The Supreme Court, Congress and State Jurisdiction Over Labor Relations

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The difficulties surrounding state jurisdiction over labor relations moved a thoughtful commentator, writing in 1954, to describe the situation as a "constitutional crisis."1 There will naturally be disagreement as to whether "crisis" was too strong a word. There will, however, be, I believe, general agreement that subsequent decisions of the Supreme Court have reflected growing disorder and difficulties. The Court’s two most recent opinions, in Russell2 and Gonzales,3 which provoked sharp dissents, have further blurred the borderland of state competence. Accordingly, the re-examination of the Court’s work in this area which will be undertaken here may be justified despite the pages of scholarship which have been devoted to the issues involved.4

An appreciation of the difficulties involved as well as their source will be promoted by a reference to the familiar constitutional and statutory framework within which the Court has dealt with federal and state power over labor relations.5 Congressional power over labor relations has in general depended on the scope given to the commerce power. Under the restrictive constitutional doctrine prevailing prior to the constitutional revolution of the thirties, labor relations were beyond the commerce power. Prior to the enactment of the Wagner Act in 1935, substantially all governmental regulation of labor-management relations (except as to instrumentalities of commerce, such as railroads and shipping lines) was state regulation. In 1937, the Supreme Court came to terms with a new regime of federal regulation, upheld the national authority to regulate labor relations in manufacturing enterprises, and sustained the constitutionality of the Wagner Act.6

In the Wagner Act, the federal power over commerce had been fully exercised, in part at least, because it had previously been given such narrow scope by the Court. After that Act was sustained, each decision broadening the constitutional authority under the commerce clause enlarged the statutory power of the NLRB. Thus the reach of the Board’s statutory jurisdiction was determined by the accidents of constitutional litigation rather than by a considered judgment concerning either the desirability of extending federal labor regulation to enterprises of predominantly local character or the capacity of the national board to exercise effectively the far reaching responsibilities conferred on it by essentially constitutional adjudication. Insofar as the recognition of federal competence operated to oust state power over matters "affecting commerce," constitutional considerations, although often fortuitous as to the proper adjustment between state and federal regulation, were decisive.

In the early administration of the Wagner Act, the newly-confirmed federal power was for a time pressed close to its periphery. As a result, the NLRB was in danger of being swamped by a mass of cases which it considered relatively minor and which would have conscripted the time and energies necessary for the effective handling of cases which appeared to the Board to have a more significant impact on the national interest. In order to husband its resources, which appeared inadequate for the full exercise of its statutory authority, the Board, as a matter of administrative policy, declined on a case-by-case basis to exercise jurisdiction over small business and particular types of business, such as hotels and restaurants, which it considered essentially local in character.7

Although the reach of the Wagner Act was long, encompassing all enterprises whose impact on interstate commerce could be said to be more than de minimis,8 its purpose and its prohibitions were relatively narrow. It was designed to protect the employees’ freedom to choose representatives for collective bargaining and to engage in the group activity which usually precedes and accompanies such bargaining. The Act implemented those purposes by proscribing employer coercion and interference with such activities and by providing for representation machinery which would register the employees' wishes.

The Wagner Act did not regulate union pressures in any way, and it was generally assumed that state competence over such matters remained.9 Nevertheless, the overtones of several Supreme Court decisions10 suggested that the Court might curtail state competence by expansively reading the national proscription of employer interference with "concerted activities" as including similar interference through state regulation.

There was no occasion to resolve this problem because the enactment of the Taft-Hartley Act11 significantly changed the framework in which state power was to be defined. The purposes behind the Act were

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1Footnotes start on page 125.
much broader than those of the original NLRA. At the risk of oversimplification, three of its principal purposes may usefully be mentioned: (1) protection of employee self-determination against union, as well as employer, pressures, (2) protection of employers and the public against the disruption caused by certain "bad practices" by unions, (3) a general increase in the power of employers relative to that of unions, whose strength had grown and had been vigorously exerted during the war and post-war period. To achieve these purposes, the Act regulated strikes, picketing and boycotts. In addition, it sought to protect the integrity of collective bargaining agreements by proscribing pressures to modify them during their agreed upon term and by providing for their enforcement in federal courts.

Taft-Hartley thus laid hold of aspects of labor relations which, except for the incidental impact of the Sherman Act, had been left wholly to state regulation. Such regulation was, however, not a discreet and nicely identifiable body of law. It consisted not only of labor relations statutes, tailor-made for labor-management problems, but also of an extensive body of statutory and common law regulation of general application which impinged on such problems.

Even if Congress had been aware of the problems of federalism posed by the Act, Congressional formulation of guidelines for allocating power would have involved formidable intellectual and political difficulties. It is, however, reasonably clear that Congress, including the principal draftsmen of the Act, did not appreciate the problems involved, let alone the fact that the ultimate allocation between state and national authority could frustrate the purposes articulated by particular legislators and shared perhaps by a majority of them. In any event, Congressional directions were, as the Court has frequently observed, fragmentary and elusive. As a result, there was committed to the Court the task of adjusting two intricate systems of regulation. The Court, in turn purported to determine what Congress "intended," or what it would have "intended" if it had appreciated the problems involved, or perhaps what kind of adjustments between federal and state power made sense within the framework of the national regulation.

This task is always difficult in part because of the controversy surrounding the proper role of the states under modern economic and technological conditions and also because of the difficulty of separating the issue of who should regulate from issues concerning the merits of particular regulation. In the context of labor relations, two considerations made the latter issue peculiarly acute: (1) The "community," as well as unions and employers, have remained sharply divided as to content of a wise labor policy; (2) unions generally urged the contraction of state power while employers generally urged its preservation. The Court, assuming that it could stay above the partisan battle, could scarcely expect powerful, vocal, and disappointed interest groups to concede its detachment. Thus the coalescence of touchy problems of federalism with controversial issues of labor policy invited public misunderstanding and disparagement of the Court's work.

The Court's treatment of the problems involved will be better understood in the light of three familiar categories of conduct developed by the NLRB and the federal courts for the purpose of administering the Wagner Act and subsequently the LMRA:

(1) activity protected by federal law;
(2) federally prohibited activity; and
(3) an intermediate category of activity, neither protected nor prohibited by federal law.

"Protected" conduct under the Wagner Act covered a broad range of group activities which were protected against employer interference or reprisal. Such protection was afforded in general terms by the broad language of Section 7, which in turn was implemented by more specific prohibitions of certain forms of employer conduct embodied in Section 8. In addition, Section 8 prohibited certain forms of conduct on the part of labor organizations. Employees participating in such conduct were divested of statutory protection, i.e., were not in general protected by law against the exercise of the employer's economic power. Activities neither protected nor prohibited consisted of group conduct which, although free from federal prohibition, was considered to be unworthy of legislative protection against the employer's economic power.

The Act did not, however, define with any clarity the standards for distinguishing between protected and unprotected conduct. The Board, which was frequently reversed by the courts, developed elastic and fluctuating lines between the two types of activities. These lines reflected an attempt to balance the employees' interest in group activities, against a cluster of competing interests. Illustrative of the latter were orderly and efficient production, the performance of no-strike obligations and of other employee obligations based on the mutual responsibilities considered appropriate to the employment relationship, the basic objectives of federal labor-management regulations and of other federal statutes, and the avoidance of violence and intimidation.

State Regulation of Federally Protected Conduct

The failure of the Wagner Act to regulate employee activities, its silence about state power, and the bitter controversy which surrounded the legislation of restraints on employer power, might have been read
as an indication that state power was not to be curtailed. State regulation, designed ostensibly at least to promote the public interest, was manifestly different from the exercise of private economic power, designed to promote private interests. Nevertheless, Hill v. Florida suggested that the Wagner Act would be expansively read as excluding state, as well as employer, interference with protected activities. In that case, the Court invalidated a Florida criminal statute imposing licensing requirements on union agents and reporting requirements on unions. The Court, equating state interference with employer interference, concluded that Florida's restriction on the freedom of employees to choose a bargaining representative was incompatible with the declared national purpose of promoting such freedom. This decision was an understandable reaction to the harsh features of the Florida law, which could be viewed as an effort to frustrate the central purpose of the national scheme. But, as Mr. Justice Frankfurter forcefully urged in dissent, there was nothing in the Wagner Act which was directed at restraining state power. Accordingly, the state regulation could have operated without "conflict" with the federal scheme. The Court's rejection of this approach and its broad rationale implied that a large body of state regulation would be invalidated, but this implication was scarcely noticed at the time.

After the passage of Taft-Hartley, the opponents of state power could urge, first, that Hill v. Florida, which had not been disturbed by Congress, precluded state regulation of "protected activities" and, secondly, that Congressional regulation of certain forms of union conduct excluded supplementary as well as parallel state regulation.

In the so-called Briggs-Stratton case, the Court considered only the question raised by first contention as the substantial one. Perhaps this emphasis arose from the fact that the case had come before the state board when the Wagner Act, which did not regulate union practices, was in effect. Since, however, the Wisconsin order was to continue in effect after the enactment of the LMRA, the Court considered the order in relation to both statutes.

The Wisconsin order challenged in Briggs-Stratton had restrained unannounced and intermittent work stoppages called by a union during negotiations for a new contract without any disclosure of the union's demands. Speaking through Mr. Justice Jackson, the Court, in a 5 to 4 decision, rejected the broad argument that Congress had completely ousted state power over labor relations. It accepted, however, the narrower contention that the states were precluded from prohibiting conduct protected by federal law, and it declared generally that the states could reach only employee conduct which was neither federally protected nor prohibited. The Court indicated, moreover, that the states could prohibit conduct illegal because of the methods involved, but that they could not outlaw the purposes of union or employee conduct solely on the ground that they were pursued by concerted action. Concluding that the "quickie strike" was a "coercive" method which was neither federally protected nor prohibited, the Court sustained the Wisconsin order.

The general approach reflected in Briggs-Stratton became the basis for an unanimous decision in International Union v. O'Brien, which invalidated a Michigan statute prescribing a favorable employee strikevote and a waiting period as prerequisites for strike action. The decisive consideration was that:

... In the National Labor Relations Act ..., Congress safeguarded the exercise by employees of "concerted activities" and expressly recognized the right to strike. It qualified and regulated that right in the 1947 Act .... None of these sections can be read as permitting concurrent state regulation of peaceful strikes for higher wages. Congress occupied this field and closed it to state regulation. ....

"Even if some state legislation in this area could be sustained the particular statute before us could not stand. For it conflicts with the federal act." (Emphasis supplied)

In Amalgamated Ass'n v. Wisconsin Employment Relations Board, the Court made it clear that not even the most pressing state interest would open the door to state regulation of peaceful strikes for higher wages. It invalidated a Wisconsin statute prohibiting strikes and lockouts and requiring compulsory arbitration in connection with certain disputes involving public utilities. The Court's opinion, by Mr. Chief Justice Vinson, not only relied on the conflict between the Wisconsin regulation and the federal protection of the right to strike for higher wages but also urged that Congress by imposing certain restrictions on strikes "closed to state regulation the field of peaceful strikes in industries affecting commerce." It was, however, not clear whether the Court was suggesting the complete ouster of state power over peaceful strikes even in the absence of an encroachment on protected activities.

The dissenters urged weighty objections against the Court's holding: The states had traditionally subjected utilities to broad and special regulation not applicable to other industries. There was nothing in the federal act which implied the ouster of state power to deal with emergencies "economically and practically confined within a state." On the contrary, the federal provisions for national emergency strikes implied state power to deal with comparable local situations...
beyond the reach of those provisions.

It should be noted that the Court’s sanction of state power over “violence” on the picket line was a sharp contrast to the denial of state power to maintain the flow of essential services. Plainly, a breakdown in such services could enormously increase and complicate the problem of preserving order. Furthermore, such a breakdown posed at least as serious a problem for local authorities as a breach in the etiquette of picketing.

The considerations supporting state competence over public utility disputes, regardless of their persuasiveness, were irrelevant under the formula approved in O’Brien. Adherence to that formula would achieve a measure of predictability, but the formula plainly had the defects of its virtues. It necessarily excluded any attempt to balance the interests at stake, such as the nature and importance of the state interest involved, the impact of the challenged state regulation on the principal objectives of the national scheme, the significance of the regulatory gap left by the ouster of state regulation and the inapplicability of comparable national regulation to a local problem which local authorities reasonably considered to be acute. The exclusion of such considerations meant that an abstract formula became controlling despite the fact that such a formula could not be supported in terms of either a plainly expressed legislative purpose or the consequences produced in concrete situations.

Federally Prohibited Activities

Where state preventive remedies reached activities which were (or might be) prohibited by federal law, the Court ousted state power on the basis of three interrelated considerations: (1) State enforcement of parallel prohibitions would interfere with centralized and expert administration of the national act by the NLRB and would create the “conflict” inherent in overlapping remedies and successive state and federal adjudication of the same conduct; (2) the line between protected and prohibited conduct is so indistinct that state regulation of conduct which might be proscribed by the LMRA involved the risk of curtailing activity which might be protected under the federal act; (3) the federal act by regulating only certain forms of conduct implied that related forms of conduct were to be free from other sources of restraint. It should be noted that the denial of state power involved only injunctive or affirmative relief for peaceful conduct and that different questions are raised both by state injunctions against violence or intimidation and by state damage actions whether for violent or peaceful activity.

The exclusion of parallel state relief began with Plankinton v. Wisconsin Employment Relations Board. The Court, in a cryptic per curiam opinion, invalidated a Wisconsin order requiring an employer to reinstate an employee with back pay because of a discriminatory discharge which had violated both the Wisconsin Act and the LMRA. In a later case, the Court chose to explain Plankinton on extremely broad grounds, stating:

Section 7 of the Labor Management Relations Act not only guarantees the right of self-organization and the right to strike, but also guarantees to individual employees the “right to refrain from any or all of such activities,” at least in the absence of a union shop or similar contractual arrangement applicable to the individual. Since the N.L.R.B. was given jurisdiction to enforce the rights of the employees, it was clear that the Federal Act had occupied this field to the exclusion of state regulation. Plankinton and O’Brien both show that states may not regulate in respect to rights guaranteed by Congress in Section 7. Thus, O’Brien, which had denied state power to curtail Section 7 rights, was assimilated to a decision barring state power to enforce those rights.

In Garner v. Teamsters Union, the Court unanimously indicated that state jurisdiction over peaceful strikes, picketing, and boycotts was completely foreclosed without regard to whether state regulation conflicted with, coincided with, or supplemented, the federal scheme. Garner has become the dominant case in preemption litigation. For that reason and because of its obscurities, it merits extended discussion.

In Garner, the Teamsters had picketed a trucking company, apparently for recognition. Although the company had not objected to unionization, the Teamsters had recruited only four of its twenty-four employees before the picketing began. The picketing, which had resulted in a drastic decline in the company’s business, had been enjoined as a violation of the Pennsylvania Labor Relations Act. The Pennsylvania Supreme Court had reversed on the ground that the alleged union conduct also constituted a federal unfair labor practice and that the federal remedy was adequate and exclusive. One dissenter had rejected this position for practical reasons, namely, that the federal remedy was inadequate because the slow processes of the national board could not prevent imminent and irreparable harm to employers. The Supreme Court affirmed the denial of state jurisdiction in an opinion by Mr. Justice Jackson.

The Court cited Briggs-Stratton (also written by Mr. Justice Jackson) with approval but put it aside on the ground that Garner did not involve “injurious conduct” which either is “governable by the State or . . . is entirely un gover ned.” The Court emphasized that the national statute in language almost
identical to that of the Pennsylvania provision had prescribed the union coercion involved. Nevertheless, the Court explicitly refrained from finding a violation of the federal act on the ground that such a finding would invade the primary jurisdiction of the national board.

The emphasis on the probable illegality of the union's conduct together with the continued vitality given to Briggs-Stratton suggests that Garner may be narrowly interpreted as merely invalidating state regulation which parallels the federal act. Indeed, it was so interpreted in Weber v. Anheuser-Busch, Inc.,[24] and in United Const. Workers v. Lauburnum.[25] It may be noted in passing that the Court's suggestion that a federal violation was involved was not justified by the record tested by the Board's precedents.[25]

Under the narrow interpretation of Garner, union action, if it were classified as neither prohibited by Section 7 nor prohibited by Section 8, of the LMRA, would be subject to state power, in accordance with the Briggs-Stratton dictum. State boards and courts would determine the facts, and if they classified the conduct involved as "ungoverned" by federal law, would apply state law. The propriety of this classification, on which state jurisdiction would turn, would be subject to ultimate review by the Supreme Court.

Such an interpretation is, however, inconsistent with other passages in Garner. Thus the opinion emphasizes throughout the importance of preserving the national board's primary jurisdiction. It was this consideration which caused the Court to refrain from directly ruling on the legality of the union's conduct under the national act. But if the Court is unwilling to make such determinations prior to action by the NLRB, it plainly could not dispose of the federal questions raised by a claim that state action had impinged on either prohibited or, indeed, on protected conduct. The Court could thus prevent such state encroachment only by ousted the states of power over conduct "ungoverned" by federal law as well as over conduct federally prohibited or protected. In other words, the states would be denied any power over peaceful activities in the context of labor-management relations.

This comprehensive ouster of state power was, moreover, implied by language in Garner which suggested that for the purpose of determining state power there were only two relevant categories of conduct, namely prohibited and protected. Thus the Court stated:

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

The implication of the total ouster of state power, in the passage just quoted, is plainly incompatible with the result and the approach in Briggs-Stratton, where, it will be recalled, the Court appraised the union conduct prior to a Board determination and granted the same latitude to a state agency. But the Garner opinion cited and summarily "distinguished" Briggs-Stratton.

Weber v. Anheuser Busch[27] deepened the uncertainties produced by Garner. Weber arose from an old work assignment dispute between the International Machinists and the Millwrights (affiliated with the Carpenters). During negotiations for a 1952 contract, the Machinists had requested that the company agree to give certain repair work on its machinery only to contractors under contract with the Machinists. A similar clause had been in and out of the earlier agreements, with its status presumably dependent on the company's response to the pressures of the rival unions. In the 1952 negotiations, the Carpenters' protests led the company to reject the Machinists' demand. The Machinists thereupon struck and picketed the company's premises. A detailed statement of the subsequent litigation will highlight the uncertainties and the practical difficulties which preemption issues have created both for state tribunals and litigants.

The company promptly charged before the NLRB that the Machinists had violated one of the subsections of Section 8 of the LMRA (Subsection 8(b) (4)(D)). Seven months later, the NLRB quashed a notice of hearing on the ground that there had been no violation of that subsection. Somewhat less than two weeks after its resort to the NLRB, the company sought a state court injunction, alleging that the Machinists had violated the common-law prohibitions against secondary boycotts as well as three provisions of Section 8 of the LMRA: (8) (b) (4) (A) (B) and (D). After the issuance of a temporary injunction the company amended its complaint by charging also that the Machinists had been guilty of restraint of trade in violation of the Missouri common law and statutes. More than a year after the NLRB had determined that 8 (b)(4)(D) had not been violated, the Missouri Supreme Court upheld the permanent injunc-
tion. The United States Supreme Court reversed in an unanimous opinion by Mr. Justice Frankfurter.

The Court referred to the possibility that the Machinists, as alleged by the company in the state courts, had violated Section 8(b)(4)(A) and (B) of the NLRA. Those possibilities, the Court emphasized, had not been ruled on by the NLRB, which had negated only the alleged violation of a different subsection. If the Board had also ruled against a claimed violation of the other subsections, "we would have a different case." But Garner had indicated that the hypothetical case would not be different since Garner had suggested that conduct free from federal regulation could properly be subject to state restrictions. The hypothetical case would be different only if the Court rejected the intimation in Garner that federal prohibitions of certain conduct implied that other conduct was to be free from state restraints. And there is language in Weber which suggests that preemption will operate only when the conduct involved is (or may reasonably be deemed to be) federally prohibited or federally protected against employer reprisal. Weber may thus be read as recognizing state power over cases involving conduct which is clearly not protected and clearly not prohibited, i.e., Weber curtails somewhat the state competence sanctioned by Briggs-Stratton but extends it beyond the narrow limits suggested by Garner. This interpretation gains additional support from the Court's sympathetic reference to the difficulties surrounding state court determination as to the protected or prohibited character of concerted activities. Such difficulties would exist only if the states retain some jurisdiction over conduct which falls within the intermediate category.

The uncertainties and difficulties generated for state courts and for counsel by these cases scarcely need elaboration. Notwithstanding Garner, state competence may survive if rulings by the national board negative every possibility (or every reasonable or plausible possibility) that the conduct complained of is prohibited by federal law. But even such rulings will not destroy the possibility that the conduct involved is protected. And perfect avoidance of that possibility appears also to require an adjudication by the national board that the conduct complained of is not protected. But the Board's dismissal of a charge, although it generally discloses that the conduct is not prohibited, at least by the statutory provision specifically invoked, does not necessarily disclose whether the conduct is protected. There is, moreover, no possibility of securing a Board adjudication as to whether many significant and questionable forms of union pressure are "protected." The category of protected conduct has, as indicated above, been elaborated under the NLRA and the LMRA for the purpose of insulating certain forms of concerted employee action against employer interference and reprisal. The NLRB is, accordingly, not faced with the need of adjudicating whether particular conduct is protected unless an employment relationship and employer interference with such a relationship is involved. Where, however, as in Garner, stranger picketing is involved, the concept of activities protected by Section 7 is not directly applicable. If a few employees had participated in minority picketing and had been discharged, a Board ruling as to whether their conduct was protected would presuppose the filing of a charge that the discharge was unlawful and would usually involve such delay as to make any theoretical state preventive jurisdiction valueless for most practical purposes.

Total ouster of state power has been urged as a method for escaping from the difficulties and uncertainties resulting from case-by-case determination of state competence and as appropriate for two other related reasons: First, the prohibitions of the federal act have struck a balance between conflicting forces. Congress in determining what was to be prohibited was also concerned with conduct which was to be free. Accordingly, additional state limitations on freedom of action through prohibitions on unions or employers would destroy that balance and would therefore be inconsistent with the federal policy. Secondly, the uniform regulation of labor relations which can be achieved only by the ouster of state regulation would be desirable as a matter of policy.

The balance metaphor, considered alone, assumes the critical question, i.e., whether it is reasonable to impute to Congress the purpose of completely preempting state power. As the most detached advocates of complete preemption concede, there is no clear evidence of such a purpose. On the contrary, it is extremely unlikely that the architects of Taft-Hartley sanctioned such a far-reaching alteration in the federalist balance or would have done so if the question had been plainly put. They were, after all, essentially "states rights" in their basic philosophy. Furthermore, when the issue of state power was raised on the floor, debate generally appeared to be based on the assumption that state power survived. Finally, the architects of the act were astounded by some of the results wrought in the name of the legislative purpose.

In view of the inconclusiveness, to say the least, of the legislative history, the obliteration of state power would appear to be justified only by strong considerations of policy. Even if agreement could be reached on the existence of such considerations, there would, of course, be questions as to whether the
Court should maintain state power until Congress plainly calls for its obliteration.

The case on policy grounds for comprehensive preemption emphasizes the following considerations: 68

(1) State power may frustrate the working out of the national policy. Labor relations are part of a continuous human relationship; intervention at one point inevitably affects the whole process.

(2) State competence would destroy the uniformity and convenience which are part of the justification for national legislation. It would invite competition among the states in drafting "pro-management laws" as a magnet for the location of industry.

(3) It is desirable to avoid the fine lines of distinction inherent in the preservation of some areas of state competence.

(4) The federalist values of local autonomy, diversity and experimentation can be fostered by withdrawing the labor relations of smaller enterprises from the NLRB's jurisdiction and leaving their regulation exclusively to the states.

Appraisal of such considerations will obviously involve judgments or predilections about the contemporary role of state power; as well as judgments about the coherence and gaps in the particular federal legislation which is urged as the basis for state supersession. There is plainly no formula which will yield the proper appraisal. Several general comments may, however, sharpen the issues involved. In a society with a federalist tradition, the "uniformity" which is part of the justification for federal regulation consists of two extremely different kinds of uniformity. First is the uniformity which results when the national power is exercised to enforce minimum standards of conduct within the sphere of the national interest. Secondly, there is the uniformity which can be achieved only by an exclusive system of national regulation. The first type of uniformity plainly does not theoretically involve total preemption of state power; for regardless of whether or how the states act, they are precluded from abrogating the minimum national standards. In practice, there will, of course, be acute controversy as to whether particular state regulation "conflicts" with such standards. And to the extent that the states were in error as to the existence of "conflict," interference with the national power would result pending appellate correction of state determination. But unless federal regulation in any context is, contrary to our tradition, 69 to destroy state competence, in each case the values of preserving "consistent" state power, i.e., the values of federalism, must be balanced against the danger of deranging the federal scheme. The fact that different aspects of labor relations are interrelated does not materially help in striking that balance because similar interrelationships exist in connection with almost any activity subject to federal regulation.

Nor does the objective of excluding competition among state legislatures in the enactment of "pro-employer legislation" justify total state preemption. This question cannot usefully be decided as an abstraction without regard to gaps in the federal scheme and to whether supplementary state legislation may give coherence to an interstitial federal scheme. Furthermore, the objective of avoiding competition through variations in state law could be achieved only by displacing a vast body of state law of general application which impinges on labor relations. Even the most ardent preemptionists shrink from the regulating gaps flowing from such an attrition of state power. 70 Nevertheless, general regulations, for example, laws concerning safety, health, maximum hours for women, and hiring practices, probably have at least as strong an impact on inter-state rivalry for new businesses as does the regulation of activities neither prohibited nor protected by the national law. The same point may be even more important in connection with differences in local taxes. Finally, competition through legal differences which are compatible with nationally prescribed minima is merely another way of describing the characteristic values, complexities, and costs of a federal scheme.

No one who has wrestled with the Court's decisions in this area can be unsympathetic to the objective of reducing "fine lines of distinction." At the same time, no one bred in the common-law tradition can ignore the need for discriminating distinctions directed at achieving some national development of statutory and social purposes. Whether particular lines of distinction will succeed in achieving such purposes or whether they are worth the cost are debatable questions. But able commentators, such as Professor Cox, who have espoused a broad preemption of state power, in part to avoid fine distinctions, have nevertheless proposed limitations on preemption, which necessarily involve such distinctions. 71 Such limitations make it clear that our system has recognized other values beyond the quiet life for the judge or lawyer.

Finally, an attempt to compromise between the uniformity which flows from a single source of regulation and the diversity of the federalist idea, by according to the states exclusive control over the labor relations of smaller enterprises, is not without its difficulties. It may be a rough and ready way of exempting small businesses from the burdens of federal regulation and, at the same time, reducing the regulatory burdens of the national government. But such exemption frequently ignores that the fundamental purpose of national regulation is to insulate the observance of minimum standards where the national interest is
involved. The size of a particular business—or of its interstate transactions—is plainly a mechanical formula for determining the existence of the national interest and the need for national regulation. A more significant inquiry is the extent to which a class of small businesses are subject to the abuses which the national law is designed to suppress. In this connection, it is significant that in debating the Taft-Hartley Act, Senator Taft expressed special concern about the abuses existing in the labor relations of small enterprises. More recently, the McClellan Committee has dramatically documented the genuine basis for such concern. Under such circumstances abdication of national power on the ground that each enterprise is small and without regard to the cumulative effect of the relevant abuses, may well involve a perverse surrender of national objectives.

Such surrender will not, moreover, fully achieve the local diversity and experiment which the federalist tradition is designed to promote. The problems of small enterprises are not the same qualitatively as those of larger entities. Thus, to take only one example, a strike in a small enterprise will rarely give rise to a local emergency. Consequently, state competence over small enterprises would not promote the experimentation with arrangements which might improve our not altogether satisfactory methods for dealing with disputes which threaten the welfare of local communities or of the whole country.

These somewhat general observations are re-enforced by regard for the character of and the contrast between (a) state regulation bearing on labor relations and (b) the LMRA. State regulation (preemption aside) theoretically constitutes a complete system, with the capacity for growth and adaptation inherent in a mixed statutory and common-law system. It includes, as indicated above, regulation, such as labor relations statutes, tailor-made for labor-management problems. It also includes regulations, such as fair employment practices and safety rules, pinpointed at the employment relation without regard to whether that relation is subject only to the discipline afforded by the market or to collective bargaining as well. It includes also general tort and contract doctrines and general regulation, such as antitrust and transportation regulation. The application of such general standards to labor relations will reflect in varying degrees the distinctive elements of labor-management relations.

The substantial problems involved in classifying various kinds of state regulation and in integrating them with the national scheme will be considered below. Here it is sufficient to note that uniformity in the regulations controlling labor relations could be achieved only by displacing a vast body of state reg-
ulation directed at ends and embodying values not explicitly dealt with in the LMRA or its legislative history. The regulatory vacuum which would result from such a single-minded pursuit of uniformity is so extensive and so incompatible with the federalist tradition as to reinforce the doubts expressed above concerning the desirability of seeking the uniformity which results from an exclusive system of federal regulation.

These doubts are also reinforced by a consideration of the substantive and remedial gaps in the LMRA, which are so serious as to threaten the basic objectives of the national scheme. The outer of state power, without regard to whether it advances or retards these objectives, thus may in concrete situations involve a doctrinaire application of the supremacy clause, which perversely rejects the aid of the states in the achievement of basic national purposes.

The federal-state adjustment with respect to stranger and minority picketing is a useful illustration of such perverse results. Until the relatively recent decision in Curtis Bros. the NLRB's position was that stranger or minority picketing for recognition was not a violation of the LMRA. As a result, an employer subjected to such picketing was faced with a Hobson's choice: He could recognize the union, thereby violating the national act; or he could obey the national law and withhold recognition, thereby in many cases risking the stranguulation of the enterprise by picketing. Prior to Curtis, the federal law thus prescribed certain standards while denying protection against conduct deliberately designed to inflict damage for the purpose of inducing a violation of the governing standards. It is not easy to see the basis for denying to the states the power to avoid so grotesque a result, by enjoining the picketing in question. Such relief would plainly implement a fundamental policy of the national scheme, namely that the bargaining agent should have uncoerced majority support and that individual employees, absent such support, should be free to bargain for themselves.

It is true that once the states were permitted in the first instance to decide what regulation was a consistent supplement to the federal scheme, error, deliberate or inadvertent, was possible. But such errors could have been cured by judicial review. Furthermore, where state injunctions restrained protected activity, the power of the NLRB to restrain their enforcement could have been developed, thereby expediting curative relief. The mere possibility of such errors, under the preemption approach, precluded the exercise of state power to curb an abuse which threatened both national purposes and important local interests.

There is no calculus for weighing the danger of such
errors against the difficulties resulting from the destruction of state power to redress the anomalies and gaps of the federal law. But it is at least appropriate to refer to the familiar danger that "uniformity" and "expertise" and "primary jurisdiction" may become shibboleths which divert attention from the question of whether state power is deranging or promoting federal purposes.

State Competence over "Violence,"

Intimidation, etc.

"Violence" as used in this context, is a comprehensive term encompassing a broad variety of conduct. It includes not only the application of physical force to persons and property but also threats of force explicit or implicit in activities such as mass picketing, and verbal abuse so sustained and provocative as to involve the prospect of violence against or by the objects of such abuse. In view of the controversy as to the proper etiquette for the picket line and the wide range of activities connected with picketing, characterization of conduct as "violent" or "peaceful" may involve both subtle issues of judgment and the risk that the state may lay hands on conduct which the national board might find to be protected.

The Court's validation of state power over violence despite such risks has been a sharp contrast to its approach in Garner and Weber. The Court has indicated, without dissent, that state criminal sanctions for violence, incitement to violence, and intimidation are not displaced by the LMRA. Similarly there appears to be agreement that civil actions, such as personal injury suits, for what may be termed the direct consequences of violence are unaffected by the LMRA. The fighting issues have involved the validity of both state injunctions against violence and damage remedies for what may be called the indirect consequences of violence, e.g., loss of profits by an employer or loss of pay by employees resulting from union threats and intimidation which prevented willing employees from working. As to these matters, a majority of the Court has recognized state competence, over the consistent dissent of Mr. Justice Black and Douglas, who have been joined intermittently by Mr. Chief Justice Warren.

The dominating case in United Construction Workers v. Laburnum. In Laburnum, the Court, with Mr. Justice Douglas and Black, dissenting, sustained an employer's recovery of compensatory and punitive damages against a union. The employer, while under contract with an A. F. L. union, had rejected the recognition demand of the defendant-union, which had lacked significant employee support. Thereupon, the defendant, to secure its demand, had resorted to a campaign of violence and intimidation against the employees involved, thereby forcing the employer to abandon several construction projects. The state award to the employer for the resultant damages rested on the ground that the defendant had tortiously interfered with the plaintiff's advantageous relationships.

Although the Court assumed that the defendant had violated Section 8(b) (1) (A) of the LMRA, it rejected the contention that Garner foreclosed state action. Its opinion relied principally on three separate, if interrelated, considerations: (1) "Here Congress has neither provided nor suggested any substitute for traditional state court procedure for collecting damages for injuries caused by tortious conduct." (2) The legislative history showed plainly that federal proscription of violence was not designed to oust state law. (3) Under common law tort principles, unorganized persons would have been liable for the loss caused by similar violence; the union, which the Court observed, had lacked any contractual relationship with the plaintiff or its employees, was not immunized against similar liability.

The last ground, together with the Court's supporting citations, has been read as an acceptance of the view that the preemption cases do not oust state laws of general application, as opposed to labor regulation as such, even though such general laws are applied to non-violent conduct involved in a labor dispute. Before examining that interpretation, it is convenient to consider the post-Laburnum decisions concerning state power over violence.

In United Auto Workers v. Wisconsin Board, (the "Kohler" case) the Court upheld an order of the Wisconsin Employment Relations Board restraining violence and mass picketing, even though the order had been based on a state labor relations act and had granted a remedy available under the federal act. In Kohler, the Chief Justice, who had been with the majority in Laburnum, joined Mr. Justice Douglas and Black in dissent.

The Court explicitly disclaimed any concern with whether Wisconsin acted through its courts (enforcing a general policy against violence) or through its labor board (enforcing a policy pin-pointed at labor-management relations). The decisive consideration was: "The States are the natural guardians of the public against violence. It is the local communities that suffer most from the fear and loss occasioned by coercion and destruction. We would not interpret an act of Congress to leave them powerless to avert such emergencies without compelling directions to that effect."

In Youngdahl v. Rainfair, the Court held that conduct which threatened to develop into, or to provoke, violence was also subject to state injunctive power. In that case, employees struck and picketed
to secure recognition of a union as bargaining agent. Although it was not clear whether the union had had majority support, the number of strikers, at all times fell short of a majority of the employees. The strike was accompanied by threats against the plant manager and other forms of misconduct, such as the scattering of tent pegs on the company parking lot and on the driveways of non-strikers. After about two weeks, the recognition strike and picketing ended. About a month later the strike and picketing resumed as a protest against the employer's denial of recognition to the union and his refusal to reinstate the strikers. In its second phase, the strike was accompanied by acts of violence and by mounting tension caused in part by sustained and provocative abuse which the strikers directed at the non-strikers. According to the findings of the Arkansas courts, the strikers' conduct was calculated to provoke violence and was likely to do so unless restrained. Arkansas had restrained the strikers and the union representatives from engaging in threats or intimidation of non-strikers, obstruction of the streets, etc., and (2) all picketing. The Court, by Mr. Justice Burton, sustained the first phase of the injunction (with the Chief Justice and Mr. Justice Black and Douglas dissenting) but invalidated the injunction insofar as it restrained peaceful picketing, an an encroachment of "the preempted domain of the National Labor Relations Board."

In sustaining Arkansas' power to prevent prospective violence, the Court necessarily rejected the contention that the strikers' conduct was protected. This determination marked the first occasion since Briggs-Stratton in which the Court overcame its unwillingness to rule in the first instance on the protected character of conduct where NLRA precedents created doubt as to its proper characterization. This approach may well be confined to the context of actual or incipient violence. Nevertheless, Rainfair reinforces the possibility that state jurisdiction to enjoin peaceful conduct unprohibited and unprotected by federal law may still survive, in accordance with the Briggs-Stratton rationale.

In International Union, United Automobile Aircraft and Agricultural Implement Workers v. Russell, the Court recognized state power to grant to individual employees remedies similar to the employer remedies which had been sanctioned by Laburnum. In Russell, the Court (with Mr. Chief Justice Warren and Mr. Justice Douglas, dissenting, and Mr. Justice Black not participating), sustained an Alabama verdict, requiring a union to pay compensatory damages of about $500 (for lost pay) plus $10,000 in punitive damages, to a non-striking employee (Russel) whose entry into a strike-bound plant had been blocked by mass picketing and threats of violence. The damages had been based on the union's having committed the tort of wrongful interference with a lawful occupation.

The Court assumed, arguendo, that Section 10(c) of the LMRA authorized the NLRA to award lost pay to Russell, notwithstanding Board precedents disclaiming such remedial power. The assumed availability of such compensatory relief, the Court conceded, differentiated Russel from Laburnum, where the Board had lacked authority to make the employer whole. The Court declined, however, to make this difference decisive, for the following reasons: Congress had not established "a general scheme authorizing the Board to award full compensatory damages for injuries caused by wrongful conduct." The primary legislative purpose had been "to stop and prevent unfair labor practices;" the Board's power under Section 10(c), to compensate for lost pay was incidental to a scheme of dominantly preventive relief. Lost pay, even for victims of unfair labor practices, was not a matter of right but depended on the Board's discretion. The overlap of federal and state compensatory remedies did not create the "conflict of remedies referred to in Laburnum." Previous preemption cases reflected only a concern that "one forum would enjoin as illegal conduct which the other forum would find legal or that the state courts would restrict . . . rights in this connection guaranteed by the Federal Acts." The dissenters urged, first, that under the majority's assumption that compensatory relief was provided by the LMRA, there was a duplication between federal and state remedies, which was inconsistent with the rationale of Garner. The dissenters did not, however, rest on the assumed scope of the Board's remedial authority. They adopted an extremely broad view of federal preemption under which the current federal regulation would deny the states power to grant damages for the indirect economic consequences of violence even though the NLRA also lacked such power. They stated: "The Federal Act represents an attempt to balance the competing interests of employee, union and management. By providing additional remedies the States may upset that balance as effectively as by frustrating or duplicating existing ones." Such remedies, varying especially in their punitive aspects from state to state, would destroy the uniform scheme of national regulation which the LMRA was designed to achieve. The threat of varying damages was also inconsistent with the statutory objective of promoting industrial peace. The prospect of lucrative punitive relief would deter recourse to the "curative" federal machinery, and private litigation would, as the dissent in Laburnum had emphasized, drag on, "keeping old wounds open." This language can scarcely be reconciled with the result or the rea-
soning in *Laburnum*, a decision in which the Chief Justice, who spoke for the dissenters, had joined.

The dissenters, sensitive to the difficulties posed by *Laburnum* and unwilling to distinguish it by conceding the Board’s authority to award lost pay, pointed to three other grounds of distinction: (1) Since an employee’s abstention from concerted activities is protected by Section 7 of the LMRA, the union’s interference with the non-striking employees in *Russel* directly and inherently involved a violation of Section 8(b) (1) (A), whereas that subsection was involved only “furtively” in the union’s interference with the employer’s interest in *Laburnum*. (2) Since the defendant union in *Russel* had been the certified bargaining representative, its conduct was an incident of an ordinary economic dispute which would, presumably, be followed by continuing labor-management relations. In *Laburnum*, per contra, the defendant union had been a stranger attempting to displace an incumbent union by “predatory” coercion of both the employees and the employer. There was, accordingly, no prospect of continuing relations between the litigants and no need to consider the possibility that litigation might prejudice such relations. (3) Finally, in *Laburnum*, only one plaintiff, the employer, could recover punitive damages, whereas, all of the many employees affected by the conduct in *Russel* could successively recover punitive damages, a prospect aggravated by the Alabama rule that evidence of a previous punitive recovery was inadmissible in a subsequent action.

There are obvious difficulties in reconciling the broad positions of either the majority or the dissent with the Court’s precedents; both opinions, moreover, give rise to difficulties because they proceeded on different assumptions regarding the NLRB’s remedial authority. The majority’s distinguishing of *Garner* and related cases solely on the ground that they involved preventive, rather than damage, relief is questionable. State damage actions, like injunctions, enforce policy and control conduct, albeit somewhat more indirectly. They involve, moreover, the possibility of the same kinds of conflict which the broad language of *Garner* was apparently designed to suppress. Thus, states purporting to apply substantive standards identical to those embodied in the federal scheme may reach different results in particular cases because of divergent attitudes and procedures. State damage remedies may, moreover, be imposed for conduct which might be held protected under the federal scheme, and the possibility of such awards would operate to restrain activities which the LMRA, as previously interpreted by the Court, was said to free from all restraints. Where an adequate compensatory remedy is supplied by the federal act, it is not easy to see any special justification for running the risks of state adjudications which would overlap or conflict with the federal scheme.

Nor is any convincing argument for such state action (given the premises of *Garner*) supplied by the Court’s attempt to minimize the importance of the compensatory remedy which it assumed was provided by the LMRA. Even though damage remedies under the LMRA are “incidental” to a scheme of dominantly preventive relief and even though they are entrusted to the Board’s discretion, these considerations do not affect the impact of the Board’s compensatory powers on conduct or the potentiality of conflict between state and federal action. Indeed, in many situations, it is the fear of back pay liability which is the decisive deterrent to unfair labor practices since the NLRA’s purely preventive processes give wrongdoers one free bite.

In view of the presence of violence in *Russel*, the Court’s broad distinction between damage and injunctive relief was plainly not necessary for the decision. Violence and related conduct, as *Garner* and other cases suggest, present a special case. The paramount responsibility of the states for dealing with violence, the importance of recognizing power adequate to responsibility, and the pertinent legislative history, appear to justify the recognition of state power over actual or incipient violence despite a potential overlap or conflict between state and federal regulation.

The Court in *Russel* did not, however, clearly treat violence as a special case. Its narrow reading of previous preemption cases may be interpreted as a general authorization of state damage actions without regard to whether violence is involved or to whether such actions are necessary to fill remedial gaps in the federal scheme. Such state power would naturally be limited so as to exclude encroachment on protected activities. It should be observed, however, that the opinion, by stressing the “kind of conduct . . . involved,” suggests that the limitation on *Garner* may be confined to situations involving violence.

The question of whether that limitation should be expanded generally to cover all actions for damages, as opposed to injunctive relief, can be more conveniently explored below. At this point, it is sufficient to note that the special history and characteristics of the injunction in labor disputes might serve to justify a distinction, for preemption purposes, between damage and injunction cases, respectively. Labor’s hostility to the labor injunction resulted in part from the fact that the consequences of an erroneous injunction often could not be reversed by a successful appeal because changes in the circumstances underlying the dispute precluded effective reinstatement of strikes or picketing. A reversal of erroneous damage awards would,
however, come closer to restoring the status quo.

As for the dissenting opinion, its major premise that any additional state remedy would destroy the balance in labor relations which Congress sought to create, involves a somewhat cavalier treatment of both the legislative purpose imputed to Congress by *Laburnum* and the underlying questions of policy. Congress, according to *Laburnum*, had been unwilling to omit state remedies for violence and had not in that connection suggested a distinction between state damage remedies for violence, as such, and its economic consequences.

There are, moreover, strong considerations against such fragmentation of state competencies—considerations which are particularly forceful if, as the dissenters apparently assumed, the federal scheme does not provide for compensatory relief in the *Russell* situation. The primary responsibility of states for dealing with violence is a familiar aspect of our federalist tradition. For this purpose, "civil responsibility and public punishment by common usage have long been established as appropriate and complementary associates." Indeed, in labor disputes, civil liability is often a more effective deterrent than the criminal law. Prosecutors may be reluctant to take action because of inertia, sympathy with the strikers, or political indebtedness to the interests involved. Jurors may be unwilling to convict individuals whose wrongdoing occurred in the surcharged atmosphere of a labor controversy but may be willing to grant compensatory relief against an impersonal association. Such reluctance may be especially strong when violence has not actually erupted but, as in the case of mass picketing and related techniques, is implicit in the total situation. An assumption of a "federal balance," which gains no support either from the legislative history or from the general traditions of federalism, scarcely justifies the denial of state power to employ civil actions as a device for deterring violence and compensating its victims.

The dissenters' argument, pushed to the limits of its logic, would not merely fragment state power over violence in labor disputes but would destroy it completely. State criminal statutes, if they are enforced, involve dangers similar to those implicit in civil remedies. They bring diverse local attitudes and procedures to bear on conduct occurring in the context of labor controversies. They also involve the risk that activities which might be protected under the national scheme might be made "too risky to undertake." Furthermore, the institution and prosecution of criminal actions may also poison a continuing relationship. In short, the considerations urged by the dissenters to support the ouster of state civil remedies—regardless of the remedial deficiencies of the federal scheme—equally support the ouster of state criminal sanctions.

The basic difficulties with the dissent arise, in my opinion, from a one-sidedness in striking a balance between the interests at stake. The dissenters appeared to be so preoccupied with a contingent and remote limitation on the union's protected activities that they gave inadequate attention to the actual and direct interference with Russell's protected activities, which resulted from the union's violative of both federal and state law. Presumably, it was this one-sided emphasis which led the dissenters to urge in effect that measurable economic loss deliberately inflicted by violence and intimidation should at present not be compensable under either system. Such a self-defeating jurisprudence, which might be read as an encouragement to violence in the context of labor-management relations, would scarcely promote the search for orderly adjustments in that context or other contexts where law is challenged by force.

A similar preoccupation with a single interest underlies the dissenters' fears that state remedies for violence would disturb a continuing labor-management relationship. The fostering of a proper climate for such relationships is, of course, an important objective of labor policy. But employees and employers as well as unions are parties to that relationship. Disregard of, or inadequate remedies for, union violence against employees or employers may in some situations appear to avoid strains on the tripartite relationship. But in other situations, violent conduct which might have been checked by appropriate deterrents, may also poison the atmosphere.

Whatever the uses and dangers of appeasement in this context, both federal and state law have proscribed violence. The federal act implies, moreover, that the risks of disturbing continuing relationships are the justifiable costs of avoiding abuses by the interests involved. Thus any charge that an incumbent union has violated the LMRA, may disturb such a continuing relationship. Furthermore, Section 301 of the Act confirms liability for breach of collective bargaining agreements, and Section 303, for violations of the restrictions imposed on unions by the provisions of Section 8b(4) of the LMRA. The enforcement of such liabilities is not without risks to continuing relationships. The dissenting opinion does not make it clear why similar risks should become intolerable where liability for the economic consequences of violence is involved.

The dissenters' specific grounds for distinguishing *Russell* from *Laburnum* are in my opinion, no more convincing than their general philosophy of preemption. First, even if the protection against violence afforded to an employee by Section 8(b)(1)(A) is "direct" and the employer's protection "derivative,"
these labels do not suggest that an employee should be deprived of adequate compensatory relief. Indeed, the contrary conclusion seems more acceptable; Congressional preoccupation with employees' rights scarcely warrants the destruction of their compensatory remedies while compensatory state relief for employers is preserved. Secondly, the fact that the defendant-union in *Russel* was certified whereas the defendant in *Laburnum* was a stranger attempting to muscle out the incumbent, although it plainly made the conduct in *Laburnum* more distasteful, scarcely serves as a basis for a legal distinction. It is not easy to see why that fact should destroy all compensatory relief for violence clearly prohibited by federal as well as state law. The argument that state action initiated by the employees might poison the future bargaining relationship ignores, as already indicated, both the prophylactic possibilities of such actions and similar dangers to the continuing relationship implicit in any legal action against unions. In any event, *Laburnum* had declared that Congress had determined that state remedies for violence and its economic consequences should survive. There is nothing in *Laburnum* or in the LMRA which justifies a different result where the violence is committed by incumbent unions.

The final difference between *Russel* and *Laburnum*, the prospect of multiple punitive damage awards in *Russel*, is an appealing basis for distinguishing the cases. But it is difficult to convert that difference into an acceptable basis for a legal distinction however desirable it may be as a matter of policy to exclude punitive damages from this area. If, as *Laburnum* indicated, state compensatory and punitive remedies for violence and its consequences are valid, one of the familiar risks of recognizing state power under a federalist scheme is that it will be exercised harshly or unreasonably. But neither the preemption cases nor the commerce clause provide the yardsticks for measuring the validity of successive penalties for conduct which may be, but need not be, considered a single transaction. Other provisions of the constitution, and especially the Fourteenth Amendment, would appear to be more relevant. Furthermore, similar risks of multiple punitive awards exist where an employee brings an action for personal injuries or for the fear, inflicted by violence or the threat of violence during a labor dispute, or where the state charges a union or its officers with multiple criminal offenses. The dissenters, as already indicated, appeared to concede state competence over such actions, including, presumably, competence to grant successive punitive damage awards. Such damage awards, despite differences in the underlying legal concepts, would have substantially the same impact on labor-management relations as the award in *Russel*. It is accordingly extremely difficult to articulate a coherent concept of preemption which would warrant the distinction drawn by the dissent between the two types of awards.

State Damage Actions for Non-Violent Conduct

The uncertainty surrounding state competence in this area is illustrated by the problems presented by the California litigation involving one Garmon as the plaintiff and San Diego Unions as the defendant. In *Garmon v. San Diego Unions* the California Supreme Court upheld a damage award, as well as injunctive relief, against the defendant-union, which had picketed the plaintiff for recognition and a union-shop clause without having any members among the employees involved. The United States Supreme Court reversed the injunction but remanded the damage award, stating that *Laburnum* had involved "an award of damages under state tort law for violent conduct" and therefore presented a "different situation." On remand, the California Supreme Court in a 4-3 decision sustained the damage award. The United States Supreme Court recently granted certiorari.

State competence should, in my opinion, be sustained in situations such as *Garmon*. Stranger or minority picketing for recognition is, as indicated above, incompatible with the basic objectives and provisions of the national law. Although the LMRA, as now interpreted by the Board, proscribes such conduct, it does not afford employers a compensatory remedy for the economic losses which are the object and the result of the union's conduct. Consequently, it is only the states which can now provide adequate compensation for the deliberate infliction of economic loss by conduct which violates both state and federal law. Furthermore, the delay surrounding preventive relief through the processes of the national board increases the need for civil liability as an adjunct to the Board's preventive relief. These considerations, in my opinion, make the case for state competence in the *Garmon* situation even stronger than in the *Russel* situation where the Court assumed that the federal law provided adequate money damages and where the complication of multiple claims for punitive damages existed.

Reliance on state awards to implement a federal policy may naturally be attacked as disturbing the federally created balance imputed to Congress. But, as indicated above, this metaphor is question-begging at best. Furthermore, in the context of concrete situations, such as those involving stranger picketing, its application appears to frustrate, rather than to implement, the basic statutory purposes.
The principal consideration against upholding state damage awards in the absence of violence appears to be the greater danger of the misapplication by the state of the criteria for distinguishing between prohibited and protected conduct. Several persuasive reasons suggest, however, that this consideration does not warrant the destruction of state competence to grant damages for non-violent but federally prohibited activities where such competence is necessary for an adequate compensatory scheme. First, there is a similar danger in the violence context, namely, that of disparate federal and state approaches to vicarious responsibility. A more important consideration is the implication of Section 303 of the LMRA, viz., that Congress was prepared to tolerate such conduct where it was the price of an adequate compensatory scheme. Section 303 expressly authorizes state and federal courts to award damages for violation of Section 8 (b) (4) of the act. The jurisdiction of the courts is, moreover, independent of the Board’s. As a result the same conduct may be held to be unprohibited, and impliedly protected, by the Board and yet may be the basis of a damage award in a court action. It is true that to the extent that such conflicts result from different interpretations of the federal statute, state application of Section 303 could be harmonized with federal adjudications by the exercise of the Supreme Court’s reviewing power. But the Court could not reach conflicts resulting from reasonable differences in fact-determination. And provisions such as Section 303 which turn on “purpose” are, of course, a fruitful source of such conflicts. Furthermore, the Supreme Court could exercise its reviewing authority to strike down damage awards based on state law if such awards encroach on federally protected activities. Such review would incalculably involve the possibilities of federal and state conflict, but, like the conflict arising from Section 303, which is not fundamentally different, it could be dismissed as the price for adequate remedies against conduct banned by both state and federal law.

Where state damages are assessed for activities which are neither prohibited nor protected, the problem is more troublesome. In this context, there is more force to the claim that state additions to the substantive, as opposed to the remedial law, of labor relations would derange the balance struck by the federal act. But in appraising that assertion the reasons for denying group activities the protection of the statute must be considered. As already indicated, such protection is in general denied because the conduct involved is deemed incompatible with the objective of the LMRA, or some other federal statute, with notions of mutual responsibilities of employer and employee, or because the unprotected conduct invades an employer interest considered paramount. The fact that such marginal activities are denied the statutory protection may be read either as a declaration of national neutrality with respect to supplementary state power or as a declaration that the states also should abstain from regulation these marginal activities.

The general problems underlying the choice involved have been discussed above. It may, however, be useful to illustrate these problems by reference to a concrete situation. A union may picket or exert other pressures to obtain recognition despite the fact that a rival union also is claiming majority status and the Board is processing the representation question. If an employer grants recognition because of the picketing, he violates the LMRA. If, in obedience to the national law, he withholds recognition, he runs the risk of substantial losses as a result of the union’s pressures. The national board, pending an election, presumably cannot enjoin the picketing in any event, its processes may be too slow to grant effective protection. State injunctive power is subject to the uncertainties flowing from Garner. If employees participated in the picketing the employer would, of course, have the theoretical right to discharge them. But that right may be a paper right either because the employer cannot secure employees with requisite skills or because discharge would aggravate a tense situation.

Under the foregoing circumstances, the recognition of state competence to grant damages would serve substantially the purpose which lies behind the characterization of the employee’s activities as unprotected, i.e., it would to some extent deter the marginal conduct involved. State damage awards would, moreover, be implementing a central purpose of the national scheme by protecting the integrity of the Board’s representation machinery as well as the principle of majority rule. Naturally, if uniformity is postulated as the objective of the national scheme, any state remedy would derange the balance achieved by Congress. But plainly, any such abstract postulate begs the essential question, i.e., whether the national law should be the only source of regulation.

Union-Security Provisions, Internal Union Affairs and Related Matters

The Wagner Act did not affirmatively sanction or prohibit the closed shop or other forms of union-security arrangements. Although the Act was silent about state authority, its legislative history indicated that the states were to retain authority to prohibit or regulate such arrangements. Section 14(b) of the Taft-Hartley Act expressly empowers the states to prohibit union-security arrangements which, in the absence of
state regulation, would be permitted by Section 8 of the statute. The legislative history of that section suggests that its purpose was not merely to sanction state regulations more restrictive than the federal prohibitions but rather to preserve concurrent state regulation without regard to whether it supplemented or overlapped with the federal scheme. In other words, the legislative history indicates that the purpose of Section 14(b) was to preserve for the states the same power to deal with union-security which they had under the Wagner Act.

The Court has, however, not explicitly recognized the unique problems posed by Section 14(b) and the pertinent legislative history. Its early treatment of state power in the union-security area proceeded on the assumption which underlay Garner, namely, that overlap between federal and state remedies was fatal to state competence. Thus, as indicated above, Plankinton, a per curiam decision, denied state authority to grant affirmative relief from union-security arrangements violating state law where such relief duplicated remedies available under the LMRA. Furthermore, the Court's later explanation of Plankinton implied that the states were barred from granting relief of any kind for conduct discriminating against non-union (or union) employees if such conduct constituted a federal unfair labor practice.

The recent Gonzales case introduced new uncertainties concerning state action which involves such a partial or complete remedial overlap. In Gonzales, the Court, divided as in Russel, affirmed a California decision restoring the plaintiff union membership from which he had been expelled and awarding him damages for lost pay and $2,500 for physical and mental suffering. In the California litigation, the plaintiff relied on the doctrine that a union constitution constitutes a "contract" between the union and its membership and had urged that under state law he was entitled to both restoration of membership and damages as a remedy for the union's breach of that contract through wrongful expulsion. The Court, by Mr. Justice Frankfurter, confirmed state power over membership rights—a point conceded by the dissenters and the defendant. Turning to the disputed issue—state power to grant damages for loss of employment resulting from the plaintiff's expulsion—the Court, in sustaining state competence, emphasized three grounds: (1) the crux of the California action was breach of contract; (2) it was desirable to afford the plaintiff a complete remedy for the invasion of his rights and (3) the facts raised doubts as to the availability of a remedy for lost pay, under the LMRA.

Mr. Chief Justice Warren, with whom Mr. Justice Douglas joined in dissent, reiterated the principal points of the Russel dissent: erosion of Garner and the deterrent to recourse to the "curative" federal machinery flowing from the state award of psychic damages as well as lost pay. The dissent also pointed to the state's duplication of the NLRB's back pay remedy and contended that the interest in a complete equitable remedy did not justify the frustration of both "the remedial pattern of the Federal Act" and the "uniformity of substantive law so essential to matters having an impact on national labor regulation." Finally, the dissent forcefully rejected the significance attached by the majority to the contractual nature of the state action, stating:

But the presence or absence of pre-emption is a consequence of the effect of state action on the aims of federal legislation, not a game that is played with labels or an exercise in artful pleading. In a pre-emption case decided upon what now seems to be discarded principles, the author of today's majority opinion declared: 'Controlling and therefore superseding federal power cannot be curtailed by the State even though the ground of intervention be different than that on which federal supremacy has been exercised.' Weber v. Anheuser-Busch.

There is considerable force to the dissenters' charge that Gonzales is inconsistent with the Court's previous declarations, which had implied an ouster of overlapping state remedies regardless of their labels. Nevertheless, several distinctive elements in Gonzales invited a departure from, or a reshaping of, earlier pronouncements. First, supervision of internal union affairs has a close functional connection with the policing of union-security arrangements. Indeed, the desire of some members to acquire and to retain union membership results from the fact that membership is often a practical, if illegal, condition of employment. This connection renders somewhat artificial a federal-state allocation which grants the states authority to restore membership but grants to the federal board alone authority to compensate for the economic losses resulting from a violation of the rights of membership.

Such a concept of divided jurisdiction involves obvious obstacles to prompt and adequate relief. State relief confined to restoration of membership is often subject to great delays and uncertainties as a result of the requirement that a member exhaust internal union remedies. An expelled member may, moreover, be reluctant to file a charge with the NLRB out of fear of prejudicing such internal union remedies and being forced to resort to the uncertainties of state litigation. Accordingly, the expelled union member who wishes to remain in a given occupation and to avoid friction with the union leadership may initially resort to internal union remedies. If these are unavailing, his remedy from the Board is subject to the re-
requirement that a charge be filed within six months after the alleged job discrimination occurred, or continued. The delay involved in resort to union remedies and the evidentiary obstacles to showing a continuing violation may create substantial practical difficulties for him. But even if he surmounts these difficulties and secures a Board cease and desist order, that order, without a restoration of membership, may as a practical matter not effectively protect him against future discrimination which will, however, not be amenable to proof. Furthermore, even if the Board's order is effective, an expelled member may wish to have his membership restored for reasons independent of its utility as a defense against discrimination. Thus if he is to vindicate all of his rights despite the union's unwillingness to correct its error, the alternative to the Gonzales decision would be two actions against the union. These practical shortcomings of the concept of divided jurisdiction give considerable support to the result in Gonzales.

Although that result appears to sanction the overlap condemned in Garner, it should be observed that the states' conceded jurisdiction over internal affairs, coupled with the competence sanctioned by Section 14(b), excludes the possibility that damages will be imposed on the basis of standards which involve an encroachment on protected activities. Generally, any job discrimination against an expelled member because of his expulsion will, of course, violate the LMRA and thus will not be protected. But in the event that an expellee suffers economic loss as a result of his expulsion without a violation of the LMRA being involved, state competence over both union-security arrangements and internal affairs would prevent the state action from encroaching on protected activities. Accordingly, there is no basis in the Gonzales situation for the fear expressed in Garner that state action would impose accountability for protected activities. And where such a possibility does not exist, the interest in avoiding state duplication of the federal remedy is a doubtful basis for limiting the states' general competence over internal affairs.

In this connection, it is significant that in a comparable situation, the possible existence of a Board remedy has not excluded alternative forms of relief by courts. In Syres v. Oil Workers, the Court sustained the jurisdiction of the federal courts to grant relief for an alleged breach of a bargaining representative's duty of fair representation despite the fact that (1) the breach involved might also have been an unfair labor practice, and (2) even though no unfair practice had been involved, the Board could have decertified the representative unless it abandoned its discriminatory representation. It is not easy to see why a partial Board remedy of doubtful effectiveness should be fatal to state power in the Gonzales situation when such a remedy does not oust the courts of jurisdiction over discriminatory representation.

Section 14(b) is relevant not only to consummated hiring arrangements which violate state laws operative under that section but also to antecedent pressures directed at securing such arrangements. Where such pressures appear to violate the LMRA as well as state law, the Court, without any explicit consideration of Section 14(b), has invalidated state injunctive relief. It is true that Garner on the surface appears to exclude such state action. But the applicability of Garner is questionable because Section 14(b) and its legislative history suggest, as already indicated, that state policy as to union shop-arrangements was to be given paramount effect. Such paramount authority should apply not only to consummated hiring arrangements but also to antecedent pressures directed at achieving them.

Where antecedent pressures violate state law without violating the LMRA, there are even stronger grounds for recognizing state competence to grant injunctive relief. The denial of such competence would result in a self-defeating jurisprudence which commanded an employer not to enter into a union-security agreement while denying him any relief against pressures designed to compel the execution of such an agreement.

It is true that the recognition of state competence would involve the risk of state tribunals restraining activities which might be found to be protected under the national scheme, risks which might be especially acute in states whose enactment of "right-to-work" laws may reflect anti-union attitudes. Restraints on protected activity might occur, for example, where the state tribunals determined, on the basis of conflicting or ambiguous evidence, that union pressure was directed at securing hiring arrangements prescribed by state law, but where the NLRB might reasonably reach a contrary conclusion. Section 14(b) tolerates such risks as to state adjudications concerning the validity of the executed arrangements. If appropriate weight is given to the policy and legislative history of Section 14(b), it is not easy to see why such risks should be fatal where antecedent union pressures are involved.

State Laws of General Application

Some commentators, although urging generally a limited role for state power over labor relations, have also suggested that for preemption purposes a distinction should be drawn between labor regulations, as such, and state regulation of general application. The thrust of this position, which may be illustrated by the views of Professor Cox, appears to
be that the states should be free to enforce general regulations even though such enforcement involves conduct which otherwise is or might plausibly be prohibited or protected under the national scheme. The proposed formula would, of course, avoid the regulatory gaps and the drastic impairment of state power which would result if all state law of general application were foreclosed whenever it impinged on labor-management relations.

The formula involves, however, several difficulties. (1) It rests on a classification scheme which would be extremely difficult to apply to the wide variety of state regulations involved. (2) It appears to dilute the values of uniformity and the avoidance of fine lines of distinction which have been urged in support of comprehensive preemption. These difficulties will be examined and then the predictive value of this formula appraised in the light of the Supreme Court decisions.

The common law of labor relations began as a branch of the law of torts and emerged in the 20th century as a distinct body of regulation. The common law basis for state prohibition of stranger picketing for recognition typically is the general tort doctrine that intentional interferences with advantageous relationships are tortious unless justified and that a union’s desire to spread organization is not sufficient justification. It can be urged that such a state regulation is merely a general application of tort law to labor-management relations. But, Professor Cox urges, the application of the tort doctrine involves a social appraisal of the conflicting interests of the union, the employer, and the community in the labor controversy. Since the existence of a labor dispute is central to the social appraisal involved, the application of tort doctrines to make the union’s conduct actionable is “labor regulation as such.” Presumably, a different social appraisal leading to the legality of stranger picketing would not exclude the same characterization. The critical element in Professor Cox’s classification thus appears to be that the liability depends on an appraisal of the distinctive elements of labor management relations in the light of other competing interests or objectives.

In my opinion, the basic difficulty with such a classification scheme arises from the fact that substantially the same social appraisal is involved in any rational legislative or judicial determination that any general regulation should be controlling in the labor-management context. For example, a union which has entered into price fixing agreements with employers or into agreements excluding the purchase of out-of-state goods is indicted under a broad state anti-trust law condemning all arrangements and conspiracies in restraint of trade. The disputed issue is whether the distinctive aspects of the union movement justify a refusal to apply a general standard in the context of labor-management relations. Although the technique for resolving such an issue will depend on whether a statute or a common-law standard is controlling, its resolution will turn on what force should be given to the union’s claim that there is a social justification for exempting it from a general standard which on the surface appears to be applicable. It is precisely such a claim which must be adjudicated when a union urges its “right” to engage in stranger picketing or to induce the breach of a contract between an employer and another union. In view of the basic similarity of the social appraisal involved in the anti-trust situation and the prima facie tort situation, the distinction between labor regulation, as such, and regulations of general application appears to be essentially verbal; for whatever the state has concluded that a given rule should control labor relations despite the distinctive elements involved, there is no analytical basis for determining whether the state regulation deals with labor-relations as such or is a rule of general application applied to labor-management relations.

The difficulty of classification is illustrated by Professor Cox’s criticism of the decision by the Missouri Supreme Court in the Weber case. His criticism rested on the contention that the court, in holding the restraint in question unlawful under the Missouri anti-trust law, relied on the following ground: “[U]nder the terms as above sought to be imposed by the Union, persons employed by or seeking to work for the above construction contractors in moving, erecting or installing machinery in St. Louis area breweries would be compelled to forego representation by their present bargaining agent, the Millwrights’ Union, and become affiliated with the Machinists’ Union in order to retain their employment with such contractors.” Accordingly, Professor Cox concluded that the underlying issue was made to turn “on balancing the interests of employers, employees, and unions in organization or collective bargaining and that, under such circumstances, the states should be no more free to apply anti-trust laws than statutes or court decisions avowedly based upon those considerations.”

Under Professor Cox’s view, the rhetoric used by the Missouri Supreme Court seems to be the decisive consideration in denying state competence. Plainly, state courts and legislatures, determined to uphold state power, will be able to accommodate their rhetoric to the demands of the situation. Indeed, other passages in the Missouri opinion, not referred to by Professor Cox, if taken at face value, support the conclusion that Missouri was implementing a general
policy against restraint of trade and not "labor regulation as such." Thus the court emphasized throughout that the union was seeking to force the company to become a party to a conspiracy against independent contractors and their Mill-Wright employees.\textsuperscript{157} I.e., the union was seeking an agreement which would exclude from the market all contractors not under contract with the union. Such agreements which may be viewed as attempts at permanent exclusion from a market, can plausibly be said to involve the basic evils which anti-trust regulation is designed to suppress. In this connection, it is worth recalling that the basic dispute involved in Weber had moved a national administration, not unfriendly to labor, to institute anti-trust proceedings against a union seeking the same kind of exclusive arrangements condemned by Missouri in the Weber case.\textsuperscript{158}

These considerations underscore the difficulties with the contention that Missouri's regulation should have been invalidated because the Missouri judgment resulted from balancing the interests involved in labor regulation. This contention is no more persuasive than the claim that Missouri attempted to balance the interests involved in the application of general regulations in a specialized context, namely, labor-management disputes. Nor is there anything in the application of Professor Cox's formula to the Weber case which affords a useful guide for determining when general regulation, such as anti-trust regulation, will be treated as general regulations for preemption purposes rather than as labor regulation in disguise.

Although, as indicated more fully below, the formula in question may be a useful expedient for avoiding the drastic displacement of a broad range of state regulation, it involves a serious risk of making preemption a game played with labels\textsuperscript{159} which naturally do not disclose the determinants of decision. In this connection, it is instructive to compare Professor Cox's treatment of Weber with his treatment of a general regulation applied by a state to invalidate the erection of geographical trade barriers by a union through agreements with employers to boycott goods not produced in a given locality. Professor Cox, despite his approval of the foreclosure of state power in Weber, recommends the recognition of state competence in the latter situation.\textsuperscript{160} It is not easy to see the basis for this difference in result. In both situations the unions are attempting to maximize employment opportunities for their members by excluding specified enterprises from the market.\textsuperscript{161} In both situations similar arrangements among employers would appear to violate the state anti-trust law. Accordingly, the ultimate issue faced by state government in each case is whether a union's interest in maximizing employment for its members justifies a relaxation of the general rules against restraint of trade. It is difficult to see anything in the distinction between labor regulation as such and general regulation which warrants different decisions as to state power in these two situations. Nor do the interests emphasized in Garner, such as centralized administration of the national act, avoidance of overlap and the like, warrant such disparate results. Thus, if two unions struck for each of these objects there would in each case be similar possibilities of an overlap between state and federal remedies.\textsuperscript{162} Consequently, all of the arguments against state power invoked in Garner would be equally applicable to both situations.

It is difficult to avoid the conclusion that Professor Cox's formula will spawn a new set of slippery distinctions,\textsuperscript{163} thereby frustrating one of the purposes behind his general endorsement of a broad doctrine of federal preemption. Furthermore, that formula also threatens the other values invoked to support such a doctrine, namely, uniformity and preservation of the federally-created balance between labor and management. These consequences of the formula are interesting not only in their own right but also—and more importantly—because the necessity of invoking such a formula to avoid drastic impairment of state power puts into question the basic presupposition behind a broad and abstract rule of federal preemption.

The Court's decisions which bear on the proposed distinction between labor and general regulation, respectively, have not accorded significant weight to the fact that state regulation was of general application. At most, the Court has treated that factor as reinforcing other considerations invoked to sustain state power.\textsuperscript{164} As already indicated, that distinction will not serve to explain the Court's disposition of Weber.\textsuperscript{165} Indeed, in Gonzales, the dissenters pointed to broad language in Weber which rejected as irrelevant the state's contention that it was applying a rule of general application.\textsuperscript{166} Conversely, the fact that Wisconsin in the Kohler case predicated its restraint of violence on a labor relations statute did not operate to invalidate state action.\textsuperscript{167}

Perhaps the most striking instance of the Court's disregard of the distinction in question and its invalidation of general regulation is its treatment of state cases involving enforcement of so-called hot cargo clauses entered into by common carriers and unions representing their employees. Such clauses frequently give the carrier's employees the right not to cross picket lines and to refuse to handle "hot-cargo," defined to include non-union materials or materials produced by, or consigned to, another employer with whom the contracting union or some other union has a controversy. When such a controversy arises, the
union or the employees may invoke their "rights" under such clauses.

Such clauses appear plainly to be inconsistent with the historic duty of common carriers to serve without discrimination, a duty which arises under state as well as federal transportation law.\textsuperscript{168} Interference with that duty by private non-union groups could be remedied by state injunctions. Where, however, such injunctions or similar relief has been directed at unions or employers who are parties to hot cargo clauses, the Court has reversed, \textit{per curiam}.\textsuperscript{169} Furthermore, the Court has chosen not to notice that such cases involve three separable, if related, issues. The first relates to the propriety of a union's enlisting the help of the employees of employer B, the common carrier, in order to secure the union's demand against employer A, the primary employer. This issue involves the scope of the secondary boycott provisions [Section 8(b)(4)(A)] of the LMRA. The second issue goes to the validity of a hot cargo clause under the general transportation law of the state—an issue which has been pinpointed in the state litigation by requests for a declaration of the invalidity of such clauses.\textsuperscript{170} The third issue relates to the propriety of an injunction which requires not only the carriers but also their employees not to interfere with the rendition of equal services to the primary employer. A persuasive argument could be made that state determination of the second issue involves the effect of a transportation regulation of general application and not labor regulation as such. A similar argument could be made as to an injunction running against the carriers' employees and prohibiting interference with the carriers' discharge of its obligations, although the argument in this context involves greater difficulties.\textsuperscript{171} Indeed, the Court in dealing with the significance of a hot cargo clause as a defense to charge of violation of the LMRA's ban against secondary boycotts explicitly recognized that the validity of a hot cargo clause and its impact on the carrier's obligation to serve was a matter of transportation, rather than labor policy.\textsuperscript{172} But in dealing with state power over hot cargo clauses, the Court did not consider the separation of the transportation issue from the related issues but, by cryptic \textit{per curiam} decisions, nullified the state action \textit{in toto}.\textsuperscript{173}

If, as the foregoing discussion suggests, the label or the generality of state regulation is not a passport to validity, either all general regulation impinging on labor management relations will be invalidated unless the challenged regulation falls within established exceptions to the general rule of preemption or supplementary criteria will have to be developed. Total invalidity would, as indicated above, involve so drastic an attrition of state power and would leave such regulatory gaps as to be almost unthinkable. It would, for example, be bizarre indeed to strike down FEPC regulation, anti-trust regulation, transportation regulation, various forms of safety regulation, merely because such regulation limited the objectives sought in collective bargaining. On the other hand, the development of supplementary criteria which will give meaningful guidance to the interests affected and to state tribunals will be no easy task. Perhaps, all that can be said is that the decisive factor will be a judgment as to the impact of the state regulation on the central purposes of the national act. For example, FEPC regulation, barring the use of either collective bargaining or employer-determined hiring practices as an instrument of racial discrimination might well be treated differently from state imposed wage-ceilings or from general licensing requirements applicable to all agents of out-of-state organizations who solicit dues or the power to represent persons in their economic relations.\textsuperscript{174} Different treatment of those situations would appear to be justified because FEPC legislation seems to be more remote from the central objectives of the union movement and seems to involve less of threat to collective bargaining and employee freedom to choose their representatives than do the other forms of state regulation referred to above. It is plain, however, that difficult issues of degree are involved and that there is a genuine danger that the resolution of these issues will involve the Court in the slippery game of passing on the wisdom of the state action or the propriety or conventionality of the union objectives. But similar risks are a familiar and a possibly inescapable aspect of federalist accommodation.

In this process of accommodation, the fact that the state regulation applies generally to the non-unionized as well as the unionized sector, although not decisive, is not wholly irrelevant. The generality of the regulation may, together with other considerations, reflect the importance which a state attaches to the values involved. The requirement of generality may, moreover, curb regulations devised for the sole purpose of creating roadblocks to effective union organization or collective bargaining. But the reality of such a curb would, of course, depend on whether drafting skills or selective enforcement policies could be exploited to dress up anti-union legislation as general regulation. These considerations, which suggest that in some situations weight may be attached to the fact that regulation is of general application, are not offered as neat logical solutions for difficult questions of degree. They are essentially pragmatic limitations on both the range of state power which will be validated and on the otherwise broad sweep of current preemption doctrines.
NLRB Self-Limitation and State Competence

Guss v. Utah Labor Board\(^{175}\) involved the most dramatic attrition of state power in the area of labor relations. In Guss, the Court (with Mr. Justice Burton and Clark, dissenting) ruled that the NLRB's ad hoc decision not to handle a specific case or its published jurisdictional standards limiting its statutory power did not result in state authority to handle matters excluded from the Board's effective jurisdiction. The proviso added to Section 10(a) of the Wagner Act by Taft-Hartley provided, the Court concluded, the only method by which the states could be authorized to handle matters within the Board's statutory jurisdiction. That proviso empowered the Board to cede jurisdiction over certain cases to a state agency provided that there was conformity between the state regulation and the national statute. The Court read the proviso as excluding state action in cases where the Board, instead of ceding its jurisdiction, declined to exercise it.\(^{176}\)

No state has been able to meet the requirements of the proviso, as interpreted by the NLRB. Accordingly, the result of Guss and the Board's policy of selective jurisdiction is, of course, a no-man's land in which conduct unlawful under both federal and state law is not restrained by the Board and cannot constitutionally be dealt with by the states. This result, which under any circumstances would be indefensible as a matter of policy, is a grotesque paradox in the context of the LMRA. That statute in general expanded regulation of labor relations. It reflected, moreover, both in its provisions\(^{177}\) and its legislative history\(^{178}\) a special concern for the labor relations of smaller enterprises. And yet all regulation of the labor relations of such enterprises is suspended unless they fall within the ill-defined and shrinking category of businesses which do not "affect commerce" or unless exceptions to preemption, e.g., cases involving violence, are applicable. This result is an eloquent reminder of the difficulties produced by the failure of Congress to bring responsible craftsmanship to bear on the problems of federalism implicit in the LMRA.\(^{179}\)

Guss has sharpened for both the national government and state tribunals a set of problems whose solution will determine the effectiveness of labor regulation in the no-man's land and the scope of state authority over "small business." The essentially national problems include:

(1) The validity of the Board's jurisdictional standards, which have for some time been challenged as beyond the Board's statutory authority\(^{180}\) and which, after Guss, have been challenged as a violation of the Fifth Amendment.\(^{181}\)

(2) Revision by the Board of its jurisdictional standards, with a view to reducing or eliminating the no-man's land.\(^{182}\)

(3) The content of remedial legislation in the area "affecting commerce": (a) Should Congress require the Board to exercise jurisdiction over every enterprise subject, as a matter of constitutional law, to the commerce power? (b) Should the Board be authorized to limit its own jurisdiction either by general standards announced in advance or by ad hoc determinations? (c) Should Congress determine the limits of the Board's jurisdiction regardless of how those limits are defined? (d) Should the state be able to act independently of the national policy in the area of declined jurisdiction? (e) Should state action be subjected to the national policy through review by the NLRB or by the federal courts, with frivolous review deterred by the assessment of counsel fees against the culpable party?

An extensive discussion of these problems is beyond the scope of this paper.\(^{183}\) But a few general comments may be in order. First, it is plain that the Court cannot alone work out viable solutions. The Court can command the Board to occupy the no-man's land but only Congress can supply the necessary funds. Although Congress has recently increased appropriations for the Board,\(^{184}\) Congress, faced with a growing deficit and international tensions, is an unpredictable provider. The net result of judicial invalidation of the Board's current policies may mean theoretical relief for employees and employers involved in small enterprises which "affect commerce" but a denial of effective relief to all employees and employers because of increased delays in an area where a meaningful remedy must be a prompt one. This result plainly leaves much to be desired although it is appealing because it affords a remedy to the groups which need it most and "equal" in the sense that it may equalize chaos.

The problems which would be raised by requiring the Board to exercise jurisdiction over all of the enterprises affecting commerce obviously cannot be solved solely by larger appropriations. More money and more staff will not eliminate, and may indeed accentuate, the difficulties and delays inherent in an effort by a five man board in Washington to regulate up to the periphery of the national competence.\(^{185}\) Legislative changes in the Board's administrative structure,\(^{186}\) coupled with a legislative review and revision of rigid, time-consuming, and unproductive statutory requirements\(^{187}\) may perhaps make it possible for the Board to deal with a substantially increased load without multiplying current delays.

Pending such action, Guss will naturally complicate jurisdictional determinations by state agencies.
State power theoretically extends only to an ill-defined category of enterprises which do not "affect commerce." The Court has indicated that contacts with interstate commerce which are more substantial than "de minimis" are a sufficient predicate for the exercise of the national power.

The Court has, moreover, made it clear that the existence of national power is not to be determined solely by the quantitative effect of the activities under litigation. "Appropriate for judgment is the fact that the immediate situation is representative of many others throughout the country, the total incidence of which if left unchecked may well become far-reaching in its harm to commerce." But there are practical limits to the all-encompassing national power implicit in this approach. "Scholastic reasoning may prove that no activity is isolated within the boundaries of a single State, but that cannot justify absorption of legislative power by the United States over every activity." Precisely where scholastic reasoning ends and a functional approach begins has necessarily been left open. More concretely, the labor cases in which the Court has delineated the broad reach of the commerce power have not involved "small" retailers and service establishments which are loosely considered to be "local." Whether the Court will now validate state regulation of such enterprises is wholly conjectural. But so long as the no-man's land exists, it will invite a vigorous resistance, and in constitutional terms, an over-vigorous exercise of state power as the only method of shrinking the regulatory vacuum. It may also invite the Court by denial of certiorari to disregard state encroachments on the commerce area.

Beyond these questions of efficiency, there are naturally touchy and imponderable questions of faith suggested by slogans such as "states rights" and "uniformity in a national economy." In this connection it is again useful to keep in mind the difference between the exercise of federal power to enforce minimal standards throughout the sphere of national competence and the exercise of that power to exclude all state regulation. If the federal power is to be exclusive in the area of its application, the vitality of the federalist ideal and practical pressures may be strong enough to exclude federal power entirely from smaller business, thereby jeopardizing minimal federal objectives in that area. Thus, the accommodation in the no-man's land may well depend on the distribution of federal and state power throughout the whole area of labor relations.

The problem of federal-state accommodation in the no-man's land and elsewhere plainly call for Congressional solution. They involve clashes in basic outlooks and values whose resolution generates enormous strains on the Court — strains on its internal unity and on public acceptance of the finality and authority of its judgments. The tensions resulting from the lawless opposition to integration in education underscore the need for Congress to reduce the number of sensitive political judgments which the Court must make concerning matters which are not controlled by the Constitution. Perhaps these considerations, together with the anomaly of the no-man's land, will move Congress to face the intellectual, political, and practical difficulties raised by legislation which would occupy the no-man's land and which would also lay down clearer guides for an adjustment of federal and state power in the entire area of labor relations.

Section 301 and the Enforcement of Collective Bargaining Agreements

The dominant Congressional objective behind the enactment of Section 301 of the LMBA was a relatively simple one, namely, to eliminate certain technical obstacles to suits for breach of collective bargaining agreements. Such obstacles had been particularly formidable in actions at law because of the common law requirement that all members of a union be joined as party defendants or party plaintiffs and because of the failure in actions at law to shape the class suit into a device for satisfying or avoiding the requirements of common law doctrines. Congress, in its effort to overcome those difficulties, gave inadequate attention to federal-state relationships and to the relationship between judicial and administrative competence. As a result the Congressional effort to simplify the enforcement of rights under a collective bargaining agreement has paradoxically surrounded such enforcement with perplexing complexities.

Section 301 (a) provides:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Although the quoted provisions appear to be only a grant of jurisdiction, it should be noted that the standards for vicarious responsibility embodied in Section 301 (b) constituted substantive regulation: this provision was the only unequivocally substantive regulation in the section.

Section 301 has raised seven major problems:

(1) Did it confer only jurisdiction on the federal courts, which (respondent superior problems aside) were to apply state law in determining liability in
actions for breach of collective bargaining agreements? If so, was the section invalid as beyond the judicial power granted by Article III of the federal Constitution?205

(2) Did Section 301 provide for the development by federal courts of a new federal law of collective bargaining agreements thereby avoiding any constitutional problem under Article III?205

(3) If so, was state law displaced in state as well as in federal courts?

(4) In so far as state law was displaced, what was to be the source of the new federal substantive law?

(5) Was state jurisdiction also preempted?

(6) If state law was displaced but state jurisdiction survived, a set of problems, which may be conveniently described as the converse of the problems raised by Erie R. R. v. Thindpkins206 would result. Three considerations promised to make such problems especially troublesome in this context (a) the injunction is of great importance as a weapon and as a symbol in labor disputes. (b) Some states lacked restrictions on state injunctive procedures comparable to those imposed by the Norris-LaGuardia Act207 on the federal courts. (c) The legislative history of Section 301 implied that state remedies, including, apparently, injunctive relief, were to be supplemented rather than superseded.198

(7) Suits for breach of contract would sometimes involve conduct which could plausibly be claimed to be prohibited or protected under the LMRA and would also involve questions concerning the rights of unions to represent particular employees. Since such questions are for some purposes within the Board's exclusive jurisdiction, suits under Section 301 would require an accommodation between judicial power and that of the NLRB.196

In Association of Westinghouse Salaried Employees v. Westinghouse Corporation,208 the first case requiring the Court to determine the reach of Section 301, the question raised by Article III was deferred by a remarkable exercise in "statutory construction" and by a 3-3-2 division within the Court. Westinghouse involved a suit by a union for wages allegedly due to about 4,000 employees under the provisions of a collective bargaining agreement. There were four separate opinions, none of which secured a majority. Mr. Justice Frankfurter announced the Court's judgment that Section 301 did not authorize suits by unions to enforce employees' "personal" claims for wages. His opinion, concurred in by Mr. Justice Burton and Minton, emphasized that Section 301 was designed only to supply a federal forum for the enforcement of state law. To avoid the grave constitutional question posed by such an interpretation, the section was given a narrow construction, viz., that it did not extend to the Westinghouse case.

The Chief Justice, Mr. Justice Clark and Mr. Justice Reed concurred in the holding, but their opinions rejected the suggestion of a constitutional infirmity in Section 301.201 Mr. Justice Douglas, in a dissenting opinion concurred in by Mr. Justice Black, urged that the union had standing to sue and summarily disposed of the Article III question by asserting that Congress had authorized the federal courts to develop federal rules for the interpretation of collective bargaining agreements.

The process by which Mr. Justice Frankfurter avoided the constitutional issue seemed to involve a striking disregard of the language of Section 301 (b). That subsection provided explicitly that a labor organization, where commerce was affected, "may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States." (emphasis added.) This language, which surprisingly was not invoked by the dissenters, had separate significance only if it authorized unions to enforce rights which in one sense were "personal," to individual employees.202 Furthermore, a literal construction of the quoted language was supported by several practical considerations: First, there is a close relationship between the union's enforcement of so-called personal rights by the grievance-arbitration procedure and by court action, where necessary. Secondly, there were substantial difficulties involved in separating "individual" and collective interests.206 Thus some familiar contract clauses, e.g., a provision that employees be paid for time spent on union activity or a provision against discrimination for union activities, plainly involve a coalescence of individual and collective interests. Furthermore, the union, as the individual's representative for the negotiation and administration of the agreement, has an interest in the proper application of every contract clause. This interest was recognized in other provisions of the statute even though they were primarily directed at protecting the interests of the individual employee.204 Finally, although court action by individual employees where permitted by the collective agreement205 had not, as Mr. Justice Frankfurter noted, been blocked by the procedural obstructions to actions involving unions, there were other practical obstacles to such suits. Thus where restrictive doctrine precluded the use of the class suit as a device for enforcing small claims, the small stake of each potential plaintiff involved excessive litigation expenses, which might result in the abandonment of the claim. In view of the foregoing considerations, the line drawn by a majority of the Court seemed a dubious one whether tested by the language of the statute or by the functional problems involved.
That line, moreover, in no way changed the character of the constitutional issue which ultimately would be raised by a case involving a union's "collective interests." If in such a case the constitutionality of Section 301 were sustained, doubt as to the continued vitality of the "Westinghouse" decision would necessarily result.296 Westinghouse, insofar as it was based on constitutional considerations, was thus a delaying action. Since it involved distinctions dubious in the light of functional considerations and the possibility of early obsolescence, it was doubtful that the delaying game was worth the candle.

In Textile Workers Union v. Lincoln Mills,297 the Court disposed of the constitutional problem tabled in Westinghouse. Its reasoning provoked thoughtful complaints that it had not candidly faced the difficulties involved, had dealt cavalierly with evidence of legislative purpose, and had substituted dogmatic assertion for reasoned discussion.298

Lincoln Mills, and its two companion cases,299 each involved a controversy about the amount of money due to individual employees under a collective bargaining agreement providing for arbitration as the terminal step for settling specified disputes. In each case the employer, after processing a dispute through the pre-arbitration steps, declined to submit it to arbitration. The unions in each case thereupon brought an action in a federal district court for specific performance of the agreement to arbitrate. They invoked Section 301(a) of the LMRA as the source of federal jurisdiction and relied on that section and the United States Arbitration Act210 as a source of equity jurisdiction.

The Court's opinion was announced by Mr. Justice Douglas, who spoke for a majority of five. It held that Section 301 requires federal courts to give specific enforcement to agreements to arbitrate grievance disputes. It relied largely on the legislative history of Section 301. This history, although characterized by the Court as "cloudy and confusing,"301 was read as reflecting a federal policy of promoting the inclusion of no-strike clauses in collective bargaining agreements and providing for the enforceability of such clauses. Arbitration agreements, the Court urged, are the quid-pro-quo for no-strike clauses.302 Accordingly, Section 301 was not merely jurisdictional. "It expresses a federal policy that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can be best obtained only in that way."303 This policy required specific enforcement of arbitration clauses.

The Court, having asserted earlier in the opinion that Section 301 is a mandate to the federal courts to fashion a body of law for the enforcement of collective bargaining agreements,304 turned to this question again but merely reiterated its assertion. It thus surmounted any constitutional obstacle under Article III by making it clear that litigation under Section 301 would present a "federal question." This phase of its opinion, in striking contrast to the first phase, contained no references to legislative history; its earlier references did not bear on this basic problem.

The Court's conclusion that Section 301 itself must be read as providing for specific enforcement of arbitration clause made it unnecessary to deal with problems raised by the United States Arbitration Act, which was not mentioned.305

The Court did, however, consider the broad restrictions on the jurisdiction of federal courts embodied in the Norris-La Guardia Act. Although conceding that a literal reading of that Act barred specific enforcement of arbitration clauses,306 the Court found it inapplicable because such enforcement was not "part and parcel of the abuses against which the Act was aimed."307 It found further justification for its position in Section 8 of Norris LaGuardia, which endorses the settlement of disputes by arbitration by denying injunctive relief to any person who has not made "every reasonable effort" to settle a labor dispute by arbitration, among other means.308 Accordingly, the Court concluded, there was "no justification in policy for restricting Section 301 to damage suits, leaving specific performance of a contract to arbitrate grievance disputes to the inapposite procedural requirements of that Act."309

Mr. Justice Burton, joined by Mr. Justice Harlan, concurred separately. They found federal power to fashion an "appropriate remedy," i.e., specific performance, in Section 301 itself, in inherent equitable powers, "nurtured by a Congressional policy to encourage and enforce labor arbitration in industries affecting commerce."310 Their crucial difference with the majority lay in their conclusion that the federal courts should apply state substantive law and should look to federal law only in connection with remedial questions. They surmounted Article III problems by approving a concept of "protective jurisdiction."311

Mr. Justice Frankfurter wrote a 24 page dissent supplemented by an 85 page appendix, embodying extracts from the legislative history. He urged that the Court's transformation of a plainly procedural or jurisdictional section into a mandate for the invention of a body of substantive federal law had ignored both the language of Section 301 and its legislative history. He urged also that even if such a mandate were inferred, the relevant federal law, the United States Arbitration Act, excluded specific enforcement of arbitration clauses in collective bargaining agreements. Finally, he rejected the applicability of the
protective-jurisdiction concept to this case. He concluded that Section 301, as an exclusively jurisdictional provision which was to operate in the absence of diversity of citizenship or a federal question, was beyond the federal judicial power conferred by Article III of the Constitution.

A comprehensive analysis of the rival positions advanced in Lincoln Mills would be a tempting exercise. But such an analysis, which has already been ably done,272 would take us too far afield from our main concern, which is the unresolved problems regarding the role of state law and state jurisdiction in the enforcement of collective bargaining agreements.

The Court in Lincoln Mills declared:

"... the substantive law to be applied in suits under § 301 (a) is federal law, which the Courts must fashion from the policy of our national labor laws. ... The range of judicial inventiveness will be determined by the nature of the problem.

... Federal interpretation of federal law will govern, not state law. ... But state law, if compatible with the purpose of § 301, may be resorted to in order to find the rule that will best effectuate the federal policy. ... Any state law, applied, however, will be absorbed as federal law and will not be an independent source of private rights."273

The Court spoke in the context of an action filed in a federal court pursuant to Section 301(a). Nevertheless, its language suggests that federal law will also control actions which could have been filed in a federal court, but were filed in a state forum.274 The federal law governing collective bargaining agreements plainly appear to constitute "laws of the United States" binding on state courts by virtue of the supremacy clause of the Constitution.275 Furthermore, given the Court's general emphasis on the desirability of uniform handling of problems of labor relations and its particular emphasis in Lincoln Mills on the federal interest in the integrity of collective bargaining agreements, it is highly unlikely that the Court would sanction the development of two competing systems of substantive regulation applicable to actions on collective bargaining agreements.

The Court's opinion does not make clear whether state jurisdiction over Section 301 actions, as well as state substantive law, is foreclosed. Such jurisdictional preemption has been urged by commentators.276 But whatever the merits of such a result as a matter of policy,277 Section 301 does not provide that federal jurisdiction should be exclusive, and its legislative history suggests that state jurisdiction was to be supplemented rather than superseded. Thus unless the Court is prepared to sanction a free-wheeling inroad on traditional state jurisdiction, it will recognize parallel state jurisdiction over Section 301 actions.278

The recognition of such jurisdiction, coupled with the controlling effect of a federal "substantive law," will involve complex adjustments between the state and federal system. The converse of the difficulties which have surrounded the Erie doctrine in the federal courts will as already indicated, be transplanted into the state system. What is the line between "substantive" and "procedural" law for this purpose? May states use the machinery prescribed by their arbitration acts to enforce an agreement to arbitrate or an arbitration award?279 May state courts deny remedies, such as specific enforcement of arbitration clauses, granted by the federal courts. May the state courts grant remedies, such as the specific enforcement of no-strike clauses, which may be denied in the federal system. Such problems, which will be discussed below, will be puzzling even after content has been given to the federal law, which, in Mr. Justice Frankfurter's phrase, is still largely "in the bosom of the judiciary."280

But during the period of uncertainty, which promises to be long, state courts will be bedeviled by questions concerning both the content and the authoritative sources of federal law. How, for example, does a decision by a federal district court sitting within or outside of a given state rank with a decision of the highest state court?281

The state courts will, in addition to these special problems, have problems in common with the federal courts while the federal law is being developed. Under Lincoln Mills, federal law governing collective bargaining agreements is to be derived from the policy of our national labor laws. Federal labor laws and other federal laws, such as antitrust regulation, which impinge on labor relations, are complex and often reflect policies not easy to accommodate.282 Furthermore, except for a narrow range of issues,283 it is difficult to secure from the LMRA or other national labor laws significant guidance for the development of a new body of jurisprudence to govern the enforcement of collective agreements. It thus seems likely that the new federal law will be distilled largely from state court doctrines, which in turn were derived largely from commercial law analogies reshaped to some extent to reflect the distinctive elements of the collective bargaining relationship. The large and growing body of published arbitration awards will presumably be another source of guidance. Whatever the ultimate content of the federal law, it seems likely that state courts will during its developmental stage identify their own precedents as "federal law" unless the precedents appear to be unsound or incompatible with purposes implied by the LMRA or other federal statutes.
Soon after the decision in Lincoln Mills, several of the major problems flowing from the Court’s approach were presented to the California Supreme Court in McCarroll v. Los Angeles County District Council of Carpenters. In McCarroll, a labor union had entered into a collective bargaining agreement containing a no-strike clause and a conventional grievance and arbitration clause. The union, claiming that the employer had engaged in allegedly illegal labor contracting and had not conformed to safety standards, called a strike. The Supreme Court of California, with one judge dissenting, affirmed the grant of a preliminary injunction against the union’s violation of its no-strike pledge. The court in an opinion by Justice Traynor concluded that the Norris LaGuardia Act would have precluded injunctive relief by a federal court—a conclusion which is, however, open to question under the rationale of Lincoln Mills. Although recognizing the controlling effect of federal substantive law, the court concluded that a state was free to grant a remedy unavailable in a federal forum.

The problem of disparate state and federal equitable remedies for contract violation involves a dilemma which cannot be resolved in a manner which is compatible with both the implications of Lincoln Mills and the legislative history of Section 301—a dilemma which annotates Mr. Justice Frankfurter’s warning in his Lincoln Mills dissent that the Court’s approach “is more likely to discommodulate than to compose.” Although the Court in Lincoln Mills unfortunately did not set forth the policy considerations supporting the supersession of state substantive law, presumably it deemed the uniformity which might ultimately be achieved as justifying the labor pains which would surround the birth of a federal substantive law.

The importance which the Court apparently attached to uniformity is a basis for a strong argument that the Norris LaGuardia Act, although literally applicable only to federal courts, should also control state enforcement of collective bargaining agreements. The availability of a labor injunction has a crucial impact on the balance of power between the contending forces. Furthermore, the Supreme Court in the much debated Hutcheson case gave far-reaching substantive effect to the Norris LaGuardia Act in the federal system. Presumably, the uniformity which the Court seeks is not a wooden uniformity of “substantive” rather than “remedial” law, but a uniformity which is meaningful in the light of the interests at stake. Such meaningful uniformity would be frustrated by a doctrine permitting either forum-shopping for the purpose of securing an injunction in labor disputes or disparate results in the federal and state courts.

In this connection, the Supreme Court’s recent decision in Bernhardt v. Polygraphic Co. of America is significant. In Bernhardt, the Court held that a federal court, required by Erie R.R. v. Thompson to follow state “substantive” law in a diversity action, was barred from specifically enforcing an agreement to arbitrate where that remedy was not available under the applicable state law. It found the remedy “outcome-determinative” within the meaning of Guaranty Trust Co. v. York. In the converse situation presented under Section 301, the desire for uniformity which apparently moved the Court to fashion a controlling federal law, would appear to require the states to deny injunctive relief if it is not available under federal law.

Although the Supreme Court of California in McCarroll expressed doubts as to the authority of Congress to require state courts to withhold state remedies in Section 301 litigation, such doubts seem unwarranted. Congress may lack authority to impose general regulations on state procedure, but the supremacy clause and the commerce clause, which would support the complete ouster of state jurisdiction, would also appear to support a Congressional mandate that strikes in the area of commerce, although giving rise to damages, should be free from state, as well as federal, injunctive relief.

If, however, the implications of the policy of uniformity were followed, a paradoxical frustration of the purpose behind Section 301 would be involved. The pertinent legislative history suggests that the primary objective of Congress was to secure increased union compliance with no-strike clauses by facilitating the recovery of damages for the breach of such clauses. Although Congress deliberately declined to lift the restrictions of the Norris LaGuardia Act from federal courts, neither section 301 nor its legislative history discloses a purpose to interfere with state procedures or state remedies. On the contrary, the legislative history suggests that reliance was to be placed on the normal processes of the courts, which included injunctive relief in those states which lacked baby Norris LaGuardia Acts or which had construed them as inapplicable to contract disputes. Furthermore, a damage suit is often a much less effective stimulus to union responsibility than injunctive relief. It would, as Justice Traynor suggested in McCarroll, be an ironic twist to read Section 301 as excluding state injunctions against breach of a no-strike clause.

The Supreme Court may escape from the dilemma illustrated by McCarroll and from all of the converse-of-Erie problems by holding, contrary to McCarroll, that state jurisdiction over Section 301 actions, as well as state law, is preempted. Complete federal preemption would be a logical sequel to Lincoln Mills and an escape from some of the problems it has spawned.
But, as indicated above, it would, in the absence of new legislation, appear to involve an impairment of state power unwarranted by either the language or the history of Section 301.

If state competence survives, state as well as federal courts will be faced with a series of subtle and complex problems when contract actions raise issues which for some purposes are within the jurisdiction of the NLRB. Such issues may, for example, arise from contentions that the alleged contractual violations were or might be deemed to be conduct prohibited by the LMRA or (2) that the alleged violations were justified by the plaintiff’s antecedent unfair labor practices and were consequently protected by the federal statute or (3) that the validity of the underlying contract or of the particular contractual provision in question, or that the right to maintain a contract action, depends on statutory or administrative criteria which peculiarly involve the Board’s expertise and which should therefore be applied by the Board rather than by the courts. Such issues will call upon the state courts, and the lower federal courts, initially, and the Supreme Court, ultimately, to make adjustments between two putatively competent jurisdictions, that of the courts over contract actions and that of the Board over unfair labor practices, representation matters, and protected activities.

In this connection, it is useful to refer generally to the respective responsibilities of the NLRB, the courts, and arbitrators for issues involving an alleged breach of a collective bargaining agreement. The interpretation and administration of collective bargaining agreements is the responsibility of the courts and of arbitrators and not of the Board. The Board, although not the proctor of the bargain, is the proctor of the bargaining process; in policing the process in enforcing the duty to bargain, the Board will sometimes be faced with issues as to the scope of the bargain. Thus Section 8 of the LMRA provides that the duty to bargain is violated by the use of economic power to secure the modification of an existing contract provision during the term of the contract. Similarly, the Board has held that a unilateral repudiation of the existing terms of an agreement, or an employer’s unilateral change in wage rates or other conditions of employment, constitutes a violation of the duty to bargain. Charges of violations of the duty to bargain thus sometimes require the Board to determine the scope of any explicit or implied agreement sanctioning or excluding unilateral action. But such determinations are primarily a function of the Boards concerned with the integrity of the bargaining process and not of any jurisdiction over breaches of the agreement as such.

The LMRA in general commits to the courts the responsibility for remedying breach of collective bargaining agreements. But in practice the issues of contract administration raised by claims of breach are for the most part resolved by recourse to arbitration rather than the courts. Congress was familiar with, and endorsed, the use of the arbitration mechanism—an endorsement which was generously implemented by the Court in _Lincoln Mills_.

The respective functions of the Board, the courts, and arbitrators, suggest strongly that an overlap, actual of potential, between statutory and contractual prohibitions should not in general curtail the jurisdiction of the courts directly to remedy alleged breaches of substantive contractual provisions or to compel recourse to the contractually prescribed arbitration procedures for the disposition of the issues involved. The Supreme Court has not yet ruled on these questions; the opinions of other courts are obscure and conflicting and the commentators are also divided.

Accordingly, it may be useful to consider two specific instances of overlap which have proved troublesome: (1) actions to remedy an alleged violation of a no-strike pledge when the strike may be an unfair labor practice; (2) actions to compel specific performance of an agreement to arbitrate or the observance of an arbitration award, when the underlying conduct which is within the putative competence of the arbitrator may be an unfair labor practice.

A strike (or a lockout) designed to change the provisions of a collective bargaining agreement during its term is generally a violation of both the federal statute and of a typical no-strike clause. Under the LMRA both the courts and the Board are putatively competent with respect to the underlying conduct. But the perspective of the Board, on the one hand, and the courts and arbitrators on the other, differ. The courts are concerned with the compatibility of the conduct with the standards embodied in the bargain; the Board with the compatibility of the conduct with the statutory standards regulating the bargaining process. Since the Courts and the Board have different standards and are reaching for different, if related, objectives, the fact that their respective jurisdictions may overlap in a given situation does not appear to warrant a destruction of either type of jurisdiction. Accordingly, such overlap alone would not appear to justify a limitation on the general legislative purpose—to entrust contract actions to the courts or, where the parties prefer, to arbitration.

The contrary approach would not only risk frustration of that legislative purpose but would also give rise to important and unnecessary practical disadvantages. It would complicate judicial enforcement by requiring the courts to test their jurisdiction against a complex body of NLRB precedents which are not
directly relevant to issues of contract administration. It would deprive litigants of a complete, and often more expeditious, judicial remedy because of the possible existence of an administrative remedy which might, however, not be forthcoming. The possible existence of two remedies thus might in practice paradoxically result in the denial of any remedy. Such denial would, of course, always result in cases falling within the no-man's land.

Garner has been invoked to support ouster of judicial competence over contract remedies involving overlap with the statutory remedies. But the applicability of Garner in this context is extremely questionable. Garner did not involve the enforcement of obligations voluntarily assumed by the parties but the enforcement of obligations imposed by the coercive power of the state. The failure of the LMRA to deal expressly with the exercise of such coercive power contrasts sharply with its explicit sanction of judicial competence over contract actions—a competence which the statute does not purport to qualify in situations involving overlapping remedies. Furthermore, where a defendant challenges the jurisdiction of a court over contract actions on the ground of possible overlap, judicial action, even if it reaches conduct prohibited by the statute, will involve only a different method of vindicating the national policy. And if the defendant's conduct is not prohibited by the statute, there is no room for the approach suggested by Garner, under which activity not prohibited by the federal act is to be free from supplementary governmental prohibitions. Section 301 means that supplementary prohibitions imposed by collective bargaining agreements are in general to be judicially enforced even though they may curtail activities which, in the absence of contractual restrictions, would be protected by the statute. In view of the essential differences between the problems involved in Garner and those raised by the exercise of the power conferred by Section 301, overlap between contractual and statutory prohibitions does not appear to warrant curtailment of judicial power to enforce collective bargaining agreements.

This conclusion is reinforced by the decisions of the Court in other contexts. Thus the Court has held that judicial enforcement of Section 303 of the LMRA is completely independent of Board enforcement of the parallel provisions of Section 8 (b) (4). Section 303 imposes liability in damages for violations of the complex provisions of Section 8 (b) (4), which, as to permanent preventive relief, are within the Board's exclusive jurisdiction. The case for independent judicial competence as to contract enforcement under Section 301 is considerably stronger in view of the fact that the statute generally entrusts such questions to the courts rather than to Board.

The overtones of Gonzales point in the same direction. It will be recalled that the Court there emphasized that the crux of the action was contractual and that remedies for breach of contract should not be displaced merely because of a possibility of overlap with a Board proceeding. Although the "contract" involved in Gonzales was not covered by Section 301, that fact does not weaken the implications of that case for the problems of overlapping jurisdiction in the context of Section 301. The dominating consideration both as to Section 301 agreements and the "contract" embodied in union constitutions is that both types of agreements were to be enforced by the courts. If overlap does not curb the courts as to the membership contract, it should have no greater effect as to collective bargaining agreements. Indeed, in view of the plain and explicit mandate of Section 301, it is arguable that greater protection to judicial competence over Section 301 actions would be appropriate.

All of the considerations which support judicial competence directly to enforce the substantive provisions of a contract despite their possible overlap with the LMRA apply where the aid of a court is invoked to support the arbitration process in an action to compel observance of either an agreement to arbitrate or an arbitration award. There are, moreover, additional reasons for sanctioning judicial competence to support the arbitration process under such circumstances. The widespread use of the arbitration mechanism as an instrument of self-government is persuasive evidence of its utility. Arbitration has, moreover, been endorsed not only by the LMRA but also by the Board. Thus the Board, which has been extremely jealous of its jurisdiction in non-contractual matters, has not sought to displace arbitral jurisdiction in cases of overlap. On the contrary, it has relinquished its own jurisdiction in deference to arbitration—a self-denial which is striking in view of the provisions of Section 10 (a) of the LMRA. Although the Board's decisions involve uncertainties, they indicate generally that even though alleged contractual violations are or may be statutory violations, arbitral procedures prescribed by the contract should be exhausted before there is recourse to the Board's machinery. And where an arbitrator has adjudicated an issue within the Board's statutory jurisdiction, the Board will in general stay its hand except where its intervention is necessary to remedy procedural unfairness in the arbitration process or to reverse a result repugnant to statutory policies. The Board has thus recognized that the national policy entrusts the responsibility for securing performance of contractual obligations to other tribunals. It has, moreover, recognized the special values attached to the arbitration process. And the Board's approach represents an ap-
appropriate adjustment between those values and the desirability of protecting the basic standards embodied in the national scheme. It gives the mechanism of self-adjustment full scope and yet permits correction of procedural abuse or departures from the federal standards by the exercise of the Board's paramount power. Similar considerations justify the preservation of judicial competence to aid the arbitration process despite the fact that the underlying conduct to be adjudicated may involve statutory as well as contractual prohibitions.

It may be urged, however, that the values of arbitration depend essentially on the parties' willingness to use it after a particular controversy has arisen. Thoughtful students have expressed concern that judicial intervention in cases which involve a breakdown of arbitral procedures threatens the values of arbitration as a self-operating instrument of self-government. It is not necessary here to explore the merits of that position or to elaborate the interesting contrast between it and the long search for obligatory jurisdiction and the rule of law in the international sphere. It is sufficient to note that Lincoln Mills has declared that the national policy favors the use of judicial power to compel the parties to use arbitral machinery prescribed by the contract.

The exclusion of judicial competence because of overlap would not only undercut that policy but might also result in an artificial fragmentation of the arbitrator's jurisdiction and the intrusion of unnecessary technicalities in grievance adjustment. A concrete situation will illustrate these difficulties. A typical contractual provision, prohibiting employer discrimination against employees on account of their union activities, duplicates the prohibition of Section 8 (a) (3) of the LMRA. Findings of fact which established or negated the violation of the contract provisions would, if accepted, presuppose the same result under the statute. But a collective bargaining agreement would typically contain another provision protecting employees against discharge without "just cause." The Board does not, however, police discharges not based on "just cause" unless they are connected with employee participation in or abstention from union (or related) activities.

Under the contract described above, if an employee's discharge were questioned, the issues before the arbitrator would not be the same as those before the Board in an unfair labor practice proceeding. Both the Board and the arbitrator would be faced with the issue as to whether discrimination had entered into the discharge. But for the Board, unlike the arbitrator, that would be the only issue in the case. Once the Board rejected the charge of discrimination, it would have no jurisdiction over the issue of employee misconduct and the appropriateness of discharge as a penalty. The arbitrator, after finding no discrimination, would, however, be faced with such issues.

The arbitral and Board jurisdiction could be divided with the arbitrator empowered to pass only on the issue of "just cause" and with the Board retaining exclusive jurisdiction over issues of discrimination. Although some courts have fragmented the contract issues in this way to avoid the overlap issue, such treatment plainly involves an artificial separation between two interrelated questions. In any close arbitration case the existence of discrimination would manifestly affect the determination of "just cause" and would be litigated even if the arbitrator theoretically lacked jurisdiction to resolve the discrimination issue. Neither the statute nor policy considerations warrant the artificial fragmentation of two related issues or a division of jurisdiction which would call for two proceedings before both issues could be resolved. Nor is there any justification for a rule which might require parties to draft grievances so as to make clear the issues of contract interpretation involved do not overlap with questions of unfair labor practices. Such technical niceties wholly inappropriate to the informality of the grievance process would become important if arbitral jurisdiction, or judicial competence to direct arbitration, were ousted by overlap.

Somewhat greater difficulties of adjusting judicial and administrative competence are involved when a defense against an alleged breach of contract rests on the contention that the apparent breach was provoked, and rendered privileged, by the plaintiff's antecedent unfair labor practices. The problem suggested by Mastro Plastics Corporation v. NLRB illustrates the difficulties involved. In that case, the Supreme Court ruled that a no-strike clause which in general terms barred all strikes did not apply to a strike in response to the employer's serious unfair labor practices. The Court, accordingly, characterized the strikers' conduct as protected and sustained a Board order reinstating strikers who had been discharged. Antecedent unfair labor practices, such as those involved in Mastro Plastics might be invoked as a defense to an action against the union for damages or for injunctive relief, based on breach of contract. The question would then arise as to whether the court itself should determine whether such unfair labor practices were committed or whether it should require the union to raise that issue by filing a charge with the Board, staying the contract action pending an administrative determination. The doctrine of "primary jurisdiction" appears at first glance to call for reference of such specialized questions of fact to the Board, assuming that the statute of limitations has not run and that the Board's jurisdictional yard-
sticks are satisfied. But further analysis suggests doubt as to such a result.

When a union urges that a general no-strike pledge does not bar a strike prompted by particular conduct, the issue raised is strictly, not the proper characterization of the employer’s conduct under the LMRA. The issue is whether the employer’s conduct is of such character as to justify a construction of the no-strike clause which renders it inapplicable to the strike in question. A no-strike clause may, of course, be inapplicable even though no employer unfair labor practice is involved, for example, when a strike occurs, during the term of a contract after an impasse produced by negotiations concerning wages under a reopening clause. On the other hand, a no-strike clause may be applicable despite the presence of employer unfair practices, for example, where a no-strike clause specifically applies to strikes caused by unfair labor practices. Accordingly, what is decisive in the hypothetical contract action is not the characterization of the employer’s conduct under the LMRA but an appraisal of its relationship to the purposes which can reasonably be imputed to the parties. The basic issue thus appears to be one of contract interpretation rather than one which involves the NLRA’s specialized competence as to unfair labor practices. The alternative approach to this problem which urges exclusive jurisdiction over activities appears to disregard the essential nature of the issue involved.

Whatever the force of the foregoing analysis or its applicability to other situations, other considerations of convenience and policy support the desirability of avoiding fragmentation of jurisdiction when unfair labor practices are urged as a defense in an action on a collective bargaining agreement. The Board’s machinery has been subject to great delays, delays which may be increased by the expansion of the Board’s jurisdiction. The fragmentation of jurisdiction would import such delays into contract actions. In all actions on no-strike pledges, defendant-unions might attempt to postpone judicial relief by defenses (meritorious and frivolous) based on alleged unfair practices by the employer. Delay is particularly undesirable in connection with any action to enforce collective bargaining agreements because of the adverse impact of such actions on the parties’ continuing relationship and on subsequent negotiations. In the case of action for injunctive relief against strikes and lockouts, there are, of course, special reasons for avoiding the pyramiding of delays. If the Supreme Court should sanction such injunctive relief notwithstanding the Norris-LaGuardia Act, its decision would reflect the judgment that the national labor policy calls for a prompt preventive remedy. To defeat such a remedy because of concern for the Board’s “primary jurisdiction” would scarcely yield a coherent policy.

The invocation of “primary jurisdiction” in contract actions would, moreover, not be wholly consistent with the Court’s decision in other contexts. The Court’s direction in Lincoln Mills that the new federal law for collective contracts should reflect the policy of the national labor laws implies judicial competence to deal with unfair labor practice problems enmeshed in a contract action. Furthermore, the decision that court actions under Section 303 are independent of Board actions under the parallel provisions of Section 8 (b) 4 of the LMRA strongly suggests a similar recognition of independent judicial competence under Section 301.

The contract actions discussed above all involve situations in which the basic issue turns on the meaning or applicability of the contractual provisions. More troublesome questions of accommodation between judicial and administrative competence are raised where the result in a contract action turns on whether a particular contract clause violates the provisions of the LMRA or on questions of representation.

Such matters involve the specialized insights attributed to the Board rather than the more general insights about the institution of contract attributed to the courts. For example, an employer may defend against an action to restrain, or to grant damages for, his alleged violation of a union-shop-clause coupled with a check-off provision. The issue before the Court is whether the union-shop arrangement satisfies the statutory requirements, i.e., whether the provision on its face or in its application constitutes an unfair labor practice. In such situations, a strong case can be made for the invocation of primary jurisdiction. On the other hand, Section 303 again may be invoked as an indication that where judicial competence is recognized by the statute such competence is not to be fragmented in order to protect the Board’s jurisdiction. There is plainly no apparent reason for permitting the courts under Section 303 to adjudicate such complex matters as the scope of vague proscriptions of secondary boycotts while denying their competence to pass on the reach of other provisions which may invalidate contract clauses relied on in an action under Section 301.

There is no easy escape from the dilemma involved. The recognition of complete judicial competence to deal with all questions raised by Section 301 actions will run the risk of results incompatible with, and subject to nullification by, Board determinations. The fragmentation of judicial competence by the invocation of primary jurisdiction will subject the plaintiff to delays in an area where stability in labor relations calls for a prompt remedy. Although the problem
scarcely is an invitation to dogmatism; the importance of a prompt remedy, the implications of the Court’s recognition of independent judicial competence under Section 303 and the provision for an apparently similar competence under Section 301, may justify the rejection of “primary jurisdiction” in actions involving the validity of a contract clause under the LMRA. In any event, this approach has the persuasive support of Judge Magruder, speaking for the First Circuit.

The difficulties of accommodating administrative and judicial competence in Section 301 actions are most acute when the validity of an agreement or its enforceability turns on a question of representation. Such questions would, for example, be decisive in the following situations: (1) A defendant (employer or union) may urge that the contracting but uncertified union lacked majority support in the appropriate unit when the agreement was executed and that the agreement was consequently invalid. The determination of such questions involves complex administrative standards governing unit determinations and the indicia of majority support—matters which peculiarly involve the Board’s competence. (2) During the term of a contract valid ab initio, the employees of the unit involved shift their allegiance to a rival union. Such a shift may produce problems as to which union is entitled to administer the old contract. Furthermore if the employer recognizes, and contracts with, the rival, there will be problems as to the impact of the new situation on the predecessor’s rights under the old contract.

Where the successor union has been certified by the NLRB, the court can generally resolve issues concerning the right to enforce the old contract or the right to enforce a later and inconsistent contract, without invoking rules within the Board’s special competence. Indeed, the Board has abstained from determining such contractual issues even though it certifies a new bargaining agent prior to the expiration of a contract with a predecessor representative. The recognition of judicial competence over such issues is accordingly necessary to avoid a vacuum.

Where, however, no such certification has occurred, determination of rights to enforce the first contract or the effect of a later contract between the employer and an alleged successor union depend on complex and shifting administrative standards regarding “schism” and the lifting of “the contract bar” and the Mid-West Piping doctrine. There is no need here to elaborate on these standards. It is enough to note that courts of general jurisdiction may find them somewhat esoteric and not easy to manage, that they peculiarly involve the expertise attributed to the Board and that determinations concerning breach of contract which involve such issues could be undone by the exercise of the Board’s paramount power. Such considerations make a strong case for the invocation of “primary jurisdiction.”

It is, however, possible to read Section 301 as a somewhat oblique rejection of that doctrine. That section applies to “suits for violations of contracts between an employer and a labor organization representing employees in an industry affecting commerce.” (Emphasis added.) The quoted language is extremely puzzling; it does not make clear whether the union is to have representation status as of the time of suit, at the time the agreement was executed, or as of such time or times as are relevant in the light of the issues to be litigated. But the difficulties resulting from inartistic drafting can, in accordance with the mandate of Lincoln Mills, be resolved in the light of the policy of the national labor laws. The second ambiguity of the language is more important in relation to “primary jurisdiction”: Does the inclusion of the reference to representation in a section creating judicial competence imply that the courts, rather than the Board, are to resolve representation issues relevant to the contract issues involved. That view has been advanced by Judge Magruder, speaking for the First Circuit. It is, however, doubtful that the puzzling language of Section 301 would justify the rejection of “primary jurisdiction” if its application appears justified by an appraisal of the competing interests involved. Indeed, the language quoted above may be dismissed as disclosing nothing about the legislative purpose concerning a relatively sophisticated concept, such as “primary jurisdiction”; that language, after all, may be read as representing only an effort, inartistically executed, to limit Section 301 to cases “involving commerce.”

The distinctions suggested above between issues of contract interpretation and genuine issues of primary jurisdiction are complex. Perhaps they are unduly complex. Perhaps the complexities should be avoided by reading Section 301 as a mandate to the courts to decide whatever unresolved issues must be decided to dispose of a claim for breach of contract. Such an expansive view of judicial power would involve the courts in complex and specialized issues, but it would also reduce the possibilities that undue preoccupation with so-called “expertise” and with “uniformity” would result in denying prompt and comprehensive relief, and in some cases, all relief.

Those whose patience has brought them this far may feel a sense of despair about the complexities and the paradoxes involved in the accommodations between federal and state power over labor relations (or involved at least in this paper). In a period bristling with primitive denunciation of the Supreme
Court it is appropriate to say again that these problems have not been created by the Court. They result in part from the complexities of a federal system, which are magnified in a "field," such as labor relations, which intersects with so many activities and implicates such diverse forms of regulation. They result also from the default of Congress with respect to fundamental issues whose solution determines how and by whom a modern economy should be governed and, indeed, in some situations whether it is to be governed at all.

In the context of labor relations, the judicial process is a doubtful instrument for filling the policy and power vacuum left by Congress. The problems involved are highly charged and political in every legitimate sense. Under the current statute, the Court, no matter how it decides, cannot escape the charge that it is preferring one powerful interest over another. The problems do not, moreover, lend themselves to solution by comprehensive formulas which the Court tends to lay down to reduce case-by-case tests of preemption and to rationalize policy judgments in terms of the legislative will. Thus, for example, the rule of the states with respect to strikes for higher wages might well be different from their role as to strikes to impose geographical trade barriers or to prevent technological innovation. But the Court's formula and the Court's processes are not adequate to the task of making such functional adjustments.

It may be that, despite the defects of the judicial process, the issues of federalism in labor relations must be left to the Court because they are too complex for legislative determination or compromise. Certainly, the lack of federalist sophistication in the Taft-Hartley Congress and the subsequent legislative paralysis support such a judgment. But a decade of litigation and debate have at least identified the principal issues at stake. The issues are ripe for Congressional determination. Specific Congressional solutions may turn out to be "unwise" or inept. But they would at least be wise in the sense that they would reflect a healthy tradition under which political decisions are made and changed by avowedly political agencies.


* It should be noted that while state power over labor relations "affecting commerce" was being preempted, state power to formulate labor policy (absent commerce or preemption) was being expanded by limitations on the doctrine that picketing was "free speech" protected against state regulation by the 14th Amendment. The free speech cases are summarized in Int. Bhd. v. Vogt, 354 U. S. 284 (1957).

See generally, Stern, The Commerce and the National Economy, 59 Harv. L. Rev. 645, esp. 674 et seq. (1946); Hays, supra, note 961 et seq.; Cox, supra, note 4, at 1208 et seq.


See NLRRB v. Fainblatt, 306 U. S. 601, 607 (1939); Polish National Alliance v. NLRRB, 322 U. S. 643, 647 (1944). These cases are discussed more fully infra, in text accompanying note 188.


See LMRA; § 1(a), "Declaration of Policy", Section 1 and Section 7.

See LMRA, § 8(b).


See LMRA, §§ 8(b)(3), 8(d).

See LMRA, 301.

* See Hays, supra, note 1, at pp. 965, 966, quoting Mr. Hartry, who said in reply to a question about the effect of the federal act on the Wisconsin law: "... this will not interfere with the State of Wisconsin in the Administration of its own law." 93 Cong. Rec. 6983 (1947); see also, e.g., remarks of Senator Pepper, 2 Legislative History of the Labor-Management Relations Act 1947 (pub. by NLRRB) hereinafter cited as "Legisl. Hist." 1379-80 (1948), implying preservation of state injunctive power. But cf. House Rept. No. 245 on H. R. 3020, 80th Cong. 1st Sess. p. 40, 44, 1 Legis. Hist. 331, 335. For a general discussion of the legislative history as it bears on preemption problems, see Smith, supra, note 9, passim, but cf. Cox and Seldman, supra, note 4.
Congress dealt explicitly with federalist problems in Section 14(a), dealing with supervisors; in Section 14(b), dealing with state regulation of union-security arrangements; in Section 8(d) (3), prescribing notice of a bargaining impasse to state mediation services and in Section 10(a), prescribing the conditions for cession by the NLRB of its powers to the states.

Before turning to these categories, it is convenient merely to note that the Court has made it clear that state agencies are ousted of jurisdiction over representation cases "affecting commerce," without regard to whether the state criteria conflict or coincide with the pertinent federal standards. See Bethlehem Steel Co. v. New York State Labor Relations Board, 330 U. S. 767 (1947); LaCrosse Tel. Corp. v. Wisconsin Employment Relations Board, 336 U. S. 18 (1949). See also Guss v. Utah Labor Board, 353 U. S. 1 (1957). For a discussion of the representation cases, see Cox and Seidman, supra note 4, at 212 et. seq.; and note 47, infra.

For a thoughtful treatment of the problems involved, see Cox, The Right to Engage in Concerted Activities, 26 Ind. L. Journ. 319 (1951).


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


The Committee reports were equally silent on this issue. See Smith, supra, note 9, at 606.


The Court recently invoked the 14th Amendment rather than presumption to invalidate a similar but purer local regulation. See Staub v. City of Barkey, 355 U. S. 313 (1958). Frankfurter, J., joined by Clark, J., dissenting on procedural grounds.

As Mr. Chief Justice Stone forcefully urged in his partial dissent, this consideration did not justify the invalidation of the Florida requirement for annual reports by a labor organization, giving the names and addresses of its officers and location of its office. The Court, although conceding that this requirement was compatible with the national scheme, invalidated it on the curious ground that the imposition of punishment for non-compliance would create an obstacle to collective bargaining. See 325 U. S. at 543. A redactio ad absurdum of this argument would be a holding that state criminal laws against theft of union property, although not in conflict with the federal act, could not be enforced against union officials because enforcement would interfere with employee free choice and collective bargaining.

The dim future for state regulation was, however, noted in State Regulation of Labor Unions, 55 Yale L. J. 440, 455 (1946).

In a supplemental Senate report on the bill which after amendment became the LMRA, the late Senator Taft referred to Hill v. Florida as posing important questions of accommodating Federal and State legislation. See Sen. Rep. No. 105 on S 1126, 80th Cong. 1st Sess., 6, 1 Legis. Hist. of LMRA 412. This reference occurred in connection with a discussion of whether the federal act would permit a union-shop in states illegalizing such arrangements. Subsequently, the union-security problem was dealt with by a specific recognition of state power in Section 14(b) of the LMRA.


International Union v. Wisconsin Employment Relations Board, 336 U. S. 245, 252 (1949). It should be noted that in Briggs-Stratton and in all of the cases prior to the Guss case (see text, infra, accompanying n. 160), the Court in invalidating state regulation, carefully noted that the enterprise involved was one over which the NLRB would customarily exercise jurisdiction. The Guss case obliterated any distinction based on the Board's declination of its statutory jurisdiction.

This statement was supported by the assertion that the federal act proscribed strikes only because their objectives, as distinguished from their means, were illegal. Id. at p. 253. That assertion was plainly in error. See § 8(b)(1)(A) of the LMRA and United Const. Workers v. Laburnum Const. Corp., 347 U. S. 656 (1954).

The Court declared: "In the light of labor movement history, the purpose of the quoted provision of the statute (§ 7) becomes clear. The most effective legal weapon against the struggling labor union was the doctrine that concerted activities were conspiracies, and for that reason illegal. Section 7 of the National Labor Relations Act took this conspiracy weapon away from the employer in employment relations which affect interstate commerce. No longer can any state, as to relations within reach of the Act, treat otherwise lawful activities to aid unionization as an illegal conspiracy merely because they are undertaken by many persons acting in concert. But because legal conduct may not be made illegal by concert, it does not mean that otherwise illegal action is made legal by concert." 336 U. S. at pp. 257-58.

In view of the suggestion in the Weber case, discussed in text, infra, accompanying n. 57, that the possibility that conduct is federally prohibited excludes state action, it should be noted that similar harassing tactics during negotiations were held by the NLRB to be in violation of Section 8(b)(3) of the LMRA. Textile Workers Union of America, 106 NLRB 743 (1954), enforced in part, set aside in part, in Textile Workers v. NLRB, 227 F. 2d 609 (App. D. C., 1955), cert. granted, 350 U. S. 1004 (1956), grant vacated, 352 U. S. 884 (1956), apparently because a new union had been certified. 339 U. S. 454 (1950).

Id. at 456-58. It is not entirely clear from this passage whether the Court was relying on "conflict" or "occupation of the field." In the last paragraph of the opinion, the Court highlighted the "conflict" theme by referring to the Briggs-Stratton principle as "controlling." Id. at 459.


Id. at 394.

Thus the Court declared: "We deal only with the question of conflicting federal legislation as we have found that issue dispositive of both cases." Id. at 388-389.

Id. at 407.

Cf. Frankfurter, J., dissenting 340 U. S. at 404; see also discussion in text accompanying note 79.

Cf. Hays, supra note 1, at 964, 965-66, urging that the Court misinterpreted the Congressional intent on which it so heavily relied.


The opinion cited Bethlehem Steel Co. v. New York Labor Board, 350 U. S. 767 (1947) and La Crosse Telephone Corp.
v. Wisconsin Employment Relations Board, 336 U. S. 18 (1949); see note 19 supra for reference to discussions of these cases. In these two cases, the Court recognized the NLRB’s exclusive jurisdiction over representation questions in any business subject to the Board’s effective jurisdiction. Since a state decision, even though based on criteria consistent with the federal criteria, might establish a representation pattern incompatible with federal policy and since such patterns have continuing consequences under the federal Act, the Court found “the situation too fraught with potential conflict to permit intrusion of the state agency, even though the National Board had not acted in the particular case.” The Court’s summary reliance on these cases ignored the problems raised by the explicit recognition in Section 14(b) of the LMRA of state competence over union-security arrangements and by the legislative history of that section, which suggested that state jurisdiction over such arrangements was not to be impaired. See discussion infra in text accompanying note 125 et seq. § 48. See Amalgamated Ass’n v. Wisconsin Employment Relations Board, 340 U. S. at 390. Cf. the explanation of Flankington by Frankfurter, J., as involving an overlap of federal and state unfair labor practices, id. at 402.

* * *

... even if it were clear that no unfair labor practices were involved, it would not necessarily follow that the state was free to issue its injunction. If this conduct does not fall within the prohibitions of § 8 of the Taft-Hartley Act, it may fall within the protection of § 7, as concerted activity for the purpose of mutual aid or protection.” 348 U. S. at 478-79. Query: Is “concerted activity” here being used to describe activity protected against employer neutral or, as Garner suggested, activity not subject to federal prohibition? In this connection, cf. the statement by Frankfurter, J., in the Court’s opinion, in Algoma Plywood v. Wis. Bd., 338 U. S. 301, 313 (1949): “Where the State and federal laws do not overlap no cession is necessary because the State’s jurisdiction is unimpaired.”

The Weber opinion also emphasized that the plaintiff had alleged in the state proceedings that the conduct complained of was a federal unfair labor practice. See 348 U. S. at 479, 481. Under the broad implications of the language of Garner, such allegations would be of no importance since the states would be excluded regardless of state overlap with federal remedies or state encroachment of activities protected by Section 7 of the LMRA. Perhaps, the limitation of Garner adumbrated in Weber moved Mr. Justice Black, an exponent of broad preemption with respect to labor relations, to concur in result only.

“... Weber did not, however, refer to the intimation in Briggs-Stratton that the states were limited to regulating the means, rather than purposes, of union conduct. See supra, note 36. Since the union inclined in a peaceful strike, that limitation, if controlling, would have disposed of the case.

“... That concept is indirectly applicable because employees who participate in conduct which constitutes an unfair labor practice by a union are normally divested of statutory protection vis-a-vis their employer.”

See, e.g., Ritter, supra, note 33 at 97-98 (1952); Cox, supra, note 4, at 1318-19.


See Hays, supra, note 1 at 964-65; see also, e.g., 2 Legis. Hist., 1195, 1208, 1379-80, 1019-20; but cf. e.g., id. at 1561 where Senator Morse challenged Section 14(b) and urged a national policy with respect to union-security arrangements; House Rep. No. 245 on HR 3020, 1 Legis. Hist. 331. It is also worth noting that opponents of the legislation objected on the ground that federal regulation increased the centralized national power. It may be significant that such criticism was couched in terms of encroaching on or duplicating traditional state power and not in terms of displacing it. See 2 Legis. Hist. 1258, 11th pt. 356, 2 nd pt. 1385, 1261, 1262, 1264, 1266.

See Hays, supra, note 1, at 965-66.

See Cox, supra, note 4, at 1315 et seq.

“Federal legislation is generally interstitial and “builds upon legal relationships established by the states, altering or supplanting them only so far as is necessary for a special purpose.” Hart and Wechsler, The Federal Courts and the Federal System, p. 435 (1953).

See, e.g., Ritter, supra, note 4 at 104, et seq.

“... For example, Cox, prior to the Amalgamated decision (discussed supra in text accompanying supra, note 46) urged that the Wisconsin anti-strike regulation be upheld (see Cox & Seidman, supra, note 4, at 240-41), despite the difficulty of reconciling such a result with the language of the O’Brien case. After the Amalgamated decision Cox proposed narrowly drawn legislation which would reinstate state power. See Cox, op. cit. n. 4, at p. 1520-21. Furthermore, notwithstanding the fine lines involved, Cox has also proposed a distinction, for preemptions purposes, between state labor regulation, as such, and
general regulation which impinges on labor relations. The problems presented by such a distinction are discussed infra in text accompanying note 148 et seq.,

Cf. the use of such a standard by the Supreme Court in determining both the extent of the commerce power and of the NLRB's statutory jurisdiction. See, e.g., Polish Alliance v. NLRB, 322 U. S. 643, 648 (1944).

See 2 Legis. Hist. 1005-07.

See text, infra, accompanying n. 149 et seq.

119 NLRB No. 33, 416 LRRM 1025 (1957). The Board's decision has not yet been upheld by the courts, and there are, of course, serious doubts that it will be affirmed by the Supreme Court.

Total preemption yields similar results where the employer, faced with conflicting representation claims by rival unions, is picketed for immediate recognition by one of the rivals while the NLRB is processing the rival claims. Although recognition by the employer has been held to be an unfair labor practice, the picketing as yet has not been held to be an unfair labor practice. Cf. Curtis Bros., 119 NLRB No. 33, 416 LRRM 1025 (1957). Under such circumstances some state courts, prior to Garner, relieved the employer from the conflicting pressures of the LMRA and picketing by enjoining the picketing. See, e.g., Goodwins v. Hagedorn 303 N.W. 300, 101 N.E. 2d 697 (1951).

The Court, in a divided opinion, denied the jurisdiction of federal district courts to restrain, at the instance of private parties, the enforcement of state injunctions. Amalgamated Clothing Workers of America v. The Richman Brothers, 348 U. S. 511 (1955). Cf. Capital Service Inc. v. NLRB 347 U. S. 501 (1954) (sustaining jurisdiction of the federal district courts to restrain, at the instance of the NLRB, enforcement of state injunctions after the NLRB has issued a complaint covering the conduct subject to state court injunction). But in Richman Bros., the Court invited efforts by the NLRB to develop methods for barring enforcement of state injunctions against protected activities, stating: "... it has not yet been determined that if an employer resorts to a state court in relation to conduct that is obviously taken over by the Taft-Hartley Act and outside the bounds of state relief, it may not under appropriate circumstances give rise to a finding of an unfair labor practice." (See 348 U. S. at 520-21; citing W. T. Carter and Brother, 90 NLRB 2020 (1950). In Carter, the Board, with Chairman Herzog, dissenting, held that an employer's resort to a state court proceedings to enjoin protected conduct was an unfair labor practice: Even the dissent recognized the Board's paramount authority notwithstanding the state injunction and acquiesced in the Board's order directing the employer to request the state court to vacate or modify the injunction to conform it to the Board's decision.

See Youngdahl v. Rainfair, 355 U. S. 131 (1957), discussed infra in text at note 90.


347 U. S. 656, 663-64 (1954). The Court referred to the civil liabilities imposed by Section 303 of the LMRA but concluded that that provision, instead of impliedly excluding other damage recoveries, made it inconsistent to deny recovery for the more flagrant conduct, such as violence. Id. at 666.

Id. at 669-69. The Court referred to a statement by the late Senator Taft, which approved the duplication of federal and state remedies for violence. This reference has been criticized on the ground that the Court omitted a prior statement by the Senator which reflected the assumption that state law did not reach intimidation which fell short of physical violence. See Bernstein, Complement or Conflict: Federal-State Jurisdiction in Labor-Management Relations, 3 How. L. J. 191, 213 (1957). Bernstein argues that this assumption, together with the Senator's assumption, that there would be federal and state duplication only in "extreme cases" indicates that the Senator was suggesting only that the LMRA might duplicate state criminal law. Although there is some ambiguity in the language relied on by the Court, other portions of the legislative history reflect the understanding of both proponents and opponents of the statute that the states could deal with mass picketing and other threats of violence by means of civil remedies. See, e.g., 2 Legis. Hist. 1365-66 (Sen. Taft), 1021.

The Court in Laburnum also relied on the notion that state jurisdiction was aided by the fact that private rather than public rights were being adjudicated. 347 U. S. at 665. This distinction had, however, been dismissed as unimportant in Garner. See 346 U. S. at 490-500.


Id. at pp. 274-75.

347 U. S. 131 (1957).

In an election held about 5 months after the strike began, a majority of the employees voted against representation by the union. See id. at 133, note 1.

Id. at 132-133.

The Court in rejecting the contention that the concerted activities were protected cited Chaplinsky v. New Hampshire, 315 U. S. 568, 571-72 (1942), thereby creating some ambiguity as to whether it was concerned with protection of free speech under the Fourteenth Amendment or the protection conferred by the LMRA. It seems fair, however, to read the opinion as dealing with statutory protection.

Under the Board's precedents, the threats and minor vandalism of the strikers were clearly unprotected, but their abusive language, which the Court indicated could be restrained, raised a different question. See NLRB v. Longview Furniture Co., 206 F.2d 274 (4th Cir., 1953), modifying a Board order insofar as it required reinstatement of striking employees who had been discharged for "hurling obscene and insulting epithets" at non-strikers in an attempt to keep them from working. The Board had ordered reinstatement on the ground that the strikers had not violated the etiquette appropriate for the picket line. See Longview Furniture Co., 100 NLRB 301, 304 (1952).


See id. at 641, note 5.

Id. at 643.

Id. at 642-643.

Id. at 642.

Id. at 642.

Id. at 614.

Id. at 614.

Id. at 614.

Id. at 650.


See Traynor, J., dissenting in Garner v. San Diego Building

30 See 346 U. S. at 488.


32 See text at note 94.

33 See 356 U. S. at 642.


35 It should be observed that the arrangements with the incumbent union in the Laburnum case provided for exclusive hiring of skilled workers through the AFL unions and for the unions' consent to the employer's hiring of unskilled workers who were unorganized. See 347 U. S. at 660, note 4. The arrangement, which appeared to contemplate either a closed shop or the preferential hiring of unionized workers, was illegal under the LMRA. This consideration does not, in my opinion, affect the validity of the result in Laburnum since violent self-help to remedy violations is scarcely justifiable in view of the orderly remedies afforded by the LMRA. But cf. Bernstein, supra, note 84, at pp. 211-12. Nevertheless, the probable illegality of the arrangements between the incumbent unions and the employer in Laburnum is an additional reason for questioning the force attached by the dissenters to the fact that an incumbent union as well as the employer was the object of the rival union's violence in Laburnum.

36 See note 80, supra.

37 The overlapping state and federal jurisdiction recognized in Rustel may give rise to troublesome questions as to the effect in a NLRB proceeding of a prior state judgment and the effect in a state proceeding of a prior NLRB determination. This footnote, which has not been preceded by a comprehensive examination of the authorities, is designed only to raise these questions.

A state determination that a union's conduct was violent would not appear to be binding in a subsequent Board proceeding arising from a charge that the employer had violated the LMRA by disciplining employees who had participated in the assertedly non-violent activities. Under familiar doctrines concerning collateral estoppel, the General Counsel of the NLRB, not having been a party to, or in control of, the state litigation, would not be bound by the state judgment, quite apart from questions which might exist concerning identity of issues. See Matter of N.Y. State Labor Relations Bd. v. Holland Laundry, 294 N. Y. 480, esp., 489-95, 63 N. E. 2d 68 72-75 (1945), mot. for rearg. denied 295 N. Y. 508 (1946). Furthermore, collateral estoppel of the NLRB would appear to be precluded by the provision of Section 10 (a) (1) of the LMRA, that the Board's powers shall not be affected by any other means of adjustment. Cf. Judge Learned Hand in Lyons v. Westinghouse Electric Corp., 222 F. 2d 184 (2d Cir., 1955), cert. denied 350 U. S. 825 (1955), noted in 55 Col. L. Rev. 1078 (1955).

Nevertheless, Judge Magramed has suggested without deciding, that a holding that the Board is bound by the findings in the state injunction proceeding might perhaps be justified in that it might "facilitate the reestablishment of labor stability in the disrupted plant." See NLRB v. Thayer Co., 213 F.2d 748, 754 (1st Cir. 1954). In view of the provisions of Section 10(a) and the importance attached by the Supreme Court to uniform and centralized administration of the LMRA, it seems unlikely that conventional requirements of collateral estoppel would be relaxed so as to give binding effect in a NLRB proceeding to prior state determinations which are invoked against the Board.

More troublesome is the problem presented by the converse situation, i.e., whether an explicit or implicit Board determination that conduct is protected is binding in a state proceeding arising out of a claim that the conduct in question was violent, unprotected, and, therefore, within the state's jurisdiction. Even though the party asserting the state claim had been the charging party before the Board, the fact that control of the Board proceeding is vested in the General Counsel would appear to negate the "privity" generally required for collateral estoppel. See Boeing Airplane Co. v. Aeronautical Industrial District Lodge, 188 F.2d 356 (9th Cir., 1951). Nevertheless, in the light of Garner, it would be strange to permit a state to award damages for conduct previously characterized as protected by the Board. Garner preempted state jurisdiction in part to avoid the possibility of state interference with activities which might be found by the Board to be protected. To sanction state action against conduct previously characterized as protected by the Board would appear to be incompatible with the purposes behind Garner and other preemption cases. But due process considerations, as well as orthodox collateral estoppel requirements, would present serious obstacles to a holding that a party to a state proceeding is bound by a previous characterization of conduct in a national proceeding to which he was not a party. But such obstacles might be avoided on the ground that the national government, which could completely nullify state jurisdiction, can so condition its exercise as to avoid encroachment on activities determined by the NLRB to be protected. Such an approach would in turn invite the contention that an unconstitutional condition was being imposed on state jurisdiction. Predicting in this situation is obviously hazardous. But national characterization of conduct may well be held controlling in a subsequent state proceeding in order to implement the purposes implicit in the preemption decisions. In any event, the exercise of state jurisdiction in such situations will, of course, be subject to review by the Supreme Court if it is urged that state action encroaches on protected activities.

Interesting complications also arise where a prior Board or state determination is offered against a party to the earlier proceeding. For example, a finding by the Board that a union, defendant in a Board proceeding, was guilty of violence, may be offered against that union defending a state action for damages. The absence of mutuality would not in some jurisdictions preclude a holding that the defendant in the state action is bound by the prior Board determination. See Currie, Mutuality of Collateral Estoppel; Limits of the Bernhard Doctrine, 9 Stan. L. Rev. 281 (1957). Nevertheless, a state might reject such a result on the ground that it would be incompatible with its "exclusive jurisdiction" over the cause of action involved. Cf. Judge Learned Hand in Lyons v. Westinghouse Electric Corp., 222 F. 2d 184 (2d Cir., 1955). Federal jurisdiction in diversity actions, over such state created rights could be reconciled with the claim of the state's "exclusive jurisdiction" on the ground that a federal court, under the Erie doctrine, is an arm of state law.

In the converse situation, the Board would appear to be barred by the provisions of § 10(a) of the LMRA from finding a defendant in a Board proceeding by a finding against him as defendant in an earlier state proceeding.


See text supra at notes 75-76.

See text supra, following note 64.


The express provision for jurisdiction in § 303 invites the inclusion in that argument. But that argument is far from persuasive. The provision for judicial remedies embodied in Section 303 reflected the strong Congressional disapproval of the secondary and other pressures proscribed in that section. The explicit provision in LMRA for state and federal competence over consuming actions for conduct deemed particularly obnoxious by the Congress indicates only that damages were to be granted for such conduct despite varying state rules as to the legality of such conduct. It does not indicate that all other state damage remedies for non-violent conduct were to be ousted regardless of the impact of the conduct on the federal purposes and of the remedial gaps in the federal scheme. Plainly, both Laburnum and Russel reject any mechanical inclusion non intermittent argument based on Section 303.


See text supra, following note 20.

See text supra at note 20.

Curtis Bros. 119 NLRB No. 33, 41 LRM 10 25 (1957), might be extended to deal with this situation.

Relevant extracts are set forth in Algoma Plywood and Veneer Co. v. Wisconsin Employment Relations Board, 336 U. S. 301, 307-310 (1949).

§ 14(b) provides: "Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law." § 14(b) might be read as bringing into play the federal prohibition against discrimination embodied in §§ (a)(3) and (8)(b)(2)(C) of the LMRA when union-shop arrangements violate state law. The proviso to §§ (a)(3) interposes, however, technical difficulties in the way of such an interpretation. It provides: "nothing in this Act or in any other statute of the United States, shall preclude an employer from making union-security agreements which conform to the requirements imposed by Taft-Hartley. Furthermore, the legislative history of §14(b) (see supra, note 120) suggests that Section 14(b) was not designed to incorporate state law into the LMRA but only to authorize state invalidation of union-security agreements permitted by the LMRA.

H.R. 3020, 80th Cong. 1st Sess., which, after amendment, became the LMRA, provided in § 13 that union security arrangements were "divested of their character as a subject of regulation by Congress under its power to regulate commerce . . . to the extent that such agreements shall, in addition to being subject to any applicable provisions of this Act, be subject to the operation and effect of such state laws and constitutional provisions as well." See 1 Legis. Hist., pp. 80-81; see also House Rept. on H.R. 3020, 80th Cong. 1st Sess. p. 34, 44, 1 Legis. Hist. 320, 335. The provision which was ultimately embodied in §14(b) was agreed to in the course of Conference to reconcile the House bill and the Senate bill which did not contain a corresponding provision. The House

Conf. Rept. stated: "It was never the intention of the National Labor Relations Act . . . to preempt the field . . . so as to deprive the States of their powers to prevent compulsory unionism . . . To make certain that there should be no question about this, Section 13 was included in the House bill. The Conference agreement, in Section 14(b), contains a provision having the same effect." House Conf. Rept. No. 510, on H.R. 3020, 80th Cong., 1st Sess. p. 60 (1947), 1 Legis. Hist., 504. Subsequently, in the debates Senator Ball referred to the provisions embodied in §14(b) as "new" and to the compromise in the House on language spelling it out. 2 Legis. Hist. 1546. Senator Taft replied: "The Senate Committee report stated on its face that State laws would still remain in effect. All we have done is to write in expressly what our committee report said." Ibid. No statement in the Senate Committee Rept. on S 1126 (Sen. Rept. No. 105, 80th Cong. 1st Sess.) has been found which has the tenor suggested by Senator Taft. Cf. p. 6 of that report. 1 Legis. Hist. 412-413, which Senator Taft apparently had in mind. See 2 Legis. Hist. 1596-97. Nevertheless, his statement on the floor is wholly consistent with concurrent state power and the statement in the Senate Committee report is not inconsistent with such power.

Senator Taft stated that the LMRA did not "in any way prohibit the enforcement of State laws which already prohibit closed shops." See 2 Legis. Hist. 1597.

See supra, text at note 47.

See supra, text at note 48. It should be noted, however, that the Court, relying on the legislative history to justify its departure from the literal language of §14(b) (quoted supra note 127) sanctioned state regulations which, instead of prohibiting union-security arrangements, imposed requirements supplementing those imposed by the LMRA. See Algoma Plywood and Veneer v. Wisconsin Emp. Relations Board, 336 U. S. at 314. The NLRB appears, however, in at least one case to have neglected the implications of this decision. See Cyclone Sales Inc., 115 NLRB 431 (1956).


The "contract theory" of the union constitution has been criticized as a fiction which disregards the fact that the constitutional provisions are unduly vague, are not the product of consensus or negotiation, and are frequently subject to an unlimited amending power. See Summers, Legal Limitations on Union Discipline, 64 Harv. L. Rev. 1049, 1054-58 (1951); Wellington, Union Democracy and Fair Representation: Federal Responsibility in a Federal System, 67 Yale L. J. 1327, 1346 (1948). It is true, that the contract concept in its purity does not neatly attach to the relationship between a union and its members. But it is also true that the concept is a flexible one which in many fields (e.g. corporations and public utilities not to speak of "quasi contracts") is applied to non-negotiated and non-consensual arrangements. The technical limitations of the contract concept are thus less important than its usefulness in protecting reasonable expectations or in restraining, through "public policy" limitations, "abuses" of power. For these purposes, the concept is applied in the light of distinctive relationships involved, appears to be as useful a tool for defining and shaping the mutual responsibilities of the union and its members as any other which is available.

346 U. S. 618-621.

Id. at 632.

Id. at 631. The dissent also urged that the provision for private remedies in §303 of the LMRA by implication excluded all other private remedies. This contention ignores the fact the §303 was defining new substantive liabilities in an area
where state law had often excluded any relief. The provision for private actions in such situations is a dubious basis for ousted state power to grant relief for established categories of liability, such as contract liability, in an area, such as union internal affairs, which is in general subject to state power.

33 Id. at 633-633.

32 The dissenter declared that state and federal courts had been unanimous in denying state power to award damages for employer discrimination (instigated by unions) against nonmembers. Id. at 628-629, citing cases in note 15; but see Selvus v. Local 174 of Int'l Brotherhood of Teamsters, 50 Wash. 2d 660, 314 P.2d 456 (1957), cert. denied, 356 U.S. 975 (1958); cf. Thorman v. International Alliance, 49 Cal. 2d 629, 320 P.2d 494 (1958).

31 See §10(b) of the LMRA.

30 In industries with a closed shop tradition, employers may be reluctant to hire or retain a person who is not a union member even though the union does not press such job discrimination. Where the union expels a member, such employer reluctance may make proof of resulting job discrimination extremely difficult. It is true that covert forms of discrimination against employees whom unions have been forced to restore to membership are also possible, but the employer's possession of a union card would appear to increase somewhat the obstacles to the effective use of such tactics.

31 Multiple litigation scarcely promotes the healthy continuing relationship between the union and its members, and it is doubtful that two actions will be particularly "curative."

32 An employee, for example, expelled from a union for claiming the Fifth Amendment as to questions concerning alleged membership in the Communist Party may thereafter be discharged by his employer. Whether such a discharge violates the LMRA turns on a hairline distinction, viz., whether it was based on the employee's expulsion from the union rather than the employer's unwillingness to retain employees suspected of being communists. See Comment, 62 Yale L.J. 954, 964-65 (1953).

Whatever the result under the LMRA, expulsion under such circumstances, if not authorized by the union constitution, could be remedied by a state direction of restoration of membership and (preemption aside) by a damage award. Cf. Allen v. Office Employees Union, 329 P.2d 205 (Wash.Sup.Ct., 1958). It would seem unfortunate to bar a state court pass on the propriety of expulsion from also passing on the damage issue merely because of the possibility of a finding of an unfair labor practice by the NLRB.

33 The present no-man's-land resulting from the Guss case and the NLRB's jurisdictional policies (see text at note 175, infra) is, of course, another practical aspect of the remedial situation. Guss, coupled with a designation of jurisdiction by the Board, would deny the wronged member any compensatory relief if state power were ousted. This anomaly is a pervasive consequence of the no-man's-land. But in an area so intimately connected with state competence over internal affairs, there are special make-weight reasons for obliquely shrinking the no-man's-land by recognizing state power. Furthermore, the recognition of the implications of §14(b) and its legislative history would constitute an independent basis for Gonzales. But such an approach would require the overruling of Flanagan. See text, supra, accompanying note 130-131.


35 Professor Cox has urged that bargaining by a union which violates its duty of fair representation should be held to be a violation of Section 8(b)(3) of the LMRA. See Cox, The Duty of Fair Representation, 2 Vill. L. Rev. 151, 172-175 (1952); see also Note 65, Harv. L. Rev. 490, 494, n. 46 (1952). Although recognizing the technical difficulties involved, Cox has not considered whether more vigorous enforcement by the Board of the duty of fair representation would interfere with its other functions. The problems resulting from the great delays already involved in Board proceedings but also from the fact that the most flagrant and the most easily identifiable departures from fair representation involve racial discrimination. Vigorous intervention in this area by the Board might provoke budget-cutting by Congress; hostility from the Southern bloc might be intensified by the absence of clear statutory authority. This political factor is also passed over by Professor Wellington, who, moved by the Board's expertise, recommends a statute conferring on the Board responsibility for enforcing the duty of fair representation. See Wellington, supra note 133, at 1357. But reliance on the "Board's expertise," which is easily and frequently exaggerated, may merely obscure the enormous difficulties involved in policing the duty of fair representation, except where flagrant racial discrimination is involved. Since more vigorous enforcement of this duty will probably be directed largely at racial discrimination, a judicial remedy may be preferable to an administrative remedy because the former remedy is dispersed and is less vulnerable to budgetary reprisals. Although the judicial remedy suffers from the absence of government-supplied counsel, private counsel may be available—at least in the area of racial discrimination—even though individual litigants may not be able or willing to pay the fees. Furthermore, since the basic problem in this area appears to be adequate preventive relief, the possible bias of juries in actions for damages may be put aside.


37 In Farnsworth and Chambers Co. v. Local Union 429, 299 S.W. 2d 6 (Tenn. 1957), picketing to secure the employment of union members exclusively was enjoined as a violation of the Tennessee "right-to-work" law. The Supreme Court reversed per curiam. Local Union 429, Int. Broth. of Elec. Workers, 353 U.S. 909 (1957), citing Webber v. Anheuser-Busch, 348 U.S. 468 (1955) and Garner v. Teamsters Union, 346 U.S. 485 (1953). The underlying facts together with these citations suggest that the basis for the Court's decision was the overlap between the state injunction and the NLRB's remedy for violation of Section 8(b)(2) of the LMRA.

38 See Douglas Aircraft v. BREV, 41 LRRM 2994, 2998 (Sup. Ct. of N.C. 1958).

39 See Cox, supra note 4, at 1324 et seq.

40 See supra, text following n. 68.


42 See e.g., Keith Theatre v. Vachon, 134 Me 392, 403, 187A992 (1936). The rationale for subsequent decisions reaching a similar result has naturally been affected by the pin-pointing of the issues involved by frequent litigation and by subsequent state and federal statutes. See generally 11 ALR2d 1338 (1950).

43 See Cox, supra note 4, at 1324.


45 364 Mo. 573, 579, 265 SW2d 325, 328.

46 See Cox, supra note 4, at 1330.

47 See 364 Mo. at 579, 580, 582, 265 SW2d at 328, 329, 330, 331.


49 See text accompanying note 137, supra.

50 See Cox, supra note 4, at 1351. The example is suggested by Allen-Bradley Co. v. Local Union No. 3, 325 U.S. 797.
(1945) and Mayor Bros. Poultry Farm v. Meltzer, 274 App. Div. 169, 80 N.Y.S. 2d 874 (1st Dept. 1948), app. den. 83 N.Y.S. 2d 228, 274 App. Div. 877. In view of the possible overlap between state and federal anti-trust laws in the situations described in the text, it should be noted that national anti-trust legislation has generally not been viewed as preempting state regulation. See Standard Oil Co. v. Tennessee 217 U.S. 413, 421-22 (1910), Commonwealth v. McHugh, 326 Mass. 249, 264-267, 95 NE 2d 751, 762 (1950); Mayor Bros. Poultry Farm v. Meltzer, 274 App. Div. at 177. As to state anti-trust law applied to labor-management relations, this view merits reexamination because of the interlacing of federal labor statutes and the Sherman Act in the Hutchenson case (312 U.S. 219 (1941)), and the preemption of state power over labor relations.

It is true that in the Weber situation the particular exclusionary arrangements would be lifted after the appropriate shift in the union status of the employees of the excluded enterprises. But such a shift might touch all new exclusionary pressures on the part of the rival union. Furthermore, in the case of exclusion based on location, exclusion presumably could also be ended by plant relocation which would bring the enterprise within the orbit of the union enforcing the exclusionary arrangements.

A strike in both the Weber and the geographical boycott situation would appear to involve a violation of § 8 (b) (4) (A) of the LMRA. If, however, performance of the contract at the time of its execution would not involve a termination of an existing relationship with a particular employer, such a violation might perhaps be avoided. Cf. International Association of Machinists 101 NLRB 346 (1952) and Teamsters, Warehousemen and Helpers Local Union, No. 135, 105 NLRB 740, 744, note 6 (1953), reserving the question of the legality of a strike for a hot-cargo clause. After these decisions the NLRB modified its general views as to hot-cargo contracts. See Local 1976, Carpenter v. NLRB, 42 LRRM 2243 (1958).

Professor Cox, himself, recognized this possibility. See supra note 4 at 1331.

See, e.g., Laborum, discussed supra, in text accompanying note 81; Gonzalez, discussed supra, in text accompanying and following note 88.

See supra text at note 57.

See supra text accompanying note 137.

See supra text accompanying note 88.


A comparison of the Court's apparent refusal to separate these issues in preemption cases with the L.C.C.'s approach is instructive. The L.C.C. declared that the validity of agreements between unions and carriers was a matter solely within the NLRB's competence. (At about the same time, two of the three members of the Board who declared hot-cargo clauses executed by common carriers invalid, justified this result by reference to the Interstate Commerce Act and the L.C.C. rulings thereunder. See Genuine Parts Co., 119 NLRB No. 53, 41 LRRM 1657, 1691-92 (1957).) The L.C.C., although deferring to the Board's expertise in labor matters, asserted its own jurisdiction over the conduct of common carriers in relation to their public obligations under the Interstate Commerce Act, without regard to terms included in their collective bargaining agreements. The Commission concluded that the carrier's refusal to provide service because of its hot-cargo clause violated the Interstate Commerce Act. See Be-Mac Transport Co. (L.C.C.), No. MC-C 1922, Dec. 6, 1957, 41 LRRM 163.

Since the concurrent jurisdiction of the states over common carriers has been recognized (see Meker v. Lehigh Valley R. R., 236 U.S. 412 (1915)), it is difficult to see why the states, any more than the L.C.C., should be disabled from enforcing their general policy against a carrier merely because of the carrier's involvement in a labor dispute.

See 296 S.W. 2d at 382.

Only a brief reference to the complex argument involved is possible here. Where the employees of a secondary employer (here, the carrier) refuse to cross a picket line adjacent to a primary employer (here the shipper or consignee) or refuse to handle or process the primary employer's goods, the employees' refusal is, unless sanctioned by a contract, unprotected, i.e., the carrier could lawfully discharge them. See Snow Auto Parts, 107 NLRB 242 (1953); cf. NLRB v. Rockaway News Supply Company, 345 U.S. 17 (1953). In the common carrier context, the validity of such a contract is uncertain. See Local 1976, Carpenter v. NLRB, 357 U.S. 93, 108 (1958). The intersection of labor and transportation policy complicates the issue of what federal tribunal has jurisdiction to pass on the issue of validity. See note 169, infra. Insofar as the states are concerned, their jurisdiction to enforce the carrier's duty to serve without discrimination was confirmed, prior to the enactment of the LMRA. See Meker v. Lehigh Valley R. R., 263 U.S. 412 (1915). Insofar as relations between the carrier and its customers are concerned, state competence would appear to extend to the validity or effect of a hot-cargo clause. Even if Lincoln Mills v. Lincoln Mills (353 U.S. 148 (1957), discussed in text at note 208, infra) has displaced state law, state competence to apply federal law to collective bargaining agreement may be upheld.

Where, however, a state attempts to regulate employee activity on the ground that it defeats the state transportation policy, the possibility of overlap with federal remedies or encroachment on federally protected activities exists. Nevertheless, in this context, whether the employee conduct is protected depends on the validity of the hot-cargo clause—and that issue could be characterized as dominantly one of transportation policy although labor policy is also "incidentally" involved. The crucial bearing of transportation policy on the issue might justify reliance on Brinco-Stratton (discussed supra, at note 34) as authority for state determination of whether the employees' refusal to serve was federally protected. A negative determination would be the basis for state competence to enjoin employee interference with the carrier's discharge of its duty to serve, i.e., an injunction requiring the employees to cross the picket line. Whether state power should be exercised in a given situation and the possible impact of the Norris-LaGuardia Act are, of course, separate questions.

A final complication results from the puzzling proviso of § 8 (b) (4) of the LMRA, which provides that "nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer) if the employees are engaged in a strike ratified . . . by a representative of the employees of the strike-bound employer." (Emphasis supplied.) This complex provision cannot be fully treated here. It is worth noting, however, that the underscored language implies that there may be other sources of restraint against respect
for picket lines other than those embodied in §8(b)(4). Furthermore, although the prohibition against involuntary servitude might bar judicial compulsion to force employees to cross picket lines, that prohibition would not preclude judicial restraint of actions by unions to bring about a boycott by the employees of common carriers. The problems involved in compelling employees of common carriers to serve without discrimination resemble, it may be noted, those involved in compelling employees to serve others without regard to their race or creed.

This footnote is not offered as a solution of the problems involved but only as a suggestion that they do not seem appropriate for per curiam disposition.

117 See Local 1976, Carpenters v. NLRB, 357 U. S. 93, 110-111.

118 See cases cited in note 64, supra.


120 353 U. S. 1 (1957); two companion cases were also controlled by the Guam decision: Amalgamated Meat Cutters v. Fairlawn, id. at 20; San Diego Unions v. Garmon, id. at 26.

121 The alternatives to the Guam result have been the subject of exhaustive discussion, which will not be recaptulated or appraised here. See generally, Tishler v. Grodin, Taft-Hartley Pre-emption in the Area of NLRB Inaction, 44 Cal. L. Rev. 663 (1956), citing many other discussions prior to Guam.

122 See, e.g., §8(b)(4)A, prescribing union pressure to force an employer or self-employed person to join a union. This problem typically arises in connection with small businesses.

123 For example, the late Senator Taft declared during the legislative debate:

I myself feel that the larger employers can well look after themselves, but throughout the United States there are hundreds of thousands of smaller employers, smaller businessmen, who, under the existing statute, have come gradually to be at the mercy of labor union leaders, either labor-union leaders attempting to organize their employees, or labor-union leaders interfering with the conduct of their business for one reason or another. 2 Legis. Hist. 1005 (Congressional Record, Senate—April 23, 1947).

124 In Guam, the Court appeared to invite legislation changing its decision. See 353 U. S. 11. Legislative efforts have failed in part because they have become enmeshed with larger differences concerning the content of a desirable national labor policy.


The Court was careful to point out in Guam that it was not passing on the validity of the Board's declining jurisdiction on an ad hoc basis or on the basis of its general yardsticks. The general standards based on dollar minima might be invalidated without necessarily outlawing the ad hoc declinations of jurisdiction. See 71 Harv. L. Rev. at 532-34. The Board's practice of ad hoc declination was established under the Wagner Act and was not disturbed by Taft-Hartley. Although an ad hoc policy would theoretically permit the Board to consider the seriousness of the abuse involved in a particular case, the Board's case load might make this possibility largely academic. Such a policy would avoid public announcement of the fact that a federal statute could be violated with impunity. See (ex-Board-Chairman) Madden, Comment and Appraisal, 18 Ohio St. L. Rev. 427, 432 (1955), objecting that prior announcement of jurisdictional standards "lets the cat out of the bag." But the ad hoc policy would revile the uncer-
coverage of the National Act—reaches the wheat grown by a single farmer for his own consumption (Wickard v. Filburn, 317 U. S. 111), and a retail druggist who removes 12 tablets from their out-of-state container and places them in his own box for local sale. U. S. v. Sullivan, 332 U. S. 600, 607, 696.* 110


* See cases cited in note 175, supra, for illustrations of enterprises, including retailers which were not "large" but were large enough to "affect commerce." See also, Howell Chev. Co. v. NLRB 346 U. S. 482 (1953) sustaining applicability of LMRA to Chevrolet dealer franchised by General Motors, purchasing $1,000,000 annually from G. M. 43% of which was manufactured out of state. Douglas J., dissenting without opinion.

* In Textile Workers v. Lincoln Mills, 353 U. S. 448, 452 (1957) the Court found the legislative history inconclusive. Commentators have differed on the meaning of that history as well as on the wisdom of the decision in Lincoln Mills. Cf., e.g., Bickel and Wellington, Legislative Purposes and the Judicial Process. The Lincoln Mills Case, 71 Harv. L. Rev. 1 (1957) with Feininger, Enforcement of Labor Agreements—A New Era in Collective Bargaining, 43 Va. L. Rev. 1261, esp. at 1270-71 (1957), and Bunn, Lincoln Mills and the Jurisdiction to Enforce Collective Bargaining Agreements, Id. at 1247. Although the disagreement within and outside of the Court cautions against dogmatism, the extracts from the legislative history set forth in the opinion of Frankfurter, J., dissenting in Lincoln Mills, p. 485 et seq., esp. pp. 530, 540-44 are, in my opinion persuasive evidence in support of a dominantly jurisdictional interpretation of § 301.


* § 301(b) provided "Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets." It is, of course, arguable that both the provisions conferring a judicial status on unions and those dealing with the enforceability of judgments are "substantive."

* Section 2 of Article III provides in part: "The judicial power [of the United States] shall extend to all Cases in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority... between Citizens of different States."

* 304 U. S. 64 (1938).


* The Conference Report, in explaining the deletion of a provision which would have made the failure to abide by an arbitration agreement an unfair labor practice, stated: "Once parties have made a collective bargaining contract, the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board." H.R. Conf. Rep. No. 510, 80th Cong. 1st Sess., p. 42, quoted 353 U. S. 448, 452. See also references to Mr. Justice Frankfurter's dissent in Lincoln Mills, cited in note 192, supra.

The only one of the problems enumerated in the text, which was raised during the legislative history was the constitutionality of a grant of jurisdiction to federal courts to enforce state law in non-diversity actions. For references to the legislative history, see 353 U. S. 485, 533, 541-42.

* 345 U. S. 437 (1953).

* Mr. Chief Justice Warren wrote an opinion concurring in Clark J., Beed J., concurring separately. See also Rule 17(a) of the Federal Rules of Civil Procedure discussed in Bunn, op. cit. note 183, at 1258.

* Mr. Justice Frankfurter forcefully developed these two considerations (see 345 U. S. at 456-59) but disregarded them in order to avoid constitutional questions.

* See the proviso to §9(a) of the LMRA.

* For a discussion of the individual's right to bring an action under a collective bargaining agreement, see Cox, Individual Enforcement of Collective Bargaining Agreements, 8 Lab. Law. Forn. 850 (1959).

* When the Court reaches these questions, it may well reverse Westinghouse. Cf. Rep. of Committee on Labor Arbitration of Labor Relations Section of American Bar Assn. (1956), 28 LA 913, 917. The underlying labor-management disputes in Westinghouse and Lincoln Mills (as well as its two companion cases) were basically the same in that each involved monetary claims of individual employees. See Bunn, supra note 183, at 1248 et seq. Given the elimination of the constitutional questions raised by Section 301, there is no apparent justification for recognizing federal-question jurisdiction under § 301 to enforce union demands for arbitration of disputes concerning the individual rights of employees while denying such jurisdiction over direct enforcement of such rights. On the contrary, such disparate treatment would be anomalous. It would, e.g., imply a denial of jurisdiction under § 301, to enforce arbitration awards even though such awards resulted from the previous enforcement, under § 301, of agreements to arbitrate. This result is implied because an award which provides for money payments to employees defines their individual rights to the same extent as the provisions involved in Westinghouse. Neither § 301 nor a coherent policy of labor relations or of judicial administration warrants such a truncated allocation of federal judicial power.

Adherence to Westinghouse may also produce difficulties in state, as well as federal diversity, actions involving individual rights of employees. In such actions, courts will be confronted with the question of whether state or federal substantive law governs. See text accompanying note 223 infra and Bridges v. F. H. McGraw and Co., 302 S.W. 2d 109 (Ky. 1957), holding that state substantive law controls. Such an approach, however, could produce inconsistent interpretations of the same agreement under federal and state law, respectively, and thus threaten the uniformity which was apparently the basic objective of the Court's ouster of state law in Lincoln Mills. For a fuller discussion of the problems involved, see 21 Harv. L. Rev. 1169 (1958), noting the Bridges case.

* 353 U. S. 448 (1957).

* See Bickel and Wellington, op. cit., supra, n. 183.

* Goodall-Sanford, Inc. v. United Textile Workers, 353 U. S. 550 (1957); General Elec. Co. v. Local 205, United Elec. Workers, 104 at 547.


* 353 U. S. at 452.

* Id. at 455.

* Ibid.

* Id. at 451.

* But cf. General Electric Co. v. Local 205, 353 U. S. 457,
548 where the Court stated: “We follow in part a different path than the Court of Appeals, though we reach the same result.” Since the Court of Appeals for the First Circuit (233 F.2d 85, 87 et. seq.) (1956) had relied on the Arbitration Act, the Court’s language reinforces the rejection of the applicability of that Act implied by the failure to invoke it in *Lincoln Mills*. Cf. Frankfurter, J., dissenting, 353 U. S. at 466. In Boston Printing Pressmen Union No. 67 v. Potter Press, 241 F.2d 767 (1st Cir. 1957), cert. denied, 355 U. S. 817 (1957), Section 301 was held not to authorize specific enforcement of an agreement to submit to arbitration issues as to the terms to be included in a new contract, principally on the ground that such enforcement is not authorized by the United States Arbitration Act. The Supreme Court’s failure to rely on that Act in *Lincoln Mills* would appear to eliminate that ground for distinguishing, in actions for specific enforcement, between clauses providing, respectively for “grievance” and “economic” arbitration. That distinction, which is not warranted by the language of Section 301, has properly been questioned. See 70 Harv. L. Rev. 365 (1956), 52 N.W. L. Rev. 284, 288, 294 (1957); but cf. 105 U. Pa. L. Rev. 269 (1956). Cf. also with *Potter Press*, St. Ry. Employees v. Pittsburgh Rys., 30 L.A. 477 (Pa. Sup. Ct., W. Dist., 1958) cert. denied, Nov, 10, 1958, 43 L.R.R. 53 (enforcing under Pennsylvania Arbitration Act on agreement to arbitrate amendments of contract provisions for a retirement plan).


353 U. S. at 458.

353 U. S. at 458.

353 U. S. at 458.

"Id." at 460.

That concept has been invoked to sustain the jurisdiction of federal courts to apply state law in actions involving federally created instrumentalities. See Frankfurter, J., dissenting, 353 U. S. at 473, et. seq. Such jurisdiction has been defended in the context of labor relations on the ground that it is necessary for the protection of an extensive body of federal labor regulation. See Mendelsohn, Enforceability of Arbitration Agreements under Taft-Hartley Section 301, 61 Yale L. J. 167, 191 (1956). Senator Taft during the hearings on the proposed legislation defended federal jurisdiction on grounds quite similar to this protective jurisdictional concept although he did not invoke it by that name. See Hearings before Committee on Labor and Public Welfare, on S. 55 and S. J. Res. 22, 80th Cong., 1st Sess., pp. 56-58, quoted in the dissent of Frankfurter, J., 353 U. S. 524-29, esp. p. 526.

See references cited in note 203, supra.

Actions to enforce collective bargaining agreements brought in state courts are not strictly “Section 301 actions”; they are actions brought under state jurisdictional authorizations and not pursuant to Section 301. “Section 301 actions” will, however, be used here to include actions which could have been filed in a federal court pursuant to Section 301 even though they are filed in a state court.

353 U. S. at 456-57.

See McCarrol v. Los Angeles County Dist. Comm. of Car. 49 Cal. 2d 45, 315 P.2d 322 (1957), discussed infra in text accompanying note 235.

It has been suggested that in state actions state law will govern “collateral questions of substantive law,” such as the general law of contract and general defenses, such as fraud, etc. See Firsing, The Minnesota Uniform Arbitration Act and the Lincoln Mills Case, 42 Minn. L. Rev. 333, 374 (1958). Although determination of collateral questions on the basis of state law is a familiar incident of federal-question jurisdiction, the general law of contract and general defenses have so crucial an impact on the existence of a “federal right” under a collective bargaining agreement, that it is doubtful that such matters will be controlled by state law.

See, e.g., Mendelsohn, supra note 221, at p. 189.

See, Note, 57 Col. L. Rev. 1123, 1132-34 (1957), for a useful discussion of the competing considerations.


Since such machinery would appear to be “procedural,” the answer would seem to be clearly “yes.” But the use of such machinery would presumably be governed by “federal law” concerning arbitrability or the arbitrator’s jurisdiction, the basis for attacking an award, the requirements of fair procedure in arbitration. Such matters go to the heart of the federally-recognized right to enforcement of arbitration provisions and would accordingly appear to be matters of “substance” controlled by federal standards.

See 353 U. S. at 465.


See, e.g., United States v. Hutcheson, 312 U. S. 219 (1945); Allen-Bradley Co. v. Local No. 3, Int. Bhd. of Electrical Workers, 325 U. S. 797 (1939). The problem of accommodating Section 301 and the Norris-LaGuardia Act will be especially acute. See text, infra, accompanying note 245 et. seq. § 301 makes it clear that the union may sue and be sued as an entity, that unions and employers are to be responsible for the acts of their “agents,” without, however, clarifying the standards of vicarious responsibility, and that a collective bargaining agreement imposes legally enforceable duties whose breach is to be remedied by suits for damages.

In addition other provisions of the LMRA will bear on the basic validity of the agreement involved or of particular clauses such as those embodying union-security arrangements.

49 Cal. 2d 45, 315 P.2d 322 (1957), noted in 58 Col. L. Rev. 278 (1958).


See 71 Harv. L. Rev. 1172, 1175 (1958); 25 Univ. of Chi. L. Rev. 496 (1958).

See 353 U. S. at 464.


In damage actions, the practical importance of the question is reduced by the plaintiff’s right to sue in a federal court and by the defendant’s power to remove state actions. 28 U.S.C.S. 1441 (a) (1952) provides that “any civil action brought in a state court of which the federal district courts ... have original jurisdiction, may be removed by the defend-
ant... to the district court of the United States.” But in injunction actions, the defendant’s attempt to remove may be blocked by the argument that the action is not removable since the Norris-La Guardia Act has deprived the federal courts of “jurisdiction” to enjoin strikes. See 28 U.S.C.S. 1441(a) quoted supra. Some federal courts have taken this position. See Fay v. American Cystoscope Makers Inc., 98 F. Supp. 278, 280 (S. D. N.Y. 1951); Pearson v. Sinclair Refining Corp., 16 Lab. Cas. (CCH) Par. 65, 705 (E. D. Okl. Civ. No. 2709, March 14, 1950). Contra, Miller Parlor Furniture Co. v. Furniture Worker’s Industrial Union, 8 F. Supp. 209 (D. N. J., 1934). See generally 20 Univ. of Chi. L. Rev. 304 (1953).

352 U. S. 99 (1945).

It is not clear whether states which deny injunctive relief under “baby” Norris-LaGuardia Acts could be compelled to grant such relief in Section 301 cases if it were available in the federal courts. See Hart, The Relations Between State and Federal Law, 54 Col. L. Rev. 361, 507 (1954); 71 Harv. L. Rev. 1712, 1714 (1958). If the availability of such relief in federal courts were clearly established, the practical significance of this question would be reduced as the result of the plaintiff’s privilege to sue in a federal court.

See 315 F. 2d at pp. 331-32.
353 See Lincoln Mills, 335 U. S. at 454-55.
354 See id. at 452. Senator Taft indicated that § 301 would not displace state equitable remedies. See extracts from legislative history appended to opinion of Frankfurter, J., dissenting in Lincoln Mills, id. at 493.


356 See 315 F. 2d at p. 332.
357 See, e.g., Beacon Piece Dyeing and Finishing Co., 121 NLRB No. 113, 42 LRRB 1491 (1958); Inland Steel Co., 77 NLRB, 14 (1948), enforced, 170 F.2d 247 (7th Cir., 1948), cert. denied 336 U. S. 969 (1949); General Motors Corp. 81 NLRB 779 (1949), enforced, 179 F.2d (2nd Cir., 1950).


359 The most important exception involves disputes as to breach of no-strike clauses. For a collection of cases on the arbitrability of such disputes, which is affected by the breadth of the arbitration clause, see McCord v. Los Angeles County Dist. Conn. of Car., 315 P.2d 322, 334, note 1 (Cal. 1957).

360 See note 218 supra.
361 The Court in another context has recognized that, in enforcing the duty to bargain, consideration should be given to “the philosophy of collective bargaining as worked out in the labor movement of the United States.” NLRRB v. American NafAm. Ins. Co., 343 U. S. 395, 408 (1952). Recognition of that “philosophy,” including the widespread reliance on arbitration in resolving issues of contract administration, would be equally appropriate in adjusting judicial and administrative jurisdiction.


363 For illustrative cases affirming judicial competence notwithstanding an overlap between contractual and statutory prohibitions, see Machinists’ Assn. v. Cameron Iron Works, 257 F.2d 465 (5th, 1958), cert. den. 42 LRR 310 (1958) (specifically enforcing arbitration clause); United Elec. Workers v. Worthington Corp. 236 F.2d 364 (1st Cir., 1956), reversing 136 F. Supp. 31 (E. D. Mass., 1955) (enforcing arbitration award); Ind. Petrol Workers of N. J. v. Esso Standard Oil Co., 235 F.2d 401 (3rd Cir. 1956). Contra: United Ass’n. of Journeymen, etc. v. Marchese, 81 Ariz. 162, 302 P.2d 930 (1956) (2 justices dissenting). See also United Electrical Workers v. General Elec. Co., 231 F.2d (App. D. C., 1956) denying jurisdiction where union’s complaint for injunctive relief alleged that employer’s unilateral adoption of new discharge rule constituted a violation of both the agreement and the duty to bargain. Although the General Electric case was “distinguished” in the Worthington case (see 236 Fed. 2d at 370) the only basis for distinction would appear to be the fact that the plaintiff’s complaint in General Electric explicitly charged an unfair labor practice whereas the charge was merely implied in Worthington. This essentially formal difference appears to be a dubious basis for disparate results as to the existence of Section 301 jurisdiction even though the Supreme Court in Weber attached significance to the fact that the moving party had alleged a federal unfair labor practice. See 348 U. S. 468, 481 (1955). Whatever weight should be attached to the form of the complaint in other contexts, that factor scarcely seems entitled to significant, let alone, decisive, weight in the context of Section 301. That section recognizes judicial competence to deal with contract violations; such violations are separable from violations of the LMRA. Under such circumstances, the adjustment between judicial and administrative competence should be based on more substantial considerations than the form of the pleadings. See the Worthington case, 236 F.2d 364, 370, citing cases where courts in dealing with conduct which simultaneously could constitute a contractual and statutory violation have separated the issues and have exercised jurisdiction over the contractual issues.

For extensive discussions of cases dealing with jurisdiction in the overlap context, see Dunan, supra, note 250; Note, 69 Harv. L. Rev. 735 (1956).
364 Cf. Mcdonough, supra note 221, at 186 with Dunan, supra note 251.
365 See, e.g., McCarroll v. Los Angeles County Dist. Conn. of Car. 49 Cal. 2d 45 at 52-3, 315 P.2d 322, at 325 (1957). In McCarroll, the court in order to maintain jurisdiction of an action for breach of a no-strike clause avoided the problem raised by overlap by concluding that the union’s conduct, although it might reasonably have been considered a unilateral repudiation of a term of the contract, could not reasonably be deemed to be a violation of Section 8(b)(3) of the LMRA. This conclusion is, however, extremely doubtful. See note 230 supra.
366 Illustrative cases are cited in note 255, supra.
367 The pertinent difficulties are illustrated by the differences between the Board and the reviewing courts with respect to union-sponsored strikes after union grievances have been denied by an arbitrator or prior to arbitration of such grievances. In Westmoreland Coal Company, (117 NLRRB 1072 (1957), the Board found a violation of Section 8(b)(3) of the LMRA when a union whose grievance was denied by an arbitrator
struck without complying with the notice and other requirements prescribed by Section 8(d). Its decision was, however, reversed. Local 9735, U.M.W. v. NLRB, 42 LRRM 2320 (Ct. of App. D. C., 1958), one judge dissenting. The reversal seems appropriate because the master contract left the issue involved to collective bargaining at the individual mines. Accordingly, the arbitration award held that in the absence of a newly bargained standard the employer was free to take the action involved; it did not define the standard to be controlling during the term of the contract. Since that standard was left open by the parties, the union was privileged to strike to secure the standard which it preferred. Cf. NLRB v. Jacobs Mfg. Co. 196 F.2d 680 (2nd Cir. 1952).

In Boone County, 117 NLRB 1065 (1957), the Board held that a union had violated Section 8(b)(3) of the LMRA when it struck over grievances cognizable under the contractually prescribed grievance—arbitration procedure, without resorting to that procedure. Again, its decision was reversed, on the ground that the explicit provision of a no-strike obligation in the contract made the provisions for grievance adjustment “a gentleman’s agreement.” See UMV v. NLRB, 42 LRRM 2264 (Ct. App., D. C., 1958) (one judge dissenting). But cf. Int. Broth. etc. v. W. L. Mead, 290 F.2d 576 (1st Cir., 1965). The Board’s intervention in such cases may be criticized as involving it in questions of contract administration which are beyond its responsibilities. See Cox, The Duty to Bargain in Good Faith, 71 Harv. L. Rev. 1401, 1438 (1958). But the Board’s assumption of this responsibility seems at least as justifiable as its assumption of similar responsibilities, e.g., over unilateral change or rejection, (see note 250, supra) which involve it in policing the bargain under the guise of policing the bargaining process. The grievance and arbitration procedure, even though the obligation to use it is voluntarily assumed, is an integral and a usual part of the bargaining process. Cf. Timken Roller Bearing v. NLRB, 161 F.2d 499 (5th cir. 1947). Accordingly, the Board’s conclusion that respect for such obligations must be enforced to protect the integrity of the bargaining process is justifiable.

What is of primary interest here is not the merits of that conclusion but the difficulty of forecasting the action of the Board and of the reviewing courts in situations involving a possible overlap. If in a particular situation the courts withheld relief under the contract because of a claim of overlapping remedies, the practical result might be a denial of a judicial remedy because of an unfounded assumption that a Board remedy would be forthcoming. To avoid such results, contractual jurisdiction should be exercised without regard to overlap.

Discussed supra in text accompanying note 50.


See Dunan, supra note 250, at p. 53-54 for an able and extensive discussion of the differences between Garner and overlap in the context of Section 301.

See cases cited in note 122, supra.

See text accompanying note 134, supra.

See Consolidated Aircraft Co., 47 NLRB 694, (1943). The Board declared (at pp. 705-06): “We are of the opinion that it will not effectuate the statutory policy of encouraging the practice and procedure of collective bargaining for the Board to assume the role of policing collective contracts between employers and labor organizations by attempting to decide whether disputes as to the meaning and administration of such contracts constitute unfair labor practices within the meaning of the Act. On the contrary, we believe that parties to collective contracts would thereby be encouraged to abandon their efforts to dispose of disputes under the contracts through collective bargaining or through the settlement procedures mutually agreed upon by them, and to remit the interpretation and administration of their contracts to the Board. We, therefore, do not deem it wise to exercise our jurisdiction in such a case, where the parties have not exhausted their rights and remedies under the contract as to which the dispute has arisen.” The Board’s approach was approved and extended in the enforcement proceeding, 141 F.2d 785, 788 (9th Cir., 1944). See generally, address by Board Member Jenkins, entitled “The Peacemakers,” before Arbitration and Industrial Relations Conference, Fort Worth, Texas, November 19, 1957, p. 10 et seq. (mimeo. available from Public Information Division of NLRB.)

Spiegelman Mfg. Co., 112 NLRB 1080 (1955); New Britain Machine Tool Co., 116 NLRB 645 (1956), reversed and remanded, on the ground that the Board had misconceived the statutory standards, in Int’l Ass’n. of Machinists, AFL-CIO v. NLRB, 247 F.2d 414 (2d Cir., 1957).


350 U. S. 270 (1956). Mr. Justice Frankfurter, with whom Mr. Justice Minton and Harlan concurred, dissenting, on the ground that the strike, although a response to employer unfair labor practices, was subject to the waiting period and other requirements prescribed by §8(d) of the LMRA and that that section precluded reinstatement of the striking employees.

This procedure is recommended in note 66 Yale L.J. 291 note 40. A general discussion of “primary jurisdiction” will not be undertaken here. For a thoughtful treatment, see Jaffe, Primary Jurisdiction Reconsidered: The Antitrust Laws, 162 Univ. of Pa. L. Rev. 577 (1954).

Thus it may be urged that a strike provoked by unfair labor practices is “protected activity” and that a court’s mistaken failure to hold that the employer had engaged in such practices would result in its granting damages or injunctive relief for conduct sanctioned by the national statute. In this connection, it is significant, however, that the protected or unprotected status of the conduct involved flows from an interpretation of the contract and that such interpretation is not controlled by a doctrine that all strikes in response to employer unfair labor practices are necessarily protected.

It is true that the Court in Mastro Plastics obliquely questioned the validity of a clause barring unfair labor practice strikes during the term of the contract. See 350 U. S. at 283. But the difficulties of distinguishing between unfair labor practice strikes and economic strikes and the availability of the Board’s machinery for the correction of unfair labor practices would appear to be ample grounds for sustaining the parties’ agreement to forego all use of economic pressure during the contract term. The validation of such a broad no-strike clause would make clear that the basic issue before the courts would be the interpretation of the contract rather than of the Board’s doctrines as to protected activity.

Thus the parties might attempt to invite Board determinations concerning rights under their agreement by embodying statutory standards therein. A no-strike clause might, e.g., expressly negate its applicability to strikes provoked by antecedent employer unfair labor practices. Such a clause would appear to make liability under the no-strike clause dependent on whether the employer’s conduct had violated the statutory provisions.
defining unfair labor practices. And it is arguable that such a determination should be made by the NLRB rather than by the courts, at least in situations where the Board’s jurisdictional standards, the LRMA’s statute of limitations, and other requirements for the use of the Board’s machinery (see §9 f-h) could be satisfied. Nevertheless, the parties’ incorporation of statutory standards in their agreement would not change the fact that the basic issue is one of the construction and application of the contract. And if the LMRA is read as reining such questions to the courts, it is doubtful that the parties’ agreement should be permitted to change the legislative allocation of authority.

See the dictum in Int. Bhd. of Teamsters v. W. L. Mead, 230 F.2d 576, 581-82 (1st Cir., 1956), cert. denied 352 U. S. 802 (1956). But cf. Ferguson Steere Motor Co. v. Int. Bhd. of Teamsters, 223 F.2d 842 (5th Cir., 1955) holding that federal district courts lack jurisdiction to grant a declaratory judgment that a contract had been renewed by its terms. The grounds for decision were (1) jurisdiction was barred by Westinghouse and (2) the issue involved was peculiarly within the Board’s jurisdiction under §8(d) of the LMRA, which, together with §301 had been invoked as a source of jurisdiction by the plaintiff. Westinghouse seems a dubious basis for denying jurisdiction where the issue is the existence of a contract rather than the union’s capacity to enforce “personal” provisions thereof. The second ground for the decision is equally dubious in that it ignores the fact that the issue of whether a contract was renewed by its own terms is separable from the unfair labor practice issue which may be raised by a union’s non-compliance with §8(d). See International Union of Operating Engineers v. Dahlem Const. Co., 193 F.2d 470, 473, et seq. (6th Cir., 1951).

This position has been adopted by the Board. See International Metal Products Co., 104 NLRB 1076 (1953); Curtis Bros. Inc., 119 NLRB No. 33, 41 LRMR 1025, 1028 (1957).

See Moline Mfg. Co. v. Grand Lodge Int. Assn. of Machinists, 216 F.2d 326 (6th Cir., 1954) [Union A certified in 1948 had executed a contract embodying unit-shop and check-off provisions. Prior to the expiration of that contract, the NLRB certified Union B as the representative of the bargaining unit. The Sixth Circuit recognized the district court’s jurisdiction, under Section 301, to determine the right of the displaced union to enforce the provisions described above despite the fact that the contractual issue depended on the provisions of the LMRA governing the employer’s duty to bargain and his related duties vis-a-vis a certified union.


See, e.g., Hershey Chocolate Corp., 121 NLRB No. 24, 42LRMR 1460 (1958), which modifies the NLRB’s “chimera” doctrine; Pacific Coast Ass’n. of Pulp and Paper Makers, 121 NLRB, No. 34, 42 LRMR 1477 (1958), modifying the term during which a long-term contract will operate to bar an election; Keystone Coat and Apron Towel Supply Co., 121 NLRB No. 15, 42 LRMR 1450 (1958), revising rules as to when an invalid security-arrangement will prevent a contract from constituting a bar.

See Shea Chemical Corp., 121 NLRB No. 129, 42 LRMR 1487 (1958), modifying previous rules permitting an employer and an incumbent union to negotiate and execute a new contract despite a timely claim of a rival union which raises “a real question” of representation.

See note 19 supra.

See also International Union, United Industrial Workers of America, Local No. 289 v. Star Products Co., 16 Ill. App. 2d 321, 149 NE2d 43 (Ill. App., 1st Dist. 1959). Plaintiff-union and the employer entered into a contract, including a check-off provision and apparently a union-security provision. Prior to the expiration of the contract, some members of the plaintiff union joined a rival union. The employer, without any certification of the rival by the NLRB, entered into a contract with the rival which was inconsistent with the plaintiff’s unexpired contract. Plaintiff brought suit in the state court for a declaration that its contract was "valid from its inception" and for further appropriate relief. The trial court dismissed for want of jurisdiction. The appellate court in sustaining the judgment urged (1) the original validity of the contract depended on questions as to majority status and appropriate unit, which, it implied, were within the Board’s exclusive competence; (2) the validity of the second and inconsistent contract depended on the application of §8(a)(5) of the LMRA and the application of the "chimera doctrine"; since the continued force of the first contract also involved these issues, which were appropriate for Board determination, the trial court (somewhat) lacked jurisdiction; (3) as a result of the Board’s, i.e., the Regional Director’s, refusal to issue a complaint on the ground of "insufficient evidence" of statutory violations, the issues as to the validity of the first contract were res judicata.

It should be noted that the court’s first ground would appear to destroy judicial competence under §301 unless the contracting union had been certified within a year of the execution of the contract relied on. But see Int. Broth. of Teamsters v. W. L. Mead, 230 F.2d 576, 581-82 (1st Cir., 1956), cert. denied 352 U. S. 802 (1956); see also Westinghouse, 348 U. S. at 451; "... in such actions [under Section 301] the validity of the agreement may be challenged on federal grounds —that the labor organization negotiating it was not the representative of the employees involved, or that subsequent changes in the representative status of the union have affected the continued validity of the agreement." (The supporting citation was: "Cf. La Crosse Telephone Corp. v. Wisconsin Employment Relations Board, 330 U. S. 18 [recognizing the Board’s exclusive jurisdiction over representation questions]. Query: Does the "Cf." imply judicial competence over such questions in the context of Section 301 actions?"

The court’s reliance on res judicata in Star Products appears to raise serious constitutional difficulties, which I have not adequately explored and which can only be mentioned here. Cf. dissent in Graybar Elec. Co. v. Automotive Petroleum and Allied Industries Employees Union, Local 618, 365 Mo. 753, 775, 287 S.W. 2d 794 (1956). The plaintiff’s alleged contract rights are destroyed on the basis of an ex parte administrative investigation, in which neither the plaintiff nor anyone else is accorded the substance of a fair hearing. It is true that the plaintiff’s interest in a statutory remedy may be destroyed by similar administrative determinations. But it does not follow that asserted contract rights, whose enforcement generally depends on the plaintiff’s initiative, can be constitutionally destroyed in the same fashion.

Some courts faced with motions to stay arbitrations on the ground that the contracting union had not represented a majority had denied such motions, declaring that the issues are within the NLRB’s exclusive jurisdiction and that the collective agreement is presumed to be valid until the Board makes a determination which invalidates it. See Matter of Levinsohn Corp., 209 N. Y. 454, 87 NE2d 510 (1949). Although the Levinsohn case was controlled by the Wagner Act, it has, without discussion, been followed despite the new problems raised by §301. See In re Wyatt Mfg. Co., 29 L. A. 171 (N. Y. Sup Ct. 1959).

See Int. Bhd. of Teamsters v. W. L. Mead, 203 F.2d 576,
581-82 (1st Cir., 1956), cert. denied, 352 U. S. 802 (1956). Courts, in exercising equity jurisdiction in Section 301 actions, will presumably apply conventional equitable doctrines under which relief may be withheld as a matter of discretion where an alternative remedy exists or where equitable relief may be nullified in another forum. Even though similar considerations enter into an application of “primary jurisdiction,” the canons of equity would appear to import considerably more flexibility.

Cf. Hays, supra, note 1, at 978-79.