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Federal Preemption and State Jurisdiction over Labor-Management Relations Problems under Section 14(c) of the LMRA

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NOTES

FEDERAL PREEMPTION AND STATE JURISDICTION OVER LABOR-MANAGEMENT RELATIONS PROBLEMS UNDER SECTION 14(c) OF THE LMRA

I. BACKGROUND

With the passage of the National Labor Relations Act of 1935,[1] Congress showed its intention to place the federal government in a primary position to oversee labor-management relations problems, which, prior to 1935, had been primarily looked after by the several states.[2] The several states had, however, seemed to fail in the task of overseeing labor relations problems, and, indeed, in some cases, seemed unwilling to undertake it.[3] Thus, Congress was induced to create a national administrative agency to foster industrial peace, to protect interstate commerce, and to promote the growth of organized labor.[4] Congress took this action pursuant to its commerce clause[5] power, and the validity of its action was upheld by the Supreme Court in 1937.[6]

The national agency, although given authority to the fullest extent of Congress' commerce power,[7] has never, since its inception,

1. 29 U.S.C.A. §§ 151-168 (1965), 49 Stat. 449 (1935), hereinafter referred to as the NLRA or the Wagner Act.

2. Meltzer, *The Supreme Court, Congress, and State Jurisdiction over Labor Relations*, 59 COLUM. L. REV. 6, 8 (1959), Smith, *The Taft-Hartley Act and State Jurisdiction over Labor Relations*, 46 MICH. L. REV. 593, 606 (1948).

3. Aaron, *The Labor-Management Reporting and Disclosure Act of* 1959, 73 HARV. L. REV. 1086, 1095 (Part II, 1960), 105 Cong. Rec. 17875 (Sept. 3, 1959), remarks of Senator Morse.

4. The findings and policies of Congress are set out in 29 U.S.C.A. § 141 (1965).

5. U. S. CONST. art. I, § 8, cl. 3.

6. National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1 (1937), National Labor Relations Board v. Fruehauf Trailer Co., 301 U.S. 49 (1937), National Labor Relations Board v. Friedman-Harry Marks Clothing Co., 301 U.S. 58 (1937).

7. Guss v. Utah Labor Relations Board, 353 U. S. 1, 3 (1957), National Labor Relations Board v. Fainblatt, 306 U. S. 601 (1939).

been able to exercise it.[8] This has been due primarily to budgetary shortages.[9] Because of the National Labor Relations Board's failure to completely exercise its authority, and because of the fact that so comprehensive a labor code as the Wagner Act was, must necessarily be ambiguous, problems in the division of federal-state jurisdiction began to arise.[10]

From 1935, with the passage of the Wagner Act, to 1947 with the enactment of the Taft-Hartley Amendments,[11] the federal labor laws dealth mainly with the protection and promotion of unionism, in the face of unfair practices by employers.[12] Decisions regarding the dividing line between federal-state jurisdiction — preemption decisions — by the Supreme Court from 1937 to 1947 (and from thence onward) have necessarily been on primarily an *ad hoc* basis because of the changing facts of the several cases, and because of a lack of clear showing of congressional intent.[13] During the decade, 1937 to 1947, the National Labor Relations Board was not extremely interested in unfair labor practices by labor unions, as they were not expressly covered by the NLRA.[14] Thus, state jurisdictions over infractions of various types by labor unions was not too seriously challenged in the period 1937 to 1947 [15]

> With the enactment of the Labor Management Relations Act in 1947, the scope of federal intervention into the field of labor relations was greatly expanded. Along with that expansion came a greater degree of uncertainty as to the extent of pre-emption which the new Act intended to create. The search for the legislative intent began, but it was fruitless. As with the Wagner Act, the Courts found themselves without guidance and were forced into the responsibility of clothing the skeleton of the statute in order to give definite limits to its scope.[16]

In the period 1947 to 1957, the Supreme Court decided that a union which engaged in work stoppages without striking could be

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8. Guss v. Utah Labor Relations Board, 353 U. S. 1, 3 (1957), Note, 62 YALE L. J. 116 (1952).

9. Note, 71 HARV. L. REV. 527, 536 (1958).

10. Aaron, *supra* note 3 at p. 1089.

11. Labor-Management Relations Act, 29 U.S.C.A. §§ 141-188 (1965), 61 Stat. 136 (1947) hereinafter referred to as the LMRA or Taft-Hartley.

12. Section 8(b), 29 U.S.C.A. 158(b), dealing with unfair labor practices by labor organizations was added by P.L. 101 (1947), 61 Stat. 140 (1947).

13. Roumell and Schlesinger, *The Preemption Dilemma in Labor Relations*, 18 U. DET. L. J. 17, 22 (Part 1, 1954), Petro, *Participation by the States in the Enforcement and Development of National Labor Policy*, N. Y. U. FIFTH ANNUAL CONF. ON LAB. 1, 23 (1952).

14. *Supra* note 12.

15. Meltzer, *The Supreme Court, Congress, and State Jurisdiction over Labor Relations*, 59 COLUM. L. REV. 6, 8 (1959), Long, *Boundaries of State-Federal Jurisdiction in Labor-Management Relations under the new Labor Law -- a State View*, N.Y.U. THIRTEENTH ANNUAL CONF. ON LAB. 75, 77 (1960).

16. Roumell and Schlesinger, *supra* note 13 at p. 27, *Labor Decisions of the Supreme Court at the October Term*, 1957, 44 VA. L. REV. 1057, 1059 (1958), International Association of Machinists v. Gonzales, 356 U.S. 617, 619 (1958).

ordered to desist by a state labor board;[17] that a state labor board could invalidate a contractual maintenance of membership agreement which did not comply with state law in its inception;[18] that a state court could vindicate the personal rights of ousted union members;[19] and that a state court could enjoin union picketing which threatened, intimidated, or provoked violence.[20]

In addition, the Court had previously determined that a state labor board could issue a cease and desist order to halt mass picketing, on the grounds that such action was within the police power of the state.[21]

On the other side of the coin, the Court determined in *Weber v Anheuser-Busch, Inc.*[22] that termination of unfair labor practice charges was primarily in the NLRB and that state jurisdiction to enjoin peaceful strikes had been preempted by the LMRA.[23]

The Court also decided that a state could not regulate a particular industry (public utilities) so as to prohibit peaceful strikes.[24]

In 1957 the Court rendered a series of three decisions[25] which seem to nearly completely put an end to state jurisdiction over labor relations problems, except in those settings where the state's police power could be invoked.

The *Guss* case stated that state labor relations boards had no jurisdiction over matters which were protected by Section 7[26] or prohibited by Section 8[27] of the Labor Management Relations Act.

The *Fairlawn Meats* case stated that state court action could not be permitted within the area of commerce which was within the competence of the national board, even though such state action might be consistent with the policy of the national act.

17. International Union, United Auto Workers of America, A. F. of L., Local 232 v. Wisconsin Employment Relations Board, 336 U.S. 245 (1949).

18. Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board, 336 U.S. 301 (1949).

19. Int'l Ass'n. of Machinists v. Gonzales, 356 U.S. 617 (1958).

20. Youngdahl v. Rainfair, 355 U.S. 131 (1957), United Construction Workers v. Laburnum Construction Corp., 347 U.S. 656 (1954). See also Ford v. Boeger, 362 F.2d 999 (8th Cir. 1966).

21. Allen-Bradley Local No. 1111, United Electrical, Radio & Machine Workers of America v. Wisconsin Employment Relations Board, 315 U.S. 740 (1942).

22. 348 U.S. 468 (1955).

23. Garner v. Teamsters, Chauffeurs & Helpers Local Union No. 776 (A.F.L.), 346 U.S. 485 (1953). See also Bethlehem Steel Co. v. New York State Labor Relations Board, 330 U.S. 767 (1947), in which the Supreme Court overthrew a state agency certification of a union consisting of foremen on the ground that state administrative action conflicted with NLRB jurisdiction.

24. Amalgamated Association of Street, Electric Railway & Motor Coach Employees, Division 998 v. Wisconsin Employment Relations Board, 340 U.S. 383 (1951).

25. Guss v. Utah Labor Relations Board, 353 U.S. 1 (1957), Amalgamated Meat Cutters & Butcher Workmen of North America, Local No. 427, A.F.L. v. Fairlawn Meats, Inc., 353 U.S. 20 (1957) San Diego Building Trades Council v. Garmon, 353 U.S. 26 (1957). See also San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959), Hotel Employees Union Local No. 255 v. Sax Enterprises, Inc., 358 U.S. 270 (1959).

26. 29 U.S.C.A. § 157 (1965), 49 Stat. 452 (1935) as amended 61 Stat. 140 (1947).

27. 29 U.S.C.A. § 158 (1965).

The third case in the series, *Garmon*, should be noted in more detail at this point, as it is the case cited most by advocates of full federal preemption.

The Garmon brothers were engaged as partners, in the lumber business in San Diego, California. None of their employees was a member of any labor union, and they (the employees) had indicated a desire to remain non-unionized. The San Diego Building Trades Council decided that the Garmon's business should be unionized, and demanded a labor agreement of the Garmons, which was to include a union shop clause. The Garmons refused to sign such an agreement, believing that prior to selection of a statutory bargaining agent by their employees, the signing of such an agreement would be an unfair labor practice. Shortly thereafter, the union commenced picketing the company's premises. The purpose of said picketing, as found by the trial court, was "to force the company to execute the agreement or suffer destruction of its business."[28] The Garmons brought an action in state court seeking damages and an injunction against the picketing.

The trial court gave judgment awarding damages, and granting the injunction. The Supreme Court of California, with three Justices dissenting, affirmed this judgment.[29] The United States Supreme Court held that the California state courts were incompetent to grant injunctive relief under either state or federal law, and implied that a damages award could not be granted by a state court under federal law.[30] The Supreme Court then remanded to the California court for a decision on whether damages could be awarded under California law. This last decision was arrived at despite the fact that the NLRB had refused jurisdiction of an unfair labor practice charge brought by Garmon prior to his suit in state court.

On remand the California Supreme Court decided that damages could be awarded for the tortious concerted activity under state law.[31] When the case again came before the Supreme Court of the United States in 1959, it held that state courts have been preempted of jurisdiction over all activities arguably within Section 7 or Section 8 of the LMRA, regardless of a refusal to exercise jurisdiction by the NLRB. State and federal courts must both bow to the NLRB's jurisdiction when an activity is arguably subject to Section 7 or Section 8, and this is so even though only damages for tortious

28. Garmon v. San Diego Building Trades Council, 45 Cal.2d 657, 291 P.2d 1, 3 (1955).
29. *Supra* note 28.
30. San Diego Building Trades Council v. Garmon, 353 U.S. 26 (1957).
31. Garmon v. San Diego Building Trades Council, 49 Cal.2d 595, 320 P.2d 473 (1958).

concerted activity be sought in the state court.[32]

The *Guss*, *Fairlawn Meats*, and the two *Garmon* cases had effectively created a "no-man's land" in the area of labor relations. State courts were forbidden to take jurisdiction over labor disputes, even though the NLRB refused to exercise its jurisdiction.[33] But as Justice Burton stated:

> Congress has demonstrated a continuing and deep interest in providing governmental machinery for handling labor controversies. The creation by it of a large, unsupervised, no-man's land flies in the face of that policy Due regard for our federal systems suggests that all doubts on the score should be resolved in favor of a conclusion that would not leave the State powerless when the federal agency declines to exercise its jurisdiction.[34]

Congress reacted to this problem, and others, in the labor relations field with the passage of the Landrum-Griffin Act[35] in 1959. This act added Section 14(c) to the Labor Management Relations Act.[36] This section caused much concern and debate just prior to the time of its passage. In contrast to what it provided, some had advocated forcing the NLRB to assume jurisdiction over all cases within the full range of its power.[37] Another proposal would have spelled out in detail the area in which state courts could work and the type of law to be applied in arriving at their decisions.[38]

The accepted amendment reads as follows:

> (c) (1) The Board, in its discretion, may by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction; provided, that the board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.
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> (2) Nothing in this Act shall be deemed to prevent or bar any agency or the courts of any State or Territory (including the Commonwealth of Puerto Rico, Guam, and the Virgin Islands), from assuming and asserting juris-

32. San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959). See also Figueroa v. National Maritime Union of America, AFL-CIO, 342 F.2d 400 (2d Cir. 1964).
33. Cases cited *supra* note 25.
34. Guss v. Utah Labor Relations Board, 353 U.S. 1, 18 (1957) (dissenting opinion).
35. Labor-Management Reporting and Disclosure Act, P.L. 86-257, 73 Stat. 519 (1959).
36. 29 U.S.C.A. § 164(c) (1965), Section 701(a) of the LMRDA (Landrum-Griffin Act).
37. 1 LEGIS. HIST. OF THE LMRDA OF 1959 397 (1959), report on S. 1555, S. 3974, 85th Cong., 2d Sess. § 602 (1958).
38. 105 Cong. Rec. 5947 (1959), the Prouty amendment.

diction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction.[39]

Theoretically, this amendment should have ended the "no-man's land" problem. It seems, however, that this section has probably raised as many questions as it has answered. The following portions of the paper will be devoted to a discussion of Section 14(c) and the rights, powers and duties of state courts and agencies in asserting their "residual jurisdiction."[40]

II. PREEMPTION — PRO AND CON

The problem of the power of the several states to solve labor-management relations problems still looms as one of the more vexing questions in the labor law field.

The National Labor Relations Board can, theoretically, cover almost the total spectrum of labor disputes, as the range of the commerce power extends to the most minute operations, because of the possibility that multiplication of these minutiae could seriously affect commerce.[41] The Board, however, has never, for various reasons,[42] been able to exercise its full power After the *Guss*,[43] *Fairlawn Meats*,[44] and *Garmon*[45] decisions, if the NLRB would not take jurisdiction to settle the labor dispute, with a few minor exceptions,[46] no authority could exercise such jurisdiction. Let us now examine the rationale behind the theory of complete federal preemption.

One of the foremost of the arguments advanced for federal preemption is stated by Mr Justice Jackson in *Garner v Teamsters, Chauffeurs & Helpers Local Union No. 776 (AFL)* [47]

A multiplicity of tribunals and a diversity of procedures

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39. *Supra* note 36.

40. Aaron, *The Labor-Management Reporting and Disclosure Act of* 1959, 73 HARV. L. REV. 1086, 1094 (Part II, 1960) "Considered in the context of the LMRDA, the new formula for allocating jurisdiction over labor-management disputes between the federal government and the states is something of a paradox. Ostensibly, it nullifies the decisions of the Supreme Court in the Guss and Companion cases and restores a measure of power to state courts and agencies. Its net effect, however, is to adopt the long line of Supreme Court decisions confirming the federal government's preemption of the labor relations field while throwing a few crumbs to the states, Congress made it clear that the lion's share of labor cases is reserved exclusively for the NLRB and the federal courts." The phrase "residual jurisdiction" is used in Russell v. Electrical Workers Local 569, 48 Cal. Rptr. 702, 409 P.2d 926 (1966).

41. *Cf.* Polish National Alliance of the United States v. National Labor Relations Board, 322 U.S. 643 (1944) Wickard v. Filburn, 317 U.S. 111 (1942) National Labor Relations Board v. Fainblatt, 306 U.S. 601 (1939).

42. *Supra* note 8 and accompanying text.

43. 353 U.S. 1 (1957).

44. 353 U.S. 20 (1957).

45. 353 U.S. 26 (1957), 359 U.S. 236 (1959).

46. *Supra* notes 17-21 and accompanying text.

47. 346 U.S. 485 (1953).

> are quite as apt to produce incompatible or conflicting adjudication as are different rules of substantive law The same reasoning which prohibits federal courts from intervening in such cases, except by way of review or on application of the federal Board, precludes state courts from doing so.[48]

Thus, a statement of the requirement of uniformity of decision is made, but why must labor decisions be uniform? The arguments are primarily as follows:

1. Many industries and many labor organizations are now national in scope, and their operations, contracts, and labor disputes take effect in a multi-state area. It is not conceivable to the advocate of full federal preemption, that an industry-wide dispute could be at the mercy of the courts or agencies of the several states.[49]

2. If the states were allowed to apply their labor laws to various situations, industrial complexes would tend to migrate to states in which the law tended to favor management, thus disrupting the stream of commerce.[50]

3. The majority of the states do not have labor legislation that compares to Sections 7 and 8 of the LMRA[51] and thus labor problems would have to be solved according to the common law of the several states which as a rule is unfavorable to organized labor [52]

4. The competency of local state courts to realize the scope of the labor problem, and to be able to render intelligent, unbiased decisions is also questioned by the preemptionists.[53]

It is clear that the preemptionists feel that uniformity of treat-

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48. *Id.* at 490.

49. 105 Cong. Rec. 17875 (1959), remarks of Senator Morse. Roumell and Schlesinger, THE PREEMPTION DILEMMA IN LABOR RELATIONS, 18 U. DET. L. J. 135, 158 (Part II, 1955).

50. Roumell and Schlesinger, *supra* note 49 at 159.

51. Only 14 states have a comprehensive labor relations code Colorado COLO. REV. STAT., 1963 §§ 80-4-1 to 80-4-22 (1964), Connecticut: CONN. GEN. STAT. §§ 31-101 to 31-111 (1961) Hawaii HAWAII REV. LAWS §§ 90-2 to 90c-3 (Supp. 1963), as amended S.L. 1965, Act 244 Kansas: KAN. GEN. STAT. ANN. §§ 44-801 to 44-817 (1964) Massachusetts: MASS. GEN. LAWS ANN. ch. 150A §§ 1-12 (1958), Michigan. MICH. COMP. LAWS §§ 423.2 to 423.25 (Supp. 1961), Minnesota. MINN. STAT. §§ 179.01-179.58 (1966) New York. N.Y. LAB. LAW §§ 700 to 717, Oregon. ORE. REV. STAT. §§ 662.010 to 662.655 (1965) North Dakota N.D. CENT. CODE §§ 34-12-01 to 34-12-14 (Supp. 1965), Pennsylvania. PA. STAT. ANN. tit 43, §§ 211.1 to 211.13 (1964) Rhode Island. R. I. GEN. LAWS ANN. §§ 28-7-1 to 28-7-47 (1957) Utah. UTAH CODE ANN. §§ 34-1-1 to 34-1-34 (1966), Wisconsin. WIS. STAT. ANN. §§ 111.01 to 111.19 (1957).

52. 105 Cong. Rec. 17875 (1959), remarks by Senator Morse. "For labor disputes involving employers and unions below the Board's standards, the conference bill would allow State agencies and State courts to exercise jurisdiction. Of the 50 states, 38 have no administrative agencies whatsoever, hence, in these states, labor disputes will be handled by state courts."

53. Roumell and Schlesinger, *supra* note 49 at 160 105 Cong. Rec. 17875 (1959), remarks of Senator Morse.

ment as applied by federal authority is the only answer to labor-management problems.

Another reason for the extension of federal preemption prior to 1959 was the fact that the states had not shown a willingness to take the matter in hand.[54]

There are three basic theories in regard to the extent of preemption of state jurisdiction.[55] The first is that when Congress has legislated in a certain field, the states are powerless to act in that area.[56] This theory is exemplified by a statement of Mr Justice Holmes in the *Varnville Furniture*[57] case:

> When Congress has taken the particular subject-matter in hand coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go.[58]

This theory is the one espoused by the preemptionists.

The second basic theory is that state law does not have to yield to federal law unless it clearly conflicts therewith.[59] This test does not presently reflect the trend of federal judicial thought.[60]

The third theory is that state action in the labor relations field should not be excluded unless Congress has specifically voiced an intention to do so.[61] Professor Cox feels that Congressional specificity in this area is impossible, and that it is up to the courts in the first instance to maintain the balances of federalism.[62]

Before proceeding to discussion of the actual exercise of state jurisdiction under Section 14(c) a glance at some of the arguments in favor of state jurisdiction over labor relations problems is in order

> State law is likely to be more immediately responsive to prevailing public sentiment than is federal law . Moreover, to cut off this opportunity, would be to make an unwarranted assumption as to the ultimate wisdom of federal labor legislation and to deprive the nation of valuable pragmatic lessons which can be learned if the possibilities for

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55. See generally Comment, 59 MICH. L. REV. 643, 645 (1961), Roumell and Schlesinger, *The Preemption Dilemma in Labor Relations*, 18 U. DET. L. J. 17, 23 (Part I, 1954), Smith, *The Taft-Hartley Act and State Jurisdiction over Labor Relations*, 46 MICH. L. REV. 593, 614 (1948).

56. *Supra* note 55. But *cf.* Michelman, *State Power to Govern Concerted Employee Activities*, 74 HARV. L. REV. 641, 647 (1961).

57. Charleston & Western Carolina Ry. Co. v. Varnville Furniture Co., 237 U.S. 597 (1915).

58. *Id.* at 604, See also Garner v. Teamsters, Chauffeurs & Helpers Local Union No. 776 (A.F.L.), 346 U.S. 485, 500 (1953).

59. *Supra* note 55, Petro, *Participation by the States in the Enforcement and Development of National Labor Policy*, N. Y. U. FIFTH ANNUAL CONF. ON LAB. 1, 31 (1952).

60. *Cf.* Amalgamated Meat Cutters & Butcher Workmen of North America, Local No. 427, A.F.L. v. Fairlawn Meats, Inc., 353 U.S. 20, 23 (1957), Notes 57 and 58 *supra*.

61. *Supra* note 55.

62. COX, *Federalism in the Law of Labor Relations*, 67 HARV. L. REV. 1297, 1346 (1954).

> social experimentation inately presented by our federal system are fully exploited.[63]

So, the first argument is that the authority with the primary (in terms of geographical impact) interest in the dispute should have a hand in resolving it.[64] The second argument uses the Holmesian[65] theory that the state should be used as a testing ground for a multiplicity of ideas in order to point the way to more effective legislation, both national and local.

Another argument is that state agencies (and possibly state courts) would act faster in settling a labor dispute than does the NLRB.[66] As long as the state action reached a result consistent with, or at least not violently disruptive of, federal labor policy, there seems to be no reason not to favor speed in adjudication.[67]

It has also been argued that Congress had no intention in the Wagner and Taft-Hartley Acts of completely regulating all phases of labor relations, and thereby completely excluding the states.[68]

The NLRA and the LMRA were intended to protect public rights and put an end to unfair labor practices, and, with minor exceptions,[69] were not designed to vindicate private rights.[70] Preemption of a state court's jurisdiction over actions for damages for violation of a private right cannot rely on the same rationale as do decisions denying state courts the right to enjoin labor activities.[71] The reversal of an award of damages leaves the parties in *status quo*, while an injunction would cause the strike, or other dispute, to dissipate itself, without a solution of the underlying issues.[72] The argument that the allowance of a state damage action would stifle labor experimentation is refuted by the experience with civil suits allowed under Section 303[73] of the Labor-Management Relations

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63. Smith, *The Taft-Hartley Act and State Jurisdiction over Labor Relations*, 46 MICH. L. REV. 593, 595 (1948).

64. Michelman, *supra* note 56 Petro, *supra* note 59 at 37.

65. Holmes, J. dissenting in Truax v. Corrigan, 257 U.S. 312, 344 (1921) "There is nothing that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several States, even though the experiments may seem futile or even noxious to me and to those whose judgement I most respect." See also Roumell and Schesinger, *The Preemption Dilemma in Labor Relations*, 18 U. DET. L. J. 135, 160 (Part II, 1955).

66. Petro, *supra* note 59 at 37, Roumell and Schesinger, *supra* note 65.

67. Petro, *supra* note 59 at 31.

68. *Id.* at 17.

69. Section 10(c), 29 U.S.C.A. § 160(c) (1965), allows the NLRB, in certain instances, to award back pay to reinstated employees.

70. Comment, 36 U. DET. L. J. 92 (1958), Michelman, *State Power to Govern Concerted Employee Activities*, 74 HARV. L. REV. 641, 653 (1961).

71. *Cf.* San Diego Building Trades Council v. Garmon, 353 U.S. 26 (1957), Garner v. Teamsters, Chauffeurs and Helpers Local Union No. 776 (A.F.L., 346 U.S. 485 (1953).

72. Comment, 58 MICH. L. REV. 288, 292 (1959).

73. 29 U.S.C.A. § 187 (1965), 61 Stat. 158 (1947) as amended 73 Stat. 545 (1959).

Act.[74] Therefore the states should be allowed to uphold their laws which protect private rights,[75] and if an error is made, the right of final review should be with the United States Supreme Court.[76]

Linn v United Plant Guard Workers of America, Local 114,[77] points out that the preemption question is still very much alive. The case involved a libel action filed in federal district court, on the basis of diversity of citizenship, against a union which had published statements concerning plaintiff's employer (Pinkerton National Detective Agency, Inc.) and himself which allegedly were libelous. The district court dismissed the action[78] on the ground that the union's action was arguably an unfair labor practice under Section 8(b)[79] of the LMRA, and thus jurisdiction was preempted by the NLRB. The district court cited *Garmon*[80] in arriving at this decision. The court of appeals affirmed the judgment.[81]

On certiorari, the Supreme Court reversed the judgment stating that the state's concern with the perpetration of libel overcame the "merely peripheral concern" of the NLRB in this type of union activity [82]

Mr Justice Clark, in writing for a five justice majority,[83] made observations that could lead to a new look at complete preemption of state authority.

> When the Board and state law frown upon the publication of malicious libel, albeit for different reasons, it may be expected that the injured party will request both administrative and judicial relief. The Board would not be ignored since its sanction alone can adjust the equilibrium disturbed by an unfair labor practice. If the malicious libel contributed to union victory in a closely fought election, few employers would be satisfied with simply damages for 'personal' injury caused by the defamation. An unsuccessful union would also seek to set the election results aside as the fruits of an

74. Michelman, *State Power to Govern Concerted Employee Activities*, 74 HARV. L. REV. 641, 653-54 (1961).

75. See Rose, *The Labor Management Relations Act and the State's Power to Grant Relief*, 39 VA. L. REV. 765, 769 (1953).

76. Petro, *Participation by the States in the Enforcement and Development of National Labor Policy*, N. Y. U. FIFTH ANNUAL CONF. ON LAB. 1, 50 (1952) "There is a single judicial head of this nation. If what state courts do in human situations which might also involve NLRA unfair practices is inconsistent with the national policy, rightly construed, the United States Supreme Court has the function and the duty of setting matters straight."

77. 383 U.S. 53 (1966).

78. Information at 337 F.2d 69, the district court's opinion is unpublished, see 383 U.S. 57.

79. 29 U.S.C.A. § 158(b) (1965).

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

81. Linn v. United Plant Guard Workers of America, Local 114, 337 F.2d 68 (6th Cir. 1964).

82. *Supra* note 77 at 61, 63.

83. It is to be noted that Justice Clark dissented in the *Fairlawn Meats*, 353 U.S. 20 (1957), *Garmon*, 353 U.S. (1957), and *Guss*, 353 U.S. 1 (1957) cases, see 353 U.S. 12.

> employer's malicious libel. And a union may be expected to request similar relief for defamatory statements which contribute to the victory of a competing union. *Nor would the courts and the Board act at cross purposes since, as we have seen, their policies would not be inconsistent.*[84] (Emphasis supplied)

Thus, it seems a possibility that the federal courts will recognize that there is another method of allocating power between state and federal governments in regard to labor problems; a method based on a study of the results achieved by state action superimposed upon the results desired by federal law

> Therefore, in deciding questions of preemption, courts should attribute to the statute the objective of achieving a rational allocation of functions in a federal system. The decisional process should take into account the degree to which the proposed state action would impair the national program, as it is understood from the words and the evident policies of the NLRA. Against this impact should be weighed the magnitude of the interest which the state seeks to protect and the appropriateness, in light of the national interest, of the mode of protection selected by the state.[85]

The point has now been reached for a discussion of the problems involved in the exercise of state jurisdiction in the area of authority allotted to the states by Section 14 (c) (2) [86]

III. MAJOR PROBLEMS UNDER 14(c)

The problems involved in making a working proposition out of Section 14(c) (2) are diverse, but seem to center on two main areas: First, what is within the NLRB's jurisdiction, and who is to announce whether a dispute is within or without; and, second, once a state agency or court assumes jurisdiction what law is to be applied?

Section 14 (c) (1) provides that the NLRB is not to refuse to assert jurisdiction over cases which it would have taken under its standards extant on August 1, 1959.[87] These standards[88] leave huge areas of the labor-management stratum unregulated.[89] Further, these standards are complex, and difficult of application.[90]

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84. *Supra* note 77 at 66. See also Prospect Dairy, Inc. v. Dellwood Dairy Co., 237 F Supp. 176, 177 (N.D.N.Y. 1964).

85. Michelman, *supra* note 74 at 681.

87. See 1 CCH LAB. L. R5$. ¶1610, p. 5407 (1966).

86. 29 U.S.C.A. § 164(c) (2) (1965).

88. *Ibid.*

89. McCoid, *Notes on a "G-String" A Study of the "No Man's Land" of Labor Law*, 44 MINN. L. REV. 205, 233 (1959).

90. Aaron, *The Labor-Management Reporting and Disclosure Act of* 1959, 73 HARV. L. REV. 1086, 1095 (1960) 105 Cong. Rec. 17877, remarks of Senator Morse, Hanley, *Federal-*

Although the board cannot refuse to exercise jurisdiction over cases within the above standards, it can, at its discretion, exercise jurisdiction over cases not falling within those standards.[91] A prime example of this expansion is the recent assertion of jurisdiction over gambling casinos[92] which were excluded under the 1959 standards.[93]

Another problem is that the NLRB may decline jurisdiction only to have a federal court determine that such refusal was arbitrary and without the baord's ambit of power [94]

The above factors are pointed out to illustrate the danger, to disputants, that a state court or agency, having made a seemingly valid assumption of jurisdiction, will have its judgments endangered when the NLRB decides to expand its jurisdiction.[95]

The crux of the jurisdictional problem is which authority should make the initial determination as to the NLRB's exercise of jurisdiction.

> Although a state court may assume jurisdiction over labor disputes over which the National Labor Relations Board has, but declines to assert, jurisdiction, 29 U. S. C. §§164 (c) (1) and (2) (1958 Ed.Supp V), there must be a proper determination of whether the case is actually one of those which the Board will decline to hear [96]

This somewhat cryptic quote is the last word the Supreme Court has had to say on the subject. Who is to make the "proper determination?" The Association of State Labor Relations Agencies advocates state action before the NLRB declines jurisdiction in the specific case.[97]

A recent California case[98] has interpreted *Broadcast Service*[99] to mean that state courts are competent to determine whether the case falls within their "residual jurisdiction" in the first instance. Justice Tobriner, for a unanimous court, stated:

State Jurisdiction In Labor's No Man's Land: 1966, 48 GEO. L. J. 709, 713 (1960). For example of the confusion in application, see McAllister Transfer Inc., 110 N.L.R.B. 1769 (1954).

91. *Cf.* McLeod v. Local 32-E, Building Service Employees International Union, AFL-CIO, 227 F Supp. 242, 245 (S.D.N.Y. 1964).

92. El Dorado Inc., 151 N.L.R.B. 579 (1965).

93. *Supra* note 87.

94. *Cf.* Hotel Employees Local No. 255, Hotel and Restaurant Employees and Bartenders International Union v. Leedom, 358 U.S. 99 (1958), Office Employees International Union, Local No. 11, AFL-CIO v. National Labor Relations Board, 353 U.S. 313 (1957) National Relations Board v. Harrah's Club, 362 F.2d 425 (9th Cir. 1966).

95. Lorenz, *Problems of Federal-State Jurisdiction in Labor Relations, N.Y.U.* FIFTH ANNUAL CONF. ON LAB. 119, 124 (1952).

96. Radio & Television Broadcast Technicians Local Union 1264, IBEW, AFL-CIO v. Broadcast Service of Mobile, Inc. 380 U.S. 255, 256 (1965).

97. Aaron, *supra* note 90 at 1095-96.

98. Russell v. Electrical Workers Local 569, 48 Cal. Rptr. 702, 409 P.2d 926 (1966).

99. *Supra* note 96.

> We hold that the jurisdiction exercised by the state courts pursuant to Section 14 (c) does not depend upon a showing that the board has, in fact, declined to act. Rather, we believe that the party seeking relief need only demonstrate, on the basis of published regulations and decisions of the board, that the case is one which the board would decline to hear [100]

The court stated that to rule otherwise would frustrate Congress' clear intention that the board should be able "to delimit the boundaries of its jurisdiction" through decision or duly published regulations, and not be forced to decline jurisdiction on a case-by-case basis.[101]

Although the NLRB is prepared to give informal jurisdictional advice through its regional offices,[102] this process would be time-consuming and would involve making the same determinations regarding the standards as the state court or agency would have to make in order to take jurisdiction.[103] If the NLRB were to advise that it would decline jurisdiction, the time consumed at arriving at this determination may well have ruined one of the disputants.[104]

There is a certain class and size of business which can be recognized by the humbliest of courts as being solely within NLRB jurisdiction, beyond this line the local courts could be corrected by the Supreme Court,[105] if necessary This would tend to speed the settlement of labor disputes in smaller economic units, and could possibly encourage more states to pass labor legislation modeled after federal law, which, in turn, could possibly encourage the NLRB to cede jurisdiction to some of the states[107] thus reducing its case load,[108] and allowing it to concentrate more energy on truly national labor problems.

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100. Russell v. Electrical Workers Local 569, 48 Cal. Rptr. 702, 409 P.2d 926 (1966). *Contra,* Gust G. Larson & Sons, Inc., v. Radio & Television Broadcast Engineers Local No. 1220, IBEW, 66 Ill. App.2d 146, 213 N.E.2d 100, 107 (1965) "It is essential, however, that a person seeking relief through a State court, in such a situation, show by appropriate allegations in the complaint for injunction that he has, in fact, sought the aid of the Board and that the Board has not, or cannot, act in time to prevent substantial and irreparable injury."

101. *Supra* note 98 at 704 of 48 Cal. Rptr.

102. 29 C.F.R. §§ 101.39 to 101-41 (1966).

103. *Supra* note 98 at 704 of 48 Cal. Rptr. But *cf.* Beeson, *Boundaries of State-Federal Jurisdiction in Labor-Management Relations Under the New Labor Law — A Federal View,* N.Y.U. THIRTEENTH ANNUAL CONF. ON LAB. 51, 64 (1960).

104. *Supra* note 101.

105. 105 Cong. Rec. 17878 (1959). remarks of Senator Morse Hanley, *Federal-State Jurisdiction in Labor's No Man's Land* 1960, 48 GEO. L. J. 709, 713 (1960) "It has been said that even the Board experts cannot determine the boundaries of Board jurisdiction."

106. Petro, *supra* note 76.

107. The NLRB may cede jurisdiction to the states under Section 10(a), 29 U.S.C.A. § 160(a) (1965), of the NLRA. This, however, has never been done. See letter from J.M. Glaser, North Dakota Deputy Commissioner of Agriculture and Labor to John Graham, dated December 29, 1966.

108. The NLRB had 7007 cases pending as of June 30, 1960, TWENTY-FIFTH ANNUAL REPORT NLRB 177 (1961), and 8911 cases pending as of June 30, 1965, THIRTIETH ANNUAL

Another area of concern raised by Section 14(c) (2)[109] is which law—state or federal—is to be applied once a state agency or court assumes jurisdiction of a labor dispute?

There are three general theories concerning this, as yet, unanswered question:

The first is the "accordion" theory[110] which, in its strictest form, would not allow the state courts or agencies to apply state law at all. This theory is based on two concepts: First, because the scope of the NLRA-LMRA has not been restricted by the addition of Section 14(c), the state courts and agencies have no choice but to act as "little NLRB's" and to protect federally created rights as the NLRB and the federal courts would do on the same facts;[111] and second, because the jurisdiction of the NLRB is subject to expansion and retraction (the accordion effect),[112] it has never totally lost jurisdiction but is only declining to exercise it, and therefore the state courts and agencies must apply federal substantive law when they step into the NLRB's shoes.[113]

The second theory is the "willy-nilly" theory[114] which states that in exercising their "residual jurisdiction" state courts and agencies must apply state law This theory would probably not be upheld by the federal courts, as espousal of this theory would allow the NLRB not only to forego jurisdiction in favor of the states, but would also allow the NLRB to endanger the protection of federal substantive rights by passing to the states the power to render decisions that conflict with those rights.[115]

The third theory, and seemingly the only workable one, is that state courts and agencies can apply both state and federal law, as they choose, but they cannot apply state law where it would affirmatively conflict with federally protected rights.[116]

The use of the latter theory will not jeopardize the body of federal labor law already created, but it will allow the state authorities to continue that experimentation which, hopefully, will create a still more tightly rational law of labor in the future.

REPORT NLRB 177 (1966). The NLRB decided 22,183 and 27,199 cases respectively in those same fiscal years.

109. 29 U.S.C.A. § 164(c)(2) (1965).

110. Aaron, *supra* note 90 at 1097-98.

111. Papps, *Section 701 and the State Courts· What Law to be Applied?* 48 GEO. L. J. 316, 322 (1959).

112. Aaron, *supra* note 90 at 1097-98. *Cf.* McLeod v. Local 32-E, Building Service Employees International Union, AFL-CIO, 227 F Supp. 242, 245 (S.D.N.Y. 1964).

113. Papps, *supra* note 111.

114. Aaron, *supra* note 90 at 1097-98.

115. Hanley, *Federal-State Jurisdiction in Labor's No Man's Land*. 1960, 48 GEO. L. J. 709, 731 (1960).

116. Aaron, *supra* note 90 at 1097-98 Cohen, *Congress Clears the Labor No Man's Land A Long-Awaited Solution Spawns a Host of New Problems,* 56 NW. U.L. REV. 333 (1961).

IV CONCLUSION

The field of labor law remains confused,[117] and will probably continue to remain so far into the future. The fact that the states are once again able to create labor law may well add to that confusion. However, it is equally possible that joint federal-state experimentation and cooperation may lead instead to a speedier solution of many of the problems involved in labor-management relations.[118]

The state authorities can play their part in this federalistic partnership by overcoming some of their ancient bias against labor, where it exists, and by rendering decisions which reflect adequate consideration of the totality of the interests involved in the labor relations field.[119]

Further, more of the states could pass legislation which would create agencies designed specifically to deal with labor relations problems.

Congress could attempt to clarify, with further legislation, the problems created by Section 14(c) so as to guide the courts and agencies in their actions.

The federal courts could well heed the words of Justice Brennan in rendering decisions wherein preemption is involved:

> The principle to be derived from our decisions is that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons — either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.[120]

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117. Petro, *supra* note 76 at 20.
118. Petro, *supra* note 76 at 69 Crum, *The North Dakota Labor Management Relations Act*, 37 N.D.L. REV. 321, 322 (1961). Professor Crum states that the North Dakota Act was a response to changes in the law at the federal level.
119. Roumell and Schlesinger, *supra* note 65 at 161.
120. Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963).