permit private-party access to preliminary injunctive relief, but requires the General Counsel of the Board to seek preliminary relief once he has decided to proceed with the case. At the same time, the ultimate discretion of the district court to make such orders respecting the grant or denial of injunctive relief "as it deems just and proper," with procedural safeguards relating to notice and hearing, is preserved. *Id.*

36. 29 U.S.C. §§ 160(c), (e), (f) (1970).

37. 29 U.S.C. § 160(c) (1970). (The Board may require the respondent to take "such affirmative action . . . as will effectuate the policies of this Act . . .").

38. 347 U.S. 656 (1954).

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

Russell,⁴⁰ the Court permitted the recovery of both compensatory and punitive damages for conduct actionable under state law. The fact that the conduct violated the NLRA was deemed evidence "of congressional disapproval . . . inconsistent with immunization from liability for damages";⁴¹ the Court thus found no indication that the discretion granted the NLRB to award back pay was intended "to constitute an exclusive pattern of money damages for private injuries."⁴² Instead, the Justices characterized lost pay (the limit of financial recompense obtainable from the Board) as merely "partial relief", which the states could supplement.⁴³

Chief Justice Warren strongly dissented from this view of the effect of federal law:

Even if we assume that the Board had no authority to award respondent back pay in the circumstances of this case, the existence of such a gap in the remedial scheme of federal legislation is no license for the States to fashion correctives. . . . The Federal Act represents an attempt to balance the competing interests of employee, union and management. By providing additional remedies the States may upset that balance as effectively as by frustrating or duplicating existing ones.⁴⁴

It is the Chief Justice's analysis that has prevailed. The unavailability of particular remedial measures is now perceived, not as a gap or failing which a state may fill or redress, but as a conscious congressional judgment, creating a balance which state "supplementation" may not upset.⁴⁵ Thus the emphasis, in examining the availability of a given remedy from the Board as a ground for preemption, is on the likelihood, not that the NLRB *can* provide the remedy in question, but that it *cannot*.

2. *Arguably Prohibited Conduct.* As the foregoing strongly suggests, the most illuminating area of inquiry is "arguably prohibited" conduct. Here too, my contention is that preemption does not flow from the possibility that conduct arguably prohibited may be actually prohibited—and therefore actionable before the Board, and only before the Board; the case for preemption rests rather on the prospect that arguably prohibited conduct may be actually not prohibited—and therefore intended to be free of all legal restraint, state as well as federal.

It is curious that this point has been so dimly perceived, for the Court

40. 356 U.S. 634 (1958).

41. 347 U.S. at 666-67.

42. 356 U.S. at 645.

43. 356 U.S. at 621.

44. *International Union, UAW v. Russell*, 356 U.S. at 650. *See also* his dissent in *International Ass'n of Machinists v. Gonzales*, 356 U.S. 617, 623 (1958).

45. *See Amalgamated Ass'n of Street Employees v. Lockridge*, 403 U.S. 274, 288-89 n.5 (1971), specifically condemning "disparities in the reactions of the States to unlawful union behavior."; *Teamsters Local 20 v. Morton*, 377 U.S. 252, 260-61 (1964).

had said as much as early as 1953. The *Garner* decision prohibited a state from enjoining minority-union picketing for recognition, on the ground that federal unfair labor practices dealt—albeit only partially—with union pressure on the self-organizational rights of employees. Justice Jackson's analysis bears recalling:

The detailed prescription of a procedure for restraint of specified types of picketing would seem to imply that other picketing is to be free of other methods and sources of restraint. For the policy of the national Labor Management Relations Act is not to condemn all picketing but only that ascertained by its prescribed processes to fall within its prohibitions. Otherwise, it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing. For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits.⁴⁶

This approach finds in the failure of Congress to prohibit certain conduct a warrant for the negative inference that it was deemed proper, indeed desirable—at least, desirable to be left for the free play of contending economic forces. Thus, the state is not merely filling a gap when it outlaws what federal law fails to outlaw; it is denying one party to an economic contest a weapon that Congress meant him to have available.

3. *The "Negative Inference" Rationale.* One can see how such an interpretation, combined with similar views regarding the enforcement and remedial design of the Act,⁴⁷ might lead one to characterize the Taft-Hartley amendments as labor's Magna Carta, for the significance of the restraints actually embodied in the section 8(b) prohibitions pales when set in the context of a perceived legislative commitment to the free use of economic weapons not actually proscribed. It is not surprising, recalling the nation's contemporaneous perception of Taft-Hartley, that, despite *Garner*, the period should have been marked by quite different judicial interpretations as well.⁴⁸ Never-

46. 346 U.S. at 499-500.

47. See text accompanying notes 30-45 *supra*.

48. Consider, in addition to the "remedies" decisions previously discussed, see text accompanying notes 38-43 *supra*, two cases decided in 1949. In *International Union, UAW v. Wisconsin Employment Relations Bd.*, 336 U.S. 245 (1949) (*Briggs-Stratton*), the Court upheld state power to enjoin intermittent work stoppages. This decision is the origin of the principle that, where conduct is "neither protected nor prohibited," there is a regulatory void which the state may fill. "This conduct is governable by the State or it is entirely ungoverned." *Id.* at 254. However, on the "not prohibited" side, the Court did not simply note that the unfair labor practice provisions failed to cover the challenged conduct, but made the point that there was no provision that seemed even to speak to the problem. "[N]o proceeding is authorized by which the Federal Board may deal with it in any manner." *Id.* at 253. This decision predated the attempt by the Eisenhower Board to find such a provision in section 8(b)(3), requiring unions to bargain in good faith, see *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477 (1960); today the case would doubtless be viewed differently. Cf. note 53 *infra*.

Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Bd., 336 U.S. 301 (1949), upheld a state law permitting union-security agreements only by a two-thirds

theless, it has become increasingly clear that the failure of section 8 to outlaw certain conduct raises the question whether Congress thereby legitimized it, and that the answer to the question will often be in the affirmative. Again the *Morton* decision is squarely on point. Ohio law was held precluded from interfering with noncoercive appeals to secondary employers to boycott a struck company:

In this case, the petitioner's request to Launder's management to cease doing business with the respondent was not proscribed by the Act. "[A] union is free to approach an employer to persuade him to engage in a boycott, so long as it refrains from the specifically prohibited means of coercion through inducement of employees." *Carpenters Local 1976 v. Labor Board*, . . . 357 U.S. at 99. This weapon of self-help, permitted by federal law, formed an integral part of the petitioner's effort to achieve its bargaining goals during negotiations with the respondent. Allowing its use is a part of the balance struck by Congress between the conflicting interests of the union, the employees, the employer and the community. . . . If the Ohio law of secondary boycott can be applied to proscribe the same type of conduct which Congress focused upon but did not proscribe when it enacted § 303, the inevitable result would be to frustrate the congressional determination to leave this weapon of self-help available, and to upset the balance of power between labor and management expressed in our national labor policy.⁴⁹

Lockridge in effect reaffirms this view,⁵⁰ which is plainly consonant with the realities of the legislative process as it has dealt with the economic weapons available to labor and management. Consider, for example, the reach of section 8(b)(4)⁵¹ as affected by the primary-secondary dichotomy or the consumer-publicity proviso; or the status under section 8(b)(7)⁵² of pre-election picketing during an organizational campaign which the employer is vigorously (perhaps unlawfully) opposing: Is it not apparent that, if one

vote of the employees. Justice Frankfurter, for the Court, squarely rejected the negative-inference approach:

It is argued, therefore, that a State cannot forbid what § 8(3) affirmatively permits. The short answer is that § 8(3) merely disclaims a national policy hostile to the closed shop or other forms of union-security agreement.

Id. at 307. He relied on specific legislative history from the 1935 debates to support his view, and it is important to recall that he was here holding only that the Wagner Act contained no preclusion of state regulation of union security. Federal restrictions on union-security agreements had been placed in the 1935 Act only to restrain employers from preempting genuinely independent organizing efforts; the legislature had not faced at all their propriety as a union weapon. The Taft-Hartley amendments would have changed all that, and given rise to a strong "negative inference" argument, were it not for the express disclaimer in section 14(b). See 336 U.S. at 313-14; note 50 *infra*.

49. *Teamsters Local 20 v. Morton*, 377 U.S. at 259-60. See also the Court's formulation of the issue in *Hanna Mining Co. v. Marine Eng'rs Benevolent Ass'n*, 382 U.S. 181, 189 (1965), where, however, the answer was different, see text accompanying notes 56-59 *infra*.

50. Indeed its holding amounts to a decision sub silentio that *Algoma Plywood*, discussed in note 48 *supra*, lost its validity with the passage of the Taft-Hartley amendments, except in "right to work" states under section 14(b).

51. 29 U.S.C. § 158(4) (1970).

52. 29 U.S.C. § 158(7) (1970).

concludes that certain conduct does not violate either of those incredibly complex provisions, he is not asserting that it is "unregulated" by federal law? The premise is rather that Congress judged whether the conduct was illicit or legitimate, and that "legitimate" connotes, not simply that federal law is neutral, but that the conduct is to be assimilated to the large residual area in which a regime of free collective bargaining—"economic warfare," if you prefer—is thought to be the course of regulatory wisdom.⁵³

By this analysis, a negative inference, that conduct not prohibited is "designed to be free," would ordinarily be warranted. The crucial issue is whether it is not warranted in any particular instance. Section 14(b) embodies the unique case of specific legislative rejection of the negative inference. In *Retail Clerks Int'l Ass'n v. Schermerhorn*,⁵⁴ the Court upheld a state's power to apply its own law against union-security agreements lawful under federal law, and to enforce state law in state court, despite some textual warrant for reading the provision to make enforcement of a union-shop agreement in a "right to work" state a federal unfair labor practice.⁵⁵ Another exception was dealt with in *Hanna Mining Co. v. Marine Eng'rs Benevolent Ass'n*,⁵⁶ which upheld the right of a state court to enjoin recognition picketing by a minority union comprised of supervisory workers. Supervisors are ex-

53. It is in this sense that one may speak of the use of economic weapons as "protected" under the federal Act. However, the thought meant to be conveyed is importantly different from the connotation which "protected activity" has under section 7. See text accompanying notes 25-27 *supra*. It is misleading, as well as conclusory, to employ the term in determining the effect of federal law on state restrictions of union or employer economic weapons.

The analysis set forth in the text is intellectually nourished by those decisions which, in construing the unfair-labor-practice provisions of the Act, emphasized the national commitment to free collective bargaining and the legislative reluctance to entrust to the Board or the courts wide discretion to judge the desirability of particular labor-management economic weapons. See *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 316-18 (1965) (lockouts); *Teamsters Local 357 v. NLRB*, 365 U.S. 667, 676 (1961) (hiring halls); *NLRB v. Teamsters Local 639*, 362 U.S. 274, 284 (1960) (recognition picketing); *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 500 (1960) (bargaining tactics); *Local 1976, Carpenters v. NLRB*, 357 U.S. 93, 99-100 (1958) (hot cargo agreements); cf. *Local 1424, Machinists v. NLRB*, 362 U.S. 411, 428-29 (1960) (statute of limitations). These decisions provided the perspective from which cases such as *Morton* drew preemptive inferences from congressional "failure" to prohibit. See also Justice Harlan's analysis in *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969).

54. 375 U.S. 96 (1963).

55. See *id.* at 103. Section 14(b) states that the Act (referring in particular to the proviso to section 8(a)(3)) shall not "be construed as authorizing" enforcement of union-security agreements contrary to state law. 29 U.S.C. § 158(a)(3) (1970). Such enforcement would be in violation of sections 8(a)(3) and 8(b)(2), on which a complaint to the NLRB could be based.

The *Lockridge* opinions do not discuss section 14(b), presumably because Idaho is not a "right to work" state. But the statute does not require a formal state enactment prohibiting union security, wholly or subject to certain conditions; it forbids broadly the "execution or application" of union-security agreements where prohibited by state law. See *Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Bd.*, 336 U.S. 301, 314 (1949). One must inquire why the rule of decision applied by the Idaho courts in *Lockridge* was not deemed such a prohibition. Is "state law" to be read to exclude judge-made law? Is there ground for questioning, and is it relevant to question, the prior existence of the "law" invoked in the *Lockridge* litigation?

56. 382 U.S. 181 (1965).

cluded from the statutory definition of "employee," and as a result of the interlacing definitions their union is not a "labor organization" within the meaning of the Act; accordingly, what would otherwise clearly violate section 8(b)(7) is "not prohibited" by the NLRA.⁵⁷ "[T]he question arises," Justice Harlan noted for the Court, "whether Congress nonetheless desired that in their peaceful facets these efforts remain free from state regulation as well as Board authority";⁵⁸ the Court saw in the legislative history surrounding the decision to exempt supervisors from employee status no warrant for answering the question in the affirmative.⁵⁹ The case is significant, not so much for the particularities of that answer, as for the process of decision it illustrates and the consistency of its basic approach with that suggested in *Morton*.⁶⁰

III. CONCLUSIONS

A. *The "Exceptions" to Preemption*

Justice White, dissenting in *Lockridge*, approached the preemption question conscious, not only of the difficulties with the "primary jurisdiction" rationale of *Garmon*,⁶¹ but also of the many circumstances in which the Court had permitted state law to operate in the field. "To summarize," he observed, "the 'rule' of uniformity that the Court invokes today is at best a tattered one, and at worst little more than a myth."⁶² In support, he adduced the following: enforcement of collective bargaining agreements under section 301 of the Labor-Management Relations Act,⁶³ whether in a judicial or arbitral forum; the duty of fair representation, where relevant to enforcement of employee's claim under the collective agreement; damage actions for unlawful secondary boycotts under section 303;⁶⁴ violence; defamation; and union internal affairs.

It is of interest to note that most of these "exceptions" are limitations on the pervasive exclusivity of NLRB jurisdiction, but deal with situations nonetheless governed by federal law; thus, the inconsistency is substantially

57. See 29 U.S.C. §§ 152(3), (5) (1970); *Marine Eng'rs Benevolent Ass'n v. Interlake S.S. Co.*, 370 U.S. 173 (1962).

58. 382 U.S. at 189.

59. *Id.* at 189-90.

60. I do not believe that *Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53 (1966), partially upholding state defamation suits, is inconsistent with this analysis, although the tone of the opinion is somewhat so. "The malicious publication of libelous statements does not in and of itself constitute an unfair labor practice," *id.* at 63, not because Congress deemed such conduct legitimate, but because it sought to regulate only coercive or misleading speech, and was not addressing itself to injury to reputation. "The injury that [a defamatory] statement might cause to an individual's reputation—whether he be an employer or union official—has no relevance to the Board's function." *Id.* See note 66 *infra*.

61. See note 24 *supra*.

62. 403 U.S. at 318.

63. 29 U.S.C. § 185 (1970).

64. 29 U.S.C. § 187 (1970).

lessened if one discards, as I have suggested, the primary jurisdiction of the Board as the basis for preemption. I do not mean to indicate that none of these areas would profit from judicial or legislative reexamination,⁶⁵ but they hardly render the concerns and premises of *Garmon* and *Lockridge* a "myth."⁶⁶

B. *The Need for Improved Access to Federal Remedies*

When all is said and done, however, one cannot leave an approving discussion of *Lockridge* without acknowledging that an injustice was done; *Lockridge* and others were discharged, in all probability unlawfully, and received neither recovery nor a genuine opportunity to prove their case. The

65. Section 301 is the most complex area, but in retrospect one can hardly assert with confidence that an alternate road to that marked out by the Court would have been preferable. Congress itself made the conscious decision to entrust enforcement of the agreement to the courts rather than to the Board, and the Supreme Court surely could not have been expected to hold that federal judicial jurisdiction is exclusive. *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962). It has wholly federalized the governing substantive law, *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95 (1962), and its decision not to hold judicial jurisdiction preempted by the existence of potential unfair labor practices in the facts of a breach-of-contract claim, *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962), seems a wise one. Surely it creates problems in some circumstances, but the other view would hardly have done less, and in any event the issue is quite distinct from that involved in the typical preemption case such as *Garmon*. There may be stronger grounds for questioning the wisdom of *Vaca v. Sipes*, 386 U.S. 171 (1967), which eagerly authorized section 301 suits against unions—as well as against employers—for breach of the duty of fair representation when a claim based on the agreement is involved. But the area is fiendishly complex, and no course would have eliminated overlapping forums and elusive distinctions.

I believe, however, that the totally free rein given state courts to deal with "violence" will not bear Supreme Court reexamination. As Justice White accurately observed in *Lockridge*:

[I]t is entirely possible that some States will require a greater showing of violence than others before awarding damages, so that behavior which violently seeks to coerce union membership will be prohibited in one State and allowed in another.

But the interest in uniformity is subordinated to the larger interests that persons injured by such violence be preserved whatever remedies state law may authorize. 403 U.S. at 318. It seems clear that federal law should speak at least minimally to three problems: the line between peaceful and violent conduct, as to which wide variations in local treatment are common; basic procedural safeguards in the fact-finding process, particularly in injunction cases; and some guidelines or outer limits on the availability of punitive damages. Under any analysis, it is impossible to justify the total abdication of any federal supervision over these matters (compare the treatment of defamation, note 66 *infra*), but the Supreme Court has shown no eagerness to speak to the question. *Taggart v. Weinacker's, Inc.*, 397 U.S. 223 (1970), *see* note 11 *supra*, raised some aspects of it, but the Court declined to decide the merits of the case.

66. The area of defamation deserves a word. Because the Court split so closely and so sharply on whether to preclude entirely state-created defamation suits, *Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53 (1966), it is easy to read more than is warranted into the majority's refusal to go so far. *Linn* most assuredly did not hold that state defamation actions were "exceptions" to preemption, and therefore not matters of federal concern. The Court held that federal law, derived from a concern "that the recognition of legitimate state interests . . . not interfere with effective administration of national labor policy . . .," *id.* at 64, set the outer limits of permissible resort to state defamation law. Two specific federal conditions—proof of malice in fact and of actual damages—were announced; a third, restriction of the types of defamation that could be made actionable, was rejected on policy grounds; and the Court specifically reserved the question whether experience might warrant further limitation. Again, the case reflects lessened concern over the primary jurisdiction of the NLRB, but as a substantive matter the inroads made by *Linn* are quite substantial; indeed, it would be a very rare case which would be worth litigating under it.

weaknesses in our legal regime that the case exposes are not, however, in the preemption of state law; with all respect, I have great difficulty perceiving the relevance of much of Justice White's discussion to the case there at hand.⁶⁷ The weaknesses involve rather the adequacy of access to the federal enforcement machinery, the exclusivity of which was so forcibly brought home to Lockridge.

The statute of limitations is unconscionably short as applied to cases where neither union nor employer is likely to file a charge.⁶⁸ It should be changed, but even an academic recognizes the futility of further discussion of that issue. However, the "law" governing regional-director and general-counsel decisions not to issue a complaint is another matter. The point is not that there is no judicial review of refusals to proceed, for to grant review would open the courts to a deluge of unnecessary litigation.⁶⁹ What is needlessly unjust is the almost total failure to provide basic procedural safeguards to assist the charging party—or one not represented by a labor lawyer who "knows the ropes"—in making his case, and to regularize and channel the discretion of the regional director and general counsel. Surely the Board can provide some definition of the hearing (or conference) rights to be accorded charging parties, and require some genuinely meaningful disclosure of the reasons supporting a refusal to proceed—not the form recitals so often encountered⁷⁰—by the regional director or (were protection prior to his decision deemed warranted) by staff counsel recommending dismissal.

The Supreme Court can perhaps prod the NLRB to take some remedial measures in this area, although it may find inadequate legislative warrant for doing so. No such reticence need affect the Administrative Conference or the Section of Labor Relations Law of the American Bar Association. Indeed, since the NLRB could readily embody any proposals coming from such sources in its own rules, it is apparent that it need not even await action or study by public or private groups, for the Board's rulemaking procedures provide a fully adequate basis for bringing informed opinion to bear on the question.

67. See Justice Harlan's expression of similar difficulty, 403 U.S. at 290 n.6; *cf. id.* at 288-89 n.5.

68. There is a strong argument that the limitations bar to federal unfair-labor-practice charges should preclude resort to a state-created right of action as well, since Congress' purpose in prescribing a short period in which a charge could be filed was to give substantial weight to the interest in stability. See *Local 1424, IAM v. NLRB*, 362 U.S. 411 (1960); *cf.* text accompanying notes 31-37 *supra*. A passage in *Garmon*, to the effect that state law remains preempted despite inability to obtain federal relief when the dismissal of a Board charge lacks "unclouded legal significance," 359 U.S. at 246, may be read to support this result, albeit on primary-jurisdiction grounds.

69. As Justice Douglas pointed out, dissenting in *Lockridge*, the Supreme Court has never squarely passed on the unreviewability rule, and the reaffirmation of *Garmon* may lead to a break in that position. See 403 U.S. at 305 n.2.

70. As, for example, in the dispute out of which *Lockridge* arose. See text accompanying note 16 *supra*.

C. *The Future of Lockridge*

Lockridge asked whether *Garmon* still lived; we must ask now whether *Lockridge* will survive. Justice Harlan closed his opinion in that case with these compellingly pertinent thoughts:

While we do not assert that the *Garmon* doctrine is without imperfection, we do think that it is founded on reasoned principle and that until it is altered by congressional action or by judicial insights that are born of further experience with it, a heavy burden rests upon those who would, at this late date, ask this Court to abandon *Garmon* and set out again in quest of a system more nearly perfect. A fair regard for considerations of *stare decisis* and the coordinate role of the Congress in defining the extent to which federal legislation pre-empts state law strongly supports our conclusion that the basic tenets of *Garmon* should not be disturbed.⁷¹

As I write these words, the author of those I have quoted lies near death,⁷² and another of the 5-man *Lockridge* majority is already gone. Justice Harlan's admonition was not merely the marshalling of a debater's point. He wrote for the minority in *Garmon*, and became the chief expositor of its rationale, restating its underpinnings in far more tenable fashion than did its author. His words, and his career, remind us how debased is much of the recent talk about "judicial conservatism" and "strict construction."

Service on the Supreme Court gives a man or woman a unique opportunity to discover his true perception of this country, and of the Court's role in its evolution; one hopes that those who follow Justice Harlan will find in his concepts of the judicial function a more enduring guide than thoughts spoken into the political winds would suggest. On the realization of that hope depends far more than the future of the preemption doctrine.

71. 403 U.S. at 302.

72. Justice Harlan died on December 30, 1971.