3-15-1986

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NLRA Preemption Of State Common Law Wrongful Discharge Claims: The Bhopal Brigade Goes Home

JOSEPH R. WEEKS*

I. INTRODUCTION

In the recent history of American labor law, no other subject has been as popular among commentators as the development of common law causes of action for wrongful discharge. By late 1985, the subject had been addressed with numbing redundancy in not less than seventy-six major law review articles.1 With but limited opposition,2 the

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commentators have overwhelmingly agreed that employees should be


adopt the isolated suggestions that the at will rule can be overturned by judicial interpretation of existing statutes or constitutional provisions. This has left the state legislatures and, particularly, the state courts as the preferred forums for effectuating the abolition of the at-will rule.

Within the last decade, the courts have responded to the articles written on the at-will doctrine and the litigation generated with "an explosion" of decisions adopting various state law theories creating a cause of action for wrongful discharge. In a few states, legislatures have enacted statutes that limit the at-will rule in significant respects. The speed with which the states have rushed to overturn a century-old doctrine is remarkable.

In their haste to respond to the perceived inequity of the at-will rule, the state legislatures and courts may well have overlooked a number of less obvious virtues of the rule they are so quickly aban-

6. One commentator has argued that Title VII of the Civil Rights Act of 1964 can be interpreted to prohibit arbitrary dismissals from employment unrelated to the kinds of discrimination specifically prohibited by the statute. See Blumrosen, Strangers No More: All Workers Are Entitled to "Just Cause" Protection Under Title VII, 2 INDUS. REL. L.J. 519 (1978). Blumrosen's analysis is based upon a curious interpretation of the Supreme Court's decision in McDonald v. Sante Fe Trail Transp. Co., 427 U.S. 273 (1976), in which the Court held that the Title VII protection against employment discrimination based upon race included a prohibition on "reverse" discrimination against white employees.

In 1976, the Supreme Court held in McDonald that the requirement of equal treatment applied to both whites and blacks. If an employer is required by the operation of Title VII to have good reasons for its personnel actions with respect to minorities and women, then, under McDonald it must apply the same principle and standards to its white male employees. The result is a de facto substantive law rule requiring the employer to produce good reasons or just cause for adverse personnel actions. Thus the common law [employment at will] rule is abolished in toto.

Blumrosen, supra, at 560 (emphasis in original).

7. The argument here is predicated upon the concept of the employer's action in effecting the discharge being considered "government action" and the employee's job being considered "property" within the meaning of the fourteenth amendment due process clause. See, e.g., Peck, Unjust Discharges from Employment: A Necessary Change in the Law, 40 OHIO ST. L.J. 1 (1979); Comment, Towards a Property Right in Employment, 22 BUFFALO L. REV. 1081 (1973).

8. For a review of the various proposed state statutes, see Catler, supra note 2, at 488-90.

9. The great number of articles on this subject has been partially the result of the need to demonstrate how the existing tort and contract principles in each state can be interpreted to include a cause of action for wrongful discharge. See supra note 1.

10. See H. PERRITT, supra note 3, § 1.1, at 1.

11. For a summary of the theories accepted by various jurisdictions, see infra notes 35-58 and accompanying text.


13. For a summary of the historical development of the at-will rule and its recent abandonment, see infra notes 17-62 and accompanying text.
Similarly, little or no attention has been given to the preemption risk inherent in any state law directed to the employment relation—a subject of substantial federal statutory regulation. As a result, state courts are writing landmark decisions creating new state law remedies for wrongful discharge which are clearly preempted by the National Labor Relations Act (NLRA).

This article will initially outline the development of the employment at will doctrine and its recent abandonment in jurisdictions now recognizing a wrongful discharge remedy. The article will then summarize the principles of NLRA preemption, setting forth both the recognized areas of NLRA preemption of wrongful discharge claims and the arguments supporting the recognition of two additional areas of preemption neither yet adopted nor even recognized in any of the articles and decisions in this area. The article contends that essentially all state law remedies for wrongful discharge other than those giving contractual effect in a nonunion setting to job security provisions in an employee handbook or in personnel policies, when made known to employees, are, and should be, preempted by the NLRA under one or more of three existing preemption doctrines.

14. Isolated and largely unsuccessful efforts have been made to point out the problems and inequities inherent in virtually all of the schemes advanced to create a wrongful discharge remedy. See supra note 2.


16. 29 U.S.C. §§ 151-69 (1982) [hereinafter referred to as "the NLRA" or "the Act"]. As an example, the New Hampshire Supreme Court's decision in Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974), is the seminal case in one area of wrongful discharge litigation. See infra pp. 111-12. As noted by the dissent, however, the plaintiff in Monge was represented by a union and worked under a union contract that included a grievance arbitration provision. Id. at 135, 316 A.2d at 553 (Grimes, J., dissenting). A majority of courts agree that a state law remedy for wrongful discharge in this context is preempted by the NLRA. See infra pp. 177-97. This fact was apparently never brought to the Monge court's attention.
II. THE RISE AND FALL OF EMPLOYMENT AT WILL

A. The Rise

At early common law, the master-servant relationship was viewed as being based on status rather than contract.\textsuperscript{17} As noted by Blackstone, one effect of this concept was a requirement, in some circumstances, for "reasonable cause" to support discharge.\textsuperscript{18}

By the nineteenth century, however, contractual principles replaced status concepts in defining the employer’s right to discharge. Under English common law, it became generally recognized that an indefinite hiring would be presumed to be for a one-year period and then to continue from year-to-year.\textsuperscript{19} During these successive one-year periods, the employee could not be discharged without severance pay and notice.\textsuperscript{20}

In this country, early and mid-nineteenth century decisions varied. Some courts adopted the English rule while others utilized no such presumption and held any employment for an indefinite term to be terminable at will.\textsuperscript{21} The latter view became almost universally accepted, however, following the publication of H. G. Wood’s treatise on the master-servant relationship. Relying on authorities that recent court decisions and commentators have repeatedly attacked in the campaign to abolish the employment at will concept,\textsuperscript{22} Wood announced what has come to be considered as the American Rule:

With us the rule is inflexible, that a general or indefinite hiring is \textit{prima facie} a hiring at will, and if the servant seeks to make it out a yearly hiring, the


\textsuperscript{18} 1 W. BLACKSTONE, \textit{COMMEN TARIES} 131 (1878).

\textsuperscript{19} See, e.g., Beeston v. Collyer, 130 Eng. Rep. 786, 787 (C.P. 1827) which states: If a master hire a servant, without mention of time, that is a general hiring for a year, and if the parties go on four, five, or six years, a jury would be warranted in presuming a contract for a year in the first instance, and so on for each succeeding year, as long as it should please the parties: such a contract being implied from the circumstances, and not expressed, a writing is not necessary to authenticate it.

\textsuperscript{20} See Feinman, supra note 17 at 119-20.


burden is upon him to establish it by proof. A hiring at so much a day, week, month or year, no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even, but only at the rate fixed for whatever time the party may serve.\textsuperscript{23}

The New York Court of Appeals noted that, under this rule,\textsuperscript{24} an employee hired for an indefinite term could be discharged for good cause, no cause, or even bad cause.\textsuperscript{25}

The acceptance of the American Rule was accelerated by the Supreme Court's decisions in \textit{Adair v. United States}\textsuperscript{26} and \textit{Coppage v. Kansas}.\textsuperscript{27} In these cases, the Court found to be unconstitutional federal and state statutes that imposed criminal penalties on employers discharging employees because of union membership. Finding that such statutes violated the concepts of freedom of contract and freedom of enterprise, the Court held that they therefore violated the substantive due process components of the fifth and fourteenth amendments.

The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. So the right of the employé [sic] to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employé [sic].\textsuperscript{28}

Although \textit{Adair} and \textit{Coppage}, together with the concept of substantive due process upon which these decisions were based, would later be rejected by the Supreme Court,\textsuperscript{29} Wood's American Rule was adopted by courts in virtually every American jurisdiction.\textsuperscript{30} Moreover, the rule grew from simply a rebuttable presumption of employment terminable at will to a rule of substantive law that, in many jurisdictions, could not be overcome simply by affirmative proof of a different agreement.\textsuperscript{31} Although there continued to be occasional ex-

\begin{itemize}
  \item \textsuperscript{23} H. \textsc{Wood}, \textit{Master and Servant} § 134 (1887).
  \item \textsuperscript{24} This rule will hereinafter be referred to as the "American Rule" or the "employment at will rule."
  \item \textsuperscript{26} 208 U.S. 161 (1908).
  \item \textsuperscript{27} 236 U.S. 1 (1915).
  \item \textsuperscript{28} \textit{Adair}, 208 U.S. at 174-75.
  \item \textsuperscript{30} See, e.g., C. \textsc{Labatt}, \textit{1 Master & Servant} § 160, at 159 (1913)("The preponderence of American authority in favor of the doctrine that an indefinite hiring is presumptively a hiring at will is so great that it is now scarcely open to criticism.").
  \item \textsuperscript{31} See H. \textsc{Perritt}, \textit{supra} note 3, §1.3, at 6-7. For example, contracts admittedly for "permanent" employment were held to be merely contracts for indefinite employ-
\end{itemize
ceptions in the application of the rule, and the legislative process provided significant direct and indirect protection against wrongful or arbitrary discharge for certain categories of employees, the at-will rule was not seriously challenged in the courts until recently.

B. The Fall

1. Public Policy Cases

The case of Petermann v. International Brotherhood of Teamsters, Local 396, is commonly cited as the beginning of the development of modern wrongful discharge causes of action. Petermann, an at-will employee, had allegedly been discharged because he had refused...


33. The Lloyd-LaFollette Act, 37 Stat. 539, 555 § 6 (1912), provided the first substantive protection for federal employees against discharge other than for cause. The Railway Labor Act, 45 U.S.C. §§ 151-188 (1982), provides a statutory arbitration procedure for employee claims of wrongful discharge in the railroad and airline industries when a union is recognized and the usual "just cause" provision is contained in the collective bargaining agreement. Similarly, the National Labor Relations Act, 29 U.S.C. §§ 151-169 (1982), and the Labor Management Relations Act, 29 U.S.C. §§ 141-188 (1982), provide a procedure for union-represented employees to enforce collective bargaining agreements, which in the great majority of cases contain both a "just cause" requirement for discharge and provisions establishing an arbitration procedure for resolving claims of a violation of such a requirement. See infra notes 310-12 and accompanying text. The Veterans' reemployment statutes also contain provisions requiring "cause" for the discharge of the reemployed veteran for certain time periods. See 38 U.S.C. §§ 2021(b)(1), 2024(c) (1982).


34. As late as 1975, an A.L.R. annotation on the subject stated that "few legal principles would seem to be better settled than the broad generality that an employment for an indefinite term is regarded as an employment at will which may be terminated at any time by either party for any reason or for no reason at all." Annot., 62 A.L.R.3d 271, 271 (1975)(noting isolated exceptions recognized to that point). By 1982, this annotation had been superceded. See Annot., 12 A.L.R.4th 544 (1982). See also Annot., 33 A.L.R.4th 120 (1984); Annot., 32 A.L.R.4th 1221 (1984); Annot., 9 A.L.R.4th 329 (1981).


36. See H. PERRITT, supra note 3, § 1.8, at 10.
to follow instructions from his employer that would have required him to perjure himself before a state legislative committee.\(^3\) Although the opinion is far from clear, the California appellate court held that considerations of public policy limit an employer's right to discharge an at-will employee.\(^3\)

The opinion is somewhat ambiguous, however, to the extent that the court also appeared to rely, in part, upon the fact that the plaintiff had allegedly received oral assurances that he would be employed "for such period as his work was satisfactory . . ." and had been informed on the day of his testimony before the committee "that ‘his work was highly satisfactory.’"\(^3\)

Under these circumstances, the court held that "it is well settled that the employer must act in good faith; and where there is evidence tending to show that the discharge was due to reasons other than dissatisfaction with the services the question is one for the jury."\(^4\)

However, the latter rationale is generally ignored, and *Petermann* is commonly cited as having recognized a cause of action for wrongful discharge where the reason for the discharge violates the public policy of the state.\(^4\)

Presently, thirty-six American jurisdictions have decisions which either recognize a common law action for wrongful discharge based upon a violation of public policy or indicate a judicial willingness to

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38. *Id.* at 188-89, 344 P.2d at 27.
39. *Id.* at 189, 344 P.2d at 28.
40. *Id.* This appears to be a make-weight argument. Similar to virtually every other state, the law in California had always been that employees hired "for life" or for "permanent" employment, or for any of other similar formulations of indefinite employment, could nevertheless be discharged with or without cause or notice, unless the employee had given some kind of additional consideration beyond his services to support the "lifetime" employment or, in some cases, had detrimentally relied on the offer of permanent employment. *See, e.g.*, Rabago-Alvarez v. Dart Indus., Inc., 55 Cal. App. 3d 91, 127 Cal. Rptr. 222 (1976); Brawthen v. H & R Block, Inc., 52 Cal. App. 3d 139, 149, 124 Cal. Rptr. 845, 852 (1975). *See generally* DeGiuseppi, *supra* note 17, at 10-14.
41. *See, e.g.*, H. Perritt, *supra* note 3, § 1.8, at 11. The exact nature of the cause of action has changed, however. *Petermann* was a breach of contract action. Subsequently, the California courts recognized that an action in tort will also lie for an alleged discharge in violation of public policy. *See, e.g.*, Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980). The tort cause of action has been the most common in other jurisdictions recognizing a right of action in this context and "public policy" cases are now so generally brought as torts that they have been, at times, described exclusively in such terms. *See, e.g.*, DeGiuseppi, *The Recognition of Public Policy Exceptions to the Employment-at-Will Rule: A Legislative Function?*, 11 Fordham Urb. L.J. 721, 745-53 (1983); Comment, *The At-Will Doctrine: A Proposal to Modify the Texas Employment Relationship*, 36 Baylor L. Rev. 667, 675-84 (1984).
do so in an appropriate future case.\textsuperscript{42} In the near future, courts in

many of the remaining jurisdictions can be expected to follow suit.\textsuperscript{43}

2. Good Faith and Fair Dealing Cases

The modern concept of an implied covenant of "good faith and fair dealing" inherently present in all contracts\textsuperscript{44} was first applied to the termination of an at-will employee in \textit{Monge v. Beebe Rubber Co.}\textsuperscript{45} The plaintiff in \textit{Monge} had allegedly been discharged because she had refused to succumb to the romantic overtures of her supervisor. Perceiving a need for the employment at will rule "to conform to modern circumstances,"\textsuperscript{46} the New Hampshire Supreme Court held that "a termination by the employer of a contract of employment at will which is motivated by bad faith or malice or based on retaliation . . . constitutes a breach of the employment contract."\textsuperscript{47}

Although, like \textit{Petermann}, \textit{Monge} was a contract case and did not expressly rely on the duty of "good faith and fair dealing," the case was soon cited as authority for this concept\textsuperscript{48} and it eventually developed into primarily a tort rather than a contract action.\textsuperscript{49} At present there have been decisions in eight American jurisdictions in which the court has either allowed recovery under the "good faith and fair dealing" concept or indicated in dicta that it may do so in the future.\textsuperscript{50} On the other hand, courts in ten jurisdictions have expressly

\textsuperscript{43} At least one court has viewed this expansion as inevitable. See Wagenseller v. Scottsdale Memorial Hosp., 119 LAB. REL. REP. (BNA) 3166, 3172 (Ariz. June 17, 1985)("[N]o court faced with a termination that violated a 'clear mandate of public policy' has refused to adopt the public policy exception."). This is, however, clearly an overstatement. Courts in at least nine jurisdictions have recently refused to recognize a public policy exception to the employment at will rule. See, \textit{e.g.}, Alabama: Meeks v. Opp Cotton Mills, 459 So. 2d 814 (Ala. 1984); Georgia: Taylor v. Foremost-McKesson, Inc., 656 F.2d 1029 (5th Cir. 1981); Missouri: Dake v. Tuell, 687 S.W.2d 191 (Mo. 1985) (en banc); Mississippi: Kelly v. Mississippi Valley Gas Co., 397 So. 2d 874 (Miss. 1981); New Mexico: Botijillo v. Hutchison Fruit Co., 96 N.M. 789, 635 P.2d 992 (1981); New York: Murphy v. American Home Products Corp., 56 N.Y.2d 293, 448 N.E.2d 86, 461 N.Y.S.2d 232 (1983); Ohio: Phung v. Waste Management, Inc., 122 LAB. REL. REP. 2163 (Oh. 1986); Vermont: Jones v. Keogh, 137 Vt. 562, 409 A.2d 581 (1979).

\textsuperscript{44} See generally 3 A. CORBIN, CORBIN ON CONTRACTS § 568, at 326 (1960); 5 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 670, at 158-59 (3d ed. 1961); RESTATEMENT (SECOND) OF CONTRACTS § 205 (1979).

\textsuperscript{45} 114 N.H. 130, 316 A.2d 549 (1974).

\textsuperscript{46} \textit{Id.} at 133, 316 A.2d at 551.

\textsuperscript{47} \textit{Id.}


\textsuperscript{49} The New Hampshire Supreme Court later also began to cite \textit{Monge} for this concept. See Cloutier v. Great Atl. & Pac. Tea Co., 121 N.H. 915, 920, 436 A.2d 1140, 1143 (1981).

\textsuperscript{50} Alaska: Mitford v. de Lasala, 666 P.2d 1000 (Alaska 1983); California: Cancel-
considered and rejected this concept as an exception to the employment at will rule. As at least one commentator has noted, it appears that the implied good faith and fair dealing requirement as a limitation to the at-will rule has seen its high point.

3. Limitations on Discharge Implied From Employer's Personnel Policies or Employee Handbook

The public policy and "good faith and fair dealing" exceptions to the at-will doctrine clearly constitute major revisions to the employment at will rule imposed by the courts. The same impulse fueling this trend has also led to a significant change in the judicial interpretation of the contractual effect of an employer's personnel policies or employee handbook. The effect of this change on the rapid abandonment of the employment at will rule has been equally as severe in this area, however.

As late as the publication of DeGiuseppe's two exhaustive surveys of the law in this area in 1981 and 1983, with very few exceptions courts viewed personnel policies and employee handbooks as unilateral expressions of company policy that did not create enforceable rights to job security. By late 1985, this could no longer be said.

Often citing one or both of the major cases in this area, Toussaint...
v. Blue Cross & Blue Shield of Michigan and Weiner v. McGraw-Hill, Inc., courts in seventeen jurisdictions have now either held or suggested that the employer's right to discharge at will may be limited by its personnel policies or employee handbook. Although courts in eleven jurisdictions have expressly rejected this idea, it is probably an idea that will become more widely accepted in the very near future.


58. This prediction is based on the contradiction inherent in refusing to recognize the effect of an employer’s discharge procedures. A policy under which an employer...
4. Other Exceptions

In addition to the major exceptions to the employment at will concept discussed above, courts in several jurisdictions have recognized a variety of different claims by discharged employees that also have the practical effect of significantly diluting the employment at will concept in the few jurisdictions allowing such claims. The most common claims of this nature are intentional infliction of emotional distress and promissory estoppel. Other than in jurisdictions that recognize one of the more common wrongful discharge claims, claims of this nature probably will not be allowed to any significant extent.

C. The Significance

For purposes of this article, there are two rather obvious conclusions that can be drawn from the history of the employment at will rule. First, for more than 100 years in this country, rightly or wrongly, the concept that, absent express contractual limitation, an employee could quit or be discharged at will was given virtually universal acceptance. Second, within just the last several years, this con-
cept has now been abandoned to at least some extent in most jurisdictions by the adoption of one or more common law theories under which discharged employees are allowed to challenge their employer's action. Federal law already provides a mechanism by which employees may be protected against arbitrary or unjust discharge, however, and has done so for fifty years. We will now examine the extent to which the federal law and the new state remedies can coexist.

III. THE THREE DOCTRINES OF NLRA PREEMPTION APPLIED TO STATE WRONGFUL DISCHARGE REMEDIES

It would be difficult to construct an argument against Judge Wisdom's view that "[l]abor preemption is a complex and confused area of the law." Although, in the labor context as elsewhere, the question of whether federal legislation preempts state law directed to the same conduct ostensibly turns on the intent of Congress, no effort has ever been made by Congress to indicate its intent with respect to the Labor Management Relations Act. As a result, the Supreme Court has been required to construct rules of general application that are often justified in language of apology. Its efforts have satisfied

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62. In addition to the common law theories previously discussed, many states have adopted legislative remedies for certain categories of discharged employees. See generally DeGiuseppe, supra note 17, at 738-44. For purposes of federal preemption, legislative remedies are subject to the same analysis as common law remedies.

63. Olguin v. Inspiration Consolidated Copper Co., 740 F.2d 1468, 1473 (9th Cir. 1984).

64. Metropolitan Life Ins. Co. v. Massachusetts, 105 S. Ct. 2380, 2393 (1985); Allis-Chalmers Corp. v. Lueck, 105 S. Ct. 1904, 1910 (1985). But see C. Morris, THE DEVELOPING LABOR LAW 1504-08 (2d ed. 1985) (the Court has essentially abandoned the ostensible effort to base preemption decisions on the will of Congress and has now recognized that its decisions turn on policy choices made by the Court itself).


66. "[T]he statutory implications concerning what has been taken from the States and what has been left to them are of a Delphic nature, to be translated into concreteness by the process of litigating elucidation." San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 241 (1959) (quoting International Ass'n of Machinists v. Gonzales, 356 U.S. 617, 619 (1958)).
virtually no one.\textsuperscript{67}

With respect to the evolving law of wrongful discharge litigation, the Court has not yet accepted a case presenting the preemption question.\textsuperscript{68} Inasmuch as a conflict already arguably exists within the circuits,\textsuperscript{69} however, it presumably will soon do so. Depending upon the factual context of such a case, there exist three distinct preemption doctrines that may be implicated.\textsuperscript{70} Each is discussed separately below.

\textbf{A. The Garmon Doctrine}

Although the Supreme Court's efforts to formulate preemption standards under the NLRA and the Labor Management Relations Act\textsuperscript{71} date back to the earliest days of the NLRA, the current stan-


\textsuperscript{68} The Court recently declined to review two of the leading cases in this context at the circuit court level. See Garibaldi v. Lucky Food Stores, Inc., 726 F.2d 1367 (9th Cir. 1984), cert. denied, 105 S. Ct. 2319 (1985); Jackson v. Consolidated Rail Corp., 717 F.2d 1045 (7th Cir. 1983), cert. denied, 465 U.S. 1000 (1984).

\textsuperscript{69} The Ninth and Tenth Circuits have recently held state law “public policy” wrongful discharge actions not preempted by the LMRA in the context of employees protected by a collective bargaining agreement containing a “just cause” provision. See Garibaldi v. Lucky Food Stores, Inc., 726 F.2d 1367 (9th Cir. 1984), cert. denied, 105 S. Ct. 2319 (1985); Peabody Galion v. A. V. Dollar, 666 F.2d 1309 (10th Cir. 1981). In the context of the Railway Labor Act, 45 U.S.C. §§ 151-188 (1982), the Seventh Circuit has held a public policy claim in a similar context preempted. Jackson v. Consolidated Rail Corp., 717 F.2d 1045 (7th Cir. 1983), cert. denied, 465 U.S. 1007 (1984).

\textsuperscript{70} As set out in the text, the applicability of each of the three doctrines is in large part a function of the type of wrongful discharge cause of action being considered and whether the employee in question was represented by a union and protected by the “just cause” provision of a collective bargaining agreement.

\textsuperscript{71} 29 U.S.C. §§ 141-197 (1982) [hereinafter referred to as “the LMRA”]. The relationship between the LMRA and the NLRA needs to be understood to avoid confusion resulting from the Court's terminology. See, e.g., San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 243-44 (1959) (seeming to use “LMRA” and “NLRA” as synonyms). The NLRA (National Labor Relations Act) is the original New Deal statute enacted in 1935. The LMRA (Labor Management Relations Act), enacted in 1947, both substantially added to and changed the NLRA. The amended version of the NLRA became subchapter II of the LMRA. See 29 U.S.C. § 167 (1982). The LMRA is the entire statute as currently codified, including the NLRA. See 29 U.S.C. § 141(a) (1982). All of the three preemption doctrines discussed in the text that are applicable to wrongful discharge actions are based on section 7 and section 8 of the NLRA, 29 U.S.C. §§ 157, 158 (1982). A fourth doctrine, relied on by some courts in this context but actu-
standard under which most preemption questions in this context are tested was established in San Diego Building Trades Council v. Garmon. At issue in Garmon, as in every case under this branch of preemption analysis, was an application of state law to conduct that was asserted to have been either protected by section 7 or prohibited by section 8 of the NLRA. Prior to Garmon, it had been established that both the supremacy clause of the United States Constitution and concepts of primary jurisdiction preempted state law in both contexts. The significance of Garmon is that the Court recognized

73. Section 7, 29 U.S.C. § 157, protects the right of employees to organize or join labor unions or to otherwise act in concert for “mutual aid or protection.” The scope of this protection has been defined by the National Labor Relations Board (“NLRB” or “the Board” in this article) in terms of section 8(a)(1), 29 U.S.C. § 158(a)(1), which prohibits employer interference with employees’ section 7 rights. Section 8(a) also prohibits other employer conduct such as dominating a union (section 8(a)(2)), discriminating against employees to encourage or discourage union membership (section 8(a)(3)), discriminating against employees who file charges or testify in a proceeding under the Act (section 8(a)(4)), and refusing to bargain in good faith (section 8(a)(5)). In addition, section 8(b), 29 U.S.C. §158(b), which was added to the NLRA by the LMRA, prohibits specified union conduct such as interference with employees’ section 7 rights (section 8(b)(1)(A)), causing employers to discriminate against employees in violation of section 8(a)(3) (section 8(b)(2)), refusing to bargain in good faith (section 8(b)(3)), engaging in secondary boycotts, “hot cargo” agreements, and certain jurisdictional coercion (section 8(b)(4)), requiring excessive initiation fees for membership in the union (section 8(b)(5)), extracting money from employers for work not performed (section 8(b)(6)), and violating specified organizational picketing rules (section 8(b)(7)). For an up to date and exhaustive survey of the law under the NLRA and the LMRA, see Morris, supra note 64.
74. U.S. CONST. art. VI, cl. 2.
75. As used in this context, the concept of “primary jurisdiction” refers to the intent of Congress that the NLRB, subject to federal appellate court review, be the sole means of enforcement of the NLRA to the total exclusion of state courts. See, e.g., Garmon, 359 U.S. at 242-44; Garner v. Teamsters Union Local 776, 346 U.S. 485, 490-91 (1953). Used in this manner, the term is distinguishable from the same term as it is usually employed in the administrative law context in which it means simply the requirement that the administrative body be given the opportunity to initially pass on an issue. See Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180, 199 n.29 (1978)(quoting K. DAVIS, 3 ADMIN. LAW TREATISE, § 19.01, at 3 (1958)).
76. See generally Garner, 346 U.S. at 488-91. The necessity for preemption under the supremacy clause of conduct protected by section 7 is fairly obvious. It has long been recognized that state law cannot be applied to conflict with federal law. See Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824). If the NLRA expressly protects in section 7 certain conduct by employees, state law obviously cannot be allowed to prohibit or penalize the employee’s engaging in such conduct. See Brown v. Hotel Employees’ Union Local 54, 104 S. Ct. 3179, 3186 (1984) (“If employee conduct is protected under § 7, then state law which interferes with the exercise of these federally protected rights creates
expressly in this case that the principles supporting preemption were sufficiently compelling to require preemption even where the con-
duct in question could only be said to be arguably protected or pro-
hibited by the Act. "When an activity is arguably subject to §7 or §8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be avoided."77

Although burdened with many exceptions,78 Garmon remains today at least the ostensible doctrinal foundation for the Court's approach to preemption in this context.79

The application of the Garmon doctrine to state law wrongful dis-
charge claims would not seem to involve any significant analytical problems—at least in its initial steps. The analysis requires an exam-
ination of the conduct being regulated by the state—in this case an
employer's discharge of an employee—and a determination whether
this conduct is either arguably protected by section 7 or arguably pro-
hibited by section 8 of the NLRA. Since only employee rights are se-
cured under section 7, the employer's right to discharge free from
state law restrictions cannot be protected by section 7. Thus, the
analysis is reduced to a determination in each case whether the em-
ployer's discharge is one that is arguably prohibited by section 8. If
so, the state cause of action is preempted unless it can be shown to
fall within one of the Garmon exceptions.80

an actual conflict and is preempted by direct operation of the Supremacy Clause." ).
This is obviously the most compelling case for preemption and one that will permit
none of the exceptions developed under the primary jurisdiction rationale. See, e.g.,

tel & Restaurant Employees & Bartenders Local 54, 104 S. Ct. 3179, 3186 (1984)).

The necessity for preemption of conduct prohibited by section 8 under the primary
jurisdiction rationale is not so immediately apparent. An argument can be made that,
in the admitted absence of express congressional intent to preempt state law in this
context, states should be free to prohibit with their own remedies and forums the
kinds of conduct that are also prohibited by the NLRA. Cf: Amalgamated Motor
Coach Employees v. Lockridge, 403 U.S. 274, 302-05 (1971) (Douglas, J., dissent-

ing)(summarizing, in a different context, the disadvantages of NLRB procedures when
compared to those available in state courts). Ultimately, however, the Court has recog-
nized a congressional purpose to permit the NLRB alone, subject to federal appellate
review, to adjudicate disputes of the type governed by the NLRA. See, e.g., Wisconsin
Dep't of Indus., Labor and Human Relations v. Gould Inc., 106 S. Ct. 1057, 1061-62
(1986); Lockridge, 403 U.S. at 285-91. Moreover, although not always recognized by the
Court, the supremacy clause may well require the same preemptive effect on state law
in the context of state efforts to punish or regulate conduct prohibited by the Act as it
does with respect to state efforts to regulate conduct protected by the Act. See infra
notes 152-60 and accompanying text.

77. Garmon, 359 U.S. at 245.
78. One commentator views the exceptions as having proliferated to the point that
"the Garmon test can now be described only by reference to its exceptions." Bryson,
supra note 67, at 1041.
79. See, e.g., Belknap, Inc., v. Hale, 463 U.S. 491, 507-09 (1983); Local 926, Interna-
80. In light of the relative simplicity of this analytic framework, it is to some ex-
Certain kinds of employee conduct such as attempting to organize support among fellow employees for a union are so obviously protected by section 7 that a discharge by the employer allegedly to retaliate against or halt such conduct necessarily states a claim under section 8.81 A state law cause of action providing a remedy for such a

tent surprising that the two commentators who have most extensively examined the question of NLRA preemption of wrongful discharge claims have both failed to address it. In one instance, Garmon was recognized as "protect[ing] the exclusive jurisdiction of the [NLRB] to enforce the specific protection of Section 7 and the specific prohibitions of Section 8 of the NLRA." NLRA Preemption, supra note 15, at 642-43. Apparently considering the existence of collective bargaining agreements to present the only significant preemption problem in this context, however, the commentator concluded that "this area [of the Garmon doctrine] generally is not relevant to preemption of the typical wrongful discharge claim." Id.

In the other instance, the Garmon doctrine was recognized as applicable but the analysis was directed to an examination of the kinds of employee conduct for which the employee had allegedly been discharged to determine whether this was protected by section 7. "Under the Garmon rule, a state wrongful discharge action will be preempted if the employee's conduct giving rise to the termination is arguably protected by the NLRA and an exception does not apply." State Actions, supra note 15, at 957. The obvious problem with this approach is that the state makes no effort to regulate or restrict such protected conduct by employees when it provides a state forum for hearing claims that, as a result of such conduct, the employee has been discharged. It is the employer who has allegedly penalized by discharge the exercise of the employee's protected section 7 rights. Such conduct by the employer is, of course, a violation of section 8(a)(1) and the preemption analysis therefore must focus not on the "arguably protected by Section 7" branch of Garmon but on the "arguably prohibited by section 8" branch. Superficially, it might seem that this is a meaningless distinction inasmuch as a discharge normally will not be arguably prohibited by section 8(a)(1) in this context unless the employee's conduct for which he was assertedly discharged is at least arguably protected by section 7. But see supra notes 102-04 and accompanying text. Because of this, the inquiry normally will turn in any event on whether the conduct of the employee for which he was assertedly discharged was protected by section 7. However, while this is correct so far as it goes, it ignores the fact that there is a critical difference between the "arguably protected" and the "arguably prohibited" branches of the Garmon doctrine, at least under the Supreme Court's most recent analysis in this area. As discussed previously, the Supreme Court has recently taken the position that the inquiry under the "arguably protected" branch of Garmon begins and ends with a determination of whether the conduct the state has sought to regulate is arguably protected. If so, the state is preempted "by direct operation the Supremacy Clause" or, differently expressed, "as a matter of substantive right." Brown v. Hotel Employees Local 54, 104 S. Ct. 3179, 3186-87 (1984). See also Allis-Chalmers Corp. v. Lueck, 105 S. Ct. 1904, 1912-13 n.9 (1985). No balancing of federal and state interests is permitted in this context. Id. Since, as set out in the text, many, or even most, of the recognized state law public policy wrongful discharge actions involve discharges for employee conduct that is at least arguably protected under section 7, application of the "arguably protected" branch of Garmon to this context would lead to a conclusion that all such actions are preempted. By contrast, application of the "arguably prohibited" branch of Garmon requires a close examination of the specific nature of the action and the interests in question to resolve the preemption question.

81. Indeed, the position of the NLRB has historically been that, under section 8(a)(1), not even the intent element that normally would be required under state law
discharge therefore involves an effort to regulate conduct prohibited by section 8 and is preempted under Garmon if none of the Garmon exceptions are applicable. As the protection of the efforts of employees to organize is one of the primary purposes of the NLRA, courts have had little difficulty in concluding that state law remedies in this context are preempted.

The preemption of state law wrongful discharge actions in which the asserted basis for the discharge is the employee's union organization efforts is neither particularly surprising nor a significant threat to the continued viability of such actions in general. There exists under Garmon a far more interesting and threatening potential for the preemption of state wrongful discharge remedies, however.

The most widely accepted exception to the employment at will rule is the "public policy" cause of action recognized in many states as available to employees allegedly discharged for a reason violative of the state's public policy. Within this category, the public policy exception has been applied to protect against retaliatory discharge employees who have done such things as file workers' compensation claims, refuse to commit or cover up illegal acts, or report their employer's safety or health violations. There has existed in the past, and may still exist, however, a substantial basis for concluding that all such state claims are preempted under Garmon.

need be shown. The employer violates the statute without regard to any intent to retaliate against, or halt, protected employee conduct when he engages in conduct that might reasonably be thought to have interfered with the free exercise by employees of their section 7 rights. See, e.g., Roadway Express, Inc., 250 N.L.R.B. 393 (1980), enforcement denied, 647 F.2d 415 (4th Cir. 1981); American Freightways Co., 124 N.L.R.B. 146 (1985). Although the position of the Supreme Court on this issue is unclear, see, e.g., Textile Workers v. Darlington Mfg. Co., 380 U.S. 263, 268-69 (1965); C. MORRIS, supra note 64, at 76-78; Christensen & Syanoe, Motive and Intent in the Commission of Unfair Labor Practices: The Supreme Court and the Fictive Formality, 77 YALE L.J. 1269 (1968), the inquiry under Garmon is whether the employer's conduct is arguably prohibited and, in the absence of definitive Supreme Court guidance to the contrary, any position taken by the NLRB will, by that fact alone, almost necessarily be sufficient to establish at least its "arguable" validity. See, e.g., Ford Motor Co. v. NLRB, 441 U.S. 488, 497 (1979)(NLRB construction of statute if "reasonably defensible . . . should not be rejected merely because the courts might prefer another view of the statute."); Beth Israel Hosp. v. NLRB, 437 U.S. 483, 496-501 (1978)(recognizing congressional intent to permit NLRB to develop and apply fundamental national labor policy).


84. See supra notes 35-43 and accompanying text.

85. See supra note 42 and accompanying text.
Employee rights under section 7 are not limited to organizational activities; they also include the right of employees to “engage in other concerted activities for . . . mutual aid or protection.” Although the use of the term “concerted” would seem to imply a requirement for collective action by employees to fall within the section 7 protection, the Board in 1966 adopted a “per se” concerted activity doctrine under which an individual employee, acting alone, is recognized as engaging in protected concerted activity when he acts to enforce the provisions of a collective bargaining agreement. In 1975, this doctrine of constructive concerted activity was expanded in Alleluia Cushion Co., Inc. to include situations in which there existed no collective bargaining agreement and the employee was not represented by a union. At its apex, the Alleluia doctrine held protected, and thus provided a remedy under section 8(a)(1) for discharges in retaliation for, such individual employee conduct as filing a safety complaint with a state agency, filing an overtime complaint with the Wage and Hour Division of the U.S. Department of Labor, the filing of a national origin discrimination complaint, and the filing, or expression of an intent to file, a workers’ compensation claim. The Board’s rationale in all such cases was that an individual engages in concerted activity whenever he acts in a matter that arises out of the employment relationship and which may be of common interest to other employees, since it is reasonable to presume that other employees, had they known of the complaint, would have joined in.

Although the Board’s constructive concerted activity concept, the


88. 221 N.L.R.B. 999 (1975).

89. Id.; Bighorn Beverage, 236 N.L.R.B. 736 (1978), enforced, 614 F.2d 1238 (9th Cir. 1980).


foundation of the *Alleluia* doctrine, was never supported by the reviewing courts.\(^{94}\) the Supreme Court's recent acceptance of the Board's discretion to interpret section 7 in this manner\(^ {95}\) effectively overruled the rationale employed by the circuit courts in denying enforcement to Board orders based on *Alleluia*. Similarly, although the Board itself, following a significant change in its membership, recently overruled *Alleluia* on the basis of a determination that the NLRA would not permit such a construction of concerted activity,\(^ {96}\) the D.C. Circuit rejected this rationale and held that the *Alleluia* doctrine was a permissible construction of the Act.\(^ {97}\) The court therefore directed the Board to determine whether, as a matter of its discretion in applying the Act, it would still overturn its *Alleluia* doctrine.\(^ {98}\) As of late 1985, no decision by the Board on remand had been published.

Where all of this leaves the *Alleluia* doctrine is unclear. However, even if we assume that, as presently constituted, the Board will probably reaffirm its abandonment of the doctrine, the concept of *stare decisis* has had little influence on the Board in recent years.\(^ {99}\) A change in the Board's membership could therefore easily revive the *Alleluia* doctrine. Moreover, even absent the *Alleluia* concept of constructive concerted activity, there is now little question that, where there is evidence that an employee was acting at least in part on behalf of other employees or with their authorization, the employee's conduct in doing such things as filing safety complaints, discrimination complaints, and many or most of the other activities states have

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\(^{94}\) See, e.g., Ontario Knife Co. v. NLRB, 637 F.2d 840 (2d Cir. 1980); Krispy Kreme Doughnut Corp. v. NLRB\(^ {\text{R}}\), 635 F.2d 304 (4th Cir. 1980); NLRB v. Bighorn Beverage, 614 F.2d 1238 (9th Cir. 1980); NLRB v. Dawson Cabinet Co., Inc., 566 F.2d 1079 (8th Cir. 1977); NLRB v. C & I Air Conditioning, Inc., 486 F.2d 977 (9th Cir. 1973); NLRB v. Buddies Supermarkets, Inc., 481 F.2d 714 (5th Cir. 1973); NLRB v. Northern Metal Co., 440 F.2d 881 (3d Cir. 1971).


\(^{96}\) Meyers Indus., Inc., 228 N.L.R.B. 1311 (1977).


\(^{98}\) Id. at 956-57. The Second Circuit recently reached the same conclusion and also remanded a case relying on *Meyers* to the Board for reconsideration. Ewing v. NLRB, 768 F.2d 51 (2d Cir. 1985).

\(^{99}\) Perhaps the best example of this tendency can be found in the shifting position of the Board on the question of misrepresentations during the period prior to a representation election. The modern rule in this context, adopted in 1962, had been that misrepresentations, under specified conditions, could be sufficient to require that the election result be disregarded and a new election held. *See Hollywood Ceramics Co.*, 140 N.L.R.B. 221 (1962). The *Hollywood Ceramics* position was overturned in 1978 in Shopping Kart Food Market, Inc., 228 N.L.R.B. 1311 (1977). A year later, the Board abandoned *Shopping Kart* and returned to its position as set out in *Hollywood Ceramics*. General Knit of California, 239 N.L.R.B. 619 (1978). In 1982, the Board again overturned the *Hollywood Ceramics/General Knit* rule and returned to the *Shopping Kart* standard. Midland National Life Ins. Co., 263 N.L.R.B. 127 (1982).
sought to protect against retaliatory discharge by the creation of "public policy" wrongful discharge torts will be held protected under section 7. As much of this kind of employer retaliation is, by its nature, of a kind that is directed against employees generally rather than solely against the specific employee who is discharged, there

100. This is the significance of the Supreme Court's decision in Eastex, Inc. v. NLRB, 437 U.S. 556 (1978). In Eastex, the Court recognized that the Board could properly hold protected under section 7 employee conduct intended "to improve terms and conditions of employment or otherwise improve [the employees'] lot as employees through channels outside the immediate employee-employer relationship." Id. at 565. See also C. Morris, supra note 64, at 142-43. In recent years, the Board, with the approval of the circuit courts, has regularly held this kind of employee activity protected. See generally id., at 156-58.

101. In the area of complaints of racial discrimination, for example, it has been recognized that such discrimination under the Civil Rights Act of 1964, 42 U.S.C § 2000e (1982), is class discrimination essentially by definition. See, e.g., Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 499 (5th Cir. 1968). The relief ordered in such cases commonly includes not only specific relief for the discharged employee, but injunctive relief against the discriminatory practice that, in the case of the complaining employee, was effectuated by the discharge. See generally B. Schlei & Grossman, Employment Discrimination Law 1395-1417 (2d ed. 1983). A similar rationale is obviously available under the NLRA in the context of safety complaints; to the extent there is a safety or health hazard, it normally will affect employees generally, not just the particular employee complaining.

A discharge allegedly in retaliation for an employee's having filed a workers' compensation claim does not so obviously punish an action that, by its nature, is to benefit all employees. Yet this is the rationale under which the Board, pursuant to the Alleluia doctrine, held such employee conduct to be protected concerted activity. See Krispy Kreme Doughnut Corp., 245 N.L.R.B. 1053 (1979), enforcement denied, 635 F.2d 304 (4th Cir. 1980). Although the Alleluia doctrine may no longer be accepted by the Board, see supra note 96 and accompanying text, there exists a substantial rationale to support the Board's position in Krispy Kreme. Thus, to the extent that the basis of an employee's claim is that the employer has a policy of discharging employees who file workers' compensation claims, his attack on such a policy by a section 8(a)(1) charge to the Board is necessarily seeking relief against this policy that will benefit all employees. As all of the employees benefit in concert from such relief, the complaint itself can be regarded as necessarily an expression of concerted activity, even if unauthorized by, or, indeed, unknown to, any employee other than the current victim of the policy for the charge. Conversely, to the extent that the basis of the employee's claim is not that there exists a policy of discharging employees who file workers' compensation claims, but rather that the employer has unfairly or arbitrarily selected the employee for discharge when other employees who file workers' compensation claims are not similarly discharged, the employee's section 8(a)(1) charge would be much more difficult to defend as an expression of concerted activity protected by section 7. But at the same time, however, it would also be much less defensible for a state public policy wrongful discharge action to be applied in this context, as the state interest in providing a remedy for employees arbitrarily discharged is clearly much less compelling than the interest in providing relief for victims of an employer policy of discharging all such employees. The effect of this is that, to the extent that the basis of a state action to remedy a discharge allegedly in retaliation for the employee's having filed a workers' compensation claim is defensible on the basis of a state public policy to protect the workers' compensation system against employer policies of discharging claim-
will in many cases continue to exist a substantial question whether the discharged employee's conduct was protected by section 7, and thus whether the discharge violated section 8(a)(1).

It should also be kept in mind that, as the Supreme Court has recently again noted, even where an individual employee's conduct is not "concerted activity" and therefore not protected by section 7, an employer may still violate section 8(a)(1) by the discharge of the employee where the effect of the discharge is to interfere with or restrain other employees' concerted activities. 102 It would not be difficult to construct an argument that the discharge of an employee for filing safety complaints, reporting or refusing to engage in wrongdoing, or even filing a workers' compensation claim is an action that, by its nature, chills both similar conduct by other employees and any collective efforts to correct the safety problem, halt the wrongdoing, or protest a policy of punishing by discharge the filing of a workers' compensation claim. 103 Thus, even absent a legal doctrine or a factual argument that the discharged employee was engaged in "concerted activity" protected by section 7, there may still be at least an arguable basis to contend that the employee's discharge violated section 8(a)(1). Since the test under Garmon is whether the activity the state seeks to regulate is "arguably" prohibited by the NLRA, 104 a more extended analysis of the Garmon exceptions will be required to determine whether public policy wrongful discharge remedies are preempted.

In Garmon, the Supreme Court recognized the two basic, and unhelpfully vague, exceptions to the preemption doctrine that have formed at least a part of the basis for all of the Court's subsequent decisions upholding the exercise of state jurisdiction with respect to activities arguably prohibited by the NLRA. State jurisdiction is not preempted "where the activity regulated [is] a merely peripheral concern of the [Act . . . or . . . touch[es]] interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act," 105 In the subsequent application of these exceptions to specific cases, however, the Court's analysis strongly suggests that, to the extent that such vague language was ever intended to constitute actual tests for preemption, it is an intent now essentially abandoned and the recitation of these standards is currently little more than make-weight rationalization to support

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103. See supra note 101.
104. See supra note 77 and accompanying text.
105. Garmon, 359 U.S. at 243-44 (footnotes omitted).
more specific policy choices by the Court. As the Court's application of the Garmon exceptions involves a relatively limited number of cases, a brief survey of its efforts in this context will illustrate the actual operation of the exceptions.\footnote{106 The analytical difficulties in this area have led state courts to “errors” the Court has never been reticent to expose. See, e.g., Allis-Chalmers Corp. v. Lueck, 105 S. Ct. 1904, 1912-13 n.9 (1985); Brown v. Hotel Employees Local 54, 104 S. Ct. 3179, 3186-87 (1984). These “errors” are in many respects largely the fault of the Court itself. Thus, the “error” identified in both Brown and Allis-Chalmers, decided in 1984 and 1985 respectively, were almost certainly caused by the Court’s identical “error” in two 1983 cases, Belknap, Inc. v. Hale, 463 U.S. 491 (1983) and International Union of Operating Eng’rs, AFL-CIO v. Jones, 460 U.S. 669 (1983). In both cases, the Court had described the Garmon exceptions as applicable both to actually and arguably protected and prohibited conduct.}

Subsequent to Garmon, the Court initially seemed to give the Garmon exceptions a very limited scope.\footnote{107 In Linn v. United Plant}  

\begin{enumerate}
\item (Continued) 
\end{enumerate}
Guard Workers of America, Local 114, however, the Court significantly expanded the reach of the Garmon exceptions.

The lower courts in Linn had held preempted under Garmon an action based on state libel law growing out of an allegedly libelous statement made in the context of an organizing campaign on the rationale that such libel arguably constituted conduct prohibited by section 8(b)(1)(A) of the Act. As recognized subsequently by the Court, the initial basis for the decision by the Court in Linn to reverse the lower courts and allow the state action to proceed was the Court's observation that the NLRB had held unprotected by section 7 defamation accompanied by actual malice. The unprotected nature of the malicious libel alleged in Linn seemed to mean that the exercise of state jurisdiction would satisfy the Garmon exception for a subject that is a "merely peripheral concern" of the Act. In addition, the state's "overriding state interest" in protecting its citizens from malicious libel was seen as sufficient to satisfy the "deeply rooted in local feeling" exception.

It is difficult not to read Linn as a repudiation of much of the foundation of Garmon. The whole point of Garmon's preemption of conduct only arguably protected or prohibited by the Act was that the concept of given conduct being arguably protected or prohibited necessarily means that it involves a question that must be resolved to determine whether the conduct is within the jurisdiction of the Board.

109. Id. at 55-56. Linn involves an interesting point not directly considered by the Court. Prior to filing his state court action, Linn had filed a section 8(b)(1)(A) charge with the Board alleging that the asserted libel had restrained and coerced employees in the exercise of their section 7 rights. Id. at 56-57. The Board's Regional Director had refused to issue a complaint on this charge as he determined that it was factually unsupported. Id. at 57. Linn then unsuccessfully appealed this decision to the Board's General Counsel. Thus, despite the fact that the conduct forming the basis of Linn's state court complaint had already been determined under the Board's pre-adjudicatory process not to constitute conduct prohibited by the Act, the district court dismissed Linn's complaint on the basis that the state remedy sought to regulate conduct arguably prohibited by the NLRA. This means that conduct that can be described as arguably prohibited by the Act does not lose this status, and thereby become subject to state regulation, simply because in a particular case the conduct at issue has been considered by the Board's Regional Director and General Counsel and determined to be, in fact, not prohibited. Whether the state plaintiff has made any effort to submit the controversy to the Board and, if so, the Board's disposition of such a charge are thus irrelevant factors in applying the Garmon analysis. See also infra note 204. The only exception to this may be the unusual situation in which the Board's Regional Director believes the conduct to be prohibited and therefore does issue a complaint, which the Board's adjudicatory process ultimately determines to be unfounded. In this event, Garmon recognizes at least the possibility that a state claim challenging the conduct will not be preempted. See Garmon, 359 U.S. at 245-46.
111. Linn, 383 U.S. at 61.
112. Id. at 61-62.
and thus beyond the state's power to regulate. Since the Garmon Court deemed it essential that this question be resolved by the Board, not by the courts, state claims involving even arguably protected or prohibited conduct were preempted. In Linn, however, the Court first focused on the alleged libel as being conduct that the Board would hold protected in the absence of malice and not protected if malicious. Even though the "arguably protected" branch of Garmon was not relied on by the lower courts in Linn that had found Linn's state claims preempted, the Court's analysis should have required a finding of preemption under the "arguably protected" branch. If the alleged libel in Linn might or might not have been malicious, then, as the Court recognized, it might or might not have been protected. To avoid the possibility that the state court would find the libel malicious and thus not protected and subject to state regulation when the Board might have reached the opposite conclusion, Garmon established that in these circumstances it is the Board, not the courts, that must determine the character of the libel. The Linn approach abandons this concept sub silento at the very outset.

Moreover, the Court did not do justice to the arguably prohibited branch of Garmon relied on by the lower courts in finding Linn's state claims preempted. The fact that the alleged libel would not be protected if found to be malicious was apparently enough, of itself, to satisfy the Court that it was conduct of a "merely peripheral concern" of the Act and what was described as the "overwhelming state interest" in protecting its citizens from malicious libel was seen as sufficient to satisfy as well the "deeply rooted in local feeling" exception. In the process of expanding on the Garmon exceptions, however, the Court also discussed a number of factors relevant to determining their applicability. Such factors included: (1) whether the state remedy will turn on an inquiry that will not be considered by the Board in an unfair labor practice proceeding, (2) whether the state forum can provide remedies unavailable from the Board, (3) whether allowing the state remedy will interfere with the "effective administration of national labor policy,” and, by inference, (4) whether allowing the state remedy will cause persons who would otherwise have utilized the Board's processes, to look instead to state

115. Id. at 63.
116. Id. at 63-64.
117. Id. at 64.
law for a remedy.\textsuperscript{118}

*Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America v. Lockridge*\textsuperscript{119} was accepted by the Court for the articulated purpose of providing "a fuller explication of the premises upon which *Garmon* rests and to consider the extent to which that decision must be taken to have modified or superseded this Court's earlier efforts to treat with the knotty pre-emption problem."\textsuperscript{120} The case involves not an effort by the state court plaintiff to fit a state remedy within the *Garmon* exceptions, but rather a direct assault on the foundation of *Garmon* itself. In rejecting this challenge, the Court seemed to be attempting to both emphasize the rationale of *Garmon* and establish rules of sufficient clarity to permit the lower courts to resolve future preemption problems without the necessity of extensive further involvement by the Court itself. In the process, however, as in *Linn*, the Court added substantial gloss to the scope of the *Garmon* exceptions.

Lockridge had allegedly been discharged by his employer at the insistence of his union when he fell one month behind in dues payments.\textsuperscript{121} Under the circumstances, the union's conduct was held by the state court to be an implied breach of the union's constitution and it therefore granted relief under a breach of contract theory, although it recognized that the union's conduct also violated two provisions of section 8(b) of the NLRA.\textsuperscript{122}

In defense of its refusal to find this application of local law preempted, the state court advanced two rationales of relevance beyond the immediate facts of *Lockridge* itself. First, the state court had relied on the fact that the union's conduct was not only an unfair labor practice, but also a breach of contract under state law. In the view of the state court, *Garmon* only required the preemption of state laws specifically directed to labor relations; the doctrine did not extend to a state's application of its general law of contracts.\textsuperscript{123} Second, the state court argued that the focus of the state court proceeding—the interpretation of the contractual rights of Lockridge—would be different from the focus of an unfair labor practice proceeding before

\textsuperscript{118} Id. at 66.
\textsuperscript{119} 403 U.S. 274 (1971).
\textsuperscript{120} Id. at 277.
\textsuperscript{121} Id. at 278-79.
\textsuperscript{122} Id. at 279, 284. Under sections 8(b)(1)(A) and 8(b)(2), 29 U.S.C. §§ 158(b)(1)(A) and 158(b)(2) (1982), a union violates the NLRA when it causes an employer to discharge an employee for reasons other than non-membership in the union, where this is required by the collective agreement and not prohibited by state law. Although the failure of Lockridge to pay his dues on time deprived him of "good standing" status in the union, it did not, under the union's rules, result in his loss of membership. *Lockridge*, 403 U.S. at 279-80. The union's conduct in causing the discharge of Lockridge was therefore held to be conduct prohibited by the Act. 403 U.S. at 284.
\textsuperscript{123} *Lockridge*, 403 U.S. at 284-85.
the Board—the alleged discrimination by the union.\textsuperscript{124}

Before its specific rejection of the justifications advanced by the state court for its refusal to find state law preempted, the Court devoted a substantial part of its opinion to the facially appealing argument that the Court may have perceived to be both the real basis for the state court’s opinion and a probable cause of future resistance to the arguably prohibited branch of \textit{Garmon}: if conduct is prohibited by federal law, why should not the states be free to themselves prohibit, and provide remedies for, the same misconduct? The answer to this, the Court said, was initially to be found in the intent of Congress to establish not simply the substantive prohibitions set out in the NLRA, but to ensure as well their uniform administration and punishment.\textsuperscript{125} While the Court seemed to recognize that this rationale might be less significant with respect to some prohibited practices than others, the Court noted its own institutional incapacity to be a case-by-case referee of the appropriate balance and the resulting necessity for “a rule capable of relatively easy application, so that lower courts may largely police themselves in this regard.”\textsuperscript{126} Finally, with an absence of explanation perhaps predictable in light of its analytical weakness, the Court also indicated that it felt it would be inconsistent to treat conduct prohibited by the NLRA differently for preemption purposes from conduct protected by the statute.\textsuperscript{127} With these general principles supporting the application of \textit{Garmon} to conduct prohibited by the NLRA, the Court then had little difficulty disposing of the arguments advanced by the state court in support of its judgment for Lockridge.\textsuperscript{128}

In \textit{Farmer v. United Brotherhood of Carpenters and Joiners of

\textsuperscript{124} Id. at 285.
\textsuperscript{125} Id. at 285-89.
\textsuperscript{126} Id. at 290. \textit{See also id.} at 294-95.
\textsuperscript{127} Id. at 290.
\textsuperscript{128} The Court held irrelevant the fact that the state remedy was granted under a law of general application, a breach of contract action, rather than a state law specifically directed to labor relations. “It is the conduct being regulated, not the formal description of governing legal standards, that is the proper focus of concern.” \textit{Id.} at 292. \textit{See also id.} at 297 n.7.

The Court also found either irrelevant or inaccurate the “closely related” contention that the state proceeding would focus upon a different subject—the interpretation of the union rules—rather than the focus of proceedings before the Board—the union’s discrimination. \textit{Farmer}, 403 U.S. at 292. The Court found dispositive the fact that the \textit{effect} of the state court’s judgment was to regulate the same union conduct, the procuring of Lockridge’s discharge, that the Board’s proceeding would have regulated. \textit{Id.} at 292-93.
America, Local 25, the Court considered a factual context similar in some respects to Lockridge. The court found the state tort action for intentional infliction of emotional distress brought by the plaintiff against his union not preempted despite the fact that the conduct of the union in allegedly discriminating against the plaintiff in hiring hall referrals and other allegedly discriminatory conduct said to constitute a campaign of personal abuse and harassment at least arguably appeared to constitute a violation of section 8(b) by the union. The Court, however, was unwilling to require an "inflexible application" of Garmon if: (1) the state has a substantial interest in regulating the conduct, and (2) the state's interest is not one that threatens "undue" interference with the federal regulatory scheme. Farmer was in large measure a wholesale retreat from the effort in Lockridge to affirm the sweeping preemption doctrine established in Garmon. Although the Farmer court again emphasized one of the primary holdings of both Garmon and Lockridge to the effect that a state action is not saved from preemption because it applies a law of general applicability rather than one specifically directed to the regulation of labor relations, in other critical respects much of the rationale of Lockridge favoring preemption was swept away in what seemed to be a new exception to Garmon: state claims will not be preempted if they do not "threaten undue interference" with the federal scheme. The considerations under this new exception seemed to be: (1) whether the "focus" in the state proceeding will be different from the focus in a proceeding before the Board, and (2) whether the state will provide remedies different from those available from the Board. If these criteria are satisfied, Farmer would apparently make the preemption determination turn on

130. In addition to the intentional infliction of emotional distress claim, the plaintiff had also sought in his complaint damages for breach of contract (based on alleged violations of both the collective bargaining agreement and the plaintiff's membership contract with the union) and discrimination in hiring hall referrals. Id. at 293. The state court held that all of these claims were preempted and no appeal was taken on these issues to the Supreme Court. Id. at 293 n.3.
131. Id. at 301-02.
132. See id. at 302.
133. See id. at 300.
134. Id. at 302.
135. Id. at 298-99. A virtually identical argument was considered and rejected in Lockridge. See Lockridge, 403 U.S. at 284-85, 292-93. If "[i]t is the conduct being regulated, not the formal description of governing legal standards, that is the proper focus of concern," id. at 292, what difference could it make that state courts regulate conduct in a proceeding with a different "focus" than that which would be found in a proceeding before the Board to regulate the identical conduct?
136. Farmer, 430 U.S. at 298-99. Again, this concept also should be compared to the Court's specific rejection of the identical argument when presented in Lockridge. See Lockridge, 403 U.S. at 288-89 n.5.
whether there is only "some risk" of, or "a potential" for, interference with the application of the NLRA, in which case the state claim is not preempted, or whether, instead, there is a "realistic threat" of such interference, in which case the state claim is preempted. This is clearly a retreat from the effort in Lockridge to establish a usable rule for lower courts to resolve preemption questions.

The revisionist view of Garmon suggested by Farmer arguably reached its high water mark in Sears, Roebuck & Co. v. San Diego District Council of Carpenters. The case involved trespassory picketing by non-employees at a large suburban store. When the picketers were directed to leave the store's property, they refused to do so and the store then obtained a state court injunction against the picketing. Although the picketing was both arguably protected and arguably prohibited by the NLRA, the state court of appeals upheld the injunction on the rationale that the state's regulation of the conduct at issue, trespassory picketing, fell within the "deeply rooted in local feeling" and responsibility exception of Garmon.

137. Farmer, 430 U.S. at 303.
138. Id. at 304.
139. Id. at 305.
140. The distinctions drawn by the Court predictably led it to a curious conclusion. The plaintiff in Farmer was allowed to recover for the union's discrimination in hiring hall referrals (a clear violation of sections 8(b)(1)(A) and 8(b)(2) of the Act, see id. at 303 n.11) only to the extent that the discrimination was "particularly abusive"; the discrimination itself could not be the basis for recovery. Id. at 305. Thus, ordinary discrimination or, differently expressed, an ordinary violation of section 8(b), could not be the basis for a state law claim, but an "outrageous" violation of section 8(b) can be the basis for a state law claim. Id. at 305. To those not having the benefit of the Court's careful explanation of the basis for its holding in Farmer, it might be thought that it is precisely the outrageous violations of section 8(b) that Congress would most have desired to be within the exclusive jurisdiction of the Board to remedy.
142. Id. at 182.
143. Id. at 182-83.
144. As the Court's opinion explains, the picketing resulted from the use, by Sears, of nonunion carpenters. Id. at 182. The picketing might be viewed as a violation of section 8(b)(4)(D) if its purpose was to coerce Sears into assigning the carpentry work to carpenters dispatched by the union hiring hall rather than Sears' own employees. See id. at 185-86. It might also constitute a violation of section 8(b)(7)(C) if its purpose was to coerce Sears into signing a prehire or members-only agreement with the union. Id. at 186. Conversely, if the sole object of the picketing was to secure compliance by Sears with area standards, it would be protected conduct under section 7. Id. at 186-87. Thus, both the state supreme court and the United States Supreme Court operated from the premise that the picketing was both arguably prohibited and arguably protected by the NLRA. Id. at 184, 187.
145. Id. at 183.
The state supreme court reversed, holding that the trespassory nature of the picketing could not, of itself, deprive it of protection, but was instead just a factor for the Board to consider in determining whether the picketing was in fact protected.\textsuperscript{146}

In reversing the state supreme court, the United States Supreme Court began as it left off in \textit{Farmer} with reference to the new and vaguely defined exception to \textit{Garmon} preemption first articulated in \textit{Farmer}: preemption is not required where "the State has a substantial interest in regulation of the conduct at issue and the State's interest is one that does not threaten undue interference with the federal regulatory scheme."\textsuperscript{147} It then proceeded to substantially dilute the two remaining aspects of \textit{Lockridge} favoring preemption that \textit{Farmer} had not already abandoned: the equal preemptive implications of conduct arguably protected and arguably prohibited\textsuperscript{148} and the lack of a significant distinction for preemption purposes between state laws of general applicability and those specifically directed to the regulation of industrial relations.\textsuperscript{149} However, by far the most sweeping new policy in \textit{Sears} for determining the preemption of state

\begin{footnotes}
\footnotetext[146]{Id. at 184.}
\footnotetext[147]{Id. at 188 (quoting \textit{Farmer}, 430 U.S. at 302).}
\footnotetext[148]{The \textit{Lockridge} Court concluded that "treating differently judicial power to deal with conduct protected by the Act from that prohibited by it would . . . be unsatisfactory." \textit{Lockridge}, 403 U.S. at 290. The \textit{Sears} Court concluded that "[w]hile the considerations underlying . . . [the arguably protected and arguably prohibited branches of \textit{Garmon}] overlap, they differ in significant respects and therefore it is useful to review them separately." \textit{Sears}, 436 U.S. at 190. As set out in the text, the Court in \textit{Sears} then constructed what amounts to an analytically distinct set of preemption criteria for state efforts to regulate arguably prohibited and arguably protected conduct.}
\footnotetext[149]{The \textit{Lockridge} Court had summarily rejected the argument that a distinction should exist for preemption purposes between laws of general applicability and those specifically directed to industrial relations.}
\end{footnotes}

\begin{quote}
Pre-emption, as shown above, is designed to shield the system from conflicting regulation of conduct. It is the conduct being regulated, not the formal description of governing legal standards, that is the proper focus of concern. Indeed, the \textit{Garmon} Court reached the same conclusion. See \textit{Garmon}, 359 U.S. at 244.

In \textit{Sears}, however, the absence of a distinction between state labor laws and state laws of general applicability was overturned. Although the preemption rationale was seen to have "its greatest force" when applied to state labor laws, it "may also apply to certain laws of general applicability which are occasionally invoked in connection with a labor dispute." \textit{Sears}, 436 U.S. at 193 (footnote omitted). While the general applicability of a state law is not "sufficient" to exempt it from preemption, \textit{id.} at 193 n.22 (emphasis in original) (quoting \textit{Farmer}, 430 U.S. at 300), the Court in \textit{Sears} was clearly willing to consider it a relevant factor.

While the distinction between a law of general applicability and a law expressly governing labor relations is, as we have noted, not dispositive for pre-emption purposes, it is of course apparent that the latter is more likely to involve the accommodation which Congress reserved to the Board. It is also evident that enforcement of a law of general applicability is less likely to
\end{quote}
laws regulating arguably prohibited conduct was the Court’s formulation of how it should be determined whether the Farmer significant state interest—little risk of interference exception should be applied. Under Sears, the “critical inquiry” in this context is “whether the controversy presented to the state court is identical to . . . or different from . . . that which could have been, but was not, presented to the Labor Board.”

In Sears, the Court viewed the issue that would have been considered by the Board to have been the purpose of the picketing, and the issue considered by the state court to involve only its location. Thus, the rationale supporting preemption of state regulation of arguably prohibited conduct was seen by the Court as inapplicable and as such insufficient to require preemption.

The “identical controversy” test established in Sears has been widely discussed. Conversely, one of the most remarkable features of Sears, and one with significant potential impact in applying the preemption doctrine to wrongful discharge claims has, in comparison, gone almost unnoticed. In beginning its discussion of the arguably protected branch of Garmon, the Court in Sears remarked in passing that “[a]part from notions of ‘primary jurisdiction,’ there would be no objection to state courts’ and the NLRB’s exercising concurrent jurisdiction over conduct prohibited by the federal Act. But there is a constitutional objection to state-court interference with conduct actually protected by the Act.”

The implication that the supremacy clause does not govern the arguably prohibited branch of Garmon is little short of incomprehensible. As recognized in Lockridge, Garmon established “constitutional principles of preemption.” The Court itself noted in Sears that the doctrine of primary jurisdiction, as that term is normally employed, is simply a guide to courts in determining when it should stay judicial proceedings so that an administrative agency can consider the question presented by the suit.
Nothing in this doctrine could possibly give the Supreme Court the authority to overturn state court decisions. It is the supremacy clause, and only the supremacy clause, that provides that authority in the context of *Garmon* preemption.\(^1\)

Nor does the Court in *Sears* simply assume a supervisory authority over state courts that the Court does not possess. At its core, this concept rejects, in the context of the arguably prohibited branch of *Garmon*, the entire foundation of this part of the *Garmon* doctrine as analyzed in *Lockridge*. States are not precluded from prohibiting conduct that the NLRA prohibits simply to be tactful to the National Labor Relations Board. As the Court in *Lockridge* took pains to emphasize,\(^2\) there are substantive *limits* to the prohibitions of the NLRA. If, for example, the statute would not allow the Board to require that a union pay damages for picketing in violation of section 8(b)(4),\(^3\) *Lockridge* recognized that this is, itself, a form of “protection” for such conduct.\(^4\) Absent the availability of one of the *Garmon* exceptions, which are predicated at least ostensibly on congressional intent and thus properly are a part of a supremacy clause analysis, *Lockridge* and *Garmon* deny to the states by operation of that clause any power to deprive those covered by the statute of this “protection.” To read *Garmon*, as did the Court in *Sears*, as authority for the Court’s possession of general supervisory authority to permit the state courts to regulate conduct with respect to which Congress has already established the limits of regulation, either specifically in the statute or by its delegation of authority to the Board, is the equivalent of establishing not an exception to *Garmon* but to the supremacy clause itself.

After *Sears*, decided in 1978, it would have been reasonable to conclude that the *Garmon/Lockridge* formulation of the preemption test for arguably prohibited conduct had been effectively replaced.\(^5\) So long as the state could articulate a “significant state interest in protecting the citizen from the challenged conduct” and the controversy

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157. In contrast to its general supervisory authority over lower federal courts, the Supreme Court possesses no similar authority to oversee the conduct and decisions of state courts. *See*, e.g., *Harris v. Rivera*, 454 U.S. 339, 344 (1981).


159. *See* C. MORRIS, supra note 64, at 1690.

160. *Lockridge*, 403 U.S. at 287 (“The technique of administration and the range and nature of those remedies that are and are not available is a fundamental part and parcel of the operative legal system established by the National Labor Relations Act.”).

161. *Sears* had almost as great an impact on the arguably protected branch of *Garmon*. *See*, e.g., *Brody*, supra note 67, at 220-23. This is not discussed here since, as previously indicated, a state “public policy” remedy for wrongful discharge must be analyzed as an effort to regulate arguably prohibited conduct: the employer’s arguable violation of section 8(a)(1). *See* supra note 80 and accompanying text.
to be presented to the state court is not "identical" to that which
would be presented to the Board, state regulation seemingly was not
preempted.\footnote{162}{Sears, 436 U.S. at 196-97.} Five years later, in \textit{Belknap, Inc. v. Hale},\footnote{163}{463 U.S. 491 (1983).} the \textit{Sears} analysis was to a large extent ostensibly reaffirmed. The emphasis,
however, had begun by this point to change yet again in the direction
of the original \textit{Garmon} rationale.

\textit{Belknap} involved an employer that had made offers of permanent
employment to strike replacements during the course of what was argu-
ably an unfair labor practice strike.\footnote{164}{Id. at 493-96.} During the course of an economic strike (i.e. a strike to coerce
the employer to agree to the union's negotiating demands), an employer may lawfully
hire permanent replacements for the strikers. See \textit{id.} at 500. During an unfair labor
practice strike (i.e. a strike initiated or prolonged by the employer's unfair labor prac-
tice), however, even a promise of permanent employment to strike replacements is a
violation of the Act and, in all events, the strikers must be returned to their jobs after
the strike even if this requires, as it normally does, the discharge or layoff of the strike
replacements. See \textit{id.} at 507-08.

\textit{Belknap} involved an employer that had made offers of permanent
employment to strike replacements during the course of what was argu-
ably an unfair labor practice strike.\footnote{165}{Id. at 496.} After the replacements had
been hired by means of inducements that they would not be dis-
charged at the conclusion of the strike, however, the employer
agreed to a settlement of the strike under which the strike replace-
ments would eventually be replaced by the returning strikers.\footnote{166}{Id.} In
return for the employer's settlement of the strike, the Board's Re-
gional Director dismissed the unfair labor practice complaint that
had been issued against the employer\footnote{167}{Id. at 496-97.} and, because of this, there
was never an actual determination whether the strike had been in
fact an unfair labor practice strike.

After the strike replacements had been laid off to permit the re-
turn of the strikers pursuant to the strike settlement, the laid off
replacements sued in state court alleging both misrepresentation and
breach of contract.\footnote{168}{Id. at 497-98.} The trial court granted summary judgment in
favor of the employer, holding both claims preempted, but was re-
versed by the state appellate court, which held that the employer's
conduct was not prohibited by the NLRA and that, in all events, the
misrepresentation and breach of contract claims satisfied the "periph-
eral concern" and "deeply rooted in local law" exceptions to
\textit{Garmon}.\footnote{169}{Id.}

Only a part of the Court's analysis in \textit{Belknap} is relevant to the ar-
guably prohibited branch of Garmon. With respect to the preemption of the misrepresentation claim, the Court appeared to agree that the misrepresentations to the putative replacements that they were being hired as permanent employees who would not be laid off at the conclusion of the strike arguably constituted conduct prohibited by section 8(a)(1) of the Act. The Court reasoned, however, that both the Garmon “peripheral concern / deeply rooted in local law” and the Sears “identical controversy” exceptions were applicable since the “focus” of any unfair labor practice proceeding would have been on the rights of the strikers while the state action concerned only the rights of the replacements. As the strikers could obtain no relief in state court, and the replacements could obtain no relief from the Board, there was no effort to provide an “alternative forum” to the NLRB and there was the prospect of denying any remedy at all to the replacements if their state claims were preempted. The Court thus concluded that the state action “would not interfere” with the Board’s jurisdiction, that it was “no more than [a] pheripheral concern” of the NLRB, that the state had a “substantial interest” in providing relief, and that the state interests therefore “outweigh any possible interference with the Board’s function.”

Although, as set out above, the Court’s decision in Belknap recites almost by rote the familiar and largely unhelpful catch phrases from prior cases, the principal contribution of the case to the development of the arguably prohibited branch of Garmon is probably best seen as an illustration of the scope of the Sears “identical controversy” exception. After Belknap, it seemed clear that, essentially by definition, a state claim involving arguably prohibited conduct would not

169. The Court considered whether the state claims should be preempted under the separate preemption doctrine based on Lodge 76, International Ass’n of Machinists v. Wisconsin Employment Relations Bd., 427 U.S. 132 (1976). See Belknap, 463 U.S. at 499-507. This is discussed seperately below. See infra notes 294-298 and accompanying text. The Court's analysis of the preemption of the breach of contract claim is also not relevant to the focus of the present examination. That issue essentially involved a claim by the employer that its discharge of the “permanent” replacements was in a sense “protected” activity since the discharge would have been required by the Board if the strike had been held to be an unfair labor practice strike. See Belknap, 463 U.S. at 508, 511-12.

170. Id. at 507-10. This is not entirely clear, however, since there are two levels of conjecture involved. As summarized by the Court, if the unfair labor practices could have been sustained, then the offers of permanent employment would arguably have been violations since they could be viewed as threats to refuse to reinstate what might have been unfair labor practice strikers. Id. As the Court seems to have accepted as a beginning premise that the mispresentations were arguably prohibited, however, this uncertainty can be disregarded for present purposes.

171. Id. at 510-11.

172. Id. at 510. This concern for denying a remedy to claimants felt by the Court to be deserving of one was also an important factor in the “arguably protected” analysis in Sears. See Sears, 436 U.S. at 199-208.

constitute an identical controversy to a Board proceeding challenging the same conduct if the focus of the state proceeding would be upon the rights of persons other than those whose rights would be determined by the Board in the unfair labor practice proceeding. This is clearly of little help in applying the preemption doctrine to wrongful discharge cases.174 There are, however, two other suggestions that may be drawn from Belknap that may be of relevance to such claims.

One of the justifications offered by the Court to support its finding that the misrepresentation claim in Belknap was not preempted was that the state court would not offer the state plaintiffs "an alternative forum for obtaining relief that the Board can provide."175 It is not entirely clear, however, what the Court's point was in advancing this as a justification for finding no preemption. If the Court meant to suggest that the need to avoid encouraging potential claimants before the Board to opt instead for a state forum176 was a factor that, if present, would argue in favor of preemption, then Belknap might provide at least partial support for the preemption of state public policy wrongful discharge actions. On the other hand, if the Court meant to suggest that the availability of remedies in the state forum that are unavailable from the Board in a particular class of cases is a

174. In the public policy wrongful discharge action, the focus of the same claim brought as a section 8(a)(1) charge before the Board would be upon the violation of the federally protected right to engage in concerted activity of the employee who has been discharged. In the most immediate sense, wrongful discharge actions also focus upon the employee's rights. Nevertheless, an argument can be made that such state actions exist not to protect the rights of individual employees, but to protect the state's interest in such things as its workers' compensation system, the safety and health of its citizens, and the reporting of wrongdoing. The difficulty with this argument would be that, in somewhat the same sense, the NLRA exists to enforce not just individual employee rights, but also the national interest in domestic labor peace. See 29 U.S.C. § 151 (1982). It is therefore doubtful that this aspect of Belknap could save wrongful discharge claims from preemption.

Similarly, however, Belknap cannot be read as authority for the converse proposition that, where the focus of the state and Board proceedings will be upon the rights of the same individual, the state claims will necessarily be preempted. Farmer and, to a more limited extent, Sears both involved factual situations in which no preemption was found despite the fact that any proceeding before the Board would have focused upon the rights of the same individuals as the state proceeding. Both cases were relied on by the Court in Belknap.

175. Belknap, 463 U.S. at 510.

176. This is an issue raised, but not resolved, in Linn, 383 U.S. at 66-67. There, the Court considered a similar argument and determined that, under the facts of Linn, allowing the state claim would not have the effect of discouraging the use of the Board's processes. Id. This determination precluded any indication of what effect, if any, it would have in the preemption analysis if the availability of the state remedy was to be seen as diverting potential claimants before the Board to the state courts.
factor militating against preemption, then the case could support an argument that state public policy wrongful discharge claims are not preempted.\textsuperscript{177}

There is also an implicit thematic message in \textit{Belknap} of potential relevance to the question of preemption of wrongful discharge claims. Both \textit{Garmon} and \textit{Lockridge} relied heavily in formulating the preemption doctrine on the intent of Congress in enacting the NLRA.\textsuperscript{178} At least facially, the congressional intent also formed the basis for the Court's decisions in \textit{Linn},\textsuperscript{179} \textit{Farmer},\textsuperscript{180} and \textit{Sears}.\textsuperscript{181} In \textit{Belknap}, however, there is little reference to congressional intent and none at all in the context of the Court's discussion of the \textit{Garmon} doctrine. Indeed, little more than lip service seems to be paid to even the Court's own prior opinions. In the end, the real basis for the opinion seems nothing more nor less than the majority's subjective conclusion that "[t]he state interests involved in this case clearly outweigh any possible interference with the Board's function."\textsuperscript{182} As in \textit{Farmer} and \textit{Sears}, this kind of approach means that the policy of \textit{Lockridge} to establish a \textit{rule} of preemption has been abandoned for exactly the case-by-case approach that case rejected.\textsuperscript{183} This naturally makes more difficult any prediction of the Court's approach to the preemption of state public policy wrongful discharge claims.\textsuperscript{184}


\textsuperscript{178} \textit{Garmon}, 359 U.S. at 239-44; \textit{Lockridge}, 403 U.S. at 286-91.

\textsuperscript{179} \textit{Linn}, 383 U.S. at 58-59.

\textsuperscript{180} \textit{Farmer}, 430 U.S. at 295-98.

\textsuperscript{181} \textit{Sears}, 436 U.S. at 190-93.

\textsuperscript{182} \textit{Belknap}, 463 U.S. at 289-90.

\textsuperscript{183} \textit{See Lockridge}, 403 U.S. at 289-90.

\textsuperscript{184} Nor can we proceed on a case-by-case basis to determine whether each particular final judicial pronouncement does, or might reasonably be thought to, conflict in some relevant manner with federal labor policy. This Court is ill-equipped to play such a role and the federal system dictates that this problem be solved with a rule capable of relatively easy application, so that lower courts may largely police themselves in this regard.

\textit{Id.}

\textsuperscript{184} For example, in a case decided the following year, \textit{Brown v. Hotel Employees Local 54, 104 S. Ct. 3179 (1984)}, involving what would have been the arguably protected branch of \textit{Garmon}, it is possible that the Court abandoned the \textit{Garmon} framework entirely for at least this branch of \textit{Garmon}. In \textit{Brown}, the Court initially distinguished conduct that is \textit{arguably} protected from that which is \textit{actually} protected. In the former category, a "presumption" of preemption was said to apply that can be overcome when "unusually deeply rooted" local interests are at stake." \textit{Id.} at 3186-87. In the latter category, no exceptions apply; with respect to conduct actually protected by the
Less than three months before Justice White handed down the Court's opinion in Belknap, he handed down yet another opinion for the Court applying Garmon that went unnoticed either by him or the concurring and dissenting opinions in Belknap: Local 926, International Union of Operating Engineers v. Jones. To a significant extent, however, Jones answers questions left open by Belknap and confirms the retreat suggested by Belknap from the restrictive Sears approach to preemption.

Jones is a useful case for present purposes both because it is among the most recent applications by the Court of the arguably prohibited branch of Garmon and because it involves a context very similar to that presented by a wrongful discharge claim. The facts in this case are therefore significant for our purposes.

Jones had been hired as a supervisor and was discharged on his third day of employment as the alleged result of the union's having "procured" his discharge in retaliation for Jones' decision to accept employment years previously by a nonunion employer. Jones filed an unfair labor practice charge with the Board alleging that the union had coerced his employer in its selection of supervisors and bargaining representatives in violation of sections 8(b)(1)(A) and }

Act, "[t]he relative importance to the State of its own law is not material . . . ." Id. at 3187 (quoting Free v. Bland, 369 U.S. 663, 666 (1962)). The Court then determined, however, that the challenged state law in Brown "does not actually conflict with § 7 and so is not preempted by the NLRA." Brown, 104 S. Ct. at 3190. In light of the Court's approach, it can be questioned whether anything remains of the Garmon framework, at least with respect to its "arguably protected" branch. If, as in Brown, the analysis as actually applied now requires the Supreme Court (and, by inference, the lower federal and state courts) to determine whether conduct is or is not actually protected with the preemption of the state law turning on the answer, what is left of the "arguably protected" concept? If the court determines that the conduct is actually protected, the state law is preempted forthwith without regard to balancing the local and federal interests. Id. at 3187. If the court determines that it is not actually protected, this also ends the inquiry: the regulation "does not actually conflict with § 7 and so is not preempted . . . ." Id. at 3190. Notwithstanding the Court's reformulated articulation of the Garmon test as a "presumption" of preemption for arguably protected conduct, it is difficult to see how in this framework such a presumption could operate and, thus, what further purpose would be served by describing conduct as "arguably protected." If the same analysis were to be applied to the "arguably prohibited" branch of Garmon, it would make yet more difficult any attempt to predict whether public policy wrongful discharge claims are preempted.


187. Id. at 672. Section 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(A), prohibits a union from
8(b)(1)(B). After the Board's Regional Director had dismissed his charge as being factually unsupported, Jones elected not to appeal the dismissal to the Board's General Counsel and, instead, filed suit in state court against, inter alia, the union, asserting that the union had interfered with his contractual relations with his employer—a tort under state law. The trial court dismissed the claim as preempted but was reversed by the state appellate court, which held that the state claim was not preempted both because of the state's asserted "deep and abiding interest in protecting its citizens' contractual rights and because the action, which sounded in tort, was so unrelated to the concerns of the federal labor laws that it would not interfere with the administration of those laws."1

The Court's analysis in *Jones* begins by summarizing what it describes as "a variant of a familiar theme" that has "been stated and restated." First, it must be determined "whether the conduct that the State seeks to regulate or to make the basis of liability is actually or arguably protected or prohibited by the NLRA." If so, the state law and procedures are preempted, unless one of the Garmon exceptions related to conduct that is either only a peripheral concern of the Act or is deeply rooted in local feeling and responsibility is applicable. The "deeply rooted" exception is to be governed by a "sensi-

restraining or coercing employees in the exercise of section 7 rights. It is in many respects similar to section 8(a)(1), 29 U.S.C. § 158(a)(1), prohibiting employer restraint or interference with employees' section 7 rights. As previously set out, the "arguably prohibited" branch of Garmon is relevant to an analysis of the possible preemption of public policy wrongful discharge actions because of the possibility that such a discharge might arguably constitute a violation of section 8(a)(1). See supra note 80 and accompanying text. *Jones* is therefore of particular relevance to the analysis, since the Court's approach to preemption under section 8(b)(1)(A) of *Jones* state claim alleging that the union had wrongfully brought about his discharge is in many respects analogous to the analysis under section 8(a)(1) of a claim by an employee that his employer has wrongfully discharged him.

*Jones*, in fact, came very close to preempting much of this article. A second count of *Jones* complaint had sought relief against his employer on the basis of an allegation that the employer had breached its employment contract with him. Id. at 674. The state trial court had also held this claim preempted and the state appellate court affirmed the dismissal of this part of Jones' complaint without reaching the preemption question on the ground that, as an employee at will, Jones could not obtain relief for his discharge from his employer in any event. 159 Ga. App. 693, 695, 285 S.E.2d 30, 31 (1981). Jones did not seek to appeal this determination. *Jones*, 460 U.S. at 674 n.6.

188. *Jones*, 460 U.S. at 672. Under section 8(b)(1)(B), unions are prohibited from restraining or coercing employers in the selection of the employer's representatives for collective bargaining or grievance adjustment. *Id.*

189. *See supra* note 187.


191. *Id.* at 674-75.

192. *Id.* at 675-76 (quoting Garmon, 359 U.S. at 239). In light of the history of the Court's efforts in this area as summarized above, the impatience suggested by the opinion cannot escape irony.

193. *Jones*, 460 U.S. at 676.

194. *Id.*

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tive balancing of any harm to the regulatory scheme established by Congress, either in terms of negating the Board's exclusive jurisdiction or in terms of conflicting substantive rules, and the importance of the asserted cause of action to the State as a protection to its citizens.”

Based on a very similar preemption case decided 20 years previously, the Court applied the Garmon analysis to find initially that the union's conduct forming the basis for Jones' state law claim was an arguable violation of both section 8(b)(1)(A) and section 8(b)(1)(B). In reaching this determination, the Court clarified by its analysis one of the previously unexplained ambiguities of the Garmon doctrine.

The Court had not previously explained clearly just what “arguably prohibited” means. It had been unclear whether the Court had intended to refer to an arguable legal basis or an arguable factual basis, or both, which, if accepted by the Board, would make out a violation of section 8. “Arguably prohibited” might mean that there is an arguable basis to contend that, on a given set of facts, the Board would conclude as a legal matter that a violation had been made out. It might also mean that there is an arguable basis to contend that the Board would conclude as a legal matter that a violation had been made out. The answer to this ambiguity given in Jones is that either basis will suffice to satisfy the “arguably prohibited” test. Thus, with respect to the contention that the union's conduct was arguably prohibited by section 8(b)(1)(A), the Court concluded that an existing doctrine under which a violation of this provision could be established was “arguably applicable to this case.” This is plainly “arguably prohibited” on the basis of an arguable construction of law. With respect to the contention that the union's conduct was arguably prohibited by section 8(b)(1)(B), the Court saw the question of a violation turning on whether Jones would have had collective bargaining responsibilities in his job. Since the Court found it at least arguable that he would have had such responsibilities, there was also an arguable violation of section 8(b)(1)(B). This is clearly “arguably prohibited” on the basis of an arguable factual contention.

195. Id.
197. Jones, 460 U.S. at 677-78.
198. Id. at 678-79.
199. Id. at 679.
200. Id. at 680.
Having found that the union’s conduct was arguably prohibited, the Court proceeded to consider and reject the state court’s justifications for refusing to find Jones’ claim preempted. The contention that Jones’ unsuccessful attempt to pursue a charge before the Board “satisfied all of the interests of the federal law and cleared the way for a state cause of action” was summarily dismissed. The Court observed, first, that Jones failed to attempt an appeal from the Regional Director’s dismissal of his charge as factually unsupported and therefore had failed to satisfy “ordinary primary-jurisdiction requirements.” Second, the Court noted that, even had Jones pursued unsuccessfully to exhaustion all of his remedies before the Board, this could not save his state claim from preemption.

[Jones did not take] adequate account of the decision of Congress to vest in one administrative agency nationwide jurisdiction to adjudicate controversies within the Act’s purview. Matters within the exclusive jurisdiction of the Board are normally for it, not a state court, to decide. This implements the congressional desire to achieve uniform as well as effective enforcement of the national labor policy.

Thus, an incomplete attempt, a completed attempt, and, a fortiori, no attempt at all to obtain a remedy from the Board are all irrelevant to the question of preemption.

The Court then continued to consider Jones’ argument, relying on

201. Id.
202. Id.
203. Id. at 681 (emphasis in original).
204. This conclusion is forced under the Court’s analysis. However, Jones, in common with many of the Court’s other labor preemption decisions, suggests that traditional analysis plays, at best, a minor and poorly articulated role in the Court’s decisions. Having expressly rejected Jones’ efforts to pursue a charge before the Board as a basis under which the preemption of his state claim could be avoided, the Court then proceeded to rely on that same fact as a justification for finding preemption. Because the Board’s Regional Director had found Jones’ charge that the union had caused his discharge to be factually unsupported, the Court was able to describe his state court suit as an effort “to relitigate the question in the state courts.” Id. at 683. This was seen to support the finding of preemption. “The risk of interference with the Board’s jurisdiction is thus obvious and substantial.” Id. The Court’s approach suggests a kind of Garmon “Catch 22.” A state court plaintiff with a claim involving arguably prohibited conduct is preempted from the outset if he has failed to first avail himself of an available Board remedy because this is necessary to protect “ordinary primary-jurisdiction requirements.” Id. But if he does first pursue a charge before the Board and thus satisfies these requirements, the Board’s rejection of the factual basis for the charge will mean that a subsequent effort to litigate the claim in state court will constitute an effort to “relitigate the question” and thus create an “obvious and substantial” risk of interference with the Board’s jurisdiction. Perhaps worse, this kind of analysis is misleading to the extent that it suggests that a potential state court plaintiff can avoid preemption by first pursuing to exhaustion his remedy before the Board (thereby satisfying the “ordinary primary-jurisdiction requirements”) and prevailing (thereby avoiding any risk that a successful subsequent suit in state court would involve relitigating the determination made by the Board). Of course, if the Court’s decision in Jones could be read in this fashion, it would have effectively converted a doctrine of preemption into a doctrine of primary jurisdiction as that term is commonly used in administrative law - a concept rejected by the Court in even its most
Sears, that his state cause of action should not be preempted as it was not identical to a proceeding before the Board since a Board proceeding would focus on whether the union had coercively caused his discharge while the state suit could provide relief even if the union noncoercively caused the discharge. The Court rejected this argument because of (1) the Court's conclusion that Jones' characterization of his state suit was inaccurate, (2) the argument would require the state court to determine in the first instance whether the union's conduct was coercive—a question the Court concluded should be resolved by the Board, and (3) the state court and Board proceedings would be "identical" as "a fundamental part" of the state claim was the union's causation of Jones' discharge, "the same crucial element" that must be proved to establish the violation of section 8(b)(1)(B). Apparently based on the last point, the Court was able to conclude that Jones could satisfy neither the "peripheral concern" nor the "deeply rooted in local law" exceptions to Garmon and that his state claim was therefore not saved from preemption.

Jones' final effort consisted of an argument that his state claim should not be preempted as it offered him the opportunity to recover punitive damages and attorneys fees while a proceeding before the

restrictive interpretation of the scope of Garmon preemption. See Sears, 436 U.S. at 199 n.29.

The answer to all of this is that the Court was right the first time in Jones. As stated at the outset of this part of the Jones analysis, "[m]atters within the exclusive jurisdiction of the Board are normally for it, not a state court, to decide." Jones, 460 U.S. at 681. If a state court plaintiff has failed to pursue, or to exhaust, his Board remedy, there is an additional reason for preemption by virtue of the primary jurisdiction requirements. Similarly, if he has obtained a determination from the Board at any stage of its proceedings that his claim is factually unsupported, this is, again, an additional reason for preemption by virtue of the need to avoid relitigation of the question by a state court and the resulting interference with the Board's jurisdiction. In the absence of either or both of these aggravating circumstances, however, the original basis for the Garmon doctrine still requires preemption.

205. Jones, 460 U.S. at 681-83.

206. Id. at 682. The Court interpreted the argument as conceding that a state court suit for coercive interference with contractual relations would be preempted and concluded that Jones' state court complaint alleged such coercive interference so that he "thus sought to prove a coerced discharge and breach of contract, the very claim that is concededly preempted." Id. But see id. at 686 n.3 (Rehnquist, J., dissenting) (contending that the Court had both incorrectly interpreted Jones' argument as a concession and misinterpreted his state court complaint).

207. Id. at 682.

208. Id.

209. Id. at 683. The Court also concluded, perhaps gratuitously in light of its determination on the "arguably prohibited" branch of Garmon, that Jones' state court claim would also be preempted under the "arguably protected" branch. Id. at 683-84.

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Board could only result in his receipt of back pay. Although the Court’s application of Garmon in the past provided substantial support for such an argument, it was summarily rejected by the Court’s reference to the fact that an identical effort to avoid preemption was considered and rejected in Garmon itself.

The Court’s most recent opportunity to apply the arguably prohibited branch of Garmon prompted a unanimous Court to return to the sweeping preemption language of Garmon and Lockridge. In Wisconsin Dep’t of Indus., Labor and Human Relations v. Gould Inc., the Court considered whether the NLRA preempts a state statute that established a debarment scheme under which repeat violators of the NLRA were precluded from doing business with the state. In finding that the state statute was preempted under Garmon, the Court focused directly on the central issue raised by a state’s effort to provide an alternative remedy by means of a public policy wrongful discharge action for employees discharged in violation of section 8(a)(1).

The general rule set forth in Garmon is... that states may not regulate activity that the NLRA protects, prohibits, or arguably protects or prohibits. Because ‘conflict is imminent’ whenever ‘two remedies are brought to bear on the same activity,’... the Garmon rule prevents states... from providing their own regulatory or judicial remedies for conduct prohibited or arguably prohibited by the Act.

Such unqualified language in a very recent and unanimous decision by the Court would seem to have obvious implications with respect to the possible preemption of state law public policy wrongful discharge actions, which are clearly efforts to provide alternative remedies for conduct at least arguably prohibited by the NLRA. Gould may not be as dispositive as its language might suggest, however. As noted by the Court, the statute in Gould had as its direct purpose and effect the enforcement of the NLRA rather than the protection of the state’s citizens from conduct that only coincidentally also violated the statute. In addition, the conduct punished by the state action in Gould, multiple proven violations of the NLRA, constitutes by definition conduct actually, not arguably, prohibited the NLRA. The Court

210. See, e.g., Linn, 383 U.S. at 63-64; Farmer, 430 U.S. at 298-99. See also the discussion on this point as presented in Belknap, supra notes 173-77 and accompanying text.
211. Jones, 460 U.S. at 684.
212. 106 S. Ct. 1057 (1986).
213. Id. at 1059. Under the statute, Wis. Stat. § 101.245 (Supp. 1985), persons or firms found by judicially enforced orders of the NLRB to have violated the NLRA in three separate cases within a five year period were debarred for three years. Id. at 1059-60.
215. See supra notes 84-104 and accompanying text.
has in the past utilized distinctions far less compelling than these to avoid the effect of language equally as sweeping as that in Gould.

_Gould_ completes the Supreme Court cases applying the _Garmon_ doctrine’s "arguably prohibited" branch. As suggested by the wide swings in the Court’s approach from an expansive scope of preemption (_Garmon_), to a more restricted scope (_Linn_), back again to the original expansive scope of _Garmon_ (_Lockridge_), back again to an extremely restricted scope (_Farmer_ and _Sears_), and finally returning yet again to a more expansive scope (_Belknap_, _Jones_, and _Gould_), the task of applying the _Garmon_ doctrine to the developing law of state public policy wrongful discharge actions is far from simple. At the outset, any such effort is substantially inhibited by the fact that the possibility of preemption of wrongful discharge claims in the nonunion context seems to have been generally ignored in case law outside of the limited context of claims involving a discharge allegedly caused by the employee’s efforts to organize union conduct that is not arguably but clearly prohibited by the Act.217 Even in a unionized setting, such preemption case analysis normally relates solely to the implications of the existence of a collective bargaining agreement containing its own restriction on the employer’s right to discharge. This is a separate preemption doctrine.218 With rare exceptions,219 the implications of the _Allelulia_ doctrine220 to preemption under _Garmon_ seem simply not to have occurred either to the litigants or the courts.221

Beyond this problem, the history of the Court’s development of the _Garmon_ doctrine proves, if nothing else, that analysis based on cases dealing with other contexts means little in terms of predicting the probable disposition of future cases. Indeed, the Court had contradicted itself in this area so much that it is debatable whether any principles actually exist to form a predictable basis for the application of the preemption doctrine. The progeny of _Garmon_ are replete with examples of concepts and criteria prominently relied on in one

217. See supra notes 81-83 and accompanying text.
218. See infra note 387 and accompanying text.
219. See, e.g., Flick v. General Host Corp., 573 F. Supp. 1086 (N.D. Ill. 1983) (holding a state claim alleging discharge in retaliation for a workers' compensation claim was not preempted).
220. See supra notes 88-89 and accompanying text.
221. Similarly, even post _Allelulia_ commentators have, as a group, either ignored this issue or elected not to explore it even when specifically considering the possibility of preemption of wrongful discharge claims. See, e.g., Summers, supra note 15, at 530-31; NLRA Preemption, supra note 15, at 643 n.43. One commentator has addressed this question, however. See State Actions, supra note 15, at 957-68.
case, ignored or abandoned in the next, and subsequently rediscovered. It is difficult to resist the conclusion that, like obscenity, the need in any case for preemption under \textit{Garmon} is something that the Justices know when they see it, but cannot define in terms of deductive principles to which they subsequently adhere. However, on the demonstrably naive assumption that the Court will, in this instance, adhere to principles derived from its prior decisions, a very good case can be made that essentially all state public policy wrongful discharge actions are preempted under \textit{Garmon}.

As "stated and restated" by the Court, the \textit{Garmon} analysis begins with an initial determination of whether the conduct sought to be regulated by the state is arguably protected or prohibited by the NLRA. If \textit{Garmon} is applicable at all in this context, it is because, in seeking to provide a remedy for the discharge of employees in retaliation for conduct the state wishes to protect or foster, the state is regulating conduct—the discharge—that is arguably prohibited by section 8(a)(1) of the Act: restraint, by discharge, of the exercise of the employees' section 7 right to engage in concerted activity for mutual aid or protection. So long as the Board adhered to the \textit{Alleluia} doctrine, under which an employee's individual conduct of the type sought to be protected by the state remedies was held to constructive or per se "concerted" activity, there was little question that, in virtually all cases, the state remedy would necessarily have involved at least arguably prohibited conduct and thus satisfied the initial preemption inquiry. Although the Board has recently sought to abandon the \textit{Alleluia} doctrine on the basis that its concept of constructive concerted activity is not a permissible interpretation of the Act, the Supreme Court still more recently substantially undercut the basis for the Board's abandonment of \textit{Alleluia} and two circuit courts have refused to accept Board decisions that were based on its abandonment of \textit{Alleluia}. Under these circumstances, there continues to exist at least an arguable basis to contend that state public policy wrongful discharge actions seek to regulate conduct prohibited by the Act. Under \textit{Garmon}, no more than this is required to satisfy the initial test for preemption.

Moreover, even if the Board adheres to its current policy and is ultimately sustained by the courts, this by no means ends the possibil-

\begin{itemize}
  \item 222. \textit{Jones}, 460 U.S. at 676.
  \item 223. See supra note 80 and accompanying text.
  \item 224. See supra notes 88-89 and accompanying text.
  \item 225. See also NLRA Preemption, supra note 15, at 643 n.43; State Actions, supra note 15, at 957-60.
  \item 228. See supra notes 97-98 and accompanying text.
\end{itemize}
ity of Garmon preemption for many of the state public policy wrongful discharge actions. The Alleluia doctrine simply eliminated the need for any specific showing in a section 8(a)(1) action of actual concerted activity; the nature of the employee's conduct was deemed sufficient to establish at least a presumption of concerted activity. But even without the Alleluia presumption, it will still be a violation of section 8(a)(1) for an employer to discharge an employee for the kinds of conduct at issue in this context if actual authorization or knowledge by other employees can be shown. Moreover, even where the employee who has been discharged was not engaged in concerted activity, a violation of section 8(a)(1) might still be found where the effect of the discharge is to restrain or interfere with concerted activity by other employees. Since Jones recognizes implicitly that conduct can be arguably prohibited where there is an arguable factual basis to contend that the conduct is within the scope of a section 8 prohibition, and there will be many cases in which there will be at least an arguable basis to contend that the conduct of the employee for which he was discharged was discussed with, or approved by, other employees, or that it had a chilling effect on concerted activity by other employees, the issue of preemption in this context will not go away. As there currently exists an arguable basis to contend, as a legal matter, that all discharges of this type are a restraint of concerted activity, and there will in any event continue to exist in most cases at least an arguable basis to contend as a factual matter that a particular discharge involved a restraint of concerted activity, the initial Garmon requirement for preemption that the conduct sought to be regulated be at least arguably prohibited should be little obstacle to preemption.

The more difficult question is whether one of the exceptions to the Garmon doctrine applies. Any effort to apply at least the articulated exceptions stalls at the outset, however, by reason of the almost limitless malleability of the language used by the Court to describe the exceptions. Thus, in the most general sense, the protection of employees against restraint or interference with concerted activity for mutual aid or protection is perhaps the most basic protection the NLRA provides. Such conduct, in this sense, could therefore hardly

229. See Meyers, 268 N.L.R.B. at 497.
230. See supra note 102 and accompanying text.
231. See supra notes 196-98 and accompanying text.
232. See supra note 101.
be described as only a peripheral concern of the Act. Viewed more specifically, however, the regulation of conduct that, for example, frustrates a state workers' compensation system or inhibits the reporting of violations of state law is something that is clearly only a peripheral concern of the Act at best.

Similarly, there is substantial ambiguity in the exception to Garmon preemption for a state's efforts to regulate conduct touching on "interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, it could not be inferred that Congress intended to deprive the State of the power to act..." This language at least implies a test of longevity; a state cause of action seemingly could not be "so deeply rooted" in local feeling and responsibility that congressional intent could be inferred to preserve the cause of action if it did not exist at the time Congress adopted the Act. Under this interpretation, the exception would not be available to state public policy wrongful discharge actions since, as previously discussed, such actions were unknown until very recently. On the other hand, the Court has seemingly rejected any longevity requirement and, has apparently made a term of art of "the deeply rooted in local feeling" exception such that it now involves "a sensitive balancing of any harm to the regulatory scheme established by Congress... and the importance of the asserted cause of action to the State..." Of course, the problem this creates for our purposes is that such a formulation describes not a rule of law but an explanation for a result. By its own reformulated terms, the "deeply rooted in local feeling" exception is now satisfied if the Court determines not to preempt a state cause of action and not satisfied if it does. The language in which the exception is phrased is accordingly meaningless for purposes of resolving preemption questions prospectively. A similar observation would be applicable to the Farmer exception for state claims that do not "threaten undue interference" with the federal scheme.

Despite the lip service the Court has faithfully paid the original

233. Jones, 460 U.S. at 676.
234. Id.
236. See supra notes 33-43 and accompanying text.
237. See Jones, 460 U.S. at 687-88 n.4 (Rehnquist, J., dissenting)(noting the Court's acceptance in Farmer of the relatively new tort of intentional infliction of emotional distress).
238. Id. at 676.
239. See supra note 134 and accompanying text.
Garmon exceptions, it is probably fair to say that, at least since Farmer, there has been only one exception to Garmon preemption of arguably prohibited conduct. State laws otherwise preempted under Garmon will not be preempted if, on balance, the adverse consequences of preemption in a given context outweigh the benefits of a uniform federal law of labor relations. An examination of how the Court has struck this balance in past cases, and the impact of the recurring themes on the process can provide at least some guidance in determining the ability of public policy wrongful discharge actions to survive preemption.

At one point, a popular defense against preemption was that the state was applying a law of general applicability rather than one specifically directed to labor relations. Although rejected in both Lockridge and Farmer, the argument was accepted at least to some extent in Sears. Sears suggested that, while a state law may not be saved from preemption simply because it is a law of general applicability, the rationale of preemption has its greatest force when applied to a state law expressly governing labor relations. Although the distinction was offered in Sears to support the Court’s finding that the law of general application was not preempted, the same distinction would naturally support the argument in favor of preemption when the state law in question is specifically directed to labor relations.

Sears seemed to hold that preemption would not be required unless the controversy presented to the state court would be “identical to . . . that which could have been . . . presented to the Board.” Depending upon what is ultimately resolved with respect to the Alleluia doctrine, the Sears “identical controversy” concept might or might not be relevant in this context. If the Board continues to utilize the Alleluia constructive concerted activity concept, the only issue before the Board would be one of causation. The issue is whether the discharge was caused by the employee’s having filed a workers’ compen-
sation claim, having reported the employer's safety violation, or some other similar conduct. As this would also be the sole substantive issue in the state court proceeding, the controversies would be essentially identical. If the constructive concerted activity concept of Alleluia is not utilized, the Board would also consider whether the conduct alleged to have resulted in the employee's discharge was, "concerted" activity or whether, even if not concerted, the discharge nevertheless chilled concerted activity by other employees. As such inquiries would be irrelevant to the state court proceeding, the controversies, at least to this extent, would not be identical.

All of this is now probably irrelevant, however, as the strict Sears "identical controversy" requirement seems to have been largely abandoned. As previously discussed, Jones interpreted this test to be satisfied if "a fundamental part" or the "same crucial element" would be involved in both the unfair labor practice proceeding and the state suit. Moreover, the "fundamental part" or "crucial element" involved in Jones was also causation. In Jones, the fact that a "fundamental part" of both the Board proceeding and the state suit was whether the union had actually caused Jones' discharge was seen as sufficient to satisfy the Sears "identical controversy" requirement. In the present context, the fact that a fundamental part of both a Board proceeding and a state suit would be whether the employee's conduct had been the cause of his discharge should be equally sufficient to satisfy this requirement.

One factor appears to have had great significance to the Court in finding that the state interest is sufficient to justify not finding a state suit preempted under Garmon. Although the Court has not allowed the availability of greater recovery in a state forum to be used to escape preemption, the prospect of denying recovery entirely for a discrete injury if the state claim is preempted has seemed to be very significant. Under the "arguably protected" branch of Garmon, perhaps the single most significant factor in the Sears decision which caused the Court to find the state claim not preempted was the fact that, if Sears' state suit were to be preempted, Sears would have no legal remedy for the union's continuing trespass. Under the "arguably prohibited" branch, the Court's reluctance to leave an injury without a remedy was a factor in each of the cases discussed previously in which the Court found the state claims not preempted; Linn, Farmer, and Belknap. Conversely, in each of the two

245. See supra notes 205-09 and accompanying text.
246. Jones, 460 U.S. at 682.
247. See id. at 684 (summarily rejecting contention that availability of punitive damages and attorneys fees in state proceeding justifies not preempting state claim).
249. In Linn, the Court noted that "[t]he Board can award no damages, impose no
post-\textit{Garmon} decisions preempting the state remedies, \textit{Lockridge} and \textit{Jones}, the basic injury in both cases was the plaintiff's allegedly wrongful discharge, an injury the Board had full power to remedy by reinstatement and back pay.

Finally, an additional factor of less clear significance is also reflected in the Court's decisions. Often conduct that the state seeks to regulate is only arguably, rather than clearly, prohibited by the NLRA because the case involves a factual dispute that must be resolved by a fact finder before it can be determined whether the conduct at issue is prohibited.\footnote{252} At times, the Court has seemed to attach little significance to allowing the state court to resolve this initial inquiry so that it could apply its own remedy to the extent the conduct was found not prohibited or protected by the Act.\footnote{253} At other times, however, the Court has determined that allowing the state court to make this initial determination necessarily violates the exclusive jurisdiction of the NLRB and has found preemption required to prevent this. The latter position, adopted first in \textit{Garmon} itself,\footnote{254} appears to be the Court's current view. As explained in the context of the factual issue in \textit{Jones},

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\item In \textit{Farmer}, the Court noted that "[w]hether the statements or conduct of the respondents also caused Hill severe emotional distress and physical injury would play no role in the Board's disposition of the case, and the Board could not award Hill damages for pain, suffering, or medical expenses." \textit{Farmer}, 430 U.S. at 304.
\item In \textit{Belknap}, the Court, quoting \textit{Linn}, again noted that the fraudulent misrepresentation claims of the discharged "permanent" employees could not be remedied by the Board. "It is no less true here than it was in [\textit{Linn}] . . . that 't[he] injury' remedied by the state law 'has no relevance to the Board's function' and that 't[he] Board can award no damages, impose no penalty, or give any other relief' to the plaintiffs in this case." \textit{Belknap}, 463 U.S. at 511 (quoting \textit{Linn}, 383 U.S. at 63).
\item In \textit{Garmon}, the purpose of the picketing, which would determine whether it was prohibited by the Act, was disputed. \textit{See Garmon}, 359 U.S. at 237-38. In \textit{Linn}, it was unclear whether the libel was malicious, which would render it not protected by the Act, or non-malicious. \textit{See Linn}, 383 U.S. at 60-61. In \textit{Sears}, it was again the purpose of the picketing that would determine whether it was prohibited. \textit{See Sears}, 436 U.S. at 304-05. The status of the fraudulent misrepresentation in \textit{Belknap} as also an unfair labor practice would turn on whether the strike had become an unfair labor practice strike. \textit{See Belknap}, 463 U.S. at 507-08. In \textit{Jones}, the status of the alleged interference with the plaintiff's contractual relations as also being an unfair labor practice would turn on whether the interference was coercive. \textit{See Jones}, 460 U.S. at 682.
\item \textit{See Jones}, 460 U.S. at 686-87 (Rehnquist, J., dissenting) (summarizing cases).
\item \textit{See Garmon}, 359 U.S. at 244-45. As previously set out, the concern that the Board, and not the state courts, should be making the findings on which the question of the applicability of the NLRA to the conduct in question turns is the analytical
\end{itemize}
permitting state causes of action for noncoercive interference with contractual relations to go forward in the state courts would continually require the state court to decide in the first instance whether the Union's conduct was coercive, and hence beyond its power to sanction, or noncoercive, and thus the proper subject of a state suit. Decisions on such questions of federal labor law should be resolved by the Board.255

Based on these themes found in the Court's prior cases, we can synthesize our own criteria to aid in measuring the courts future action. At issue is how the Court will weigh the state interest in public policy wrongful discharge suits against the federal interest in having the Board resolve such claims as violations of the employee's right to engage in concerted activity. This synthesis leads to the tests below. Each test seems to indicate the preemption of such claims.

(1) State public policy wrongful discharge actions are specifically directed to regulating the employer's right to discharge. They therefore are not laws of general application. Under Sears, preemption would be indicated.256

(2) As previously discussed, a "fundamental part" of both a proceeding before the Board and the state court, in this context, would be the basic question of causation: did the employer discharge the employee because of his having filed the workers' compensation claim, having reported the safety violation, or for other similar conduct? Under Jones, preemption would be indicated.257

(3) Both before the Board or before the state court, the discharged employee seeks back pay and reinstatement. Denial of access to the state forum would therefore not deprive the employee of a remedy for the injury in question. Under all of the Court's post-Garmon preemption decisions, preemption would therefore be indicated.258

(4) Although this is not clear, it seems that, to avoid regulating

255. Jones, 460 U.S. at 682.

256. See supra note 238 and accompanying text. It should be noted, however, that the three member plurality opinion in New York Telephone determined that the unemployment compensation statute at issue was "a law of general applicability." New York Telephone, 440 U.S. at 533. This was the plurality's observation that the statute "does not primarily concern labor-management relations" but was rather a means to provide security for all unemployed workers. Id. at 534. Defined in this manner, the "laws of general applicability" test might be sufficiently broad to encompass state public policy wrongful discharge actions. However, both Justice Brennan's concurring opinion and the three member dissent refused to accept this definition. See id. at 546 (Brennan, J., concurring); id. at 557 (Powell & Stewart, J.J., Burger, C.J., dissenting). The remaining two Justices failed to reach this question in light of their view that there is no distinction for preemption purposes between state laws of general applicability and laws specifically directed to labor relations. See id. at 547-51 (Blackmun & Marshall, J.J., concurring).

257. See supra notes 236-41 and accompanying text.

258. See supra notes 242-46 and accompanying text.
conduct actually prohibited by the NLRA which is within the exclusive jurisdiction of the Board, the state court in all public policy wrongful discharge actions may necessarily be called on to determine whether the discharged employee was engaged in concerted activity.\(^{259}\) This appears to be the same kind of inquiry that the Court in \textit{Jones} required to be made by the Board and thus also seems to indicate preemption.\(^{260}\)

\(^{259}\) This is the implication of \textit{Jones}. In fact, of course, the state court in \textit{Jones} would probably have been wholly unconcerned with whether the union's interference with Jones' contractual relations was coercive; any interference, whether coercive or not, would be sufficient. A similar approach was found acceptable in \textit{Sears}. There, the Court actually relied on the state court's lack of concern with the motive of the picketing as a justification for allowing the state to regulate its location. \textit{See} \textit{Sears}, 436 U.S. at 198. Similarly, the Court in \textit{Farmer} at first used the same logic, reasoning that the fact that the state court need not consider whether the union's conduct was discriminatory argued against a finding of preemption. \textit{See} \textit{Farmer}, 430 U.S. at 304-05.

The majority in \textit{Jones}, however, returned to the original Garmon concept that state courts cannot be allowed to disregard or themselves resolve the question that will determine whether, or the extent to which, arguably prohibited conduct is actually prohibited. Disagreement with this concept and its implicit abandonment of the opposite approach taken by the Court in \textit{Sears} formed one of the principal grounds for the dissent in \textit{Jones}. \textit{Jones}, 460 U.S. at 686-87 (Rehnquist, Powell & O'Conner, J.J., dissenting).

To avoid regulating conduct actually prohibited, the state court must always examine whatever factor made the conduct arguably prohibited in the first place so that the state remedy can be limited to conduct not prohibited by the Act. This was true in \textit{Linn}, in which the Court implicitly required the state court to determine whether the libel was malicious, and thus not protected by the Act, before a state remedy could be provided. \textit{See} \textit{Linn}, 383 U.S. at 64-65. Similarly, in \textit{Farmer} the Court required the state court to limit the plaintiff's recovery to conduct other than union discrimination, the conduct prohibited by the Act. \textit{See} \textit{Farmer}, 430 U.S. at 305-36.

All of the Justices in \textit{Jones} recognized that the state court could not simply ignore the issue that would determine whether the conduct there at issue was prohibited by the Act. The difference in the two positions was that the majority held that this fact required preemption, as the issue must be resolved by the Board, not the state courts. The dissent would have allowed the state court to resolve this issue.

In state public policy wrongful discharge litigation, the issue that causes the conduct in question to be arguably prohibited is the possibility that the employee's actions for which he was allegedly discharged may have constituted concerted activity, or that the discharge might have otherwise chilled the employees' right to engage in concerted activity, and therefore the employee's discharge might have violated section 8(a)(1). To avoid regulating actually prohibited conduct, the state courts would therefore be required to resolve the question whether the particular conduct in question interfered with concerted activity.

\(^{260}\) The implications of \textit{Jones} in this area must be qualified since the concept is sufficiently sweeping to threaten much of the Garmon progeny, something the Court may not, on reflection, be willing to do. If we accept the Garmon/Jones concept that it is the Board, not the state courts, that must resolve the question that makes the conduct arguably prohibited in the first instance, it is difficult to justify any exceptions to Garmon. The reasoning is circular and leads in all cases to a conclusion of preemption. Thus, if (1) states cannot be allowed to regulate conduct actually prohibited by the
The criteria available from the Court’s prior application of Garmon suggest that state public policy wrongful discharge actions should be preempted. There exist, however, broader policy justifications for this result that are applicable to essentially all of the various forms of wrongful discharge actions that the states have recently adopted. These are discussed below.

B. The Machinists doctrine

The Garmon doctrine deals with the preemption of conduct at least arguably protected or prohibited by the Act. The rationale supporting the doctrine, considered in the abstract, would suggest that conduct that cannot satisfy the initial Garmon inquiry, that is, conduct not even arguably protected or prohibited by the NLRA, should be available for regulation by the states. Although this was the original position of the Supreme Court in the Briggs-Stratton case, experience with the application of the Act in time compelled the Court to abandon Briggs-Stratton and extend substantially the scope of NLRA preemption.

The development of what would eventually become the Machinists doctrine began in dicta in Garner v. Teamsters Local 776. Garner involved an application of the Court’s pre-Garmon approach to the preemption of state regulation of picketing prohibited by the NLRA. However, in discussing what the Court seemed to find to be an interesting argument against preemption in which the state claim was defended as a protection of a purely private right that therefore could not interfere with the assertedly public rights protected by the NRLA, the Court concluded that, since the federal statute contained a detailed procedure for restraint of specified types of picketing, this implied that other picketing was to be free of “other

Act, (2) to avoid this prospect, a determination must therefore first be made that arguably prohibited conduct is not, in fact, actually prohibited conduct, and (3) this determination must be made by the Board, not the state courts, all roads seem to lead to the Board. The answer to this will probably be provided by future cases in which the Court recognizes that its actual position on this issue has historically been somewhere between the absolutist positions of the majority and the dissent in Jones. Some questions that cause the conduct in question to be arguably prohibited will be capable of resolution only by the Board, as in Garmon and Jones, others will be deemed safe for resolution by the state courts, as in Linn and Farmer. For our purposes, it is enough to conclude that the determination of whether a discharge interferes with or restrains concerted employee activity is sufficiently similar in terms of the areas in which the Board has developed significant expertise and sensitivity to the determination in Jones whether the union’s interference was coercive that it probably is also one that the Court should conclude must be made by the Board.

263. Id. at 487-89.
methods and sources of restraint." The Court's conclusion established in dicta the concept that later became in a more general sense the Machinists doctrine. "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."

The development of the Garner concept of preempting state regulation of conduct "permitted" by the Act was assisted by a number of the Court's decisions holding that the NLRB was not permitted, in the guise of regulating the bargaining obligations of parties, to interfere with the economic weapons Congress had intended to allow the parties to use. The most significant of these holdings, NLRB v. Insurance Agents, was quoted in Machinists.

For the Court soon recognized that a particular activity might be "protected" by federal law not only when it fell within § 7, but also when it was an activity that Congress intended to be "unrestricted by any governmental power to regulate" because it was among the permissible "economic weapons in reserve, . . . actual exercise [of which] on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized."

The Court returned to the question of the preemption of state remedies in this context in Teamsters Local 20 v. Morton. During the course of an economic strike, the union in Morton had attempted to bring secondary pressure on some of the employer's customers.

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264. Id. at 499.
265. Id. at 500. Perhaps in recognition of the potential of this concept, the Court's analysis in Garmon six years after Garner seemed to leave open for future development the concept that conduct not preempted by application of the Garmon doctrine might nevertheless still be preempted for other, unarticulated reasons. "[T]he Board may decide that an activity is neither protected nor prohibited, and thereby raise the question whether such activity may be regulated by the States," Garmon, 359 U.S. at 245.
266. See Lodge 76, International Assoc. of Machinists & Aerospace Workers v. Wisconsin Employment Relations Comm'n, 427 U.S. 132, 145 (1976). In NLRB v. Nash-Finch Co., 404 U.S. 138 (1971), an expression originated that was adopted by the Court in Machinists and that subsequently became the single most popular rationale for the Machinists doctrine. Thus, state remedies preempted under Machinists are said to be disallowed because they seek to regulate conduct that Congress left unregulated because it wished it to remain as part of "the free play of economic forces." Machinists, 427 U.S. at 140 (quoting Nash-Finch, 404 U.S. at 144).
270. Id. at 253. The object of a union's efforts in an economic strike is to make the employer's resistance to the union's demands sufficiently expensive to compel the employer to yield. The refusal to work by the striking employees is intended to make
The employer then sued for damages under both federal and state law. The lower courts found, and the Supreme Court agreed, that the union's secondary pressure with respect to one of the customers had been unlawful under the NLRA and therefore would support an action for damages under federal law. The union's secondary pressure against another customer was held to violate state, but not federal law. Damages were therefore awarded by the lower court under state law. The Supreme Court reversed on this issue.

This weapon of self-help, permitted by federal law, formed an integral part of the petitioner's effort to achieve its bargaining goals during negotiations. Allowing its use is a part of the balance struck by Congress between the conflicting interests of the union, the employees, the employer and the community. If the Ohio law of secondary boycott can be applied to proscribe the same type of conduct which Congress focused upon but did not proscribe when it enacted [section 8(b)(4)(B)], the inevitable result would be to frustrate the congressional determination to leave this weapon of self-help available, and to upset the balance of power between labor and management expressed in our national labor policy.

We speak today of the Machinists, rather than the Morton, doctrine because the Court in Morton did not purport to establish a rule of general applicability and failed to expressly overturn Briggs-Stratton. As Morton involved secondary boycotts, an area extensively considered and regulated by Congress, it arguably could be limited to its facts. Encouraged by Morton, however, many commentators soon began to advocate the adoption of a rule preempting generally state regulation of conduct that Congress did not specifically protect in the NLRA but nevertheless intended to remain available for the parties' use. The Court's response, in 1976, was the Machinists doctrine.

impossible, or at least more difficult or expensive, the continued production of the employer's goods or services and thereby reduce or eliminate its profit. The union's primary picketing of the employer is intended to encourage all of the employees to support the strike by also refusing to work. In addition, the union's hope is that many of the persons having business with the employer, such as truck drivers delivering raw materials or picking up the finished product, will refuse to cross the picket line and further interfere with production and sales. Secondary pressure by the union involves appeals directed to the employer's suppliers or customers in an effort to cause these secondary employers to cease doing business with the primary employer. For a fuller explanation of the concept of secondary activity and the attempts to regulate it, see C. Morris, supra note 64, at 1129-91.

271. 377 U.S. at 253-54.
272. Id. at 255-56. With respect to this customer, it was determined that the union's secondary pressure consisted of appeals to the employees of the secondary employer to force their employer to cease doing business with the primary employer. Id. at 255. This is prohibited conduct under section 8(b)(4)(B), 29 U.S.C. § 158(b)(4)(B), and the LMRA specifically provides for a federal cause of action to recover damages for violations of this section. See 29 U.S.C. §187 (1982).
273. Morton, 377 U.S. at 255. With respect to this customer, it was determined that that union's secondary pressure consisted of appeals directly to the management of the secondary employer. Id.
274. Id.
275. Id. at 259-60.
276. The two most influential of these articles are quoted by the Court in Machin-
The conduct at issue in *Machinists* was the concerted refusal of employees to work overtime, a tactic used to exert pressure on the employer during contract negotiations. Following charges filed by the employer with the NLRB, the Board's Regional Director held that this tactic was not prohibited by the NLRA. The employer then filed a complaint with the state agency alleging that the tactic was an unfair labor practice under state law. The state agency agreed and granted a cease and desist order against the union's tactic, holding the employer's complaint not preempted as the conduct in question was neither arguably protected nor arguably prohibited under the NLRA.

The Court appeared to accept the state agency's conclusion that the concerted refusal to work overtime was neither arguably protected nor arguably prohibited by the Act. Expressly overruling *Briggs-Stratton*, the Court then announced that its decisions had effectively established "a second line of pre-emption analysis . . . focusing upon the crucial inquiry whether Congress intended that the conduct involved be unregulated because [it was] left 'to be controlled by the free play of economic forces.'" After summarizing much of the history of the doctrine discussed above, the Court noted that its new doctrine, though largely developed in the context of protecting self help by unions and employees, was also applicable to the "economic weapons" of employers that Congress intended to be free from regulation.

As summarized by the Court, the *Machinists* doctrine was to be equally available to all. "Whether self-help economic activities are employed by employer or union, the crucial inquiry regarding preemption is the same: whether 'the exercise of plenary state authority to curtail or entirely prohibit self-help would frustrate effec-

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*notes, 427 U.S. at 140 n.4 (quoting Cox, Labor Law Preemption Revisited, 85 HARV. L. REV. 1337, 1352 (1972); Lesnick, Preemption Reconsidered: The Apparent Reaffirmation of Garmon, 72 COLUM. L. REV. 469, 478, 480 (1972)).

278. Id. at 135.
279. Id. at 135-36. The order was subsequently enforced in the state courts. Id. at 136.
280. This is not clear in the Court's opinion. However, the Court made no attempt to dispute the state agency's finding to this effect. Also, this seems logically required by the fact that the Court used the case to establish a new doctrine for preemption of conduct neither arguably protected nor arguably prohibited by the Act, instead of applying the *Garmon* doctrine. See also id. at 157 n.1 (Stephens, J., dissenting).
281. Id. at 140.
282. Id. at 140 (quoting NLRB v. Nash-Finch Co., 404 U.S. 138, 144 (1971)).
283. Id.
284. Id. at 147 (dicta).
The first opportunity for the Court to apply the *Machinists* doctrine occurred in *New York Telephone Co. v. New York State Department of Labor*.286 The case involved a state unemployment compensation scheme that permitted striking employees to receive benefits that were in large measure indirectly financed by their employer, after an eight week waiting period.287 The struck employer in *New York Telephone* sued for declaratory and injunctive relief invalidating the state statute. The relief was granted by the District Court, which held that the payment of unemployment compensation to the strikers conflicted "with the policy of free collective bargaining established in the federal labor laws. . . ."288 On appeal this finding was accepted by the Second Circuit. However the appellate court reversed the invalidation of the state statute and based its decision on the rationale that Congress had not expressly forbidden unemployment compensation for strikers and the court's conclusion from the legislative history of the NLRA and the Social Security Act that the failure to forbid such payments was deliberate.289

Although the Court affirmed the Second Circuit's refusal to invalidate the state statute, it is unclear just what significance the Court's opinion has. In an opinion joined, *inter alia*, by Justices Rehnquist and Stewart, Justice Stevens' dissent in *Machinists* was based, in part, on his contention that in the absence of a showing that Congress had intended to leave the partial strike activity at issue in *Machinists* unregulated, the Court should adhere to *Briggs-Stratton*.290 Unsuccessful in *Machinists*, Justice Stevens, again joined, *inter alia*, by Justice Rehnquist, wrote the three member plurality opinion for the Court in *New York Telephone* that accomplished to at least some extent what he had failed to accomplish in *Machinists*. Thus, the *New York Telephone* plurality opinion, while agreeing that the state had altered the economic balance between labor and management,291 sustained the Second Circuit's refusal to invalidate the state's payment of unemployment compensation to strikers. The opinion was based initially on the rationale that, as a law of general application rather than one specifically directed to concerted activity, the Court would review the state law with the same "deference" it employs under the *Garmon* "deeply rooted in local feeling" exception and sus-

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287. *Id.* at 523-24.
288. *Id.* at 525-26 (quoting from the district court opinion, 434 F. Supp. 810, 819 (S.D.N.Y. 1977)).
tain the law "in the absence of compelling congressional direction" of an intent to preempt.\textsuperscript{292} The plurality then continued to find such an absence of a "compelling congressional direction" to preempt the state statute. Indeed, the plurality found what it considered to be an intent discernable in the legislative history of both the NLRA and the Social Security Act\textsuperscript{293} not to preempt such statutes.\textsuperscript{294}

The concurring opinion of Justice Brennan, agreeing on this point with the dissent, questioned whether the state statute properly could be considered one of general applicability. However, Justice Brennan concurred on the basis that the congressional history relied on by the plurality established a congressional intent not to preempt the statute.\textsuperscript{295} The concurring opinion by Justice Blackmun, joined by Justice Marshall, concurred in the judgment for the same reason as Justice Brennan, but went further in its disagreement with the plurality's approach. In the view of these Justices, \textit{Machinists} would not permit a state statute that admittedly altered the economic balance between labor and management to escape preemption simply because no "compelling congressional direction" existed to preempt the statute. In their view, \textit{Machinists} established that "there is preemption unless there is evidence of congressional intent to tolerate the state practice."\textsuperscript{296}

In dissent, Justice Powell, joined by Chief Justice Burger and Justice Stewart, contended that the state statute was not one of general applicability and that, even if it were, this should have nothing to do with whether it was preempted.\textsuperscript{297} In common with the position of Justices Blackmun and Marshall, the dissent interpreted \textit{Machinists} to require evidence of congressional intent to tolerate a balance disrupting state law if it is to escape preemption, an intent the dissent could not find under the facts of \textit{New York Telephone}.\textsuperscript{298}

The Court in \textit{New York Telephone} was in agreement that an exception to \textit{Machinists} preemption exists; states will be allowed to disrupt the union-management balance of power where Congress has indicated that they may do so. The effort by the three member plurality

\begin{itemize}
  \item[292.] \textit{Id.} at 533-40.
  \item[294.] \textit{New York Telephone}, 440 U.S. at 536-46.
  \item[295.] \textit{Id.} at 546-47 (Brennan, J., concurring).
  \item[296.] \textit{Id.} at 549 (Blackmun & Marshall, J.J., concurring) (emphasis Justice Blackmun's).
  \item[297.] \textit{Id.} at 557-58 (Powell & Stewart, J.J., Burger, C.J., dissenting).
  \item[298.] \textit{Id.} at 560-67.
\end{itemize}
to expand the scope of the exception in the case of state laws of general applicability was rejected, however, by five of the Justices and unaddressed by the remaining one.

The Court's next opportunity to apply the *Machinists* doctrine came in *Belknap*. In addition to its effort to preempt the misrepresentation and breach of contract claims of the discharged "permanent" replacements under *Garmon*, the employer in *Belknap* also argued that the state claims should be preempted under *Machinists* since allowing the state remedies assertedly burdened its right to hire permanent replacements during an economic strike.\(^{300}\)

The Court concluded that the *Machinists* doctrine was inapplicable to the *Belknap* facts. It could not believe that Congress had intended to provide immunity from state remedies so that employers could utilize fraudulent misrepresentations and willful contract breaches against innocent third parties as economic weapons.\(^{301}\)

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299. See supra notes 161-84 and accompanying text.

300. *Belknap*, 463 U.S. at 499. The argument was far from frivolous. The possibility of being permanently replaced is a substantial disincentive to beginning a strike in the first place. If perceived as likely to be successful, the employer's announcement of an intent to begin hiring permanent replacements is also a powerful inducement both to the union to accept the employer's terms and end the strike and to individual employees to abandon the strike and return to work. Finally, the availability to an employer of the right to lay off "permanent" replacements to allow strikers to return to work is very powerful leverage that can be used to induce the union to end a strike or, as in *Belknap*, resolve unfair labor practice charges. The effect of not preempting the state claims of the replacements in *Belknap* is to make the employer choose between either not offering applicants unconditional status as permanent replacements, which may make it very difficult to induce them to leave other jobs and accept employment; or else not having the leverage provided by being able to agree to lay off the replacements to allow the strikers to return, which in many cases will make it much more difficult to end the strike on the employer's terms.

The unique feature of *Belknap*, however, is that, in this instance, burdening the employer's weapon also burdened the union's. Given that employers would continue to be allowed to hire permanent replacements during a strike, employees, and thus their union, have a powerful interest in there being no legal consequence associated with the employer's subsequent agreement to lay off the replacements so that the strikers can return to work. If it is known that persons hired as "permanent replacements" are indeed permanent in the sense that they have legal recourse if laid off to allow strikers to return, the employer's task of inducing such persons to accept employment becomes easier and the intended effect of the union's strike in disrupting the employer's business is, to that extent, lessened. Perhaps more importantly, *Belknap* makes available to employers a powerful inducement to employees to abandon the strike: the knowledge by strikers that permanent replacements cannot subsequently be laid off without perhaps ruinous liability for the employer. This makes very real the employer's announcement of an intent to hire permanent replacements and threatens what is, in the end, the union's major economic weapon—the solidarity of its membership.

301. See id. at 500, where the court stated:

It is one thing to hold that the federal law intended to leave the employer and the union free to use their economic weapons against one another, but it is quite another to hold that either the employer or the union is also free to injure innocent third parties without regard to the normal rules of law governing those relationships. We cannot agree with the dissent that Congress intended such a lawless regime.
theme under Garmon thus unnecessarily became a component of analysis under Machinists.

302. See supra notes 242-46 and accompanying text.

303. The Court's concern for the rights of the strike replacements as individuals is to an extent antithetical to the concept of collective bargaining that is at the core of the NLRA. As argued by the Board as amicus in Belknap, the replacements, upon accepting jobs with Belknap, became members of the bargaining unit, a unit that the Act gives the union the exclusive right to represent. Belknap, 463 U.S. at 507. See also Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50, 63-64 (1975). There is no apparent reason consistent with the federal scheme why the union, as the bargaining agent for all bargaining unit employees including both strikers and replacements, should not have the right to negotiate a strike settlement agreement that is effective to waive any individual contractual rights enforceable under state law possessed by the replacement employees in the same manner that it may waive the individual statutory right to strike possessed by the striking employees. See, e.g., NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180 (1967) (recognizing that only the union has the right to negotiate terms and conditions of employment and that, in doing so, the union is authorized to waive even individual statutory rights under the NLRA); Bowen v. United States Postal Serv., 459 U.S. 212, 225-26 (1983) (recognizing that employers are entitled to rely on union's waiver of individual employee rights). If the union unfairly represents the interests of the replacements in negotiating the strike settlement agreement, they would have a right to proceed against the union alleging a breach of the duty of fair representation. See International Brotherhood of Teamsters, Chauffers v. NLRB, 587 F.2d 1176, 1184-85 (D.C. Cir. 1978); Swatts v. United Steel Workers, 585 F. Supp. 326 (S.D. Ind. 1984). See generally Vaca v. Sipes, 386 U.S. 171 (1967). As recognized in Vaca, and reaffirmed subsequently, this remedy is provided to employees for the express purpose of constituting a substitute for persons "stripped of traditional forms of redress" by the federal labor law. See IBEW v. Foust, 442 U.S. 42, 47 (1979) (quoting Vaca, 386 U.S. at 182).

The Court in Belknap dismissed the Board's argument along these lines in a single paragraph by noting that it had been rejected in J.I. Case Co. v. NLRB, 321 U.S. 332 (1944). See Belknap, 463 U.S. at 507. The Court had held in Case that an employer could not interpose the existence of preexisting individual contracts as a defense to its obligation to bargain with the union and directed that the employer cease giving effect to such contracts "without prejudice to the assertion of any legal rights the employee may have acquired under such contract ... ." 321 U.S. at 342. Beyond the doubtful continuing validity of this early case in light of the subsequent recognition by the Court that the union possesses—indeed, must possess—the right to waive individual rights in its role as the exclusive bargaining agent for all employees within the unit, the Belknap Court overlooked a critical distinction between the facts in Case and those of Belknap. The individual contracts at issue in Case were entered into before the union became the certified bargaining agent and thus, at one point at least, were clearly valid and enforceable agreements. Id. at 333. In Belknap, the individual contracts with the replacements were entered into after the union had become the bargaining agent. As the union at that point had the exclusive right to negotiate contract terms for all unit employees, which necessarily included the replacements, it is doubtful at best that Belknap and the replacements possessed any power under federal law to enter into a binding agreement, at least in the absence of Belknap's having bargained to impasse with the union over the terms of such agreements. See generally C. MORRIS, supra note 64, at 634-39. If, as a result of federal law, the individual contracts in Belknap were void or unenforceable ab initio, it follows that they could not be made enforceable by state law.
The Belknap Court also considered an argument under *Machinists* that the state claims should be preempted because allowing such claims would make the settlement of strikes and unfair labor practice charges much more difficult and therefore would frustrate the federal policy favoring the settlement of labor disputes. This argument, which would implicitly expand the *Machinists* doctrine, was rejected by the Court through, in part, the expedient of changing the then-existing law to largely eliminate the impact of allowing the state claims on the settlement process.

In its most recent application of the *Machinists* doctrine, *Golden State Transit Corp. v. City of Los Angeles*, the Court returned somewhat ambiguously to the question that divided the Court in *New York Telephone*: is a balance disrupting state action preempted unless congressional intent can be discovered to permit the state’s action or must the proponent of preemption carry the burden of establishing congressional intent to preempt? The issue is critically important to the framework of analysis under *Machinists* and had been left largely unresolved by the various opinions in *New York Telephone*.

The employer in *Golden State*, a taxicab company, operated under

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305. Prior to *Belknap*, employers had a dual motive for hiring replacements on a permanent basis. This was seen as both necessary to induce potential employees to leave other jobs and accept employment and, perhaps more importantly, essential to achieve the intended effect in breaking the strike, since, as a matter of law, employees not hired as permanent replacements would have to be laid off at the conclusion of the strike to allow the strikers to return. *Id.* at 501. The strikers’ knowledge of this fact would largely eliminate the intended impact on their willingness to continue the strike if the employer hired replacements on any basis other than as permanent employees. Having been essentially compelled to hire the replacements as unconditionally permanent employees to achieve the intended effect, the prospect of the employer’s having to respond in damages in the event it were to execute a strike settlement that provides for the replacements being laid off was seen as greatly discouraging the willingness of employers to agree to such settlements.

The Court’s answer to this problem was to hold that replacement employees are sufficiently “permanent” to permit them to be retained at the conclusion of the strike if they are given “permanent employment, subject only to settlement with . . . [the] union and to a Board unfair labor practice order directing reinstatement of the strikers. . . .” *Id.* at 503. In the Court’s view, this eliminated the problem of federal law as a shield for misrepresentation, preserved the employer’s leverage, and would not inhibit settlements where the employer had made such a conditional offer of permanent employment to the strikers. *Id.* at 503-06.


307. Congress has never indicated its intent with respect to the preemption of state law under the NLRA. *See supra* note 65. Because of this, a balance disrupting state action would normally be preempted if congressional intent to permit the state action must be shown to avoid preemption. Conversely, if the proponent of preemption under *Machinists* must establish both that the effect of a particular state action is to disrupt the labor-management balance of power and that Congress intended to preclude this type of disruption, preemption will normally be very difficult to establish.

308. *See supra* notes 285-93 and accompanying text.
a franchise from the city that came up for renewal during the course of an economic strike by the union.\textsuperscript{309} At the urging of the union, the city's Board of Transportation denied the renewal of the franchise because of the pending labor dispute.\textsuperscript{310} In fact, the District Court found that the council conditioned the renewal on the labor dispute being settled.\textsuperscript{311} When no such settlement was reached, the franchise expired by its terms. Golden State then sued for damages, declaratory relief and injunctive relief to restore the franchise.\textsuperscript{312} After twice refusing to hear the case at earlier stages,\textsuperscript{313} the Court ultimately granted certiorari to review the summary judgment granted the city denying the relief sought by Golden State.\textsuperscript{314}

Writing for the Court's eight member majority, Justice Blackmun held the city's action in conditioning the franchise renewal on the settlement of the labor dispute was preempted under \textit{Machinists}. The focus of the opinion, however, is largely directed to supporting the conclusion that the intent of Congress, as evidenced by the language of the NLRA and its legislative history, was to leave the parties of a labor dispute free to utilize such economic leverage as they might possess. In this case, the Court held that the city's action substantially interfered with Golden State's ability to use such leverage.\textsuperscript{315} The Court's opinion, consistent with Justice Blackmun's position in \textit{New York Telephone},\textsuperscript{316} suggests that a balance disrupting state action will be preempted unless it can be shown that Congress intended to tolerate such disruption.\textsuperscript{317}
Golden State is the Court’s most recent consideration of the application of the Machinists doctrine. In contrast to the wide fluctuations over time associated with Garmon, the Machinists doctrine is relatively unchanged. In the absence of congressional intent to permit state interference in a given area, the application of state law to restrict or penalize the use of economic weapons the federal scheme contemplates that employers and unions may employ will be preempted. In the context of state wrongful discharge remedies, there is a substantial impact on the economic weapons of both employers and unions that may well require preemption under Machinists. Part of this is obvious, much of it is much less so.

Under Machinists, there is one obvious area of preemption of state efforts to provide a remedy for discharged employees. There are a number of different contexts under the NLRA in which the employer is permitted to discharge employees as a legitimate economic weapon in resisting the weapons employed by the union. For example, employers may discharge employees who:

1. engage in a sitdown strike;
2. disparage the product of their employer to the public;
3. engage in violence;
4. divulge confidential information damaging to the employer;
5. engage in a partial or intermittent strike;
6. engage in a slowdown;
7. strike in violation of a no-strike clause in a collective bargaining agreement;

has pointed to no evidence of such congressional intent with respect to the conduct at issue in this case. Id. at 1400 (citations and footnote omitted).

These two extracts from the Court’s opinion in Golden State would constitute, of themselves, weak support for the proposition that the Court has now accepted that a balance disrupting state action will be preempted unless an affirmative congressional intent not to preempt can be discovered. However, the lone dissenter in Golden State, Justice Rehnquist, seems to have recognized this implication of the Court’s analysis. He was apparently unable to join the Court’s opinion primarily because of his view that the preemption of state action cannot properly be based on the absence of an expressed congressional intent to tolerate the state’s involvement. See id. at 1401-04 (Rehnquist, J., dissenting).

318. Metropolitan Life Ins. Co. v. Massachusetts, 105 S. Ct. 2380 (1985), is a preemption case ostensibly based on the Machinists doctrine. Id. at 2394-95. In fact, the Metropolitan Life decision has nothing to do with the Machinists doctrine and is instead properly analyzed as a part of a third preemption doctrine discussed hereafter.
322. NLRB v. Knuth Bros., 537 F.2d 950 (7th Cir. 1976).

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(8) strike for a purpose prohibited by the Act.\textsuperscript{326}

With respect to these and the many other unprotected activities under the Act, Machinists will clearly preempt any state efforts to frustrate or penalize the employer’s right to discharge the employee. The impact of Machinists on state wrongful discharge remedies has much greater potential than simply this, however, as such remedies have a serious potential impact on one of the more effective weapons of labor.

To fully understand the impact of the availability under state law of a wrongful discharge remedy on unions, it is initially necessary to understand the job protection commonly available to the unionized employee. Virtually all collective bargaining agreements contain some kind of restriction on the employer’s power to discharge. The great majority require “just cause” to support a discharge.\textsuperscript{327} Virtually all of these agreements are enforced by a grievance-arbitration system.\textsuperscript{328} The concept of “just cause” is a term of art in this context and is commonly interpreted in each case finally appealed to arbitration, to require that the employer carry the burden of proof to establish both that the employee in fact committed the offense for which he assertedly was discharged\textsuperscript{329} and, in the opinion of most arbitrators, that the penalty of discharge is appropriate for such an offense.\textsuperscript{330} Moreover, discharges are also commonly overturned in arbitration for such reasons as:

(1) a failure of the employer to utilize “corrective” discipline rather than summary discharge;\textsuperscript{331}

(2) an absence of “due process” in effecting the employee’s discharge as evidenced by the failure of the employer to give the employee the opportunity to tell his side of the story before the discharge or a failure by the employer in other respects to make a reasonable investigation before the discharge;\textsuperscript{332}

(3) a failure to take the employee’s past record or length of service into account in discharging the employee rather than im-

\textsuperscript{326} See generally C. Morris, supra note 64, at 1021.

\textsuperscript{327} See 2 Collective Bargaining, Negotiations and Contracts (BNA) 40:1 (1979) (96% of collective bargaining agreements contain a job security provision; 80% allow discharge only for just cause).

\textsuperscript{328} Id. at 51:1 (99% of collective bargaining agreements contain grievance-arbitration provisions).


\textsuperscript{330} Id. at 664-66.

\textsuperscript{331} Id. at 630-32.

\textsuperscript{332} Id. at 632-34.
posing some lesser punishment;\textsuperscript{333}
(4) a failure to show that the employee had been placed on notice
that he could be discharged for the conduct in question;\textsuperscript{334} and
(5) a failure of the employer to have also discharged other em-
ployees for similar offenses.\textsuperscript{335}
As one of the best known authorities in this area has noted,
"[e]mployees in the United States who are protected by arbitration
under collective agreements probably have more complete and sensi-
tive security against unjust discipline, more effective procedures, and
more effective remedies than employees in any other country in the
world."\textsuperscript{336}
This is very substantial protection against unfair discharge. It is
available, however, only to unionized employees, who constitute less
than one third of the non agricultural work force.\textsuperscript{337} For nonunion-
ized employees, it has been estimated that 6000-7500 employees are
discharged each year under circumstances that an arbitrator would
find to be without "just cause."\textsuperscript{338}
These figures strongly suggest that until recently, one very power-
ful inducement available to unions seeking to organize employees
was the opportunity available almost exclusively by means of a union
to obtain meaningful job security. Much of the available research
suggests that this was one of the primary reasons for the growth of
unions in this country.\textsuperscript{339} Many employers, in recognition of the im-
 pact of job security in the union's organizing arsenal, have unilater-
ally adopted grievance procedures that include binding, impartial
arbitration for the express purpose of preempting any potential
union organizing effort.\textsuperscript{340}
\textsuperscript{333} Id. at 638-41.
\textsuperscript{334} Id. at 641-43.
\textsuperscript{335} Id. at 643-46.
\textsuperscript{336} Summers, Protecting All Employees Against Unjust Dismissal, 58 HARV. BUS.
\textsuperscript{337} See U.S. Bureau of Labor Statistics, Directory of National Unions and Em-
ployee Associations 1979 at 59, 74.
\textsuperscript{338} Peck, supra note 7, at 9-10. See also Note, Protecting Employees at Will
Against Wrongful Discharge: The Public Policy Exception, 96 HARV. L. REV. 1931, 1934
\textsuperscript{339} (1983)(estimating 150,000-200,000 discharges without just cause).
\textsuperscript{339} Id. at 1435, 1448 (1975) (citing W. BAER, DISCIPLINE AND
\textsuperscript{340} DISCHARGE UNDER THE LABOR AGREEMENT 1 (1972)); Bloomrosen, Settlement of Disputes Concerning the
\textsuperscript{340} Exercise of Employer Disciplinary Power: United States Report, 18 RUTGERS L. REV.
\textsuperscript{340} 428, 434 (1964); see also Catler, supra note 2, at 494. But see J. GETMAN, S. GOLDBERG
\textsuperscript{340} & J. HERMAN, Union Representation Elections: Law and Reality at 87-88 (1976)(con-
tending that employees during organizing campaigns normally discount the possibility
of job loss in deciding on the merits of unionization).
\textsuperscript{340} See Schauer, Discussion, 32 Proc. of the Ann. Meeting of the Indus. Rel. Re-
search Ass'n 183-84 (1979) quoted in Catler, supra note 2, at 494 n. 147.
What, then, is the impact of state efforts to provide remedies for wrongful discharge on this "weapon" of unions? As Catler puts it, 

[p]eople who would like to weaken labor unions should also be expected to be among the supporters of these proposals. . . . If an employer-established plan helps maintain nonunion status by effecting employee perception of the marginal advantage of a union contract, so too would a statutory scheme or judicially mandated just cause standard.341

But the articulated purpose of the NLRA is not to frustrate, or impede, union organizing efforts but to encourage them.342 If, as seems clear from the language of the statute and its consistent interpretation, Congress had a number of objectives it wished to secure by means of encouraging employee organization, any state remedy that has the effect of depriving unions of one of their most valuable tools in accomplishing this aim is at once suspect under Machinists.

However, the threat posed by state wrongful discharge remedies in discouraging employee organization is not simply that they remove an incentive to organization. The preemption doctrine threatens to make such remedies actual disincentives to organization. As discussed in the following section of this article, most courts have correctly held that, with one limited exception unionized employees protected by the just cause provision of a collective bargaining agreement cannot maintain an action for wrongful discharge under a state remedy.343 This means that by voting for the union an employee will in most cases be voting to surrender his access to the state law wrongful discharge remedy. Although an excellent argument can be, and has been, made that the job security offered by the just cause provision in a collective agreement is in many respects superior to that available under state common law remedies,344 the problem here is one of perception. The relative advantages of protection under a just cause provision over that available under a state court remedy

If then an unorganized employer voluntarily offers an appeal procedure culminating in binding arbitration and otherwise provides its employees with competitive wages, benefits, and working conditions, what incentive will employees have to organize?

Installation of appeal procedures for at least discharge cases will in the next five to ten years be a critically important factor in maintaining non-union status.

341. Catler, supra note 2, at 494. Catler's research suggests that employers having adopted such procedures have been very successful in resisting union organizing attempts. See id. at 507-08.


343. See infra note 387 and accompanying text. The only exception to this appears to be in the area of state public policy wrongful discharge actions. See infra notes 392-97 and accompanying text.

344. See, e.g., Catler, supra note 2, at 496-509.
are real but probably not easily grasped by the average worker. On the other hand, the advantages of being able to recover punitive damages in a state court are obvious, if misleading.

The point under Machinists is not that preemption is required because arbitration is preferable to state court suits to protect employees against unjust dismissals. Machinists deals with the federal labor scheme in which management and labor are each allowed the use of economic weapons that state law cannot be used to frustrate in the absence of a congressional intent to permit such interference. Congress has at no point indicated a willingness to permit states to usurp the function of unions in providing job security to employees. As state wrongful discharge remedies threaten to seriously interfere with the basic purpose of the Act itself to encourage employee organization, they are at risk under the Machinists doctrine.

C. The Oliver doctrine

Both the Court and the commentators have tended to discuss NLRA preemption of state law in terms exclusively confined to the Garmon and Machinists doctrines. There exists, however, a third, analytically distinct, NLRA preemption doctrine of relevance to our inquiry in unionized settings with a pedigree equally as impressive as Garmon and Machinists.

345. Congress recently rejected an effort to amend the NLRA to provide all employees with protection against discharge without just cause. See The Industrial Democracy Act, H.R. 7010, 96th Cong., 2d Sess. (1980). With the historic and consistently affirmed preference in labor law for uniform federal regulation, it would be difficult to contend that Congress wished to permit the states to do piecemeal what it declined to do itself.

346. One type of wrongful discharge action should be relatively safe from Machinists preemption, however. As previously discussed, it is analytically inconsistent for courts to refuse to give contractual effect to job security promises contained in employee handbooks or personnel policies, if these are deliberately made known to employees. See supra note 58. Indeed, Machinists may actually require that all states give contractual effect to such promises to the same extent the state law gives effect to other unilateral employer promises. An assurance of job security may very well be a deliberately selected economic weapon used by an employer to help preclude successful union organizing attempts. See supra note 323 and accompanying text. A state's refusal to give contractual effect generally to such provisions deprives the employer of at least some of the anticipated value of the weapon.

In all events, since it is the employer in this context that provides the job security by means of ordinary contract offer and acceptance, rather than the state by means of a common law remedy available to all employees, neither employers nor unions could properly complain under Machinists that the state was attempting to forbid or penalize the use of an economic weapon by giving contractual effect to handbook or personnel policy job security provisions. Thus, the rationale behind Machinists cannot be used to preempt such remedies.

347. See, e.g., Golden State Transit Corp., 106 S. Ct. at 1398; Metropolitan Life, 105 S. Ct. at 2394-95; Belknap, 463 U.S. at 498 ("Our cases have announced two doctrines [Garmon and Machinists] for determining whether state regulations or causes of action are preempted by the NLRA."); State Actions, supra note 15, at 951.
In Teamsters Local 24 v. Oliver,\(^\text{348}\) the collective bargaining agreement had established rental rates to be paid when the employer leased trucks owned and operated by the employee.\(^\text{349}\) The Ohio courts had determined that the establishment of such uniform rental rates violated the state antitrust law and enjoined its enforcement.\(^\text{350}\) The Court in Oliver held, that the rental rates established in the collective bargaining agreement were the equivalent of wages under the circumstances.\(^\text{351}\) As wages are a mandatory subject of collective bargaining under the NLRA,\(^\text{352}\) the Court then held that Ohio could not be allowed to frustrate the parties’ agreement by the application of state law to prohibit the wages reached in collective bargaining.

Federal law here created the duty upon the parties to bargain collectively; Congress has provided for a system of federal law applicable to the agreement the parties made in response to that duty . . . ; and federal law set some outside limits (not contended to be exceeded here) on what their agreement may provide . . . . We believe that there is no room in this scheme for the application here of this state policy limiting the solutions that the parties’ agreement can provide to the problems of wages and working conditions . . . . Since the federal law operates here, in an area where its authority is paramount, to leave the parties free, the inconsistent application of state law is necessarily outside the power of the State.\(^\text{353}\)

However, the Court’s analysis in Oliver suggested directly or implicitly three exceptions to its rule of preemption. First, collective bargaining terms dealing with permissive, rather than mandatory, subjects of bargaining may not be equally immune from conflicting state law.\(^\text{354}\) Second, in common with the Machinists doctrine, Oliver preemption will not be required in areas where Congress has indicated that the states may interpose their own law.\(^\text{355}\) Finally, the Court suggested that a different result might be required where the state law was one involving health or safety regulation.\(^\text{356}\) The Court expressly rejected, however, one frequently encountered argument under Garmon and Machinists; the fact that the state law in question is one of general applicability rather than a measure specifically directed to labor relations will not save the state law from preemption.\(^\text{357}\)

\(^{348}\) 358 U.S. 283 (1959).
\(^{349}\) Id. at 284-85.
\(^{350}\) Id. at 285.
\(^{351}\) Id. at 293-94.
\(^{352}\) See id. at 294-95.
\(^{353}\) Id. at 296 (citations omitted).
\(^{354}\) See id. at 294-95.
\(^{355}\) See id. at 296-97 n.10.
\(^{356}\) See id. at 297.
\(^{357}\) See id.
On its face, the holding in *Oliver* would seem to have little potential impact on state wrongful discharge remedies. States providing such remedies do not enjoin or penalize the operation of collectively bargained "just cause" and grievance-arbitration provisions, but instead provide their own, independent remedy to employees generally, a remedy that, in the case of a unionized employee, supplements rather than replaces the collective bargaining agreement. The similarity to *Garmon* in the Court's analysis cannot be escaped, however. As previously discussed the Court does not possess under the supremacy clause any general supervisory power over state courts. If state law is preempted by operation of the supremacy clause, it must therefore be because it conflicts with federal law, not a collective bargaining agreement. This is essentially the analysis implicitly utilized by the Court in *Oliver*. "Of course, the paramount force of the federal law remains even though it is expressed in the details of a contract federal law empowers the parties to make, rather than in terms in an enactment of Congress." 

Supported in this manner, *Oliver* begins to look very much like a more restricted version of the "arguably protected" branch of *Garmon*. Since the wage rates in *Oliver* were the result of federally required mandatory bargaining, they were required, or "protected" under the collective agreement and, hence, indirectly under federal law. When the "arguably protected" branch of *Garmon* is seen in this light as having been extended in *Oliver* to a state's effort to prohibit or penalize conduct "protected" by a collective bargaining agreement, the extention of this concept to the "arguably prohibited" branch of *Garmon* is indicated logically and it is in this respect that *Oliver* threatened from the outset to preempt in the context of unionized employees the state wrongful discharge remedies even then being formulated.

The *Oliver* doctrine lay essentially dormant for almost 20 years after *Oliver* was decided. In *Malone v. White Motor Corp.*, however, the Court again returned to the asserted preemption of state law by the terms of a collective bargaining agreement.

*Malone* involved the attempted application of minimum standards for vesting in a collectively bargained pension plan by the state of Minnesota. Under the plan at issue, the employer had the right to terminate the plan provided that it guaranteed payment of a pre-
scribed lower level of benefits to persons entitled to benefits under the plan.\textsuperscript{362} Under the Minnesota statute, however, the employer was required upon termination to guarantee full benefits to persons with ten or more years of service.\textsuperscript{363} The effect of the application of the state law was to require the employer to pay over $19 million more in benefits than it would have been required to pay under the terms of the collectively bargained plan.\textsuperscript{364}

The central feature of \textit{Malone} for present purposes is the unanimous reaffirmation by the Court of \textit{Oliver}\.\textsuperscript{365} The majority concluded, however, that the \textit{Oliver} exception permitting state interference with the terms of collective agreements when Congress has indicated an intent to allow such interference was satisfied under the facts of \textit{Malone}. This conclusion was based on an extended analysis of the language and legislative history of the federal Welfare and Pension Plans Disclosure Act.\textsuperscript{366} The Court concluded that the language and history of this Act "clearly indicate that Congress at that time recognized and preserved state authority to regulate pension plans, including those plans which were the product of collective bargaining."\textsuperscript{367} On this basis, the Minnesota statute was not preempted.\textsuperscript{368}

With \textit{Malone}, the other \textit{Garmon} shoe had dropped. The Minnesota statute at issue was not, as in \textit{Oliver}, an attempt by the state to prohibit what the collective bargaining agreement required, but rather an effort to establish minimum standards in the pension area. The state was essentially saying by the statute that it had no wish to prohibit any collectively bargained pension protection which parties might privately have negotiated, but that, in all events, state law would require at least the protection established by the statute. The statute was thus an effort to prohibit conduct (i.e. the employer's termination of a pension plan without protecting vested rights) that the

\begingroup\scriptsize\begin{align*}
\text{362. } & \text{Id. at 501.} \\
\text{363. } & \text{Id. at 501-02.} \\
\text{364. } & \text{Id. at 502.} \\
\text{365. } & \text{The majority, although holding the state statute was not preempted for the reasons set out in the text, noted, first, that its "conclusion is consistent with the Court's decision in [Oliver] . . .." Id. at 512. The Court also concluded that "we do not depart from \textit{Oliver} in sustaining the Minnesota statute." Id. at 514. The two dissenting opinions would both have held that the Minnesota statute was preempted based on \textit{Oliver}. See id. at 515-16 (Stewart, J., and Burger, C.J., dissenting).} \\
\text{367. } & \text{\textit{Malone}, 435 U.S. at 505.} \\
\text{368. } & \text{Id. at 512-14.} \\
\end{align*}\endgroup
parties’ agreement in *Malone* also prohibited, albeit to a lesser degree. To this extent, the application of the *Oliver* doctrine to the Minnesota statute was analogous to the “arguably prohibited” branch of *Garmon*.

The doctrinal structure of the *Oliver* doctrine was changed dramatically in 1985 by *Metropolitan Life Insurance Co. v. Massachusetts*.369 In this case, a Massachusetts statute required that certain mental health care benefits be provided to state residents insured under a general health care policy or an employee health care plan covering hospital and surgical expenses.370 As applied to insurance policies purchased pursuant to a collective bargaining agreement, it was contended that the Massachusetts statute was preempted as it effectively imposed a contract term on the parties that otherwise would be a mandatory subject of bargaining.371

*Metropolitan Life* should have been an easy case for the Court to reach the conclusion that the Massachusetts statute was not preempted. Four years earlier, in *Alessi v. Raybestos-Manhattan, Inc.*,372 the Court had held preempted a New Jersey statute that the state had sought to apply to bar offsets for workers’ compensation payments from payments due under collectively bargained pension plans. The state law was held preempted both under ERISA373 and, citing *Oliver*, under the NLRA. “Where, as here, the pension plans emerge from collective bargaining, the additional federal interest in precluding state interference with labor-management negotiations calls for preemption of state efforts to regulate pension terms.”374 But *Alessi*, like *Malone*, involved an effort by the state to *directly* supplement the benefits and protections provided by a collective bargaining agreement. By contrast, the Massachusetts statute at issue in *Metropolitan Life* made no effort to control the terms of collective agreements but instead regulated a service, insurance, generally available on the market within the state. It could no more be preempted than could state gambling laws in the context of a collective agreement that sought to guarantee slot machines in the cafeteria. The mere frustration felt by parties precluded by state law from having available within the state a service they would like to provide in the collective agreement is patently not grounds for preemption under *Oliver* or any other doctrine. The Massachusetts statute could have been preserved from preemption on this ground alone.

Similarly, the Court could have routinely refused to preempt the

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370. *Id.* at 2383.
371. *Id.* at 2393-94.
373. *Id.* at 525.
374. *Id.* at 525.
Massachusetts statute on either of two of the express Oliver exceptions. The state statute was clearly an effort by Massachusetts to protect the health of its citizens, and Oliver itself would have provided ample support for upholding the statute. Moreover, since the statute was a direct regulation of insurance, an area that Congress specifically saved from preemption even with respect to the express and sweeping preemption doctrine under ERISA, Oliver again would have provided ample support for upholding the statute.

The Court, however, elected to reach the same result by an entirely different road. Rather than recognize the analytical similarity of the Oliver doctrine to Garmon, the Court elected instead to analyze the Metropolitan Life facts under the Machinists framework. Although the court of appeals in Malone had made a similar attempt to compare Oliver to Machinists in a part of its analysis and had been largely ignored by the Court, in Metropolitan Life the Court simply noted, incorrectly, that its decisions had "articulated two distinct NLRA preemption principles," Garmon and Machinists. Because there was no contention that Garmon was applicable, the Court seemingly assumed that Machinists must be by a process of elimination. Of course, after having determined that Metropolitan Life should be governed by Machinists, the Court had to abandon any effort to apply the wholly inapplicable principles of Machinists to the facts of Metropolitan Life. A doctrine based entirely on the need to preserve economic weapons that labor and management are allowed to employ by Congress, is not easily applicable as an explanation of why a state's efforts to establish "minimum terms of employment" are or are not preempted.

Instead, the Court concluded that Congress had not considered

375. See Oliver, 358 U.S. at 297, discussed supra notes 330-40 and accompanying text.
377. Metropolitan Life, 105 S. Ct. at 2395.
378. If, under Machinists, "states cannot control the economic weapons of the parties at the bargaining table, a fortiori, they may not directly control the substantive terms of the contract which results from that bargaining," Malone, 435 U.S. at 503 (quoting White Motor Corp. v. Malone, 545 F.2d 599, 606 (1976)).
379. Metropolitan Life, 105 S. Ct. at 2394-95. In fairness to the Court, however, the parties also seemed to have uniformly urged the Court to apply Machinists. See id. at 2395.
380. Id. at 2397.
381. The argument was that Machinists was intended to protect the bargaining process on the principle that the NLRA was merely a means to allow the parties to reach agreement fairly. Id. at 2396. Thus, it was contended that "[a] law that interferes with the end result of bargaining is, therefore, even worse than a law that interferes with
“whether state laws of general application affecting terms of collective-bargaining agreements subject to mandatory bargaining were to be preempts.”382 The Court was able to conclude, however, that the “evil Congress was addressing,” the inequality of bargaining power, “was entirely unrelated to local or federal regulations establishing minimum terms of employment.”383 In this regard, the Court did not consider that state minimum standards should be treated differently from minimum federal standards, which had historically been held not preempted by the existence of collective bargaining terms on the same subject.384 Moreover, the Court deemed significant the fact that minimum state labor standards are, in a sense, laws of general applicability, they “affect union and nonunion employees equally”385 and thus are standards “independent of the collective-bargaining process [that] devolve on [employees] as individual workers, not as members of a collective organization.”386 Finally, and “[m]ost significantly,” since the Court could discern no intent by Congress to disturb state laws establishing minimum labor standards, such laws were seen as conflicting with none of the NLRA goals, but rather complementing what was perceived to be the congressional development of “the framework for self-organization and collective bargaining . . . within the larger body of state law promoting public health and safety.”387

It is difficult to know what to make of Metropolitan Life. Both the holding in Oliver, expressly reaffirmed in Malone, and the alternative basis of the holding in Alessi, are dismissed in Metropolitan Life as dicta.388 Similarly, the Court’s language is sufficiently broad to support an argument that nothing is left of Oliver in any event.

When a state law establishes a minimal employment standard not inconsistent with the general legislative goals of the NLRA, it conflicts with none of the purposes of the Act.

... Though [the Massachusetts statute], like many laws affecting terms of employment, potentially limits an employee’s right to choose one thing by requiring that he be provided with something else, it does not limit the rights of self-organization or collective bargaining protected by the NLRA, and is not preempted by that Act.389

However, precisely because of the breadth of the Court’s language, it

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382. Id. at 2396.
383. Id. at 2397.
384. Id.
385. Id.
386. Id. (quoting Barrentine v. Arkansas Best Freight Sys., Inc., 450 U.S. 728, 745 (1981)).
387. Metropolitan Life, 105 S. Ct. at 2398.
388. Id. at 2396.
389. Id. at 2398-99.
is impossible to know whether the Court's view is actually as sweeping as its language would suggest.

Assuming that Metropolitan Life overruled the Oliver doctrine at least insofar as the rationale of its holding would suggest, it is still another question whether that rationale is applicable to state wrongful discharge remedies. Certainly such remedies are not laws of general applicability in the sense that they apply solely to govern the employment relationship rather than, as in Metropolitan Life, all of the insurance policies sold in Massachusetts whether employment related or not. They are, however, laws of general applicability in the sense suggested by the Court's language in Metropolitan Life in that they apply to union and nonunion employers equally.

Similarly, it is far from clear that such remedies involve "minimum labor standards" in the same sense as wage and hour laws or the minimum insurance benefits in Metropolitan Life. Perhaps most importantly, Metropolitan Life did not involve any interference with the operation of the collective bargaining agreement's grievance and arbitration provisions, long recognized as one of the primary goals Congress sought to secure in the NLRA. The latter issue was directly discussed by the Court in Allis-Chalmers Corp. v. Lueck, less than two months prior to Metropolitan Life.

The employer in Allis-Chalmers maintained a disability benefits plan pursuant to a collective bargaining agreement. An employee, dissatisfied with the manner in which the employer and its insurer had handled his claim for benefits under the plan, elected to bypass the agreement's grievance-arbitration procedure and file suit in state court alleging that his claim had been handled in bad faith, a tort under state law.

The Court held the state cause of action in Allis-Chalmers preempted under section 301 of the LMRA. Under this section of the statute, which provides federal jurisdiction for suits brought to enforce a collective bargaining agreement, the Court had historically held that state courts may hear such suits, but federal law must be

392. Id. at 1907.
393. Id. at 1908.
395. Allis-Chalmers, 105 S. Ct. at 1910 n.5 (citing Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962)).
applied. Since the Court in *Allis-Chalmers* viewed the state tort suit as enforcing a duty that did not exist independently of the collective bargaining agreement, the suit was an indirect effort to apply state law to enforce the terms of a collective bargaining agreement and was therefore preempted.\(^{397}\)

A "final reason" identified by the Court for preempting the state claim in *Allis-Chalmers* was the Court's view that "only that result preserves the central role of arbitration in our 'system of industrial self-government.'"\(^{398}\) Thus, the Court identified as "[p]erhaps the most harmful aspect" of not preempting the state suit to be the fact "that it would allow essentially the same suit to be brought directly in state court without first exhausting the grievance procedures . . . ."\(^{399}\) The Court's concluding observations are critically important to the preemption of state wrongful discharge remedies.

Since nearly any alleged willful breach of contract can be restated as a tort claim for breach of a good-faith obligation under a contract, the arbitrator's role in every case could be bypassed easily if § 301 is not understood to preempt such claims. Claims involving vacation or overtime pay, work assignment, *unfair discharge*—in short, the whole range of disputes traditionally resolved through arbitration—could be brought in the first instance in state court by a complaint in tort rather than in contract. A rule that permitted an individual to sidestep available grievance procedures would cause arbitration to lose most of its effectiveness . . . . as well as eviscerate a central tenet of federal labor-contract law under § 301 that it is the arbitrator, not the court, who has the responsibility to interpret the labor contract in the first instance.\(^{400}\)

This language is typical of the Court's consistent position concerning labor arbitration. It strongly suggests that, when ultimately confronted with the question, the Court will hold state wrongful discharge remedies\(^{401}\) preempted to the extent they are made available to employees protected by the "just cause" and grievance-arbitration provisions of collective bargaining agreements. The necessity for such preemption is clear. If, as the Court recognizes in *Allis-Chalmers*,


\[\text{397. *Allis-Chalmers*, 105 S. Ct. at 1912-15. In effect, the Court's conclusion was that, but for the collectively negotiated disability benefits, the plaintiff would have been entitled to nothing that bad faith could have been utilized to handle. Also, the Court concluded that the measure of bad faith under the state law would at least in part require interpretation of the collective bargaining agreement, as to which federal, not state, law must be applied.}\]

\[\text{398. Id. at 1915 (quoting Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581 (1960)).}\]

\[\text{399. *Allis-Chalmers*, 105 S. Ct. at 1915.}\]

\[\text{400. Id. at 1915-16 (emphasis added; citations omitted).}\]

\[\text{401. As previously discussed, state efforts to give contractual effect to promises of job security set out in employee handbooks and personnel policies, when made known to employees, should not be preempted. See supra notes 58, 329. In this context, however, even state claims based on this doctrine should be preempted as the employee's collective agreement wholly displaces individual contract rights. See, e.g., J.I. Case Co. v. NLRB, 321 U.S. 332 (1944).}\]
mers as elsewhere, there exists a strong congressional intent that labor disputes be resolved by arbitration, and given that employee discharge complaints form the largest component of labor arbitration, state efforts to provide alternative remedies and forums necessarily conflict with the clear congressional intent and must therefore be preempted.

It is much less clear, however how this result can be reached within the context of the available labor preemption doctrines. Most lower courts presented with the issue have held state wrongful discharge remedies, other than the public policy torts, preempted under section 301 when they are sought to be applied to an employee protected by a collective bargaining agreement. This is very difficult to defend analytically. Section 301 simply provides federal court jurisdiction for suits "for violation of contracts between an employer and a labor organization . . . ." However, in contrast to the state bad-faith in claim processing tort held preempted in Allis-Chalmers, state wrongful discharge remedies exist wholly independently of any collective bargaining agreement. Although the Supreme Court expressly left open in Allis-Chalmers the possibility that "an independent, non-negotiable, state-imposed duty which does not create similar problems of [collective bargaining agreement] interpretation" might also be preempted, the Court failed to indicate on what basis such preemption might be found. Of course, the primary rationale of the Court in finding the state tort claim in Allis-Chalmers preempted was the Court's conclusion that the tort did not exist independently of


403. C. M Both, supra note 64, at 650 ("significant percentage" of cases reaching arbitration involve discharge and discipline).


406. Allis-Chalmers, 105 S. Ct. at 1914 n.11.
the collective agreement. After *Allis-Chalmers*, it therefore will be very difficult to contend that section 301 can preempt state wrongful discharge remedies.

There still exists, however, the *Oliver* doctrine and it is here that the basis for preemption in this context can be found. The protection of employees' job security through a "just cause" requirement for discharge and the inclusion in the agreement of an arbitration procedure to resolve claims that a particular discharge is not supported by just cause are both clearly mandatory subjects of bargaining. There is also no indication that Congress wished to permit states to interfere with the exclusive resolution of claims subject to the grievance-arbitration procedure by providing alternative remedies and forums. Instead, as indicated by *Allis-Chalmers* and other cases, there exists an express congressional intent that the grievance-arbitration process should be the exclusive procedure by which arbitrable claims should be resolved. Finally, with the exception of certain types of public policy wrongful discharge actions, it cannot be said that state remedies in this area are intended to protect the health or safety of the state's citizens. Parties to a collective agreement are required by the statute to bargain over protection for employees' job security and a grievance-arbitration procedure to enforce this protection, *Oliver*, and more particularly *Malone*, clearly establish that state remedies that "[limit] the solutions that the parties' agreement can provide" are preempted. Since, as recognized most recently in *Allis-Chalmers*, allowing state remedies in this context directly limit the parties' "federal right to decide who is to resolve contract disputes," such remedies must therefore be preempted.

*Metropolitan Life* does not require a different result. As previously set out, the rationale of the Court in not preempting the state statute at issue in that case rested largely on the fact that the state statute was not viewed by the Court as conflicting with any of

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407. *Id.* at 1912-15.
408. See *id.* at 1912 ("In extending the pre-emptive effect of § 301 beyond suits for breach of [the collective bargaining agreement], it would be inconsistent with congressional intent under that section to preempt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract.").
410. See supra note 385.
411. See also 29 U.S.C. § 173(d) (1982) ("Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement.").
413. See *Allis-Chalmers*, 105 S. Ct. at 1915-16.
414. *Id.* at 1915.
415. See supra note 370 and accompanying text.
the basic goals of Congress in enacting the NLRA.416 It would be hard to imagine any context in which this rationale would be less applicable than a state statute that frustrated the concept of the grievance-arbitration procedure being the exclusive remedy for employee discharge disputes.

There is, however, one aspect of the Court's decision in Metropolitan Life that cannot be so easily dismissed. The Court noted in that case that, were it to preempt the state statute there at issue, it would "turn the policy that antimated the [NLRA] on its head" as it would "[penalize] workers who have chosen to join a union by preventing them from benefiting from state labor regulations imposing minimal standards on non-union employers."417 Of course, this is a concept not generally transferable to the preemption of state wrongful discharge remedies since a contractual requirement of "just cause" for discharge, enforced by arbitration, is arguably greater protection against unjust discharge than that available in the state courts418 and, in all events, is clearly not, as in Metropolitan Life, an objectively lower level of protection and, thus, a penalty associated with unionization. There is no question, however, that the availability of punitive damages and, perhaps, the prospect of a sympathetic jury rather than a "shop wise" arbitrator may make state remedies preferable to at least some employees over "just cause" arbitration protection. To this extent, the preemption of such remedies would work a penalty on workers electing to unionize if such remedies were not generally preempted, at least for all employees within the jurisdiction of the NLRA.419 As previously discussed,420 however, there exist a number of justifications that would support the general preemption under Machinists of most state wrongful discharge remedies as applied to employers and employees covered by the NLRA without regard to whether or not they are organized. If preemption under Machinists were required, there obviously would be no penalty for employees electing union representation. Instead, there would be the traditional reward of possessing, in most cases, the job security provided by the usual "just cause" provision rather than the complete absence of such security resulting from the preemption of the state remedies.

417. Id. at 2398.
418. See Catler, supra note 2, at 496-509.
419. Not all workers or employers are governed by the NLRA. See C. Morris, supra note 64, at 1423-1503.
420. See supra notes 256-329 and accompanying text.
As discussed above, most courts have agreed, albeit by relying on an inapplicable doctrine, that state wrongful discharge remedies are preempted to the extent they are sought to be applied by employees protected by a collective bargaining agreement.\textsuperscript{421} There has been, however, a significant exception. Most courts have concluded that, even in this context, state public policy torts are not preempted.\textsuperscript{422} This is a difficult result to justify.

Initially, none of the published analyses supporting a failure to preempt public policy claims in this context had considered the preemptive effect of the Garmon and Machinists doctrines. As previously set out, both doctrines are applicable in this context and each should independently support preemption of claims of this nature. Similarly, none of the cases have considered the implications of the Oliver doctrine, which would, absent the applicability of one of the Oliver exceptions, clearly require preemption.\textsuperscript{423} The rationale of Oliver is particularly compelling in this context.

Employers and employees, through their union, have included arbitration provisions in virtually all collective bargaining agreements\textsuperscript{424} for several reasons. Arbitration has the advantage of being quicker, less costly, less public, and, usually, productive of better informed results than litigation.\textsuperscript{425} Of course, there are also disadvantages. By virtue of being less costly, arbitration probably results in more alleged contract violations by employers, particularly alleged discharges without just cause, being contested than would be the case if every violation had to be made the subject of a lawsuit. Employees are also disadvantaged to the extent that punitive damages and sympathetic juries are unavailable in arbitration. But whatever its advantages and disadvantages, the exclusive remedy of arbitration for


\textsuperscript{423} See NLRA Preemption, supra note 15, at 649-50.

\textsuperscript{424} See supra notes 310-18 and accompanying text.

\textsuperscript{425} See generally C. Morris, supra note 64, at 7-9.
all contract disputes, including discharge disputes, is what the parties bargained for. To allow state law to frustrate this intent by supplying a state court remedy for public policy wrongful discharge claims works a severe hardship on employers. They must still suffer the disadvantage of having to defend large numbers of what probably would otherwise be uncontested discharges because of the agreement to arbitrate such claims. At the same time, they are confronted with exactly the potential for expensive court litigation, punitive damages, and hostile juries that the arbitration remedy was to avoid.426

State public policy torts are of recent origin and the full effect of the availability of such claims, if the current trend of finding them not preempted is continued, cannot yet be known. As such claims become more widespread, however, it is probable that, in at least some cases, employers will no longer be willing to agree to resolve discharge claims by an arbitration procedure that cannot be made the exclusive remedy for such claims.427 If this happens, it will frustrate

426. For an example of the use an imaginative court can make of the public policy tort, see Novosel v. Nationwide Ins. Co., 721 F.2d 894 (3d Cir. 1983).

427. This was, and is, the concern in other areas. In Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), the Court determined that a federal court trial de novo of employment discrimination claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (1982), was required even for employees covered by collective bargaining agreements who had received an adverse award on the identical claim from an arbitrator. The district court in that case had held that the employee's right to relitigate his claim in federal court was precluded by the adverse arbitration award based, in part, on the court's conclusion that any other result "would undermine substantially the employer's incentive to arbitrate and would 'sound the death knell for arbitration clauses in labor contracts.'" Id. at 54 (quoting from the district court's opinion, 346 F. Supp. 1012, 1019 (D. Colo. 1971)). The Supreme Court's rejection of this contention in Gardner-Denver is widely relied on by the courts and commentators concluding that state public policy torts are not preempted by the availability of a remedy in arbitration. See, e.g., Garibaldi v. Lucky Food Stores, Inc., 726 F.2d 1367, 1375-76 (9th Cir. 1984), cert. denied, 105 S. Ct. 2319 (1985); Peabody Galion v. A.V. Dolar, 666 F.2d 1309, 1320-21 (10th Cir. 1982); State Actions, supra note 15, at 967-68; NLRA Preemption, supra note 15, at 657-59. Such reliance is seriously misplaced.

Initially, Gardner-Denver on its face has nothing to do with preemption under the supremacy clause, the foundation for preemption under Garmon, Machinists, and Oliver. Title VII is a federal, not state, remedy.

Secondly, although the Court did disagree with the district court's conclusion that allowing the relitigation in federal court of unsuccessful arbitration claims would threaten the continued willingness of employers to agree to arbitration of grievances, see Gardner-Denver, 415 U.S. at 54-55, the actual basis for its holding was that Congress had intended for Title VII claims to be resolved by the federal courts, not arbitrators. See id. at 44-49. Of course, a congressional intent not to preempt a particular type of claim is an exception under all of the preemption doctrines discussed in this article. There is no similar congressional intent that states be permitted to resolve discharge claims that are also arbitrable disputes under collective bargaining agreements.

Finally, the Court included in Gardner-Denver what has been described as "its now
clear congressional intent, repeatedly recognized and concurred in by the Supreme Court, that arbitration be used to resolve industrial disputes.\footnote{21}

To the extent that in this context a "sensitive balancing"\footnote{29} is required between the federal and state interests, the federal interests weigh heavily in the balance. Allowing state public policy wrongful discharge actions to proceed for unionized employees sacrifices to at least some extent:

1. the federal interest under \textit{Garmon} of having arguably prohibited conduct resolved by the Board or, in this context, by the arbitrator under the Board's deferral doctrine;\footnote{10}

2. the federal interest under \textit{Machinists} of allowing unions the economic weapon in organizational efforts of being the exclusive source of job security against discharges other than those violating federal statutory protections;\footnote{11}

3. the federal interest under \textit{Oliver} of allowing the parties' agreement to arbitration, as a collective solution to a mandatory subject of bargaining, be the exclusive remedy for discharge claims free from state-by-state frustration;\footnote{12}

4. the distinct federal interest expressly incorporated in the NLRA and recognized in a litany of Supreme Court decisions of allowing industrial disputes to be resolved by arbitration;\footnote{13}

and

5. the national interest in precluding the further proliferation of new remedies that directly and indirectly add to the cost of doing business in this country to the disadvantage of American consumers and, ultimately, workers.

On the state side of the balance, there is the obvious state interest in protecting employees from retaliation for such things as reporting
safety or health hazards, refusing to participate in, or covering up wrongdoing, or filing workers' compensation claims. Phrased in these terms, however, this is an interest that is significant only to the extent that alternative means of protecting such employees are either nonexistent or ineffective. In the present context, the employees are already protected by both an extremely effective remedy in arbitration and by subsequent Board review under its deferral doctrine. Essentially for this reason, at least some courts have avoided preemption problems entirely in this area by refusing to extend wrongful discharge remedies to employees protected by the availability of arbitration.

Therefore the only distinct state interest involved is the state's interest in having its own forums and remedies, particularly punitive damages, available to remedy and punish violations of the state's public policy. While these interests are not insubstantial, the Supreme Court's prior consideration of such interests does not suggest that they will outweigh the federal interests. Thus, in Republic Steel Corp. v. Maddox the Court recognized implicitly that the federal interest in arbitration outweighs the state interest in its own forums being available to resolve employee claims. In Jones, the Court summarily dismissed the availability of punitive damages as sufficient to avoid preemption under Garmon. If these interests are insuffi-

434. See supra note 319 and accompanying text.

435. Under United Technologies Corp., 268 N.L.R.B. 557 (1984), the Board will defer a section 8(a)(1) charge filed by an employee covered by a collective bargaining agreement arbitration procedure. After the arbitration has concluded, however, a decision adverse to the employee is reviewed by the Board to determine: (1) whether the issue under the Act (in this context, whether the employee's discharge interfered with or restrained concerted employee activity) was presented to and considered by the arbitrator, (2) whether the arbitration proceeding was "fair and regular," (3) whether all parties agreed to be bound by the result, and (4) whether the award is in any sense "repugnant to the policies of the Act." See Olin Corp., 268 N.L.R.B. 573 (1984). See generally C. Morris, supra note 64, at 957-77; Morris, The Developing Labor Law at 249-51 (1st supp. to 2d ed. 1985).


cient to allow the state forum and remedies to escape preemption, it is difficult to find a basis on which preemption in this context can be avoided.

IV. CONCLUSION

I have contended above that, as applied to employers and employees governed and protected by the NLRA, and with the exception of decisions giving contractual effect to job security provisions in employee handbooks and personnel policies when made known to unrepresented employees: (1) virtually all state “public policy” wrongful discharge actions are preempted under Garmon, (2) some kinds and, arguably, all types of state wrongful discharge actions are preempted under Machinists, and (3) all types of state wrongful discharge actions are preempted under Oliver when applied to currently organized employees.

With respect to employers and employees not protected by the NLRA, there is little question that the employment at will doctrine has sometimes produced in harsh results. States may, if they wish, seek to remedy this by providing state remedies and forums to regulate abusive discharges. These are the employees who must, if they are to be protected at all, look to the state in the absence of a general federal law on the subject.

As to employers governed and employees protected, by the NLRA, however, Congress has already provided a remedy for abusive discharge and, beyond this, any discharge not supported by “just cause.” It is called a union. For fifty years, the NLRA has worked well to provide not only job security for American workers but a host of other perceived advantages. If the Board is to go on providing effective, uniform remedies for violations of the Act’s provisions protecting employees against discharges that chill the exercise of their right to engage in concerted activity, if unions are to continue to have the use of one of their most potent organizing tools, and if the extremely effective process of resolving discharge disputes in unionized settings by arbitration is to be preserved, the supremacy clause requires the wholesale preemption of state efforts to provide their own, individual remedies and forums to employees covered by the NLRA.