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Labor Law-Preemption-State Court May Exercise Jurisdiction to Restrain Peaceful Union Tresspass Both Arguably Protected and Arguably Prohibited by National Labor Relations Act

William B. B. V. Smith

RECENT DEVELOPMENT

Labor Law—Preemption—STATE COURT MAY EXERCISE JURISDICTION TO RESTRAIN PEACEFUL UNION TRESPASS BOTH ARGUABLY PROTECTED AND ARGUABLY PROHIBITED BY NATIONAL LABOR RELATIONS ACT

Sears, Roebuck & Co. v. San Diego County District Council of Carpenters, 436 U.S. 180 (1978)

The National Labor Relations Act (NLRA)[1] guarantees employees the right to organize and encourages peaceful, private resolution of labor conflicts.[2] To insulate fledgling unions from hostile judicial attitudes,[3] and to insure uniform application of the Act, Congress created the National Labor Relations Board (NLRB) and granted it jurisdiction over labor disputes.[4]

In *San Diego Building Trades Council v. Garmon*,[5] the Supreme Court declared that the NLRA preempts state jurisdiction over conduct arguably protected or arguably prohibited by the Act. Although *Garmon*'s "arguably prohibited" prong has been riddled with exceptions allowing state jurisdiction, the Supreme Court until recently had not limited the preemptive sweep of the "arguably protected" prong. In *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*,[6] however, the Court upheld state jurisdiction to restrain peaceful union trespass that was both arguably prohibited and arguably protected by the NLRA. The *Sears* Court added a balancing test to its analysis of arguably pro-

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[1] 29 U.S.C. §§ 151-69 (1976). Congress enacted the NLRA in three major installments—the Wagner Act, ch. 372, 49 Stat. 449 (1935) (creating the National Labor Relations Board and enumerating federally protected and unfair labor activities); the Labor Management Relations (Taft-Hartley) Act, ch. 120, 61 Stat. 136 (1947) (separating the adjudicative and prosecutorial functions of the Board and adding several union unfair labor practices); and the Labor-Management Reporting and Disclosure (Landrum-Griffin) Act, Pub. L. No. 86-257, 73 Stat. 519 (1959) (further regulating union reporting practices and allowing state actions concerning conduct over which the Board declines jurisdiction). For background of the legislative history of national labor legislation, see R. GORMAN, BASIC TEXT ON LABOR LAW 1-6 (1976); SECTION OF LABOR RELATIONS LAW; AMERICAN BAR ASS'N, THE DEVELOPING LABOR LAW chs. 1-4 (1971 & Supps. 1971-77).

[2] *See* Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337, 1352-53 (1972).

[3] Prior to enactment of the NLRA, state and federal courts often treated organizational efforts by employees as tortious conspiracies or illegal restraints of trade, and liberally granted injunctions against such activities. *See generally* F. FRANKFURTER & N. GREENE, THE LABOR INJUNCTION 26-29 (1930).

[4] *See* Garner v. Teamsters Local 776, 346 U.S. 485, 490 (1953), *quoted in* note 12 *infra*.

[5] 359 U.S. 236 (1959).

[6] 436 U.S. 180 (1978).

tected conduct, weighing the state interest in assuming jurisdiction against the need for uniform application of federal labor policy.

Although the *Sears* approach—balancing interests to create exceptions within both prongs of *Garmon*—is an encouraging development, retention of *Garmon*'s "arguably" test as a threshold to balancing serves no useful purpose. Moreover, *Garmon* suffers from the typical infirmities of a wooden rule garnished with an unstable set of exceptions—it encourages misdirected lower court analysis and is unfair to litigants. The Court should retire *Garmon*, and retain a test that balances state and federal interests. A properly formulated balancing test for the state courts would eliminate the disadvantages of the *Garmon* rule with little risk of state court interference with federal labor policy.

I

HISTORICAL PERSPECTIVE

In section 7 of the NLRA, Congress granted employees the right to organize and join labor organizations, and to engage in collective bargaining and mutual protection activities.[7] Section 8[8] forbids unfair labor practices, including employer interference with employees' section 7 rights. The NLRB is empowered to prevent what section 8 prohibits.[9] Congress did not, however, address the extent to which the NLRA preempts state jurisdiction over labor disputes; that task fell to the courts.[10]

A. *Early Preemption Cases*

The Supreme Court early on made clear that the NLRA preempts state jurisdiction to regulate conduct protected by sec-

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[7] Section 7 provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may he affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C. § 157 (1976).

[8] 29 U.S.C. § 158.

[9] 29 U.S.C. § 160.

[10] "The statutory implications concerning what has been taken from the States and what has been left to tbem are of a Delphic nature, to be translated into concreteness by the process of litigating elucidation." International Ass'n of Machinists v. Gonzales, 356 U.S. 617, 619 (1958).

tion 7 or prohibited by section 8.[11] Two rationales justify barring state jurisdiction over such conduct. First, placing primary jurisdiction in the NLRB promotes uniform interpretation of the NLRA.[12] Second, prohibiting state courts from applying their own laws to conduct also prohibited by section 8 promotes uniformity of remedy.[13]

The Court's early decisions did not, however, make clear the breadth of its labor preemption doctrine. According to the narrow view, insulation of national labor policy justified preemption of state jurisdiction to apply local law *only* against conduct specifically protected by section 7 or prohibited by section 8.[14] A second,

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[11] *See* Hill v. Florida, 325 U.S. 538 (1945) (protected by § 7); Garner v. Teamsters Local 776, 346 U.S. 485, 500-01 (1954) (prohibited by § 8).

[12] 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 these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies.

Garner v. Teamsters Local 776, 346 U.S. 485, 490 (1954).

[13] *Id.* at 498-99. Professor Cox notes that "[i]f Congress were to make employer unfair labor practices crimes and authorize private suits for damages, the amendments would be regarded as a major change in labor policy. No less a change of policy results if a state creates the crime or right of action for damages." Cox, *supra* note 2, at 1343.

On the other hand, the federal scheme presupposes the application of at least some kinds of state law to conduct prohibited by § 8 in order to protect local interests. The Court has consistently upheld state jurisdiction to enjoin and award damages for violent or menacing conduct also prohibited by § 8. *See, e.g.*, UAW v. Russell, 356 U.S. 634 (1958); Youngdahl v. Rainfair, Inc., 355 U.S. 131, 139 (1957); UAW v. Wisconsin Employment Relations Bd., 351 U.S. 266, 271-74 (1956) (the *Kohler* case); United Constr. Workers v. Laburnum Constr. Corp., 347 U.S. 656 (1954); Allen-Bradley Local 1111 v. Wisconsin Employment Relations Bd., 315 U.S. 740 (1942). The *Laburnum* Court attempted to reconcile the application of state remedies in violence cases with *Garner*'s prohibition against supplementary state remedies for conduct violating § 8:

To the extent that Congress [in granting the NLRB authority to forbid or enjoin prohibited conduct] prescribed preventive procedure against unfair labor practices, [*Garner*] recognized that the Act excluded conflicting state procedure to the same end. To the extent, however, that Congress has not prescribed procedure for dealing with the consequences of tortious conduct already committed, there is no ground for concluding that existing criminal penalties or liabilities for tortious conduct have been eliminated.

347 U.S. at 665.

[14] *See* UAW Local 232 v. Wisconsin Employment Relations Bd., 336 U.S. 245 (1949) (the *Briggs-Stratton* case) (upholding state jurisdiction to regulate "quickie strikes" neither protected by § 7 nor prohibited by § 8. The Court stated: "We find no basis for denying to Wisconsin the power, in governing her internal affairs, to regulate a course of conduct neither made a right under federal law nor a violation of it." *Id.* at 265.

more expansive theory of preemption transcended specific NLRA provisions. It characterized the Act as a comprehensive federal scheme of delicately balanced labor-management interests. According to this view, Congress intended to occupy the field, ousting state jurisdiction over some conduct neither specifically protected by section 7 nor prohibited by section 8.[15]

B. *The Garmon Rule*

In *San Diego Building Trades Council v. Garmon*,[16] a state court deciding that picketing and secondary pressure violated state law had awarded damages to an employer.[17] Without deciding whether the union's conduct was governed by NLRA sections 7 and 8, the NLRB had previously declined to exercise jurisdiction over the dispute. The Supreme Court reversed the state court's award of damages, holding that states were preempted from regulating conduct that was *arguably* protected by section 7, or *arguably* prohibited by section 8.[18] The Court's test reserved for the NLRB the exclusive power to decide whether labor-management activity came under the protection or prohibition of the NLRA, thus reducing the risk of erroneous state court assumption of jurisdiction.[19] The test offered two practical advantages: (1) it was easy for state courts to apply, and (2) it sharply curtailed the

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

Garner v. Teamsters Local 776, 346 U.S. 485, 499-500 (1954) (dictum). Commentators describe this third kind of preempted conduct as "permitted." Permitted conduct is insulated from state, but not employer, interference; the *Garner* dictum did not decide that the union had a *right* to use permitted picketing against employers, but only that states could not limit union freedom to use the weapon. Protected conduct, on the other hand, is insulated from employer as well as state interference. Section 8(a)(1) makes it an unfair labor practice for employers to "interfere with, restrain, or coerce employees in the exercise" of rights protected by § 7. *See* Cox, *supra* note 2, at 1345-46; Lesnick, *Preemption Reconsidered: The Apparent Reaffirmation of Garmon*, 72 COLUM. L. REV. 469, 477-81 (1972). For more recent cases adopting the expansive view suggested in *Garner*, see note 79 *infra*.

[16] 359 U.S. 236 (1959).

[17] *Id.* at 239.

[18] *Id.* at 244-45.

[19] *Id.*

need for ad hoc Supreme Court adjudication of state preemption cases.[20]

The *Garmon* rule postponed the choice between the narrow and expansive theories of preemption. A Board decision that conduct was neither protected nor prohibited would "raise the question whether such activity may be regulated by the States,"[21] In effect, however, the "arguably" test promoted an expansive result by insulating from state jurisdiction, pending NLRB determination, some conduct not specifically protected or prohibited by the Act.[22]

C. *Exceptions to Garmon's "Arguably Prohibited" Prong*

From its inception, the "arguably prohibited" prong of the *Garmon* test suffered from exceptions that soon limited its utility. A statute enacted in the same year that the Court decided *Garmon* allowed state jurisdiction over section 8 disputes where the NLRB declined to assert jurisdiction.[23] The *Garmon* Court itself recognized two exceptions to accommodate earlier decisions allowing state jurisdiction where the arguably prohibited conduct was a "peripheral concern" of the NLRA[24] or involved union vio-

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[20] *Id.* at 242. In reviewing the justifications for adopting the *Garmon* rule, the Court has said: "[We cannot] proceed on a case-by-case basis to determine whether each particular final judicial pronouncement does, or might reasonably be thought to, conflict in some relevant manner with federal labor policy." Amalgamated Ass'n of St. Employees v. Lockridge, 403 U.S. 274, 289 (1971). Since "[v]ery few labor activities aimed at management are not either arguably protected or arguably prohibited by the NLRA" (Cox, *supra* note 2, at 1350), *Garmon* promised to reduce sharply Supreme Court ad hoc review of erroneous state court assumption of jurisdiction.

[21] 359 U.S. at 245 (footnote omitted).

[22] For a discussion of the expansive view, see note 15 and accompanying text *supra,* and note 79 and accompanying text *infra*. For a general discussion of the *Garmon* rule, see Cox, *supra* note 2, at 1348-51.

[23] Labor-Management Reporting and Disclosure (Landrum-Griffin) Act, Pub, L. No. 86-257, § 701(a), 73 Stat. 519 (codified at 29 U.S.C. § 164(c)(2) (1976)). *See* Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act,* 44 MINN. L. REV. 257, 262 (1959). Statutory exceptions to the exclusive jurisdiction of the NLRB over § 8 conduct have been created for the federal courts as well. These provide federal court jurisdiction to award tort damages for injury to business or property resulting from unfair labor practices (29 U.S.C. § 158(b)(4) (1976)) and over suits for breach of collective bargaining agreements (29 U.S.C. § 185 (1976)).

[24] 359 U.S. at 243-44. The Court cited International Ass'n of Machinists v. Gonzales, 356 U.S. 617 (1958), which upheld state jurisdiction to order a union to reinstate a wrongfully expelled employee, even though the union conduct may have violated § 8. *But cf.* Amalgamated Ass'n of St. Employees v. Lockridge, 403 U.S. 274, 293-97 (1971) (union's membership clause not peripheral concern).

lence.[25] The violence exception soon grew into a "local interest" exception, allowing state jurisdiction over conduct touching interests "deeply rooted in local feeling and responsibility."[26] Subsequent decisions upheld state jurisdiction to regulate such less violent, arguably prohibited activities as obstructive picketing, malicious libel, and intentional infliction of emotional distress.[27]

The need for exceptions to the *Garmon* rule's "arguably prohibited" prong illustrates its overinclusiveness. In eliminating the risk of conflicting state remedies for specific conduct unlawful under the NLRA, the test frustrated state remedies for general tortious conduct that only incidentally affected federal labor policy.

D. *A Balancing Test for State and Federal Interests Within Garmon's "Arguably Prohibited" Prong*

The proliferation of *Garmon* exceptions produced defensible results, but complicated a preemption test formerly known for its ease of application.[28] In *Farmer v. Carpenters Local 25*,[29] the Court struggled to reduce this complexity by stating the factors common to all exceptions allowing state jurisdiction over arguably prohibited conduct. A union member had brought a state tort action for emotional distress, alleging union discrimination in job referrals. Although section 8 arguably prohibited the discrimination,[30] the Supreme Court upheld state jurisdiction by balancing "the state interests in regulating the conduct in question . . . [with] the potential for interference with the federal regulatory scheme."[31]

Two factors in *Farmer* indicated a strong local interest: (1) the offense affected a personal, rather than an economic, interest;[32]

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[25] 359 U.S. at 244 & n.2. *See* cases cited in note 13 *supra*.

[26] This language comes from *Garmon* itself (359 U.S. at 244), but the *Garmon* Court cited only violence cases (*id.* at 244 n.2).

[27] *See, e.g.*, Farmer v. Carpenters Local 25, 430 U.S. 290 (1977) (intentional infliction of emotional distress); NLRB v. Boeing Co., 412 U.S. 67, 74 (1973) (reasonableness of union fines); Vaca v. Sipes, 386 U.S. 171 (1967) (union breach of statutory duty of fair representation); Linn v. Plant Guard Workers Local 114, 383 U.S. 53 (1966) (malicious libel); UAW v. Russell, 356 U.S. 634 (1958) (mass picketing and threats of violence).

[28] Indeed, one commentator wrote that "the *Garmon* test can now be described only by reference to its exceptions." Bryson, *A Matter of Wooden Logic: Labor Law Preemption and Individual Rights*, 51 TEXAS L. REV. 1037, 1041 (1973).

[29] 430 U.S. 290 (1977).

[30] Discrimination in hiring-hall referrals is prohibited by NLRA §§ 8(b)(1)(A) and 8(b)(2).

[31] 430 U.S. at 297.

[32] The Court said that the decisions permitting the exercise of state jurisdiction in tort actions rests on "the nature of the State's interest in protecting the health and well-being of

and (2) state law allowed recovery only in cases involving "outrageous" conduct.[33] Two factors indicated a weak federal interest: (1) the "outrageous" conduct clearly was not protected under section 7,[34] and (2) "the state-court tort action [could] be adjudicated without resolution of the 'merits' of the underlying labor dispute."[35] "On balance," said the Court, "we cannot conclude that Congress intended to oust state-court jurisdiction over actions for tortious activity such as that alleged in this case."[36]

II

SEARS, ROEBUCK & CO v. SAN DIEGO COUNTY DISTRICT COUNCIL OF CARPENTERS

In October 1973, representatives of a San Diego carpenters' union determined that individuals not dispatched by the union hiring hall were performing carpentry work at a Sears department store in Chula Vista, California. After requesting in vain that Sears employ only union-dispatched carpenters, the union began picketing the store site on Sears' property.[37] When the union refused Sears' request to remove the pickets, Sears filed a trespass complaint in the Superior Court of California. Prior to an adversary hearing on the complaint, the court entered a temporary restraining order prohibiting union picketing on Sears' property. The union removed its pickets to the public sidewalks. The court subsequently granted a preliminary injunction, from which the union appealed. Upholding state jurisdiction, the California Court of Appeals found trespass laws to come within the "local interest" exception to *Garmon*.[38] The Supreme Court of Califor-

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its citizens." *Id.* at 303. Violence, defamation, and intentional infliction of emotional distress are directed against persons.

[33] Our decision rests in part on our understanding that California law permits recovery only for emotional distress sustained as a result of "outrageous" conduct. The potential for undue interference with federal regulation would be intolerable if state tort recoveries could be based on the type of robust language and clash of strong personalities that may be commonplace in various labor contexts.

Id. at 305-06.

[34] 430 U.S. at 302.

[35] *Id.* at 304. Under California law, recovery of damages for emotional distress required proof only that the union intentionally engaged in outrageous conduct causing the employee's distress. Recovery did not hinge on proof of actual or threatened discrimination. *Id.*

[36] *Id.* at 305.

[37] 436 U.S. 180, 182 (1978).

[38] Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 52 Cal. App. 3d 690, 696-97, 125 Cal. Rptr. 245, 248-49 (1975). For discussion of the "local interest" exception to *Garmon*, see notes 25-27 and accompanying text *supra*.

nia reversed, finding state jurisdiction preempted.[39] Because the union's trespassory picketing sought to "secure work for the Union's members," the trespass was "concerted activity" arguably protected by section 7.[40] The trespass was also arguably prohibited; if the picketing objective had been to force employer recognition of the union, the union's failure to file a petition for a representation election would have violated section 8(b)(7)(c).[41] The court recognized contrary state court decisions on trespassory picketing,[42] but noted that the United States Supreme Court had never endorsed an exception for peaceful trespass arguably protected by the NLRA.[43]

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[39] Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 17 Cal. 3d 893, 553 P.2d 603, 132 Cal. Rptr. 443 (1976).

[40] *Id.* at 898, 553 P.2d at 608, 132 Cal. Rptr. at 448.

[41] *Id.* at 900-01, 553 P.2d at 609, 132 Cal. Rptr. at 449.

[42] *Id.* at 906 n.8, 553 P.2d at 613 n.8, 132 Cal. Rptr. at 453 n.8. For state cases upholding state jurisdiction to regulate trespassory union conduct, see May Dep't Stores Co. v. Teamsters Local 743, 64 Ill. 2d 153, 355 N.E.2d 7 (1976) (arguably protected trespass); People v. Bush, 39 N.Y.2d 529, 349 N.E.2d 832, 384 N.Y.S.2d 733 (1976) (union chanting and obstruction of entrance); Hood v. Stafford, 213 Tenn. 684, 378 S.W.2d 766 (1964) (obstruction of entrance); Moreland Corp. v. Retail Store Employees Local 444, 16 Wis. 2d 499, 114 N.W.2d 876 (1962) (peaceful picketing of store front). For cases denying state jurisdiction to regulate peaceful trespassory activity, see Reece Shirley & Ron's Inc. v. Retail Store Employees Local 782, 222 Kan. 373, 565 P.2d 585 (1977) (no jurisdiction unless threat to public safety or denial of reasonable ingress and egress); Commonwealth v. Noffke, 364 N.E.2d 1274 (Mass. App. Ct. 1977) (no jurisdiction to enforce criminal statute against union organizer disseminating information to employees on company property); Broadmoor Plaza, Inc. v. Amalgamated Meat Cutters, 21 Ohio Misc. 245, 257 N.E.2d 420 (1969) (peaceful picketing in public shopping center); Freeman v. Retail Clerks Local 1207, 58 Wash. 2d 426, 363 P.2d 803 (1961) (en banc) (union picketing of shopping center).

[43] Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 17 Cal. 3d at 905, 553 P.2d at 612, 132 Cal. Rptr. at 452. Three Supreme Court cases decided prior to *Garmon* had discussed the extent to which peaceful union trespass was protected by § 7. In NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956), the Court held that the NLRB could not compel an employer to allow nonemployee distribution of union literature on company premises. The Court said, however, that in some circumstances employer property rights must yield to the § 7 right of union organization. 351 U.S. at 112 (dictum). In Youngdahl v. Rainfair, Inc., 355 U.S. 131 (1957), the Court held that a state court injunction directed against violent or obstructive picketing could not lawfully enjoin all union picketing of the premises. *Id.* at 139-40. And in Meat Cutters Local 427 v. Fairlawn Meats, Inc. 353 U.S. 20 (1957), the Court held that state jurisdiction to issue a broad injunction against union picketing, trespass, and secondary pressure on suppliers was preempted. The Court explicitly left open the question of whether a state could exercise jurisdiction to issue a narrowly drawn injunction against peaceful trespass. *Id.* at 24.

Taggart v. Weinacker's, Inc., 283 Ala. 171, 214 So. 2d 913 (1968), *cert. granted*, 396 U.S. 813 (1969), *cert dismissed*, 397 U.S. 223 (1970), presented the kind of narrowly drawn trespass injunction upon which the Court in *Fairlawn Meats* had reserved decision. But the Court dismissed certiorari as improvidently granted. Chief Justice Burger filed a concurring opinion supporting state jurisdiction over union trespass. Claiming that trespass laws were part of the general backdrop of state law that Congress had not intended to preempt

Rejecting a "literal, mechanical" application of the *Garmon* rule, the United States Supreme Court reversed.[44] The Court quoted *Farmer*,[45] and endorsed exceptions to *Garmon* where arguably prohibited conduct meets two conditions: first, a significant state interest in protecting its citizens; second, little risk that state jurisdiction will interfere with NLRB primary jurisdiction to enforce section 8 prohibitions.[46] Without discussing the first condition, the Court found the second satisfied because the controversy before the state court differed from that which could have been presented to the NLRB under section 8.[47] In *Sears*, the state controversy involved the picketing location, whereas the NLRB controversy would involve the picketing objective.[48] Because the controversies were "different ... (as in *Farmer*),"[49] the Court concluded that the rationale for preempting arguably prohibited conduct did not apply.[50]

The Court next considered the arguably protected character of the trespass. It admitted that where conduct is arguably protected, the state court controversy potentially overlaps with an NLRB section 7 determination.[51] The supremacy clause of the

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by enacting the NLRA, the Chief Justice argued that the "local interest" and "peripheral concern" exceptions should allow state jurisdiction even over arguably protected trespass. 397 U.S. at 227-29. At least two state courts have assumed jurisdiction in explicit reliance on Chief Justice Burger's concurring opinion. *See* Sheet Metal Workers Int'l Ass'n v. Carter, 133 Ga. App. 872, 212 S.E.2d 645 (1975), *cert. denied*, 423 U.S. 1078 (1976); May Dep't Stores Co. v. Teamsters Local 743, 64 Ill. 2d 153, 355 N.E.2d 7 (1976). *See generally* Broomfield, *Preemptive Federal Jurisdiction Over Concerted Trespassory Union Activity*, 83 HARV. L. REV. 552, 554-55 (1970).

[44] 436 U.S. 180, 188-89 (1978).

[45] "Our cases indicate ... that inflexible application of the doctrine is to be avoided, especially where the State has a substantial interest in regulation of the conduct at issue and the State's interest is one that does not threaten undue interference with the federal regulatory scheme." *Id.* at 188 (quoting *Farmer*, 430 U.S. at 302).

[46] 436 U.S. at 196.

[47] *Id.* at 197. Unfortunately, the Court did not delineate the degree of difference required in order to avoid preemption of the state controversy. The distinction between separate controversies arising from the same set of facts and separate aspects of the same controversy is rarely clear.

[48] If the objective of the picketing had been to coerce Sears into assiguing work away from its employees to union members, the picketing would have been prohibited by § 8(b)(4)(D). If the objective of the picketing had been to force Sears to recognize the union—"recoguitional picketing"—§ 8(b)(7)(C) would have prohibited it unless a petition for a representation election had been filed within 30 days. Thus, the illegality of the picketing under the NLRA depended upon NLRB determination of its objective, not its location. 436 U.S. at 198, 201 nn.31 & 32.

[49] *Id.* at 197. *See* note 35 and accompanying text *supra*.

[50] *Id.* at 198.

[51] *Id.* at 200-01.

United States Constitution[52] requires that a state court decide the same issue that the NLRB would determine—whether the trespass is actually protected by federal law—prior to granting relief under state law.[53] Nevertheless, said the Court, "there was in fact no risk of overlapping jurisdiction in this case."[54] Regardless of whether the state suit was allowed, the employer had no standing to invoke NLRB determination of whether section 7 protected the trespass.[55] Absent a *union* decision to file a section 8 unfair labor practice charge against the employer, the Board could not determine the section 7 issue.[56] Thus, preemption of state jurisdiction would have relegated the employer to self-help remedies.[57]

The Court concluded that permitting state courts to evaluate the merits of the union's section 7 defense before applying local law posed little threat to national labor policy. Trespass, the Court declared, is "far more likely to be unprotected than protected."[58] Moreover, where there is a strong argument that the trespass is protected, the union will likely respond to an employer's demand to depart by filing a section 8 charge.[59] This filing would allow NLRB adjudication of the status of the trespass. Thus, the employer's need for a forum to determine the legality of the tres-

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[52] U.S. CONST. art. VI, cl. 2.

[53] 436 U.S. at 201. This obligation exists independently of the labor law preemption doctrine. It derivies from the familiar supremacy clause analysis of Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824), and exists whenever a state court seeks to apply local law against conduct potentially protected by federal law. *See* Cox, *supra* note 2, at 1340-41.

[54] 436 U.S. at 201.

[55] The NLRB may hear only cases alleging § 8 unfair labor practices. *See* 29 U.S.C. § 160 (1976).

[56] 436 U.S. at 201.

[57] *Id.* at 202. The preemptive sweep of the "arguably protected" test as applied to trespassory picketing is particularly troublesome. Although unlawful under state law, such conduct is often not arguably prohibited by § 8, leaving the employer without access to the NLRB. Preemption of state jurisdiction in these cases leaves the employer with no forum, limiting him to "the unsatisfactory remedy of using 'self help' against the pickets to try to provoke the union to charge the employer with an unfair labor practice." Longshoremen's Local 1416 v. Ariadne Shipping Co., 397 U.S. 195, 201-02 (1970) (concurring opinion, White, J.). *See* Broomfield, *supra* note 43, at 562-68.

[58] 436 U.S. at 205.

[59] The NLRB had previously taken the position that mere resort to the courts by an employer does not violate § 8. *See* NLRB v. Nash-Finch Co., 404 U.S. 138, 142 (1971). Thus, the union can protect itself by filing a § 8 charge with the NLRB only if the employer has demanded that the union leave the premises prior to initiating his trespass claim. This demand becomes the basis for the union's § 8 allegation of interference with its § 7 rights. The *Sears* Court held that, at least as long as the NLRB holds to the position noted above, such a demand is a precondition for state court jurisdiction. 436 U.S. at 207-08 n.44.

passory picketing "outweighed" any danger to national labor policy created by state court jurisdiction.[60]

The majority opinion did not determine whether state jurisdiction is preempted if the union does file a section 8 charge when asked to leave the premises. Two members of the majority added separate opinions in which they disagreed on this issue. Justice Blackmun argued that the exclusive unfair labor practice jurisdiction of the NLRB ousts state jurisdiction pending NLRB determination of the section 8 charge.[61] In contrast, Justice Powell argued that state courts should be able to grant preliminary injunctive relief against trespass pending NLRB disposition.[62]

Joined by Justices Stewart and Marshall, Justice Brennan dissented from the majority opinion on three major grounds. First, he asserted that the majority had underestimated the risk to national policy in allowing state courts to determine the likelihood of section 7 protection before applying local law.[63] Second, he ar-

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[60] *Id.* at 206-07.

[61] *Id.* at 209-10. This view rests on the traditional arguments for preempting jurisdiction over prohibited conduct: uniformity of NLRA interpretation and uniformity of remedy. *See* notes 12-13 and accompanying text *supra.*

[62] 436 U.S. at 212-14. Concerned that delays in the NLRB hearing process pose a "danger of violence" even after the union has filed a § 8 charge, Justice Powell would have allowed aggrieved employers to seek "orderly interim relief." *Id.* The *Sears* Court, however, sought only to provide the aggrieved employer with a forum to determine the status of the dispute. It did not seek to remedy the inadequacies of NLRB procedures through state court intervention. Once the union has filed a complaint with the NLRB, the employer has his forum. State courts should then defer to NLRB expertise.

[63] The dissenters disagreed with both of the Court's reasons for concluding that the state determination did not threaten the federal scheme. First, the dissent challenged the Court's reliance on NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956), *discussed in* note 43 *supra*, for the proposition that trespass is unlikely to be protected:

> *Babcock* involved a trespass on industrial property which the employer had fenced off from the public at large, and it is grave error to treat *Babcock* as having substantial implications for the generic situation presented by this case. To permit trespassory § 7 activities in the *Babcock* fact pattern entails far greater interference with an employer's business than does allowing peaceful nonobstructive picketing on a parking lot which is open to the public and which has been used for other types of solicitation.

436 U.S. at 231. Second, the dissent challenged the Court's assertion that where the trespass is protected, the union will respond to the employer's demand to depart by filing an unfair labor practice charge with the NLRB:

> A request that a trespass cease may or may not so threaten the union as to lead it to go to the trouble and expense of attempting to invoke the Board's jurisdiction, and the strength of the argument that the conduct is protected will frequently be a factor of no relevance. . . .
>
> . . . The Court assiduously avoids holding that resort to the Board will oust a state court's jurisdiction and is divided on this question.

Id. at 232-33 (footnote omitted).

gued that the kinds of trespassory union conduct that most threaten local interests are not arguably protected, and are already subject to state jurisdiction under existing exceptions to *Garmon*'s "arguably prohibited" prong.[64] Third, he feared that state courts might construe *Sears* broadly, assuming jurisdiction whenever employers confronted with arguably protected conduct are unable to invoke an NLRB section 8 determination.[65]

III
TOWARD A MORE RATIONAL TEST FOR PREEMPTION

A. *Sears' Impact on Arguably Prohibited Conduct*

Although the *Sears* Court endorsed *Farmer*'s flexible approach to preemption,[66] it balanced competing state and federal interests incorrectly. The Court overestimated the state interest, which was significantly weaker than the state interests supporting other "arguably prohibited" exceptions. The tort in *Sears* threatened not a personal, but a business interest.[67] The trespass did not realistically portend violence.[68] Unlike *Farmer, Sears* involved state law that was not limited to the regulation of "outrageous" conduct.

In addition, the Court underestimated the federal interest in preempting state jurisdiction. The Court's reliance on *Farmer* to create a "same or different controversy" test[69] for threats to NLRB primary jurisdiction insufficiently safeguards federal labor policy. Unlike *Farmer*, where a union member sued his union,[70] *Sears* required resolution of a dispute between labor and management interests. If the picketing in *Sears* was actually prohibited by section 8, failure to oust state jurisdiction would threaten the remedial balance of the federal scheme.[71]

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[64] *Id.* at 226-27.

[65] *Id.* at 236. Such broad construction is likely. *See* notes 74-76 and accompanying text *infra.*

[66] *See* note 45 *supra.*

[67] The *Farmer* Court had characterized exceptions to "arguably prohibited" preemption as resting on "the State's interest in protecting the health and well-being of its citizens." 430 U.S. at 303.

[68] One commentator discussing peaceful trespass has argued against "stretching the term [violence] to include peaceful activity which shows no signs of presently becoming violent and which does not physically interfere with the employer's operations or others' access to his place of business." Broomfield, *supra* note 43, at 565-66 (footnote omitted).

[69] *See* notes 47-50 and accompanying text *supra.*

[70] *See* note 30 and accompanying text *supra.*

[71] *See* note 13 *supra.*

B. *Sears' Impact on Arguably Protected Conduct*

Sears is the first post-*Garmon* case to uphold state jurisdiction over arguably protected conduct.[72] By balancing state and federal interests within *Garmon*'s "arguably protected" prong, *Sears* mirrors *Farmer*'s balancing approach to the "arguably prohibited" prong.[73] Taken together, the two cases land a one-two punch that threatens to knock out the exception-riddled *Garmon* rule.

State courts are likely to interpret *Sears* broadly, although a narrow reading is possible.[74] Because the Court discussed trespassory conduct in its generic form,[75] the exception must extend to all instances of peaceful union trespass. Moreover, the other factors the Court considered will likely exist whenever employers confronted with arguably protected conduct are unable to invoke an NLRB section 8 determination.[76] In short, *Sears* paves the

[72] Justice Brennan, for the dissent, went so far as to say: "[I]t has heretofore been absolutely clear that there is no state power to deal with conduct that is a central concern of the Act and arguably *protected* by it . . . ." 436 U.S. at 223 (emphasis in original) (footnote omitted). *See* note 43 and accompanying text *supra.*

[73] *See* notes 29-36 and accompanying text *supra.*

[74] [T]he Court apparently intends to create only a very narrow exception to *Garmon*—largely if not entirely limited to situations in which the employer first requested the nonemployees engaged in area-standards picketing on the employer's property to remove the pickets from the employer's land and the union did not respond by filing § 8(a)(1) unfair labor practice charges . . . .

436 U.S. at 234 (dissenting opinion, Brennan, J.).

[75] "[W]hile there are unquestionably examples of trespassory union activity in which the question whether it is protected is fairly debatable, experience under the Act teaches that such situations are rare and that a trespass is far more likely to be unprotected than protected." 436 U.S. at 205.

[76] *See* notes 44-60 and accompanying text *supra.* The factors the Court considered may be grouped as follows:

Strong State Interest	Weak Federal Interest
(1) denial of any remedy to employer	(1) no threat to NLRB primary jurisdiction
(2) risk of violence	(2) "trespass" likely to be unprotected
	(3) union may protect itself by filing § 8 charge.

State factor (1) and federal factors (1) and (3) exist whenever an employer who demands that a union cease to engage in arguably protected conduct cannot himself secure an NLRB § 8 determination. Under *Sears*, the employer's demand is a precondition of state jurisdiction. *See* note 59 *supra.* Employers who have read *Sears* will invariably make such demands, since the result will be either state jurisdiction or a union § 8 charge and NLRB resolution. The Court mentioned state factor (2) but did not discuss it; it is difficult to argue that any real risk of violence existed in *Sears. See* note 68 *supra.* Thus, none of the factors mentioned in *Sears* seem likely to limit state court expansion of *Sears*' rationale to regulate other arguably protected conduct.

way for broad state inroads on *Garmon*'s "arguably protected" prong.

Given the Court's new willingness to create further exceptions by examining competing interests within both prongs of the *Garmon* rule, that rule's usefulness has ended. The original *Garmon* formulation offered two practical advantages: it was easy for state courts to apply and its broad sweep rendered erroneous state-court assumption of jurisdiction unlikely, thereby making Supreme Court review unnecessary. The proliferation of exceptions to *Garmon* destroys both advantages; application of the rule is difficult, and the Supreme Court must continually review the scope of an ever-lengthening list of exceptions.

Not only has the *Garmon* test lost its advantages, but it also retains disadvantages. First, it encourages misdirected argument and analysis at the state court level. State court jurisdiction remains preempted under *Garmon* unless Supreme Court balancing of state and Federal interests has created an applicable exception; retention of *Garmon* thus tempts state courts to assert jurisdiction by stretching the contours of existing exceptions without focusing on the extent to which national policy requires exclusive federal jurisdiction.[77] Second, Supreme Court concern for the vitality of the *Garmon* test can cause unfairness to litigants. In particular cases, the Court may preempt state jurisdiction that would not interfere with federal labor policy in order to reaffirm the weakened *Garmon* rule.[78]

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[77] The more state courts are hemmed in by sweeping preemption rules which prevent them from reaching a sensible decision on the facts of a particular case, the more they are likely to struggle to evade or to avoid the rules. The disposition of difficult cases may not be greatly facilitated, and there will be some compulsion to a kind of lawlessness in the federal system which cannot be effectively policed.

Michelman, *State Power to Govern Concerted Employee Activities*, 74 HARV. L. REV. 641, 683 (1961).

[78] *See, e.g.*, Amalgamated Ass'n of St. Employees v. Lockridge, 403 U.S. 274 (1971). In *Lockridge*, a union had terminated the membership of a bus driver who failed to pay his monthly dues. Lockridge brought a breach of contract action against the union, claiming that his expulsion was premature and therefore violative of the union constitution. The state court reinstated Lockridge and granted compensation for lost wages. The Supreme Court reversed, holding that the NLRB had exclusive jurisdiction to remedy any wrong resulting from the discharge, because the breach of contract was also an unfair labor practice under § 8. The Court canvassed existing exceptions to *Garmon*, failing to fit Lockridge's case into any of them.

The Court's preemption of state jurisdiction in *Lockridge* was unfortunate. First, the conflict did not pit labor against management. Rather, it was an internal matter between union and member. Second, construction of the union constitution and collective bargaining agreements does not require the expertise of the NLRB. Courts, not the NLRB, usually

Third, the exception-riddled *Garmon* superstructure is not even the exclusive test for preemption. When union conduct is not arguably protected or prohibited, the Supreme Court has sometimes gone beyond *Garmon* to preempt on the ground that the challenged conduct is an economic weapon intended to be free from state interference.[79] In short, the rule is underinclusive in some contexts, as well as overinclusive in others.[80]

C. *A Balancing Test for Preemption*

The *Sears* Court's willingness to reject mechanical application of either prong of the *Garmon* rule in favor of a reasoned weighing of state and federal interests marks a long-needed shift in national labor policy. But the *Sears* approach needs improvement. The *Garmon* rule should be abandoned. Moreover, the majority viewed trespass as likely to be unprotected,[81] and therefore believed it "anomalous" to deny the employer a state remedy in deference to a federal law he could not invoke.[82] The dissenters,

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have jurisdiction over such matters. *See* 29 U.S.C. § 185 (1976). Lockridge clearly suffered an injustice from the Court's decision to preempt state jurisdiction. *See* Cox, *supra* note 2, at 1339; Lesnick, *supra* note 15, at 482. The *Lockridge* Court's reluctance to define another exception to *Garmon* appears explicable only as a reaction against widespread doubt as to the continued vitality of the *Garmon* rule. Justice White observed in dissent that "the 'rule' of uniformity that the Court invokes today is at best a tattered one, and at worst little more than a myth." 403 U.S. at 318. A balancing test without *Garmon* would avoid the injustice arising from doctrinally-based reluctance to carve out further exceptions.

[79] *See, e.g.*, Local 20, Teamsters v. Morton, 377 U.S. 252 (1964). The union had violated state law by persuading one of Morton's customers to boycott Morton's business. The conduct was neither arguably protected by § 7 nor arguably prohibited by § 8. Nonetheless, the Supreme Court harred application of the state law, explaining:

> This weapon of self-help, permitted by federal law, formed an integral part of the [union's] effort to achieve its bargaining goals during negotiations with [Morton]. Allowing its use is a part of the balance struck by Congress between the conflicting interests of the union, the employees, the employer and the community.

Id. at 259 (footnote omitted). *See* Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132 (1976) (state injunction against union employees' refusal to work overtime preempted notwithstanding prior NLRB dismissal of § 8 charge). *Lodge 76* and *Morton* thus adopted the expansive view of preemption introduced eleven years earlier in Garner v. Teamsters Local 776, 346 U.S. 485 (1953). *See* note 15 and accompanying text *supra.*

[80] The overinclusiveness of the "arguably prohibited" prong and the development of exceptions to it are discussed in notes 23-27 *supra.* More than one writer has urged that *Garmon* be scrapped in favor of a direct consideration of the effect that state jurisdiction would have upon the federal regulatory scheme. *See* Cox, *supra* note 2, at 1351-68; Michelman, *supra* note 77, at 680-83.

[81] *See* note 75 *supra.*

[82] 436 U.S. at 206-07.

viewing at least some trespass as likely to be protected, were less concerned with the employer's remedy.[83] To resolve this division, a workable preemption test should look beyond the generic term "trespass" and balance competing interests in particular instances.

The following test would provide the particularity needed in preemption analysis while retaining solid guidelines for state court decisionmaking. First, the state court must determine that the law it seeks to apply is one of general applicability, affecting employee organization, collective bargaining, or labor disputes only incidentally. This requirement would preclude state courts from enforcing state labor relations laws in these areas, which is almost certain to interfere unduly with the federal scheme.[84] If this condition is met, the state court should examine relevant NLRB and federal court precedent, and assess the likelihood that the challenged conduct is protected by section 7. The court should decline jurisdiction if it appears at least as probable as not that the conduct is protected. If the conduct is probably not protected, the court should ask whether application of the state remedy conflicts with section 8's accommodation of labor and management interests.[85] If no conflict exists, the court should feel free to exercise jurisdiction.

If remedial conflict does exist, however, the state court should examine the strength of the state interest. Several factors indicate a strong state interest: (1) the need to protect personal, rather than economic interests; (2) the danger of violence absent state regulation; and (3) the extent to which preemption would deny the aggrieved party any forum to bring suit.[86] The state court should then weigh the state and federal interests, assuming

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[83] "[T]he denial to the employer of a remedy is an entirely acceptable social cost for the benefits of a preemption rule that avoids the danger of state-court interference with national labor policy." *Id.* at 227.

[84] *See* Cox, *supra* note 2, at 1356. For cases denying state-court application of state labor relations laws in deference to the federal Act, see Garner v. Teamsters Local 776, 346 U.S. 485 (1953); UAW v. O'Brien, 339 U.S. 454 (1950); LaCrosse Tel. Corp. v. Wisconsin Employment Relations Bd., 336 U.S. 18 (1949); Bethlehem Steel Co. v. New York State Labor Relations Bd., 330 U.S. 767 (1947); Hill v. Florida, 325 U.S. 538 (1945).

[85] There are two ways in which the state remedy might conflict with such an accommodation. First, the conduct that the state seeks to regulate might be specifically prohibited by § 8. Second, conduct not specifically prohibited might nevertheless be "permitted"—where the prohibition of certain activities raises the presumption that Congress intended others be left unregulated by the states. *See* notes 15, 79, and accompanying text *supra.*

[86] The *Sears* and *Farmer* Courts considered these factors within the *Garmon test. See* notes 29-36, 76, and accompanying text *supra.*

jurisdiction only when an overwhelming need for state regulation exists.[87]

The foregoing test eliminates the problems associated with the *Garmon* rule.[88] Moreover, abandoning *Sears'* generic characterization of the challenged conduct would achieve more precision in balancing interests in particular cases. The principal objection to jettisoning *Garmon* in favor of such direct examination of the particular, rather than the generic, character of the challenged conduct is the increased risk of erroneous state court decisions. This risk, however, is no longer great. First, the gradual development of NLRB and federal court precedent on NLRA issues provides clearer standards for initial state determinations than existed prior to the *Garmon* decision.[89] Second, because unions are far stronger and more widely accepted today than when the NLRA was passed,[90] they do not need the same measure of federal protection. Third, the NLRB may seek a federal injunction against state court actions preempted by the NLRA.[91] The possibility of such intervention limits the threat to national policy flowing from erroneous state assumption of jurisdiction.

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[87] Even though regulating union violence would in some circumstances require an accommodation between labor and management interests, overwhelming state interest would justify state jurisdiction. On the other hand, no overwhelming state interest would be required for state jurisdiction in cases like *Farmer*, where the challenged conduct is between unions and their members and does not involve a labor-management accommodation.

[88] *See* notes 77-79 and accompanying text *supra.*

[89] In *Sears*, for example, a state court could have relied on cases suggesting that § 7 protection of trespass has been upheld only where the union has no reasonable access to employees through alternative means of communication. *See, e.g.*, NLRB v. Tamiment, Inc., 451 F.2d 794 (3d Cir. 1971) (union lawfully denied entrance to resort area where no attempt to use alternative means of communications, such as mails or notices), *cert. denied*, 409 U.S. 1012 (1972); NLRB v. S & H Grossinger's, Inc., 372 F.2d 26 (2d Cir. 1967) (NLRB order requiring employer to permit nonemployee union organizers to solicit employees on premises upheld where employees not reachable by other practicable means and employer showed no possible detriment from allowing their presence). The question of what constitutes reasonable access to employees through alternative channels of communication has been discussed in the NLRB cases. *See, e.g.*, Scholle Chem. Corp., 192 N.L.R.B. 724 (1971) (union access insufficient where employees could not be identified because they shared private access road entry with workers from other plants.

[90] *See generally* D. Bok & J. Dunlop, Labor and the American Community I-41 (1970).

[91] *See* NLRB v. Nash-Finch Co., 404 U.S. 138 (1971). The anti-injunction statute prohibits a federal court from enjoining state proceedings "except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283. The Court, however, has recognized an exception for suits brought by the United States. *See* Leiter Minerals, Inc. v. United States, 352 U.S. 220, 224-26 (1959). The Court in *Nash-Finch* held that the NLRA granted the NLRB implied authority to obtain a federal injunction against state court action preempted by the Act.

CONCLUSION

Upholding for the first time state jurisdiction over conduct arguably protected by the NLRA, the *Sears* decision further erodes the exception-riddled *Garmon* test for labor preemption. The Court should discard *Garmon* and retain a properly-formulated balancing approach for the state courts. Such an approach would remedy the complexities and inadequacies of the *Garmon* rule with little threat of increased state encroachment on federal labor policy.

William B. B. Smith V

The Court declared that the Board "moved to prevent 'irreparable injury to a national interest.' The Board is the sole protector of the 'national interest' defined with particularity in the Act." 404 U.S. at 145 (footnote omitted) (quoting *Leiter Minerals*, 352 U.S. at 225-26).

See also Amalgamated Clothing Workers v. Richman Bros., 348 U.S. 511 (1955) (§ 2283 bars private party from injunctive relief in federal court against state court antipicketing order, unless federal court previously acquires jurisdiction pursuant to NLRB § 8 adjudication). *See generally* Broomfield, *supra* note 43, at 576 & n.135.

With the *Sears* decision opening up new opportunities for state courts to assume jurisdiction within the "arguably protected" prong, NLRB reliance on *Nash-Finch* to restrain erroneous state court action should increase.