

1960

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Recommended Citation

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Notes on a "G-String": A Study of the "No Man's Land" of Labor Law

In this article, Professor McCoid discusses the recent Supreme Court decision in the Garmon case, which closed one loophole to the "no man's land" in labor regulation, and the legislative "solution" of the no man's land problem. He raises questions concerning the wisdom of the Court's refusal to permit state courts and agencies to act where the National Labor Relations Board declined to exercise its jurisdiction over businesses affecting commerce, and analyzes some of the problems which the recent legislation may raise. He concludes that the "solution" may still leave substantial questions unanswered.

Allan H. McCoid*

INTRODUCTION

ON April 20, 1959, the Supreme Court of the United States handed down the latest in a series of decisions dealing with the power of the federal and state governments to regulate labor-management relations, a series which might well be categorized as the "G-String" since four of the most significant decisions in the series were *Garner v. Teamsters Union*,¹ *Guss v. Utah Labor Relations Bd.*,² *International Ass'n of Machinists v. Gonzales*,³ and the most recent case, the second decision in *San Diego Bldg. Trades Council v. Garmon*.⁴ Three of these, *Garner*, *Guss* and *Garmon*, resulted in the development by the summer of 1959 of a "no man's land," in which the federal labor act was apparently applicable because the industry or labor dispute "affected commerce," but the NLRB declined to exercise its jurisdiction for budgetary or

* Professor of Law, University of Minnesota. The author wishes to express his indebtedness to Dean William Lockhart and Professors Kenneth Culp Davis and John J. Cound of the University of Minnesota Law School, who read this Article during its preparation and whose comments were of great assistance.

1. 346 U.S. 485 (1953).

2. 353 U.S. 1 (1957).

3. 356 U.S. 617 (1958).

4. 359 U.S. 236 (1959). The earlier decision, 353 U.S. 26 (1957), was a companion to the *Guss* decision.

other reasons, and the state courts or labor agencies were almost entirely excluded from exercising jurisdiction. As a result, employers, employees, and labor organizations were left without effective regulation of their relations and without protection against abuse of the labor-management relation by other parties. To complete the alliterative assembly of authority in this area, we now have a new piece of pertinent federal legislation, which had as its respective legislative sponsors Senator Goldwater and Representatives Landrum and Griffin.⁵

In undertaking a discussion of the problem of the no man's land and federal pre-emption of regulation in the field of labor law, the author faces the not too pleasant challenge that the development of law in this area has been fully documented and that the policy considerations which underlie any rational decision concerning the extent of federal pre-emption in the labor law field have already been extensively considered by others for whose opinion he has great respect.⁶ What follows, therefore, is merely intended as a comment on two recent developments in the area, the second decision of the Supreme Court in the *Garmon* case⁷ and the enactment of the Labor-Management Reporting and Disclosure Act of 1959 (hereinafter referred to as LMRDA). The discussion which follows is a bifurcated one: first, an analysis of the second *Garmon* decision in terms of the background of prior, relevant Supreme Court decisions, the reasoning of the members of the Court in *Garmon* itself, and the probable consequences of the decision had no legislation intervened; second, a description of the legislative development from the Wagner Act through the most recent labor

5. Labor Management Reporting and Disclosure Act of 1959, 73 Stat. 519, U.S. CODE CONG. & AD. NEWS 2953 (Supp. XIV, Sept. 14, 1959), which is cited hereafter merely by reference to the section in LMRDA. While the "Administration" bill introduced by Senator Goldwater of Arizona and others failed to pass the Senate, its provisions dealing with the no man's land were substantially incorporated into the successful Landrum-Griffin Bill in the House and are now incorporated in LMRDA § 701(a). Even if the labor reform act should ultimately be identified with Senator Kennedy, its treatment of the no man's land is so opposed to Senator Kennedy's own proposals that he can hardly be classified as one of its sponsors.

6. Articles on federal pre-emption in the area of labor relations have been frequent, the most helpful of which have appeared to be: Cox, *Federalism in the Law of Labor Relations*, 67 HARV. L. REV. 1297 (1954); Cox & Seidman, *Federalism and Labor Relations*, 64 HARV. L. REV. 211 (1950); Isaacson, *Labor Relations Law: Federal Versus State Jurisdiction*, 42 A.B.A.J. 415 (1956); Meltzer, *The Supreme Court, Congress and State Jurisdiction Over Labor Relations*, 59 COLUM. L. REV. 6, 269 (1959); Wellington, *Labor and the Federal System*, 26 U. CHI. L. REV. 542 (1959).

7. On its initial appearance before the Court, as a companion case with *Guss*, the Court divided only 6 to 2 in favor of denying the state court the power to issue an injunction against stranger picketing for recognition and a union shop contract, and remanding the question of the state court's power to give damages under state law. *San Diego Bldg. Trades Council v. Garmon*, 353 U.S. 26 (1957).

reform act, with comments on the probable consequences of the most recent provisions.

I. THE SUPREME COURT'S CONTRIBUTION TO THE NO MAN'S LAND

A. *The Background to Garmon II*

The no man's land arose from a combination of two lines of development: the doctrine of federal pre-emption of regulation over interstate commerce and the practice of the NLRB of declining to exercise the full jurisdiction given it by the National Labor Relations Act of 1935 (hereinafter referred to as the NLRA) and the Labor-Management Relations Act of 1947 (hereinafter referred to as the LMRA). Of course, federal pre-emption is not a doctrine peculiar to labor law. It arises from the supremacy clause of the Constitution⁸ and was originally developed in cases involving regulation of commerce in a rather restricted sense. As summarized in a 1942 case, *Cloverleaf Co. v. Patterson*:

[T]he scope of Congressional power is such that it may override the exercise of state power and render impossible its application to petitioner's manufacturing processes. . . . Nor is this power limited to situations where national uniformity is so essential that, lacking Congressional permission, all state action is inadmissible notwithstanding a complete absence of federal legislation. Exclusive federal regulation may arise, also, from the exercise of the power of Congress over interstate commerce where, in the absence of Congressional action, the states may themselves legislate. It has long been recognized that, in those fields of commerce where national uniformity is not essential, either the state or federal government may act. . . . Where this power to legislate exists, it often happens that there is only a partial exercise of that power by the federal government. In such cases the state may legislate freely upon those phases of the commerce which are left unregulated by the nation. But where the United States exercises its power of legislation so as to conflict with a regulation of the state, either specifically or by implication, the state legislation becomes inoperative and the federal legislation exclusive in its application.⁹

As the Court has pointed out more than once,¹⁰ Congress, in

8. U.S. CONST. art. VI, cl. 2: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

9. 315 U.S. 148, 154-56 (1942). A discussion of the "occupation of the field" is to be found in Note, "Occupation of the Field" in Commerce Clause Cases, 1936-1946: Ten Years of Federalism, 60 HARV. L. REV. 262 (1946), in which reference is made to the early pre-emption cases in the labor field, *Hill v. Florida ex rel. Watson*, 325 U.S. 538 (1945) and *Allen-Bradley Local 1111, UEW v. Wisconsin Employment Relations Bd.*, 315 U.S. 740 (1942).

10. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 241 (1959); *IAM v. Gonzales*, 356 U.S. 617, 619 (1958); *Garner v. Teamsters Union, Local 776*, 346 U.S. 485, 488 (1953).

taking hold of the problem of labor-management relations, has left something to the states, but the extent of that something has been a matter of dispute for more than a decade. Mr. Justice Frankfurter has likened the congressional intent in this regard to the Oracle of Delphi,¹¹ but at times it appears that the oracles may sit not upon Capitol Hill but behind the bench of our highest court. This refers not merely to the recognition that "congressional intent" is frequently a construction of the Justices based on only partially formulated policies of the legislators. It also refers to the fact that those of us who thought we detected the drift of the oracles in *UAW v. Russell*¹² and *Gonzales* away from the all-embracing federal pre-emption doctrine were trapped by words rather than deeds. For what the Court, or five members thereof, now say about the scope of federal and state power sounds somewhat awry from what we thought we heard the year before.

Looked at in terms of the *actual facts* with which the Court was dealing in each case, the series of holdings from *Hill v. Florida*¹³ (or possibly from *Allen-Bradley Local 1111 v. Wisconsin Employment Relations Bd.*¹⁴) to *Garmon II* formed a pattern consistent with the position of the majority in the latter case:

- (1) The federal government had completely foreclosed state action in dealing adversely with conduct which the federal law protects¹⁵ and in conducting a representation and certification procedure paralleling that of the NLRA.¹⁶
- (2) Similarly, the federal government had foreclosed state action to restrain conduct which is prohibited by the federal law.¹⁷

11. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 241 (1959); *IAM v. Gonzales*, 356 U.S. 617, 619 (1958).

12. 356 U.S. 634 (1958).

13. 325 U.S. 538 (1945).

14. 315 U.S. 740 (1942).

15. *Youngdahl v. Rainfair, Inc.*, 355 U.S. 131 (1957) (peaceful picketing); *Amalgamated Ass'n of St. Ry. Employees, Div. 998 v. Wisconsin Employment Relations Bd.*, 340 U.S. 383 (1951) (strike in public utility forbidden by state law requiring compulsory arbitration); *UAW v. O'Brien*, 339 U.S. 454 (1950) (strike without complying with state law requiring notice of intent and majority vote); *Hill v. Florida ex rel. Watson*, 325 U.S. 538 (1945) (organization of union).

16. *La Crosse Tel. Corp. v. Wisconsin Employment Relations Bd.*, 336 U.S. 18 (1949); *Bethlehem Steel Co. v. New York Labor Relations Bd.*, 330 U.S. 767 (1947).

17. *San Diego Bldg. Trades Council v. Garmon*, 353 U.S. 26 (1957) (minority union picketing for recognition of closed shop); *Amalgamated Meat Cutters, Local 427 v. Fairlawn Meats, Inc.*, 353 U.S. 20 (1957) (minority picketing for recognition of secondary boycott); *Guss v. Utah Labor Relations Bd.*, 353 U.S. 1 (1957) (interference with and coercion of employees by employer); *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468 (1955) (jurisdictional dispute and secondary boycott); *Garner v. Teamsters Union, Local 776*, 346 U.S. 485 (1953) (minority union picketing for recognition); *Plankinton Packing Co. v. Wisconsin Employment Relations Bd.*, 338 U.S. 953 (1950) (discharge under unlawful closed shop).

- (3) The foreclosure applied even though the applicable federal agency, the NLRB, declined to make full use of the federal power to regulate labor-management relations.¹⁸
- (4) The states retained the power to prevent or remedy injuries resulting from violence, a threat of violence or other breach of the peace, or an obstruction of public streets.¹⁹
- (5) The states retained power to act where the conduct was not a concern of the federal law, being neither protected conduct nor prohibited.²⁰

However, looked at in terms of *rationale* apparently put forward by the Court, the import of the cases is not so clear. True, the language of the Court in *Hill v. Florida*,²¹ stated fairly clearly the barrier about "protected" activity. True also, the language of the unanimous Court in *Garner* forecast the consequences in each of the other cases:

Congress has taken in hand this particular type of controversy where it affects interstate commerce. . . . It is not necessary or appropriate for us to surmise how the National Labor Relations Board might have decided this controversy had petitioners presented it to that body. The power and duty of primary decision lies with the Board, not with us. . . .

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 those diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. . . . A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law. The same reason 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.²²

18. *San Diego Bldg. Trades Council v. Garmon*, 353 U.S. 26 (1957); *Amalgamated Meat Cutters, Local 427 v. Fairlawn Meats, Inc.*, 353 U.S. 20 (1957); *Guss v. Utah Labor Relations Bd.*, 353 U.S. 1 (1957).

19. *UAW v. Russell*, 356 U.S. 634 (1958) (mass picketing, threats, and intimidation); *Youngdahl v. Rainfair, Inc.*, 355 U.S. 131 (1957) (threats and incitement to violence); *UAW v. Wisconsin Employment Relations Bd.*, 351 U.S. 266 (1956) (*Kohler* case); *United Constr. Workers v. Laburnum Constr. Corp.*, 347 U.S. 656 (1954); *Allen-Bradley Local 1111, UEW v. Wisconsin Employment Relations Bd.*, 315 U.S. 740 (1942) (mass picketing and violence).

20. *IAM v. Gonzales*, 356 U.S. 617 (1958) (expulsion from union and refusal to refer); *UAW v. Wisconsin Employment Relations Bd.*, 336 U.S. 245 (1949) (*Briggs-Stratton* case) ("quickie" work stoppages).

21. 325 U.S. 538, 542 (1945).

22. 346 U.S. at 488-91.

But *Garner* was soon followed by *United Constr. Workers v. Laburnum*,²³ in which the language of the Court was focused less upon the nature of the acts involved (threats of violence and intimidation) than upon the disparity of remedies:

In the *Garner* case, Congress had provided a federal administrative remedy, supplemented by judicial procedure for its enforcement, with which the state injunctive procedure conflicted. Here Congress has neither provided nor suggested any substitute for the traditional state court procedure for collecting damages for injuries caused by tortious conduct. For us to cut off the injured respondent from this right of recovery will deprive it of its property without recourse or compensation. To do so will, in effect, grant petitioners immunity from liability for their tortious conduct. We see no substantial reason for reaching such a result.²⁴

To the extent that Congress prescribed preventive procedure against unfair practices, that case [*Garner*] recognized that the Act excluded conflicting state procedure to the same end. To the extent, however, that Congress has not prescribed procedure for dealing with the consequences of tortious conduct already committed, there is no ground for concluding that existing criminal penalties or liabilities for tortious conduct have been eliminated. The care we took in the *Garner* case to demonstrate the existing conflict between state and federal administrative remedies in that case was, itself, a recognition that if no conflict existed, the state procedure would have survived.²⁵

The Chief Justice and Mr. Justice Frankfurter joined in this opinion, but the dissenting Justices, Douglas and Black, reiterated the doctrine of *Garner*.²⁶ Four years later, in the *Russell* case, the majority of the Court drew the same distinction as it had drawn in the *Laburnum* case. Surprisingly, the *Russell* majority included Justices Frankfurter and Brennan, who a year later were to join the Chief Justice and Justices Black and Douglas in forming the "majority" in *Garmon II*, which classified *Russell* and *Laburnum* as decided primarily on the basis of the traditional power of states over violence, intimidation, and breaches of the peace. But even more surprising, and perhaps misleading in light of *Garmon II*, was Mr. Justice Frankfurter's opinion in *Gonzales* in which, although indicating that the Taft-Hartley Act had specifically negated any intention to control the membership qualifications of unions, he noted the possibility of a violation of section 8(b)(2) and placed primary emphasis on the absence of a "full remedy" under the Board's procedures:

If, as we held in the *Laburnum* case, certain state causes of action sounding in tort are not displaced simply because there may be an argumentative coincidence in the facts adducible in the tort action and a

23. 347 U.S. 656 (1954).

24. *Id.* at 663-64.

25. *Id.* at 665.

26. *Id.* at 669-671.

plausible proceeding before the National Labor Relations Board, a state remedy for breach of contract also ought not be displaced by such evidentiary coincidence when the possibility of conflict with federal policy is similarly remote. The possibility of conflict from the court's award of damages in the present case is no greater than from its order that respondent be restored to membership. In either case the potential conflict is too contingent, too remotely related to the public interest expressed in the Taft-Hartley Act, to justify depriving state courts of jurisdiction to vindicate the personal rights of an ousted union member. This is emphasized by the fact that the subject matter of the litigation in the present case, as the parties and the court conceived it, was the breach of a contract governing the relations between respondent and his unions. The suit did not purport to remedy or regulate union conduct on the ground that it was designed to bring about employer discrimination against an employee, the evil the Board is concerned to strike at as an unfair labor practice under § 8(b)(2).²⁷

The last quoted sentence is significant because one of the elements of damage claimed by the plaintiff was the loss of wages resulting from the failure of the union to refer him to jobs through its hiring hall arrangements, conduct which might have given rise to an NLRB order for back pay.²⁸

In view of the Court's return in *Garmon II* to the position it had assumed previously in *Garner* with respect to pre-emption generally, it is noteworthy that the unanimous Court suggested in *Garner* that the power of the states might be recognized if the conduct was "governable by the State or is entirely ungovernable," or if the NLRB should be shown to have declined for budgetary or other reasons to exercise fully its granted power.²⁹ Yet, three years after the *Garner* decision, in *Guss* and *Garmon I*, the majority of the Court, including four of the Justices who had joined in *Garner*, rejected the proposition that when the Board declines to exercise its potential jurisdiction over a business or class of businesses because the effect upon commerce of a labor dispute in such business is not sufficiently substantial to make such exercise of jurisdiction effectuate the policies of the act,³⁰ the state court or agency may

27. 356 U.S. at 621-22.

28. *Radio Officers Union v. NLRB*, 347 U.S. 17 (1954); *Born v. Laube*, 213 F.2d 407 (9th Cir. 1954), *cert. denied*, 348 U.S. 855 (1954); *NLRB v. Waterfront Employers*, 211 F.2d 946 (9th Cir. 1954); *NLRB v. Longshoremen's Union*, 210 F.2d 581 (9th Cir. 1954); *NLRB v. F. H. McGraw & Co.*, 206 F.2d 635 (6th Cir. 1953); *NLRB v. Jarka Corp.*, 198 F.2d 618 (3d Cir. 1952); *Alaska Chapter of Ass'n Gen. Contractors*, 113 N.L.R.B. 41 (1955); *Alaska S.S. Co.*, 98 N.L.R.B. 22 (1952).

29. 346 U.S. at 488.

30. It appears that the Board has never exercised its potential jurisdiction under the federal act to the fullest extent. Before 1950, it declined to assert jurisdiction in specific cases in which it felt that the business itself or the labor dispute involved did not have a substantial effect upon interstate commerce. *E.g.*, *Herff Motor Co.*, 74 N.L.R.B. 1007 (1947); *Southwest Metals Co.*, 72 N.L.R.B. 54 (1947); *Air-line Bus Co.*, 64 N.L.R.B. 620 (1945). However, in some early cases this declina-

properly step into the breach even without a formal cession of jurisdiction under section 10(a) of the Taft-Hartley Act.³¹

Finally, in remanding *Garmon* to the California court instead of reversing both the granting of an injunction and the judgment for damages, the Court suggested that if there were a valid tort claim under state law, the damage action might be sustained. After pointing out that the California court erroneously had felt compelled to apply federal law to the damage claim, the majority added:

We cannot know that the California court would have interpreted its own state law to allow an award of damages in this different situation. We

tion was phrased in terms of lack of evidence which would establish that the labor dispute or question of representation did affect commerce. *E.g.*, *Yellow Cab & Baggage Co.*, 17 N.L.R.B. 469 (1939); *San Diego Ice & Cold Storage Co.*, 17 N.L.R.B. 422 (1939). In 1950, the Board issued a series of decisions in which it announced for the first time some "jurisdictional yardsticks" in terms of the monetary value of interstate sales and purchases, in an effort to standardize its jurisdiction. See *Hollow Tree Lumber Co.*, 91 N.L.R.B. 635 (1950) for the Board's explanation, and 26 L.R.R.M. 50, 51 (1950) for a summary of the standards promulgated. In 1954, the standards were revised, generally doubling the required amount of interstate business for nonretail enterprises and setting up new and much higher monetary standards for retail enterprises. See 34 L.R.R.M. 75-78 (1954). The majority of the Board asserted that the change in standards was motivated by the limited budget and personnel of the Board, but Member Murdock indicated in his dissent that the real motivation may have been a desire to decrease the area of federal regulation and increase the potential area of state regulation of labor relations. See *Breeding Transfer Co.*, 110 N.L.R.B. 493 (1954). More recently, in response to the *Guss* decision and after an increase in its budget, the Board has broadened its jurisdiction considerably. See *Siemons Mailing Serv.*, 122 N.L.R.B. No. 13, 43 L.R.R.M. 1056 (Nov. 14, 1958).

31. One might also point to the apparent inconsistency of position concerning the significance of "public" versus "private" rights taken in *Garner* and subsequent cases. In response to the argument that the Pennsylvania board, in *Garner*, had been granting protection for private rights, whereas the NLRB deals only with public rights, the unanimous Court first questioned the validity of such a distinction, and then proceeded to point out that even if there were a distinction between the protection of public and private rights, the Pennsylvania Labor Act was a declaration of public policy and undertook to protect "public" as well as "private" rights. 346 U.S. at 494-98. Yet, the majority in *Laburnum* said: "The primarily private nature of claims for damages under state law also distinguishes them in a measure from the public nature of the regulation of future labor relations under federal law." 347 U.S. at 665. (Emphasis added.) And in *Gonzales*, Mr. Justice Frankfurter said: "The possibility of conflict from the court's award of damages in the present case is no greater than from its order that respondent be restored to membership. In either case the potential conflict is too contingent, too remotely related to the public interest expressed in the Taft-Hartley Act, to justify depriving state courts of jurisdiction to vindicate the personal rights of an ousted union member." 356 U.S. at 621. (Emphasis added.) In *Garmon II*, Mr. Justice Frankfurter, speaking for five members of the Court, returned to the *Garner* position: "Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme." In connection with this statement, the Court cited the language from *Garner* dealing with private versus public rights. 359 U.S. at 247.

therefore vacate the judgment and remand the case to the Supreme Court of California for proceedings not inconsistent with this opinion. . . .³²

B. Analysis of *Garmon* II

While the United States Supreme Court was still considering the *Gonzales* and *Russell* cases, the California court again dealt with *Garmon*.³³ Following the lead suggested by the Supreme Court's original opinion and the language of *Laburnum* emphasizing the difference in remedy between the federal act and the state common law tort doctrines, a majority of the California Supreme Court sustained the award of damages on the following grounds: first, that the conduct of the union violated the state civil code;³⁴ and second, that the employer would have no comparable relief under the federal act, both because the NLRB does not grant compensatory damages to employers and because the Board had declined to exercise jurisdiction over this dispute. Justice Traynor, joined in dissent by two of his colleagues,³⁵ noted that three factors had been singled out in prior decisions of other courts to distinguish *Laburnum* from *Garner*: (1) claim for reparation or compensation rather than preventive relief; (2) violent conduct rather than peaceful picketing and striking, and (3) recovery based on common law tort principles rather than statutory regulations. However, these factors were not themselves the ultimate tests of state jurisdiction, said Justice Traynor, "but only indications of whether or not there is a likelihood of conflict between federal and state policy."³⁶ He then proceeded to assert that while no such conflict occurred in *Laburnum* because of the violent nature of the conduct, there was no comparable assur-

32. 353 U.S. at 29.

33. *Garmon v. San Diego Bldg. Trades Council*, 49 Cal. 2d 595, 320 P.2d 473 (1958).

34. The court relied upon a combination of the following statutes: CAL. CIV. CODE § 1708:

Every person is bound, without contract, to abstain from injuring the person or property of another, or infringing upon any of his rights.

CAL. LAB. CODE § 923:

[T]he public policy of this state is declared as follows: Negotiations of terms and conditions of labor should result from voluntary agreement between employer and employees. . . . [I]t is necessary that the individual workman have full freedom of association, self organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

CAL. CIV. CODE § 1667:

That is not lawful which is . . . contrary to the policy of express law, though not expressly prohibited. . . .

35. 49 Cal. 2d at 615, 320 P.2d at 485 (dissenting opinion).

36. *Id.* at 618, 320 P.2d at 487.

ance on the facts of the *Garmon* case that conflict with federal policy would not result, since (1) damages are an effective means of enforcing policy and controlling conduct, and (2) nothing in the conduct of the defendants decisively indicates whether the NLRB would regard it as subject to section 8(b)(1)(A) or as protected under section 7. He concluded:

Because of the danger of conflict in the application of state law with the National Labor Relations Board's application of the federal statute, the trial court was without jurisdiction to issue an injunction. I am of the opinion that for the same reason it was without jurisdiction to award damages.³⁷

As a final point, Justice Traynor pointed out that the majority was overruling earlier decisions in treating picketing for a closed or union shop as an improper objective of concerted labor activity, and was in fact relying upon the labor policy of the state rather than upon some more general common law tort principle.³⁸

When the *Garmon* case again reached the United States Supreme Court, the way seemed cleared for an affirmation on the basis of varying state and federal relief, that is, compensatory damages for past tortious conduct rather than preventive remedies which might have been available from the Board.³⁹ The Court, however, agreed unanimously that on the facts of the case the California state courts were without jurisdiction.

Writing for a majority of five,⁴⁰ Mr. Justice Frankfurter, who had also written the *Gonzales* opinion, referred to the "Delphic nature" of the statutory implications as to the states' powers over labor relations problems, which were "to be translated into concreteness by the process of litigating elucidation,"⁴¹ and purported to find in the past decisions of the Court "the consistently applied principles which decide this case":

[The] unifying consideration of our decisions has been regard to the fact that Congress has entrusted administration of the labor policy of the

37. *Id.* at 620, 320 P.2d at 488.

38. *Id.* at 620-23, 320 P.2d at 488-90.

39. See 43 MINN. L. REV. 341 (1958), which concludes, on the basis of decisions up to and including *Gonzales* and *Russell*, that this was the position of the Court.

40. Those concurring in the opinion of Mr. Justice Frankfurter were Mr. Chief Justice Warren and Justices Black, Douglas and Brennan. Of these, the Chief Justice and Justices Black and Douglas had participated in the decisions in *Garner*, *Laburnum* and *Weber*. Justices Black and Douglas had consistently voted for federal pre-emption, while the Chief Justice had concurred in the majority opinion in each case, as had Mr. Justice Frankfurter. In the *Gonzales* and *Russell* cases, the Chief Justice and Mr. Justice Douglas had dissented in favor of pre-emption; Mr. Justice Black had not participated; and Mr. Justice Brennan had voted with Mr. Justice Frankfurter in the majority.

41. 359 U.S. at 241. The latter phrase is taken from Mr. Justice Frankfurter's opinion in *IAM v. Gonzales*, 356 U.S. 617, 619 (1958).

Nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience.⁴²

He continued by pointing out that damages, as well as injunctions or cease and desist orders, may provide an effective means of regulation; that the primary concern of the Court in the past had been focused upon the nature of the activities which the states could regulate rather than upon the method of regulation involved; and that where the exercise of state power over a particular area of activity threatened interference with a clearly indicated federal policy of industrial relations, it was judicially necessary to preclude the states from acting. Becoming more explicit, Mr. Justice Frankfurter stated that it had been clear that if the activities which the state purported to regulate constituted protected activities under section 7 or unfair labor practices under section 8, due regard for federal law required that state jurisdiction must yield. He stated two exceptions to this pre-emptive doctrine: First, situations involving violence or imminent threats to public order, which had traditionally been within the police power of the states and "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";⁴³ and second, "where the activity regulated was a merely peripheral concern of the Labor Management Relations Act . . . [citing *Gonzales*]."⁴⁴ Where it was not clear whether the activity over which the state purported to exercise jurisdiction came within the provisions of sections 7 or 8, the courts were not the primary tribunals to adjudicate the issue. Instead:

It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board. . . .

When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.⁴⁵

Turning to the facts of the case before him, Mr. Justice Frankfurter found that the conduct could be *either* protected (peaceful concerted activity directed at education or organization of workers) or prohibited (concerted activity directed at coercing or restraining the employees in the exercise of their rights, or coercion of or an

42. 359 U.S. at 242.

43. *Id.* at 244. While only the quoted language is used, the cases cited are those included in note 19 *supra* in which the Court does refer to the traditional power of the states to control violence, mass picketing, etc.

44. *Id.* at 243-44.

45. *Id.* at 244-45.

attempt to coerce the employer to compel or induce the employees to select the union as their representative), and that, therefore, in the absence of a Board determination that *neither* was true, the state could not grant any relief. The mere declination of the Board to make such a determination, as in *Guss* or this case, did not give the state the power to act.

Mr. Justice Harlan, joined by Justices Clark, Stewart and Whitaker, concurred in the result reached by the Court, on the ground that the conduct of the union arguably was protected activity under the federal law, but specifically rejected the conclusion of the majority that if the conduct were not protected, the state would be foreclosed from granting compensatory damages where the NLRB had declined to assert its jurisdiction.⁴⁶ While the majority explained the results in *Laburnum* and *Russell* as state control of violence, the concurring Justices interpreted the reference to violent conduct in these opinions as indications only of the unprotected character of the conduct, and stated that once such determination was made, the only question would be that of possible inconsistency between the federal prohibitions and state damage awards, a question which had been resolved in the past in favor of consistency.⁴⁷ The emphasis in the majority opinion upon the "primary jurisdiction" of the Board was lessened in the concurring opinion, which would require reference to the Board only if there were a question of the protected character of the activity, or if the activities could be treated as prohibited and the state damage awards were inconsistent with federal prohibitions.⁴⁸ The concurring Justices also argued that in this case, as in *Laburnum*, there was no such inconsistency since the Board would not be able to grant relief to the employer for past conduct. The concurring opinion summarized the undesirability of the result which the majority would compel in the event that the conduct of the union were not protected, as follows:

The Court's opinion in this case cuts deeply into the ability of States to furnish an effective remedy under their own laws for the redress of past nonviolent tortious conduct which is not federally protected, but which may be deemed to be, or is, federally prohibited. Henceforth the States must withhold access to their courts until the National Labor Relations Board has determined that such unprotected conduct is not an unfair labor practice, a course which, because of unavoidable Board delays, may render state redress ineffective. And in instances in which the Board declines to exercise its jurisdiction, the States are entirely deprived of power to afford any relief. Moreover, since the reparation powers of the Board, as we observed in *Russell*, are narrowly circum-

46. 359 U.S. at 249.

47. *Id.* at 251-52.

48. *Id.* at 251.

scribed, those injured by nonviolent conduct will often go remediless even when the Board does accept jurisdiction.⁴⁹

Hence, there is a substantial conflict between the two opinions in *Garmon II*. The majority asserted a rather extreme view of the importance of centralized administration of the national labor policy and of the necessity for carrying that policy to the full extent of congressional power. At the same time, what might be called the "dissent" sought to accommodate both federal and state authorities and placed primary emphasis on the protection of the interests of employers, employees and the public—interests which the federal act seeks to promote. Each group could find support for its position in the precedents, which do not conclusively favor either position. It is possible that the apparent inconsistencies in precedents arise from the past uncertainties of the Court as a whole as to what was the appropriate balance between the public and private interests and between powers of the federal and state governments. In this regard Mr. Justice Frankfurter's position over the years is of special significance, not only because of his long service on the Court, covering the entire period during which the pre-emption doctrine was developed, but also because he is the author of the majority opinions in both *Gonzales* and *Garmon II* and because there is a discernible change in his approach to the problem which may reflect the change in the Court's general approach.

In the initial "pre-emption" case, *Hill v. Florida*,⁵⁰ Mr. Justice Frankfurter dissented from the position that congressional protection of the employees' right to organize and choose representatives for purposes of collective bargaining "impliedly wipe[d] out the right of States under their police power to require qualifications appropriate for union officials having fiduciary duties."⁵¹ He argued that congressional enactments in the general domain of commerce should supplant state regulation for the protection of local interests *only* where there is a "direct and positive [conflict] so that the two acts could not be reconciled or consistently stand together."⁵² Where state legislation had been struck down, "there was, in short, concreteness of conflict between what a State prescribed and what Congress prescribed; the collision was demonstrable, not argumentative."⁵³

In *Bethlehem Steel Co. v. New York Labor Relations Bd.*,⁵⁴ the

49. *Id.* at 253.

50. 325 U.S. 538 (1945).

51. *Id.* at 547.

52. *Id.* at 548, quoting from *Sinnot v. Davenport*, 63 U.S. (22 How.) 227, 243 (1859).

53. *Id.* at 554.

54. 330 U.S. 767 (1947).

conflict of federal and state policies was obvious, since the state board granted representation status to a foremen's union which the NLRB had refused to do. In this case, Mr. Justice Frankfurter wrote a separate opinion in which he laid emphasis upon the desirability of permitting the NLRB to determine that certain cases were more appropriate for local or state regulation than national regulation, and to enter into agreements with the state boards to exercise jurisdiction over such cases.⁵⁵ In a portion of this opinion, he foreshadowed the decision in *Guss*, by questioning the validity of the majority's construction of the federal act to preclude concurrent state power where the Board deliberately decides that "industrial relations having both national and state concern can most effectively be promoted by an appropriate division of administrative resources between the National and State Boards."⁵⁶ He was "unable to see how the state authority can revive [merely] because Congress has seen fit to put the Board on short rations,"⁵⁷ thereby causing the NLRB to decline to exercise its authority for budgetary or other reasons. But the most significant language of the opinion is the following:

When construing federal legislation that deals with matters that also lie within the authority . . . of the State, we must be mindful that we are part of the delicate process of adjusting the interacting areas of National and State authority over commerce. The inevitable extension of federal authority over economic enterprise has absorbed the authority that was previously left to the states. But in legislating, Congress is not indulging in doctrinaire, hard-and-fast curtailment of the State powers reflecting special State interests. Federal legislation of this character must be construed with due regard to accommodation between the assertions of new federal authority and the functions of the individual States, as reflecting the historic and persistent concerns of our dual system of government. Since Congress can, if it chooses, entirely displace the States to the full extent of the far-reaching Commerce Clause, Congress needs no help from generous judicial implications to achieve the supersession of State authority. To construe federal legislation so as not needlessly to forbid pre-existing State authority is to respect our federal system. Any indulgence in construction should be in favor of the States, because Congress can speak with drastic clarity whenever it chooses to assure full federal authority, completely displacing the States. . . . It may make a decisive difference what view judges have of the place of the States in our national life when they come to apply the governing principle that for an Act of Congress completely to displace a State law "the repug-

55. *Id.* at 777 (separate opinion in which Justices Murphy and Rutledge joined). Mr. Justice Frankfurter indicated that he would concur in the Court's decision if it were limited to the proposition that the NLRB having determined that it was undesirable as a matter of industrial relations to compel recognition of foremen's unions, no state board can oppose this policy by a contrary policy applicable to an enterprise subject to the federal act.

56. *Id.* at 778.

57. *Id.* at 779.

nance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together. . . ." ⁵⁸

What is before us is a very real and practical situation. The vast range of jurisdiction which the National Labor Relations Act has conferred upon the Board raises problems of administration wholly apart from available funds. As a result of this Court's decision in *National Labor Relations Board v. Fainblatt*, 306 U.S. 601 [1939], untold small enterprises are subject to the power of the Board. While labor difficulties in these units in the aggregate may unquestionably have serious repercussions upon interstate commerce, in their individualized aspects they are equally the concern of their respective localities. Accordingly, the National Labor Relations Board, instead of viewing the attempt of State agencies to enforce the principles of collective bargaining as an encroachment upon national authority, regards the aid of the State agencies as an effective means of accomplishing a common end. Of course, as Mr. Justice Holmes said, "When Congress has taken the particular subject-matter in hand, coincidence is as ineffective as opposition" to save the State law. But surely this is so only when the State seeks "to enforce a State policy differently conceived. . . ." ⁵⁹

Such statements seem to foreshadow *Laburnum* and *Gonzales* but not *Guss* and *Garmon*. Two years later, when *La Crosse Tel. Corp. v. Wisconsin Employment Relations Bd.* ⁶⁰ was before the Court, involving at most a potential conflict of policy, Mr. Justice Frankfurter joined in the majority assertion of pre-emption, ⁶¹ perhaps because in the interim the Taft-Hartley Act had been passed and had provided machinery by which the NLRB could cede jurisdiction over classes of cases where the state law was not inconsistent with the corresponding provisions of the federal law.

But Mr. Justice Frankfurter had not completely abandoned his earlier position favoring some State power over industries or disputes which might affect commerce. This is apparent from his position two months later as author of the majority opinion in *Algonoma Plywood & Veneer Co. v. Wisconsin Employment Relations Bd.*, ⁶² in which the Court upheld the power of the state to forbid enforcement of a "maintenance of membership" clause unless the contract containing it was approved by two-thirds of the employees in a referendum conducted by the state board. Although the Wagner Act had originally recognized the enforcement of "closed shop" agreements with majority representatives as not constituting un-

58. *Id.* at 779-80.

59. *Id.* at 782-83.

60. 336 U.S. 18 (1949).

61. It is perhaps significant that Mr. Justice Rutledge who had joined in Mr. Justice Frankfurter's opinion in the *Bethlehem Steel Co.* case indicated his position in the following words: "Mr. Justice Rutledge, having joined in the dissent in *Bethlehem Steel Co. v. New York Labor Relations Board*, . . . acquiesces in the Court's opinion and judgment in this case." *Id.* at 27. (Emphasis added.)

62. 336 U.S. 301 (1949).

fair labor practices on the part of employers, and the Taft-Hartley Act had permitted unions and employers to enter into "union shop" agreements,⁶³ the majority treated these provisions as evidencing no federal pre-emption of the question of union security provisions. Although section 14(b) of the Taft-Hartley Act did permit state restrictions on union security, this would not wholly answer the problem which dealt with a contract entered into prior to the date of that provision and an order issued before such power was explicitly given to the state. At two points, Mr. Justice Frankfurter refers to the conflict of state and federal laws:

[The words "inconsistent with the corresponding provision of this Act" in Section 10(a)] must mean that cession of jurisdiction is to take place only where State and federal laws have parallel provisions. Where the State and federal laws do not overlap, no cession is necessary because the State's jurisdiction is unimpaired. This reading is confirmed by the purpose of the proviso in which the phrase is contained: to meet situations made possible by *Bethlehem Steel Co. v. New York S.L.R.B.* . . . where no State agency would be free to take jurisdiction of cases over which the National Board had declined jurisdiction. . . .⁶⁴

Since the enumeration by the Wagner Act and the Taft-Hartley Act of unfair labor practices over which the National Board has exclusive jurisdiction does not prevent the States from enforcing their own policies in matters not governed by the federal law, such freedom of action by a State cannot be lost because the National Board has once held an election under the Wagner Act. The character of activities left to State regulation is not changed by the fact of certification. Certification, it is true, makes clear that the employer and the union are subject to federal law, but that is not disputed. So far as the relationship of State and national power is concerned, certification amounts to no more than an assertion that as to this employer the State shall not impose a policy inconsistent with national policy, *Hill v. Florida*, . . . or the National Board's interpretation of that policy, *Bethlehem Steel Co. v. New York S.L.R.B.* . . . *La Crosse Telephone Corp. v. Wisconsin E.R.B.* . . .⁶⁵

Whether the citation of the latter cases is an indication of acceptance of the majority opinions therein by Mr. Justice Frankfurter, or only a recognition of the fact that the majority has stated the federal law, is not clear.

Mr. Justice Frankfurter's joining in the unanimous *Garner* decision combined with his own opinion for the Court in *Weber v. Anheuser-Busch, Inc.*⁶⁶ seemed to indicate his acceptance of the necessity for uniformity of application of federal policy where the Board does in fact exercise jurisdiction. And his participation in the

63. The Court discusses both acts, since although the contract had been entered into and the worker discharged prior to the enactment of the Taft-Hartley Act, the order of the Wisconsin board would have been enforceable after the Taft-Hartley amendments to § 8(a)(3) became applicable.

64. 336 U.S. at 313.

65. *Id.* at 314-15.

66. 348 U.S. 468 (1955).

Guss and *Garmon I* majorities indicate that by 1957 he had reached the position of being willing to sublimate state interests even to the extent of completely denying some remedies to the injured parties. But his opinion in *Gonzales* and his position in *Laburnum* and *Russell* suggested that there were some areas in which he believed state regulation differing in kind and in policy considerations from that of the NLRB was permissible. However, his opinion in *Garmon II* indicates that this is only true where the federal government has taken no real interest in the type of conduct involved in the state case.

How can one explain this shift in emphasis in Mr. Justice Frankfurter's opinions and voting record, if indeed it was a conscious change of position? One possible explanation could be that he became alarmed by the great number of cases in which state courts or labor boards intervened in situations where the conduct of the parties (usually unions) was probably federally protected. While most of the states seem to have accepted the *Garner-Guss-Garmon II* doctrine of pre-emption without difficulty,⁶⁷ there had been questionable state assertions of jurisdiction in cases involving such conduct as secondary pressures against employers or customers,⁶⁸ minority picketing for recognition,⁶⁹ impositions of fines for crossing picket lines,⁷⁰ peaceful picketing to organize hotels over which the NLRB had not exercised jurisdiction,⁷¹ or picketing of an employer's salesroom to compel him to reopen a plant closed ostensibly for economic reasons.⁷² In other doubtful deci-

67. See, e.g., *Devine Bros. v. Teamsters Union, Local 191*, 154 A.2d 193 (Conn. C.P. 1959); *Savva v. Royal Industrial Union, Local 937*, 20 Conn. Supp. 438, 138 A.2d 799 (Super. Ct. 1958); *Industrial Workers Local 286 v. Star Prods. Co.*, 16 Ill. App. 2d 321, 148 N.E.2d 43 (1958); *Hyde Park Dairies, Inc. v. Teamsters Union, Local 795*, 182 Kan. 440, 321 P.2d 564 (1958); *Asphalt Paving, Inc. v. Teamsters Union, Local 795*, 181 Kan. 775, 317 P.2d 349 (1957); *Swope v. Emerson Elec. Mfg. Co.*, 303 S.W.2d 35 (Mo. 1957); *Market Bowling Alleys v. Browne*, 44 L.R.R.M. 2815 (N.Y. Sup. Ct. 1959); *Corner House Restaurant, Inc. v. Wepprecht*, 42 L.R.R.M. 2167 (N.Y. Sup. Ct. 1958); *Pennsylvania Labor Relations Bd. v. Napoli*, 395 Pa. 301, 150 A.2d 546 (1958); *McJunkin Corp. v. Bell Lines, Inc.*, 108 S.E.2d 12 (W. Va. 1959).

68. *Sebastopol Co-op. Cannery v. General Truck Drivers Local 980*, 37 L.R.R.M. 2069 (Calif. Super. Ct. 1955); *Arnold Bakers, Inc. v. Strauss*, 207 Misc. 752, 153 N.Y.S.2d 999 (Sup. Ct. 1956); *Willoughby Camera Stores, Inc. v. Dist. 15, Machinists Union*, 205 Misc. 455, 129 N.Y.S.2d 734 (Sup. Ct. 1954); *Teamsters Union, Local 941 v. Whitfield Transp., Inc.*, 154 Texas 91, 273 S.W.2d 857 (1954).

69. *J. J. Newberry Co. v. Retail Clerks, Local 560*, 78 Idaho 85, 298 P.2d 375 (1956), *rev'd*, 352 U.S. 987 (1957); *Forshay Bros., Inc. v. Goldstein*, 36 L.R.R.M. 2052 (N.Y. Sup. Ct. April 15, 1955); *Cavett v. Machinists Dist. Lodge 34*, 103 Ohio App. 45, 136 N.E.2d 276 (1956); *Richman Bros. Co. v. Amalgamated Clothing Workers*, 144 N.E.2d 561 (Ohio C.P. 1956), *modified*, 144 N.E.2d 573 (Ohio Ct. App. 1957) (eliminating injunction of peaceful picketing).

70. *Carey and Lodge 78, IAM*, 44 L.R.R.M. 1060 (Wis. Emp. Rel. Bd. 1959).

71. *Hotel Employees, Local 255 v. Sax Enterprises, Inc.*, 93 So.2d 591 (Fla. 1957), *rev'd*, 358 U.S. 270 (1959).

72. *Freydberg, Inc. v. ILGWU*, 128 N.Y.S.2d 470 (Sup. Ct. Jan. 19, 1954).

sions, state courts had concluded: that the federal act was inapplicable because of the absence of an "employer" or "employee" within the meaning of those terms as used in the act;⁷³ that agreements between unions and nonlabor groups which had the effect of restraining trade were not within the purview of the federal labor act;⁷⁴ that claims which would be barred by the Taft-Hartley Act's six-month statute of limitations are subject to state court jurisdiction;⁷⁵ or that any conduct which might constitute a common law tort is subject to state regulation.⁷⁶ At the same time, state courts had asserted jurisdiction in many other instances in which conflict with the federal law was more doubtful, such as cases granting remedies for loss of employment due to union opposition to individual workers,⁷⁷ cases enjoining picketing for a closed shop,⁷⁸ and in suits to compel carriers to deliver to a company involved in a dispute with a union,⁷⁹ and to compel bargaining with a rival union when the employer already has a collective agreement with one union.⁸⁰ Even in these later cases, however, there existed the potentiality for conflict upon which the ultimate position taken by Mr. Justice Frankfurter may be explainable. It is also possible that the devious route by which the Court seems to have moved from *Hill v. Florida* and *Garner* to *Garmon II* is indicative of the fact that under the tremendous pressures and demands of the Court's

73. *New York, N.H. & H. R.R. v. Jenkins*, 331, Mass. 720, 122 N.E.2d 759 (1954), *rev'd* 350 U.S. 155 (1956); *Oliver v. All-States Freight, Inc.*, 156 N.E.2d 190 (Ohio Ct. App. 1957), *rev'd*, 358 U.S. 283 (1959); *County of Door v. Plumbers Union, Local 298*, 4 Wis.2d 142, 89 N.W.2d 920 (1958), *rev'd*, 359 U.S. 354 (1959).

74. *Lewis, Inc. v. Warehousemen, Local 542*, 163 Cal. App. 2d 771, 330 P.2d 53 (1958); *Oliver v. All-States Freight, Inc.*, 156 N.E.2d 190 (Ohio Ct. App. 1957), *rev'd*, 358 U.S. 283 (1959).

75. *Stork Restaurant, Inc. v. Fernandez*, 16 Misc. 2d 265, 184 N.Y.S.2d 810 (Sup. Ct. 1959), *modified*, 44 L.R.R.M. 2195 (App. Div. 1959) (denying jurisdiction to enjoin after *Garmon II*).

76. *Benjamin v. Foidl*, 379 Pa. 540, 109 A.2d 300 (1954), which relies on the alleged recognition in *Laburnum* of the states' right to deal with common-law torts, disregarding the fact that the remedy in that case was damages rather than injunctive relief.

77. *Sound Technicians v. Superior Court of Los Angeles County*, 141 Cal. App. 2d 23, 296 P.2d 395 (1956); *Perko v. Local 207, Bridge Workers*, 151 N.E.2d 742 (Ohio 1958); *Pierce v. Otis Elevator Co.*, 333 P.2d 480 (Okla. 1958); *MacDonald v. Feldman*, 393 Pa. 274, 142 A.2d 1 (1958); *Selles v. Local 174, Teamsters Union*, 50 Wash. 2d 660, 314 P.2d 456 (1957).

78. *Alabama Highway Express, Inc. v. Local 612, Teamsters Union*, 268 Ala. 392, 108 So. 2d 350 (1959); *Machinists Union, Local 924 v. Goff-McNair Motor Co.*, 223 Ark. 30, 264 S.W.2d 48 (1954); *Farnsworth Chambers Co. v. Local 429, IBEW*, 201 Tenn. 329, 299 S.W.2d 8 (1956), *rev'd*, 353 U.S. 969 (1957).

79. *Aladdin Industries, Inc. v. Associated Transp., Inc.*, 323 S.W.2d 222 (Tenn. Ct. App. 1958); *Kerrigan Iron Works, Inc. v. Cook Truck Lines, Inc.*, 296 S.W.2d 379 (Tenn. Ct. App. 1956), *rev'd*, 353 U.S. 968 (1957).

80. *J. Radley Metzger Co. v. Fay*, 4 App. Div. 2d 436, 166 N.Y.S.2d 767 (1957); *Planet Wood Corp. v. Marine Workers*, 13 Misc. 2d 787 (N.Y. Sup. Ct. 1958).

own caseload, a thorough and consistent analysis of the problems of federal-state relations could be developed only after a series of arguments, briefs, and conferences among the various justices encompassing fourteen years.

In assessing the wisdom of the Supreme Court's narrow restriction of state power and its insistence upon implementation of a federal labor policy by the NLRB in situations in which the Board has determined that there is no substantial impact on commerce, although technically the unfair practice "affects commerce," the question arises of the necessity for uniform protection of collective bargaining as an institution. The conclusion that Congress intended uniform federal policy to reach to the furthest extent of its power over business probably is supported in the legislative history of the NLRA and the LMRA.⁸¹ Certainly the qualifications of section 10(a), permitting cession of jurisdiction to states having laws not inconsistent with the federal act, do not necessarily pull in the other direction,⁸² and the failure of Congress to act from 1954 to late in

81. Although the primary objective of the language of § 10(a) of the Wagner Act to the effect that the Board's power to remedy unfair labor practices should be "exclusive" seems to have been to avoid conflict with other federal agencies or "boards" created by industry itself, it was important to Congress that the Board be the "paramount administrative or quasi-judicial authority in connection with the development of the Federal American law regarding collective bargaining." S. REP. NO. 573, 74th Cong., 1st Sess. 14 (1935). See also H.R. REP. NO. 1147, 74th Cong., 1st Sess. 23 (1935); H.R. REP. NO. 969, 74th Cong., 1st Sess. 21 (1935). The elimination of this language in the Taft-Hartley Act seems to have been motivated somewhat by the introduction of provisions for temporary injunctions and damage suits for secondary boycotts. H.R. REP. NO. 510, 80th Cong., 1st Sess. 52 (1947).

At the same time, Congress was willing to permit the Board to divide its jurisdiction with the state agencies, if they both applied consistent law, S. REP. NO. 105, 80th Cong., 1st Sess. 26 (1947); H.R. REP. NO. 510, 80th Cong., 1st Sess. 52 (1947), and to allow states to impose more rigid restrictions on union security provisions than the federal law did, see LMRA (Taft-Hartley) § 14(b), 61 Stat. 151 (1947), 29 U.S.C. § 164(b) (1952). It seems likely, however, that within the area of businesses affecting commerce, Congress intended the federal law to be applicable, with these two rather narrow exceptions. *But see* 93 CONG. REC. 6383 (1957), in which Representative Hartley assured his colleagues that the validity of state laws on labor is protected.

82. The original provision in S. 1126 80th Cong., 1st Sess. (1947), as reported to the Senate, read:

That the Board is empowered by agreement with any agency of any State or Territory to concede to such agency jurisdiction over any cases in any industry [with certain exceptions] . . . even though such cases may involve labor disputes affecting commerce provided the state agency conforms to national policy, as herein defined, in the determination of such disputes.

The language was included in H.R. 3020, 80th Cong., 1st Sess. (1947), as passed by the Senate. However, in the conference report, the section is explained as permitting cession, "if the applicable provisions of the State or Territorial statute and the rules of decision thereunder are consistent with the corresponding provision of the National Act, as interpreted and applied by the Board and the courts." H.R. REP. NO. 510, 80th Cong., 1st Sess. 52 (1947). The modification in language seems to have been designed to spell out more clearly what constituted conformity to national policy.

1959 to remedy the situation created by the Court's interpretation of the acts lends credence to the interpretation.

But as the "dissenting" Justices in *Garmon II* have pointed out, the effect of pre-emption in such a case is to deprive the participants in labor-management relations of *any* protection other than self-help, to leave the employer free to discriminate or interfere with his employees' concerted activities and the union free to make use of coercive tactics which may be opposed to federal policy.⁸³ While in some cases self-help may be effective, it seems clear that one of the primary objectives of the federal labor acts is to provide means for avoiding the economic disruption incident to lockouts, wholesale discharges, or strikes and picketing which cause the shut down of a business.⁸⁴ Moreover, the variations in the economic power of the participants in differing situations are just as likely to cause non-uniformity of result as the application of state laws or policies. This is not to say that the state courts should be free to enjoin or punish conduct which *on its face* appears to be protected by the federal act. While the primary authority to determine the scope of such protection may have been given to the Board, in the situation where the Board will *not* undertake to make such a determination on the merits, there seems to be no substantial reason for denying to the courts the power to look to past determinations of the Board and the legislative history of the act itself in deciding whether the particular conduct is "protected." The dangers of disruption of labor relations resulting from the use of injunctive relief could have been reduced by limiting the state courts to the granting of damages. As others have pointed out, the effect of a judgment for damages is not immediate and may be mitigated on review.⁸⁵ While it is true that the threat of punitive damages may provide a deterrent to engaging in conduct which may be protected under the act, the primary objective of protection of the participants in the labor dispute might be equally as well accomplished by limiting the states further to the granting of compensatory damages. However, no such attempt to coordinate federal policy and potential state regulation of labor

83. It has been suggested by some courts that to deny any relief to the injured party would in fact be a denial of due process. See *Johnson v. Grand Rapids Bldg. Trades Council*, 40 L.R.R.M. 2616 (Mich. Cir. Ct. 1957). Another court has suggested it is at least so contrary to justice as not to justify pre-emption. *Willard v. Huffman*, 44 L.R.R.M. 2425 (N.C. 1959).

84. See § 1 of the Wagner Act and Taft-Hartley Act for the explicit statement of this policy:

The denial by employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest. . . .

85. See Meltzer, *The Supreme Court, Congress, and State Jurisdiction Over Labor Relations*: I, 59 COLUM. L. REV. 6, 32, 39 (1959); Wellington, *Labor and the Federal System*, 26 U. CHI. L. REV. 542, 553 (1959).

relations, in the absence of effective federal enforcement, seems to have been undertaken by the Supreme Court. Instead, after a series of seemingly inconsistent statements of the doctrine of federal preemption, the Court has reached the conclusion that state courts and agencies must be precluded from offering any remedy for conduct disapproved by federal policy. While it is possible that the Court's decision on the facts of *Garmon II* can be justified on the basis that the federally protected conduct should not be regulated by state damage actions, the author believes that the Court was unwise in denying to the states the power to control or remedy *prohibited* conduct over which the Federal Board has declined to exercise any regulatory power.

There still remains, however, the possibility that there is some conduct on the part of unions or employers which is not clearly protected nor prohibited by the federal act. In an early case, *International Union, UAW-AFL v. Wisconsin Employment Relations Bd. (Briggs-Stratton)*,⁸⁶ the Court found "quickie" work stoppages to be within the range of state regulation because of lack of federal regulation. Similarly, in *Algoma Plywood & Veneer v. Wisconsin Employment Relations Bd.*,⁸⁷ the majority of the Court treated the regulation of union security provisions as within the power of the states. But in *Garner*, the unanimous Court said:

The detailed prescription of a procedure for restraint of specified types of picketing would seem to imply that other picketing is to be free of other methods and sources of restraint. For the policy of the national Labor Management Relations Act is not to condone all picketing but only that ascertained by its prescribed processes to fall within its prohibition. Otherwise, it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing. For a state to impinge on the area of labor combat designed to be *free* is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits.⁸⁸

While such language might be interpreted as sounding a death knell for the doctrine of *Briggs-Stratton*, it is noteworthy that in *Weber*, the Court's opinion written by Mr. Justice Frankfurter refers with approval to the holding in that case.⁸⁹ Professor Meltzer in his exhaustive study of the Court, Congress and the problem of state regulation suggests that some of Mr. Justice Frankfurter's language repudiates the *Garner* view that there are but two types of conduct, federally prohibited and federally protected.⁹⁰ Meltzer does point out, however, that *Weber* does in some measure impose

86. 336 U.S. 245 (1949).

87. 336 U.S. 301 (1949).

88. 346 U.S. at 499-500. (Emphasis added.)

89. 348 U.S. 468, 477 (1955).

90. Meltzer, *supra* note 85, at 18.

a restriction on *Briggs-Stratton*, since it limits state action to conduct "which is *clearly* not protected and *clearly* not prohibited."⁹¹

The problem of the demise of *Briggs-Stratton* is raised again in the opinions in *Garmon II*. Although some of the language used by Mr. Justice Frankfurter suggests that the doctrine of *Briggs-Stratton* is not completely dead,⁹² the emphasis upon the primary jurisdiction of the Board in determining the scope of the federal act seems to require that the states forego the exercise of *any* jurisdiction unless the conduct is beyond doubt a "mere peripheral concern of the Labor Management Relations Act," or involves violence or threats to public order.⁹³ Moreover, doubt is shed on the vitality of *Briggs-Stratton* by the statement: "Or, the Board may decide that an activity is neither protected nor prohibited, and thereby raise the question whether such activity may be regulated by the States."⁹⁴ To this, the following footnote is appended: "See *Auto Workers v. Wisconsin Board*, 366 U.S. 245 [*Briggs-Stratton*]. The approach taken in that case, in which the Court undertook for itself to determine the status of the disputed activity, has not been followed in later decisions, and is no longer of general application."⁹⁵

The comment of the concurring Justices is worth noting for their interpretation of this language:

I . . . can find no basis on principle or in past decisions for the Court's intimation that the States may even be powerless to act when the underlying activities are clearly "neither protected nor prohibited" by the federal Act. Surely that suggestion is foreclosed by *Automobile Workers v. Wisconsin Board*,⁵ . . . as well as by the approach taken to federal preemption in such cases as *Allen-Bradley Local v. Wisconsin Employment Relations Board*, *supra*; *Bethlehem Steel Co. v. New York State Labor Relations Board*, . . . and *Algoma Plywood and Veneer Co. v. Wisconsin Employment Relations Board*, . . . not to mention *Laburnum and Russell* and the primary jurisdiction doctrine itself.⁶ Should what the Court now intimates ever come to pass, then indeed state power to redress wrongful acts in the labor field will be reduced to the vanishing point.⁹⁶

To this the following notes are appended at the appropriate points:

5. The Court may be correct in stating that "the approach taken in that

91. *Ibid.*

92. "When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the Taft-Hartley Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield." 359 U.S. at 244. "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." *Ibid.* "In the absence of the Board's clear determination that an activity is neither protected nor prohibited or of compelling precedent applied to essentially undisputed facts, it is not for this Court to decide whether such activities are subject to state jurisdiction." *Id.* at 241.

93. *Id.* at 243.

94. *Id.* at 245.

95. *Id.* at 245 n.4.

96. *Id.* at 253-54.

case, in which the Court undertook for itself to determine the status of the disputed activity, has not been followed in later decisions, and is no longer of general application." That, however, has nothing to do with the vitality of the holding that there is no pre-emption when the conduct charged is in fact neither protected nor prohibited. To the contrary, that holding has remained fully intact, and, as already noted, underlay the decisions in *Laburnum* and *Russell*.⁹⁷

6. If the "neither protected nor prohibited" category were one of pre-emption, there would be no point in referring any injunction case initially to the Board since the pre-emption issue would be plain however the challenged activities might be classified federally. The same is true of damage cases under the Court's premise of conflict. State power would thus be confined to activities which were violent or of merely peripheral federal concern, see *International Ass'n of Machinists v. Gonzales*. . . .⁹⁸

Had the language quoted from the majority opinion stood without comment, it would have been logical to conclude that the Court intended only to negate the possibility that *Briggs-Stratton* would be relied upon by the state courts to take into their own hands the determination of what is "neither protected nor prohibited." However, the emphatic rejection of any further implication by what is essentially a dissenting opinion leads one to speculate that Mr. Justice Frankfurter and his concurring colleagues may have been attempting to by-pass all aspects of *Briggs-Stratton*. Such speculation, in turn, leads to a consideration of whether it is appropriate to leave this "loophole" in what otherwise appears to be a dike against state regulation.

In view of the extent to which Congress has examined the various aspects of labor-management relations and internal union affairs and undertaken to regulate some aspects thereof, it may be argued that conduct which has not been prohibited by the act is in fact considered by Congress to be permissible and appropriate conduct. This is negated, however, by federal decisions indicating the existence of conduct which is treated as "unprotected" although it does not fall within any of the prohibitions of the act including false or "disloyal" statements on picket signs unrelated to labor disputes,⁹⁹ strikes to compel violation of federal laws,¹⁰⁰ strikes in violation of other federal laws,¹⁰¹ strikes in breach of contract,¹⁰² sit-down strikes,¹⁰³ and wildcat strikes.¹⁰⁴ Congress was cognizant of several of these decisions when it passed the Taft-Hartley Act, and specifically stated that the protection of sections 7 and 13 is not

97. *Id.* at 253 n.5.

98. *Id.* at 254 n.6.

99. *NLRB v. Local 1229, IBEW*, 346 U.S. 464 (1953).

100. *American News Co.*, 55 N.L.R.B. 1302 (1944).

101. *Southern S.S. Co. v. NLRB*, 316 U.S. 31 (1942).

102. *NLRB v. Sands Mfg. Co.*, 306 U.S. 332 (1939).

103. *NLRB v. Fansteel Metallurgical Co.*, 306 U.S. 240 (1939).

104. *NLRB v. Draper Corp.*, 145 F.2d 199 (4th Cir. 1944).

intended to cover such conduct as strikes in violation of contract, shutdown strikes, or strikes which constitute mutiny.¹⁰⁵

It is significant that the conduct which the Court treated as in the penumbral area of unprotected-unprohibited conduct in *Briggs-Stratton*, a partial shutdown or partial strike, has since been categorized by the Board in two cases as a violation of the act,¹⁰⁶ a refusal to bargain in good faith. However, it is probably even more significant that the courts have set aside such orders as the Board has issued on the basis of this categorization.¹⁰⁷ Similarly, a strike which the Board found to be in violation of a contractual commitment to settle disputes by a grievance-arbitration procedure was treated by the Board as a violation of the act,¹⁰⁸ but the Court of Appeals for the District of Columbia Circuit set aside the cease and desist order on the ground that while a breach of contract might be "unprotected" activity, it was not an unfair labor practice.¹⁰⁹ Finally, the only conduct which the *Garmon II* majority seems to clearly recognize as unprotected and unprohibited, exemplified in *Gonzales*, has come under the eye of the federal government and may now be of something more than mere peripheral concern, although the provisions of the LMRDA make it clear that any state remedies which previously were available to the union member wrongfully disciplined are to remain available.¹¹⁰

Does the mere existence of a category of conduct which is neither protected nor prohibited by the federal act argue for state regulation? Here we must balance the interest of the state in giving protection to its citizens from conduct which is injurious, against the danger that in defining the area in which it may operate, the state will in fact encroach upon the "protected" or "prohibited" areas. For example, in *McLean Distrib. Co. v. Local 993, Brewery Drivers Union*,¹¹¹ former drivers for a brewery company had been hired by a distributor taking over the distribution of the brewery company's products. They struck to compel the distributor to bargain as to working conditions, although he already had a collective

105. S. REP. NO. 105, 80th Cong., 1st Sess. 28 (1947) (summary by Senator Taft of the conference bill).

106. Insurance Agents Union (Prudential Ins. Co.), 119 N.L.R.B. 768 (1957). Textile Workers Union (Personal Products Corp.), 108 N.L.R.B. 743 (1954).

107. Insurance Agents Union v. NLRB, 260 F.2d 736 (D.C. Cir. 1958), cert. granted, 358 U.S. 940 (1959); Textile Workers Union v. NLRB, 227 F.2d 409 (D.C. Cir. 1954), grant of cert. vacated, 352 U.S. 864 (1956).

108. Local 2935, UMW (Boone County Coal Co.), 117 N.L.R.B. 1095 (1957); Local 9735, UMW (Westmoreland Coal Co.), 117 N.L.R.B. 1072 (1957).

109. Local 2935, UMW v. NLRB, 257 F.2d 211 (D.C. Cir. 1958) (setting aside the *Boone County Coal Co.* case). The Court of Appeals also reversed the *Westmoreland Coal Co.* case, Local 9735, UMW v. NLRB, 258 F.2d 146 (D.C. Cir. 1958), but on the basis that there was no strike to modify the contract.

110. LMRDA §§ 103, 603(a), 604.

111. 94 N.W.2d 514 (Minn. 1959), 44 MINN. L. REV. 327 (1959).

bargaining agreement with the union which was not subject to reopening and renegotiation during its term. The state court found that the strike was in breach of the contract, and therefore not "protected" activity,¹¹² but went on to hold that it was also not a violation of section 8(d) forbidding strikes during the term of a contract designed to obtain modification or termination thereof.¹¹³ However, in this author's opinion, the latter construction is erroneous, and the possibility of conflict of federal and state policy is apparent. The Wisconsin board's determination that a union could not properly impose a fine upon its members for crossing a picket-line,¹¹⁴ also appears to involve the possibility of conflict with the federal policy protecting concerted activity in support of labor's claims. And a New York determination that union pressure to compel an employer to reopen a plant is outside the bounds of the federal act¹¹⁵ may run counter to a federal policy either to encourage a broad scope of collective bargaining or to limit the areas about which either side can compel the other to bargain.¹¹⁶ In such instances, the possibility of review and eventual "correction" by the Supreme Court of erroneous interpretations of the federal law may be inadequate: first, because the delay incident to review makes any injunctive relief which is immediately granted effective *even though* the injunction is eventually dissolved; second, because the Supreme Court may be unwilling, as in *Garner*, *Weber* and *Garmon*, to define with any precision the bounds of the federal act, deferring instead to the NLRB's "primary jurisdiction"; third, because the reviewing court may be unable or unwilling to undertake a *de novo* determination of the facts found by the trial court, and the protection or prohibition of the conduct may well be decided by such a fact-finding process.

The price which may have to be paid for preservation of the federal policy protecting certain conduct is the chance that other conduct which is neither protected nor prohibited may go unregulated by *any* governmental agency, where it does not involve violence or other threat to the public peace and order. It can even be argued that Congress, in having undertaken to prohibit only certain types of conduct and at the same time recognizing that there are other "non-protected" types of conduct,¹¹⁷ intended that such

112. Citing *NLRB v. Sands Mfg. Co.*, 306 U.S. 332 (1939) and *W. L. Mead, Inc.*, 113 N.L.R.B. 1040 (1955).

113. This was done by construing the Supreme Court's opinion in *NLRB v. Lion Oil Co.*, 352 U.S. 282 (1957), as limiting § 8(d) to situations where there was a contract subject to reopening.

114. *Carey and Lodge 78, IAM*, 44 L.R.R.M. 1060 (Wisc. Emp. Rel. Bd. 1959).

115. *Freydberg, Inc. v. ILGWU*, 128 N.Y.S.2d 470 (N.Y. Sup. Ct. 1954).

116. Cf. *NLRB v. Borg-Warner, Wooster Div.*, 356 U.S. 342 (1958), discussed in Note, 43 MINN. L. REV. 1225 (1959).

117. See note 105 *supra*.

nonviolent, unprotected conduct should be regulated by the provisions which the parties themselves might make for grievance or arbitration settlements, or that the parties should be left to their own powers of self-help, such as strike or discharge, to obtain remedies for this conduct.¹¹⁸ The denial of state remedies other than enforcement of collective bargaining agreements would seem to effectuate this policy decision.¹¹⁹

Perhaps the final resolution as to the distribution of power between federal and state authorities is most appropriately one for the legislative branch of the federal government. The problem involves a balancing of the interest of the nation in promoting collective bargaining and protecting neutrals and participants from the excesses of either party to collective bargaining against the interest of the states in regulation of matters which have their most immediate impact upon the locality and in assuring protection of the economic well-being of employers and employees in small business concerns. But the legislative inaction following *Garner* and *Guss* might have justified a somewhat broader policy-making function of the Court in *Garmon II*. This is particularly true in the light of *Laburnum Russell* and *Gonzales*, as well as the opinion in *Garmon I*, all of which seemed to offer some limited protection under state law against abuses of employers and unions.

II. THE LEGISLATIVE SOLUTION AND SOME QUESTIONS UNRESOLVED

A. Section 701 of *The Labor Management Reporting & Disclosure Act of 1959 and Its Antecedents*

It is probably unfair to place sole responsibility for the creation of the no man's land on the judicial branch of the federal government, since Congress had undertaken to regulate labor-management relations in very broad language and had increasingly encroached upon various aspects of those relations, while the NLRB had voluntarily withdrawn its exercise of jurisdiction. Yet, it can be said that the *Guss* and *Garmon II* decisions did nothing to alleviate the situation. The solution, if it was to come at all, seemed to rest in the

118. It should be noted that the 1947 Senate bill, proposing to make violation of a collective bargaining agreement by an employer or a labor organization an unfair labor practice, was not intended to do away with the parties' own means of compelling compliance through grievance and arbitration procedures; and it was not intended that the Board should provide a forum for the settlement of all disputes concerning alleged breaches of contract or to entertain damage actions for breach of contract. S. REP. NO. 105, 80th Cong., 1st Sess. 23 (1947). The ultimate elimination of this provision seems to have been motivated by a desire to leave the parties to the usual processes of law, that is, damage actions, under § 301. H.R. REP. NO. 510, 80th Cong., 1st Sess. 41-42 (1947).

119. The enactment of § 301 of the Taft-Hartley Act and the language of the conference committee report indicate that enforcement of collective agreements was desired by Congress.

hands of Congress, either (1) by giving the Board additional personnel and funds to engage in full scale regulation of all businesses affecting commerce or (2) by defining more precisely the dividing line between exclusive federal regulation and permissible state regulation.

As a matter of historical fact, several attempts had been made in the past to restore to the states jurisdiction over those cases of labor-management relations which the NLRB was unwilling to handle. The first of these was the addition of a proviso in section 10(a) of the Taft-Hartley Act permitting the NLRB to cede jurisdiction over certain cases to the states.¹²⁰ This came ten days following the Supreme Court's opinion in *Bethlehem Steel Co.*,¹²¹ which had thrown considerable doubt upon the validity of an agreement between the NLRB and the New York State Labor Relations Board under which the state board conducted representation proceedings over certain classes of cases. The failure of the NLRB to execute any cession agreements under section 10(a) seems to have arisen from the statutory requirement that the state law not be inconsistent with federal law, which was interpreted by the NLRB as requiring almost complete coincidence of federal and state statutory provisions.¹²² Whether this was the intention of Congress in passing section 10(a) is not clear, since the original Senate report merely referred to permitting state labor relations boards to have jurisdiction,¹²³ while the minority report says only, "this proposal is made necessary by the decision of the Supreme Court in *Bethlehem Steel Co. v. New York Labor Relations Bd.*"¹²⁴ During debates on the act, Representative Hartley stated: "This bill once again protects the validity of State laws on labor. . . . That is my interpretation of the bill, that this will not interfere with the State of Wisconsin in the administration of its own laws."¹²⁵ On the basis of this legislative history, one might argue that Congress intended to permit the Board to cede jurisdiction to states whose labor laws were not in direct conflict

120. *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

LMRA (Taft-Hartley Act) § 10(a), 61 Stat. 146 (1947), 29 U.S.C. § 160(a) (1952).

121. *Bethlehem Steel Co. v. New York Labor Relations Bd.*, 330 U.S. 767 (1947). The case was decided on April 7, 1947, and the proviso reported to the Senate on April 17, 1947, although not enacted into law until June of that year.

122. See 13 NLRB ANN. REP. 18 (1948).

123. S. REP. NO. 105, 80th Cong., 1st Sess. 26 (1947).

124. S. REP. NO. 105, 80th Cong., 1st Sess. 38 (1947) (minority views).

125. 93 CONG. REC. 6383 (1947).

with the federal law rather than limiting cession to situations where there was complete identity. However, the following year, the "watchdog committee," reviewing the activity under the new act, noted with apparent approval the Board's interpretation.¹²⁶

From 1953 up to the recent session of Congress there have been several bills introduced which would have permitted the states to assert jurisdiction over "local" businesses even though they might conceivably "affect commerce" in the constitutional sense.¹²⁷ None of these attempts proved successful, however, and in fact only one of the bills ever reached the floor of either house from committee. In contrast to these attempts to undo the doctrine of pre-emption, Senators Kennedy, Ives, Morse, and Hill, in 1958, introduced a bill which in part sought to correct the no man's land by *requiring* the NLRB to assert *all* of the potential jurisdiction which it possessed under the act.¹²⁸ While this received the approval of the Senate,¹²⁹ it did not pass the House for reasons which probably did not relate to this particular provision of the bill.¹³⁰

In June, 1958, Mr. Boyd Leedom, Chairman of the NLRB, appeared before a congressional committee and suggested that the Board would adopt new and more liberal jurisdictional standards if it could obtain an increased budget.¹³¹ The 1958-59 appropriation

126. S. REP. NO. 986, 80th Cong., 2d Sess. 30 (1948):

Generally speaking, the statutes in these states [New York, Massachusetts, Pennsylvania and Wisconsin with whom the Board had considered cession agreements] were modeled after the Wagner Act. Corresponding sections of their statutes and the Labor-Management Relations Act of 1947 have about the same degree of inconsistency as is found between the latter act and the Wagner Act. Some State statutes for example have not defined union unfair labor practices, nor have they limited the right to enter into compulsory union membership contracts. It therefore appears that ceding of jurisdiction in unfair labor practice cases will not be possible unless and until a State enacts a statute modeled after the [Taft-Hartley] Act. . . . No State laws presently contain the limitations of compliance by filing financial and other information and the making of anti-Communist affidavits, but the agreement might provide that a State agency would not process a case in an industry over which jurisdiction had been ceded unless the union had met those requirements.

127. See H.R. 9678, 85th Cong., 2d Sess. (1958); S. 1772, 1723, H.R. 6432, 85th Cong., 1st Sess. (1957); S. 2650, 83d Cong., 2d Sess. (1954); S. 2218, 1785, 1161, 83d Cong., 1st Sess. (1953). None of these except S. 2650 got out of committee, and that bill was recommitted to the Senate Committee on Labor and Welfare. See 100 CONG. REC. 6203 (1954).

128. S. 3974, 85th Cong., 2d Sess. (1958).

129. 104 CONG. REC. 11487 (1958).

130. The bill was referred to committee, 104 CONG. REC. 15342 (1958), but failed to pass the House after suspension of the rules, 104 CONG. REC. 18288 (1958). Although in the course of House debate the provision requiring the Board to exercise all of its jurisdiction was criticized, 104 CONG. REC. 18269, 18271, 18274 (1958), this was only one of many objections raised, and in spite of the passage of the Landrum-Griffin Bill by the House this year, the author is in doubt as to whether these objections were the most persuasive.

131. See 42 LAB. REL. REP. 185 (1958).

for the NLRB was thereupon increased in the amount of \$1,500,000 for the purpose of permitting the extension of jurisdiction.¹³² In the fall, the Board put its new standards into effect,¹³³ thereby expanding its jurisdiction over about twenty per cent of the no man's land and covering all but twenty-five per cent of the employees within the potential jurisdiction of the Board,¹³⁴ although this may still leave some fifty per cent of manufacturing firms and over seventy-five per cent of retail and service establishments outside the jurisdiction of the Board.¹³⁵ Chairman Leedom also had recommended that the Taft-Hartley Act be amended to permit the states to take jurisdiction of cases over which the Board had declined to exercise its potential jurisdiction.¹³⁶ In announcement of the new standards, the Board said:

We are taking this action as a consequence of the situation to which the Supreme Court referred in the case of *Guss v. Utah Labor Relations Board*. Therein the Supreme Court adverted to "a vast no-man's land, subject to regulation by no agency or court," and declared: (1) "Congress is free to change the situation;" and (2) "The National Labor Relations Board can greatly reduce the area of no-man's land by asserting its jurisdiction."¹³⁷

And, in its initial decision, while recognizing that the extension of jurisdiction would not wipe out the no man's land, the majority of the Board concluded:

[It] will bring within its exercised jurisdiction a significant number of the enterprises previously falling outside that area and the expected case-load resulting from these standards represents the maximum workload that can be expeditiously and effectively handled by the Board and its staff within existing budgetary policies. . . .¹³⁸

132. See 23 NLRB ANN. REP. 8 (1959).

133. *Siemons Mailing Serv.*, 122 N.L.R.B. No. 13, 43 L.R.R.M. 1056 (Nov. 14, 1958).

134. See *Hearings on S. 505, and Other Bills Pertaining to Labor Management Reform, Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare*, 86th Cong., 1st Sess. 606-07 (1959) (statement of Chairman Leedom of the NLRB).

135. Joseph Di Fede, Chairman of the New York Labor Relations Board, has reported a 1958 estimate of the Small Business Administration that the NLRB's pre-1958 jurisdictional limits covered less than three per cent of the retail industry, less than one per cent of the public utilities and services, and less than fifty per cent of manufacturers. Di Fede, *Problems of Federal-State Jurisdiction in Labor Management Disputes*, 4 N.Y.L.F. 398, 402 (1958). The figures in text represent eighty per cent of those areas not covered. The Small Business Administration estimates that under the present standards some 3 million out of 4 million small businesses in the United States were in the no man's land. SMALL BUSINESS ADMINISTRATION TWELFTH SEMIANN. REP. FOR SIX MOS. ENDING JUNE 30, 1959 at 2.

136. 42 LAB. REL. REP. 185 (1958).

137. NLRB Press Release R-570 July 22, 1958; 23 NLRB ANN. REP. 7 (1959).

138. *Siemons Mailing Serv.*, 122 N.L.R.B. No. 13, 43 L.R.R.M. 1056, 1057 (Nov. 14, 1958).

The Board added that in the exercise of its authority it had declined "to assert its full statutory jurisdiction . . . in the belief that such a policy will best effectuate the policies of the act."¹³⁹

When the Kennedy-Ervin bill was brought to the Senate in 1959, it contained a provision for the repeal of the "cession" provision to section 10(a) of the NLRA and for the addition of a new section 14(c) as follows:

The National Labor Relations Board shall assert jurisdiction over all labor disputes arising under the National Labor Relations Act, as amended: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases or kinds of cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases or kinds of cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.¹⁴⁰

On the other hand, the Administration bill would have added section 6(b)(1), specifically allowing the Board to decline jurisdiction when in its opinion the effect of a labor dispute upon commerce was not sufficiently substantial to warrant the exercise of its jurisdiction, and would have added section 6(b)(2):

Nothing in this Act shall be deemed to prevent or bar any agency or the courts of any State . . . from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction.¹⁴¹

The McClellan bill also contained specific provision for the Board's declination of jurisdiction, but would have required that the Board clearly define its jurisdictional limits in regulations, and would have authorized the states to act where the Board would not assert jurisdiction or could not act because of the failure of the union to comply with the filing requirements of the act.¹⁴²

What emerged from the Senate Committee on Labor and the debates on the floor of the Senate was something of a compromise between these extreme positions. Section 14 of the LMRA was to be amended by added subsections (c)(1), (c)(2) and (c)(3) which

139. *Ibid.*

140. S. 505, 86th Cong., 1st Sess. § 601(a) (1959); 105 CONG. REC. 825-26 (daily ed. Jan. 20, 1959). (The provision was introduced by Senators Kennedy, Ervin, Hill, Church, Williams of N.J., Randolph, Murray, Morse, McNamara, Clark, Sparkman and Humphrey.)

141. S. 748, 86th Cong., 1st Sess. § 502 (1959); 105 CONG. REC. 1160 (daily ed. Jan. 28, 1959). (The provision was introduced by Senators Goldwater, Dirksen *et al.*).

142. S. 1137, 86th Cong., 1st Sess. (1959); 105 CONG. REC. 2407 (daily ed. Feb. 19, 1959).

would have permitted state agencies other than courts to assert jurisdiction in cases over which the NLRB declined jurisdiction, but would have required the state agency to apply and be governed solely by federal law as set forth in sections 8 and 9 of the LMRA and the rules of decision of the NLRB and federal courts. There was also to be provision for temporary injunctive relief under section 10(j)(1) and enforcement or review of state agency orders in the federal district courts within the state, comparable to the enforcement and review of NLRB orders in the courts of appeals.¹⁴³ This provision retained the primacy of the federal law as applied to all cases of labor disputes affecting interstate commerce. At the same time, it permitted the burden of handling representation proceedings and unfair labor practice charges to be shifted from the NLRB to state agencies acting as "little NLRB's." But the most serious problem connected with the proposal was that only twelve jurisdictions have agencies which are comparable in any way to the NLRB in dealing with labor-management relations, and in two of these, Kansas and Minnesota, the agency is neither empowered, nor necessarily equipped, to deal with unfair labor practices.¹⁴⁴

143. S. 1555, 86th Cong., 1st Sess. § 601 (1959); 105 CONG. REC. 5942 (daily ed. April 24, 1959) (as proposed by Senators Cooper, Morse and Javits). 105 CONG. REC. 6048 (daily ed. April 25, 1959) (as passed by the Senate). This differs from the recommendations of the Senate Committee on Labor and Public Welfare, S. REP. NO. 187, 86th Cong., 1st Sess. 102 (1959), which would have compelled the NLRB to exercise all jurisdiction within its power but permitted it to cede jurisdiction over "cases which are primarily local" to state agencies which would act as agents of the NLRB and would be subject to federal substantive law with review and enforcement of the state agency's orders by the NLRB through the courts of appeals. It also differs from the amendment of Senator Prouty of Vermont, 105 CONG. REC. 5949 (daily ed. April 24, 1959), which would have permitted the Board to decline jurisdiction but would have required it to publish its limitations of jurisdiction and to decide whether a particular labor dispute or case was within its jurisdiction, on the petition of any person interested in the dispute, and further would have permitted state courts to deal with unfair labor practices and state agencies to deal with labor disputes, unfair labor practices and representation cases, provided the state court or agency was bound by federal law.

144. COLO. REV. STAT. ANN. §§ 80-5-1 to 80-5-22 (1953); CONN. GEN. STAT. §§ 31-101 to 111 (1958); HAWAII REV. LAWS ch. 90 (1955); KAN. GEN. STAT. ANN. §§ 44-801 to -815 (1949) (Supp. 1957); MASS. GEN. LAWS ch. 150A (1957); MINN. STAT. §§ 179.01-17 (1957); N.Y. LAB. LAW §§ 700-16 (1937); PA. STAT. ANN. tit. 43, §§ 211.1-39 (1952); P.R. LAWS ANN. tit. 29, §§ 61-76 (1955); R.I. GEN. LAWS ANN. tit. 28, ch. 7 (1956); UTAH CODE ANN. tit. 34, ch. 1 (1953); UTAH CODE ANN. 34-1-2 (Supp. 1959); WISC. STAT. §§ 111.01-19 (1957). Michigan's labor disputes act, MICH. COMP. LAWS § 423 (1948), deals with settlement of disputes by mediation and arbitration, and undertakes some restrictions on picketing and requires strike notices and authorization. But it fails to provide any unfair labor practice provisions, and places enforcement of the restrictions on strikes and picketing in the hands of the board of mediation or any person, labor organization, corporation or firm, by any proper equitable or legal remedy in any court of competent jurisdiction. Kansas and Minnesota have labor conciliators, but the enforcement of the unfair labor practices in each of these states is in the hands of others; in Kansas—the attorney general, county attorney, or any aggrieved

When the Senate bill reached the House, it underwent substantial changes. Not the least of these was the treatment of the no man's land problem. The Committee on Education and Labor voted out a bill which took the name of its chairman, Representative Elliott, and which would have (1) *required* the NLRB to assert jurisdiction over *all* labor disputes under the NLRA, (2) increased the membership of the Board from five to seven members, and (3) authorized the Board to delegate certain powers to its regional directors and to the General Counsel.¹⁴⁵ Representatives Landrum and Griffin proposed a substitute bill which would (1) permit the NLRB to decline jurisdiction in cases in which, in its opinion, the impact upon commerce was not substantial and (2) authorize the states to assert jurisdiction in such cases.¹⁴⁶ Representative Sheeley introduced still a second substitute which would have required that the Board exercise jurisdiction over all labor disputes arising under the act.¹⁴⁷

In the debates on the House floor, it was clear that all three proponents agreed that the present situation was an intolerable one and should be remedied. The supporters of the Elliott and Shelley bills argued: that uniformity in national labor policy was desirable and that to permit the states to exercise *any* jurisdiction over matters which were covered by the national act would destroy this uniformity of application; that the large majority of states lacked the agencies to administer elections or representation proceedings or to parallel the NLRB's function of protecting against unfair labor practices; and that to give the states the power to apply their own laws would involve a return to the "justice by injunction," criminal conspiracy, and the common-law principle of *prima facie* tort which had been the basis of severe criticism in the past and was not desirable today.¹⁴⁸ On the other hand, the supporters of the Landrum-

person; in Minnesota — any aggrieved person who may seek an injunction in a court of competent jurisdiction. While the jurisdiction of the labor relations board in the other states named above encompasses enforcement of the unfair labor practice provisions, in Colorado, Hawaii, and Wisconsin, this power is specifically not exclusive and does not prevent the granting of any legal or equitable relief to a person injured by an unfair labor practice. Several of the states provide for some reporting of financial affairs. See, for example, MINN. STAT. § 179.21 (1957), requiring financial reports to members. However, New York is the only state which seems to have enacted any provisions as comprehensive as the federal reporting and disclosure and "improper practices" legislation. N.Y. LAB. LAW §§ 720-32 (Supp. 1959).

145. H.R. 8342, 86th Cong., 1st Sess. § 701 (1959) (as reported to the House); 105 CONG. REC. 12860 (daily ed. July 23, 1959), 13563 (daily ed. July 30, 1959), 14175 (daily ed. Aug. 11, 1959).

146. H.R. 8401, 8400, 86th Cong., 1st Sess. § 701 (1959); 105 CONG. REC. 13877 (daily ed. Aug. 5, 1959), 14182 (daily ed. Aug. 11, 1959), 14369, 14377, 14389 (daily ed. Aug. 12, 1959), 14485, 14486, 14509 (daily ed. Aug. 13, 1959).

147. H.R. 8490, 86th Cong., 1st Sess. (1959); 105 CONG. REC. 13719 (daily ed. Aug. 3, 1959).

148. See, e.g., the statements of Representatives Udall (on behalf of the Elliott bill) and Shelley, 105 CONG. REC. 14181-82, 14192 (daily ed. Aug. 11, 1959), as

Griffin bill argued that in the existing no man's land the problem of labor relations was primarily a local one and that the national policy should be subservient to giving the employer and his employees some protection rather than leaving them to the mercies of economic warfare; that even with an expanded personnel, the Board could not provide speedy relief and would be likely to be so swamped by the rush of cases arising from the no man's land that any effective enforcement of the national policy would be endangered.¹⁴⁹ There seems to have been no substantial support for the "compromise" of the Senate bill, perhaps because the number of states which could or would be able to take over the administration of federal law in the "local" problem area was limited to twelve, and it would be unlikely that the states themselves would relish financing a "little NLRB" which did not enforce state law and was not subject to review by state courts.¹⁵⁰ The bill which *passed* the House was the Landrum-Griffin bill, which in conference was modified to prohibit the Board from declining to exercise jurisdiction over labor disputes over which it would have asserted jurisdiction under its most recent standards. As signed into *law*, the provisions read:

Section 701. Section 14 of the National Labor Relations Act . . . is amended by adding . . . the following new subsection:

"(c) (1) The Board, in its discretion may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: *Provided*, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.

"(2) Nothing in this Act shall be deemed to prevent or bar any agency or the courts of any State or Territory . . . from assuming and asserting jurisdiction over labor disputes over which the Board declines . . . to assert jurisdiction."¹⁵¹

B. Some Unresolved Questions

(1) *The Board's Definition of Jurisdiction*

One problem which the current legislation may raise is whether

well as the analysis of the Landrum-Griffin Labor Reform Bill by Representatives Thompson of New Jersey and Udall. 105 CONG. REC. 14202 (daily ed. Aug. 11, 1959).

149. See the statements of Representatives Landrum, 105 CONG. REC. 14182 (daily ed. Aug. 11, 1959), Hiestand, 105 CONG. REC. 14206 (daily ed. Aug. 11, 1959), and Dixon, 105 CONG. REC. 14209 (daily ed. Aug. 11, 1959).

150. S. REP. NO. 187, 86th Cong., 1st Sess. 26 (1959), indicates that the Senate committee intended to recommend the use of federal funds to reimburse any state agency which entered into an agreement to act as the "agent" of the NLRB. No similar provision appeared in the bill as it passed the Senate.

151. LMRDA § 701(a).

the NLRB's 1958 definition of its jurisdictional standards is sufficient to comply with the provisions for declination under LMRA section 14(c)(1). At the time those standards were announced, it was not clear that Board declination would be the process by which state courts or agencies might obtain jurisdiction. It would seem, however, that if the Board has declined because, "in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction," this should be sufficient, even though it occurred prior to the date of the act. Certainly the reference in the final provision to the jurisdiction which the Board exercised on August 1, 1959, implies that Congress believed that the Board's then existing standards were in compliance with the language of the act. As to the language used by the Board in announcing its "rule of decision"¹⁵² in *Siemons Mailing Serv.*,¹⁵³ it might be argued that the declination was based on budgetary and personnel limitations more than on a determination that there was no substantial impact on commerce. At one point the majority said: "[T]he expected caseload resulting from these standards represents the maximum workload that can be expeditiously and effectively handled by the Board and its staff within existing budgetary policies and limitations."¹⁵⁴ However, the opinion

152. The 1959 legislation gives the Board the alternative of declining jurisdiction either "by rule of decision or by published rules pursuant to the Administrative Procedure Act." So far, the Board's announcements of its jurisdictional standards have been done in the former manner. The 1958 revision was originally proposed in a press release on July 22, 1958, with an invitation to all interested persons to submit briefs or comments. The release stated that after consideration of these comments and passage of any pending legislation, "the final standards will be set forth in decisions rendered by the Board following September 1, 1958." While this would seem to constitute "notice" and an opportunity to participate in the rule-making process, both of which are required by the APA § 4, the notice and the standards were not published in the Federal Register as have been other "rules" made by the Board (see, e.g., 23 Fed. Reg. 3254 (1958)) pursuant to its "rule-making power" under § 6 of the NLRA, as amended by the Taft-Hartley Act: "The Board shall have authority from time to time to make, amend and rescind in the manner prescribed by the Administrative Procedure Act such rules and regulations as may be necessary to carry out the provisions of this Act." LMRA § 6, 61 Stat. 140 (1947), 29 U.S.C. § 156 (1952).

One might ask whether "rule of decision" differs from "decision," and whether the language used was intended to distinguish between the sort of broad rules announced in 1958 covering classes of cases and a decision which determined only that on the specific facts of the case before the Board, exercise of its jurisdiction would be inappropriate. I have found nothing in the legislative history, except the use of "any class or category of employees" in § 14(c)(1) of the LMRA, to confirm this suspicion. Of course, there is always the possibility that an attempt by the Board to exclude an entire industry, as it did in the case of hotels and labor unions, would be held to be an abuse of its discretion. See *Hotel Employees, Local 255 v. Leedom*, 358 U.S. 99 (1958); *Office Employees, Int'l Union, Local 11 v. NLRB*, 353 U.S. 313 (1957). The Board did, however, extend its exercise of jurisdiction to both hotels and labor unions before August 1, 1959.

153. 122 N.L.R.B. No. 13, 43 L.R.R.M. 1056 (Nov. 14, 1958).

154. 122 N.L.R.B. No. 13, 43 L.R.R.M. 1056, 1057 (Nov. 14, 1958).

went on to point out that any broadening of jurisdiction would probably result in a serious lengthening of the time for processing cases and a resulting loss of efficacy of the Board as a forum for the resolution of disputes, and that with these circumstances in mind, the Board declined to assert its full statutory jurisdiction "in the belief that such a policy will best effectuate the policies of the Act."¹⁵⁵ This latter language reflects that of the pre-1950 cases in which the Board declined to exercise jurisdiction because of a lack of substantial impact on commerce,¹⁵⁶ and language used by the Board in explaining its prior definitions of jurisdiction which refer to impact on commerce.¹⁵⁷ It seems relatively clear, therefore, that a state court or agency may, after November 13, 1959 (the effective date of this portion of the act), assert jurisdiction over employers who fall below the 1958 minimal requirements.

But is this decision as to whether the facts of a particular dispute fall within the area of NLRB jurisdiction or within the competence of a state tribunal to be determined by the state court? It might be noted, as Senator Morse did in his arguments opposing the compromise of the conference report,¹⁵⁸ that while the Board may lay down some monetary standards for its jurisdictional limits, in the past it has generally applied those standards on the basis of facts as to business as they appeared at the time of the hearing, looking back at the prior calendar year or the prior twelve-month period, rather than looking to the facts as they appeared when the conduct or question before it arose.¹⁵⁹ It seemed possible that the state court might do the same, making the assumption that if at the time a case is presented to it the Board would not have asserted jurisdiction under its then existing standards, the court is empowered to do so. However, the NLRB has announced that in the future it will issue "advisory opinions" concerning the application of its jurisdictional standards on petition of parties, state courts, or state agencies who may be in doubt as to whether a particular proceeding would be subject to Board jurisdiction.¹⁶⁰ This probably will result

155. *Ibid.*

156. See, e.g., *Herff Motor Co.*, 74 N.L.R.B. 1007, 1008 (1947); *Southwest Metals*, 72 N.L.R.B. 54 (1947); *Airline Bus Co.*, 64 N.L.R.B. 620, 621 (1945); *Consolidated Vultee Aircraft Corp.*, 57 N.L.R.B. 1680, 1681 (1944).

157. See, e.g., *Breeding Transfer Co.*, 110 N.L.R.B. 493-94 (1954); *Hollow Tree Lumber Co.*, 91 N.L.R.B. 635, 636 (1950).

158. See 105 CONG. REC. 16391 (daily ed. Sept. 3, 1959).

159. *Langlade Veneer Prods. Corp.*, 118 N.L.R.B. 985 (1957); *Local 340, Aroostook Fed'n of Farmers, Inc.*, 114 N.L.R.B. 538 (1955). Where the employer's current business was diminished by a strike, the Board has asserted jurisdiction on the basis of an estimate of business absent the strike. *Hygienic Sanitation Co.*, 118 N.L.R.B. 1030 (1957).

160. NLRB Rules and Regs., Series 8, Subpart H, 29 C.F.R. §§ 102.98-.104, 24 Fed. Reg. 9115 (Nov. 7, 1959). The Board regulations refer to an "advisory opinion" as contrasted with the "declaratory order" which the General Counsel may obtain

in a requirement that private parties, state courts, or agencies obtain a Board ruling in the event that there is any dispute. Certainly the language of the *Garmon II* opinion indicates that in all questionable cases the Board itself must make the decision.¹⁶¹ It should be further noted, however, that this does not mean that the Board is undertaking to make an *ad hoc* decision as to jurisdiction in each case but only that it will determine whether the facts of the case fall within its current standards.

(2) *Application of Federal Law in the No Man's Land*

One of the major problems which would appear to arise under the language of the amendment concerns the extent to which the federal law is now applicable in the area of the former no man's land. The LMRA still purports to state the rights of employees in industries affecting commerce, to define unfair labor practices which affect commerce, and to provide machinery for the selection of a representative for collective bargaining where a question of representation affecting commerce exists. It is true that the prevention of such unfair labor practices and the operation of the machinery to select a representative are placed in the hands of the NLRB, and that the Board is permitted to decline jurisdiction where "the effect of such labor dispute [presumably either an unfair practice or a question concerning representation] on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction." However, the courts and the Board have previously indicated that the regulation of labor relations by Congress may go beyond the Board's exercise of jurisdiction,¹⁶² and there is no specific provision in the 1959 act that in the areas where the Board declines to exercise jurisdiction the federal law is inapplicable. Rather the language is that the provisions of the act shall not "be deemed to prevent or bar any agency or courts of any state . . . from assuming and asserting jurisdiction over labor disputes over which the Board declines . . . to assert jurisdiction." The question of the possible extent of the federal law may arise in two contexts: (a) where the state court or agency asserts jurisdiction and is faced with a request by one party to apply federal law to the facts before it; and (b) where the NLRB extends

where both unfair labor practice charges and a petition for representation are on file with relation to the same employer at the same time. Rules and Regs., Subpart H, 29 C.F.R. §§ 102.105-110, 24 Fed. Reg. 9115 (Nov. 7, 1959). A "declaratory order" is binding upon the Board, but an "advisory opinion" is binding neither upon the Board nor presumably upon the state courts or parties. See 1 DAVIS, ADMINISTRATIVE LAW TREATISE §§ 4.09-10 (1958).

161. 359 U.S. at 244-46, discussed in text accompanying note 45 *supra*.

162. See San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959); Guss v. Utah Labor Relations Bd., 353 U.S. 1 (1957); Siemons Mailing Serv., 122 N.L.R.B. No. 13, 43 L.R.R.M. 1056 (Nov. 14, 1958).

its jurisdiction beyond the present limits and is asked to consider conduct occurring prior to such extension.

Where a state court is faced with a dispute between an employer and his employees or a labor union, it may be called upon to apply federal law even though the LMRDA says that it, rather than the NLRB, may assert jurisdiction on the facts of the dispute. The failure of earlier legislative attempts to turn over jurisdiction in the no man's land to the states,¹⁶³ and the view of the Senate that federal law should be applicable throughout the potential scope of congressional regulatory power, whether administered by federal or by state agencies,¹⁶⁴ might weigh in favor of a continued application of federal law, even though the state court or agency is now permitted to assert jurisdiction. However, the elimination, originally by the House and ultimately by the entire Congress, of a provision requiring state courts or agencies to apply federal law,¹⁶⁵ together with the statements of Senator Kennedy in explanation of the conference report,¹⁶⁶ indicate that Congress was *willing* to have state courts apply state law and leave the application of federal law to those cases in which the federal agency, NLRB, asserts its jurisdiction over a business or its labor disputes. In the majority of states, there is the possibility that something like federal rights might be enforced. Most states have no comprehensive labor relations statutes. In such states, the courts could appropriately modify the common law to give protection to those rights which the federal government has in the past protected in order to encourage collective bargaining.¹⁶⁷ Whether the courts of these states will go so far, in the absence of any directives from their legislatures, is not clear. It seems doubtful, however, that they would be likely to treat the federal act as applicable to any business which may affect commerce where the effect of a labor dispute is not sufficient to induce the NLRB to exercise jurisdiction.

In those states, such as Minnesota, where the legislature has already undertaken to define the rights of employees to engage in

163. See note 127 *supra* and accompanying text.

164. See notes 128, 129, 143 *supra* and accompanying text.

165. See notes 145-51 *supra* and accompanying text.

166. It was the opinion of the Senate that the federal law should prevail with respect to interstate commerce and, in order to compromise that feature, it was agreed that state law could prevail only in those areas in which the NLRB does not assume jurisdiction. 105 CONG. REC. 16255 (daily ed. Sept. 2, 1959).

167. A persuasive argument is presented for such modification in Blumrosen, *Common Law Limitations on Employer Anti-Union Conduct: Protection of Employee Interest in Union Activity by Tort Law*, 54 Nw. U.L. Rev. 1 (1959). The apparent reversal of position of the California court in the *Garmon* case to permit the employer to obtain protection against union activity directed at recognition or organization of his employees is an example of this sort of modification of state law. See *Garmon v. San Diego Bldg. Trades Council*, 49 Cal. 2d 595, 320 P.2d 473 (1958), discussed in text accompanying notes 33-38 *supra*.

self-organization and concerted activities for the purpose of collective bargaining, and has defined unfair labor practices of employers and labor organizations, the state courts presumably would be bound to follow the state statutes and to ignore the federal acts. Even though there is no direct conflict between federal and state regulations in such states, the application of federal law would be *inappropriate*, since it might tend to disturb the balance which the state legislature has struck between the competing interests of labor, management, and the public—just as the Supreme Court of the United States in *Garner* decided that the concurrent application of federal and state law would be inappropriate where the NLRB did exercise jurisdiction.

In state court proceedings or in proceedings before state agencies, then, federal law as such is unlikely to be applicable except as its principles are adopted by the state as its own law. But if the NLRB should undertake to extend its jurisdiction to encompass labor disputes which under the present standards are subject to state law, a more difficult question will arise as to whether federal law may be applied to conduct occurring prior to such extension of jurisdiction.

Certainly Congress, in compelling the Board to exercise jurisdiction over all labor disputes over which it would have exercised jurisdiction on August 1, 1959, contemplated that the Board might broaden its jurisdiction beyond these limits. While the Board's present position seems to be that such an extension of jurisdiction must await a future lessening of the caseload burden, this is not an insurmountable obstacle. If and when administrative reorganization or expansion makes it feasible to increase the number of cases or businesses over which the Board might exercise jurisdiction, the Board may choose to extend the coverage of the federal act's effectiveness rather than simply reducing the time which it devotes to the present scope of jurisdiction. It may then be faced with the following types of problem involving possible retroactive application of federal law.

Suppose that *Union A* and *Company B* enter into a collective bargaining agreement at a time when *Company B's* business could be said to "affect commerce" in the constitutional sense but when it would fall below the jurisdiction asserted by the Board. Suppose further that the agreement contains a closed shop provision which is legal under the law of the state,¹⁶⁸ and that *Worker C*, who is not

168. This is apparently so, either through statute or decision, in California, Colorado, Connecticut, Idaho, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New York, Pennsylvania, Rhode Island, and Wisconsin, although there may have to be two-thirds majority favoring such agreement in some of these states. *McKay v. Retail Automobile Salesmen's Local Union*, 16 Cal. 2d 311, 106 P.2d 373 (1940); COLO. REV. STAT. ANN. § 80-5-7 (1953); CONN. GEN. STAT. § 31-105 (1958); *Robison v. Hotel & Restaurant Employees Local 782*, 35 Idaho 418, 207 Pac.

a union member, is discharged under this provision. Subsequently, but within six months of the execution of the agreement and the discharge of *C*, the NLRB announces new jurisdictional standards in conformity with the LMRDA. *Company B's* business is such as to bring it within these new limits. If *C* now files charges with the Board, may it find that the conduct of *Union A* and *Company B* constituted unfair labor practices under sections 8(b)(2) and 8(a)(3) and require that *C* be reinstated with back pay from the date of discharge? Since *Company B* was always technically engaged in a business affecting commerce, the provisions of the federal act may have been applicable all the time. On the other hand, the state law permitted a closed shop, and both *Union A* and *Company B* presumably relied upon this law in entering into the contract at a time when the Board refused to deal with their conduct. Here the federal law is more stringent in its restrictions on labor and management in the interests of protecting the right of workers to refrain from joining a union or engaging in concerted activity.¹⁶⁹

Or suppose that *Union D* seeks to obtain recognition from *Company E*, making a claim supported by union authorization cards that it represents a majority of workers in *E's* plant. At the time of the demand, *E's* business is below the minimum jurisdictional standards announced by the NLRB, although *E* does receive some goods from out of state and ships a portion of its products to other states. The state law does not provide for representation elections or proceedings, and so *Union D*, in an effort to enforce its claim, sets a picket line around *E's* place of business. *E* discharges all of the known members of *Union D* and, when the picketing is continued, *E* seeks an injunction against "stranger picketing." The state court, following the older common law precedents in the state, issues a permanent injunction against picketing by non-employees. Shortly thereafter, the NLRB announces new jurisdictional standards which would now encompass the business of *E*. Can *Union D* now charge *Company E* with unfair labor practices or discriminatory discharge (section 8

132 (1922); MASS. GEN. LAWS ANN. ch. 150A, §§ 4(3), 6A, 6B, 6C (1957); MICH. COMP. LAWS § 423.14 (1948); MINN. STAT. § 179.12(3) (1957); *Caldwell v. Anderson*, 357 Mo. 1199, 212 S.W.2d 784 (1948); *F. E. East Co. v. United Oystermen's Union*, 130 N.J. Eq. 292, 21 A.2d 799 (1941); N.Y. LAB. LAW § 704(5) (1957); PA. STAT. ANN. tit. 43, § 211.6(1)(c) (1953); R.I. GEN. LAWS ANN. ch. 7, § 28-7-13 (1956); and WIS. STAT. ANN. § 111.06(1) (1957).

169. NLRA § 7, 49 Stat. 452 (1935), as amended by LMRA (Taft-Hartley Act) § 157, 61 Stat. 1140 (1947), 29 U.S.C. § 157 (1952).

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3). (Emphasis added.)

a)(3)) or refusal to bargain (section 8(a)(5))? May the NLRB order that *Company E* is under an obligation to bargain with *Union D* as the representative of its employees until the effects of the prior unfair practices have been dissipated, and a Board-conducted election can be held to determine whether *Union D* is presently the representative of a majority of the workers?¹⁷⁰ Here also there is a federally protected right, if the federal law is applicable despite the declination of jurisdiction by the Board.

Under the Taft-Hartley Act, at least, the Board's jurisdictional standards did not represent the full scope of the federal act, as evidenced by *Guss*, *Garmon II* and the Board's own application of the provisions of the federal act to conduct occurring at a time when it had not asserted jurisdiction over a particular industry or segment thereof.¹⁷¹ The "dissenting views" expressed in the House report, favoring state jurisdiction in the no man's land, stated:

Prior [to *Guss*] the National Labor Relations Board handled cases which substantially affect commerce. The States covered those refused by the Board. Employers, unions and employees knew which law applied. It was a system which worked satisfactorily for all concerned. The need today is to re-establish clear lines of authority between the Federal Government and the States.¹⁷²

The conference report or House Managers' statement of the compromise of the House and Senate conferees is not explicit on this point. But Senator Kennedy in presenting the conference agreement to the Senate said:

It was the opinion of the Senate that the Federal law should prevail with respect to interstate commerce, and, in order to compromise that feature, it was agreed that State law could prevail, but only in those areas in which the National Labor Relations Board does not now assume jurisdiction.¹⁷³

On the following day, in response to an inquiry from Senator Car-

170. Cf. *Franks Bros. Co. v. NLRB*, 321 U. S. 702 (1944). The Court upheld the determination of the NLRB that loss of a majority due to unfair labor practices of the employer did not justify denying the union the right to bargain on behalf of the workers.

171. In *NLRB v. Guy F. Atkinson Co.*, 195 F.2d 141 (9th Cir. 1952), the court refused to enforce a Board order of reinstatement of a worker discharged under a closed shop agreement not in accord with the NLRA, on the ground that at the time of the contract and the discharge the Board had declined to exercise jurisdiction over the employer or the construction industry. However, as Professor Davis has pointed out, this case is not supported either by preceding or subsequent decisions. 2 DAVIS, *ADMINISTRATIVE LAW TREATISE* § 17.07 at 530 (1958). See also *Optical Workers' Union v. NLRB*, 227 F.2d 687 (5th Cir. 1955); *NLRB v. Gottfried Baking Co.*, 210 F.2d 772 (2d Cir. 1954); *NLRB v. Kobritz*, 193 F.2d 8 (1st Cir. 1951); *Siemons Mailing Service*, 122 N.L.R.B. No. 13, 43 L.R.R.M. 1056 (Nov. 14, 1958); cf. *Amalgamated Ass'n of St. Elec. Ry. Employees v. NLRB*, 238 F.2d 38 (D.C. Cir. 1956); *NLRB v. Pierce Bros.*, 206 F.2d 569 (9th Cir. 1953).

172. H. Rep. No. 741, 86th Cong., 1st Sess., 97 (1959).

173. 105 CONG. REC. 16255 (daily ed. Sept. 2, 1959).

roll as to whether there might not still be a substantial area in which some persons who were entitled to the protection of the federal act would not be able to obtain protection, Senator Kennedy responded:

[W]e provided that the States could assume jurisdiction in that area. . . .

But we point out that when we provide that the States can assume jurisdiction in this area, we must bear in mind that 35 of the States have no adequate labor laws. In that connection, I assure the Senator from Colorado that I shall watch very carefully what actions are taken by these various states, because if any effort is made to use this provision as an opportunity to limit rights which all of us believe all American working people and employers in these States have, then it will be very easy under this provision for the National Labor Relations Board by administrative decision to assume much fuller jurisdiction.¹⁷⁴

The latter statement might be open to the interpretation that if the Board does reassert federal jurisdiction in the no man's land, the federal remedy will be available to give protection to rights which have always existed. But it may mean only that in the event of flagrant abuse of their newly reacquired power, the states may be ousted of jurisdiction over future conduct by the Board's extension of its jurisdiction.¹⁷⁵

To read the act as leaving to the discretion of the NLRB the vital question of whether its provisions are applicable to a labor dispute, as contrasted with whether they will in fact be enforced, might seem an undue delegation of authority,¹⁷⁶ though probably

174. 105 CONG. REC. 16417 (daily ed. Sept. 3, 1959).

175. It is probable that this would have to occur in several states, since the Board has in the past applied its jurisdictional limits to all states and territories, and any extension of jurisdiction is most unlikely to be on anything but a nationwide basis. The act does not specifically deny the Board the power to frame its jurisdiction on the basis of state boundaries or regional boundaries, but in using "classes or categories of employers," it seems probable that the intent of Congress was that the Board should not apply differing monetary standards in differing states. Whether such a variation in jurisdiction would violate the due process requirements of the Constitution also seems questionable. See U.S. CONST. amend. V. The equal protection clause of the fourteenth amendment does not apply to the federal government. See *Hess v. Mullaney*, 213 F.2d 635 (9th Cir. 1954); *Steward Mach. Co. v. Davis*, 89 F.2d 207 (5th Cir. 1937), *affirmed* 301 U.S. 548 (1937). But the due process clause of the fifth amendment may achieve the same result. See *Bolling v. Sharpe*, 347 U.S. 497 (1954); *United States v. Eramdjian*, 155 F. Supp. 914 (S.D. Cal. 1957). States have been permitted to make distinctions between industries in labor legislation. *Mountain Timber Co. v. Washington*, 243 U.S. 219 (1917) (distinguishing workmen's compensation liability on basis of risk); *New York Central R.R. v. White*, 243 U.S. 188 (1917) (exclusion of farm employees and domestic servants from workmen's compensation); *Holden v. Hardy*, 169 U.S. 366 (1898) (limiting hours of labor in mines and smelters). Nevertheless, it might be argued that granting protection of the federal law to employees and employers in one state while refusing to grant it in another, would constitute a form of discrimination repugnant to the constitutional requirements of equality before the law.

176. This point was made explicitly by Representatives Thompson and Udall in their analysis of the Landrum-Griffin Bill, 105 CONG. REC. 14206 (daily ed. Aug. 11, 1959), and at least by implication by Senator Morse in his comments on the con-

not an unconstitutional one.¹⁷⁷ But the uncertainty and conflict inherent in having both federal and state law apply without certainty of recourse to the federal agency may justify this interpretation as the *wiser* choice, or the Board may avoid the question by clearly stating that in extending jurisdiction it will not treat as unfair labor practices conduct of a person occurring at a time when the Board had declined jurisdiction over the class or category of employers into which the business falls. At one time the Board did take such a position with respect to its modifications of jurisdictional standards,¹⁷⁸ but recent decisions seem to have gone in the direction of *ab initio* application of the act's provisions, under the theory that the *Guss* case made it clear (prior to the 1959 legislation) that the LMRA applied to small employers even though the Board did not assert its jurisdiction.¹⁷⁹ It is not clear whether the Board will continue this latter practice when the federal law now provides that the states may exercise jurisdiction so long as the Board does not. But to permit retroactive assertion of federal law over a situation which appeared to be governed by state law may be contrary to our concepts of fairness.¹⁸⁰ The author believes such *ab initio* or retroactive application is unwise.

(3) Possible Extension of Federal Jurisdiction

A second major question which may arise from the 1959 legislation is whether, and to what extent, the Board *should* undertake to expand its present exercise of jurisdiction. The recognition by Congress of a discretionary power on the part of the Board to decline

ference report. 105 CONG. REC. 16391-92 (daily ed. Sept. 3, 1959).

177. This was the downfall of an earlier attempt at federal regulation of economic affairs. See *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935). It may be argued, however, that there are "intelligible standards" for the exercise of the delegated authority, in the requirement that jurisdiction be declined on the basis of no "substantial impact on (inter-state) commerce," and the implicit approval of the existing monetary standards which would avoid this constitutional argument. See *Bowles v. Willingham*, 321 U.S. 503 (1944); *Yakus v. United States*, 321 U.S. 414 (1944).

178. See *Almeida Bus Lines Inc.*, 99 N.L.R.B. 498 (1952); *Tom Thumb Stores, Inc.*, 95 N.L.R.B. 57 (1951); *Screw Mach. Prods. Co.*, 94 N.L.R.B. 1609 (1951).

179. [T]he Board does not believe that the mere fact that a respondent had reason to believe by virtue of the Board's announced jurisdictional policies that the Board would not assert jurisdiction over it, gave it any legal, moral or equitable right to violate the provisions of the Act. This is especially true since the issuance of the *Guss* decision which eliminated all possible basis for believing that in such circumstances the provisions of the Act did not apply, or that State law could or would apply to its conduct.

Siemons Mailing Serv., 122 N.L.R.B. No. 13, 43 L.R.R.M. 1056, 1058 (Nov. 14, 1958). The Board declined to follow the *Atkinson* decision cited in note 171 *supra*. *Ibid*.

180. For a discussion of retroactive application of law and administrative regulation, see 1 DAVIS, *ADMINISTRATIVE LAW TREATISE* § 5.08 (1958); 2 DAVIS, *ADMINISTRATIVE LAW TREATISE* § 17.07 (1958).

jurisdiction indicates that the extent of federal regulation of labor-management relations may appropriately be restricted to less than coverage of any and every business which "affects commerce," a term which carries us to the very furthest extent of permissible congressional regulatory power. If one farmer growing wheat for his own use is within the scope of potential regulation,¹⁸¹ if a window washer engaged in cleaning the windows of an office building of an interstate concern can constitutionally be subject to congressional regulation,¹⁸² or if the impact of labor disputes upon many small businesses may be cumulated to produce an "effect on commerce,"¹⁸³ then almost all retail and service or manufacturing businesses are within the potential scope of the LMRA, since almost all businesses make use of or acquire goods or services from interstate commerce, or provide goods or services to those engaged in interstate commerce, or compete with those who are clearly within the federally regulated area. On the other hand, there is reason to believe that Congress did not intend that the Board's 1958 jurisdictional standards should represent the fullest extent of federal regulation.¹⁸⁴ The statements by the Board in announcing its most recent limitations evidenced some possibility that at a future date, with an expanded budget and increased personnel, further extensions might be undertaken.¹⁸⁵ While such extensions may not occur tomorrow or perhaps for the next five years, there is reason to believe that pressure for federal regulation may ensue in the event that the majority of states continue to apply older common law principles or to give substantially less protection than the federal act does to participants in industrial relations or to the public generally.

The Board's power to limit its jurisdiction is phrased in terms of a decision by the Board that the effect upon interstate commerce of a labor dispute involving a given class or category of employers "is not *sufficiently* substantial to warrant the exercise of its juris-

181. See *Wickard v. Filburn*, 317 U.S. 111 (1942), enforcing the AAA on the basis of effect of supplanting grain which might be grown by others.

182. See *Martino v. Michigan Window Cleaning Co.*, 327 U.S. 173 (1946), enforcing the Fair Labor Standards Act prior to the 1949 amendments which defined "produced" to eliminate such localized activities.

183. See, e.g., *Polish Nat'l Alliance v. NLRB*, 322 U.S. 643, 648 (1944) (dictum); *NLRB v. Fainblatt*, 306 U.S. 601, 607-08 (1939) (dictum); *Mid-Co. Gasoline Co.*, 86 N.L.R.B. 448 (1949), *enforced*, 183 F.2d 451 (5th Cir. 1950).

184. The Senate had originally advocated application of federal law over all business affecting interstate commerce. See text accompanying note 144 *supra*. Since the House took the position that the states should be permitted to apply their own law when the NLRB declined to assert jurisdiction, a compromise was reached only on condition that the Board could not decline to exercise jurisdiction over all businesses subject to its potential jurisdiction at the time the act was passed. See text accompanying note 173 *supra*.

185. See *Simons Mailing Serv.*, 122 N.L.R.B. No. 13, 43 L.R.R.M. 1056, 1057 (Nov. 14, 1958).

diction.”¹⁸⁶ This raises the question of whether the Board may look to anything other than the impact upon interstate commerce in considering the propriety of further expansion of its jurisdiction. In the past the Board has phrased its restrictions of jurisdiction in terms of lack of “a pronounced impact upon the flow of interstate commerce.”¹⁸⁷ Similarly, the Board’s assertion of jurisdiction over individual plants in a multi-state enterprise or a multi-employer association, if the entire enterprise met the jurisdictional standards,¹⁸⁸ and its assertion of jurisdiction over secondary boycott charges on the basis of the combined interstate business of the primary and secondary employers,¹⁸⁹ have been based on impact upon commerce.

The variations in jurisdictional limits asserted from 1950 to 1959, however, suggest that something other than impact upon the flow of goods across state lines has been considered by the Board in determining the extent of its jurisdiction. It is possible, of course, that succeeding Board members have disagreed with prior decisions concerning what constitutes a “pronounced impact” upon commerce and as to how far a labor dispute in a marginal area may obstruct the free flow of goods and services. It is also possible that the increase in jurisdictional amounts from 1950 to 1954 merely reflects inflationary trends and the belief on the part of the 1954 Board that the type of manufacturer who in 1950 would have fallen below the requirements of \$25,000 direct outflow or \$50,000 indirect outflow of goods or services from the state, could in 1954 obtain Board jurisdiction unless the amounts were doubled. But it seems doubtful that mere inflation could have justified that increase, or that this was the sole basis of decision. Certainly the opinion of the Board in the *Breeding Transfer Co.* case,¹⁹⁰ which explained the 1954 standards, lays considerable emphasis upon the budgetary restrictions under which the Board operates, and the problem of controlling its caseload so that it might give more attention to important cases.¹⁹¹ In dissent Member Murdock argued that the motivating factor in the decision to restrict jurisdiction was a desire to reallocate authority between the federal and state

186. LMRDA § 701(c)(1), quoted in full at text accompanying note 151 *supra*.

187. See *Siemons Mailing Serv.*, 122 N.L.R.B. No. 13, 43 L.R.R.M. 1056, 1058 (Nov. 14, 1958); *Breeding Transfer Co.*, 110 N.L.R.B. 493, 494 (1954); *Hollow Tree Lumber Co.*, 91 N.L.R.B. 635, 636 (1950).

188. *Harlan B. Browning*, 120 N.L.R.B. 841 (1958) (association); *T. H. Rogers Lumber Co.*, 117 N.L.R.B. 1732 (1957) (multiplant enterprise); 23 NLRB ANN. REP. 8 (1958).

189. *NLRB v. Associated Musicians, Local 802*, 226 F.2d 900 (2d Cir. 1955); *Teamsters Union, Local 554 (McAllister Transfer Co.)* 110 N.L.R.B. 1769 (1954).

190. 110 N.L.R.B. 493 (1954).

191. *Id.* at 497.

governments in the regulation of labor relations, citing the statements made by the then Chairman of the NLRB and one other member of the Board.¹⁹² However, the majority expressly denied that any desire to broaden state jurisdiction was a factor in its decision.¹⁹³ In announcing its 1958 modifications, the Board openly acknowledged that the change was motivated largely by the Supreme Court's decision in *Guss*, and was an attempt to reduce as much as feasible the no man's land area.¹⁹⁴ And it again referred to the limitations of budget and administrative efficiency in justifying the failure to completely encompass the no man's land.¹⁹⁵

On the basis of this background, Congress must have been aware of factors other than mere impact upon commerce which might enter into a Board determination to extend further its jurisdiction. Indeed, Senator Kennedy indicated that in his opinion the extension of jurisdiction might be justified not on the basis of obstruction of commerce *per se* but upon the denial by state courts and agencies of the protection of those rights recognized by the federal act "which all of us believe all American working people and employers in these states have" ¹⁹⁶ It is arguable that the denial of protection of the collective bargaining process and its participants or neutrals drawn into a labor dispute, may create an impact upon commerce different from that where the state courts and agencies provide some relief comparable to that available under the federal act. However, the emphasis of the Senator seems to be on the protection of collective bargaining and the rights of workers more than upon the protection of commerce from interference. While it is true that possible interference with commercial activity arising from labor disputes has played no small part in motivating Congress in its enactment of labor legislation, of equal importance in the initial Wagner Act was the desire to protect the economic well-being of workers through the device of collective bargaining. This is evidenced by the reference to the imbalance of power in the initial versions of the policy section of the act,¹⁹⁷ and the statements of members of the legislature.¹⁹⁸ The addition of a paragraph dealing with the direct impact upon commerce seems to have been motivated more by a desire to avoid unconstitutionality than a primary

192. *Id.* at 501-03.

193. *Id.* at 497.

194. *Siemons Mailing Serv.*, 122 N.L.R.B. No. 13, 43 L.R.R.M. 1056, 1057 (Nov. 14, 1958).

195. *Ibid.*

196. 105 CONG. REC. 16417 (daily ed. Sept. 3, 1959).

197. S. 1958, 74th Cong., 1st Sess. § 1 (1935) (original Senate Print); S. 2926, 73d Cong., 2d Sess. § 2 (1934).

198. S. REP. NO. 573, 74th Cong., 1st Sess. 3 (1935); 79 CONG. REC. 6183 (1935) (speech by Senator Wagner).

concern for the free flow of goods.¹⁹⁹ An impact on commerce may come from denial to a substantial number of employees of an opportunity to bargain effectively for adequate compensation so that the potential consumption of goods is restricted. It may also arise from pressures brought to bear upon individual employers which compel them to give up their livelihood or operations. In fact, the argument well may be made that "commerce," as used in its constitutional sense, has become almost synonymous with "national economy," and that any labor dispute which may interfere with the national economic stability may "affect commerce." This may be so because of a cumulative effect of many labor disputes rather than the effect of a single dispute considered alone. If collective bargaining fails to operate effectively over a large portion of small businesses, it may have a substantial impact upon the national economy. If abuse of economic power is common in an area of the economy over which the NLRB does not currently exercise jurisdiction, this may have an impact upon the economy which would merit an extension of such jurisdiction. What I am suggesting, then, is that in evaluating the *desirability* of an extension of the NLRB's jurisdiction, it is appropriate to consider the questions of whether federal regulation is necessary for the protection of collective bargaining in "small business," and whether federal protection against abuses of economic power by either labor or management is necessary in "small business."

In defining the "small business" which would not meet the existing standards of the NLRB, reference might be made to the facts of two critical cases in the development of the no man's land: *Guss* and *Garmon II*. In the *Guss* case, the employer manufactured specialized equipment for the Air Force, receiving from out of state goods and materials amounting to "a little less than \$50,000," and shipping out of state goods under contract with the Air Force amounting to \$146,000. Its labor force was twenty to thirty employees.²⁰⁰ This would suggest that a manufacturer most of whose product remained within the state might be below the Board's standards even though he had as many as twenty to thirty employees. However, the employer in *Garmon II* would now be within the Board's jurisdiction since the company had gross sales of over \$500,000, and received goods from out of state in the amount of \$200,000 to \$250,000, although it had only eight employees.²⁰¹ This suggests that a business which does not come within the Board's

199. H.R. REP. NO. 1147, 74th Cong., 1st Sess. 9 (1935).

200. Record, pp. 2, 12-13, *Guss v. Utah Labor Relations Bd.*, 353 U.S. 1 (1957).

201. Record, pp. 81-83, *San Diego Bldg. Trades Council v. Garmon*, 353 U.S. 26 (1957).

jurisdiction is also likely to have very few employees. Of course, these may not be typical "small businesses" but in view of the present "low" standards of the Board—\$50,000 of goods flowing either into, or out of, the state in the case of a manufacturing or nonretail business, and \$500,000 gross sales in the case of a retail business—it seems likely that we are dealing with a situation in which the marginal employer who would come within the jurisdiction of the Board if it were to be extended slightly downward will have a workforce of some five to ten employees. The "small business" is likely to be operated by one or two individuals as employer, and to engage in largely a localized business.

If factors other than the immediate impact upon commerce (or flow of goods) of labor disputes involving a particular group or class of employers may be considered in determining the advisability of extending federal jurisdiction further into the area of small business, what relevant factors might appropriately be considered? What follows is less an attempt to make a definitive resolution of this question, and the original question as to whether such extension should occur, than to point up some significant considerations.

Is extension of federal jurisdiction necessary to protect the institution of collective bargaining and to assure its effective operation in the area of small business? We begin with the premise that collective bargaining is a desirable institution—at least the policy of the federal government²⁰² and some state governments²⁰³ over a substantial period of years makes the premise an acceptable one. In evaluating the desirability of governmental intervention to protect the institution of collective bargaining in small business, we can consider its claimed benefits: (a) creating and maintaining a more equitable balance of bargaining power between employees and their employers, and (b) providing mechanisms for the peaceful settlement of disputes concerning wages, hours and working conditions.

So far as the desirability of encouraging collective bargaining by government intervention depends upon the relative inequality of the

202. The protection from anti-trust prosecution which the Clayton Act purportedly granted to "the existence and operation of labor . . . organizations, instituted for the purposes of mutual help, . . . lawfully carrying out the legitimate objects thereof . . ." (38 Stat. 73 (1914), 15 U.S.C. § 17 (1958)), is apparently the first official federal recognition of such a policy. The practices of the War Labor Board during World War I, the Railway Labor Act of 1926, the Norris-LaGuardia Act of 1932, and the Wagner Act of 1935, are perhaps the more familiar pronouncements of the federal policy favoring collective bargaining.

203. Enactments of anti-injunction laws in Connecticut, Idaho, Indiana, Louisiana, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New York, North Dakota, Oregon, Pennsylvania, Rhode Island, Utah, Washington and Wisconsin, together with labor relations acts in some of these states (see note 144 *supra*), indicate that the policy favoring collective activity by workers was not limited to the federal government.

bargaining power of employer and individual employees, the argument in favor of extension of jurisdiction may be weakened as the employment unit becomes smaller. The loss of one or two employees may be far more critical to a business which has only ten persons in its labor force, than to a larger corporation. Moreover, the individual employee may find relatively good opportunities for other employment when the type of business in which he is involved is small manufacturing or retail, since there may be several similar firms operating in the vicinity. On the other hand, the employer is not without some advantage, since he may be in a better position than the large corporate employer to make a complete turnover of his labor force, and in many cases the individual employee may face competition from the employer himself or members of his family who can replace the worker or supplant him at reduced cost to the employer. There is perhaps more personal contract between the employer and his employees in the small business, but this is no particular assurance against arbitrary discharge or refusal on the part of the employer to deal with his employees on a collective basis.

While recognition of the right of employees to engage in collective activity for the purpose of compelling bargaining about wages, hours and conditions of employment may be spreading through the state courts, in the sense that they may no longer treat strikers or picketers as "conspirators" and "tortfeasors" to the extent that they did in the nineteenth century, the large majority of states still fail to provide protection against the employer's coercive tactics designed to break up and defeat organization of his employees. Moreover, even though a state lacking a comprehensive labor relations act might undertake to provide some protection against "unfair practices" by employers, the absence of any mechanism for settling disputes as to an appropriate unit for bargaining or concerning conduct of an election to ascertain the existence of a representative of a majority of the employees in a bargaining unit, tends to discourage the most effective operation of collective bargaining. Unless some administrative agency deals with this problem, it seems unlikely that a complete effectuation of a policy favoring collective bargaining is possible. Courts are already overburdened in many states with personal injury litigation, domestic relations problems, and the serious problems of juvenile delinquency. Moreover, a court, with its emphasis on the adversary procedure, may not be equipped to deal with such questions as (1) what is an appropriate bargaining unit; (2) when it is appropriate to conduct a representation election in a plant where a collective bargaining agreement has already been set up; and (3) whether conduct of employer or labor representative is such as to require an election

to be set aside because of the probability that it is not a fair representation of employee free choice. Moreover, most courts lack the machinery to hold and supervise an election such as the NLRB or a state labor conciliator normally conducts.

The past reluctance of most states to enact a comprehensive regulatory system for collective bargaining makes a sudden introduction of such a system unlikely in many states. In the absence of such intervention by government, collective bargaining is dependent upon voluntary acquiescence by employers or the use of economic isolation of the employer by the union or his employees, or even resort to coercion of a noneconomic type. If collective bargaining is a desirable means of conducting industrial relations, it seems further desirable to institute the bargaining process with as little "warfare" and as little disruption of the business itself as is possible. Therefore, unless more states adopt statutes which give some minimum protections to collective agreements and provide for representation proceedings, the argument for extension of federal jurisdiction may be persuasive.

Is extension of federal jurisdiction desirable to provide protection against abuses of power by the participants in collective bargaining? As Congress has determined in both the Taft-Hartley Act and in the recent legislation, it may not be enough to provide protection against employer coercion and to attempt to make the selection of a collective bargaining representative a peaceful one. Unions may engage in conduct which is unduly detrimental to employers and their employees, and ultimately to the public itself, through the use of union security agreements,²⁰⁴ secondary pressures,²⁰⁵ and other coercive tactics.²⁰⁶ In fact, the disclosures of the McClellan Committee suggest that one of the more lucrative areas for abuse of union power may be in the situation of the small business enterprise which the union can coerce through the use of picket lines, "unfair lists" and secondary boycotts.²⁰⁷

It may be argued that protection is in fact available under state laws, since absent federal control the state courts could intervene to give injunctive and compensatory relief to those threatened by stranger or minority picketing, discriminatory hiring practices and

204. LMRA §§ 8(a)(3), 8(b)(2), 61 Stat. 140, 141, 29 U.S.C. §§ 158(a)(3), (b)(2) (1952).

205. LMRA § 8(b)(4)(B), as amended LMRDA § 704(a).

206. LMRA §§ 8(b)(1), (2), (3), (4)(C), (4)(D), (5), (6), (7) & 8(d), 61 Stat. 140-42 (1947), 29 U.S.C. §§ 158(b)(1), (2), (3), (4)(C), (4)(D), (5), (6), & 158(d) (1952), as amended LMRDA §§ 704(a), (c).

207. 105 CONG. REC. 5764 (daily ed. April 21, 1959); Select Committee on Improper Activities in the Labor or Management Field, *Interim Report*, S. REP. NO. 1417, 85th Cong., 2d Sess. 6, 452-53 (1958).

conditions of employment, and secondary pressures. But this overlooks, for example, that in some states, unions which attain representation status may discriminate against minorities without legal sanction,²⁰⁸ and that the closed shop and picketing to obtain the closed shop is protected activity under some state laws.²⁰⁹

It seems fairly clear, therefore, that if a policy favoring collective bargaining is desirable, and if protection against the abuses of economic power and the collective bargaining process is necessary, the extension of NLRB jurisdiction may presently be the most effective means for accomplishing these objectives—and perhaps the *only* effective means.

Is such extension likely to be unduly detrimental to small business and those participating in it? Some apparent detriment may arise from the encouragement of collective bargaining which results in demands for higher wages and more favorable working conditions, tending toward standards comparable to those found in larger industry. It is possible that an employer with a limited market and a relatively narrow profit margin may find increased labor costs unbearable. Similarly, he may feel that the introduction of collective bargaining into his business deprives him of necessary management control. It should be noted, however, that the introduction of collective bargaining, even though conducted through affiliates of national unions, does not necessarily require that wages and working conditions must be the same in large and small industry. Certainly if the demands of labor are such as to drive employers from the market, this defeats the immediate interest of their employees, although it may ultimately protect the interests of employees of larger competitors. In some industries where the standard unit of operation is small and the business highly competitive, unionization may even protect the small employer from ruinous competition.²¹⁰ Indeed, an argument may be made that business enterprises whose continued operation is dependent upon the payment of "substandard" wages and the maintenance of poor working conditions relative to the major portion of the economy may

208. *Steele v. Louisville & N. R.R.*, 245 Ala. 113, 16 So. 2d 416 (1944), *rev'd*, 323 U.S. 192 (1944); *Ross v. Ebert*, 275 Wis. 523, 82 N.W.2d 315 (1957).

209. See note 168 *supra*.

210. Perhaps the most notable example of union-management cooperation which has resulted in the betterment of the economic position of the individual small employer is in the garment industry. See BARBASH, *THE PRACTICE OF UNIONISM* 375-77 (1956); Myers & Bloch, *Men's Clothing*, *HOW COLLECTIVE BARGAINING WORKS* 381-449, particularly 446-47 (Millis ed. 1942). But cooperation in other areas has also resulted in economic advantage to the employer. See GOLDEN & RUTTENBERG, *DYNAMICS OF INDUSTRIAL DEMOCRACY* 233-91 (9th ed. 1942); WILLIAMSON & HARRIS, *TRENDS IN COLLECTIVE BARGAINING* 130-41 (1945).

not be the sort of enterprises which we should encourage or protect against the pressures of collective bargaining.

But perhaps the most persuasive argument on this point is that if small business is a likely field for organization by large unions, the organization is going to occur in spite of federal or state protection of collective bargaining, and may well occur through coercive techniques. The dangers to the small businessman of having no adequate protection from government seem to counterbalance the potential danger of economic losses resulting from collective bargaining.

Would any such extension be detrimental to the persons presently subject to Board jurisdiction? The Board, in the *Siemons Mailing Serv.*²¹¹ decision, suggested that any further extension of its jurisdiction might reduce its effectiveness as an instrumentality of federal policy in the areas in which it is already operating. Nothing in the legislative history of the LMRDA suggests that Congress had any desire to imperil the effective enforcement of federal policy in the larger businesses of America. In fact there is every reason to believe that an improvement in operation is desired,²¹² and that a reduction in the time now devoted to unfair labor practice charges and representation proceedings would be as important as an extension of federal law into more areas of the national economy.

Finally, may not the desirability of maintaining a substantial area of local control mitigate against such extension? This is the point made persuasively by Professors Cox and Wellington when they emphasize that ours is a *federal* system of government and that some local autonomy is necessary for the most effective operation of that system.²¹³ Local control may be more responsive to the will of the people than control by an agency in Washington far removed from the immediate scene of the labor dispute, even though the latter is equipped with regional offices to which extensive power may be delegated.

In spite of the protests of the majority in the *Breeding Transfer Co.* case,²¹⁴ this factor may appropriately be considered by the NLRB. It appears to have found some favor in Congress, since the supporters of the final provision emphasized the desirability of local

211. 122 N.L.R.B. No. 13, 43 L.R.R.M. 1056, 1057 (Nov. 14, 1958).

212. See, e.g., the provisions for delegation of power to regional directors, and giving priority to certain charges. LMRDA §§ 701(b), 706.

213. Cox, *Federalism in the Law of Labor Relations*, 67 HARV. L. REV. 1297, 1305 (1954); Wellington, *Labor and the Federal System*, 26 U. CHI. L. REV. 542, 543 (1959). See also Meltzer, *The Supreme Court, Congress and State Jurisdiction over Labor Relations I*, 59 COLUM. L. REV. 6, 21 (1959).

214. 110 N.L.R.B. 493, 497 (1954).

control of local labor affairs.²¹⁵ Perhaps in the end, this will be the decisive factor against the extension of federal jurisdiction. The loss of "uniformity" may have no major impact upon the national economy, and some loss of "industrial democracy" may be offset by a more significant democracy of local autonomy in matters having their most immediate impact on the locality. If collective bargaining is as meritorious as Congress and many authorities believe it is, it should win the support of state government as it has of national government.

Congress has chosen to solve the problem of the no man's land not by defining with precision the limits of federal power over labor relations and returning to the states a definite area for regulation, but by leaving the matter in the hands of the NLRB, with the proviso that if the effect upon commerce of labor relations of a certain class of employers is insubstantial, the Board may decline to exercise jurisdiction and thereby permit the states to do so. It seems likely that the outer limit of actual Board jurisdiction will also be the outer limit of federal law. Whether that limit will go beyond the lines drawn by the Board in 1958, and defined as the minimum federal jurisdiction by Congress in 1959, is a matter which cannot be resolved here. What I have attempted to do is to formulate some factors which should be relevant to a determination of the proper limits of federal regulation of labor relations and to suggest that these, as well as the immediate impact upon commerce of a dispute in a given business or class of businesses, are appropriate for Board consideration in the future.

215. H.R. REP. NO. 741, *Dissenting Views*, 86th Cong., 1st Sess. 97 (1959).