

LABOR AND THE FEDERAL SYSTEM*

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I

MR. JUSTICE FRANKFURTER was alone in dissent and wrong in conclusion when he wrote this wise and provocative paragraph:

The various aspects in which this problem [of accommodating state and federal laws] comes before the Court are seldom easy of solution. Decisions ultimately depend on judgment in balancing overriding considerations making for the requirement of an exclusive nation-wide regime in a particular field of legal control and respect for the allowable area within which the forty-eight States may enforce their diverse notions of policy.¹

Evoked by these words is the image of the judge placing weights on both sides of the law's mythical scale: so many for federal purposes; so many for state interest. It is to be sure a hackneyed image (it is mine, not the Justice's) but it suggests the delicate nature of an important judicial task.

The weights to be assigned to the state and to the nation are easily determined only when federal purpose is inescapably clear. Where that purpose plainly demands an exclusive nationwide regime or plainly allows state law to survive, the matter is concluded. It is where a statute is this clear that it is most helpful for a judge to think about his problem in terms of the "intention of Congress." But because of the nature of Congress it is often impossible to discover what was "intended."

Perhaps all legislators ought to be mindful of state interest in a new area of federal concern, but this rarely occurs in the enactment of a broad regulatory program. Through experience the congressman becomes result oriented. The other consideration which dominates his thinking—if it can be distinguished from the first—is partisan politics. Often this cannot be helped. At any rate, there is little time devoted at the legislative level to determining whether in a particular area of affairs the state's concern, as distinguished from the national concern, is large or small. The exception is where these problems of federalism happen to coincide with politics. Such a coincidence rarely occurs in the labor field.

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¹ *United Mine Workers of America v. Arkansas Oak Floring Co.*, 351 U.S. 62, 76 (1956).

It is, therefore, usually necessary for the Court, without congressional guidance, to ruminate about the problems of accommodating a broad federal enactment to various types of state interest. The Court is the one institution capable of a disinterested consideration of these problems. And it has, since the 1942 *Allen-Bradley* decision,² devoted large quantities of time to accommodating state and federal labor laws. The bulk of this time has been devoted to establishing the virtual exclusiveness of federal regulation of peaceful employee concerted activity; that is, in the language of section 7 of the National Labor Relations Act, activity related to "self-organization," "collective bargaining," and "other mutual aid or protection" such as strikes, boycotts and picketing.³ The Court has been hard at work on this problem during the term just passed,⁴ and because of Mr. Justice Frankfurter's reasoned opinion in the second *Garmon* case,⁵ it is entitled to something it seldom receives these days, un begrudging praise.

But for the student confronting most of the decisions since *Allen-Bradley*, it is difficult to discover how Supreme Court justices determine in any particular case the weight to assign to the important factor of state interest. This absence of judicial instruction is perhaps attributable to a lack of anything to say, but that the states have traditionally had power to regulate labor affairs. If this is the one reason why state interest is to be considered as an independent factor, it is hard to believe that state interest is—or ought to be—ever accorded weight.

Tradition, however, is not the sole justification for independent Court consideration of state interest. States continue to be functionally as well as sentimentally important. Not only are they laboratories for experimentation, they are—and to my mind this is their main attraction—power centers peculiarly well equipped to help this country remain democratic.

The state tends to protect its citizens from potential neglect or affirmative abuse by the national government. States are not the only institutions which perform this protective function in our society. Labor unions and corporations are others. But as shameful as state governments often are, they are, on the average, more democratic, and therefore often more responsible, than any powerful non-governmental institution in America today.

The fact that states may be useful in the preservation of democracy does not mean, of course, that with respect to all areas of governmental activity the Court must be nicely sensitive to state interest. Some things clearly ought to be regulated only in Washington. This distinction was drawn by Mr. Justice Douglas in an early labor pre-emption case: "[W]e [meaning the Supreme Court]

² *Allen-Bradley Local 1111, United Electrical Workers v. Wisconsin Employment Relations Bd.*, 315 U.S. 740 (1942).

³ National Labor Relations Act §7, 61 Stat. 140 (1947), 29 U.S.C.A. §157 (1952).

⁴ In addition to the case cited in note 5 *infra*, see, e.g., *Local 24, International Brotherhood of Teamsters v. Oliver*, 358 U.S. 283 (1959); *Hotel Employees Union, Local No. 255 v. Sax Enterprises*, 358 U.S. 270 (1959).

⁵ *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959).

were more ready to conclude," he said, "that a federal Act in a field that touched international relations superseded state regulation than we were in those cases where a State was exercising its historic powers over such traditionally local matters as public safety and order and the use of the streets and highways."⁶

Most problems concerning labor relations are in the vast middle area between these extremes of predominantly national and essentially local concern. It is here that the judge should have in mind the functional service performed as well as the traditional role assumed by the states.

To move from these rather abstract observations to others equally abstract, it is helpful to turn again to Mr. Justice Frankfurter in dissent, speaking again about federal-state accommodation in a labor setting: "We are in the domain of government and practical affairs," he said in *Hill v. Florida*, "and this Court has not stifled State action, unless what the State has required, in the light of what Congress had ordered, would *truly entail contradictory duties* or make actual, not argumentative, inroads on what Congress has commanded or forbidden."⁷

The Justice's remarks are enlightening because they expose a consideration of great importance, yet one often overlooked: that is, protection of those whose conduct is regulated—in this case the union and the employer—from two systems of law which are likely to be conflicting and which are wholly independent. For this conflict-of-laws problem there is generally no method, other than pre-emption, to accommodate state and federal law.

If we think about the regime of *Swift v. Tyson*,⁸ the problem perhaps is further illumined. Individuals in their primary activities—for example, in the negotiation and performance of contracts—were, before *Erie R. Co. v. Tompkins*,⁹ unsure of whether federal or state law would apply to the language they employed and the action they pursued. This was confusing. It encouraged dispute. The same language could have different meaning and the same action different consequence in a federal court from what it would have in a state court.

This consideration—protection of those whose conduct is regulated—is best dealt with by the Supreme Court as a discrete factor, one which the Court must weigh in deciding whether federal law is exclusive. Like the question of state interest, it can be analyzed as a part of the larger question of the policy of the federal statute. Insistence upon this approach may again lead to pursuit of congressional intent. The consequence of independent and competing systems of law surely ought to be considered by Congress; however, it almost never is.

⁶ *Allen-Bradley Local No. 1111, United Electrical Workers v. Wisconsin Employment Relations Bd.*, 315 U.S. 740, 749 (1942).

⁷ *Hill v. Florida ex rel. Watson*, 325 U.S. 538, 552 (1945). (Emphasis added.)

⁸ 41 U.S. (16 Pet.) 1 (1842).

⁹ 304 U.S. 64 (1938).

Indeed, Congress usually is incapable of doing the job, and again for an institutional reason; this time because a conflict may be unforeseen until a case is litigated. The Court, on the other hand, precisely because it is in the business of deciding cases, is ideally suited to this law-making task.

There are, then, three factors upon which decision about the survival of state law must in each case rest. First, federal policy contained in statutory language and in legislative history. While this is the most important consideration it is almost never the only one because federal policy on this question is seldom clear.

Second, state interest in the particular conduct regulated by federal law. The Court here must often be the original law-making institution, no matter what the chief justices of the several states may think about it.

Third, protection of the regulated institutions—labor and management—from competing systems of primary law. The seriousness of this type of conflict, like the importance of state interest, varies from situation to situation. It is difficult to foresee and thus also difficult to resolve at the legislative level.

Therefore, it seems, the Court and not Congress is the institution which must be principally responsible for working out, case by case, an accommodation between federal law and the law of the states.¹⁰

On the basis of these factors, I propose first, to assess the wisdom of the Court's decisions regarding state jurisdiction in the areas of protected activity under section 7 of the National Labor Relations Act and of unfair labor practices under section 8 of that Act;¹¹ and second, to ask what the Court should do with the problems of possibly competing federal and state labor-contract law, created by its *Lincoln Mills*¹² interpretation of section 301.¹³

II

It is fairly easy to articulate the core proposition developed by the Supreme Court concerning state power to regulate concerted employee action: If employee action—that is, a strike, picketing, collective bargaining itself, etc.—is protected under section 7 of the National Labor Relations Act a state may not interfere with it.¹⁴

¹⁰ Compare, *Cramton, Pennsylvania v. Nelson: A Case Study in Federal Pre-emption*, 26 U. of Chi. L. Rev. 85, 107-108 (1958).

¹¹ National Labor Relations Act §8, 61 Stat. 140 (1947), as amended, 29 U.S.C.A. §158 (1952). The literature on these questions is extensive. See, e.g., Meltzer, *The Supreme Court, Congress and State Jurisdiction over Labor Relations*: I, 59 Col. L. Rev. 6 (1959); Cox, *Federalism in the Law of Labor Relations*, 67 Harv. L.Rev. 1297 (1954); Isaacson, *Labor Relations Law: Federal versus State Jurisdiction*, 42 A.B.A.J. 415 (1956).

¹² *Textile Workers Union v. Lincoln Mills of Alabama*, 353 U.S. 448 (1957).

¹³ 61 Stat. 156 (1947), 29 U.S.C.A. §185 (1952).

¹⁴ "The Court has ruled that a State may not prohibit the exercise of rights which the federal Acts protect. Thus in *Hill v. Florida*, 325 U.S. 538, the State enjoined a labor union

On its face this seems to be a sensible and workable rule of law, and fortunately appearances are not entirely deceiving; but there are difficulties. First, the legislative history of section 7 of the Wagner Act, the very language of the section, and the general structure of the statute, nowhere suggest that employee concerted action is to be protected from other than employer interference.¹⁵ Today, however, it seems plain that a judgment allowing state interference with section 7 activity would have defeated the central statutory purpose of the NLRA, namely, to encourage collective bargaining throughout the nation. The majority opinion in *Hill v. Florida*¹⁶ by recognizing this, sets us on the right path.

Second, although the literal language of section 7—"concerted activities for the purpose of collective bargaining or other mutual aid or protection"—seems broad enough to cover every form of employee concerted action, every form of action is not in fact covered.¹⁷ For example, a strike for higher wages is not protected by section 7 if it would be a federal crime for the struck employer to raise wages.¹⁸ Federal law of course determines the conduct protected. The determination in the first instance should be made by the Labor Board; ultimately a Supreme Court conclusion may be decisive.¹⁹ In determining the coverage of section 7, however, state interest has been given weight both by Board and Court; but only in a very limited way.²⁰

Conduct tortious under state law, in that it is destructive of property or personally injurious, and conduct traditionally criminal are outside the ambit of

from functioning until it had complied with certain statutory requirements. The injunction was invalidated on the ground that the Wagner Act included a 'federally established right to collective bargaining' with which the injunction conflicted. *International Union v. O'Brien*, 339 U.S. 454, involved the strike-vote provisions of a state act which prohibited the calling of a strike until a specific statutory procedure had been followed. The state act was held to conflict not only with the procedure and other requirements of the Taft-Hartley strike provisions but also with the protection afforded by §7 of that Act." *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 474 (1955).

¹⁵ Cf. *Hill v. Florida ex rel. Watson*, 325 U.S. 538, 547-561 (1945) (Frankfurter dissenting.)

¹⁶ 325 U.S. 538 (1945).

¹⁷ See, e.g., *Southern S.S. Co. v. NLRB*, 316 U.S. 31 (1942); *Cox, The Right to Engage in Concerted Activities*, 26 Ind. L. J. 319 (1951).

¹⁸ *American News Co.*, 55 N.L.R.B. 1302, 14 L.R.R.M. 64 (1944).

¹⁹ "At times it has not been clear whether the particular activity regulated by the States was governed by §7 or §8 or was, perhaps, outside both these sections. But courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board. What is outside the scope of this Court's authority cannot remain within a state's power and state jurisdiction too must yield to the exclusive primary competence of the Board." *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244-45 (1959).

²⁰ See *Cox, The Right to Engage in Concerted Activities*, 26 Ind. L. J. 319, 334-35 (1951).

section 7.²¹ Aside from these two flexible categories, state interest does not seem to be recognized in defining the content of the section.

I have no quarrel with this as a general proposition. Section 7 is indispensable to federal labor policy and except for public health and safety or protection of person or property, diverse state policies should not shape its content. A single state, no matter what its motive, cannot be permitted within its territory, to shrink or expand the federal protection afforded to peaceful employee conduct. The possible consequences to the federal program of such experimentation could be dangerous. By upsetting the employer-union bargaining balance achieved under the Act, state regulation could induce industrial unrest and obstruct the free flow of interstate commerce. Furthermore, "anti-union" legislation might attract new business to a particular state or bestow upon industry in that state a competitive advantage. It follows that state anti-trust policy, for example, should not be considered in deciding whether employee action is protected under section 7.²² And, of course, a state which out of concern with economic waste attempts to substitute a general system of compulsory arbitration for collective bargaining, should not succeed thereby in limiting the coverage of section 7. Indeed, with one exception, no state interest which does not fit the rubric of torts injurious to the person or destructive of property or of crimes of a traditional nature should affect the content of section 7.²³

When it comes to the regulation of a public utility, however, local health and safety problems should be in the foreground. Serious health and safety problems may result if a community is subjected to a prolonged strike at the water or electric company. Accordingly, to meet this local problem, a state ought to be able to limit, in this limited situation, the scope of section 7. It should also be able to effectuate its policy by direct sanctions when necessary. If I may anticipate myself a little, this should be true to the same extent and for the same reason that a state may act where there is violence.

Wisconsin tried to outlaw strikes in public utilities and to substitute compulsory arbitration. The Supreme Court held in the *Electric Railway*²⁴ case that this was unconstitutional. The holding is unfortunate. While a contrary decision would have meant diversity from state to state in the coverage of

²¹ See, e.g., *B.V.D. Co.*, 110 N.L.R.B. 1412, 35 L.R.R.M. 1246 (1954), rev'd on other grounds 237 F.2d 545 (App.D.C., 1956); *Republic Creosoting Co.*, 19 N.L.R.B. 267, 5 L.R.R.M. 497 (1940).

²² *Local 24, Teamsters v. Oliver*, 358 U.S. 283 (1959); *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468 (1955).

²³ I do not entertain the notation that the words "traditional" or "injurious to the person or destructive of property" will decide a hard case. I think, however, that they do express a mood, and for that reason are useful.

²⁴ *Amalgamated Ass'n of Street Employees v. Wisconsin Employment Relations Board*, 340 U.S. 383 (1951).

section 7 as applied to public utilities employees, it would not have created a problem of competing independent bodies of law governing the primary transactions of individuals or institutions. And, the injury to the national program of collective bargaining would have been justified because of a plainly paramount concern.

The technique of allowing a state to restrict the scope of section 7 is presently followed—to some extent at any rate—under the Taft-Hartley Act's union security provisions. The federal act on its own forbids the closed shop and places restrictions on the union shop. It allows labor-management agreement upon other union security arrangements.²⁵ But, section 14(b) provides:

Nothing in this [Act] shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State . . . in which such execution or application is prohibited by State . . . law.²⁶

Under this section, federal law accommodates itself to state regulation. In effect, a state may restrict within its territory the content of section 7, although it would seem it may not use direct equitable sanctions to enforce its policy.²⁷ The technique is fine. The only problem is that in this manner, section 14(b) of Taft-Hartley undercuts the total federal program out of respect for what is to my mind a relatively unimportant state interest.

Section 14(b)—and the state "Right to Work Laws" it makes constitutional—are contrary to the general philosophy of the National Labor Relations Act. Under the national statute, the majority union represents all employees in the bargaining unit.²⁸ Such a privilege must carry its responsibility. It does. The majority union has a duty to represent all employees fairly.²⁹ To learn of the needs of all the employees it represents, the union must establish channels of communication between worker and leader. In democratic unions channels are to be found within the organization. Membership in the organization is the condition precedent to their use, and the law should encourage membership and use. But section 14(b) and the Right to Work Laws pull in exactly the opposite direction. They encourage non-membership and non-use.

²⁵ 61 Stat. 140, 141 (1947), as amended, 29 U.S.C.A. §§158(a)(3), 158(b)(5) (1952).

²⁶ 61 Stat. 151 (1947), as amended, 29 U.S.C.A. §164(b) (1952).

²⁷ *Local Union 429, Int'l Broth. Elec. Workers v. Farnsworth & Chambers Co.*, 353 U.S. 969 (1957), reversing per curiam 201 Tenn. 329, 299 S.W.2d 8 (1957).

²⁸ *J. I. Case Co. v. NLRB*, 321 U.S. 332 (1944).

²⁹ "[T]he organization chosen to represent a craft is to represent all its members, the majority as well as the minority, and it is to act for and not against those whom it represents. It is a principle of general application that the exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf, and that such a grant of power will not be deemed to dispense with all duty towards those for whom it is exercised unless so expressed." *Steele v. Louisville & N.R.R.*, 323 U.S. 192, 202 (1944). See *Syres v. Local 23, Oil Workers Int'l Union*, 350 U.S. 892 (1955), reversing per curiam 223 F.2d 739 (C.A.5th, 1955).

Furthermore, to find, as some do, a civil liberties issue in compulsory unionism, given majority rule and the union's duty of fair representation, is as absurd as finding a civil liberties issue in the plight of a home owner who does not want to pay taxes because he does not want his garbage collected anyway.

Here is an area where Congress should act, not to undo what the Court has done, but to undo what Congress itself has done.

III

To turn now to the penumbral propositions which have developed in the area of union concerted activity and state regulation: Our attention must shift to state regulation of non-section 7 conduct. There are three problem areas: First, state equitable relief from activity which is an unfair labor practice under section 8; second, state equitable relief from conduct unprotected under section 7, but not an unfair practice under section 8; and third, damages for behavior unprotected under section 7, which may or may not be an unfair practice under section 8.

An example of the first category, that is, state jurisdiction in equity where there appears to be an unfair labor practice, is the *Weber* case.³⁰ The IAM went on strike at Anheuser-Busch because the company, under pressure from the Carpenters, refused to maintain in its collective agreement with IAM a clause promising to have machinery repaired only by contractors also under agreement with that union.

Anheuser-Busch tried to obtain NLRB relief alleging a violation of section 8 (b)(4)(D).³¹ It also sought relief in the state courts of Missouri, under federal law and under a Missouri restraint of trade statute. Anheuser-Busch lost before the board on its 8(b)(4)(D) complaint. It obtained injunctive relief from Missouri, however, upon the ground that the union's conduct constituted a violation of the state statute.

An undivided Supreme Court reversed, holding that federal law occupied the field. The Board's determination, the Court reasoned, did not necessarily mean that it had reached any conclusion as to section 8 (b)(4)(A) or (B);³² only section 8(b)(4)(D) had been before the Board. Accordingly, the Board may have had jurisdiction to grant relief. The injunction which the state court issued, therefore, may have been a potentially conflicting remedy. Furthermore, the Court said, if the union's conduct was not an unfair labor practice, it may have been protected under section 7.

The holdings in this case and others in this category—*Garner*³³ and *UAW-Kohler*³⁴ are two additional notorious examples—are to my mind quite correct.

³⁰ *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468 (1955).

³¹ 61 Stat. 140 (1947), as amended, 29 U.S.C.A. §158(b)(4)(D) (1952).

³² 61 Stat. 140 (1947), as amended, 29 U.S.C.A. §§158(b)(4)(A) and (B) (1952).

³³ *Garner v. Teamsters Union*, 346 U.S. 485 (1953).

³⁴ *UAW v. Wisconsin Employment Relations Bd.*, 351 U.S. 266 (1956).

They decide that equitable relief in state tribunals is precluded unless—and this is the learning of the *UAW-Kohler* case—the concerted employee action, which looks like an unfair labor practice, is violent, disruptive of peace or destructive of property.³⁵

Before discussing the proper rationale of the *Weber* case, I should like to begin an examination of the second penumbral proposition, which concerns state equitable relief from conduct seemingly unprotected under section 7 but not—or at least not appearing to be—an unfair labor practice under section 8. The Supreme Court has decided only one case, *Briggs-Stratton*³⁶—and that early in the game—which has raised this question directly. The *Briggs-Stratton* cases involved intermittent work stoppages. This type of conduct, the Supreme Court ultimately decided, was not within the protection of section 7. Therefore, the employer would have been free to invoke self-help without fear of federal intervention. Although he might not have been able to find qualified replacements, the employer could have discharged any worker for engaging in the work stoppages without committing an unfair practice.³⁷ However, intermittent work stoppages were assumed by the Court not to constitute a union unfair practice under the Act and so federal relief was not available to the employer.³⁸

The employer did not use his legally unrestricted economic might. Rather, he sought equitable relief from a state agency which did brand as unfair the unprotected employee conduct. This agency ordered that the employees cease, and the Supreme Court of the United States affirmed. Mr. Justice Jackson, writing for the majority, seems to suggest that the intermittent work stoppage is not unlike a sit-down strike—that it carries with it some of the same potential for explosive violence historically associated with that bargaining technique. If Justice Jackson were right about this similarity, state interest would bulk large, and the opinion would be plainly correct.

The real problem is, whether the *Briggs-Stratton* case is supportable without associating intermittent work stoppages with potential violence and destruction of property—that is, without relying upon this weightiest of state interests. I think the answer is no (and I assume that without this association intermittent work stoppages are still, as a matter of federal law, outside the protection of section 7).

³⁵ The state tribunal may issue an injunction where the concerted action, while not yet violent, has a potential for violence. *Youngdahl v. Rainfair, Inc.*, 355 U.S. 131 (1957).

³⁶ *International Union, UAW v. Wisconsin Employment Relations Bd.*, 336 U.S. 245 (1949).

³⁷ See *NLRB v. Thayer Co.*, 213 F.2d 748 (C.A.1st, 1954).

³⁸ The Board has since taken the position that this type of collective action is an unfair labor practice. *Textile Workers (The Personal Products Case)*, 108 N.L.R.B. 743, 34 L.R.R.M. 1059 (1954), *aff'd in part* 227 F.2d 409 (App.D.C., 1955), *cert. denied* 352 U.S. 864 (1956); *Insurance Agents' Int'l Union (The Prudential Ins. Co. case)*, 119 N.L.R.B. 768 (1957), *rev'd* 260 F.2d 736 (App.D.C., 1958), *cert. granted* 358 U.S. 944 (1959). In the second *Garnion* case the Court observed: "The approach taken in that case [*Briggs-Stratton*], 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." 359 U.S. 236, 245 n.4 (1959).

To be sure, a strong argument can be fashioned to support state jurisdiction. There is a substantial state interest in setting up a procedure which will head off employer self-help and will substitute law for disruptive economic combat. Short of state help, the employer has nowhere to turn. The NLRB has no jurisdiction in the absence of an unfair labor practice, and by hypothesis, the employee activity is not such a practice.

It may be suggested that collective action of the unprotected but not unfair practice type has been left by congressional design to self-help; and that accordingly the NLRA demands that the states stay out. To allow a state to add its sanction to the employer's could in some cases upset the delicate bargaining balance established by federal law. However, this is not the controlling consideration; rather, I think that at bottom much the same reason that precludes a state from enjoining under state law peaceful conduct which violates section 8 of the National Labor Relations Act operates here.

What then is the rationale for eliminating state equitable relief in the *Weber* type of situation? The answer is that Congress has created a labor board to construe the federal statute in the first instance. Federal purpose demands exclusive primary jurisdiction in an expert body, the NLRB. To allow a state court to make the initial determination of the federal question is to undercut this federal purpose, and it is a mistake to think that the availability of eventual—or perhaps potential is better—Supreme Court review is a cure. There are several reasons for this: (1) A trial court, be it state or federal, may find facts different from what the Board would find and may emphasize facts different from what the Board would emphasize. Appellate review quite likely will be unable to remedy this. (2) The Supreme Court should, whenever possible, have the benefit of a Board determination before it construes the NLRA. And (3), in determining the federal question, a state court out of ignorance, habit, or malice, may read state policy into the federal statute. This, I take it, can be rectified eventually by the Supreme Court, but, where an injunction is involved, the action of the Supreme Court may have little practical significance for the union, since the consequences of an injunction cannot easily be removed. Furthermore, between the state court determination and Supreme Court reversal, an element of uncertainty is introduced into the law which may make things more difficult for everyone regulated by the Act.

What federal question would a state have to determine in a *Weber* case if the Supreme Court had held that the state had jurisdiction? A state court certainly would not—unless it thought its charter was to apply federal law—determine that the conduct violated section 8 of Taft-Hartley. Rather it would have to determine: (1) whether the conduct is unprotected under section 7—this is the federal question and it is the inescapable threshold question in the case; and (2) whether, as a matter of state law, this conduct should be enjoined.

I submit that a state court does exactly the same thing in a *Briggs-Stratton* case and that the injury to federal policy is as great in the one as in the other. To be sure, potential conflict in the particular situation is not as imminent

where it does not appear that a section 8 union practice is involved. The NLRB may have no jurisdiction to pass upon the section 7 question, but in fact it is not always clear whether there is a section 8 violation by the union, and hence the Labor Board may very well become involved. Furthermore, if the employer uses self-help, the union may bring the case to the Board, and the central issue will be whether the union conduct was within section 7.³⁹ Quite apart from any Board-court conflict, in a particular case, however, is the general importance to the federal labor program of section 7. This importance makes it desirable for the states not to determine what peaceful employee conduct is outside the protection of that provision.⁴⁰

Thus, it seems that the reason states are without jurisdiction in the *Weber* type of situation is that no tribunal except the NLRB is to be trusted with expounding in the first instance the meaning of section 7 of the NLRA. The justification for this is rooted in American labor history. The record is replete with cases where courts have all too easily found concerted employee action illegal in purpose and improper in method.⁴¹ With respect to this federal policy, *Briggs-Stratton* is not different from *Weber*.

To proceed to the third penumbral proposition—damages for behavior, apparently unprotected under section 7, which may or may not be an unfair labor practice under section 8. The Court in two cases, *Laburnum* and *Russell*—one where the employer was plaintiff,⁴² the other where an employee initiated the action⁴³—sustained state power to award compensatory and punitive damages. Both cases involved union conduct that probably was unfair under section 8. Both cases, furthermore—and more importantly—involved conduct that could have been enjoined because of violence under the *UAW-Kohler* decision. The Court, however, made little turn upon this latter fact, but rather the majority emphasized that here Board and court remedies were not conflicting. In this term's *Garmon* case,⁴⁴ however, *Laburnum* and *Russell* were limited to their facts. *Garmon* held that a state may not award damages, even as it may not issue an injunction, where peaceful employee action appears to be unprotected under section 7 and unfair under section 8. The *Laburnum-Russell-Garmon* doctrine is sound, but the problems raised by these cases are not easy ones.

³⁹ If the conduct is protected by §7, employer interference is an §8(a)(1) unfair practice. If the conduct is not protected such interference is not illegal. See *NLRB v. Thayer Co.*, 213 F.2d 748, 752 (C.A.1st, 1954).

⁴⁰ "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." *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 246 (1959).

⁴¹ See generally, *Cox*, *Cases on Labor Law* 22-99 (4th ed., 1958).

⁴² *United Constr. Workers v. Laburnum Constr. Corp.*, 347 U.S. 656 (1954).

⁴³ *International Union, UAW v. Russell*, 356 U.S. 634 (1958).

⁴⁴ *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959).

First, the fear of substantial punitive damages may be thought to undermine federal policy by deterring employees from the full exercise of their section 7 rights. There is no clear line separating protected from unprotected activity. If a union goes too far and is slapped with an injunction, the punishment is tolerable, and hence the expectation of a potential injunction may not in practice restrain a union from engaging in activity which in fact is protected by section 7. At any rate the slight risk of such restraint surely must be run where the state interest is preservation of the peace. Large punitive damages, on the other hand, may indeed make a union more cautious.⁴⁵ State interest in deterring violence, however, is so pronounced, and the efficacy of the various deterrents so debatable, that this risk seems fully justified.

Second, having said this, should the Court in a case like *Garmon*, where the union activity is peaceful, unprotected and probably unfair, and where the NLRB would not decline to exercise jurisdiction, permit a state to award damages?

In such a case a state injunction would be improper because the Labor Board has exclusive, primary jurisdiction. To allow states jurisdiction in equity subverts clear federal policy. Furthermore the availability of federal relief reduces the need for comparable state relief, and therefore, reduces the importance of independent state interest. It is perhaps more difficult to make out a case against damages. The Board has no power to compel a union to reimburse an employer for the harm its picketing may have caused him. The answer is to be found, however, by recognizing again the congressional belief that important advantages result from initial interpretation of section 7 by a single expert agency. This consideration is nearly, but not completely, as compelling when the problem has to do with damages as when it has to do with injunctive relief.

Whether the suit in a state court is for an injunction or for damages, the state court has to decide the federal question: Is the conduct protected by section 7? But where the state court decides this question improperly and awards damages, the consequences to the defendant are not irreversible; for practical purposes they well may be when the award is an injunction. Ultimate action by the Supreme Court can reinstate the status quo if the judgment calls for the payment of money, but it often cannot put the parties in the position they were in prior to a labor injunction. However, the several other considerations articulated earlier to explain exclusive federal regulation where equitable relief is involved retain their force here. They justify the result in *Garmon*: A state may not award damages where its interest is anything short of preserving the peace, preserving local health, or deterring violence.

There is one additional difference to be noted between the damage action and the suit for an injunction. The damage action in the state court can come after a determination of the federal question by the Labor Board. No good reason

⁴⁵ *International Union, UAW v. Russell*, 356 U.S. 634, 652 (1958) (dissenting opinion).

exists for precluding such a state suit where the Board has found the conduct unprotected. The federal question should be *res judicata* in the state litigation. This device, of course, is not always available. It is not likely to be available where the concerted activity, while unprotected, is not an unfair labor practice. In such a situation it may be difficult to invoke the Board's jurisdiction. Where this occurs I think the state should not be allowed to proceed.⁴⁶

At this point a quotation from a portion of Mr. Justice Frankfurter's majority opinion in the second *Garmon* case is relevant. What the Justice wrote will be helpful as a summary of some of the observations I have made concerning these penumbral problems, and as an introduction to an additional point I should like to make:

[T]he unifying consideration of our decisions has been regard to the fact that Congress has entrusted administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience:

"Congress did not merely lay down a substantive rule of law to be enforced by any tribunal 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 towards labor controversies. . . . A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law . . ." [*Garner v. Teamsters Union*, 346 U.S. 485, 490-91].

Administration is more than a means of regulation; administration is regulation. We have been concerned with conflict in its broadest sense; conflict with a complex and interrelated federal scheme of law, remedy, and administration.⁴⁷

The Justice then went on to say:

However, due regard for the presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy, has required us not to find withdrawal from the States of power to regulate where the activity regulated was a merely peripheral concern of the Labor Management Relations Act. See *International Assn. of Machinists v. Gonzales*, 356 U.S. 617. Or where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act.⁴⁸

The last sentence of the quotation is a reference to cases involving violence or similar conduct. The sentence prior thereto, however, suggests an additional

⁴⁶ Cf. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 246 (1959).

⁴⁷ *Id.*, at 242-43.

⁴⁸ *Id.*, at 243-44.

area where state interest should be held to outweigh the policy of exclusive, primary jurisdiction in the NLRB.

The *Gonzales* case,⁴⁹ to which the Justice refers, was a suit in a state court by an expelled union member for reinstatement in his union, for damages resulting from lost wages (he was unable to obtain employment because he was not in the union) and for physical and mental suffering. The plaintiff was successful under state law on his theory that the disciplinary action of the union was contrary to its constitution and was, accordingly, a breach of his membership contract.

The NLRA affords job protection to the dues paying member who has been expelled.⁵⁰ Plaintiff, therefore, might have been able, in an unfair practice proceeding, to obtain a back pay award from the NLRB. He could not have been ordered reinstated in his union by the Board, however, and he could not there have received compensation for his pain.

Mr. Justice Frankfurter's quoted explanation for allowing the state to afford a comprehensive remedy—"the activity regulated was a merely peripheral concern" of the federal act—is as good an explanation as one can make. Yet, in one sense it is not especially helpful, although the decision in *Gonzales* is plainly correct. The difficulty, of course, is that this formulation, like any other formulation, will not decide the next case. It is not easy to know what activity is a "merely peripheral concern" of the federal statute. And yet, other suggestions for dealing with this range of problems are no better in this regard and in other ways are less helpful.

For example, the Court has, properly I think, rejected as an approach inquiry into whether state regulation is embodied in a statute of general application (the potential conflict with federal policy should be tolerated because of an independent state interest) or a statute regulating labor relations directly (the potential conflict should not be tolerated).⁵¹ Not only is it difficult to decide how to classify particular legislation, but the inquiry called for by such an approach seemingly ignores what should be the starting point, namely, the federal statute. The fact that in the *Weber* case, for example, the state acted under its anti-trust laws rather than under a labor-relations statute is not by itself relevant. If one were to classify the state action in *Weber* as regulation of labor relations, one would do so because one thought the activity regulated was more than a "merely peripheral concern" of the NLRA.

Mr. Justice Frankfurter's formulation is more direct, and while it does not decide tomorrow's case, it does—and this is all one has any right to expect—properly channel inquiry.

One additional case in this general area of state regulation of concerted action

⁴⁹ 356 U.S. 617 (1958).

⁵⁰ 61 Stat. 140, 141 (1947), as amended, 29 U.S.C.A. §§158(a)(3), 158(b)(5) (1952).

⁵¹ See *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 479-80 (1955); *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244-45 (1959).

invites a word or two of comment. *Guss v. Utah Labor Relations Board*,⁵² decided late in the 1956 term, held that the pre-emption doctrine of *Weber* applied where the Board had declined to exercise its jurisdiction because of the local nature of the controversy. Plainly this holding cannot be explained in terms of potentially conflicting remedies since the Board had taken itself out of the picture. But the federal statute, exhausting as it does Congress' power under the commerce clause, applied to the situation. Perhaps, therefore, the state before it could act would have to determine that none of the conduct it was about to enjoin was protected under federal law. For Utah, the state involved, to make such a determination may be as potentially dangerous to federal policy as it was for Missouri so to determine in *Weber*.⁵³

While it is possible satisfactorily to explain *Guss* in this fashion, the decision, by establishing a large "no law land" creates a most unfortunate situation—one which could have been avoided. The Court was free to hold that when the Board determined not to exercise its jurisdiction, federal law had no application and Utah was at liberty to proceed without deciding any federal question.⁵⁴ But today, the situation can be cured if at all only by Congress. The cure, it seems to me, is to allow state law to apply completely to those areas where the Board in accordance with proper procedure has determined that it will not exercise its jurisdiction.⁵⁵

IV

I have been discussing problems of accommodation between federal and state regulation of employee concerted activity, and have suggested that federal policy requires an exclusive, nation-wide regime except in the limited area "where the activity regulated [by a state is] a merely peripheral concern of the Labor Management Relations Act,"⁵⁶ or where violence or public health or safety is involved. National labor policy embodied in the NLRA must be protected from state regulation which tends to defeat that policy. Collective

⁵² 353 U.S. 1 (1957).

⁵³ See *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 246 (1959).

⁵⁴ Cf. *Guss v. Utah Labor Relations Bd.*, 353 U.S. 1, 12 (1957) (dissenting opinion).

⁵⁵ Legislation should contain the following elements:

a. The NLRB should be authorized to make rules defining its jurisdictional boundaries based on the size and nature of the employer's business.

b. These rules should be made after notice and hearing in accordance with the provisions of the Administrative Procedure Act.

c. Businesses outside the jurisdictional boundaries as defined by the Board should be subject to state law.

d. In any labor dispute in an industry affecting commerce, the state could not assert jurisdiction unless the Board or its authorized agent certified that the employer was outside the Board's jurisdictional boundaries.

But cf. Sen. 1555, 86th Cong. 1st Sess. tit. VII, §701 (1959) (Kennedy Bill, which passed the Senate 90 to 1), 105 Cong. Rec. 6,048 (Apr. 25, 1959).

⁵⁶ *San Diego Building Trades Council v. Garmon*. 359 U.S. 235, 243 (1959).

bargaining, as the central institution for ordering labor-management relations, would be jeopardized if states were free, directly by means of restrictive regulation or indirectly by concurrent primary jurisdiction, to interfere with the rights section 7 of the National Labor Relations Act grants to employees. Some of this same reasoning applies, but with a good deal less force, in the area to which I should now like to turn.

The *Lincoln Mills* case decided that section 301 of Taft-Hartley was a charter to the federal courts to develop federal labor-contract law. The case did not decide what the Court eventually must determine, namely, whether the new federal contract law is exclusive.

If state substantive law were to survive *Lincoln Mills*, some direct interference with section 7 rights occasionally might occur. For example, suppose under state law a state court awards an employer damages, holding that a strike is in violation of an implied "no-strike" provision in a contract. Suppose further that under federal law the "no-strike" provision would not have been implied, and that therefore, the strike was a protected activity under section 7. If this sort of conflict were frequently to occur, it would be unfortunate indeed. However, judicial litigation under a labor contract generally is ancillary and relatively unimportant to the institution of collective bargaining. National labor policy will not often be injured if diverse laws are applied by federal and state court, in suits for breach of the labor contract. It can be argued, therefore—although I think otherwise—that the infrequent harm to national labor policy resulting from such diversity, is not sufficient reason to overthrow existing state law grounded in legitimate state interest.⁵⁷

But whether this is so or not, given *Lincoln Mills*, some federal pre-emption is plainly necessary. The reason is the protection of the union and the employer who sign a collective agreement. Primary rights and duties of parties to a labor contract ought not to be governed by two bodies of possibly conflicting law. I use the word "primary" to distinguish such rights and duties from the remedies available once a dispute reaches a court.

There may be several reasons why the parties' primary rights and duties, should not be governed by independent state and federal law. In the first place competing systems of law will lead to uncertainty in the formation and performance of the agreement. Words in any legal document are ambiguous, but the body of law which grows up in an area through decision helps to dispel this ambiguity. The existence of two bodies of law which cannot be accommodated by any conflict-of-laws rule, however, is calculated to aggravate rather than to alleviate the situation.

It is also likely—and this is the second consideration—to stimulate dispute

⁵⁷ Of course these difficult problems of accommodating federal and state law in the area of contract breach would not have developed if §301 had not been held to create a substantive-federal-contract law. See Wollett & Wellington, *Federalism and Breach of the Labor Agreement*, 7 *Stan. L. Rev.* 445 (1955).

between the union and the employer because it may increase the number of positions which a party to the agreement can reasonably take. And finally, in the pathological case where a dispute is not resolved by the machinery established in the agreement, the existence of competing state and federal law may lead to forum shopping.

But the fact that labor-contract law must for these reasons be exclusively federal does not mean that state courts may not have concurrent jurisdiction to administer this exclusive federal law. Indeed, the usual presumption is quite the contrary,⁵⁸ and nothing in the particular situation would seem to overcome this presumption.

Federal policy precludes a state in most situations from determining whether employee concerted action is protected under section 7. The statute envisions, and wise labor policy requires, that this question be decided initially, if it be decided at all, by a single, expert tribunal. But the NLRB is not the tribunal primarily responsible for developing labor contract law. Section 301 invests the federal courts with this task, even though occasionally a court in deciding the contract question, in effect determines that conduct is not protected under section 7. The federal courts are not a unitary institution nor are they expert. Ultimate uniformity can be achieved only by the Supreme Court. What I am saying is that there is no problem of exclusive-primary jurisdiction in the 301 area, and accordingly, state tribunals may apply and develop federal law along with the federal courts.

The fact that state courts have concurrent jurisdiction in the contract-breach area to develop and apply federal substantive law, gives rise to another intriguing question of federal-state relations. This question was presented and resolved satisfactorily by the Supreme Court of California in the *McCarroll* case.⁵⁹ That court held that California has the power to enjoin a strike in breach of a collective bargaining agreement. The court assumed correctly, although the question is not free from doubt,⁶⁰ that the Norris-LaGuardia Act⁶¹ would have precluded a federal district court from granting equitable relief. Judge Magruder in the first *Mead* case⁶² and Judge Clark in *Bull Steamship*⁶³ have held in like situations that this is so. A federal court, however, could have awarded damages.

⁵⁸ See *Claffin v. Houseman*, 93 U.S. 130 (1876).

⁵⁹ *McCarroll v. Los Angeles County Dist. Council of Carpenters*, 49 Cal.2d 45, 315 P.2d 322 (1957), cert. denied 355 U.S. 932 (1958).

⁶⁰ See Wellington, Judge Magruder and the Labor Contract, 72 Harv. L. Rev. 1268, 1277-81 (1959).

⁶¹ 47 Stat. 70 (1932), as amended, 29 U.S.C.A. §§101-15 (1952).

⁶² *W. L. Mead, Inc. v. International Broth. of Teamsters*, 217 F.2d 6 (C.A.1st, 1954).

⁶³ *A. H. Bull S.S. Co. v. Seafarers' Union*, 250 F.2d 326 (C.A.2d, 1957), cert. denied 355 U.S. 932 (1958).

If the California court is correct, a competitive situation is of course created between federal and state tribunals as to the remedies available for breach of contract. Is this not as detrimental to the welfare of the parties to the collective agreement as would be state-federal competition on questions of primary rights? That is, are not the very same reasons that make for exclusive federal regulation on questions of primary rights operative here?

I suggest that the answer to this question is no for the following two reasons: (1) The existence of competing federal and state remedies, as distinguished from the existence of competing primary rights, does not becloud understanding in the formation and performance of the agreement; and (2) Competing federal and state remedies are also unlikely to stimulate disputes, the way competing primary rights do, although, the presence or absence of injunctive relief in both sets of courts might do so. When litigation is in order, however, forum shopping will thrive on the existence of such competition. But if the parties to the agreement are not subjected by competing remedies to increased uncertainty or forced into increased disputation—and I do not see how they will be—who is injured by forum shopping?

In some situations forum shopping would, if invited, indeed be an evil. For example, if it is true that in a diversity case a federal district court is just another court of the state in which it sits,⁶⁴ the federal government has no interest in providing a remedy in its courts when that remedy is unattainable in the state court. To the contrary, such action might be destructive of the federal policy which underlies the diversity jurisdiction. It may also interfere with the state policy which in diversity cases is always supreme.

In state court suits under section 301, the situation is altogether different. A state court has an interest in the remedy it grants. State courts applying federal statutes are not just courts of the national government, unless the national program embodied in the federal statute demands that they assume such a role. Justice Traynor, who wrote for the majority in *McCarroll*, is very persuasive in arguing that federal labor policy, which in this case is the relevant national program, makes no such demands. He said:

The principal purpose of section 301 was to facilitate the enforcement of collective bargaining agreements by making unions suable as entities in the federal courts, and thereby to remedy the one-sided character of existing labor legislation. . . . We would give altogether too ironic a twist to this purpose if we held that the actual effect of the legislation was to abolish in state courts equitable remedies that had been available, and leave an employer in a worse position in respect to the effective enforcement of his contract than he was before the enactment of section 301.⁶⁵

⁶⁴ See, e.g., *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945).

⁶⁵ *McCarroll v. Los Angeles County Dist. Council of Carpenters*, 49 Cal.2d 45, 63-4, 315 P.2d 322, 332 (1957), cert denied 355 U.S. 932 (1958). It has been suggested that although the Norris-LaGuardia Act is a statute which in terms merely limits the jurisdiction of the federal courts, it expresses a substantive federal policy. Cf. *United*

The *McCarroll* case does not exhaust the difficult problems of co-ordinate federal-state jurisdiction created by the *Lincoln Mills* interpretation of section 301. *Lincoln Mills* was decided after *Westinghouse*,⁶⁶ and there is no suggestion in the later opinion that the restrictive reading given 301 in *Westinghouse* is about to be discarded. On the other hand, there is no reason why the Court cannot quite properly reverse *Westinghouse*. For at least some members of the Court, the *Westinghouse* interpretation of 301 was compelled by constitutional doubts which *Lincoln Mills* has now dispelled. But whether *Westinghouse* is to be overruled or not, it seems probable that some litigation involving breach of the labor agreement will not be cognizable under section 301. *Westinghouse* itself held that a union could not sue under the section for back wages allegedly owed employees. Either the union or an employee might have a cause of action under state law to sue for these wages. It seems to me that a state surely may provide a cause of action in the *Westinghouse* type of situation. Furthermore, I would think a state may under any circumstances grant an employee, who is given rights under the collective agreement, a state cause of action, if 301 is construed to provide a cause of action only to the union or employer. The state, however, ought not to have unrestricted power. Indeed, its power should be severely circumscribed.

The question of who has a right to sue under the collective agreement and of the law to be applied in the state court under the state cause of action must be decided in a manner harmonious with the federal law developed under section 301 itself. It would be intolerable if, as a matter of federal law, a contract were interpreted in one fashion, while under a state cause of action a different interpretation was applied. This would bring about all of the evils which I have suggested would exist if federal law were not the exclusive law applied in actions cognizable under section 301. It would make the negotiation and interpretation of the agreement difficult, and it would invite dispute between the parties to the

States v. Hutcheson, 312 U.S. 219 (1940). And accordingly, "state enforcement of labor agreements by injunction . . . conflicts with the broader purpose of the Norris-La Guardia Act." Injunctions in State Courts, 10 Stan. L. Rev. 575, 579-80 (1958). Prior to §301, however, Norris-La Guardia did not preclude a state court from enjoining a strike in breach of a labor agreement. "[A]nd hence if its restrictions were to be made applicable to state courts, section 301 would have to be the vehicle. And if section 301 is construed implicitly to embody the restrictions and to carry them into state courts, the paradox is apparent: enactment of section 301, originally intended to provide relief in federal courts where none could be obtained in state courts due to the non-suability of unions, results in denying a form of relief theretofore available in many states." *Id.*, at 577. For a court to reach such a result would require it to ignore congressional "intent" in one of the few situations where "intent" is clear. Norris-La Guardia may express a substantive federal policy, but that policy is not that state courts are powerless to enjoin a strike in breach of contract. For a critical judgment on *McCarroll*, however, see Gregory, *The Law of the Collective Agreement*, 57 Mich. L. Rev. 635, 652-53 (1959).

⁶⁶ *Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp.*, 348 U.S. 437 (1955).

agreement. Here again we are dealing with the primary rights and duties of the parties in a situation where there is no adequate conflict-of-laws rule to accommodate competing bodies of law except that of federal supremacy.

One final thought: The *Lincoln Mills* decision necessitates a substantial curtailment of state power in the labor field because independent bodies of law should not compete to regulate the primary rights of individuals and organizations. I do not think that this curtailment had to be. *Lincoln Mills* could quite properly have held that state law applies in 301 suits. Such a holding would have compensated for the occasionally necessary, but nevertheless unfortunate, banishment of the states from other areas of labor-management affairs.