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Judicial deference to the administrative expertise of the NLRB has recently been waning. Either by statute or by Supreme Court pronouncement, federal and state courts have acquired greater jurisdictional reach over issues previously thought "arguably subject" to the provisions of the N.L.R.A. and therefore subject to the primary jurisdiction of the NLRB. With the continued use of such phrases as "peripheral concern of the Labor-Management Relations Act," or "interests so deeply rooted in local feeling"[1] the Court appears to be returning to the era when courts, and not the Board, were the main arbiters of the boundaries of national labor policy. Recent cases dealing with issues beyond the traditional labor dispute have held that the jurisdiction retained by state courts included such issues as the union's duty of fair representation to its members,[2] malicious libel in an election campaign,[3] and disqualification of felons from holding union office.[4]

The apparent spirit of these cases has been applied in New York to attack the heart of the collective bargaining process, the contract itself, without initial reference to the Board. *New York v. Milk Handlers and Processors Association*[5] involved an alleged fixing and maintenance of noncompetitive prices in violation of the Donnelly Act,[6] New York's antitrust law. Union drivers received salary plus commission, with the commission determined by the wholesale price paid by the retailer. The "impartial chairman" under the industry-wide agreement allegedly established fixed-price markups to protect the commission. The defendants argued that the state was preempted from applying its laws to "activities . . . intertwined with collective bargaining agreements,"[7] claiming that the agreement concerned

1. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 243-44 (1959).
2. Vaca v. Sipes, 386 U.S. 171 (1967) ("[T]he decision to preempt federal and state court jurisdiction over a given class of cases must depend upon the nature of the particular interests being asserted and the effect upon the administration of national labor policies of concurrent judicial and administrative remedies." *Id.* at 180).
3. Linn v. Plant Guard Workers Local 114, 383 U.S. 53 (1966).
4. De Veau v. Braisted, 363 U.S. 144 (1960).
5. 52 Misc. 2d 658, 276 N.Y.S.2d 803 (Sup. Ct. 1967).
6. N.Y. GEN. BUS. LAW §§ 340-41 (McKinney 1957).
7. 52 Misc. 2d at 661, 276 N.Y.S.2d at 807-08. The union was not joined as a party in the antitrust litigation, but it did file an amicus brief on the side of the milk companies appealing this decision. Subsequently, union officials were indicted on criminal

wages, a subject about which the parties were statutorily required to bargain. The resolution of the prices-wages issue would determine the applicability of state law, since while no one would deny that state law would be preempted from penalizing the parties for agreeing on wage provisions,[8] state law could penalize the parties for price-fixing neither protected nor prohibited by the Act. The court rejected the defendant's argument that it could not act until the NLRB determined whether the agreement fixed prices or wages:

> There is no dispute between defendants and the union. They have agreed. The subject matter of the dispute between plaintiff and defendants is not a charge of unfair labor practice or refusal to bargain collectively; it is not wages or working conditions. Hence, the subject matter alleged in the complaint is not cognizable by the National Labor Relations Board.[9]

The court apparently assumed that because the Board lacked jurisdiction over the particular dispute, the state law was not preempted. This Note examines that assumption: In the context of state antitrust enforcement, does the mere absence of NLRB jurisdiction over specific issues—or specific issues presented in particular disputes—enable the state court to assert jurisdiction over a dispute involving conduct arguably protected by the N.L.R.A.? When the NLRB has explicit statutory jurisdiction to rule upon the existence of a possible unfair labor practice or of possible protection by the Act, state courts must defer to the NLRB.[10] The negative implication of this rule may be, however, that when the NLRB lacks jurisdiction, preemption disappears as a doctrine compelling initial abstinence by state (or federal)

conspiracy charges arising from the same basic situation, which included other allegations not relevant here.

8. Teamsters Local 24 v. Oliver, 358 U.S. 283 (1959).

9. 52 Misc. 2d at 662, 276 N.Y.S.2d at 808-09 (footnotes omitted).

10. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959). Recent applications of this general principle of judicial deference to administrative resolution of the factual controversy on which coverage by the Act will turn include IBEW Local 1264 v. Broadcast Serv., 380 U.S. 255 (1965) (per curiam) (integrated enterprise with sufficient earnings to meet Board's jurisdictional prerequisites); Hattiesburg Bldg. & Trades Council v. Broome, 377 U.S. 126 (1964) (per curiam) (Board's jurisdictional standards as to commerce can be satisfied by primary or secondary employer); Liner v. Jafco, Inc., 375 U.S. 301 (1964) (picketing arguable labor dispute within exclusive jurisdiction of the Board); Journeymen & Apprentices Local 100 v. Borden, 373 U.S. 690 (1963) (union interference with right of individual to pursue occupation); Construction & Gen. Laborers' Local 438 v. Curry, 371 U.S. 542 (1963) (picketing); Marine Eng'rs Beneficial Ass'n v. Interlake S.S. Co., 370 U.S. 173 (1962) (status as a labor organization). Pre-*Garmon* preemption cases in which the primary jurisdiction rationale controlled include Guss v. Utah Labor Relations Bd., 353 U.S. 1 (1957) (preemption even though Board declined to exercise its jurisdiction); Weber v. Anheuser-Busch, Inc., 348 U.S. 468 (1955) (jurisdictional dispute); Garner v. Teamsters Local 776, 346 U.S. 485 (1953) (peaceful picketing). Exceptions to this otherwise absolute rule are discussed notes 35-37 *infra*.

courts.[11] If so, control over state court interpretation of federal law would survive only on Supreme Court review.

Although no direct precedents resolve this issue, radiations from three major cases suggest a tendency to blur together pre-emption and the existence of Board jurisdiction, making the former depend upon the latter. Rejection of this view in favor of initial pre-emption regardless of Board jurisdiction may result in the creation of a no man's land wherein neither federal administrative nor state judicial remedies are available.[12]

In *Teamsters Local 24 v. Oliver*[13] the state court had to decide whether certain conduct constituted wage-fixing protected under federal law or price-fixing prohibited by state law. Upon a re-examination of the facts, the Supreme Court held that the contract fixed wages and not prices; the Ohio antitrust laws were therefore pre-empted.[14] But although *Oliver* denied the applicability of state law, the Supreme Court implicitly approved the state's exercise of initial jurisdiction to decide whether the challenged labor contract provision concerned protected or unprotected activity.[15]

Shortly after *Oliver,* the Court faced the problem of initial pre-emption in *San Diego Building Trades Council v. Garmon*[16] and held that when an activity is arguably subject to Section 7 or 8 of the Act, state as well as federal courts must defer to the exclusive competence of the Board in order to avert state interference with national policy.

In *Garmon,* since union picketing was being challenged by an em-

11. *See* Journeymen & Apprentices Local 100 v. Borden, 373 U.S. 690, 694 (1963), where the Court, in applying *Garmon,* stated that "the first inquiry . . . must be whether the conduct called into question may reasonably be asserted to be subject to Labor Board cognizance"; but did not state what the second inquiry would be if the first were not met.

12. The original no man's land of Guss v. Utah Labor Relations Bd., 353 U.S. 1 (1957), was shortlived since Congress soon provided a statutory solution. 29 U.S.C. § 164(c)(l) (1964). The hypothetical no man's land under discussion would differ from that in *Guss* since the *Guss* situation concerned cases where the Board had jurisdiction but declined to assert it, whereas the hypothetical is concerned with an absence of Board jurisdiction under the statute itself.

13. 358 U.S. 283 (1959).

14. "To allow the application of the Ohio antitrust law here would wholly defeat the full realization of the congressional purpose. The application would frustrate the parties' solution of a problem which Congress has required them to negotiate in good faith toward solving, and in the solution of which it imposed no limitations relevant here." *Id.* at 295-96.

15. The *Garmon* "arguably subject" test, discussed p. 792 *infra,* was not unveiled by the Court until three months after *Oliver.* It is not clear that had *Garmon* preceded *Oliver,* the "arguably subject test" would have controlled and resulted in deference to the primary jurisdiction of the Board to determine the factual prices-wages issue which the *Oliver* court itself resolved, since there was no traditional labor dispute between the parties with which to invoke the processes of the Board. For a more extensive discussion of this point, see p. 792.

16. 359 U.S. 236 (1959).

ployer, the Board clearly had jurisdiction to hear the employer's unfair labor practice complaint and to decide whether the activity was protected, prohibited, or beyond the scope of the Act and therefore within the jurisdictional competence of the state. The "arguably subject" test of *Garmon* might therefore be read to apply only to situations in which the Board had jurisdiction over the dispute. If so, the doctrine of initial pre-emption hinged upon the existence of Board jurisdiction and *Oliver* might still be good coin; if the Board lacked jurisdiction, the pre-emption doctrine permitted the state court initially to decide the jurisdictional issue, subject to Supreme Court review.[17]

Finally, *Meat Cutters Local 189 v. Jewel Tea Co.*[18] held that the doctrine of primary jurisdiction did not bar a federal court from determining whether a marketing hours provision was a mandatory subject of bargaining and therefore immune from the Sherman Act. The Court pointed out that the Board was powerless to resolve a controversy when the parties to a collective bargaining agreement were assailed by a third party who alleged that their agreement illegally restrained trade:

> The Board does not classify bargaining subjects in the abstract but only in connection with unfair labor practice charges of refusal to bargain. . . . Agreement is of course not a refusal to bargain, and in such cases the Board affords no mechanism for obtaining a classification of the subject matter of the agreement.[19]

Jewel Tea thus ratified federal court jurisdiction to determine whether a collective bargaining provision was protected by the Act whenever the Board lacked jurisdiction over the dispute. Application of its reasoning to a case arising under a state antitrust law might suggest that since the NLRB cannot decide such disputes, a state court need not find its jurisdiction pre-empted merely because the defendants' conduct was "arguably protected" as, say, wage-fixing, but could

17. *See* discussion note 15 *supra*.

18. 381 U.S. 676 (1965). Although the union lost the primary jurisdiction battle it won the antitrust exemption war: the marketing hours restriction was a mandatory subject of bargaining and since no conspiracy was proven, it did not violate the antitrust laws.

19. *Id.* at 687. The Court also recognized the possibility that even if jurisdiction lay with the Board its General Counsel might not issue a complaint, and/or that in this antitrust context the Act's six-month statute of limitation will often have expired. *Contra*, Liner v. Jafco, Inc., 375 U.S. 301 (1964): "For although the National Labor Relations Board is not barred from granting appropriate remedies by the fact that the challenged conduct has ceased, . . . or that the construction has been completed, . . . charges of unfair labor practices must be filed within six months of their occurrence, and an employer armed with a state injunction would have no incentive to initiate Board proceedings." *Id.* at 307 (footnotes omitted).

properly decide the jurisdictional issue subject to Supreme Court review.

Thus, the logic of the *Milk Handlers* case can be explained by a synthesis of the results reached in *Oliver*, *Garmon*, and *Jewel Tea:* the first implicitly rejected initial pre-emption, the second accepted it but only in a context where Board jurisdiction was available, and the third explicitly denied pre-emption in a dispute over which the Board lacked jurisdiction.

It can be argued, however, that the two doctrines are independent—that initial pre-emption does not depend on the availability of Board jurisdiction. If this is so, then *Garmon* is not limited to the labor dispute context of Board jurisdiction, but creates a doctrine of initial pre-emption extending to conduct not involving "normal" labor disputes which is nevertheless "arguably protected" by the Act.

This alternative theory of initial pre-emption is not inconsistent with the reasoning of *Oliver*, *Garmon*, and *Jewel Tea.* Although *Oliver* rejects initial pre-emption in favor of initial state jurisdiction and Supreme Court review, *Garmon* announced a retreat from this role of factfinder on review three months later without even mentioning *Oliver:*

> The approach . . . 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.[20]

Thus, while *Garmon* can be reconciled with *Oliver* on its facts, the Court's treatment of the earlier decision signalled not a new application of a settled or smoothly developing doctrine, but a sudden shift in attitude. The Court's new tack, however, is easily explainable. Before *Garmon* state courts had continued to assert initial jurisdiction by distinguishing, misconstruing or ignoring the Court's pronouncements on preemption, and "reversal on appeal came long after the

20. 359 U.S. at 245 n.4. The Court referred to UAW Local 232 v. Wisconsin Employment Relations Bd., 336 U.S. 245 (1949), as an example of its discarded approach. There the union, without clarifying its demands, had engaged in numerous unannounced work stoppages; the Court itself construed the N.L.R.A. as neither protecting nor prohibiting such action, thus leaving it within the jurisdictional reach of the states. Whether *Garmon*'s disapproval of this approach overruled by implication the comparable approach taken in *Oliver* cannot be determined. *Oliver* did not involve the traditional labor dispute in which the literal *Garmon* preemption rule (rejected by this Note, p. 794 *infra*), a rule seemingly dependent upon the availability of Board jurisdiction, could be invoked, whereas the Wisconsin case concerned a traditional union-employer dispute, albeit one which involved new tactics by the union. The *Garmon* court was not unaware of *Oliver*, and even cited it in another context (359 U.S. at 243 n.1), but seemingly chose not to overrule it.

generating labor dispute had run its course."[21] Placed in this context, the *Garmon* "arguably protected" preemption doctrine must be viewed as a new aggressive effort to immunize federal labor policy from such state intervention.

Nor were the possible costs of the new policy lost upon the Court. *Garmon* recognized that requiring the states to yield to the Board did not ensure Board adjudication of the dispute involved, since the Board might decline to assert its jurisdiction, the General Counsel might refuse to file a charge, or the status of the activity might remain undefined in some other way.[22] The Court foresaw and accepted the consequence that initial preemption and Board inaction might create a new "no man's land":

> [T]he failure of the Board to define the legal significance under the Act of a particular activity does not give the States the power to act. . . . 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.[23]

Garmon thus appears to turn more on the dangers of state interference and the need for preemption than on an availability-of-forum rationale. If the latter were determinative, failure of the Board to act should logically resurrect state jurisdiction; but as we have seen, the Court clearly rejected this view.

Finally, *Jewel Tea*'s rejection of Board primary jurisdiction in favor of an initial judicial determination is not applicable *pari passu* when a state court is to decide whether a union, singly or in collusion with management, has violated a state rather than a federal antitrust law. Of course the argument will inevitably be made that *UMW v. Pennington*[24] and *Jewel Tea* should operate to permit state as well as federal

21. C. Summers & H. Wellington, Labor Law, II-223, Sept. 1966 (Preliminary & Tentative Edition No. 3).
22. 359 U.S. at 245-46.
23. *Id.* at 246 (footnote omitted).
24. 381 U.S. 657 (1965). "This is not to say that an agreement resulting from union-employer negotiations is automatically exempt from Sherman Act scrutiny simply because the negotiations involve a compulsory subject of bargaining, regardless of the subject or the form and content of the agreement . . . . [T]here are limits to what a union or an employer may offer or extract in the name of wages, and because they must bargain does not mean that the agreement reached may disregard other laws . . . . [W]e think a union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wagescale on other bargaining units. . . . This is true even though the union's part is an undertaking to secure the same wages, hours or other conditions of employment from the remaining employers in the industry." *Id.* at 664-66. Thus a conspiracy of union and employer *X* to fix the *wages* to be demanded from employer *Y*, although involving a mandatory subject of

courts to scrutinize labor-management agreements regardless of whether they represent conduct either arguably or in fact protected or prohibited by the N.L.R.A. If the entrusting of federal labor policy to the Board does not supersede the federal antitrust statutes, it is no longer clear that it supersedes state antitrust statutes. The cases display little analytic differentiation between preemption and primary jurisdiction.[25] The exclusion of federal courts from labor law determinations has usually been sufficient to exclude state courts as well. And it works the other way: *Garmon*, although dealing with action by a state court, is normally assumed to have operated to deny federal courts jurisdiction (for federal causes of action as well as in diversity cases) whenever conduct was arguably protected or prohibited.[26]

To meet the argument that *Jewel Tea* applies to state courts deciding state causes of action, one might first point to the consequences of allowing state courts to apply state antitrust laws to collective agreements. The dividing line between permissive labor activity and prohibited restraints on trade is at best unclear, and at worst more aptly described as radically subjective. Union activity extending beyond the limits of a single firm will be directly anticompetitive in its thrust, at least when unions pursue traditional goals and seek to eliminate wage differentials as an element of inter-firm competition.[27] A line between

collective bargaining about which the union is required to bargain and within the arguable protection of Section 7, is nevertheless subject to the provisions and sanctions of the Sherman Act.

25. Writers in the field have made the distinction. *See, e.g.*, Ratner, *New Developments in Federal-State Jurisdiction*, in N.Y.U. 15TH ANNUAL CONFERENCE ON LABOR 47, 55 (1962): "[W]hat compels the state to yield is not the primary jurisdiction of the Board, but Congress' determination to remove from state control certain areas in the field of labor relations that are not necessarily co-extensive with the Board's jurisdiction to protect or prohibit. If state power depends on whether or not the disputed conduct falls within or without that area, the scope of the Board's power may be quite irrelevant." *See also* Meltzer, *Labor Unions, Collective Bargaining, and the Antitrust Laws*, 32 U. CHI. L. REV. 659, 699 (1965) (distinguishing *Jewel Tea*'s acceptance of federal court jurisdiction from issues involved in the previous state cases): "Those [pre-emption] cases are designed primarily to bar the application of state substantive doctrines and state procedures and scarcely control the issue of whether the jurisdiction of other federal tribunals charged generally with the enforcement of the fundamental national policy embodied in the Sherman Act should be obliterated."

26. *Garmon*, 359 U.S. at 242-43, reveals the Court's belief that the dangers of interference with the objective of confiding administration of national labor policy to a central agency are as great if different courts applying the same law are involved as when a state court applying its own law is involved. *See also* Garner v. Teamsters Local 776, 346 U.S. 485, 490-91 (1953): "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." (Quoted in part in *Garmon*, 359 U.S. at 243).

27. *See generally* Winter, *Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities*, 73 YALE L.J. 14 (1963).

the conflicting policies protecting unions acting in their own self-interest and protecting the public from collusive anticompetitive practices can perhaps be drawn by federal courts, which have experience if no background of achievement in balancing the conflicting federal laws. But 50 state courts seeking to harmonize 50 state antitrust laws with the principles of federal labor policy will read into the N.L.R.A. their individual prejudices and preconceptions concerning how much protection federal law has actually given unions. The purpose of preemption, as emphasized in *Garmon*, is to prevent such a result. And to the extent that *Garmon* is the touchstone of state court jurisdiction over labor disputes, the availability or non-availability of procedures before the Board cannot be decisive if it is relevant at all.

Thus, by this analysis, the existence of Board jurisdiction is relevant in federal litigation, where the concept of Board primary jurisdiction recognizes "the need for orderly and sensible coordination of the work of agencies and of courts."[28] The presence or absence of Board jurisdiction should not control the existence of state jurisdiction. Preemption as an independent doctrine is

> designed, not to prevent courts from adjudicating questions which the Board can adjudicate, but to bar the application of substantive state law upsetting the balance of power between labor and management expressed in the national labor policy.[29]

Full protection of the balance of power from state intervention can be maintained only if the *Garmon* "arguably subject" test is protected from the wholesale erosion which would result from a return to an availability-of-Board-adjudication rationale for the preemption doctrine.

A careful reading of Mr. Justice White's opinion in *Jewel Tea* suggests that the Court may have left itself a line of retreat, albeit an inelegant one, from the seemingly all-encompassing reach of *Penning-*

28. 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 19.01, at 5 (1958).

29. Brief for United States as Amicus Curiae at 81-82, Meat Cutters Local 189 v. Jewel Tea Co., 381 U.S. 676 (1965). The briefs in *Jewel Tea* reveal that the union sought to identify its argument for the dismissal of the case (becuase primary jurisdiction lay with the Board) with a combination of *Oliver* and *Garmon*, the former of which, as we have seen, not finding preemption until the Court itself had resolved the prices-wages controversy, and the latter involving state jurisdiction over a traditional labor dispute. The union assumed that had its case arisen under state antitrust law, *Oliver* and *Garmon* would require its dismissal. Brief for Petitioner at 111, Meat Cutters Local 189 v. Jewel Tea Co., 381 U.S. 676 (1965). The United States, as amicus, appeared to admit that a state prosecution would have to be dismissed but sought to distinguish it in the federal context; since the Court adopted most of the arguments proferred by the Government it may have given this assumption insufficient attention. *See* note 30 *infra*.

ton and *Jewel Tea.* White's opinion is pivotal because he wrote for the three Justices fence-sitting between Mr. Justice Douglas' enthusiastic embrace of, and Mr. Justice Goldberg's vitriolic opposition to, an expanded applicability of the antitrust laws to organized labor. In rejecting the argument that Board jurisdiction over the dispute barred a federal court action, Justice White dropped a delphic footnote:

> To be distinguished are the pre-emption cases in which the possibility that the Board may not exercise jurisdiction renders state courts no less powerless to act . . . .[30]

Because the note cites *Garmon,* it might be read as applicable only to a situation in which the Board has clear statutory jurisdiction but refuses to exercise it. On the other hand, the note is available to the Court as a basis for the possible future assertion that *Pennington* and *Jewel Tea* did not license indiscriminate state prosecutions under state antitrust law.

Furthermore, White's denial of primary jurisdiction was pegged to federal court experience in classifying "terms and conditions of employment" (since these issues frequently arise in Norris-LaGuardia injunction requests).[31] In state antitrust cases there are no grounds for assuming experience in interpreting the issues which arise under N.L.R.A.

Second, White was able to argue that resolution of the manadatory-nonmandatory controversy was irrelevant to the jurisdiction of the federal court in *Jewel Tea* because the plaintiff's complaint alleged a conspiracy between labor and management to force marketing hours upon non-agreeing employers; under *Pennington,* an agreement growing out of such a conspiracy would violate the Sherman Act even

30. 381 U.S. at 688 n.4. The Court supported this proposition with references to *Garmon* and, more generally, Teamsters Local 20 v. Morton, 377 U.S. 252 (1964), where it had held that a federal court was preempted by the remedial provisions in the Labor-Management Relations Act (Taft-Hartley Act) § 303, 29 U.S.C. § 187 (1964), from applying state common law to award damages resulting from peaceful union activity.

The Court's footnote in *Jewel Tea* may indicate a tacit acceptance of the unsupported assumption of both the union and the Government that preemption would bar the bringing of the suit at issue under a state antitrust law instead of the Sherman Act. However this possibility was ignored by the state court in the *Milk Handlers* case.

31. "[C]ourts are . . . not without experience is classifying bargaining subjects as terms or conditions of employment. Just such a determination must be frequently made when a court's jurisdiction to issue an injunction affecting a labor dispute is challenged under the Norris-LaGuardia Act, which defines 'labor dispute' as including 'any controversy concerning terms and conditions of employment' . . . ." 381 U.S. at 686 (footnotes omitted). Although White speaks in terms of "courts" and not specifically "federal courts," the Norris-LaGuardia reference limits the recognition of experience to courts of the United States.

though its provisions involved a mandatory subject of bargaining.[32] Hence, to the extent that White relied upon the specific jurisdictional allegations present in *Jewel Tea*, his opinion does not foreclose a different result in subsequent cases with different jurisdictional allegations. Whenever a *Pennington*-type conspiracy is not alleged, as in the *Milk Handlers* case,[33] determination of the mandatory-nonmandatory issue may still be decisive. Moreover, the concept of a "conspiracy" has a wraithlike quality in *Pennington*. The determination of when unions have acted in their own self-interest and when they have "conspired" with management[34] may be no less crucial to the resolution of conflicting federal policies toward antitrust enforcement and the protection of "legitimate" union activity than the determination of precisely which issues are mandatory subjects of bargaining. If this is true, the same considerations which support the argument that state courts should not be allowed to draw the line between mandatory and nonmandatory subjects of bargaining suggest that neither should state courts be allowed to assert jurisdiction on the basis of whatever they conclude constitutes a *Pennington*-type conspiracy.

If we turn to prior cases involving the rights of states to enforce their own laws in the area of labor-management relations, the availability of a remedy before the Board is neither a necessary nor a sufficient test for state court jurisdiction. The availability-of-remedy test does not explain the decisions reached. But there is an alternative analysis available which does harmonize the case law. The pattern which apparently emerges from the decisions to date is that state courts retain

32. "*Jewel's* complaint alleged the existence of a conspiracy between Associated and the unions [and, although involving terms and conditions of employment,] such an understanding is not exempt from the Sherman Act . . . . [Therefore] a Board determination would have been of subsidiary importance at best." 381 U.S. at 686-87.

33. In *Milk Handlers* the complainant was not a third-party employer claiming injury from the conspiracy of the union with other employers, but was the State, as the representative of the public interest, which was suffering adverse effects from the alleged retail price-fixing. However, even if a suit on all fours with *Pennington* were brought by a complaining third party employer under state antitrust law, the *Jewel Tea* nondispositive issue rationale, which concerned only the scope of labor's exemption from the Sherman Act and not issues of preemption of state antitrust law, might not lead to the same result.

34. This self-interest versus conspiracy language has been determinative since the decision in United States v. Hutcheson, 312 U.S. 219, 232 (1941), wherein Mr. Justice Frankfurter stated: "So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under § 20 [of the Clayton Act] are not to be distinguished by any judgment regarding the . . . rightness or wrongness . . . of the end of which the particular union activities are the means." *See also* Allen Bradley Co. v. IBEW Local 3, 325 U.S. 797 (1945).

Mr. Justice Douglas' concurrence in *Pennington* would, under certain conditions, view the industry-wide collective bargaining agreement itself as prima facie evidence of an antitrust violation. 381 U.S. at 673. If this view were to become widespread, indiscriminate state attacks on the collective bargaining agreements in isolation from other indicia of conspiracy would greatly interfere with national labor policy.

jurisdiction over conduct "arguably subject" to the provisions of the N.L.R.A. in three areas: (1) conduct involving violence and the threat of harm (since the states were felt to have a "dominant interest" as the "natural guardians of the public against violence");[35] (2) areas where Congress has sanctioned the retention of jurisdiction by the states;[36] (3) conduct beyond the scope or remedies of the N.L.R.A. (out of this exception developed the "peripheral concern" test).[37] When state antitrust law is applied to a provision of a collective bargaining agreement which may "arguably" be protected as a mandatory subject of bargaining, the rationale of the above exceptions is not met. There is no physical violence or threat of harm, Congress has not sanctioned state

35. The major violence cases are all pre-*Garmon:* Youngdahl v. Rainfair, Inc., 355 U.S. 131 (1957) ("Though the state court was within its discretionary power in enjoining future acts of violence, intimidation and threats of violence by the strikers and the union, yet it is equally clear that such court entered the pre-empted domain of the National Labor Relations Board insofar as it enjoined peaceful picketing by petitioners." *Id.* at 139); UAW v. Wisconsin Employment Relations Bd., 351 U.S. 266 (1956) ("No one suggests that such violence is beyond state criminal power. The Act does not have such regulatory pervasiveness. . . . The States are the natural guardians of the public against violence." *Id.* at 272, 274); Allen Bradley Local 1111 v. Wisconsin Employment Relations Bd., 315 U.S. 740 (1942) (a pre-Taft-Hartley case, thus not involving a situation where the Act could be argued to have provided remedies for the union's conduct. "If the order of the state Board . . . caused a forfeiture of collective bargaining rights, a distinctly different question would arise." *Id.* at 751).

36. Retail Clerks Local 1625 v. Schermerhorn, 375 U.S. 96 (1963) (state prohibition of agency shop clause held enforceable by state courts: "[W]hile Congress could pre-empt as much or as little of this interstate field as it chose, it would be odd to construe § 14(b) [29 U.S.C. § 164(b) (1964)] as permitting a State to prohibit the agency clause but barring it from implementing its own law with sanctions of the kind involved here." *Id.* at 99); Smith v. Evening News Ass'n, 371 U.S. 195 (1962) ("The authority of the Board to deal with an unfair labor practice which also violates a collective bargaining contract is not displaced by § 301 [29 U.S.C. § 185 (1964)], but it is not exclusive and does not destroy the jurisdiction of the courts in suits under § 301." *Id.* at 197); De Veau v. Braisted, 363 U.S. 144 (1960) ("[T]he States presented their legislative program to cope with an urgent local problem [felons holding union office] to the Congress, and the Congress unambiguously supported what is at the core of this reform." *Id.* at 153).

37. Vaca v. Sipes, 386 U.S. 171 (1967) ("[T]he unique role played by the duty of fair representation doctrine in the scheme of federal labor laws, and its important relationship to the judicial enforcement of collective bargaining agreements in the context presented here, render the *Garmon* pre-emption doctrine inapplicable." *Id.* at 188); Linn v. Plant Guard Workers Local 114, 383 U.S. 53 (1966) ("[T]he exercise of state jurisdiction here would be a 'merely peripheral concern of the Labor-Management Relations Act' . . . ." *Id.* at 61. The redress of malicious libel was also classified as "an overriding state interest," and the Court recognized the remedial differences involved. *Id.* at 61, 63); Hanna Mining Co. v. District 2, Marine Eng'rs, 382 U.S. 181 (1965) ("[T]he Board's decision that Hanna engineers are supervisors removes from this case most of the opportunities for pre-emption." *Id.* at 188); Carey v. Westinghouse Elec. Corp., 375 U.S. 261 (1964) (arbitration not pre-empted since "the Act does not deal with the controversy anterior to a strike nor provide any machinery for resolving such a dispute absent a strike." *Id.* at 263); there are a number of pre-*Garmon* cases which exemplify the scope-of-coverage and absence-of-conflicting-remedy rationales, including IAM v. Gonzales, 356 U.S. 617 (1958) (damage suit for expulsion from union); Construction Workers v. Laburnum Constr. Corp., 347 U.S. 656 (1954) (though conduct also an unfair labor practice, state common law action for damages remains); UAW Local 234 v. Wisconsin Employment Relations Bd., 336 U.S. 245 (1949) (state could enjoin intermittent work stoppages "because the Federal Board has no authority either to investigate, approve or forbid the union conduct in question." *Id.* at 254).

intrusion, and the conduct is not beyond the scope of the N.L.R.A., but rather is affirmatively protected if it involves the determination of wages rather than prices.[38]

Moreover, the "peripheral concern" cases[39] were not focused on the economic relations of the parties but instead involved questions of remedy and internal relations within the union itself which were in fact as well as rhetoric "peripheral." In contrast, if anything is a central concern of the Act it is the bargaining process and its culmination in the collective agreement—both of which are threatened by application of state antitrust law.[40] True, the Act itself does not define with any clarity the limits on the content of collective agreements. But a persuasive argument can be made that the line-drawing problem is too critical to federal labor policy to allow state rather than federal courts to perform the delicate task. This conclusion seemingly follows by clear analogy from the words of the Court in *Oliver:*

> If there is to be this sort of limitation on the arrangements that unions and employers may make with regard to these subjects, pursuant to the collective bargaining provisions of the Wagner and Taft-Hartley Acts, it is for Congress, not the States, to provide it.[41]

Federal courts in, for example, *Pennington* and *Jewel Tea,* have found such congressional limitations in the Sherman Act. If state courts are only to apply the same limitations there seems no need for their jurisdiction. If they are to draw different limitations from state law, there seems no role for their jurisdiction under the philosophy of *Garmon.*[42]

38. This would be true unless a *Pennington* conspiracy were alleged and, as could happen, *Pennington* were held to remove state pre-emption as it has removed federal antitrust exemption.

39. Namely *Vaca* and *Linn. See* note 37 *supra.*

40. Where state law has sought to regulate that which the Court regarded as a central concern of national labor policy, the state law has been invalidated. In Hill v. Florida, 325 U.S. 538 (1945), a state statute prohibiting the union from functioning as a collective bargaining agent unless it had previously complied with the law's provisions was voided as infringing on the "full freedom of employees in collective bargaining." A similar fate befell a Wisconsin statute which punished interruptive strikes by public utility workers in Motor Coach Div. 998 v. Wisconsin Employment Relations Bd., 340 U.S. 383 (1951), and a Michigan statute which prohibited strikes without prior resort to state mediation and strike authorization procedures in UAW v. O'Brien, 339 U.S. 454 (1950). Just as the right to bargain collectively and the right to strike are guaranteed by the N.L.R.A., so should the right to reach a collective agreement on mandatory subjects of bargaining be protected, subject only to limitations engrafted upon it by federal, and not state, law.

41. 358 U.S. at 297.

42. Although this Note has assumed that the only alternative to state jurisdiction in an antitrust litigation involving a collective bargaining agreement arguably protected by the Act but over which the Board has no jurisdiction is the preemption of the state jurisdiction, the N.L.R.A. could be amended to provide for Board jurisdiction to decide such abstract questions of law. *Jewel Tea*'s denial of such "abstract question" jurisdiction

This analysis can claim only the same vitality that the *Garmon* philosophy enjoys, of course. *Garmon* arose as a reaction to state court recalcitrance in applying federal labor policy, and perhaps should be re-examined as an overreaction. State courts may have outgrown their hostility to federal labor policy since 1959; perhaps the Supreme Court overestimated the threat even then. Even if full faith cannot yet be placed in the state courts, the situation may well have improved sufficiently to justify a more selective solution to the problem than *Garmon* represents. The exceptions grafted upon that doctrine without overt effort to update its sharp basic thrust suggest that this is so, at least in the eyes of the Supreme Court. Perhaps state courts can safely be entrusted with the delicate task of reconciling federal labor policy with the need to protect consumers from anticompetitive practices. If so, a reappraisal of *Garmon* would be more fitting than recourse to an availability-of-administrative-forum test putatively consistent with *Garmon* but at odds with its philosophy.

stemmed from a narrow reading of the mandate given the Board which specifies that it "is empowered . . . to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce," since by necessary implication the Board should have the power to prevent interference with bargaining parties who have avoided the commission of unfair labor practices. The Act was drawn to provide administrative resolution of unfair labor practice charges so that the institution of collective bargaining and the sanctity of the collective agreement could be preserved. In order to perform its function properly the Board should be given jurisdiction to resolve questions as to whether or not a specific contractual provision involves a subject about which the parties are commanded to bargain by the Act. 5 U.S.C. § 1004(d) (1964) (Section 5(a) of the Administrative Procedure Act), provides that:

> The agency is authorized in its sound discretion, with like effect as in the case of other orders to issue a declaratory order to terminate a controversy or remove uncertainty.

This provision appears ideal for use as suggested, and yet the Court in *Jewel Tea* appeared to reject it. To correct this, Congress could specifically provide for such "abstract question" jurisdiction either limited to actions under state antitrust law or including those arising under the Sherman Act.