Conflict of Federal and State Jurisdiction Under the National Labor Relations Act as Amended

John Joseph Devine
Loyola University Chicago

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CONFLICT OF FEDERAL AND STATE JURISDICTION UNDER
THE NATIONAL LABOR RELATIONS ACT
AS AMENDED

by
John J. Devine

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and Industrial Relations of Loyola University in
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LIFE

John Joseph Devine was born in Chicago, Illinois, May 28, 1930.

He was graduated from Loyola Academy, Chicago, Illinois, June, 1949, and from Loyola University June, 1953, with the degree of Bachelor of Social Science.

The author began his graduate studies at Loyola University in September, 1954.
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CHAPTER I

INTRODUCTION

The increase of labor relations has given rise to troublesome problems of supremacy and accommodation between state and federal laws. Prior to 1935 there was little labor relations law other than the judge-made law of strikes and picketing. The National Labor Relations Act of 1935\(^1\) guaranteed employees the rights of self-organization and collective bargaining whenever their denial would "affect" interstate commerce; it also provided procedures for resolving disputes as to the identity of employees' representatives. The broad interpretation which the Supreme Court placed upon the term "affecting commerce" carried federal authority into fields traditionally subject to state regulation, producing inevitable conflict as soon as state legislatures also passed "baby Wagner Acts" dealing with employer unfair labor practices and questions of employee representation. Then, in 1947 the full panoply of en-

trance of the federal government into the field of labor relations through the enactment of the Labor-Management Relations Act of 1947\(^2\) has opened a Pandora's box of jurisdictional complexities that bid well to occupy the resources of both federal and state courts for some considerable time. In other words, in 1947 the area of overlapping legislation was enlarged by enactment of the Taft-Hartley Act. Theretofore only the states had sought to deal by law with the problems of strikes, picketing and other concerted activities; and they had consistently applied their laws to industries also covered by the NLRA. Therefore, the Taft-Hartley amendments listing union unfair labor practices superimposed federal regulation upon the existing body of state law. Much the same is true of the provisions dealing with internal union affairs, the settlement of labor disputes, and the terms and enforcement of collective bargaining agreements.

The resulting problems of supremacy and accommodation are essentially issues of legislative policy. The reach of federal power under the commerce clause is broad enough to permit Congress to make regulation of labor relations the exclusive province of the National Government. It is no less clear

that Congress may permit the states to exercise legislative power over employer practices and employee activities without regard for their effect upon interstate commerce, either alone or concurrently with federal regulation. Ideally, therefore, Congress should draw the lines between (1) matters which are to be subjects of exclusive national regulation; (2) matters which are to be regulated by the federal government but are also open to state regulation and (3) matters which are to be left to the states. However, Congress has not done this in the past but instead leaves the decision to the Supreme Court. And the Court, paradoxically, then draws the necessary lines by asking - in form, if not actually - where Congress drew them. In view of the refusal of Congress to delimit the labor relations field, the scope and variety of the jurisdictional problems presented by the Act will surely increase. The reasons for this are numerous — the vastness of the field contemplated by the Act; definitions relating to commerce; the comprehensiveness of the regulations contrived by Congressional ingenuity; and lastly, and most important, the resolute determination which many state courts have manifested to retain and exercise their control in labor controversies, particularly over the injunctive processes in labor litigation. Therefore, the fact that the federal regulations, though numerous and comprehensive, are spelled out with the minimum of specificity required by the rules controlling the drafting of statutes, has provided a germinating bed for the creation of
ever new jurisdictional problems because state courts have generally shown a tendency to retain their power in this field. If the past history of equity courts in this field, as demonstrated by their exercise of the combined law making, law interpreting, and law enforcing functions, is any indication of what the future may present, one can anticipate an ever growing multiplication of an infinite variety of new judicial improvisations to provide an area for such judicial action free from the paramount federal power. Thus, the importance of this problem is easily seen. If this problem is not cleared up quickly, chaos will result not only within our Government system but also between Management and Labor. The two forces are far enough apart now, but will become even farther apart if this problem becomes more acute.

The purpose of this thesis will not be to formulate an hypothesis and then to draw concrete conclusions. Such an attempt would be suicidal in a field such as this. However, the purpose of this paper will be to analyze some of the conflict between state and federal laws, primarily from the viewpoint of adjudication, and come to a tentative conclusion on which side of the line, e.g. federal or state, actual jurisdiction falls.

The problem of this thesis is, the author believes, clear. We know that a State cannot regulate what the federal government has lawfully chosen to regulate. In other words, when there is a federally protected right, a state court cannot be allowed to grant an injunction and thus detract or destroy the
federally protected right. However, even here, there is a difference between a state court granting an injunction and providing money damages. We shall see, that one will run directly counter to the NLRA, while the other will not run counter to the Act. However, what about those things which Congress has shown no intention to regulate or with which the Act does not specifically deal, even though it deals with the field in which that specific conduct is? Here one meets head on with the problem. For example, suppose that a state labor relations act were amended to make it an unfair labor practice to fail to include in a collective bargaining agreement some provision for the final settlement of disputes over its interpretation and application. Strictly speaking, Congress has not sought to govern the conduct of employees and unions with respect to the inclusion of such a clause, nor has it manifested any intention beyond that of leaving the parties free from federal compulsion in negotiating the terms of their agreements. Whether enforcement of the supposed state law would actually thwart any legislative or administrative policy of the federal government is entirely speculative, yet one may predict with some assurance that the supposed state law would be held inapplicable to industries subject to the NLRA. The reason is that although voluntary incorporation of such a clause is generally regarded as sound policy, for the court to permit a state to require its inclusion would involve an undue risk of interference with the basic policy of free negotiation underlying
the NLRA.

As can be seen, there is a definite problem and when this is coupled with the problem of "potential conflict" and of an attempt to find out the true intention of Congress, one encounters many difficulties. An attempt will be made to solve such difficulties without trying to come to concrete and definite conclusions. This does not mean that when this paper is finished the reader will be "left up in the air." On the contrary, there will be a conclusion drawn after analyzing the cases. But this does not mean that the author will come to a conclusion saying everything is "white" and therefore nothing can be "black".

Therefore, in summary, before entering into the text proper of this thesis, the author would like to restate the problem clearly and concisely so we know what we must try to solve. The root of the problem is imbedded in the principle that state regulation is excluded from any field of activity where Congress, in accordance with its constitutional authority, has shown its intention to regulate and in which it has not affirmatively provided for state regulation. Then from here one goes on to the fact that there is a peripheral area about each of the exact prohibitions of the NLRA, into which the states may not intrude without federal authorization. The real problem is one of defining that area. In other words, is the failure of Congress to proscribe certain conduct an indication that the federal policy is to permit the conduct
without interference from anyone, or is this evidence of a willingness to leave the issue to the states? It will be the purpose of this paper to clear up these troublesome perplexities and to throw light on some possible solutions, and to bring agreement where there has been disagreement.
CHAPTER II
DEVELOPMENT OF THE PROBLEM - THE PRINCIPLE OF PRE-EMPTION AND THE "SUPREMACY CLAUSE"

In examining problems of federal-state jurisdiction in the field of labor relations the fact is sometimes overlooked that these problems spring from the distribution of governmental power in our federal system; that similar problems arise in virtually every field of federal regulation; and that the problems are not intrinsically "labor relations" problems at all. The doctrines which the Supreme Court has applied in its labor relation cases which have raised federal-state jurisdiction issues have a history far older than Congress' first attempts to regulate labor relations under the "Commerce Clause". Examination of that history may help to explain the cases which the writer will delve into further on in this paper and may afford a clue to the resolution of the numerous issues of federal-state jurisdiction in the labor relations field which remain unsettled.

It was decided early in our constitutional history that the "Commerce Clause", standing alone, does not bar state regulation of activities of predominantly local concern, where nationwide uniformity of regulation is not
imperative, even though the activities involve or affect interstate commerce. However, at the same time, it was decided that the affirmative grant to Congress of power to regulate interstate commerce, coupled with the federal "Supremacy Clause", enabled Congress to close the door completely to state regulation even in these areas. In other words, it was decided that if Congress was to carry out those express powers granted to it by the Constitution, it should also be able to take steps to effectuate those express powers - the means to obtain the end.

From these first principles it followed that the fate of state regulation in areas which Congress was empowered to regulate rested entirely upon the will of Congress. Where Congress clearly manifested its intention either to permit or to preclude state regulation, nothing remained for the courts but to give effect to that Congressional policy. But what were the courts to assume when, as frequently happened, Congress, while undertaking to regulate a field which the states had previously been free to regulate, manifested no intention with respect to the survival of state regulatory powers, and where, indeed, there was no evidence that Congress had even considered the problem?

This issue was squarely met by the Supreme Court for the first time in
Houston v. Moore. There, Mr. Justice Washington speaking for the Court, took occasion to repudiate what he described as the "novel and unconstitutional doctrine, that in cases where the State governments have a concurrent power of legislation with the National Government, they may legislate upon any subject on which Congress has acted, provided the two laws are not in terms, or in their operation, contradictory and repugnant to each other."

The heart of the matter, as the Court saw it, is that when Congress undertakes to legislate on a subject it must be presumed that its regulations go as far as Congress "thought right." Therefore, state regulation which goes further, even though in the same direction, is necessarily incompatible with Congress' judgment as to how far the regulation should go. This is true even though it be conceded that "important provisions have been omitted, or that others which have been made might have been more extended, or more wisely devised." Thus, if the federal law and the state law "correspond in every respect, then the latter is idle and inoperative; if they differ, they must, in the nature of things, oppose each other, so far as they do differ. If the one imposes a certain punishment, for a certain offense, the presumption is that this was deemed sufficient, and under all circumstances, the only proper one.

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3 Houston v. Moore, 5 Wheat. 1, 20-23 (1820).
If the other legislature imposes a different punishment, they cannot both consist harmoniously together."

Since Congress presumably did not intend to sanction such opposition, the will of Congress "is to be discovered as well by what the legislature has not declared, as by what they have expressed."

This presumption - that the enactment of legislation by Congress reflects its considered judgment as to what substance and form regulation of a particular subject should take - remains to this day the cornerstone of the so-called "pre-emption", or "occupation of the field" doctrine. It has been reiterated through the years by some of the most illustrious justices who have sat on the Supreme Court.

Mr. Justice Holmes' classic restatement of the principle for a unanimous Court in the Varnville Company Case⁴ is illustrative. "When Congress has taken the particular subject-matter in hand, coincidence is as ineffective as opposition, and a State law is not to be declared a help because it attempts to go farther than Congress has seen fit to go." And in 1926, Mr. Justice Butler, also speaking for a unanimous Court, struck down a state law regulating liability of railroads for loss of property on the ground that,

"Congress must be deemed to have determined that the rule laid down and the means provided to enforce it are sufficient and that no other regulations are necessary. Its power to regulate such commerce is supreme; and as that power has been exerted, state laws have no application. They cannot be applied in coincidence with, as complementary to, or as in opposition to, Federal enactments which disclose the intention of Congress to enter a field of regulation that is within its jurisdiction."

Thus, in a "nut-shell", the "pre-emption" doctrine rests upon the assumption that in regulating a subject within its constitutional powers, Congress goes as far as it thinks necessary and proper. Supersedure of state legislative power in the regulated field is therefore necessary to preserve the integrity of Congress' judgment that the rights and remedies which it provides are sufficient. The consequence is that by virtue of the "Supremacy Clause", state law which either duplicates, complements or supplements Congressional regulation must fall.

Therefore, as can be seen, the "Supremacy Clause" enters into the labor relations area as it did in the commerce area. As the "Supremacy Clause" gave the Federal Government priority in the field of commerce by

expanding the area over which the Federal Government had control, so it
has given the Federal Government more power to deal with labor relations
by enhancing and giving more power and meaning to the "pre-emption" doc­
trine. Whether this is a valid extension of Federal control or an usurpation
of State's Rights remains to be seen. The answer to this can only be gotten
through analyses of relevant Supreme Court decisions.
CHAPTER III

PERTINENT PROVISIONS OF THE NLRA AND THEIR APPLICATION

Before going any further in this paper it would be wise to examine those provisions of the Labor Management Relations Act, 1947 which touch on the subject of state jurisdiction. Reference to state action and jurisdiction are to be found in sections 8(d), 10(a), 13, 14(a) and 14(b) of Title I, which enacts an amended National Labor Relations Act, in section 203(b) of Title II and in section 303 of Title III. Section 8(d) contemplates that the parties to a contract modification or termination dispute shall, among other things, give notice thereof to the State mediation agency, if any. Section 10(a) provides that the power of the National Labor Relations Board to prevent unfair labor practices under the amended NLRA shall not be affected by any other means of adjustment but authorizes the board to "cede" jurisdiction, subject to certain limitations, to state agencies. Section 13 provides, among other things, that the Act is not intended to affect any limitations or qualifications on the right to strike. Section 14(a) says that no other law, national or local, shall operate to require employees subject to the federal act to give supervisors bargaining
rights. Section 14(b) expressly preserves state freedom to impose more severe limitations on the use of union security than are contained in the federal act. Section 203(b) directs the Federal Mediation and Conciliation Service to stay out of minor disputes if state mediation is available. And section 303 provides for a damage remedy in the federal and state courts for injuries suffered as a result of secondary boycotts and other federally proscribed kinds of union conduct.

It is significant that none of these provisions contains a clear, comprehensive delineation of the subject matter either pre-empted by Congress or shared with the states. The statute does not, like the Securities Act of 1933\(^6\), the Fair Labor Standards Act of 1938\(^7\), and the original United States Warehouse Act\(^8\), give a clear green light to the states, nor on the other hand, does it, like the Railway Labor Act,\(^9\) fail to provide any signal at all. Rather, it contains a kind of incomplete book of traffic rules, some specific, some vague. Some lanes are clearly open to the states; others are as clearly

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closed. But many roads are unmarked, or marked with confusing signs, making it necessary for the traveler to rely upon some general compass bearing in order to be able to proceed.

Some details of these provisions are clear, others less clear, and still others are altogether ambiguous. The discussion of these provisions will be only to throw some knowledge on the sections of the Act which are relevant to our discussion. At no time will the author discuss the wiseness or unwiseness of congressional policy concerning these sections. The purpose of this discussion will not be to see if Congress was wise in writing certain provisions into the Act, but to try to make clear those provisions which can be made clear, in hope of trying to make those more ambiguous sections such as 10(a) a little more understandable to the reader, so that when it comes time to analyze the cases the reader will have a workable knowledge of the very pertinent section 10(a).

Section 14(b) of the amended NLRA provides: "Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."

The legislative history of this provision confirms what is apparent on
its face that Congress thereby desired to make clear its intent to leave the states free to deal with union security provisions, provided state action is not less restrictive than the federal act. It seems to me that the draftsmen simply wanted to make sure that the uncertainty as to state authority which existed under the original NLRA should not exist under the Act as amended. The amended NLRA outlaws the closed shop as a form of discrimination, but permits the union shop under certain conditions. There is no question but that the states are not bound to tolerate even the union shop. They may, if they so desire, prohibit both the closed and the union shop. Or, they may permit the union shop, but on conditions not less restrictive than those provided by the amended NLRA. This is true, of course, whether the state imposes the limitations by legislation or by judicial decision.

Section 14(a) of the amended NLRA operates, on the other hand, as an absolute limitation on the authority of the states to require employees subject to the Act to accord bargaining rights to supervisory employees. This section reads: "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any state law, either national or local, relating to collective bargaining."

By this provision Congress established a uniform, national policy with
respect to the bargaining rights of supervisory employees of employers whose activities affect interstate commerce. The result is that the collective bargaining position of such employees is to be determined by the parties themselves, not by law. This restores the situation to the status quo before the original NLRA.

Section 13 of the amended NLRA reads: "Nothing in the Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right." (Underlining supplied)

The first part of this provision is irrelevant to our present problem. The underlined portion may be pertinent. It may be read as leaving the states free to impose such limitations on strike action as they shall deem to be necessary. On the other hand, Congress may have sought by this section only to leave unimpaired those indirect sanctions on improper strike action which had been worked out in the form of a denial of the privileges of the original NLRA in the Fansteel Case. The legislative history shows that the draftsmen had the latter purpose in mind, but it does not show whether they regarded this as a minimum or maximum objective. It is perhaps


not unreasonable to suggest, however, that if at this point they were thinking of the major problem of state restrictions on union conduct, they would have been careful to use language which would leave their intention clear. On the whole one must put the section down as ambiguous, although a reasonable man could hardly be charged with negligence if he should take the section at its face value and conclude that state power to deal with strikes remains unimpaired.

There is no question but that the states are left free to employ the techniques of mediation with respect to some categories, at least, of labor disputes involving employers subject to the LMRA. Section 8(d) of the amended NLRA requires that notice of contract termination or modification disputes shall be given not only to the Federal Mediation and Conciliation Service, but also to "any State or Territorial agency established to mediate and conciliate disputes." And section 203(b) of Title II of the LMRA directs the Federal Service "to avoid attempting to mediate disputes which would have only a minor effect on interstate commerce if State or other conciliation services are available to the parties." These provisions are meaningful only if it is intended that the State services shall be free to intervene at least to the extent indicated. Thus, Congress did intend at least some state mediation.

Section 303(b) of Title III of the LMRA provides a damage remedy in the
Federal District Courts and "in any other court having jurisdiction of the parties" for violations of the provisions of Section 303(a) making unlawful certain kinds of union collective action. This provision, of course, does not per se shed light on the problem the author is considering, but it does serve to indicate that Congress did not intend to set up an exclusive system of federal remedies.

These are the sections which in some way deal with the problem. It is true that the jurisdictional problem is not directly taken up in any of these provisions. However, a small explanation of these provisions was necessary before discussing Section 10(a), which is concerned with the problem very deeply. These were the provisions where one can find some basis for reaching a conclusion on the meaning of the sections, and which will at least indirectly help us to give meaning to the very pertinent provision in Section 10(a), whose discussion deserves a chapter in itself, for here is where the "heart" of the problem lies.
CHAPTER IV

THE MEANING OF SECTION 10(A) — THE "HEART" OF THE PROBLEM

The most important and latently ambiguous of the specific references in the LMRA to state action is that contained in Section 10(a) of the amended NLRA, which provides:

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provisions of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

It will be observed that the National Labor Relations Board is given express authority to "cede" jurisdiction over any cases of which it has jurisdiction under the amended NLRA subject to two exceptions. First, it may not do so if the applicable portion of the state statute is inconsistent with the federal act. Second, it may not do so in any event in the mining, manufactur-
ing, communications or transportation fields unless the situation can be brought within the "predominantly local in character" category. There is some doubt whether this latter category is to be determined by reference to the industry (the employer) or to the particular case, but the legislative record makes it fairly clear that the criterion is the character of the employer's operations, not the nature of the case. 12

There are several possible constructions or meanings which may be given to section 10(a). First, it may be contended that Congress thereby indicated its intention to pre-empt completely the fields of regulation entered by the amended NLRA, with the following exceptions: (1) the case of minor industries to the extent that jurisdiction is specifically and properly ceded by the NLRB; (2) the reservation to the states made in sections 13 and 14; and (3) an implied reservation of state power to protect person and property against acts of violence. To attach this meaning to section 10(a) would mean that the police power of the states is suspended as to employer and union interferences with the right of self-organization and as to union collective action except to the extent that jurisdiction is expressly ceded by the NLRB as to local industries, and except to impose restrictions on the use of union

security provisions, to preserve the peace and, possibly, to impose general limitations on the "right" to strike. The word "possibly" as to restrictions on strike action is used advisedly, since, if this construction should be placed upon section 10(a), the ambiguity in section 13 might very well be resolved against the existence of state power.

At the other extreme it may be contended that Congress did not, by section 10(a), intend to indicate pre-emption in any respect, but only to give express approval to the practice already started by the Board under the original NLRA of making practical, working arrangements with state boards under which persons interested could be clear as to the jurisdiction of state boards to enforce under state laws, as to certain designated industries, policies comparable with those of the federal act. Under this view the question of the applicability of state labor relations legislation and common law would be determined in the light of the general principles concerning implied supersedure of state authority which have been used by the Supreme Court. As will be seen, these concepts are sufficiently flexible to permit the Court to conclude that the states are free to enforce regulations additional to and not inconsistent with those of the federal act, and even regulating comparable with those of the federal act, at least so long as the National Board has not acted in the case.

A third meaning that may be given to section 10(a) is that Congress in
section 10(a) indicated its intention to pre-empt the field as to the major industries, subject to certain express or implied exceptions, but not to pre-empt the field at all as to minor industries. The exceptions would be the following: (1) any subject matter not touched by the amended NLRA, (2) the implied authority of the states to preserve the peace, and (3) types of regulations expressly reserved to state authority by sections 13 and 14 of the act. A possible variant of this interpretation, and hence a fourth meaning that may be attached to section 10(a), is that Congress intended to exclude all state regulation in the field of management -- union relations, subject, of course, to exceptions (2) and (3) above, even as to subject matter not touched by the federal statute, but to leave the states free to act with respect to minor industries.

The writer thinks that it is fairly cognizable that each of these constructions of section 10(a) is possible. However, does any one of them harmonize more than the others with the general purposes and other relevant provisions of the Act? There is in the author's opinion no conclusive answer to this question. The first construction -- pre-emption -- would render section 14(a), dealing with supervisory employees, redundant, but would give point to sections 13 and 14(b), as well as to section 8(d) -- that is, these provisions would be necessary if Congress intended, despite general pre-emption, to leave the states free to act in certain cases. The second construction -- no pre-emption
at all — would render section 14(b) and, to some extent section 13, superfluous and, what is more important, would leave the State boards incongruously free to act even with respect to the major industries while permitting the National Board to "cede" jurisdiction only with respect to the minor industries. The third construction — pre-emption, with exceptions, as to the major industries; no pre-emption as to others — would give meaning to sections 8(d), 13, and 14(b), as exceptions to general pre-emption in the case of the major industries, as well as meaning to section 14(a) as establishing a uniform national policy with respect to supervisory employees even in the minor industries. The fourth construction — pre-emption, with exceptions, as to the major industries even to the point of excluding regulation as to matters not touched by the federal act; no pre-emption as to the minor industries — would yield like results in making other provisions of the act meaningful, but would rest on the dubious assumption that Congress intended to supersede the state police power completely as to management-union relations in the major industries except for those matters specifically reserved. On the whole the third and fourth constructions most consistently coordinate with the other specific references in the act to state action, but this fact is probably not conclusive. The determination of the existence or non-existence of state power should not hang on so slender a thread as section 10(a) being construed the way which comes closest to giving meaning to the other pro-
visions in the act.

Thus, the author will take up the legislative history of section 10(a) to make its meaning clearer and therefore have a stronger basis on which to draw our conclusions on the issue of state freedom of action under the NLRA versus the limitation necessary to secure full effectiveness of national policies.

In studying the short legislative history of section 10(a) one would have to come to the conclusion that on its face Congress intended a construction of section 10(a) which would deny to the states jurisdiction of the subject matter touched by the amended NLRA except as otherwise expressly provided. This contention is supported by the pertinent portions of the Report of the House Committee on Education and Labor on section 10(a) which provided: "The Board is empowered, as hereinafter provided, to adjudicate complaints of unfair labor practices affecting commerce filed by the Administrator. Such power of the Board shall be exclusive." 13

The Committee indicated that it thought the "exclusive jurisdiction" which would thereby be given to the board necessitated a special provision giving the states "a concurrent jurisdiction in respect of closed shop and other union security arrangements", and it referred to the act as an "illu-

tration" of the policy calling for uniformity in "matters of national policy under the commerce clause." The Committee further stated that "since by the Labor Act Congress pre-empts the field that act covers in so far as commerce within the meaning of the act is concerned, the saving provision was necessary."\(^{14}\)

The Senate Committee Report of section 10(a) which was substantially in the form finally incorporated in the Act,\(^ {15}\) referred to the section briefly to say that the proviso was added to permit the NLRB "to allow State labor-relations boards to take final jurisdiction of cases in border-line industries (that is, border-line insofar as interstate commerce is concerned), provided the State statute conforms to national policy." The Conference Report makes it apparent that the Conference Committee accepted the Senate's version of the first part of section 10(a) in order to make it clear that the damage and injunction provisions of the LMRA, while depriving the NLRB of exclusive jurisdiction, would not operate to cut off the administrative remedy. This latter point to the author's mind at first seemed contradictory. However, a closer look at the words used made things clear. The reason the words were changed from "exclusive" to "not be affected by other means

\(^{14}\)Ibid., pp. 40, 44.

of adjustment or prevention", was to allow the Board to "cede" jurisdiction which comes in the proviso in section 10(a). The words in the final analysis give the same result. But the latter allows the Board to cede jurisdiction where the Board is overburdened with work while the former would leave the Board in the embarrassing position of "biting off more than it can chew."

Neither this Report nor the Senate Committee Report made reference to the problem of state jurisdiction absent a specific cession of jurisdiction by the NLRB. This failure to discuss the problem of concurrent state jurisdiction in reference to the Senate Bill leaves the intentions of the draftsmen in some doubt. But it must be conceded, in view of the House Committee's statement, that there is somewhat more in the record against than in favor of a construction which would permit the states to act, as to matters touched by the federal act, either in the case of major industries, or, independently of cession of jurisdiction, in the case of minor industries.

Thus, it would seem that the fourth construction — Congress intended to exclude all state regulation in the field of management-union relations, subject to the exceptions of the implied authority of the states to preserve the peace and types of regulations expressly reserved to state authority by sections 13 and 14 of the act, even as to subject matters not touched by the federal statute, but to leave the states free to act with respect to minor industries — would be the most apt one for the environment of the legislative his-
tory which surrounds it. However, at the same time note should again be taken of the ambiguity of section 10(a). It can be argued that if Congress had intended to suspend the operation of the state police power in the field of management-union relations, except as otherwise expressly provided or as necessarily implied, it would seem that clear language to this end would have been used in view of the importance of the result. No valid answer can be given to this contention by any writer who concerns himself with the issue of Federal-State jurisdiction. This is a matter for the courts to interpret and decide. For it is through court decisions that meaning is given to our laws. And even here where there is ambiguity, not all of the judges will give the same meaning to section 10(a). This problem the reader shall soon see when he comes to the chapter analyzing the pertinent cases on this subject matter. For the present, the author will look to the intent of Congress that is manifested under the entire Act.
CHAPTER V

CONGRESSIONAL INTENT UNDER THE NLRA AS AMENDED

Since we have discussed the intent of Congress in relation to Section 10(a), in order to give a meaning to that section, the writer thinks it wise to inquire into the intent of Congress under the entire Act. In this way the reader will have some idea what Congress meant when it legislated this Act. This knowledge of Congressional intent will make for a better understanding of the cases because it is the fashion of recent cases to treat the "intent of Congress" as the controlling consideration in determining what state regulation has been superseded by federal law.

Before delving into the legislative history of the Act, the author will concern himself with the philosophy and usefulness of Congressional intent. The phrase "intent of Congress" may be a helpful reminder of the duty of judges to decide questions of pre-emption from the standpoint of one who approves not only the substantive federal policy but also the substance of the state law so far as not plainly inconsistent with the former, rather than according to "personal views" about the substantive policies embodied in the legislation. Some of the opinions of our learned judges, however, seem to use the expression as if Congress had a specific intention with respect to each issue
of pre-emption which it is the Court's function to divine. A concrete example of this can be found in International Union v. Wisconsin Employment Relations Bd., 16 where the Court stated: "We therefore turn to its legislation for evidence that Congress has clearly manifested an exclusion of the state power sought to be exercised in this case." Where there is convincing evidence of a specific Congressional intent, as there is in many sections of the NLRA, it surely should be followed, though it may seem unwise. But such an inquiry is frequently illusory. Congress rarely considers controversial issues of labor policy in terms of the problems of federalism.

It has sometimes been assumed that a specific intent to leave room for state regulation can be discerned in the failure of a statute to deal specifically with the particular conduct that the state wishes to control. Thus, Mr. Justice Jackson has reasoned that a state was free to police particular employee activities despite federal regulation of other employee conduct in the same field, "because the Federal Board has no authority either to investigate, approve or forbid . . . the conduct in question." 17 Whatever the mer-


17 Ibid., p. 254.
its of the particular case, the suggested test is rarely useful because the failure of Congress to deal with a specific course of conduct in an area over which a large measure of federal control has been exercised is as likely to indicate that Congress intended to leave such conduct free from regulation as that Congress intended to leave freedom of action to the states. The difficulty is best illustrated by the problem of accommodating state and federal laws regulating strikes for recognition and bargaining rights. The Taft-Hartley amendments impose two restrictions upon concerted action aimed at securing recognition as bargaining representative. Section 8(b)(4)(B) declares it to be an unfair labor practice for a labor organization to induce the employees of one employer to refuse to handle goods or render services for the purpose of forcing another employer to recognize an uncertified labor organization as the bargaining representative of his employees. Section 8(b)(4)(C) declares concerted economic action unfair when its purpose is to force "any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of Section 9."

Now a number of states have regulated organizational activities along different lines. In California strikes and picketing appear to be unlawful
whenever two unions are competing for recognition. New York and Massachusetts have taken the view that a minority union should not be allowed to invoke economic pressures after the employees have voted in a labor board election. Pennsylvania has attempted to forbid all stranger picketing and Florida all minority strikes for recognition.

It is futile to attempt to extract from Section 8(b) evidence of a conscious Congressional desire either to exclude or to permit these forms of state regulation. The fact that Congress proscribed only some organizational strikes may indicate only that there is no national policy opposed to other strikes aimed at securing recognition or bargaining rights. Yet Congress considered the whole field of organizational activities and apparently felt no inhibition against excluding state regulation. Consequently, it seems just as reasonable to suppose that Section 8(b) does not restrict the conduct covered by the California, New York, Pennsylvania, Massachusetts and Florida laws

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21Pennsylvania Statutes Annotated, Title 43, §211.6 (1950).

22Florida Statutes Annotated, §481.09(3) (1950).
because Congress concluded as a matter of substantive policy that it should not be suppressed.

The difficulty with attempting to inquire into the intent of Congress on the basis of either statutory prohibitions or for that matter legislative history, which is only clear as to some aspects of the Act, may also be illustrated by an example involving an employer unfair labor practice. Wisconsin makes it an unfair labor practice to violate an agreement to submit a labor dispute to arbitration.\(^\text{23}\) There is no similar provision in the NLRA. The silence of Congress might be taken to mean either that the subject was left to state control or that Congress believed such an enactment to be so unwise that the regulation should not be imposed. Legislative history in this instance furnishes no assistance. When the Taft and Hartley bills were referred to the Conference Committee, both included provisions making it an unfair labor practice for an employer to violate the terms of a collective bargaining agreement. The Conference Report contained no similar provision. The House managers' explanation of the omission was that: 'Once the parties have made a collective bargaining contract, the enforcement of the contract should be left to the usual processes of the law and not to the Nation-

\(^{23}\text{Wisconsin Statutes, 111.06(2)(c) (1949).}\)
al Labor Relations Board. "24 The explanation may reflect either the dis-
trust of the NLRB which was felt by many Congressmen or else the desire
to relieve the Board of the burden involved in enforcement of such a provis-
ion; in either event, it might be said, the defeat of this proposal does not
manifest an intention to deprive the states of power to determine the forum
in which collective bargaining agreements should be enforced. Equally
strong arguments can be presented for a contrary conclusion. Some Con-
gressmen must have been aware of the prevailing opinion that enforcement
of collective bargaining agreements through labor relations boards would re-
sult in the development of a different body of law and policy than could be
achieved through litigation in the courts. Should the reader not conclude
therefore that Congress preferred court enforcement to administrative hand-
ling, whether by the Federal Government or the states?

If the test of consistency is not sufficient and some supposed specific
intent of Congress turns out to be a will-o' the-wisp, how then should one
decide what part of the field of labor relations Congress has pre-empted
against state control? Perhaps we must be content with T. R. Powell's ob-
servation that the decisions turn on whether "the impediment of further state

24 House Report, No. 510, Conference Committee, 80th Congress, 1st
Session, June 3, 1947, p. 42.
requirements is to be deemed a bane rather than a blessing." 25 Few would question the sense of this commentary on judicial behavior. For many judges there are strong temptations in any particularistic approach. It offers an easy escape from the evils of over-generalization and excessive reliance upon the logical development of precedents. The judge who follows it may permit state intervention whenever he believes that Congress overlooked a serious evil that the state has dealt with wisely, or, if he holds the opinion that the labor policy of the Federal Government is preferable to a particular state law, he may find the field pre-empted against that kind of regulation. To be sure, judges cannot entirely eliminate their preferences among substantive policies from their judgments upon issues of exclusive or concurrent control, yet surely such preferences should be pushed into the background as far as possible by the development of other criteria. It is not the function of judges to set aside or approve according to their notions of public labor policy laws adopted by the people of a state. In deciding questions of pre-emption, therefore, a court should accept the policy of the federal statute and, in the absence of clear inconsistency, should assume that the state legislation is no less soundly conceived. The question of policy which the court

has then to decide is whether from the standpoint of one interested in the development of the federal labor policy the state legislation, however wise it may be, is more of a bane than a blessing.

In resolving this issue several lines of inquiry appear to be pertinent in order to establish criteria on which the judge can better give a decision on a set of facts in a case. The chance of collision between federal and state administrative agencies is an important factor to which the decisions give great weight. But the danger that enforcement of a state regulation will thwart the development of federal policy is not confined to instances of inconsistency on the face of the statutory provisions or in the exercise of administrative discretion. It may result from permitting a state to regulate specific conduct which Congress has left ungoverned although it is part of a broader field of activity over which Congress has asserted general control. In the latter case the U.S. Supreme Court has declared void state regulations as an undue risk of interference with the basic policy of free negotiation underlying the NLRA.

A second pertinent line of inquiry is into the desirability of avoiding too fine a line of decision. As Mr. Powell said, "The primary desideration is to have a settled rule or dictate rather than to be sure that the legislative
Mind has been correctly divined.\textsuperscript{26} The illustrations the author has already drawn from state and federal statutes regulating strikes and picketing reveal the problems that a particularistic approach to the delimitation of state and federal authority would almost surely create. If the validity of each state law were decided ad hoc, endless litigation would be required; meanwhile the litigants and all persons similarly situated would be left to build a highly delicate relationship upon shifting sands. There is merit in extending to the whole field of labor relations Mr. Justice Douglas' admonition that "the uncertainty as to which board is master and how long it will remain such can be as disruptive of peace between various industrial factions as actual competition between two boards for supremacy."\textsuperscript{27}

Finally, the division of public authority over industrial relations would seem likely to discourage the development of an integrated public labor policy. This is an important consideration not only as it bears upon the development of administrative policies but also from the standpoint of further legislation. The problems which arise during employee organization, the selection of a bargaining representative, the negotiation of a series of collective agreements and their day-to-day administration are all phases of a

\textsuperscript{26}\textit{Ibid.}, 631.

\textsuperscript{27}LaCrosse Tel. Corp. v. Wisconsin Employment Relations Bd., 336 U. S. 18, 26 (1949).
continuous human relationship. The reader need not consider how far, or into what channels, government should seek to shape its development. Government intervention at one point inevitably affects the whole course of events. Where the Federal Government has enacted what was intended to be a comprehensive program for dealing with such problems, it should be encouraged to retain the responsibility and the states should be excluded from the entire area except where Congress has explicitly authorized them to intervene.

All that the author has been trying to do in this chapter thus far is to show that the intent of Congress cannot always be easily perceived and that even if it is seen it does not always mean as much as some judges try to make it mean. However, there certainly is some evidence in the legislative history which shows what Congress intended to do in enacting the NLRA. Not all cases have been decided on the "bane or blessing" theory of Mr. Powell. For example, the writer believes there is much evidence in the legislative history of the act to show that Congress devoted a great amount of attention to the question whether and to what extent its legislation should supersede state law. A suggestion was made during the course of debate in the House that the act should contain a provision preserving the constitutionality of state laws in the field of labor relations. But when Congressman Case of South Dakota replied "that to preserve 'State rights' in this field would nullify much of the
the suggestion was immediately abandoned and was never brought to a vote.

This and other portions of the legislative history, which were mentioned in Chapter IV, the writer believes manifest at least some evidence of congressional intent. Thus, there are some intentions of Congress clearly manifested as to what Congress expected the states to do in the field of labor relations, and there are others, as the statement of Congressman Case above, which impel the courts to presume pre-emption where Congress is silent. This does not mean that the "bane or blessing" theory of Mr. Powell is never to be used. On the contrary, there are many instances where the intent of Congress is not clear and one will have to turn to see if the state regulation is good or evil. But these are only in specific concrete cases. As far as the whole atmosphere of the NLRA is concerned, the author believes that there is evidence of congressional intent which outlaws the states' freedom of action in the labor relations field. However, there are many judges who disagree with the author in their decisions, so now let us turn to the relevant cases to ascertain their reasoning and critically review their assumptions.

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CHAPTER VI
HISTORICAL ANALYSIS OF RELEVANT CASES

We now come to the most important chapter of this thesis - the analysis of pertinent court decisions dealing with our subject matter. Up to now the author has attempted to give a foundation, partly theoretical, and partly factual, for a better understanding of the cases we shall now analyze. In this chapter the reader will see just how far a state may go in dealing with labor relations. In other words, what limits are placed on state court jurisdiction in the field of labor relations. In analyzing these court decisions one shall see two opposing views clash. On the one hand, the view of Mr. Justice Frankfurter,29 which states that the states must be permitted to apply their local policies in the absence of a clear manifestation of the intent of Congress to pre-empt the field, if the state law is not inconsistent; on the other side, the view of Professor Archibald Cox of Harvard Law School,30 which


See also Alyoma Plywood & Veneer Co. v. Wisconsin E.R.B. 336 U. S. 301 (1949).

upholds the argument that state regulation must be excluded in any field of activity where Congress has shown its intention to regulate unless there is an affirmative showing that the way was kept open for state regulation. The reader shall soon see that some judges follow their colleague, Justice Frankfurter, that others follow Mr. Cox, and that still others follow Mr. Thomas Powell's "bane or blessing" theory. The latter choice does not always stand alone but usually is the reason why a judge chooses one of the first two alternatives. However, it is also possible that a judge will limit state regulation merely because it is more of a "bane" than a "blessing", regardless of his feeling on the two opposing views of Justice Frankfurter and Professor Cox.

Before taking up the cases, the writer thinks it wise to note a few important points which make up the environment that surrounds these court decisions. To begin with it must be realized that this problem, which the author will attempt to solve, is not a struggle between state and federal government alone. It is true that the age-old problem of supremacy between the federal government and the state governments is very much a part of the problem. But what is more important to the author's mind is the danger of industrial instability which will arise if this problem is not met and solved. In other words, the relationship between the federal and state governments is not the only thing at stake in this problem, but also the relationship between manage-
ment and labor. It is only too clear that the industrial relations problem as it stands today is not a good one. There is still much bitterness felt between the parties. Therefore, the conflict of federal or state jurisdiction must be cleared up soon or chaos will result, not only within the government but also between management and labor. In fact, it naturally follows that if there is industrial instability, our capitalistic system is in danger and, therefore, our government of democracy.

It is in this light, the writer believes, that these cases should be read with the avowed purpose of trying to achieve simplicity and certainty. Even without actual conflict, uncertainty as to which governmental agency - federal, or state - was master would produce industrial instability. Therefore, the writer thinks that it is very important to have a definite and concrete rule which works tolerably well in the majority of cases, rather than to have to walk on shifting sands by deciding the rule on a case to case basis. It is from this point of view that the writer believes that the cases should be analyzed.

For convenience, the writer shall discuss these cases in three parts - those cases which came before the Garner case, the Garner case itself, and those decisions which came after the Garner case. The reason for this is that the Garner case is one of the most important and far-reaching decisions in the field of labor relations handed down by the Supreme Court for many years. In discussing the problem in this way, the reader will see what the law was up until the time of that important decision and whether or not the
Garner case is still the law today. The author will now review the leading cases and see how the courts regard these powers granted to the National Labor Relations Board, and whether such powers exclude the states from acting, and if so, to what extent, keeping in mind all the time what has been said in the previous chapters.

I BEFORE THE GARNER CASE

The first case which deals with our subject matter for all practical purposes, is the Allen-Bradley case. This case shows clearly that the Supreme Court, in its attempt to adjust the boundary between federal and state power to regulate labor-management relations, was for a time of the opinion that unless the state law directly conflicted with the federal law, state regulation was not precluded. The facts of this case were as follows: The Wisconsin Board found that the union had engaged in mass picketing, threatening employees, picketing their domiciles and obstructing factory entrances and the free use of the streets; conduct which was an unfair labor practice under the Wisconsin Employment Peace Act. The Wisconsin Board ordered the union to cease and desist from this conduct, although the activities of the employer undoubtedly affected interstate commerce. The question came before the United States Supreme Court as to whether the enactment of the NLRA

excluded regulation of such activity by the State of Wisconsin. The Supreme Court said it was not necessary to treat the state act as a whole, but only those provisions which authorize the State Board to enter such orders, since there was a broad severability clause.

The Supreme Court held:

In sum, we cannot say that the mere enactment of the NLRA without more excluded state regulation of the type which Wisconsin has exercised in this case. It has not been shown that any employee was deprived of rights protected or granted by the federal act or that the status of any of them under the federal act was impaired. Indeed if the portions of the state act here invoked are invalid because they conflict with the federal act, then so long as the federal act is on the books it is difficult to see how any state could under any circumstances regulate picketing or disorder growing out of labor disputes of companies whose business affects interstate commerce. 32

Thus, the Allen-Bradley case recognized the continuance of the traditional police powers of the states to prevent such union conduct as mass picketing, threats or violence. 33

However, a state may not use the powers left to its control to deprive employees of the rights guaranteed them by the federal act. In other words,

32 Ibid., 315 U. S. 748 (1942).

the state may not use its traditional powers, if in so doing it obstructs full
effectuation of the federal policy. This was the general rule laid down in
Thomas v. Collins\textsuperscript{34} and Hill v. Florida\textsuperscript{35} In the latter case the United
States Supreme Court held invalid a Florida statute, where the state pre-
scribed forfeiture of collective bargaining rights as the penalty for non-com-
pliance with the state requirements of having a union and its agent procure a
state license as a requirement or condition of bargaining for its members.
The Court reached the conclusion that the state statute conflicted with Sec-
tion 7 of the NLRA because the Florida statute "impeded the free exercise of
a federally established right to collective bargaining." The Court maintained
that to uphold the state statute would substitute the state of Florida's judg-
ment for the workers' judgment and would thus deprive them of their right,
protected by the federal act, of freely choosing their bargaining representa-
tives. Again, in the Collins case, the United States Supreme Court declared
a Texas statute, requiring labor organizers to register with and procure an
organizer's card from a designated state official before soliciting member-
ship in a labor union, invalid as being in conflict with federal jurisdiction and

\textsuperscript{34} Thomas v. Collins, 323 U. S. 516 (1944).

\textsuperscript{35} Hill v. Florida, 325 U. S. 538 (1945).
the NLRA which gives Congress the power to regulate labor unions in their relation to the collective bargaining process.

The next case involving the jurisdictional issue was the Bethlehem Steel Co. case. This case rejected the "concurrent" power or jurisdiction theory of the Allen-Bradley case. In this case, foremen, employees of the Company, finding that the NLRA frustrated their desire for official certification as a bargaining unit with the right to require the employer to bargain, filed a petition with the New York LRB, which proceeded to set up a bargaining unit comprising the foremen. On appeal the New York Court of Appeals upheld the state action and from there it was brought to the United States Supreme Court which stated:

"... However, the powers of the state may not so deal with matters left to its control as to stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

"If the two boards attempt to exercise a concurrent jurisdiction to decide the appropriate unit of representation, action by one necessarily denies the discretion of the other. The second to act either must follow the first, which would make its action useless and vain, or depart from it, which would produce a mischievous conflict. The State argues for a

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37 This familiar rule is that where the actual incidence of federal regulation depends upon action by an administrative agency and the agency has not acted, the state may regulate the same subject matter until the federal agency intervenes.
rule that would enable it to act until the federal board has acted in the same case. But we do not think that a case by case test of federal supremacy is permissible here. The federal board has jurisdiction of the industry in which these particular employees are engaged and has asserted control of their labor relations in general. 38

Thus, this case stands for the principle that where the NLRB has asserted general jurisdiction over unions of foremen employed in industries subject to the NLRA, but has refused to certify such unions as collective bargaining representatives on the ground that to do so at the time would obstruct rather than further effectuation of the purpose of the Act, certification of such unions by the New York State Labor Relations Board under a state Act similar to the National Act is invalid as in conflict with the NLRA and the "Commerce Clause" of the Federal Constitution.

Although, on its face, the case seems to throw out the "concurrent" jurisdiction theory, a closer analysis of the decision might give us another conclusion. Even though the Bethlehem ruling made it clear that the states were not always free to act until the NLRB assumed jurisdiction over the same controversy, the opinion left the rationale of the decision uncertain. The failure of the NLRB to decide the question of representation involving Bethlehem foremen was clearly the result of a national policy opposed to the certification of bargaining representatives for supervisory employees. It could

plausibly be contended, therefore, that the Bethlehem case held only that the federal policy must control wherever there was direct conflict between the policies of state and federal agencies having concurrent jurisdiction and that except in cases of direct conflict (as there was in this case), the states could continue to assert jurisdiction until the federal power is exercised or jurisdiction thereto is taken as to particular employees. The writer believes that this latter contention is the correct one to be applied to the Bethlehem decision.

However, no matter what point of view one takes of the Bethlehem case, the issue was decided in the LaCrosse case,\textsuperscript{39} which arose the following year. LaCrosse was a small telephone company which handled interstate calls. It had never been before the NLRB, but the NLRB had consistently exercised jurisdiction over similar companies. Prior to 1945, LaCrosse voluntarily recognized the International Brotherhood of Electrical Workers as the collective bargaining representative of its plant and traffic department employees. Later, the Telephone Guild instituted a representation proceeding before the Wisconsin Employment Relations Board seeking certification as the representative of the same employees, plus the office employees. After an election the Wisconsin Board determined that the plant

and traffic department employees constituted an appropriate bargaining unit whose representative was the Telephone Guild. The office employees were placed in a separate unit but chose the same representative. The NLRB had not undertaken to determine the appropriate bargaining unit.

There was no conflict between this state determination and any federal rule. If the case had come before it, the NLRB, so far as appears, would have reached the same conclusion as the Wisconsin board. Yet the opportunities for conflict and confusion were large. Representation cases turn primarily on determinations of administrative policy concerning the time for elections, the composition of the bargaining unit and the eligibility of voters. Quite apart from any collision between the formal orders of two boards, conflicts might arise in the administrative settlement of cases without a formal ruling. The intervention of the state agency, even though it could be formally reversed by a subsequent NLRB decision, might have the practical effect of establishing a pattern of representation inconsistent with federal policy. Even without conflict, as has been mentioned before, uncertainty as to which board was master might produce industrial instability. For these reasons the Supreme Court concluded that, "the national Board had jurisdiction of the industry in which those particular employees were engaged and had asserted control of their labor relations in general . . . Since the employees in question were subject to regulation by the National Board, we thought the sit-
uation too fraught with potential conflict to permit the intrusion of the state agency, even though the National Board had not acted in the particular cases before us. . . . Those considerations control the present case."40 Thus the "potential conflict" theory was established in the field of labor relations.

Therefore, what the Bethlehem case left unsolved, or at least ambiguous, the LaCrosse case solved and cleared up the ambiguity. For the Court decided in this case that whether the conflict be direct, indirect, or even if there is no conflict at all, if the employer is subject to regulation by the NLRB, the states will not be allowed to interfere for fear of "potential conflict." In other words, the LaCrosse decision holds that there does not have to be a head-on collision between Federal and State directives, for there to be an illegitimate intrusion into the jurisdiction of the national government. The case further held that potential conflicts are enough to keep the states out of the field labor relations. Thus, the LaCrosse case makes it plain that the states may not deal with questions of representation in industries over which the NLRB customarily exercises jurisdiction, even though the NLRB has not actually assumed jurisdiction in the specific case.

However, it was not long before the United States Supreme Court retreated from its position of "potential conflict" bars state action. For it

was only a few months later that the Court decided the Briggs-Stratton case. Briggs-Stratton was engaged in the production of goods for interstate commerce. During contract negotiation, which became deadlocked, the union called twenty-six unannounced meetings during working hours, all within a space of four months. These meetings during working hours naturally caused work stoppages which interfered with production. No demands were made on the company in connection with the stoppages. The union's purpose was to impose hardships on the company greater than the pressure of a strike. Briggs-Stratton appealed to the Wisconsin ERB which ordered the union to cease and desist from the specific misconduct in which it had engaged. On certiorari the Supreme Court held, five to four, that the prohibitions in Section 8(b) against certain kinds of strikes did not pre-empt the field so as to prevent Wisconsin from dealing with the conduct of the union even though labor relations at the plant were subject in other respects to the jurisdiction of the NLRB. The Court continued by saying:

"The substantial issue is whether Congress has protected the union conduct which the state has forbidden, and hence the state legislation must yield. . . Congress has not seen fit in either (the NLRA or the LMRA) to declare either a general policy or to state specific rules as to their effects on state regulations over which the several states traditionally have exercised control . . . . However, as to coercive tactics in

labor controversies, we have said of the NLRA what is equally true of the LMRA of 1947, that 'Congress designedly left open an area for state control' and that 'the intention of Congress to exclude the states from exercising their police power must be clearly manifested.' "42

The Court next discussed the effect of the two labor acts, saying,

"While the Federal Board is empowered to forbid a strike, when and because its purpose is one that the Federal Act made illegal, it has been given no power to forbid one because its method is illegal -- even if the illegality were to consist of actual or threatened violence to persons or destruction of property. Policing of such conduct is left wholly to the states. In this case there was also evidence of considerable injury to property and intimidation of other employees by threats and no one questions the states' power to police coercion by those methods." 43

The Court, through Mr. Justice Jackson, observed further,

"It seems to us clear that this case falls within the rule announced in Allen-Bradley that the state may police these strike activities as it could police strike activities there, because 'Congress has not made such employee or union conduct as is involved in this case subject to regulation by the Federal Board.' There is no existing or possible conflict over overlapping between the authority of the federal and state Boards, because the federal Board has not authority either to investigate, approve or forbid the union conduct in question. This conduct is governable by the state or it is entirely ungoverned." 44

42 Ibid., 336 U. S. 252.
43 Ibid., 336 U. S. 253.
44 Ibid., 336 U. S. 253.
Then in summing up the Court concluded,

"We find no basis for denying to Wisconsin the power, in governing her internal affairs to regulate a cause of conduct neither made a right under federal law nor a violation of it and which has the coercive effect obvious in this device." 45

Although this case does show the retreat by the Supreme Court from its decision in the Bethlehem and LaCrosse cases, three points should be noted. In reading over this decision, unless we keep in mind what the Wisconsin ERB was trying to do, the final remark of the court noted above may mislead the reader. The employer who was being injured by the union's unannounced stoppages, which took place without the employees leaving the premises, filed charges with the Wisconsin Board that the union was engaging in unfair labor practices under the Wisconsin Act. The Wisconsin Board processed these charges administratively, and ordered the union to desist. This was an administrative process comparable to that with which the National Board is charged. It was only the power to process the unfair labor practice which was challenged here, and no other power or authority of the state, despite the broad language of the decision. Another important point to be noted in relation to this case is that, to the author's mind, the majority of the court was not absolutely accurate. The writer believes that the Court's rationale

is, in certain instances, vitiated by section 8(b)(1)(A) of the Taft-Hartley Act which was not mentioned by the Court. 46 This section clearly gives the NLRB jurisdiction over at least some strike methods. It insures that certain strikes must be conducted peaceably by persuasion and propaganda and not by physical force, or threats of force, or of economic reprisal, such as physical intimidation of fellow employees by violent striking, mass picketing and similar organized coercion. Thus, this section was clearly aimed at the "means" and not the "ends" of a strike. Therefore, when the court, speaking about the power of the Federal Board, said: "it has no power to forbid one because its method is illegal, but only to forbid if its ends is illegal", was not absolutely correct. A third point to be noted is that potentiality of conflict exists here, as well as in the prohibited activity cases, as a reason for denying state jurisdiction; the line dividing activities which are protected by section 7 from those which are unprotected is sufficiently shadowy to invite difference of opinion. But no matter what one thinks of this decision, the Court by dictum swung the pendulum back to state control as long as the control was not in direct conflict with federal policy.

46 Section 8(b)(1)(A) prohibits certain union tactics but is limited to such tactics directed against employees and thus may not have been considered as applicable to the facts of the Briggs-Stratton case.
The resurrection of the "concurrent" theory of state regulation was extended even further by the Algoma case,\(^{47}\) which was decided a month later. This was the first unfair labor practice case to raise the issue of supersession. In this case the Wisconsin Employment Relations Board had issued an order requiring Algoma Plywood & Veneer Co., an employer subject to the NLRA, to cease giving effect to a union security contract which had not been approved by two-thirds of the employees, as required by state law. The execution and application of the agreement were admittedly employer unfair labor practices under the Wisconsin law, but not under the NLRA. The employer contended that the federal statute displaced the state legislation. The Court held, however, that enforcement of the Wisconsin statute was not precluded by the NLRA either in its original form or as amended by the Taft-Hartley law. The rationale of the Court's decision was that the states may regulate the practices of employers which affect interstate commerce unless the state regulation is inconsistent with the federal law.

Part of the company's case was predicated upon Section 8(3) of the original Wagner Act, which was still in force when the events in question took place although not at the time of the Supreme Court decision. Section 8(3) prohibited discrimination against employees because of their union member-

\(^{47}\) Algoma Plywood & Veneer Co. v. Wisconsin ERB, 336 U. S. 301 (1949).
ship or their failure to belong to a union, but a proviso declared that "nothing in this Act, or in any other statute of the United States" should prohibit discharges pursuant to a union security contract with a union representing a majority of the employees in the bargaining unit. The opinion of the Court did not expressly consider whether Congress pre-empted the field of discriminatory discharges affecting interstate commerce by the enactment of this legislation. Mr. Justice Frankfurter, who delivered the opinion, appears to have assumed that the power of Wisconsin to regulate such labor practices turned exclusively upon the question whether the state regulation was consistent with national policy or curtailed the exercise of a federal right to enter into union security agreements. From a review of the legislative history he concluded that the proviso merely disclaimed any national policy hostile to union agreements, leaving their status to be determined by the states. The same assumption appears in the Justice's discussion of the Taft-Hartley amendments, for he pitched this branch of the case upon an inquiry into whether the amended Act expressed a policy inconsistent with the Wisconsin law. Again, in answering the company's argument that an earlier NLRB certification of the union as the representative of its employees ousted the


49 Ibid, 336 U. S. 313.
state of jurisdiction over its labor relations, the Justice declared:

"Since the enumeration by the Wagner Act of unfair labor practices over which the National Board has exclusive jurisdiction does not prevent the States from enforcing their own policies in matters not governed by the federal law, such freedom of action by a State cannot be lost because the National Board has once held an election under the Wagner Act. The character of activities left to State regulation is not changed by the fact of certification. Certification, it is true, makes clear that the employer and the union are subject to federal law, but that is not disputed. So far as the relationship of State and national power is concerned, certification amounts to no more than an assertion that as to this employer the State shall not impose a policy inconsistent with national policy. . . or the National Board's interpretation of that policy. . ."50

And he classified both the Bethlehem and LaCrosse cases as instances of inconsistency.

However, it was not long before the pendulum swung the other way, and the court reasserted its rejection of concurrent jurisdiction by the states, and resurrected federal supremacy over the field of labor relations. A year had not elapsed when the Plankinton case 51 came before the United States Supreme Court.

On February 20, 1945, the National War Labor Board had issued a directive requiring Plankinton and the representative of its employees to enter in-

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50 Ibid. 336 U. S. 314.

to a contract containing a maintenance of membership clause applicable to employees who were union members on March 9, 1945. On February 20, Stokes was a member of the union, but he resigned during the escape period. Nevertheless, the employer discharged Stokes upon the union's demand. The Wisconsin Board concluded that both the employer and the union were guilty of unfair labor practices under the Wisconsin Employment Peace Act.

Both respondents challenged the jurisdiction of the state board on the ground that the company was engaged in interstate commerce within the NLRA. The Wisconsin Supreme Court held that the state board had jurisdiction. After argument on the merits, the Supreme Court of the United States reversed per curiam, without opinion, the decision of the Wisconsin Supreme Court, citing the Bethlehem and LaCrosse cases.

In the absence of an opinion, one hesitates to draw firm inferences from the Plankinton decision. It would seem to represent a sharp departure from the Algoma assumption that the states may regulate the practices of employees which affect interstate commerce unless the state regulation is inconsistent with the federal law. There was no appreciable danger of conflict in the Plankinton case. Theoretically, the NLRB might have made different findings of fact than the Wisconsin Board and, therefore, might have reached a different conclusion. The risk of "potential conflict", however, is so famil-
iar an aspect of our legal system and is also a matter of such small moment that the ruling can hardly be explained on that ground. Conceivably, there might be minor discrepancies between the two boards in fashioning a remedy once the unfair labor practice was proved. Reinstatement with back pay, however, is the normal remedy in most jurisdictions. Possible variations in ruling upon alleged grounds for denying reinstatement or in computing back pay are trivial matters. Nor would it impose serious hardship upon the persons subject to regulation to require them to deal with two sets of officials. The true explanation of the Plankinton decision appears to be that the Court was now willing to go one step further than the "potential conflict" theory of the LaCrosse decision, and was prepared to apply in the labor field the long line of precedents holding that when the federal power to regulate interstate commerce has been exerted, state laws have no application. They cannot be applied "in coincidence with, as complementary to or as in opposition to, federal enactments which disclose the intention of Congress to enter a field of regulation that is within its jurisdiction."52

However, even if the Plankinton decision cannot be said to have held to such a strong conclusion, the O'Brien case,53 decided in the same year,


certainly took a step in this direction. A Michigan strike control law required employees desiring to strike to file certain notices with the State Board of Mediation and further provided that no strike should be authorized unless a majority of the employees in the bargaining unit voted in favor of such action. The United Automobile Workers struck against Chrysler Corporation without complying with the statute. To enjoin a possible prosecution, UAW brought a bill for an injunction. The Supreme Court of Michigan held that the statute was valid and applicable to the union even though Chrysler employees were covered by the NLRA. On appeal, the Supreme Court of the United States reversed the judgment, holding that the Michigan statute could not constitutionally be applied under these circumstances to employees whose activities affected interstate commerce.

The opinion of the Court, which was delivered by Mr. Chief Justice Vinson, draws upon two lines of analysis. First, the state law attempted to limit a federal right, since in the original NLRA "Congress safeguarded the exercise by employees of 'concerted activities' and expressly recognized the

54Michigan Comp. Laws §423.1 (1948). The difference between the federal and state laws was the following: (1) different period for the giving of notice, e.g. state - 20 days; federal - 60 days; (2) no majority vote for strikes in the federal law; (3) unit to be voted on would be confined within the state; (no comparable provision in the federal law).
right to strike."\textsuperscript{55} Second, Congress itself had qualified and regulated that right in the 1947 Act. Thus, Congress "occupied this field and closed it to state regulation."\textsuperscript{56} The same or parallel reasoning is applicable to any peaceful strike arising out of grievances or contract negotiations. With small modifications it could be invoked in the case of strikes for other objectives. The conclusion to which the decision points — that the Court is about to hold that the Federal Government has excluded the states from regulating strikes, picketing and other "concerted activities" in industries affecting commerce — is also supported by the closing paragraph in the opinion in which Mr. Chief Justice Vinson answered the contention of the state authorities that their action was sustained by the Briggs-Stratton case.

"Clearly, we reaffirmed the principle that if 'Congress has protected the union conduct which the state has forbidden the state legislation must yield.' That principle is controlling here."\textsuperscript{57}

Nevertheless, there are other passages in the O'Brien opinion making the decision susceptible of a narrower interpretation. The Chief Justice was

\textsuperscript{55}Ibid, 339 U. S. 457.

\textsuperscript{56}Ibid.

\textsuperscript{57}Ibid, 339 U. S. 459.
careful to state that "even if some state regulation in this area could be sustained, the particular statute before us could not stand." The Michigan statute prescribed different periods for the giving of notices than the federal law. Congress had considered proposals to take a vote before permitting a strike and rejected them on their merits. The unit in which the state vote was to be taken would have to be confined within the borders of Michigan whereas the NLRB had certified UAW for a unit of Chrysler employees employed in plants in California and Indiana as well as Michigan. The Chief Justice continued by saying, "A state statute so at war with the federal law cannot survive." If a majority of the Court should subsequently abandon the basic philosophy underlying other parts of the opinion, these factors would facilitate distinguishing the O'Brien case.

However, in the light of the present authorities, two conclusions seem warranted. First, the right to engage in "concerted activities" is a federal right which the states may not abridge. Second, NLRA Section 8(b) also imposes restraints upon state regulation by pre-empting part, but not all of the field of employee activities. On principle, the states would seem to be as


powerless to restrict the federal right or regulate conduct in the pre-empted area by the familiar labor injunction as they are by statute or administrative order. Therefore, the conclusion that we should draw from the O'Brien case, and still be on safe ground is that where a strike or any "concerted activity" is peaceful and lawful it is within the federal jurisdiction. It is only when it becomes unlawful and endangers the general welfare that a state may step in with its police power, the latter falling outside the protection of the federal Act.

The swing of the pendulum was kept moving by the Bus Employees case, 60 which was decided the following year. The facts of this case were similar to the O'Brien case. The union and employees in the former case, however, were in the public utility industry and were ostensibly covered by a state anti-strike compulsory arbitration statute. In other words, the state act required that collective bargaining continue until an "impasse" was reached and then made provision for compulsory arbitration, whereas the federal Act required both employer and the union to continue to bargain collectively even though a strike may actually be in progress. The Court found invalid the Public Utility Anti-Strike Act, as applied to a local transit com-

pany and a local gas company, whose activities affect interstate commerce.

The Court said,

"It is true that this is a local public utility and not a national manufacturing organization but Congress has made no distinction but regulates labor relations to the full extent. Federal labor legislation, encompassing as it does all industries 'affecting commerce', applies to a privately owned public utility whose business and activities are carried on wholly within a single state."\(^{61}\)

The Court then concluded that,

"It would be sufficient to state that the Wisconsin Act, in forbidding peaceful strikes for higher wages in industries covered by the Federal Act has forbidden the exercise of rights protected by Section 7 of the Federal Act."\(^{62}\)

The O'Brien and Bus Employees cases relate to what the Court felt were unmistakable overlappings of the state laws with the federal Act, and hence concluded that the state laws must yield. These two cases, along with the Plankinton case, stand for the proposition that where there is a federally protected right, a state may not act in any way to destroy or detract from this federally protected right. And if the state does act, its action will be held null and void.

Therefore, the Plankinton, O'Brien and Bus Employees decisions are ex-


\(^{62}\)Ibid, 340 U. S. 398.
tensions of the "potential conflict" rule of the LaCrosse case. And in the light of the O'Brien and Bus Employees cases, we need no "potential conflict." The fact that Congress has seen fit to "protect" certain rights and "prohibit" others is enough on its face to do away with state jurisdiction.

Thus, the age-old "pre-emption doctrine" which we discussed in one of the earlier chapters comes to the fore -- supersEDURE of state legislative power in a regulated field is necessary to preserve the integrity of Congress' judgment that the rights and remedies which it provides are sufficient. These cases stand for the general principle that the desirability of having a single arbiter of labor disputes outweighs the advantage of the speedier settlement of disputes offered by state boards.

This was the atmosphere setting before the Garner case. Although there were still many dubious areas in the field of labor relations concerning the jurisdictional issue, and the oscillating of the Supreme Court was not an uncommon occurrence, the pendulum had definitely swung to the side of federal supremacy.

II THE GARNER CASE 63

In this case the law as to just what jurisdiction the states will be allowed

63 Garner v. L.B. of T. Local Union No. 778, 346 U.S. 485 (1953)
in cases involving labor relations which affect interstate commerce was declared. This case dealt directly with the issue of state versus federal jurisdiction in labor disputes.

The facts of this case are relatively simple. The company was an interstate carrier which employed twenty-four men, four of whom were members of Teamsters Local No. 776. The company had no objection to the rest becoming members. No controversy, strike or labor dispute was in progress. The defendant union peacefully picketed in order to gain union membership for the non-members. The company sought an injunction against this picketing by the defendant union in the state court, for the reason that the picketing reduced their business as much as ninety-five per cent. The lower court granted the restraining order.

On appeal to the Supreme Court of Pennsylvania, the restraining order was dissolved, the court stating, "In our opinion such provisions for a comprehensive remedy precluded any state action by way of a different or additional remedy for the correction of the identical grievance." The court, of course, was referring to remedies provided by the National Labor Relations Act, as amended by the Labor Management Relations Act of 1947.


The purpose of the picketing was thought to be to coerce the employer, through a reduction of his profits by picketing, to in turn coerce his employees into joining the defendant union. This is an unfair labor practice under the federal Act, which provides:

"It shall be an unfair labor practice for an employer . . . (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."\(^{66}\)

Any such conduct amounting to an unfair labor practice is within the jurisdiction of the Labor Board.\(^{67}\)

On appeal to the Supreme Court of the United States, the Pennsylvania high court was sustained. It was pointed out by the Court that this was not a case of injurious conduct which the Board was without express power to prevent, and which, if it could not be prevented by the state, could not be prevented at all. Similarly, this was not, as the Court pointed out, a case of "mass picketing, threatening of employees, obstructing streets and highways, or picketing homes. We have held that the state still may exercise its historic powers over such traditionally local matters as public safety and order and

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\(^{67}\)Ibid. §160(j)
the use of streets and highways."

The Garner case involved a type of conduct which was definitely within the jurisdiction of the Board, and there were no extenuating circumstances which would remove it from such jurisdiction.

Since the Board has the power and authority to take in hand such a controversy, the issue became whether the State, through its courts, could judge the same controversy and extend its own form of relief.

The main holding of the case is as follows:

Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law. The same reasoning which prohibits federal courts from intervening in such cases, except by way of review or on application of the federal Board, precludes state courts from doing so. And the reasons for excluding state administrative bodies from assuming control of matters expressly placed within the competence of the federal Board

also excludes state courts from like action. 69

The Court implied further in its decision that if Congress prohibits certain things in a category, then the rest of those things are to be left free and not to be interfered with. For the court stated, "The NLRA only prohibits some picketing. Now, 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." 70 Thus, the doctrine of "pre-emption" comes to the fore once again. Therefore, it is not the possibility of conflict which distrub this court, but the fact that once Congress has protected certain rights and set up remedies in order that these rights might be so protected, no other agency in our judicial system should be allowed to set up either new or different remedies, nor similar remedies. In other words, what the Court is saying in its decision is that if Congress provides that the punishment for violating an Act of Congress shall be a certain fine, and if a state legislature then provides for an additional fine or imprisonment for the same violation, the state law, to be sure, would not prevent the federal law from being carried into execution but surely the will of Congress is, nevertheless, thwarted

70 Ibid, 346 U. S. 491
and opposed. This is particularly true in the field of labor relations, where the choice of remedy and forum has been no less a burning legislative issue than the choice of a substantive rule, and where the ultimate pattern of the federal legislation reflects the best compromise obtainable by opposing forces. Thus, Congress' decision as to what the rights of the parties should be left no room for the survival of causes of action, either private or public, based on state law. Consequently, under pre-emption standards, the propriety of state court relief does not turn on whether the claim is predicated upon state law or upon the national act. The test, rather, is whether the transaction involved is in the "field" covered by the national act. If so, the rights to which it gives rise flow exclusively from the federal law; substantive rights as well as remedies flowing from state authority are superseded.

The remainder of the case was devoted to overruling the argument that the Board remedy was public, while the state court remedy was private, and that thus the two were not mutually exclusive remedies. The Court cast this argument aside by denying a distinction between public and private rights under the NLRA. The Court merely said, "When federal power constitutionally is exerted for the protection of public or private interests, or both, it becomes the supreme law of the land and cannot be curtailed, circumvented or extended by a state procedure merely because it will apply some doctrine
of private right. 71 Then as if to completely ignore the argument, the Court mentioned that this is arguing beside the point since "the conflict lies in remedies, not rights."

And the Court concluded that since the petitioner could have presented his grievance to the National Labor Relations Board, and did not, his grievance was held not to be subject to litigation in the state courts.

The Garner case seems to lay down the law concerning federal and state jurisdiction in the field of industrial relations affecting interstate commerce. By virtue of the "Supremacy Clause" in the Constitution, any state law which either duplicates, complements or supplements Congressional regulation must fall. Also when Congress establishes rights, the states will not be allowed to detract or destroy such federally "protected" rights, nor will the state be allowed to permit actions which Congress has seen fit to "prohibit". Therefore, the state will not be allowed to cause an undue risk of interference with basic federal policies concerning industrial relations. On the other hand, since the national Act pre-empts only the field of labor relations law and policy, the states are not precluded from applying to unions, employees or employers the same general legal and policy standards which are applicable to citizens generally. Violence by unions or employees, and unlawful seizure of property, for example, are not placed beyond the power of the

71 Ibid. 346 U. S. 493.
states to control merely because they occur in a labor relations context. However, it must be understood, that if easy evasion of the Congressional pre-emption policy is to be avoided, state regulation, as has been mentioned above, which, in fact, duplicates or complements the protection accorded by the federal Act to the rights which it guarantees cannot be permitted to stand, no matter how differently conceived or oriented the state policy may be. And, of course, if application of any state law or policy involves forfeiture of rights guaranteed by the national Act, or obstructs effectuation of the national policy, the state law cannot be given effect.

Thus, the Garner decision was hailed as the great emancipating decision — emancipating labor unions from having to try their cases in state courts where there was all too often little sympathy shown for the union cause. Or, at least, sympathy for the way in which the labor cause was manifested.

III AFTER THE GARNER CASE

The first pertinent case subsequent to the Garner case was Building Trades Council v. Kinard Construction Co. 72 In this case the Supreme Court of the United States reversed a judgment by the Alabama Supreme Court.

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Court which granted injunctive relief against picketing which was an unfair labor practice under the National Labor Relations Act and which affected commerce. This was done on the basis of the holding in the Garner case. It was also held that it was unnecessary to decide whether or not the state court would have jurisdiction to grant relief in such case if the National Labor Relations Board should decline to exercise its jurisdiction, since there was no clear showing that application for relief had been made or that it would have been futile to make such application to the NLRB.

This latter issue has never been decided by the United States Supreme Court. As a result all we have to rely on is conjecture. From a reading of the past cases the "potential conflict" argument, to be sure, would be advanced to bar state jurisdiction, for the NLRB, having discovered that the field of labor regulation is not one to which mathematical formulae can be applied successfully, has departed from its jurisdictional standard when to do so would better effectuate the policy of the Act. Thus, "potential conflict" becomes a reality. But Congress has plainly shown an intent that certain activities should be regulated, and if the states do not step in when the NLRB refuses to do so, they will not be regulated at all, and a "no-man's-land" comes into being in the field of interstate labor relations. This issue, to be sure, is a dilemma which should be cleared up by the Supreme Court as soon as possible.
The next case to come to the Supreme Court was the *Capital Service* case\(^\text{73}\), which involved a completely new issue. The issue of this case was the following: "In view of the fact that exclusive jurisdiction over the subject matter was vested in the National Labor Relations Board could the Federal District Court, on application of the Board, enjoin petitioners from enforcing an injunction already obtained from the State Court."\(^\text{74}\)

In the state court, Capital Service had obtained a restraining order restraining the defendant union from peacefully picketing, pursuant to a labor dispute between the parties. An unfair labor practice charge had been filed with the Board, and the purpose of the restraining order was to maintain the status quo pending the outcome of the complaint.

The Board had then gone into federal court seeking to restrain Capital Service from enforcing the restraining order obtained by Capital Service in the state court.

The Federal Circuit Court of Appeals had stated, "The boycott of the product of Service's bakers to restrain their opposition to and to compel their unionization is prohibited by Section 8(b)(1) of the Taft-Hartley Act. We think Congress has pre-empted this function to the National Labor Rela-

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tions Board and that the state court is without jurisdiction to issue such an injunction." 75

The Supreme Court of the United States granted certiorari in this case and held: "... Where Congress, acting within its constitutional authority, has vested a federal agency with exclusive jurisdiction over a subject matter and the intrusion of a state would result in conflict of functions, the federal court may enjoin the state proceeding in order to preserve the federal right." 76

The Court concluded that "if the state court decree were to stand, the Federal District Court would be limited in the action it might take, to exercise its jurisdiction freely and fully it must first remove the state decree. When it did so, it acted 'where necessary in aid of its jurisdiction.'" 77

Thus by the Capital Service and Kinard cases, the principle of the Garner case was extended and fortified. Also a significant point is that the Alabama Supreme Court, which in the past has always upheld state jurisdiction in labor relations and has turned down the "potential conflict" theory, decid-

75 NLRB v. Capital Service, 204 F. 2d 848, 850 (9th Cir. 1953).
76 Ibid, 347 U. S. 503.
77 Ibid, 347 U. S. 505.
ed in the Ledbetter case, \(^78\) that the state court was without jurisdiction to enjoin picketing which amounted to unfair labor practices under the federal Act. When a labor dispute affects interstate commerce, the Act vests exclusive jurisdiction to regulate such disputes in the federal Board, held the Court. \(^79\) Thus, it would seem that the law as laid down by the Garner case was well founded and closely adhered to. However, the Supreme Court of the United States still had to deal with the Laburnum case \(^80\), which took away some of the "steam" from the Garner decision.

According to the Laburnum decision, the NLRA as amended has not given the NLRB exclusive jurisdiction over the subject matter of a common-law tort action for damages so as to preclude an appropriate state court from hearing and determining its issues where such conduct constitutes an unfair labor practice under the Act.

The Court pointed out that


\(^79\) The Supreme Court of the United States refused to handle the case on the ground that it would not judge on a temporary injunction since it is not final and therefore dismissed the writ of certiorari which it had granted.

"In the Garner case, Congress had provided a federal administrative remedy, supplemented by judicial procedure for its enforcement, with which the state injunctive procedure conflicted. Here Congress has neither provided nor suggested any substitute for the traditional state court procedure for collecting damages for injuries caused by tortious conduct. For us to cut off the injured respondent from his right of recovery will deprive him of his property without recourse or compensation." 81

Then the Court gave the rationale for its decision:

"To the extent that Congress prescribed preventive procedure against unfair labor practices, conflicting state procedure to the same end is excluded. To the extent, however, that Congress has not prescribed procedure for dealing with the consequences of tortious conduct already committed, there is no ground for concluding that existing criminal penalties or liabilities for tortious conduct have been eliminated." 82

The Court also pointed out that, "The LMRA sets up no general compensatory procedure except in such minor supplementary ways as the reinstatement of wrongfully discharged employees with back-pay." 83

The Court then concluded by saying:

"The Act did not expressly relieve labor organizations from liability for unlawful conduct. If a state is denied jurisdiction, it will mean that where the federal preventive administrative procedures are impotent or inadequate, the offenders, by coercion of the type found here, may destroy property without liability for the damage done. If petitioners

were unorganized private persons, conducting themselves as petitioners did here, Virginia would have had jurisdiction. The fact that the petitioners are labor organizations, with no contractual relationship with the respondent, or its employees, provides no reasonable basis for a different conclusion." 84

There was a strong dissent by Mr. Justice Douglas and Mr. Justice Black in this case, which stated:

"The federal act was designed to decide labor-management controversies, to bring them to a peaceful, orderly settlement. If the parties not only have the remedy Congress provided but the right to sue for damages as well, the controversy is not settled by what the federal agency does. It drags on and on in the courts, keeping old wounds open and robbing the administrative remedy of the healing effects it was intended to give. A union does not have a choice of remedies but may only institute proceedings before the NLRB. Therefore, since the union cannot sue the employer for tortious conduct, the employer should not be able to sue the union." 85

The dissent argues, in the author's opinion, beside the point and is faulty in its conclusion. The fact remains that Congress did not prescribe a procedure for tortious conduct and therefore some remedy must be given. The conclusion is faulty for to say that a union's tortious conduct is the same as an employer's is ludicrous. It is true that the employer may commit a tort against a union but the chances of this happening is very remote, whereas

84 Ibid., 347 U. S. 661.
85 Ibid., 347 U. S. 663.
a union commits torts against employer, e. g., destruction of property, quite frequently. Also, although a union may not be able to sue an employer, an individual of that union may, and as the writer sees it this is the only way that an employer can commit a tort. In other words, if there is a tortious action by an employer, it will be against the individuals of a union, and not the union as an entity. Thus it would seem that the dissent is a little "off-base" in its argument, while the majority holding seems more logical and fair.

Therefore, it would seem that the sweeping language of the Garner case, which seemed to leave little, if any, jurisdiction to the states touching a labor matter subject to NLRB regulation, is not so encompassing as its language indicates. When construed in the light of the Laburnum decision, it becomes clear that the classification is one of remedies rather than of rights. It now seems that the Board has exclusive jurisdiction only when the NLRB as amended provides a remedy for conduct condemned by it, with which any state action would conflict. According to the Laburnum case, if the state courts offer a remedy which will not conflict with present or future action by the NLRB and which is not available under the act, they have jurisdiction to award it. Also the states have jurisdiction because as the court pointed out there was no conflict between state and federal law because

86 These words are very important in that they show that the "potential conflict" theory is not thrown out.
the granting of damages by state courts was consistent with LMRA because

damage remedy is distinguishable in kind from the federal injunction remedy.

The principle of the Garner case and the "pre-emption" doctrine was

further fortified and extended by the Anheuser-Busch Inc. case. Anheuser-

Busch was engaged in the interstate manufacture and sale of beer. There

was a dispute between the machinists and the carpenters over the work to be

performed for the company. The machinists' union picketed the company's

brewery as part of an attempt to get included in their collective bargaining

agreement with the company a clause providing that the company would not

let contracts for new construction to any independent contractor who did not

employ members of the machinists' union to take care of the moving, erect-

ing and installing machinery.

The bargaining agreement provided that the machinists' union should do

all such work performed within the employer's plant. What, in effect, was

desired by the machinists was to get work for their union which had custom-

arily been done by the Millwrights union.

Because of the protests of the Millwrights Union, the employer struck

the advantageous clause from the contract. Then the machinists' union went

on strike and picketed the employer's place of business.

Anheuser-Busch filed a charge of unfair labor practice under section 8(b)4(d). In the meantime, after the filing but before the Board had acted upon it, the company sought an injunction against the Union in the State Circuit Court, and broadened its charge to include (A) and (B) of Section 8(b)4. A temporary and then a permanent injunction was then granted by the State Court. The union appealed to the Missouri Supreme Court but the State Supreme Court affirmed the Circuit Court. (It should be noted that the NLRB found no unfair labor practice under Section 8(b)4(d)).

The important fact about this case, in its relation to the Garner case, is that an unfair labor practice had been filed with the Board, and a finding pursuant thereto that no unfair labor practice existed.

The main issue which the Supreme Court of the United States had to decide was whether a state court has jurisdiction to enjoin a union's peaceful picketing or whether its jurisdiction has been pre-empted by the authority vested in the NLRB. The Court found that the NLRB had jurisdiction over the union's activity.

The Court based its reasoning on the Plankinton, LaCrosse, Bethlehem and Garner cases. The Court concluded:

"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."
"A state may not enjoin under its own labor statute conduct which has been made an "unfair labor practice" under the federal statute.

"When the NLRB held that conduct of the union did not constitute an unfair labor practice under the LMRA, alleged by the employer to have been violated, but in the employer's complaint filed in the state court for injunctive relief, the employer broadened its allegations to include violation of other sections of the Act, the state court did not have jurisdiction to enjoin the unions' conduct for violation of such sections, since the Board had the power in the first instance, to determine whether the unions' conduct constituted an unfair labor practice under those sections.

"When the moving party itself alleges unfair labor practices, when the facts reasonably bring the controversy within the sections prohibiting these practices, and when the conduct, if not prohibited by the federal Act, may be reasonably deemed to come within the protection afforded by that Act, the state court must decline jurisdiction in deference to the tribunal which Congress has selected for determining such issues in the first instance." 88

Thus, it would seem that the Supreme Court of the United States is willing to accept the Garner case as the law of the land, with certain exceptions such as a state's jurisdiction to grant damages for Common Law Torts.

(Laburnum case) It would seem from the Garner and Anheuser-Busch cases that the supremacy of the NLRB is upheld and that the pendulum has swung completely over to the side of federal control. However, the Richman

Brothers case has caused the pendulum to oscillate once again.

In the Richman Brothers case the A.C.W., an unincorporated association of clothing workers, peacefully picketed a number of Richman Brothers retail stores, presumably to compel its factory employees to join their union. Richman Brothers is engaged in the manufacture and sale of men's clothing in interstate commerce. The company filed suit in the Court of Common Pleas in Ohio, alleging that the union's conduct constituted a common law conspiracy as well as a statutory and common-law restraint of trade. It prayed for temporary and permanent injunctions.

The union brought proceedings to remove the case to the U. S. District Court, claiming that the employer's petition alleged facts bringing the case within the original jurisdiction of the District Court as a civil action arising under the Taft-Hartley Act. The Federal District Court remanded the action to the state court on the ground that if, as the union contended, the complaint in effect alleged a violation of Section 8(b)(1)(A) of the Taft-Hartley Act, under the decision of the Garner case, only the NLRB had jurisdiction of its subject matter.

Upon sending the case back to the state court, the union invoked the

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ground taken by the District Court in denying its jurisdiction, in a motion to
dismiss the action in the state court. The union then filed a complaint in
the same District Court seeking an injunction which would require the em-
ployer to withdraw the action commenced in the state court. The union con-
tended that the District Court had jurisdiction based on 28 U.S.C. §1337,
which confers jurisdiction on federal courts over any civil action arising
under any Act of Congress regulating interstate commerce. The Federal
District Court held under 28 U.S.C. §2283 of the Judicial Code, which
prohibits federal injunctions against state court proceedings, that it was
without power to grant the requested relief, inasmuch as the action did not
come within any of the exceptions to that general prohibition.

The Court of Appeals affirmed the District Court's decision. The case
then came before the Supreme Court of the United States.

The issue that was to be decided before the Court was whether a federal
court may, before a complaint has been entertained by the NLRB and at the
request of one of the private parties, enjoin the attempt to secure relief
through state proceedings. The majority of the Court held that the Federal
District Court has no jurisdiction of union's suit to enjoin employer from pro-

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90 Section 2283 states: "A court of the United States may not grant an in-
junction to stay proceedings in a State Court except as expressly authorized
by an Act of Congress, or where necessary in aid of its jurisdiction, or to
protect or effectuate its judgments."
ceeding in a state court before a complaint has been entertained by the NLRB.

The Court in this case argues in technicalities and not with logic or justice. The Court, through Mr. Justice Frankfurter, makes a distinction between a private party and the National Board asking for injunctive relief. This was obviously mentioned so that the Court would not go contrary to the Capital Service case which said that a Federal District Court, on application of the National Board, could enjoin petitioners from enforcing an injunction already obtained from a State Court. Here Mr. Justice Frankfurter obviously followed "the letter" but not "the spirit" of the law. He gives what amounts to purely technical reasons for his conclusions. The Court concluded that,

"Resort to a state court may not be circumvented by the power of the Board to entertain such a complaint. A penumbral region must remain between state and federal authority touching industrial relations until finally clarified by definite rulings and until this is done state litigation must be allowed to run its course."\(^9^1\)

This conclusion by the court is exactly what the author believes will sooner or later lead to industrial and governmental strife. It is against the whole object of this thesis. Justice Frankfurter talks about definitive rulings, and what, may I ask are the Garner and Laburnum cases. These two

\(^9^1\) Ibid. 348 U. S. 517.
cases, in the author's opinion, act as definitive rulings until amendments to the LMRA are initiated.

It is the author's opinion that there is no explanation for this ruling except that it must be remembered that Mr. Justice Frankfurter has repeatedly asserted that the states must be permitted to apply local policies in the absence of a clear manifestation of the intent of Congress to pre-empt the field. It does not "dawn" on Justice Frankfurter that recent decisions have established the fact that Congress has shown its intention to occupy the field of labor relations. Also Mr. Justice Frankfurter does not realize that rarely has Congress devoted such attention to the question whether and to what extent its legislation should supersede state law. For instance, a suggestion was made during the course of debate in the House that the Act should contain a provision preserving the constitutionality of state laws in the field of labor relations. But when Congressman Case of South Dakota replied that to preserve "State rights" in this field would "nullify much of the Bill", the suggestion was immediately abandoned and was never brought to a vote.\(^2\) And as a result of its awareness of the problem and its intention generally to pre-empt the field, Congress took care to reserve to the states in clear-cut terms those

areas in which it desired state regulation to be operative.

It appears to this author that the dissenting opinion of Chief Justice Warren and Mr. Justice Black and Douglas is the better one. It disregards technicalities for justice. The majority opinion in reading Section 2283 literally ignores not only the legislative history but also over a century of judicial history, which came to a culmination in the Garner case.

The logic of Chief Justice Warren is to be condoned when he says,

"The Board, although clearly having jurisdiction of the subject matter cannot adjudicate the dispute as long as the employer does not file an unfair labor practice charge; and the employer has no incentive to do so as long as the state court injunction is outstanding."93

The idea of justice is also present in which Mr. Justice Black has to say:

"Today's decision allows state courts to intrude in a domain where the federal agencies, i.e., NLRB and Federal District Court, have been granted primary and exclusive jurisdiction, without leaving the aggrieved party any effective remedy.

"Where Congress has made clear that federal agencies have exclusive jurisdiction of a controversy, that legislation should be taken to qualify §2283 pro tanto.

"If a federal court first takes possession of a res, it may protect its control over it, even to the extent of enjoining a state court from interfering with the property."94

93Ibid, 348 U. S. 520.
And the remarks of Mr. Justice Black are just as enlightening:

"There can be no appeal to this Court from the temporary injunction. It may take substantial time in the trial court to prepare a record to support a permanent injunction. Once one is granted, the long, drawn-out appeal through the state hierarchy and on to this court commences. Yet, by the time this court decides that from the very beginning the state court had no jurisdiction, as it must under the Garner case, a year or more has passed; and time alone has probably defeated the union claim.

"That course undermines the federal regulation; it emasculates the federal remedy; it allows one party to a labor-management controversy to circumvent the law which Congress enacted to resolve these disputes.

"The federal regulatory scheme cries out for protection against these tactics of evasion." 95

And Mr. Justice Black concludes that private parties as well as the Board should be able to seek the protection of the federal court, especially in view of the Garner decision where there was no distinction between private and public rights.

The author believes that the dissenting opinion is the correct one in view of the field that we are dealing with. In other fields, where human beings are not the primary objects of discussion, technicalities may be the guidepost for decisions. But in the field of labor relations, where every act or judgment affects millions of people, the guidepost should be justice, fairness

95 Ibid, 348 U. S. 525.
and uniform treatment of all.

We have come a long way in our analysis of cases — from *Allen-Bradley* to *Richman Brothers*. That span has covered approximately thirteen years, and in these thirteen years the Supreme Court has upheld federal supremacy over the field of industrial relations and has given its jurisdiction to the federal government, even though at times it has oscillated and even changed completely its mind. Thus, through the *Garner* decision the field of labor relations has been revolutionized so far as state jurisdiction is concerned — not as much as some would have us believe, but more than others care to admit.
CHAPTER VII

A SYNOPSIS OF THE LAW

It would be wise at this point to have a short synopsis of the law pertaining to federal and state jurisdiction under the National Labor Relations Act, which was analyzed in the last chapter. The author will attempt to give the law as it exists today under certain categories such as (1) Representation cases; (2) Jurisdiction over protected or prohibited activities; (3) Jurisdiction over activities which are neither protected nor prohibited; and (4) Jurisdiction where the NLRA refuses jurisdiction. Under each of these categories where the law is not certain, or where the Supreme Court has not handed down a decision on the particular subject matter, the author will give his opinion on what the law should be on the basis of past Supreme Court decisions and common sense.

I REPRESENTATION CASES

One of the most important areas in labor regulation is the selection of proper collective bargaining representatives. Consequently, it is of extreme importance that jurisdiction in this area be sharply delineated so that in the first instance the proper governmental agency — either state or federal — will take jurisdiction and a final decision be quickly made. It is not surpris-
ing, therefore, that the permissible scope of state regulation was first delineated in this area.

Thus, in the LaCrosse case the Court held that the field of representation is such a "sensitive and delicate one" that the power to enforce the policy of Congress must be singular and exclusive.

Therefore, this field of jurisdiction over representation cases was held to be within the exclusive jurisdiction of the National Board because there is an ever present possibility that state determination in representation proceedings will conflict with that of the NLRB even when the state is applying a law ostensibly identical with the National Act.

II JURISDICTION OVER PROTECTED OR PROHIBITED ACTIVITIES

The Garner case decided without any doubt that the NLRB has exclusive jurisdiction over activities which are either protected or prohibited by the NLRA as amended. However, there were limitations put on the Garner case by the Laburnum decision. The law in this field now seems to be that if the federal government provides a remedy then the state should not be able to provide for the same remedy; and if there is a federally "protected" right or an action "prohibited" by the federal Act, then a state court cannot be allowed to take any action which would detract or destroy this federally
"protected" right, or pass legislation which would permit acts which are forbidden by the federal Act. However, the Laburnum decision made a distinction between a state court granting an injunction and granting money damages. According to the Laburnum decision, the former would run directly counter to the Act while the latter would not interfere with the National Board's control over the subject matter, since Congress has neither provided nor suggested any substitute for the traditional state court procedure for collecting damages for injuries caused by tortious conduct. Thus, it would seem that a common-law tort action for damages is an exception to the Garner case.

Therefore, the principle that there should be no chance of conflict so as to deprive a person of his rights under the federal Act is upheld. However, for the principle to be upheld there must be a procedure set-up by the federal Act; and when there is no procedure or remedy set-up, the states will be allowed to apply their traditional remedies, e. g. liability for tortious conduct.

III JURISDICTION OVER ACTIVITIES WHICH ARE NEITHER PROTECTED NOR PROHIBITED

The delineation of the permissible scope of state regulation of activities which are neither protected nor prohibited by the federal law is one of the most difficult and controversial problems arising under the Taft-Hartley Act.
Presumably the NLRB cannot take jurisdiction in this area. There is no indication, however, of a legislative intent either to give jurisdiction to the state, or to reserve the unexercised power to the federal government. However, such cases as the Briggs-Stratton and Algoma have decided that the state can regulate any activity which is neither "protected" nor prohibited" by the federal Act. Thus, there are three general categories that the states may regulate — (1) Illegal Strike Action; (2) Picketing which is neither protected nor prohibited; (3) Power to enjoin violations of Collective Bargaining Agreements.

In regard to the third area — Power to enjoin violations of Collective Bargaining Agreements — it has not been decided who has jurisdiction. In the preliminary draft of the Taft-Hartley Act, a proposal that the breach of a collective bargaining agreement be an unfair labor practice was considered and rejected. Instead, a provision was made for suit in the federal court. Therefore, the parties may only collect damages. This remedy is, however, of little practical significance.

In favor of state jurisdiction over breaches of collective bargaining agreements, it may be argued that an injunction is the only adequate remedy.

for breach of a collective bargaining agreement and that the Norris-La-Guardia Act precludes this remedy in the federal courts. Perhaps, however, the uniform application of an inadequate remedy (which can be improved upon), is preferable to desperate regulation by the states.

But no matter into whose jurisdiction it may fall, "sanctity of contract" must be upheld, for if it is not then the collective bargaining agreement becomes meaningless and of no value. "Sanctity of contract" is the pillar of our capitalistic system and if it is not upheld, the field of industrial relations will soon crumble. Therefore, what this writer has said in the above paragraph does not seem as well-founded as it first appears. Thus, improvement in the federal remedy is definitely in order.

However, in the first two categories — illegal strikes and picketing which are neither protected nor prohibited — it would seem that state regulation is the best solution. If the states were not allowed to regulate, for example, violent picketing, such picketing would soon come to be a "no-man's-land" in the field of labor relations, since generally it is neither "protected" nor "prohibited" by the NLRA as amended. The NLRB therefore could not regulate it. Thus, neither state nor federal regulation would be allowed and acts which are not right either morally, ethically or in justice would be allowed to run wild.
In order to reduce its case load, the NLRB can theoretically cede jurisdiction to state labor relation boards. However, in order to do this the provisions of the state and federal acts must be parallel in all respects and this is, generally speaking, not the case. Also because of the financial limitations upon the NLRB, the Board will refuse jurisdiction. Thus, when the NLRB refuses jurisdiction, some of the states have assumed jurisdiction over the subject matter.

Under this area the "potential conflict" argument may be advanced against state jurisdictions. However, in this field also a "no-man's-land" may be created if the states do not step in. Congress has plainly shown an intent that certain activities should be regulated, and if the states do not step in when the NLRB refused to do so, they will not be regulated at all.

Therefore, this then is roughly how the law under each of these categories exists today, some of it clear and some of it ambiguous, and still in some areas unproclaimed.
CHAPTER VIII

CONCLUSION

If one proposition can be advanced concerning the field of the law designated as "labor relations" with any degree of certainty, it is that no principles or rules are so influential and binding to such an extent that they can be assumed to control any new situation that may arise. Where the problem also presents the question of pre-emption of the jurisdiction and power of the state courts, the field, already confused by widely divergent views of social philosophy, becomes supercharged with strong and deep-seated differences of political philosophy. The results which can flow from such a combination of conflicting convictions when considered in terms of judicial opinion defy prediction. Hence, the most zealous advocate must restrain any tendency to suggest the principle controlling any situation until the highest court has laid down the rule in the case and has charted a clear-cut and well-defined course. For this reason the conclusions will be mostly tentative and opinionative except where the Supreme Court has spoken. In the latter instance, the conclusion will be concrete and authoritative.

From what has been said in the past seven chapters there are certain concrete conclusions concerning state jurisdiction. It appears from the cases we have analyzed that the states may now act in the field of interstate
labor relations only in the following situations:

(1) To properly exercise its police power in regulating the mechanics of labor relations such as preventing breaches of the peace in strikes.

(2) Where, as a matter of public policy, the Court determines that the complaint, or issue of the controversy is not essentially a labor dispute.

(3) (a) Where the NLRA specifically permits the state to act (This is limited to Sections 10(a) and 14(b)).

(b) Where suits for damage are predicated upon rights created by the LMRA, Section 303(a).

(4) On the authority of the Laburnum case, the state courts now have jurisdiction to decide damage suits based upon common law torts.

There are conclusions that may be drawn with certainty and rightly so. Clearly, it is desirable for the states to regulate in some areas — where speed is essential for justice, where regulation is desirable but the NLRB has no jurisdiction and where there is a larger effect on intrastate commerce and only a small effect on interstate commerce. It is important, however, to limit state jurisdiction to cases falling within one of these categories so that in so far as possible labor relations will be subject to uniform regulation.

As the author sees it, the main conflict between State and Federal jurisdiction comes from the fault of the Act itself. There are certain things in
the Act or in the policy in carrying out the Act which cause conflict between the jurisdictions. Therefore, the following suggestions are offered to correct this defect.

(1) The initial change to be brought about should be a re-definition of, or use, some other term than "affecting commerce" in fixing the scope of the Act. A term such as "placing a substantial burden upon commerce" would restore to the federal government and the states the spheres which have been traditionally theirs. This would preserve the basic goal of the Act — to establish labor relations on a uniform national basis.

(2) Either Congress should expressly exempt from the operation of the Act certain traditionally local industries, e. g., hotel industry, building and construction, taxicabs, and privately owned public utilities, or if Congress does not exempt them, the NLRB should not be permitted to decline jurisdiction.

(3) A more express standard should be used in the regulation of labor relations disputes concerning wages, hours and other working conditions. The standard could be on the basis of the number of employees and the annual payroll of the particular employer, with a minimum standard set in both instances. This would be a more realistic approach than basing a standard on such a nebulous term as "affecting interstate commerce", as the Act now does.
(4) The NLRB should be compelled to accept or decline jurisdiction of a case within a fixed time, e.g., one week. Failure to accept within the fixed period, should be deemed a declination. A controversy once declined should be subject to state action. However, if, in declining jurisdiction, the NLRB affirmatively stated that its action in the particular case was in the best interests of accomplishing the objectives of the Act, it should be assumed that the Board had accepted jurisdiction.

(5) Once Congress has fixed the boundaries of the Board's jurisdiction, it should recognize its obligation to implement enforcement of the Act by appropriation of a budget sufficiently large enough to enable the Board to fully administer the law.

(6) Cooperative action between the labor boards of the states and the National Board, e.g., close liaison should be established between the National Board and the state boards for the handling of any questions of conflicts of jurisdiction — joint review the cases of conflict.

(7) State legislatures should conform their laws to the National law. Such items as anti-communist affidavits, free speech guarantees, specification of the duty of a union to bargain collectively, and fiscal and financial policy provisions should be made uniform.

These suggestions are for the purpose of minimizing jurisdictional conflicts. It is duly submitted that amendment of the NLRA and LMRA as sug-
gusted above would eliminate most of the abuses that have arisen since the Allen-Bradley case and, at the same time, retain sufficient federal control over labor relations with a uniform policy, without undue encroachment upon state sovereignty.

We have argued in this thesis for a large area of exclusive federal authority in order to permit the development of a unified labor relations program, not only by the NLRB in administering the present statute but also by the Congress in improving the law.

In view of practical administrative difficulties with which the Board is faced, opportunity and responsibility for effectuating Congressional policy in so far as "pre-emption" and "conflict" matters are concerned must rest largely upon state courts and private parties. If the "pre-emption" policy is given effect in the spirit of the "Supremacy Clause", it will, as Congress intended that it should, aid in reducing federal-state jurisdictional conflicts, and point the way to desirable improvements in federal law in the field of labor-management relations. On the other hand, to paraphrase the Supreme Court's decision in the LaCrosse case, state court decisions which promote uncertainty as to whether the federal government or the state is master "can be as disruptive of peace between various industrial factions" as actual competition between the federal government and the states for supremacy.
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