Notes

Labor Law Preemption After *Belknap, Inc. v. Hale*: Has Preemption as Usual Been Permanently Replaced?

I. Introduction

Federal labor law preemption is, theoretically, a simple concept. Congress has mandated that labor-management relations be governed under a federal body of law known as the National Labor Relations Act (NLRA).[1] To provide necessary uniformity in the control of labor-management relations,[2] state interference with the federal scheme has been precluded.[3] Despite this need for uniformity, the United States Supreme Court and the National Labor Relations Board (NLRB), the body created by Congress to administer the NLRA,[4] have recognized certain situations in which state causes of action are not preempted by the federal Act.[5] In practice, however, labor law preemption has been a complex and difficult area. The problems have arisen in the judicial determination of the boundary lines between state or concurrent jurisdiction and exclusive federal jurisdiction.[6]

Belknap, Inc. v. Hale[7] is the United States Supreme Court's latest pronouncement of the labor law preemption doctrine. In *Belknap*, the Court found that the NLRA did not preempt state causes of action for misrepresentation and breach of contract brought against an employer by non-union former employees. The employees had been hired to

---

[1]29 U.S.C. §§ 141-87 (1976). The current version of the NLRA is composed of the National Labor Relations Act (Wagner Act), ch. 372, 49 Stat. 449 (1935), as amended by the Labor-Management Relations Act (Taft-Hartley Act), ch. 120, 61 Stat. 136, (1947), and the Labor-Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act), Pub. L. No. 86-257, 73 Stat. 519. The present NLRA has also been subject to numerous minor amendments. *See, e.g.*, Act of July 26, 1974, Pub. L. No. 93-360, 88 Stat. 395.

[2]A uniform body of labor law is necessary to effectively protect rights granted under the NLRA from erosion in state courts and legislatures. *See, e.g.*, Vandeventer v. Local 513, Int'l. Union of Operating Engineers, 579 F.2d 1373 (8th Cir.), *cert. denied*, 439 U.S. 984 (1978).

[3]*See, e.g.*, Tyree v. Edwards, 287 F. Supp. 589 (D. Alaska 1968), *aff'd sub nom.* Alaska v. Local 302, Int'l Union of Operating Engineers, 393 U.S. 405 (1969).

[4]29 U.S.C. §§ 141-87 (1976).

[5]*See, e.g.*, UMW v. Gibbs, 383 U.S. 715 (1966); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959).

[6]*See* Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337 (1972) [hereinafter cited as *Revisited*.]

[7]103 S. Ct. 3172 (1983).

permanently replace striking workers and were later dismissed to accommodate returning strikers.[8]

The Court examined two preemption doctrines and their exceptions but failed to explicitly rely upon any single reason for the result.[9] This Note will first examine preemption historically, and as applied to the facts of the *Belknap* case. The *Belknap* decision's effect upon a variety of issues in labor preemption will then be analyzed. These issues include the importance of third parties to the labor contract and parties' rights in labor disputes. Finally, the Note will discuss *Belknap's* effect upon the preemption doctrine.

II. Labor Law Preemption: Past and Present

A. Preemption Before Belknap

1. State Jurisdiction Before the Modern Era of Preemption.—The supremacy clause of the United States Constitution[10] dictates that states may not pass or enforce laws in conflict with the substantive rights granted by federal law.[11] By enacting the National Labor Relations Act,[12] Congress exhibited clear intent to regulate certain aspects of labor-management relations. Section 7 of the NLRA protects specified kinds of employee conduct from interference by employers.[13] Section 8 prohibits certain conduct of both employers and employees.[14] Conduct which interferes with section 7 rights or which is prohibited by section 8 results in an unfair labor practice, triggering the NLRB's power to grant certain remedies to aggrieved parties.[15]

Prior to 1959, the United States Supreme Court developed a philosophical inconsistency regarding the extent of state jurisdiction over labor disputes.[16] The case which laid the foundation for this inconsistency was *UAW v. Wisconsin Employment Relations Board*,[17] better known as the *Briggs-Stratton* case.

---

[8]*Id.* at 3175-76.

[9]*See infra* notes 92-110 and accompanying text.

[10]U.S. Const. art. VI, cl. 2.

[11]*See, e.g.*, Edgar v. MITE Corp., 102 S. Ct. 2629 (1982); City of Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1973); Miles v. Illinois Cent. R.R., 315 U.S. 698 (1942); *see also Revisited*, *supra* note 6, at 1341.

[12]29 U.S.C. §§ 141-87 (1976).

[13]"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively . . . and to engage in other concerted activities . . . ." 29 U.S.C. § 157 (1976).

[14]29 U.S.C. § 158 (1976). Section 8(a) concerns employers' conduct while § 8(b) describes prohibited conduct of labor organizations. *Id.*

[15]These remedies include cease-and-desist orders, reinstatement of wrongfully discharged employees and awards of back pay. The NLRB's orders are enforced by the United States District Courts. 29 U.S.C. § 160 (1976).

[16]*See infra* notes 18-33 and accompanying text.

[17]336 U.S. 245 (1949).

In *Briggs-Stratton*, a union's tactic for pressuring the employer called for a long series of unannounced meetings of uncertain duration, designed to have greater effect upon the employer's business than would a strike.[18] Although these work stoppages were unfair labor practices under state law,[19] the United States Supreme Court found the conduct to be neither protected nor prohibited by the NLRA.[20] The Court allowed a state injunction to stand, refusing to hold that the NLRA preempted the state statute.[21] The Court reasoned that congressional silence could not be interpreted as condoning the conduct, and concluded that the state must have jurisdiction because the conduct would otherwise go ungoverned.[22] *Briggs-Stratton* generalized that unprotected and unprohibited conduct not governed by the NLRA is within state control.[23]

Four years later, in *Garner v. Teamsters Local 776*,[24] the United States Supreme Court impliedly recognized that statutory and NLRB silence regarding certain activity did not necessarily require a finding of state jurisdiction. In *Garner*, union members who were not employees picketed an employer to persuade the company to influence its employees to join the union.[25] The employer won an injunction in state court because the picketing violated the state labor relations statute.[26] The Court found that the conduct was prohibited by section 8 of the NLRA, and was, therefore, within the NLRB's jurisdiction.[27] The Court held that the state was precluded from providing relief to the employer,[28] noting that the conflicting remedies in state and NLRB proceedings justified preemption here.[29]

---

[18] *Id.* at 249.

[19] Wisconsin Employment Peace Act, WIS. STAT. § 111.06(2) (1947).

[20] 336 U.S. at 253. In examining preemption under the NLRA, the Court considered there to be basically three classes of conduct: conduct protected by § 7 of the NLRA, conduct prohibited by § 8, and conduct neither protected by § 7 nor prohibited by § 8. *See, e.g.*, UAW v. O'Brien, 339 U.S. 454 (1950) (involving conduct protected by § 7); Garner v. Teamsters Local 776, 346 U.S. 485 (1953) (involving conduct prohibited by § 8). *See generally Revisited, supra* note 6, at 1340. Under modern analysis, still ten years in the future, the conduct may have been both arguably protected by § 7 and arguably prohibited by § 8. *See infra* notes 35-46 and accompanying text.

[21] 336 U.S. at 264-65. *See Revisited, supra* note 6, at 1347.

[22] 336 U.S. at 254.

[23] *Id.* at 246-47. *See also Revisited, supra* note 6, at 1347-48.

[24] 346 U.S. 485 (1953).

[25] *Id.* at 487.

[26] Pennsylvania Labor Relations Act, PA. STAT. ANN. tit 43, § 211.6 (Purdon 1952).

[27] 346 U.S. at 488. Unlike *Briggs-Stratton*, the Court in *Garner* avoided adjudicating whether the conduct in issue was actually prohibited by the NLRA. Instead, the Court noted that "Congress has taken in hand this particular type of controversy . . . . The power and duty of primary decision lies with the [NLRB], not with us. But it is clear that the Board was vested with power to entertain petitioners' grievance . . . ." *Id.* at 488-89. Under modern preemption analysis, the conduct involved in *Garner* may have been better classified as arguably prohibited. *See infra* notes 35-46 and accompanying text.

[28] 346 U.S. at 501.

[29] *Id.* at 498.

The conflict lies in remedies, not rights. The same picketing may injure both

Although facially reconcilable because *Briggs-Stratton* involved conduct neither protected by section 7 of the NLRA nor prohibited by section 8[30] while *Garner* concerned activity prohibited by section 8,[31] the cases were inconsistent philosophically. *Briggs-Stratton* generalized that conduct not regulated by the NLRA must be left to state control.[32] Conversely, *Garner* recognized that Congress could indicate, through statutory silence, that certain kinds of conduct are beyond state control, even if not expressly regulated by the NLRA.[33] In 1959 the United States Supreme Court was faced with a case which required further subdivision of conduct under the NLRA in order to avoid the conflict between the foundations of *Briggs-Stratton* and *Garner*. *San Diego Building Trades Council v. Garmon*[34] marked the beginning of the modern approach to preemption.

2. Garmon *and the Modern Approach: The Birth of "Arguable" Conduct.*—In *San Diego Building Trades Council v. Garmon*,[35] the United States Supreme Court was presented with facts which highlighted the inconsistent philosophies of *Briggs-Stratton* and *Garner*.[36] The result was a new preemption doctrine.

> public and private rights. But when two separate remedies are brought to bear on the same activity, a conflict is imminent. It must be remembered that petitioners' state remedy was a suit for an injunction prohibiting the picketing. The federal Board, if it should find a violation of the [NLRA], would issue a cease-and-desist order and perhaps obtain a temporary injunction to preserve the *status quo*. Or if it found no violation, it would dismiss the complaint, thereby sanctioning the picketing. To avoid facing a conflict between the state and federal remedies, we would have to assume either that both authorities will always agree as to whether the picketing should continue, or that the State's temporary injunction will be dissolved as soon as the federal Board acts. But experience gives no assurance of either alternative, and there is no indication that the [NLRA] left it open for such conflicts to arise.

Id. at 498-99 (footnote omitted). The Court did, however, recognize as an exception the state's interest in restraining violent conduct. *Id.* at 488. Thus, the Court's premise in *Garner* was that, as a general rule, dual jurisdiction was unworkable due to the resulting diversities and conflicts that would frustrate the congressional purpose of a uniform national body of labor law. *Id.* at 500.

[30] *See supra* note 20 and accompanying text.

[31] *See supra* note 27 and accompanying text.

[32] *See supra* note 23 and accompanying text.

[33] 346 U.S. at 500. "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." *Id.* *Briggs-Stratton* survived for many years as an anomaly in preemption law. Prior to *Belknap*, every case since *Briggs-Stratton* followed *Garner's* philosophy, which allows for a zone of unregulated conduct. No direct conflict with *Briggs-Stratton* arose until International Assn. of Machinists v. Wisconsin Employment Relations Comm., 427 U.S. 132 (1976), which carried the *Garner* philosophy to a fact situation more like that of *Briggs-Stratton*. *See infra* notes 47-68 and accompanying text.

[34] 359 U.S. 236 (1959).

[35] *Id.*

[36] *See supra* notes 30-33 and accompanying text.

Garmon involved a union's picketing to pressure an employer to recognize a closed shop[37] despite the company's insistence that the employees desired to remain non-union.[38] The company successfully sued in state court to enjoin the picketing and for damages to compensate for business losses attributable to the union's activity.[39]

The Court was unable to follow either *Briggs-Stratton* or *Garner* without overruling or severely damaging the other.[40] The conduct's classification was unclear. The Court refused to hold that the conduct was protected by section 7 of the NLRA or prohibited by section 8, noting that such a finding was exclusively within the jurisdiction of the NLRB.[41] The Court was, therefore, unable to follow *Garner*, which had involved conduct prohibited by section 8, without overruling *Briggs-Stratton*.[42] To follow *Briggs-Stratton* would have been an equally unpleasant solution,

---

[37]The union desired an agreement with the employer to the effect that only employees who belonged to the union or those who applied for membership within thirty days would be permitted to remain employed. 359 U.S at 237.

[38]*Id.*

[39]*Id.* at 237. The United States Supreme Court held that federal law preempted the equitable claim in San Diego Building Trades Council v. Garmon, 353 U.S. 26 (1957), and remanded the damages claim to the state court, where it was upheld. Garmon v. San Diego Bldg. Trades Council, 49 Cal. 2d 595, 320 P.2d 473 (1958). The *Garmon* doctrine was announced when the Court subsequently reviewed the damages judgment. 359 U.S. 236 (1959). Simultaneously with the commencement of the state suit, the employer began a representation proceeding before the NLRB so that the employees would have the opportunity to vote for or against representation by the union. *Id.* at 238. The Board declined to hear the case "presumably because the amount of interstate commerce involved did not meet the Board's monetary standards in taking jurisdiction." *Id.*

[40]*Revisited*, *supra* note 6, at 1348-49.

[41]The court stated:

> At times it has not been clear whether the particular activity . . . was governed by § 7 or § 8 or was, perhaps, outside both these sections. But courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the [NLRA] that these determinations be left in the first instance to the [NLRB].
>
> The case before us is such a case.

359 U.S. at 244-45. The NLRB's primary jurisdiction over conduct governed under the NLRA was recognized before *Garmon*. Six years earlier, the Court, in *Garner*, noted:

> 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.

346 U.S at 490. By 1959, *Briggs-Stratton's* view of the NLRB's jurisdiction was clearly out of favor. In *Garmon*, the Court noted that "the approach taken in [Briggs-Stratton], in which the Court undertook for itself to determine the status of the disputed activity, has not been followed in later decisions, and is no longer of general application." 359 U.S. at 245 n.4.

[42]*Revisited*, *supra* note 6, at 1348-49. *See supra* notes 17-33 and accompanying text.

because to do so would have been inconsistent with *Garner's* philosophy.[43]

The Court's solution was to further subdivide the categories of conduct. In addition to conduct clearly protected by section 7 of the NLRA or prohibited by section 8 and conduct clearly not protected or prohibited, the Court now recognized conduct arguably protected or prohibited. *Garmon* did not affect preemption cases involving the former two categories of conduct.[44] Rather, *Garmon's* significance was in the Court's holding that "[w]hen an activity is arguably subject to section 7 or section 8 of the [NLRA], the states as well as the federal courts must defer to the exclusive competence of the [NLRB] if the danger of state interference with national policy is to be averted."[45] It is this standard, that state causes of action will be preempted if they involve conduct actually or arguably protected by section 7 or prohibited by section 8, that is known as the *Garmon* doctrine.[46]

Subsequent to *Garmon* there remained a dividing line in the spectrum of conduct. Prior to *Garmon*, that line was drawn between conduct that clearly was subject to the protections of the NLRA's section 7 or the prohibitions imposed by section 8, and activity that clearly was not. *Garmon* recognized that labor and management conduct was not always amenable to classification in such absolute terms. The Court, therefore, shifted the dividing line, placing conduct actually or arguably subject to section 7 or section 8 of the NLRA on one side and all other conduct on the opposite side. Both sides of this line have been subject to change. The side of preemption analysis involving the former category of conduct became confused in *Sears, Roebuck & Co. v. San Diego District Council of Carpenters.*[47] The latter category, at the time of *Garmon*, had been controlled by *Briggs-Stratton.*[48] Subsequently, *Briggs-Stratton* was replaced

---

[43]*See supra* notes 30-33 and accompanying text. *See also Revisited, supra* note 6, at 1349.

[44]Conduct clearly unprotected or unprohibited was not addressed in *Garmon*. Thus, *Briggs-Stratton* remained intact although severely limited in its application. 359 U.S. at 245 n.4. Also, the Court reaffirmed that activity clearly subject to § 7 or § 8 of the NLRA called for preemption. *Id.* at 244.

[45]*Id.* at 245.

[46]*Revisited, supra* note 6, at 1349. *See generally* Brody, *Labor Preemption Again—After the Searing of Garmon*, 13 S.W.U.L. Rev. 201 (1982); Cox, *Recent Developments in Labor Law Preemption*, 41 Ohio St. L.J. 277 (1980) [hereinafter cited as *Recent Developments*]. Although the doctrine was broadly stated, the Court in *Garmon* recognized exceptions to preemption where "the activity regulated was a merely peripheral concern of the . . . Act . . . [o]r where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling Congressional direction, we could not infer that Congress had deprived the states of the power to act." 359 U.S. at 245.

[47]436 U.S. 180 (1978). *See infra* notes 59-76 and accompanying text.

[48]This category was conduct clearly not subject to § 7 or § 8 of the NLRA. *Briggs-Stratton* operated such that when this kind of conduct was involved, the NLRA would not preempt state law. *See supra* notes 17-23 and accompanying text.

with a new rule in *International Association of Machinists v. Wisconsin Employment Relations Commission.*[49]

3. Machinists *and* Sears: *The Complications Set In.—a.* Machinists: *No state interference with economic weapons.—Machinists* broke new ground by explicitly overruling *Briggs-Stratton's* holding that conduct clearly not protected by section 7 of the NLRA or prohibited by section 8 was necessarily within the jurisdiction of the states.[50]

Machinists involved union members' concerted refusal to work overtime during contract negotiations with the employer. The employer filed an unfair labor practice charge with the NLRB and also filed a complaint with the Wisconsin Employment Relations Commission (WERC). The federal unfair labor practice charge was dismissed by the NLRB, which found no violation of the NLRA.[51] The union's activity did, however, constitute an unfair labor practice under state law.[52] The Court held that the state cause of action was preempted and, in so holding, overruled *Briggs-Stratton.*[53] The majority in *Machinists* focused upon "whether Congress intended that the conduct involved be unregulated because left 'to be controlled by the free play of economic forces.' "[54] The crucial inquiry was "whether 'the exercise of plenary state authority to curtail or entirely prohibit self-help would frustrate effective implementation of the

---

[49]427 U.S. 132 (1976). *See infra* notes 50-57 and accompanying text.

[50]In so holding, the Court extended the philosophy enunciated in Teamsters Local 20 v. Morton, 377 U.S. 242 (1964). In *Morton*, the union had gone on strike and also engaged in activities designed to induce the employer's suppliers and customers to cease doing business with the employer. *Id.* at 255. This was a kind of secondary boycott which Congress had scrutinized but which it had not proscribed in the 1959 amendments to the NLRA. *Id.* at 259-60. *See generally* Labor-Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act), Pub.L. No. 86-257, 73 Stat. 519 (1959). Although the conduct was neither protected by § 7 nor prohibited by § 8 of the NLRA, the United States Supreme Court reasoned that Congress had intended this activity to remain available to parties to a labor dispute. 377 U.S. at 258. The Court refused to allow the state to prohibit the conduct because to have held otherwise would have upset the balance of bargaining power between management and labor sought to be achieved by the NLRA. *Id. Briggs-Stratton* was impliedly distinguished in that *Morton* involved clear congressional intent to leave this kind of conduct available to labor disputants. *Revisited, supra* note 6, at 1352. Thus, the Court was not barred from holding that the NLRA preempted the state statute. Professor Cox foresaw the potential for broad application of the *Morton* principle, essentially an extension of *Garner*, to cover conduct not protected or prohibited, four years before the *Machinists* decision. *Id.*

[51]427 U.S. at 135.

[52]*Id. See* Wisconsin Employment Peace Act, Wis. Stat. § 111.06(2) (1974). The WERC's position was that because the conduct was neither arguably protected by § 7 nor prohibited by § 8 of the NLRA, the state was not preempted from issuing a cease and desist order. 427 U.S. at 135.

[53]427 U.S. at 154. *Briggs-Stratton* had held that if conduct was not protected by § 7 nor prohibited by § 8, it was necessarily within state jurisdiction. *See supra* notes 17-23 and accompanying text.

[54]427 U.S. at 140 (quoting NLRB v. Nash-Finch Co., 404 U.S. 138, 144 (1971)).

Act's processes.' "[55] The Court reasoned that because Congress had enacted a comprehensive body of labor law and had been specific in outlawing the use of certain economic weapons,[56] congressional silence could not be interpreted as an indication of approval of state interference with other such weapons.[57] Until *Belknap, Inc. v. Hale*,[58] *Machinists* represented the last word on whether state laws or suits involving conduct neither protected nor prohibited by the NLRA would be preempted.

b. Sears: *What happened to* Garmon?—Although *Machinists* was limited to the neither protected nor prohibited side of preemption analysis, *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*[59] examined the arguably or actually protected or prohibited side. *Sears* recognized *Garmon* as controlling,[60] but injected uncertainty into the future application of the *Garmon* doctrine.

Sears involved non-employee union members' trespassory picketing upon the employer's private property.[61] The employer successfully sued in state court to enjoin a continuing trespass. The California Supreme Court reversed the judgment, holding that the picketing was both arguably protected by section 7 and arguably prohibited by section 8 of the NLRA and that the state injunction was therefore preempted under *Garmon*.[62] The employer brought the case before the United States Supreme Court. The Court was faced with a dilemma. The conduct was both arguably protected under section 7[63] and arguably prohibited under section 8,[64] thus

---

[55]427 U.S. at 147-48 (quoting Railroad Trainment v. Jacksonville Terminal Co., 394 U.S. 369, 380 (1969)).

[56]An economic weapon is the right to engage in self-help activities, sanctioned by the NLRA, and is designed to put pressure upon the opposing party in a labor dispute. A well-known example is the right to strike.

[57]427 U.S. at 143-48. The Court did, however, recognize the *Garmon* exceptions of local interest and peripheral concern, as well as the state's interest in policing violence. *Id.* at 136-37. *See supra* note 46. Justice Powell and Chief Justice Burger concurred with the understanding that the states would remain free to enforce "neutral" state laws in the context of a labor dispute. 427 U.S. at 155-56. Neutral state laws were defined as "state laws that are not directed toward altering the bargaining positions of employers or unions but which may have an incidental effect on relative bargaining strength." *Id.* at 156. This concurring opinion was necessary in reaching a majority. Justices Stevens, Stewart and Rehnquist dissented and would not have overruled *Briggs-Stratton*. *Id.*

[58]103 S. Ct. 3172 (1983).

[59]436 U.S. 180 (1978).

[60]*Id.* at 187-88.

[61]*Id.* at 182. The Sears store was situated in the center of a large lot and was surrounded by sidewalks and ample parking area. The pickets occupied the sidewalk adjacent to the store and also the adjoining parking lot. The picketing's purpose was to protest the use of non-union labor in the remodeling project. *Id.*

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

[63]The union's action would have been protected by § 7 if the sole purpose of the picketing had been to pressure the employer into applying area union labor standards to its non-union employees. 436 U.S. at 186-87.

[64]The picketing may have been prohibited by § 8 if the object was to force the employer

Garmon pointed to preemption.[65] A finding of preemption, however, would have practically denied a remedy to Sears because it could not have challenged the trespassory nature of prohibited picketing,[66] and it could not challenge protected picketing at all.[67]

The Court adhered to *Garmon's* basic purpose of protecting the NLRB's primary jurisdiction. The Court stated, however, that it is only where

> the controversy presented to the state court is identical to . . . that which could have been, but was not, presented to the [NLRB] . . . that a state court's exercise of jurisdiction necessarily involves a risk of interference with the . . . jurisdiction of the [NLRB] which the arguably prohibited branch of the *Garmon* doctrine was designed to avoid.[68]

The Court found that the controversy before the state court differed from that which could have been presented to the NLRB because the federal issue would have been concerned with the objective of the picketing while the state cause of action examined the picketing location.[69] The Court reasoned, therefore, that "permitting the state court to adjudicate Sears' trespass claim would create no realistic risk of interference with the [NLRB's] primary jurisdiction to enforce the statutory prohibition against unfair labor practices."[70]

---

to assign work to employees from a particular labor organization or to force Sears to bargain with the union where Sears' employees had not agreed to be represented by the union. *Id.* at 185-86.

[65]Brody, *supra* note 46, at 214-16. *Garmon* calls for preemption when the conduct in issue is actually or arguably protected by § 7 or prohibited by § 8 of the NLRA. Although *Garmon* recognized exceptions where the conduct was a peripheral concern of the NLRA and where the activity touched interests deeply rooted in local feeling and responsibility, these exceptions were of no use to the Court in *Sears*. The peripheral concern exception was not applicable given the Act's central concern with picketing. Further, the local feeling exception has never been extended to include conduct protected by the NLRA. Brody, *supra* note 46, at 214-16.

[66]"[I]f Sears had filed an unfair labor practice charge against the union, the [NLRB's] concern would have been limited to the question whether the Union's picketing had an objective proscribed by the [NLRA]; the location of the picketing would have been irrelevant." 436 U.S. at 186.

[67]Broady, *supra* note 46, at 213-14. If the picketing was protected by § 7, only a union could have filed an unfair labor practice charge based on Sears' interference with the right to picket. *Id.* at 214. This, the union did not do. 436 U.S. at 187.

[68]436 U.S. at 197 (footnote omitted).

[69]*Id.* at 198.

[70]*Id.* The Court also held that *Garmon's* arguably protected branch did not require preemption. *Belknap, Inc. v. Hale*, however, does not involve any manner of protected activity. This aspect of *Sears* analysis is thus beyond the scope of this Note. Generally, the *Sears* analysis of *Garmon's* arguably protected prong examines a party's reasonable lack of a federal remedy and the amount or risk of interference by the state cause of action with the protected conduct. *See, e.g.*, Brody, *supra* note 46; *Recent Developments, supra* note 46.

Sears' effect upon the doctrine of preemption is not clear. It does not affect cases involving clearly protected or prohibited conduct.[71] It also reaffirms *Garmon's* exceptions to preemption where "the activity regulated [is] a merely peripheral concern of the . . . [NLRA] . . . [o]r where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling Congressional direction, we could not infer that Congress had deprived the states of the power to act."[72] *Sears* does, however, add an exception where the controversy presented to the state court differs from that which could be brought before the Board.[73]

One commentator criticized *Sears* as being analytically defective,[74] suggesting that while *Sears* purported to follow *Garmon*, it is really the antithesis of *Garmon's* rationale.[75] He stated that "*Garmon's* reasoning is designed to safeguard NLRB primary jurisdiction. Therefore, *Garmon* implies the need to avoid, as much as possible, any concurrent or overlapping jurisdiction by the Board and state courts. *Sears*, however, tolerates overlapping jurisdiction and even extends it to the protected activity area."[76] That such criticism was justified is apparent from the United States Supreme Court's recent decision in *Belknap, Inc. v. Hale*.[77]

B. Preemption in Belknap, Inc. v. Hale

Petitioner, Belknap, Inc., had recognized Teamsters Local No. 89 as the exclusive bargaining representative for its warehouse and maintenance employees. After reaching an impasse during negotiations for a new labor contract, approximately 400 employees struck over economic issues.[78] The employer then granted, without union approval, a wage increase as a reward to union employees who had continued to work. It also advertised

---

[71]The conduct involved in *Sears* was both arguably protected by § 7 and arguably prohibited by § 8. *See supra* notes 63-64 and accompanying text. However, the conduct could not have been clearly protected or prohibited since the controversy had not been before the NLRB, the only body with jurisdiction to adjudicate the status of the parties' conduct. *See supra* note 41.

[72]359 U.S. at 245.

[73]Brody, *supra* note 46, at 225. *See supra* text accompanying note 68.

[74]Brody, *supra* note 46, at 223.

[75]*Id.*

[76]*Id.* Professor Brody appears to have viewed *Sears* as an implied attack upon *Garmon's* foundation, rather than an exception. Professor Cox does not share this view. Instead, he is satisfied with the soundness of *Sears*, but states that the decision "[does] nothing to clarify the principles that govern . . . preemption in labor law." *Recent Developments*, *supra* note 46, at 300.

[77]103 S. Ct. 3172 (1983).

[78]The purpose of an economic strike is to win economic concessions from the employer. This is in contrast to an unfair labor practice strike, the object of which is to protest an employer's violation of the NLRA.

for permanent replacements.[79] Several employees, including the respondents, were hired.[80]

Both the union and the company filed unfair labor practice charges with the NLRB, which later issued complaints against both parties.[81] The NLRB's complaint alleged that the employer's unilateral wage increase violated the NLRA.[82] The employer made assurances of permanent employment to the replacements, both before and after the NLRB's complaints were issued.[83]

Approximately three months later, the Regional Director for the National Labor Relations Board called a meeting with the employer and the union and told them that he would dismiss all charges and complaints in exchange for a settlement agreement.[84] The parties' compromise required the company to recall a minimum of 35 strikers per month, until all strikers had been offered reinstatement.[85] The company eventually laid off the "permanent" replacements to accommodate returning strikers.[86]

The terminated replacements then brought suit in state court against Belknap, alleging misrepresentation and breach of contract.[87] Each

---

[79]The relevant portion of the advertisement stated: "PERMANENT EMPLOYEES WANTED . . . OPENINGS AVAILABLE FOR QUALIFIED PERSONS LOOKING FOR EMPLOYMENT TO PERMANENTLY REPLACE STRIKING . . . EMPLOYEES." 103 S. Ct. at 3174-75 n.1.

[80]Each replacement signed the following form: "I, the undersigned, acknowledge and agree that I as of this date have been employed by Belknap, Inc. . . . as a regular full-time permanent replacement to permanently replace ____ in the job classification of ____." 103 S. Ct. at 3175.

[81]In response to the charges filed, the Regional Director for the National Labor Relations Board issued two complaints. The first, against the employer, alleged that Belknap wrongfully granted a wage increase without notice to the union. A second complaint was issued against the union, alleging picket line violence. Brief for the National Labor Relations Board as Amicus Curiae at 2-3, Belknap, Inc. v. Hale, 103 S. Ct. 3172 (1983).

[82]103 S. Ct. at 3175.

[83]Prior to the NLRB's complaints, Belknap issued a letter to all permanent replacement employees which stated, in part, "you will continue to be permanent replacement employees so long as you conduct yourselves in accordance with [company] policies and practices . . . . [W]e have no intention of getting rid of the permanent replacement employees just in order to provide jobs for [returning] strikers." *Id.* at 3175. After the complaints were issued, the company stated: "We want to make it perfectly clear, once again, that there will be no change in your employment status as a result of the charge by the National Labor Relations Board . . . ." *Id.*

[84]The issue of strikers' reinstatement had been the major stumbling block in settling the strike. The union had insisted upon immediate reinstatement for all strikers, a condition rejected by Belknap. The Regional Director then suggested a compromise calling for gradual reinstatement according to a fixed schedule. Brief for Petitioner at 5, Belknap, Inc. v. Hale, 103 S. Ct. 3172 (1983) (citing Record at 87).

[85]103 S. Ct. at 3176.

[86]*Id.*

[87]*Id.* The laid-off replacements alleged that the company had represented that the replacements were to be permanent employees, knowing that the representations were false and that the replacements would detrimentally rely upon them. The replacements further

replacement claimed compensatory and punitive damages totalling $500,000. Although Belknap won a summary judgment at the trial court, the Kentucky Court of Appeals reversed the decision.[88] Relying upon the 1966 United States Supreme Court decision, *Linn v. United Plant Guard Workers*,[89] the state court held that the state causes of action were not preempted by the NLRA[90] because they were within the local interest and peripheral concern exceptions to the *Garmon* rule.[91]

The United States Supreme Court affirmed the judgment of the Kentucky Court of Appeals by a 6 to 3 decision. Justice White's majority opinion[92] concluded that the replacements' state causes of action were not preempted by the NLRA. The Court first rejected the argument that either the misrepresentation or breach of contract claim was preempted under the rule of *Machinists*.[93] The majority recognized that the *Machinists* doctrine may operate to preempt a state claim which concerns conduct neither protected by section 7 nor prohibited by section 8 of the NLRA where Congress intended the conduct to remain unregulated and available as an economic weapon.[94] However, in *Belknap*, the Court refused to infer the congressional intent that an employer may exercise an economic weapon made available by the NLRA[95] so as to be insulated from liability for

---

alleged that the layoffs were in breach of the employment contracts between Belknap and the non-union replacements. *Id.* In states which continue to adhere to the doctrine of employment-at-will, a state cause of action may be unavailable because individual contracts of employment are terminable at the will of either party. *See, e.g.*, Shaw v. S. S. Kresge Co., 167 Ind. App. 1, 328 N.E.2d 775 (1975). Kentucky, where *Belknap* originated, retains the employment-at-will doctrine. Louisville & Nashville R.R. v. Marshall, 586 S.W.2d 274 (Ky. Ct. App. 1979). The doctrine is, however, subject to contractual modification. *Id.* That the employment contract in Belknap was for a "permanent" term, thus a contractual modification of the common law rule, is the likely explantion for the employees' breach of contract claim being recognized in Kentucky. It is also possible that Belknap impliedly abolishes employment-at-will. This issue is, however, beyond the scope of this Note. For an extended discussion of the doctrine, see Murg & Scharman, *Employment-at-Will: Do the Exceptions Overwhelm the Rule?*, 23 B.C.L. Rev. 329 (1982).

[88]103 S. Ct. at 2176.

[89]383 U.S. 53 (1966). *Linn* involved libelous statements made in the context of a labor dispute. The United States Supreme Court held that a state cause of action for malicious libel was not preempted by the NLRA because such an action was of peripheral concern to the Act and there existed an overriding state interest in protecting citizens from such conduct. Thus, the case fell within the *Garmon* exceptions of local interests and deeply rooted local feeling. *Id.* at 61-62. *See infra* notes 214-16 and accompanying text.

[90]103 S. Ct. at 3176.

[91]*See supra* text accompanying note 72.

[92]Chief Justice Burger and Justices Rehnquist, O'Connor and Stevens joined in Justice White's opinion.

[93]103 S. Ct. at 3177.

[94]*Id.* (citing 427 U.S. 132, 140, 147-48).

[95]The economic weapon involved is the employer's privilege to hire permanent replacements during an economic strike. Under federal law, an employer faced with a strike over economic issues may hire permanent replacements who may be retained in preference

otherwise actionable breaches of contract or misrepresentations.[96]

Belknap argued that the imposition of liability for the firing of permanent replacements would either dissuade employers from hiring permanent replacements at all, or would encourage employers to refuse to settle strikes.[97] Thus, these state claims would necessarily interfere either with an employer's use of an economic weapon or with the federal policy of encouraging the settlement of labor disputes. Justice White rejected this argument, reasoning that Congress did not intend to preempt state law where the use of an economic weapon injures "innocent third parties."[98] The Court rejected the NLRB's position on the issue of state interference with economic weapons and federal policy by finding that the employer could have acted consistently with both federal and state law.[99] The Court's novel suggestion to the employer was to hire the replacements "permanently," subject to an NLRB order to reinstate the strikers or to a negotiated settlement with the union.[100] The Court stated:

> An employment contract . . . promising permanent employment, subject only to settlement . . . and to a Board . . . order . . . would not in itself render the replacement a temporary employee subject to displacement by a striker over the employer's objection during or at the end of . . . a purely economic strike

---

to strikers who offer to return to work. The requirement that the replacements be given permanent status provides the "legitimate and substantial business justifications" which are necessary to override strikers' interests in reinstatement. Laidlaw Corp. v. NLRB, 414 F.2d 99, 105 (7th Cir. 1969) (citing NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938)). However, if the strike is in protest of an employer's unfair labor practice, federal law requires that the strikers be reinstated whether or not permanent replacements were hired. 103 S. Ct. at 3174.

[96]103 S. Ct. at 3177-78.

[97]Belknap argued:

> If an employer could be subjected to substantial financial liability for agreeing to recall the strikers as part of a strike settlement agreement, as a practical matter, the employer would have the alternative of either being constrained from hiring permanent replacements altogether, in which case the theoretical right becomes illusory; or the employer could hire permanent replacements and thereafter be constrained to refuse to agree to recall the striking employees even though such agreement might settle a labor strike. The latter situation would inevitably prolong economic strikes and frustrate the collective bargaining process.

Brief for Petitioner at 19, Belknap, Inc. v. Hale, 103 S. Ct. 3172 (1983).

[98]103 S. Ct. at 3178. The Court stated:

> It is one thing to hold that the federal law intended to leave the employer and the union free to use their economic weapons against one another, but is quite another to hold that either the employer or the union is also free to injure innocent third parties without regard to the normal rules of law governing those relationships. We cannot agree . . . that Congress intended such a lawless regime.

Id.

[99]*Id.* at 3179.

[100]*Id.*

> . . . . Those contracts . . . create a sufficient permanent arrangement to permit the prevailing employer to abide by its promises.[101]

The Court also held that neither the contract claim nor the misrepresentation claim was preempted under the *Garmon* rule.[102] The opinion noted that "[u]nder *Garmon*, a state may regulate conduct that is of only peripheral concern to the Act or which is so deeply rooted in local law that courts should not assume that Congress intended to preempt the application of state law."[103] Justice White relied upon three cases to conclude that both state claims fell within the *Garmon* exceptions. *Linn v. United Plant Guard Workers*,[104] also relied upon by the state court in *Belknap*, held that a state cause of action for malicious libel fell within both the peripheral concern and the deeply rooted local interest exceptions.[105] *Farmer v. United Brotherhood of Carpenters*,[106] held that a state claim for intentional infliction of emotional distress also fell within these exceptions.[107] The Court in *Belknap* also relied upon *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*.[108] The *Belknap* opinion viewed *Sears* as requiring that the controversies which could be brought both in the state court and before the NLRB must be identical to preempt the state cause of action.[109] In *Belknap*, the controversies differed because the focus of the state cause of action was on the rights of the replacements while any potential NLRB action would focus upon the rights of the strikers.[110]

---

[101] *Id.*

[102] The *Garmon* rule holds that where activity is actually or arguably prohibited by § 8 of the NLRA, the state cause of action is preempted. The majority concluded this to be the case even if the hiring of the replacements was itself an unfair labor practice prohibited by § 8. The hiring could have been so classified if the unilateral wage increase granted by the employer during the strike had converted the strike into an unfair labor practice strike. The unfair labor practice would be interference with the right to strike, a right protected by § 7 of the NLRA. The interference would be the permanent replacement of unfair labor practice strikers, who are entitled to automatic reinstatement at the conclusion of the strike. *See, e.g.*, NLRB v. Fleetwood Trailer Co., 389 U.S. 375 (1967).
375 (1967).

[103] 103 S. Ct. at 3182.

[104] 383 U.S. 53 (1966).

[105] *See supra* note 89 and accompanying text.

[106] 430 U.S. 290 (1977).

[107] *Farmer* involved a union member's state cause of action against his union for intentional infliction of emotional distress. The Court concluded that the claim was not preempted. The Court analogized the claim to those involving violence or malicious libel. *See* Linn v. United Plant Guard Workers, 383 U.S. 53 (1966) (involving malicious libel); UAW v. Russell, 356 U.S. 636 (1958) (involving violence). Thus, the cause of action in *Farmer* was found to be within the peripheral concern and local interest exceptions. *See infra* notes 217-24 and accompanying text.

[108] 436 U.S. 180 (1978).

[109] 103 S. Ct. at 3183. *See infra* notes 227-35 and accompanying text.

[110] 103 S. Ct. at 3183. *See infra* notes 147-55, 227-35 and accompanying text.

Thus, neither the contract claim nor the misrepresentation claim was preempted under the *Machinists* doctrine because Congress did not intend the activity to go unregulated. Nor was either claim preempted under *Garmon* because both claims fell within the peripheral concern and deeply rooted local interest exceptions.

Justice Blackmun concurred in the judgment, but was unwilling to join the majority's analysis. His primary criticism of the decision was that the Court had not deferred to the NLRB's interpretation of the Act regarding permanent replacements.[111] His concern was that the Court's standard of conditional permanence[112] would not satisfy the requirement of the substantial and legitimate business justifications which must be met if the employer is to retain replacements in preference to economic strikers.[113] The concurring opinion went on to suggest that an employer who chooses to retain replacements hired under the majority's standard would be open to unfair labor practice charges of threat of reprisal or of discouraging employees' rights to strike.[114]

Although Justice Blackmun recognized that this was a difficult case that did not comfortably fit within existing preemption analysis, he joined the majority's finding of no preemption. He recognized that an employer must show a substantial and legitimate business justification in order to retain replacement employees in preference to returning strikers.[115] Justice Blackmun also recognized that a promise of permanent employment provides this justification.[116] He reasoned that such a promise would not provide the required justification unless the employer was bound to perform by the terms of that promise.[117] Justice Blackmun concluded that because

---

[111]103 S. Ct. at 3184 (Blackmun, J., concurring). The NLRB would not have recognized the Court's new standard of permanence and would have held the state claims preempted. *Id.*

[112]Justice Blackmun interpreted the Court's standard as meaning that "the jobs are permanent unless [the employer] later decides they are temporary. Such a promise bears little resemblance to a promise of permanent employment." *Id.* at 3185.

[113]*Id.* In order to retain replacement workers in preference to returning economic strikers, the employer must show a substantial and legitimate business justification for doing so. NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 378 (1967). One example of such a justification is where the replacements have been hired permanently in order for the business to remain in operation. *Id.* at 379.

[114]Justice Blackmun reasoned that the majority's conditional promise of permanent employment would allow an employer to threaten to retain replacement employees in preference to returning strikers even though he has not obligated himself to do so. 103 S. Ct. at 3185 (Blackmun, J., concurring).

[115]*See supra* note 113.

[116]*Id.*

[117]Justice Blackmun stated:

> This power to override the economic strikers' statutory entitlement to reinstatement must be based on the common-sense notion that, in order to continue to operate the business, the employer was required to obligate himself to third parties in a manner inconsistent with the strikers' right to a subsequent reinstatement.

state law is the only method of enforcing a promise of permanent employment, federal law must presume the enforceability of the state cause of action.[118] Thus, the concurring opinion would have held that the state causes of action were not preempted under *Machinists* because Congress did not intend the activity to be unregulated.[119] Justice Blackmun also refused to hold that the replacements' claims were preempted under *Garmon*, because he could find no conduct, either actually or arguably, protected by section 7 or prohibited by section 8 of the NLRA.[120]

Justice Brennan, joined by Justices Marshall and Powell, dissented and would have held that the NLRA preempted both state claims.[121] The dissent viewed the contract claim as preempted under the *Garmon* doctrine. The opinion noted that the strike could have been an unfair labor practice strike from near the beginning, had the parties not settled their dispute and had the NLRB held that Belknap's wage increase was an unfair labor practice.[122] The breaching conduct was, therefore, "arguably required" by federal law.[123] Justice Brennan conceded that arguably required activity was not explicitly covered by the *Garmon* standard,[124] but argued that such conduct is implicitly addressed by *Garmon's* focus upon the NLRB's primary jurisdiction. The dissent stated:

> If there is a need to protect the primary jurisdiction of the Board to avoid conflicting interpretations of federal law, then certainly there is an even greater need to preempt conflicting state regulation of activity that an employer might be required to pursue

---

Certainly, avoidance of liability for breach of contract is a legitimate business objective.

103 S. Ct. at 3187-88 (Blackmun, J., concurring).

[118] *Id.* at 3188.

[119] *Id.*

[120] *Id.* at 3189.

[121] *Id.* at 3190 (Brennan, J., dissenting).

[122] The NLRB argued:

> If, during an economic strike, an employer commits what the [NLRB] later determines to be an unfair labor practice and the union continues the strike beyond its natural duration to protest that practice, the strike is converted into an unfair labor practice strike. In such circumstances, the strikers become unfair labor strikers on the date of the conversion.

Brief for the National Labor Relations Board as Amicus Curiae at 11, Belknap, Inc. v. Hale, 103 S. Ct. 3172 (1983) (citing Philip Carey Mfg. Co., Miami Cabinet Div. v. NLRB, 331 F.2d 720, 729 (6th Cir. 1964)). The date of conversion would have been the date beyond which the strike was extended because of the unfair labor practice. 331 F.2d at 728-29.

[123] The dissent viewed the conduct as arguably required because if the strike had been converted into an unfair labor practice strike, dismissing the replacements would have been the only way to obey federal law requiring reinstatement of strikers. 103 S. Ct. at 3192 (Brennan, J., dissenting).

[124] *Garmon* addressed only arguably protected or arguably prohibited conduct. 359 U.S. at 244-45.

> by the Board. The need to preempt conflicting state regulation of arguably required activity follows *a fortiori* from the arguably protected branch of *Garmon*.[125]

The dissent would not have held the misrepresentation claim preempted under the *Garmon* doctrine.[126] Justice Brennan was unable to see the risk of conflicting regulation of employer conduct that he saw with the breach of contract claim, because federal law could not require the misrepresentations.[127] The opinion recognized that, in order for the *Garmon* doctrine to apply, the misrepresentations would have had to have been arguably protected by section 7 of the NLRA or arguably prohibited by section 8.[128] Without elaboration, Justice Brennan stated that the conduct was not arguably protected.[129] Although he believed the conduct to be arguably prohibited by section 8,[130] Justice Brennan was unable to avoid the principle announced in *Sears*,[131] that the state cause of action must be identical to that brought before the NLRB before the state claim can be preempted.[132] *Belknap's* dissent reasoned that a claim brought under the NLRA over the arguably prohibited conduct would differ from the misrepresentation claim brought in state court;[133] therefore, the latter could not be preempted under the *Sears* analysis.

Justice Brennan would have, however, held the misrepresentation claim preempted under the *Machinists* doctrine.[134] The dissenting opinion reasoned that the employer's use of this economic weapon, the right to hire permanent replacement employees during an economic strike,[135] was part of the delicate balance achieved by Congress between the rights of management and labor. The opinion concluded that allowing the state

---

[125]103 S. Ct. at 3193 n.2 (Brennan, J., dissenting).

[126]*Id.* at 3195.

[127]Justice Brennan stated:

> There is no sense in which it can be said that federal law required [the employer] to misrepresent to [employees] the terms on which they were hired. Permitting [the employees] to pursue their misrepresentation claim in state court, therefore, does not present the same potential for directly conflicting regulation of employer activity as permitting [them] to pursue their breach of contract claim.

Id.

[128]*Id.*

[129]*Id.*

[130]Justice Brennan stated that "[i]f this strike was converted into an unfair labor practice strike almost immediately after it started, . . . [Belknap's] offers of permanent employment to replacements may have constituted additional unfair labor practices." *Id.* at 3195 n.8.

[131]437 U.S. at 180.

[132]*See supra* notes 108-10 and accompanying text.

[133]103 S. Ct. at 3195-96 n.8 (Brennan, J., dissenting).

[134]*Id.* at 3196. *See supra* notes 51-57 and accompanying text.

[135]The employer's ability to promise permanent status to replacement employees is an economic weapon against the union because it allows the employer to refuse to reinstate strikers at the conclusion of an economic strike. *See supra* note 113.

suit would burden the employer's right to use this weapon, thus upsetting the federal balance.[136]

Finally, the dissenting opinion stressed that *Belknap* did not fall within the exceptions to the preemption doctrines.[137] Justice Brennan stated that the breach of contract claim was not of merely peripheral concern to the NLRA,[138] and impliedly recognized that the same was true of the misrepresentation claim.[139] The dissent was further convinced that the conduct in *Belknap* did not "touch 'interests so deeply rooted in local feeling and responsibility that, in the absence of compelling Congressional direction, we could not infer that Congress had deprived the States of the power to act.' "[140] Justice Brennan distinguished *Belknap* from *Linn*[141] and *Farmer*,[142] cases relied upon by the majority, noting that *Belknap* involved no malicious, outrageous, or violent conduct.[143]

III. *Belknap*: Little Clarification Where Much is Needed

In the five years between *Sears* and *Belknap*, the body of labor law preemption was severely criticized.[144] Referring to *Sears*, one commentator noted that the case "put additional embroidery onto an already complicated legal structure . . . [and] will not encourage coherent development of the preemption doctrine."[145] Another writer "perceive[d] little interest in logical consistency and less interest in building a coherent and continuing body of law."[146] *Belknap* does not make these criticisms obsolete. Rather, the case perpetuates the criticized trends.

This section will first view the importance to *Belknap's* analysis of the existence of third parties to the bargaining agreement. Then the courts refusal to classify the conduct in *Belknap* as either arguably prohibited by section 8 or not prohibited will be discussed. Finally, the Note will analyze *Belknap's* effect upon the *Machinists* and *Garmon* doctrines and upon the *Sears* case.

---

[136]103 S. Ct. at 3197 (Brennan, J., dissenting).

[137]*Id.* at 3195 n.7. *See supra* notes 105-07 and accompanying text. *See also infra* notes 214-24 and accompanying text.

[138]103 S. Ct. at 3195 n.7 (Brennan, J., dissenting).

[139]The implication arises from the dissenting opinion stressing that the misrepresentation claim would impinge on the employer's use of an economic weapon, the right to hire permanent replacements. This interference leads to the conclusion that the claim is not of merely peripheral concern to the NLRA. *See supra* note 135 and accompanying text.

[140]103 S. Ct. at 3195 n.7 (Brennan, J., dissenting) (quoting *Garmon*, 359 U.S. at 243).

[141]103 S. Ct. at 3195 n.7 (Brennan, J., dissenting).

[142]*Id.*

[143]*Id. See supra* note 105-07 and accompanying text. *See also infra* notes 214-24 and accompanying text.

[144]*See* Brody, *supra* note 46; *Recent Developments, supra* note 46.

[145]Brody, *supra* note 46, at 223.

[146]Recent Developments, *supra* note 46, at 300.

A. The Significance of Third Parties to the Bargaining Agreement

The *Belknap* controversy was between an employer and non-union employees hired as permanent strike replacements. This is probably the greatest distinction between *Belknap* and all prior labor preemption cases. Indeed, no previous case addressed the problems of preemption as applied to this fact situation.[147] It is unfortunate that the Court in *Belknap* did not discuss more fully the significance of this distinction.

The NLRB argued that the replacement employees were, in fact, members of the bargaining unit and were, therefore, bound by the settlement agreement reached by the employer and the union.[148] The NLRA itself states that a bargaining representative represents all employees in the unit.[149] The United States Supreme Court rejected the argument, relying upon *J. I. Case Co. v. NLRB*.[150] The *Belknap* majority stated that the *Case* opinion "was careful to say that the Board 'has no power to adjudicate the validity or effect of such contracts except as to their effects on matters within its jurisdiction.'"[151] The Court in *Belknap* relied upon this language to assert that *Case* foreclosed the argument that individual employment contracts must yield to collective agreements, presumably because the individual contracts are outside of the NLRB's jurisdiction.[152] Based on this reasoning, Justice White rejected the NLRB's argument that the replacement employees were bound by the settlement

---

[147]All prior preemption cases have involved disputes between employers and unions or unions and their members. *See, e.g., Farmer*, 430 U.S. 290 (involving conduct between union and union member); *Garmon*, 359 U.S. 236 (involving conduct between employer and union).

[148]Brief for the National Labor Relations Board as Amicus Curiae at 20, Belknap, Inc. v. Hale, 103 S. Ct. 3172 (1983).

[149]The Act provides: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit . . . shall be the exclusive representatives of all the employees in such unit for the purpose of collective bargaining in respect to . . . conditions of employment . . . ." 29 U.S.C. § 159(a) (1976).

[150]321 U.S. 332 (1944). *Case* involved individual employment contracts made between the employer and many employees before a majority of the employees voted in favor of union representation. The company refused to bargain with the union with respect to matters covered by the individual contracts. The Court held:

> Individual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the [NLRA] looking to collective bargaining, nor to exclude the contracting employee from . . . [the] bargaining unit; nor may they be used to forestall bargaining or to limit or condition the terms of the collective agreement.

Id. at 337.

[151]103 S. Ct. at 3181 (quoting 321 U.S. at 340).

[152]103 S. Ct. at 3181. The Court did not explicitly state the connection between *Case's* language and the assertion of the enforceability of the individual employment contracts. In fact, that same language could be interpreted to justify the opposite conclusion.

agreement between Belknap and the union.[153] *Case*, however, appears not to have rejected the argument, but to have left the issue open where the individual contract contains terms superior to those in the collective agreement. The *Case* opinion stated:

> We cannot except individual contracts generally from the operation of the collective ones because some may be more individually advantageous. Individual contracts cannot subtract from collective ones, and whether under some circumstances they may add to them in matters covered by the collective bargain, we leave to be determined by appropriate forums under the laws of contracts applicable, and to the Labor Board if they constitute unfair labor practices.[154]

In dicta, the Court in *Case* expressed skepticism about the wisdom of injecting individually advantageous contracts into the context of the collective bargain, stating that "[t]he practice and philosophy of collective bargaining looks with suspicion on such individual advantages."[155] It is unfortunate that, with misplaced reliance upon *Case*, the Court dismissed the NLRB's argument in two paragraphs.[156]

Even accepting the Court's rejection of the argument that the replacements were bound by the settlement agreement, uncertainty also exists as to why existing preemption doctrine was applied to the *Belknap* situation. Existing doctrine was designed to determine the preemption of state causes of action involving two parties—employers and union employees. It was not fashioned to handle the triangle that results when non-union replacement employees are added to the dispute.

The Court missed a choice opportunity to enunciate a new doctrine fashioned to accommodate these novel facts. This route, however, would

---

[153]If the replacement employees were not bound by the settlement agreement, it could be for one of two reasons. Either the replacements were not part of the bargaining unit and were, therefore, not bound by the collective agreement, or they were not bound even though they were members of the bargaining unit. Justice White was unclear about whether the quoted passage from *Case* supports the former or the latter proposition. The latter interpretation, that members of the bargaining unit are not bound by the agreement, conflicts with § 9(a) of the NLRA, which states that the union "shall be the exclusive [representative] of all the employees in [the] unit for the purposes of . . . bargaining in respect to . . . conditions of employment . . . ." 29 U.S.C. § 159(a) (1976). Thus, the NLRA requires that all members of the unit be bound by the agreement. The former interpretation, however, does not support the proposition that the replacements are excluded from the bargaining unit. There is no logical link between the language of the NLRB's power to pass upon the validity of an individual employment contract and a conclusion that permanent replacements are not to be included in the bargaining unit. Thus, Justice White reached his conclusion through either of two interpretations; one contrary to law, the other contrary to reason.

[154]321 U.S. at 339.

[155]*Id.* at 338.

[156]103 S. Ct. at 3181.

not have afforded the chance to make some major alterations in existing doctrine which the Court apparently desired to make.

B. What Kind of Conduct was Involved?

Before *Belknap*, the threshold issue in preemption analysis was the classification of the conduct involved.[157] This issue is important because under the *Garmon* doctrine a state cause of action can be preempted only where the conduct is actually or arguably protected by section 7 or prohibited by section 8.[158] Conversely, the *Machinists* doctrine supports preemption of state claims only where the conduct is neither protected by section 7 nor prohibited by section 8.[159] Thus, only after the conduct has been identified as actually or arguably protected or prohibited, or clearly not protected or prohibited, does it become apparent which doctrine applies. *Belknap* certainly involved no protected conduct because section 7 only protects employees' conduct.[160] Assuming all conduct falls into one of the above categories, the employer's representations of permanent employment and the dismissal of replacement employees must be more narrowly characterized as actually, arguably, or clearly not prohibited by section 8.

Justice White's majority opinion failed to stress that *Belknap* involved two separate instances of conduct, thus missing the first point of a solid preemption analysis. The misrepresentation claim involved conduct which occurred at the time the replacements were hired, while the breach of contract claim was based upon discharging the replacements.[161] These two instances of conduct do not necessarily lend themselves to analysis under a single heading. This point was addressed by the dissent,[162] the NLRB,[163] and Belknap.[164] It is unfortunate that the Court did not separately stress the classifications of the representations of permanent employment and of the firing of the replacements because it makes *Belknap's* logic difficult to follow. The confusion over the proper classification of each action is further highlighted by the fact that even Belknap and the NLRB,

---

[157]*See, e.g.*, Sears, Roebuck & Co. v. San Diego County District Council of Carpenters, 436 U.S. 180 (1978).

[158]*See supra* text accompanying note 46.

[159]*See supra* text accompanying note 50.

[160]At issue in *Belknap* was an *employer's* conduct, consisting of promises of permanent employment to replacement employees and the firing of those employees. 103 S. Ct. at 3174-76. Justice Brennan's dissenting opinion viewed the conduct involved in the breach of contract claim as being arguably required, which he argued was implicit within the arguably protected prong of the *Garmon* rule. *Id.* at 3194 (Brennan, J., dissenting).

[161]*See supra* note 87.

[162]103 S. Ct. at 3190 (Brennan, J., dissenting).

[163]Brief for the National Labor Relations Board as Amicus Curiae, Belknap, Inc. v. Hale, 103 S. Ct. 3172 (1983).

[164]Brief for Petitioner at 16, Belknap, Inc. v. Hale, 103 S. Ct. 3172 (1983).

both arguing in favor of preemption, were unable to agree on the issue.[165]

Separate analysis concerning the classification of each instance of conduct is material to the remainder of the Court's analysis, no matter how the conduct is actually classified.[166] The Court must have viewed both causes of action as preempted regardless of how the conduct was classified, given that both the misrepresentation and breach of contract claims were examined under *Garmon* and *Machinists*. If this was the Court's rationale, it is unfortunate because confusion is sure to result over the proper classifications in future cases. The refusal to delineate the classification of each instance of conduct, however, gave the Court an opportunity to examine several facets of both the *Garmon* and *Machinists* doctrines, which were unnecessary to the decision. This enabled the Court to modify two mutually exclusive preemption analyses within a single case.[167]

---

[165]*Belknap* asserted that the conduct underlying the misrepresentation claim was arguably prohibited. Brief for Petitioner at 16, Belknap, Inc. v. Hale, 103 S. Ct. 3172 (1983). The NLRB, however, argued that only the contract claim could come under the arguably prohibited prong. Brief for the National Labor Relations Board as Amicus Curiae at 19, Belknap, Inc. v. Hale, 103 S. Ct. 3172 (1983). Justice Brennan viewed the firing of the replacements as "arguably required," thus to be analyzed under the arguably protected prong. 103 S. Ct. at 3192-93 (Brennan, J., dissenting).

[166]As a threshold matter, each instance of conduct must be analyzed separately for classification purposes. If both can be classified under the same heading, arguably prohibited for example, then both may be analyzed together under a single preemption doctrine. Because *Garmon* and *Machinists* are mutually exclusive doctrines, there would be no need to discuss both cases in such a situation. If, however, each instance of conduct cannot be classified under the same heading then one must be examined under *Garmon* and the other under *Machinists*. In this situation, it would be unnecessary to analyze both kinds of conduct under both doctrines.

[167]It appears that Justice White's refusal to separately examine preemption of the misrepresentation claim and of the breach of contract claim was an easy way to consider the *Garmon* and *Machinists* doctrines in the same opinion. Once a certain kind of conduct is labeled as either arguably protected or prohibited or clearly not protected or prohibited that conduct is controlled by only one of two preemption doctrines. In *Belknap*, if the conduct underlying either the breach of contract or the misrepresentation claim was arguably prohibited by § 8, the claim can be analyzed only under *Garmon*. Conversely, if either the representations of permanent employment or the firing of the replacement employees was not prohibited by § 8, *Machinists* provides the only applicable doctrine.

The majority in *Belknap* could have reached the same result of no preemption without any discussion of *Garmon* and it exceptions. *See supra* notes 113-19 and accompanying text. Indeed, *Belknap* could have been a straight-forward decision of preemption under the *Machinists* doctrine. Not even *Belknap's* dissent was able to find any arguably prohibited conduct. Justice Brennan was able to apply *Garmon* only by labeling the dismissal of the replacements as "arguably required." 103 S. Ct. at 3192-93 (Brennan, J., dissenting).

Alternatively, if each kind of conduct fell into a separate classification, then each should have been analyzed separately under a single preemption doctrine. This was the approach taken by *Belknap's* dissent, where the breach of contract claim was viewed under the *Garmon* doctrine and the misrepresentation claim under *Machinists*. *Id.* at 3192-96.

C. *The* Machinists *Doctrine: Are Economic Weapons Safe from State Interference?*

The use of economic weapons is a fact of life in labor disputes. The most potent of the weapons held by employees is the right to strike. Under the NLRA, "[n]othing . . . shall be construed so as either to interfere with or impede or diminish in any way the right to strike . . . ."[168] For nearly fifty years, the United States Supreme Court has recognized a potent counter-weapon in the hands of an employer, the right to continue operating in the face of a strike by hiring replacements for striking employees.[169] "It does not follow [from the employees' right to strike] that an employer, guilty of no act denounced by [the NLRA], has lost the right to protect and continue his business by supplying places left vacant by strikers."[170] In order to defeat the strikers' right to return to work at the conclusion of an economic strike, the employer's offer to replacements must be for permanent employment.[171]

The doctrine enunciated in *International Association of Machinists v. Wisconsin Employment Relations Commission*[172] was predicated upon the recognition that certain state causes of action may be preempted by federal law even where they do not concern conduct arguably or actually protected by section 7 or prohibited by section 8 of the NLRA.[173] The thrust of the doctrine is that Congress has achieved a delicate balance, between rights available to employees and rights available to management, which is not to be disturbed by state law.[174] Clearly, the United States Supreme Court in *Belknap* did not allow the *Machinists* rule to preempt either state cause of action.[175] What is less clear is precisely why the Court so concluded. There are several possible explanations of *Belknap's* rationale.

One explanation is that the conduct, either the representations of permanent status or the dismissal of the replacements, was arguably prohibited by section 8 of the NLRA and, therefore, controlled by *Garmon*.[176] It is unlikely, however, that this was the Court's primary focus. Although this classification of the employer's actions as arguably prohibited by section 8 would have been an easy way to reach the result of no preemption under the *Machinists* doctrine, this option was not viable. By so classifying,

---

[168]29 U.S.C. § 163 (1976).
[169]NLRB v. Mackey Radio & Tel. Co., 304 U.S. 333 (1938).
[170]*Id.* at 345.
[171]*Id.* at 346.
[172]427 U.S. 132 (1976).
[173]*See supra* notes 50-57 and accompanying text.
[174]*See supra* notes 54-57 and accompanying text.
[175]103 S. Ct. at 3177-81.
[176]*See supra* notes 41-49 and accompanying text.

the majority would have been foreclosed from its extended discussion of *Machinists* because any case involving arguably prohibited conduct would be controlled solely by *Garmon*.[177] Further, such a classification may have been impossible. Not even the dissenting opinion was willing to label either instance of conduct arguably prohibited.[178]

Had the Court desired to do so, it could have factually distinguished *Belknap* from *Machinists* because *Machinists* involved a specific state labor statute while *Belknap* involved state tort and contract law.[179] *Machinists*' result was reached only by the concurring votes of Justice Powell and Chief Justice Burger, who joined with the understanding that states were not to be precluded "from enforcing, in the context of a labor dispute, 'neutral' state statutes or rules of decison . . . ."[180] *Machinists*' concurring opinion defined neutral state laws as those "that are not directed toward altering the bargaining positions of employers or unions but which may have an incidental effect on relative bargaining strength."[181] *Machinists*' concurring opinion went on to provide almost perfect language for distinguishing *Belknap* by stating that "[e]xcept where Congress has specifically provided otherwise, the states generally should remain free to enforce, for example, their law of torts or of contracts, and other laws reflecting neutral public policy."[182] The *Belknap* majority, however, did not appear to base its decision upon this distinction.[183]

A more likely explanation of *Belknap's* rationale in holding that the state claims were not preempted is that at least some of the Justices of the *Belknap* majority saw this case as an opportunity to narrow the importance of the *Machinists* doctrine.[184] Justice White, author of the Court's *Belknap* opinion, was the only Justice in the majority of both this case and *Machinists*. The *Belknap* opinion, however, seems to return to the philosophy that congressional silence indicates an intent to leave the

---

[177]*See supra* notes 157-67 and accompanying text.

[178]Justice Brennan, in analyzing the contract claim under *Garmon*, was forced to argue that the breaching conduct was "arguably required," a classification implicit in *Garmon's* arguably protected prong. 103 S. Ct. at 3192-93 (Brennan, J., dissenting). Belknap contended that the strike had arguably been converted into an unfair labor practice strike and that any representations of permanent status were thus arguably prohibited. Brief for Petitioner at 16-17, Belknap, Inc. v. Hale, 103 S. Ct. 3172 (1983). The majority, however, did not squarely address the argument. Instead, it proceeded into a discussion of the peripheral concern and local interest exceptions to the *Garmon* rule. 103 S. Ct. at 3182.

[179]*See supra* notes 52, 87 and accompanying text.

[180]427 U.S. at 156.

[181]*Id.*

[182]*Id.*

[183]The Court's opinion did not discuss this language as a distinguishing factor. Further, Justice Powell joined the dissent in *Belknap*. This leads to the inference that he did not believe this to be the basis of the majority opinion.

[184]Two members of the *Belknap* majority had dissented in *Machinists* and seem to have viewed that case as separate and apart from the main body of preemption law. *Recent Developments*, *supra* note 46, at 285-87.

activity under the control of state law.[185] This was the rationale behind the *Briggs-Stratton* case,[186] which *Machinists* explicitly overruled.[187] *Belknap* was not the first time that the continuing validity of *Machinists* was called into question. One commentator perceived a similar attitude following the Court's opinion in the *Sears* case,[188] but believed that the rule had been reaffirmed in a subsequent case.[189]

Apparently the Court desired to significantly narrow *Machinists*. The Court in *Belknap* focused upon what it believed to be the congressional intent that the state claims should not be preempted.[190] Congressional intent was a key factor under the *Machinists* doctrine[191] and was to be found by inquiring "whether 'the exercise of plenary state authority to curtail or entirely prohibit self-help would frustrate effective implementation of the [NLRA's] processes.' "[192] Thus, under the *Machinists* rule, it would

---

[185]In *Belknap*, the Court stated:

> It is one thing to hold that the Federal law intended to leave the employer and the union free to use their economic weapons against one another, but is quite another to hold that either the employer or the union is also free to injure innocent third parties without regard to the normal rules of law governing those relationships. We cannot agree . . . that Congress intended such a lawless regime.

103 S. Ct. at 3178. The tone of this language is arguably analogous to that in *Briggs-Stratton*, where the Court noted that "[t]his conduct is governable by the State or it is entirely ungoverned." 336 U.S. 245, 254. In both cases, the Court was unwilling to infer that Congress could possibly have intended that the conduct remain free from state interference.

[186]*See supra* notes 17-23 and accompanying text.

[187]Justices Stevens and Rehnquist would not have overruled *Briggs-Stratton* and thus did not participate in the birth of the *Machinists* doctrine. Consistently, they joined the *Belknap* majority. The third member of the *Machinists* dissent, Justice Stewart, had retired from the Court prior to *Belknap*. Justice O'Connor, his replacement, joined *Belknap's* majority.

[188]Professor Cox observed that "[Justice Stevens, author of the *Sears* opinion,] impliedly rejected *Machinists*, referring to the two aspects of the *Garmon* rule as '*the* general guidelines for deciphering the unexpressed intent of Congress regarding the permissible scope of State regulation of activity touching upon labor-management relations.' " *Recent Developments, supra* note 46, at 285 (quoting 436 U.S. at 187 (emphasis added)). Professor Cox continued: "There is further reason to think . . . *Sears* . . . sought to undermine . . . the *Machinists* decision [in that *Sears*] spontaneously reject[ed] any suggestion that a state may never grant remedies for trespassory picketing because the omission of any federal prohibition implies that the conduct is to be left free of regulation." *Recent Developments*, *supra* note 46, at 286.

[189]New York Tel. Co. v. New York State Dep't of Labor, 440 U.S. 519 (1979). The case involved a constitutional attack upon a state statute which mandated the payment of unemployment benefits to strikers at their employers' expense. The Court, in a 6 to 3 decision with three plurality opinions, "seem[ed] to accept the premise that a state law may be unconstitutional even though the *Garmon* rule [does] not condemn it." *Recent Developments*, *supra* note 46, at 292.

[190]103 S. Ct. at 3178.

[191]*See supra* text accompanying note 54.

[192]427 U.S. at 147-48 (quoting Railroad Trainment v. Jacksonville Terminal Co., 394 U.S. 369, 380 (1969)).

seem that a state cause of action which burdens the use of a federally sanctioned economic weapon would imply congressional intent that the state suit be preempted by the NLRA. Belknap made such an argument.[193]

The Court in *Belknap*, however, refused to focus upon whether a burden existed and, if so, its effect upon the NLRA's processes. Justice White stated that "'[a]rguments that entertaining suits by innocent third parties for breach of contract or for misrepresentation will 'burden' the employer's right to hire permanent replacements are no more than arguments that 'this is war,' that 'anything goes' . . . . We cannot agree . . . that Congress intended such a lawless regime.'"[194] Accordingly, future analysis under the *Machinists* doctrine may be nothing more than deciding whether Congress intended preemption. If so, *Machinists* will be of little use in protecting the availability of economic weapons against state interference.

The Court in *Belknap* refused to recognize any burden upon the employer's right to hire permanent replacements so as to preempt the state cause of action. Although the Court did not remove the employer's right to use this weapon, this opinion will likely increase the cost of its use. A primary effect of *Belknap* is that there is now only one way for an employer faced with an economic strike to exercise this right and to concurrently remain free from liability should it dismiss the replacements.[195] The employer must now make its offer of permanent employment to replacements conditional upon the NLRB's failure to order the strikers reinstated and upon the absence of a strike settlement agreement to the same effect.[196] Four members of the Court[197] and the NLRB[198] argued

---

[193]Belknap argued:

> If an employer could be subjected to substantial financial liability for agreeing to recall the strikers as part of a strike settlement agreement, as a practical matter, the employer would have the alternative of either being constrained from hiring permanent replacements altogether, in which case the theoretical right becomes illusory; or the employer could hire permanent replacements and thereafter be constrained to refuse to agree to recall the striking employees even though such agreement might settle a labor strike. The latter situation would inevitably prolong economic strikes and frustrate the collective bargaining process.
>
> It is precisely this type of state interference with conduct designed [by Congress] to be left unregulated which prompted the preemption rationale enunciated . . . in *Machinists*.

Brief for Petitioner at 19, Belknap, Inc. v. Hale, 103 S. Ct. 3172 (1983).

[194]103 S. Ct. at 3178.

[195]An employer will be forced to discharge replacements in an unfair labor practice strike, because federal law requires the reinstatement of unfair labor practice strikers. *See supra* note 95.

[196]103 S. Ct. at 3179.

[197]103 S. Ct. at 3186 (Blackmun, J., concurring), 3190 (Brennan, J., dissenting). The dissenting opinion was joined by Justices Marshall and Powell.

[198]Brief for the National Labor Relations Board as Amicus Curiae at 17, Belknap, Inc. v. Hale, 103 S. Ct. 3172 (1983).

that a promise of conditionally "permanent" employment would lack the "legitimate and substantial business justification"[199] which is required to enable the employer to retain the replacements in preference to the returning strikers.[200] This, they asserted, could be an unfair labor practice.[201] The employer's only alternative is to promise unconditional permanent employment, as in *Belknap*, and risk being sued by discharged replacements when strikers are reinstated.

After *Belknap*, an employer will be reluctant to settle a labor dispute by agreeing to reinstate strikers. There will be a propensity to litigate unfair labor practice charges to final adjudication in order to either establish the employer's right to retain the replacements, or to receive a Board order to dismiss them. The NLRB noted that in excess of 82 percent of unfair labor practice complaints are settled by the parties.[202] Given that the NLRB issues nearly 8,000 complaints annually,[203] any significant increase in the propensity to litigate will result in added delay and expense to those involved in labor disputes. These additional costs will further dampen parties' willingness to assert their rights under the NLRA.

In sum, the *Belknap* opinion has narrowed the availability of preemption in cases involving activity neither protected by section 7 of the NLRA nor prohibited by section 8. The Court did not stop here, but went on to discuss preemption of state claims involving conduct arguably protected by section 7 or prohibited by section 8. This strand of preemption is controlled by the analysis of *San Diego Building Trades Council v. Garmon*.[204]

D. Belknap's Garmon *Analysis—What About* Sears?

The *Belknap* majority recognized that "state regulations and causes of action are presumptively preempted if they concern conduct that is actually or arguably prohibited . . . by the [NLRA]."[205] This is the so-called *Garmon* doctrine.[206] After finding that the *Machinists* doctrine did not require preemption, the United States Supreme Court in *Belknap* went on to hold that the replacements' state causes of action were not preempted under *Garmon*.[207] As in its *Machinists* analysis, the Court in

---

[199]NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 379 (1967).

[200]*See supra* note 113.

[201]Justice Blackmun suggested charges of threat of reprisal for engaging in concerted activity and unjustified refusal to reinstate strikers at the conclusion of an economic strike. 103 S. Ct. at 3186 (Blackmun, J., concurring).

[202]Brief for the National Labor Relations Board as Amicus Curiae at 13 n.6, Belknap, Inc. v. Hale, 103 S. Ct. 3172 (1983).

[203]*Id.*

[204]359 U.S. 236 (1959).

[205]103 S. Ct. at 3177.

[206]*See supra* notes 35-46 and accompanying text.

[207]103 S. Ct. at 3183.

Belknap mentioned several justifications for the result but relied on none specifically.

An easy but unlikely explanation of the result is that neither the employer's representations of permanent employment to replacements nor their firing was conduct arguably prohibited by section 8 of the NLRA. Had the activity been classified as not arguably prohibited, the *Garmon* doctrine would not have applied.[208] However, this interpretation would have foreclosed the opportunity to examine the exceptions to the *Garmon* rule,[209] which the *Belknap* opinion discussed at length.[210]

The more probable interpretation of *Belknap* is that the Court found that the case fell within one of *Garmon's* exceptions. The Court, in *Garmon*, had recognized that the states' power to regulate is not preempted where "the activity regulated was a merely peripheral concern of the . . . Act . . . [or] where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act."[211] These exceptions are possible because they do not interfere with *Garmon's* underlying rationale of protecting the NLRB's primary jurisdiction.[212]

Belknap's majority opinion focused upon two cases which had explained the exceptions. *Linn v. United Plant Guard Workers*[213] involved a state libel suit which charged the union with making false and defamatory statements. The union argued for preemption, but the United States Supreme Court allowed the state claim for malicious libel to stand because the cause of action was of only peripheral concern to the NLRA and would not interfere with the NLRB's adjudication of the underlying labor controversy.[214] The Court also recognized an overriding state interest in redressing citizens' injuries from malicious libel.[215]

Farmer v. United Brotherhood of Carpenters[216] involved a union member's suit against his union for intentional infliction of emotional distress resulting in bodily harm and for discrimination with regard to job referrals. The union argued that preemption was required because the employment discrimination was arguably an unfair labor practice under the NLRA. The state cause of action was, however, allowed to stand.[217]

---

[208] *See supra* note 173.

[209] *See supra* text accompanying note 46.

[210] 103 S. Ct. at 3182-84.

[211] 359 U.S. at 243-44.

[212] These exceptions also apply to preemption under the *Machinists* doctrine. 427 U.S. 132, 136-37. However, the Court did not rely upon these exceptions in analyzing the *Machinists* side of the *Belknap* case.

[213] 383 U.S. 53 (1966).

[214] *Id.* at 61.

[215] *Id.* at 62.

[216] 430 U.S. 290 (1977).

[217] *Id.* at 302.

The Court in *Belknap* read *Linn* and *Farmer* more broadly than they had been read in the past,[218] by interpreting these cases as exempting from preemption less egregious conduct than malicious or outrageous activity.[219] *Farmer*, a unanimous opinion, had limited *Linn* to situations involving defamatory statements published with knowledge of or reckless disregard for falsity[220] and analogized intentional infliction of emotional distress to prior exception cases involving violence and defamation.[221]

The *Belknap* opinion greatly expanded *Farmer* in a manner not justified by, and arguably contrary to, the Court's opinion in *Farmer*. Justice White asserted that the cause of action in *Farmer* was not preempted "even though a major part of the cause of action consisted of conduct that was arguably an unfair labor practice."[222] However, the *Farmer* opinion stated that "it is essential that the state tort be either unrelated to employment discrimination or a function of the particularly abusive manner in which the discrimination is accomplished or threatened rather than a function of the actual or threatened discrimination itself."[223] The *Farmer* opinion further limited itself by requiring a showing of outrageous conduct, noting that the state suit would be intolerable if it could be made on proof of common clashes in labor disputes.[224] *Belknap* relied in part upon *Linn* and *Farmer* to fit the replacements' misrepresentation and breach of contract claims into the local interest and peripheral concern exceptions to the *Garmon* rule.[225] This indicates a substantial broadening of the exceptions to cover not only violence, malicious defamation and outrageous conduct, but also ordinary misrepresentation and breach of contract which are more closely intertwined with the underlying labor dispute.[226]

The Court cited *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*[227] as additional support for the holding that *Belknap* fell within the exceptions to the *Garmon* doctrine. Prior to *Belknap*, the

---

[218]*See, e.g., Sears,* 436 U.S. 180, 195-97.

[219]103 S. Ct. at 3182-84.

[220]430 U.S. at 299.

[221]*Id.* at 302. *See, e.g., Linn*, 383 U.S. 53 (involving libel); UAW v. Russell, 356 U.S. 364 (1958) (involving violence).

[222]103 S. Ct. at 3183.

[223]430 U.S. at 305.

[224]*Id.* at 305-06. In *Farmer*, the Court remanded the case due to a fear that the jury may have relied upon the facts showing employment discrimination, the unfair labor practice, in awarding damages for the outrageous tortious conduct. *Id.* at 306.

[225]103 S. Ct. at 3182-84.

[226]Justice Brennan's dissent would have read *Linn* and *Farmer* more strictly, thus distinguishing *Belknap*. 103 S. Ct. at 3195 n.7 (Brennan, J., dissenting). The conduct involved in *Belknap*, the hiring and firing of employees from specific jobs was at the very core of the dispute, as contrasted with libelous statements and violent conduct which arises from, rather than causes, the underlying dispute.

[227]436 U.S. 180 (1978).

impact of *Sears* upon *Garmon* was unclear. The Court in *Sears* endorsed the *Garmon* doctrine in form, but appeared to severely damage the doctrine's philosophical structure.[228] Read broadly, *Sears* could have shaken the foundation of preemption analysis developed in *Garmon*. *Belknap*, however, narrowed *Sears* so that it can be read only as creating another exception to the *Garmon* doctrine.[229] In *Belknap*, the Court's only discussion of *Sears* was in the context of the local interest and peripheral concern exceptions, on the level of cases such as *Farmer* and *Linn*.[230] The Court appeared to cite to Justice Stevens' language in *Sears* as an additional exception. "[A] critical inquiry [in applying the *Garmon* rule] . . . is whether the controversy presented to the state court is identical with that which could be presented to the Board."[231] Where the controversies differ, *Garmon* no longer borders on being irrelevant.[232] Rather, *Garmon's* normal operation is not applicable such that the state cause of action will be allowed to stand. *Belknap* apparently meant to limit *Sears* to its facts out of fear that the latter's sweeping language could crumble the *Garmon* cornerstone of labor law preemption.

There exists, however, an inconsistency regarding the term "controversy," as used in the context of the *Sears* exception. *Sears*' use of the term "controversy" was narrow in that the word was defined in terms of elements of the state and federal causes of action.[233] In *Belknap*, the Court found that the state and federal controversies differed because the state causes of action would focus upon the rights of the replacement employees while an NLRB proceeding would be centered upon strikers' rights.[234] While the Court appeared to follow *Sears*' interpretation of

---

[228]*See supra* notes 75-76 and accompanying text.

[229]*See supra* text accompanying notes 108-10.

[230]103 S. Ct. at 3177, 3182-83.

[231]*Id.* at 3183.

[232]*See supra* notes 71-76 and accompanying text.

[233]In *Sears*, the controversy that could have been presented to the NLRB involved the nature of the picketing while the state controversy concerned the picketing's location. The Court in *Sears* stated:

> [T]he federal issue would have been whether the picketing had a recognitional or work reassignment objective; [the] decision of that issue would have [been] . . . completely unrelated to the simple question whether a trespass had occurred. Conversely, in the state action, Sears only challenged the location of the picketing; whether the picketing had an objective proscribed by federal law was irrelevant to the state claim.

436 U.S. at 198 (footnote omitted).

[234]Justice White stated:

> It is true that whether the strike was an unfair labor practice strike and whether the offer to replacements was the kind of offer forbidden during such a dispute were matters for the Board. The focus of these determinations, however, would be on whether the rights of strikers were being infringed. Neither controversy would have anything in common with the question whether Belknap made

"controversy," it allowed the replacements to recover *damages* for breach of an employment contract, but would not permit the state to grant specific performance of such a contract or injunctive relief if such a remedy would require the dismissal of a striker entitled to reinstatement under federal law.[235] This is inconsistent because, in such a situation, nothing has changed the controversy. Rather, only the remedy differs.[236]

If a broader and more general interpretation of "controversy" is used, it is arguable that the state and federal controversies in *Belknap* would be found to be identical under the *Sears* exception. Strikers claimed the right to return to their former jobs under federal law, while replacements claimed the right to occupy those same jobs under state law. The Court apparently concluded that different parties created different controversies. However, both controversies involved precisely the same conduct and the same jobs. The need for additional judicial gloss upon the *Sears* exception to *Garmon* is clear. Without proper refinement, this new exception could completely engulf the rule.

Superficially, the *Belknap* majority reaffirmed the vitality of the *Garmon* doctrine. Realistically, however, the doctrine is now better defined by its exceptions. *Belknap* has widened the scope of the local interest and peripheral concern exceptions to include ordinary tort or breach of contract suits in state court. *Belknap's* interpretation of *Sears* further narrowed the *Garmon* doctrine by expanding *Sears'* "different controversies" exception to include different *remedies*. After *Belknap*, as long as the state remedy is different from the NLRB remedy, a state cause of action will not be preempted under *Garmon*.

---

misrepresentations to replacements that were actionable under state law. The Board would be concerned with the impact on strikers not with whether the employer deceived replacements.

103 S. Ct. at 3183.

[235] *Id.* at 3183 n.13. *See supra* note 95.

[236] It is not an answer to say that the state award of damages is of no threat to NLRB jurisdiction because that agency is powerless to award damages. *Garmon* stated that it was not "significant that [the state] asserted its power to give damages rather than to enjoin what the Board may restrain though it could not compensate . . . . Such regulation can be as effectively asserted through an award of damages as through some form of preventive relief." 359 U.S. at 246-47.

Also, this interpretation of "controversy" leads to the conclusion that *Garmon* now can only operate to preempt a state cause of action brought under a state labor relations statute containing language similar to that of the NLRA. A state suit brought under any other laws would not be identical to a controversy brought under the NLRA. This result is contradictory to language in *Garmon*, where the Court stated that it did not matter "whether the states have acted through laws of broad general application rather than laws specifically directed towards the governance of industrial relations. Regardless of the mode adopted, to allow the states to control conduct which is the subject of national regulations would create a potential frustration of national purposes." *Id.* at 244.

IV. Conclusion

Belknap does little to clarify ambiguities that have arisen in recent labor law preemption cases. Instead, *Belknap's* "deeply rooted, different remedy, Congress could not have intended" test further clouds preemption law. One clear implication is that states now control a larger portion of the body of labor law than they did before *Belknap*. It is also clear that the Court desired to use *Belknap* to address a broad range of issues in the area. The *Machinists* doctrine is now narrower, as is the *Garmon* rule through the expansion of its exceptions. In its haste to limit the area of exclusive federal domain in favor of more state control over labor law, the court has raised new uncertainties regarding the practical value of an employer's right to exercise his most powerful economic weapon, the right to hire permanent replacements, which must make labor's weapons less secure by analogy. Although the result in *Belknap* may have been desirable, because the state remedy was probably the only one available to the replacements, it is unfortunate that the Court chose such a complex route to that end. If nothing else, the case shows further need for a coherent preemption doctrine.

James P. Cavanaugh III