

CASENOTES

State Court Jurisdiction Over Trespassory Union Picketing: *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*¹—Sears, Roebuck & Co. operated a large department store in Chula Vista, California. On October 23, 1973, representatives of the San Diego District Council of Carpenters (Union) discovered that men who had not been dispatched from the union hiring hall were performing carpentry work at the store.² Union representatives met with Sears' management and requested that Sears either contract the carpentry work through a building trades contractor who employed carpenters dispatched from the hiring hall, or agree to abide by the terms of the union's master labor agreement relative to the dispatch and wages of carpenters. Sears never accepted or rejected these demands.³

Two days later, the union set up picket lines on Sears' property. The pickets were located on the private walkways immediately adjacent to the store and in the store's parking areas.⁴ The pickets carried signs identifying themselves as members of the Carpenters Trade Union. They were peaceful and orderly.⁵ The Sears security manager requested that the pickets leave Sears' property. The pickets refused, stating that they would not leave unless legally compelled.

On October 29, 1973, Sears filed a complaint in California Superior Court seeking an injunction against the continuing trespass.⁶ The court granted a temporary restraining order enjoining the union from picketing on Sears' property.⁷ In response, the union moved its pickets to the public sidewalk approximately 200 feet from their original position.⁸ After a full hearing, the California Superior Court entered a preliminary injunction against further picketing on Sears' property.⁹

The union unsuccessfully appealed the issuance of the preliminary injunction to the California Court of Appeal.¹⁰ The appellate court agreed

¹ 436 U.S. 180 (1978).

² *Id.* at 182.

³ *Id.*

⁴ *Id.* The Sears store was located in the center of a large rectangular lot. Walkways and parking lots surrounded the building. *Id.*

⁵ *Id.*

⁶ *Id.* at 183.

⁷ *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, No. 347511 (Super. Ct., San Diego County 1973). The injunction was issued in an ex parte proceeding. See 436 U.S. at 212 (Blackmun, J., concurring).

⁸ 436 U.S. at 183. The union apparently found the picketing to be ineffective at this location and stopped picketing on November 12, 1973. *Id.*

⁹ *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, No. 347511 (Super. Ct., San Diego County 1973). The injunction restrained the union, its officers, agents, representatives, and members from "causing, instigating, furthering, participating in, or carrying on picketing on the plaintiff's property . . ." The injunction specifically noted that "this order and preliminary injunction shall not apply to the public sidewalks on 5th Avenue, 'H' Street and 'I' Street which are adjacent to the private property of the plaintiff." *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 17 Cal. 3d 893, 896, 132 Cal. Rptr. 443, 446 (1976).

¹⁰ *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 49

with the superior court that state law did not prohibit the injunction and that the first and fourteenth amendments did not protect the picketing.¹¹ It also concluded that federal labor law did not preempt state court jurisdiction over the picketing at Sears.¹² The appellate court found that the trespassory picketing at Sears fell within an established exception to the general rule that state courts lack jurisdiction over disputes covered by federal labor law.¹³ Under this exception, state courts may exercise jurisdiction over conduct "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."¹⁴

The California Supreme Court reversed the appellate court.¹⁵ It found that the union's conduct was both arguably protected by section 7¹⁶ and arguably prohibited by section 8¹⁷ of the National Labor Relations Act (NLRA or Act).¹⁸ Since the National Labor Relations Board (NLRB or Board) has exclusive subject matter jurisdiction over conduct which is arguably protected or arguably prohibited by the NLRA, the California Supreme Court held that the lower court lacked subject matter jurisdiction over the trespassory picketing.¹⁹ The court therefore vacated the injunction.²⁰

The United States Supreme Court granted certiorari,²¹ reversed the California Supreme Court, and HELD: the jurisdiction of the NLRB does not preempt state court jurisdiction over an employer's action to enforce state trespass laws against nonemployee union pickets where: (1) the picketing is either arguably protected or arguably prohibited by the NLRA, (2) the pickets

Cal. App. 3d 232, 122 Cal. Rptr. 449, *aff'd on rehearing*, 52 Cal. App. 3d 690, 125 Cal. Rptr. 245 (1975).

¹¹ *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 52 Cal. App. 3d 690, 704-05, 125 Cal. Rptr. 245, 254-55 (1975).

¹² *See id.* at 697, 125 Cal. Rptr. at 249.

¹³ *See text and notes 36-39 infra. See generally Cox, Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337 (1972); *Comie, Federal Preemption of Labor-Management Relations: Current Problems in the Application of Garmon*, 56 VA. L. REV. 1435 (1970); *Lesnick, Preemption Reconsidered: The Apparent Reaffirmation of Garmon*, 72 COLUM. L. REV. 469 (1972).

¹⁴ *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 52 Cal. App. 3d at 696-97, 125 Cal. Rptr. at 249 (quoting *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244 (1959)).

¹⁵ *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 17 Cal. 3d 893, 907, 553 P.2d 603, 614, 132 Cal. Rptr. 443, 454 (1976).

¹⁶ Section 7 provides in pertinent part:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection

29 U.S.C. § 157 (1976).

¹⁷ Section 8 categorizes both employer and union unfair labor practices. 29 U.S.C. §§ 158(a)-(g) (1976).

¹⁸ *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 17 Cal. 3d 893, 901, 553 P.2d 603, 610, 132 Cal. Rptr. 443, 450 (1976).

¹⁹ *Id.* at 906-07, 553 P.2d at 613-14, 132 Cal. Rptr. at 453-54.

²⁰ *Id.*

²¹ 430 U.S. 905 (1977).

have been requested to leave the employer's property but they have not filed a section 8(a)(1) charge with the Board, and (3) the employer cannot effectively bring the dispute before the NLRB.²² Three justices dissented, arguing that the Court should retain the primary jurisdiction approach.²³ The dissent asserted that the primary jurisdiction approach avoided the problem of state court interference with national labor policy and could be applied easily by state courts.²⁴ The dissent also predicted that allowing state courts to enjoin peaceful trespassory picketing would lead to inconsistent state and federal remedies,²⁵ and create the possibility of state courts' restraining protected activity.²⁶

The Court's resolution of the trespassory picketing issue in *Sears*, granting state courts subject matter jurisdiction over such picketing, is a significant development in two respects.²⁷ First, *Sears* gives state courts jurisdiction to enjoin a form of concerted activity which is arguably protected by federal labor law. Second, the Court announced in *Sears* a new balancing approach to preemption under which it will weigh both the employer's and the state's interest in state court jurisdiction against the potential interference with national labor policy in order to determine whether a state court may assert jurisdiction over some aspect of a labor dispute. This balancing test is a clear departure from the Court's traditional primary jurisdiction approach.

This casenote will first outline the primary jurisdiction approach to federal preemption prior to *Sears*. The rationale of the majority and the dissent in *Sears* will then be analyzed in detail. Finally, this casenote will discuss the significance and probable impact of the *Sears* decision in the field of labor law preemption. In particular, it will discuss the procedural uncertainties which the partial concurrent jurisdiction of the NLRB and state courts creates.

²² 436 U.S. at 201-02. Justice Stevens delivered the opinion of the Court in which Chief Justice Burger and Justices White, Blackmun, Powell, and Rehnquist joined. Justices Blackmun and Powell also filed separate concurring opinions, differing with each other as to the procedural impact of the decision.

²³ *Id.* at 214. Justice Brennan, joined by Justices Stewart and Marshall, dissented.

²⁴ *Id.* at 216. Justice Brennan reasoned that "[t]he limitation on employer remedies is fully justified both by the ease of application of the test by thousands of state and federal judges and by its effects of averting the danger that state courts may interfere with national labor policy." *Id.*

²⁵ *Id.* at 219.

²⁶ *Id.* at 221.

²⁷ In two cases prior to *Sears*, the issue whether peaceful trespassory union picketing was preempted from state court jurisdiction was left open by the Court. *Taggart v. Weinacker's, Inc.*, 283 Ala. 171, 214 So. 2d 913 (1968), *cert. granted*, 396 U.S. 813 (1969), *cert. dismissed*, 397 U.S. 223 (1970); *Meat Cutters Local 427 v. Fairlawn Meat*, 353 U.S. 20, 24-25 (1957). State courts which had considered the problem were divided over whether they had jurisdiction over peaceful trespassory picketing. *Compare Shirley v. Retail Store Employees Union*, 222 Kan. 373, 565 P.2d 585 (1977) and *Freeman v. Retail Clerks Local 1207*, 58 Wash. 2d 527, 363 P.2d 803 (1961) (*en banc*) (cases where federal preemption was found) with *May Dep't Stores Co. v. Teamsters Local 743*, 64 Ill. 2d 153, 355 N.E.2d 7 (1976) and *People v. Bush*, 39 N.Y.2d 529, 349 N.E.2d 832, 384 N.Y.S.2d 733 (1976) and *Hood v. Stafford*, 213 Tenn. 684, 378 S.W.2d 766 (1964) (cases where state court jurisdiction was found).

I. THE PRIMARY JURISDICTION APPROACH

A. *Formation of the Primary Jurisdiction Approach*

The proper accommodation of federal labor legislation and state law has been a difficult and contentious issue since the passage of the Wagner Act in 1935.²⁸ Although the NLRA deals specifically with some aspects of state jurisdiction in labor disputes,²⁹ to a large degree "the statutory implications concerning what has been taken from the states and what has been left to them are of a Delphic nature, to be translated into concreteness by the process of litigating elucidation."³⁰ In 1959, after a lengthy period of "litigating elucidation," the Supreme Court, in *San Diego Building Trades Council v. Garmon*,³¹ held that the NLRB has primary and exclusive subject matter jurisdiction over labor disputes arguably covered by the NLRA to the exclusion of state and federal courts.³²

In *Garmon*, members of the San Diego Building Trades Council demanded that a construction company execute a collective bargaining agreement that included a union shop provision.³³ The company refused. The unions began to picket peacefully and discouraged some customers from doing business with the company.³⁴ In an action instituted by the employer, the California Superior Court found that the unions' picketing was for the illegal purpose of coercing the employer to sign a collective bargaining agreement regardless of the employees' wishes. The court therefore enjoined the picketing and awarded damages.³⁵

The United States Supreme Court reversed the California court and held that the National Labor Relations Board had primary and exclusive jurisdiction over the dispute, and, therefore, that the California Superior Court lacked subject matter jurisdiction to issue the injunction.³⁶ Justice Frank-

²⁸ Wagner Act, ch. 372, § 1, 49 Stat. 449 (1935). See Cox, *supra* note 13, at 1337.

²⁹ See, e.g., § 10(a), 29 U.S.C. § 160(a) (1976) (by agreement with a state agency the Board may cede jurisdiction to such agency); § 8(d), 29 U.S.C. § 158(d) (1976) (state mediatory or conciliatory agencies must be notified before a party may terminate or modify an existing collective bargaining agreement); § 14(b), 29 U.S.C. § 164(b) (1976) (the Act may not be construed as authorizing agreements requiring union membership as a condition of employment where such agreements are prohibited by state laws); § 14(c)(2), 29 U.S.C. § 164(c)(2) (1976) (the Act does not bar states from asserting jurisdiction over labor disputes over which the Board declines to assert jurisdiction because of insufficient effect on interstate commerce).

³⁰ International Ass'n of Machinists v. Gonzales, 356 U.S. 617, 619 (1958) (Frankfurter, J.).

³¹ 359 U.S. 236 (1959).

³² *Id.* at 245.

³³ 359 U.S. at 237.

³⁴ *Id.*

³⁵ *Id.* at 237-38.

³⁶ The Supreme Court first dissolved the injunction and remanded the case to the California Supreme Court for reconsideration of the damage award. *San Diego Bldg. Trades Council v. Garmon*, 353 U.S. 26, 29 (1957). The California Supreme Court affirmed the damage award. *Garmon v. San Diego Bldg. Trades Council*, 49 Cal. 2d 595, 615, 320 P.2d 473, 485 (1958). On rehearing, the Supreme Court re-

further, writing for the Court, fashioned the scope of the primary jurisdiction of the NLRB:

When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. . . . At times it has not been clear whether the particular activity regulated by the States 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 Act that these determinations be left in the first instance to the National Labor Relations Board. . . . When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with the national policy is to be averted.³⁷

Despite the seeming rigidity of the primary jurisdiction approach as enunciated by Justice Frankfurter, it did not exclude all state regulation of labor disputes. The *Garmon* Court created two exceptions to the NLRB's preemption of state court jurisdiction. One exception was that state courts retained jurisdiction over conduct that was of "merely peripheral concern of the Labor Management Relations Act."³⁸ Under the other *Garmon* exception,

versed the damage award. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 248 (1959).

³⁷ 359 U.S. at 244-45 (citations omitted). See also *Cox*, *supra* note 13, at 1348-51. Two policy considerations underlie the *Garmon* primary jurisdiction approach to federal preemption in labor disputes. First, the Court sought to minimize the risk that state courts, through differences in substantive law, procedure, or remedies, would conflict with the NLRB and national labor policy. Second, the Court felt that the standard for federal preemption should be easily applied by the lower state courts. *Id.* at 242-43. See *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 290 (1971). Justice Harlan, writing the Court's opinion in *Lockridge*, cited the impracticality of case-by-case adjudication of federal preemption in the Supreme Court as the reason for a clear rule of preemption. As he stated:

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

Id. at 289-90.

³⁸ 359 U.S. at 243. See Hooten, *The Exceptional Garmon Doctrine*, 26 LAB. L.J. 49, 52 (1975). Cases which have fallen within this exception include *International Ass'n of Machinists v. Gonzales*, 356 U.S. 617, 620 (1958) (pre-*Garmon* case, state court has jurisdiction over suit brought by union member against his union for wrongful expulsion from the union); *Hanna Mining Co. v. Marine Eng'rs*, 382 U.S. 181, 193 (1965) (state court has jurisdiction to apply state labor relations law to union of supervisory personnel); *Vaca v. Sipes*, 386 U.S. 171, 180 (1967) (state court has jurisdiction over union member's suit for breach of the duty of fair representation by his union). *Vaca* added a new exception to the primary jurisdiction approach. State courts may retain jurisdiction where the particular rule of law involved is so structured and administered

the NLRB did not preempt state court jurisdiction over conduct that "touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, it could not infer that Congress had deprived the States of the power to act."³⁹

B. *Erosion of the Primary Jurisdiction Approach*

The primary jurisdiction approach enunciated in *Garmon* stood for nearly twenty years. The Supreme Court repeatedly reaffirmed this basic approach.⁴⁰ With the Supreme Court's decision in *Linn v. Plant Guard Workers Local 114*,⁴¹ however, an erosion of the primary jurisdiction approach began.

In *Linn*, the assistant manager of the Pinkerton Detective Agency brought a diversity action in federal court against the union, alleging that statements contained in a pamphlet used in the union's organizational campaign defamed him.⁴² The district court dismissed the complaint because of the primary jurisdiction of the NLRB.⁴³ The Supreme Court, however, held that a federal court in a diversity action in which state law applies could entertain a libel action arising out of a labor dispute.⁴⁴ The Court determined that a suit alleging malicious libel falls within both of the exceptions to the primary jurisdiction approach.⁴⁵ First, the Court found that malicious libel is a "merely peripheral concern of the Labor Management Relations Act;"⁴⁶ thus, there is no significant conflict between a court's consideration of a libel suit and enforcement of national labor policy. Second, the Court held that "a State's concern with redressing malicious libel is 'so deeply rooted in local feeling and responsibility' that it fits within the exception specifically carved out by *Garmon*."⁴⁷

that in virtually all instances it is safe to presume that judicial supervision will not disserve the interest promoted by the federal labor statutes. See 386 U.S. at 180-81.

³⁹ *Garmon*, 359 U.S. at 244. Cases which have fallen under this exception include *Automobile Workers v. Russell*, 356 U.S. 634, 640 (1958); *Youngdahl v. Rainfair Inc.*, 355 U.S. 131, 139 (1957); *United Constr. Workers v. Laburnum Constr. Corp.*, 347 U.S. 656, 664-65 (1954) (three cases where mass picketing, violence, and threats of violence were found to be within state court jurisdiction); *Linn v. Plant Guard Workers Local 114*, 383 U.S. 53, 61 (1966) (state court has jurisdiction to award damages for actual injury caused by libel, published with actual malice, during the course of a representation election). See also *Hooten*, *supra* note 38, at 51-52.

⁴⁰ See *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 285 (1971); *Lodge 76 International Ass'n of Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 138 (1976).

⁴¹ 383 U.S. 53 (1966).

⁴² *Id.* at 56.

⁴³ *Id.* at 55.

⁴⁴ *Id.* at 61-62. The court limited the availability of state remedies by requiring that a plaintiff prove that the statement was published with knowledge of falsity, or reckless disregard of the truth or falsity, and that the plaintiff suffered actual harm. *Id.* at 65.

⁴⁵ *Id.* at 61-62.

⁴⁶ *Id.* at 61.

⁴⁷ *Id.* at 62.

Although the Court in *Linn* appeared to follow *Garmon*, there are indications in the Court's opinion of an erosion of the primary jurisdiction approach. The *Linn* Court made two findings which were not necessary to the application of the primary jurisdiction approach. The Court first determined that malicious libel clearly was not protected by section 7 of the NLRA.⁴⁸ The Court also found that the issues before the Board on a possible unfair labor practice charge and those before a court on a defamation complaint would be different.⁴⁹ The Court did not pull these findings into an explicit standard. The findings suggest, however, that the Court not only utilized the traditional primary jurisdiction approach in reaching its decision, but also balanced the state's interest in protecting its residents from libels against the risk that state court exercise of jurisdiction would interfere with the Board's administration of the NLRA. The Court concluded that, on balance, the state's interest was greater than the risk of interference with national labor policy.⁵⁰

Although the Court in *Linn* merely hinted at a new balancing approach to federal preemption, it later explicitly articulated this approach in *Farmer v. United Brotherhood of Carpenters*.⁵¹ In *Farmer*, a carpenter sued his union in state court for intentional infliction of emotional distress.⁵² The Court announced that in deciding whether the state court had jurisdiction to entertain the suit, it would approach preemption by "examining the state interests in regulating the conduct in question and the potential for interference with the federal regulatory scheme."⁵³ The Court held that in cases involving allegations of intentional infliction of emotional distress the "potential for interference is insufficient to counter-balance the legitimate and substantial interest of the State in protecting its citizens."⁵⁴ The Court therefore allowed the state court to exercise jurisdiction.

Through the development of a balancing approach, *Linn* and *Farmer* eroded the clear rule of the *Garmon* primary jurisdiction approach. This balancing approach to federal preemption, applied concurrently with the *Garmon* primary jurisdiction approach, formed the analytical structure for the Court's opinion in *Sears*.

⁴⁸ *Id.* at 61.

⁴⁹ *Id.* at 63. If either the employer or the union filed a charge with the Board concerning false or misleading statements in campaign literature, the Board would only intervene in the election where there has been a misrepresentation, or other similar campaign trickery, which involves a substantial departure from the truth at a time which prevents the other party or parties from making an effective reply so that the misrepresentation whether deliberate or not may reasonably be expected to have a significant impact on the election. See General Knit of Calif., 239 N.L.R.B. No. 101, 99 L.R.R.M. 1687 (1978).

⁵⁰ 383 U.S. at 64.

⁵¹ 430 U.S. 290 (1977).

⁵² *Id.* at 293.

⁵³ *Id.* at 297.

⁵⁴ *Id.* at 304.

II. THE SEARS DECISION

Guided by the primary jurisdiction approach, the Court in *Sears*⁵⁵ first considered whether the arguably *prohibited* nature of the union's conduct preempted state court jurisdiction.⁵⁶ The Court then considered whether the arguably *protected* character of the union's conduct ousted state court jurisdiction.⁵⁷ The Court determined that neither the arguably prohibited nor the arguably protected nature of the union's conduct precluded state jurisdiction.

Turning to the first inquiry of the primary jurisdiction approach, whether the conduct at issue was arguably prohibited, the Court in *Sears* determined that there were two theories under which the trespassory picketing was arguably prohibited by section 8 of the NLRA.⁵⁸ If the union's purpose in picketing was to coerce Sears into assigning the carpentry work to union carpenters dispatched from the hiring hall, the picketing arguably violated section 8(b)(4)(D).⁵⁹ Alternatively, if the union's purpose was to force the company to recognize the union, then the picketing arguably was subject to the restrictions of section 8(b)(7)(C).⁶⁰ Under the primary jurisdiction approach set forth in *Garmon*, the Court's finding that the conduct was arguably prohibited would trigger NLRB preemption of state court jurisdiction over Sears' trespass claim.⁶¹ The Court, however, refused to apply the *Garmon* primary jurisdiction approach in a mechanical fashion.⁶² Rather, the Court developed a new approach to determine whether to preempt state court juris-

⁵⁵ 436 U.S. at 182. Justice Stevens, the author of the majority opinion, was joined by Chief Justice Burger and Justices White, Blackmun, Powell, and Rehnquist.

⁵⁶ *Id.* at 190.

⁵⁷ *Id.* at 199.

⁵⁸ *Id.* at 185.

⁵⁹ *Id.* at 186 & n.9. Section 8(b)(4)(D) provides in pertinent part:

It shall be an unfair labor practice for a labor organization or its agents . . . (4) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where . . . an object thereof is, . . . (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work.

29 U.S.C. § 158(b)(4)(D) (1976).

⁶⁰ 436 U.S. at 186 & n.10. Section 8(b)(7)(C) states in pertinent part:

It shall be an unfair labor practice for a labor organization or its agents . . . (7) to picket . . . any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees . . . unless such labor organization is currently certified as the representative of such employees: . . . (C) Where such picketing has been conducted without a petition . . . [for a representative election] being filed within a reasonable time not to exceed thirty days from the commencement of such picketing.

29 U.S.C. § 158(b)(7)(C) (1976).

⁶¹ See text at note 37 *supra*.

⁶² 436 U.S. at 188.

diction. Under its new test, the Court weighs the state's interest in protecting its citizens from the challenged conduct against the risk that a state court proceeding would interfere with the regulatory jurisdiction of the NLRB.⁶³

As to the risk of interference with the NLRB, the Court found that this risk was slight since the controversies presented to the respective forums would be different.⁶⁴ If Sears had filed a section 8(b)(4)(D)⁶⁵ or section 8(b)(7)(C)⁶⁶ charge with the NLRB, the Court reasoned, the issue before the Board would have been the union's *purpose* in establishing the picket line.⁶⁷ The issue before the California Superior Court in the trespass action, however, was not the purpose but the *location* of the pickets.⁶⁸ Due to the difference between the issues presented to the state and federal forums, the Court concluded that "permitting the state court to adjudicate Sears' trespass claim would create no realistic risk of interference with the Board's primary jurisdiction to enforce the statutory prohibition against unfair labor practices."⁶⁹ Turning to the other side of the balance, the Court concluded that the state's interest in protecting private property rights outweighed the slight risk of interference with the Board's regulatory jurisdiction.⁷⁰ Therefore, under the Court's new balancing approach, federal labor law did not preempt the California court's jurisdiction over Sears' trespass action. The arguably prohibited nature of the union's conduct alone was "insufficient to preclude a State from exercising jurisdiction limited to the trespassory aspects" of the union's picketing.⁷¹

Perhaps a more difficult question facing the Court in *Sears* was whether the arguably protected nature of the union's conduct precluded the California court from entertaining Sears' trespass action. The Court recognized the union's position that its purpose in picketing was to persuade Sears to comply with area standards for wages and benefits, and, therefore, the picketing was arguably protected by section 7 of the NLRA.⁷² Application of the primary jurisdiction approach would place jurisdiction of the dispute with the NLRB.⁷³ The Court, however, announced that "the mere fact that the

⁶³ *Id.* at 196-97.

⁶⁴ *Id.* at 197.

⁶⁵ 29 U.S.C. § 158(b)(4)(D) (1976). See note 59 *supra* for text of this provision.

⁶⁶ 29 U.S.C. § 158(b)(7)(C) (1976). See note 60 *supra* for text of this provision.

⁶⁷ *Id.* at 198 & n.28.

⁶⁸ *Id.* at 198. The injunction only restrained the union from picketing on Sears' property; the union was free to picket on the public sidewalks. The objective of the union in picketing was immaterial to the state court. See note 9 *supra*.

⁶⁹ 436 U.S. at 198.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Brief for Respondent at 23, *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180 (1978). Picketing to persuade an employer to comply with area standards and to inform the public that a particular employer is not paying area standards is protected conduct. See *Hod Carriers Local 41*, 133 N.L.R.B. 512, 512, 48 L.R.R.M. 1667, 1667 (1961); *Longshoremen's Local 1416 v. Ariadne Shipping Co.*, 397 U.S. 195, 201 (1970).

⁷³ See text at note 37 *supra*.

union's trespass was *arguably* protected is insufficient to deprive the state court of jurisdiction in this case."⁷⁴

In place of the arguably protected arm of the primary jurisdiction approach, the Court developed another balancing test to determine whether the state has jurisdiction over the disputed conduct. Under this new approach, the Court balances the anomaly of denying an employer a forum against the risk that the state court will misinterpret federal law and restrain activity protected by federal labor law.⁷⁵ In relating its new balancing test to the case at hand, the Court noted that an employer is denied a forum where he does not have a reasonable opportunity either to invoke the Board's jurisdiction or to induce the other party to do so.⁷⁶ Although Sears could have filed a charge based on either section 8(b)(4)(D)⁷⁷ or section 8(b)(7)(C)⁷⁸ of the NLRA, these charges would have presented the issue of the union's purpose rather than the location of the picketing.⁷⁹ There was no procedural route whereby Sears could have presented simply the issue of trespass to the NLRB.⁸⁰ Thus, Sears was denied a forum for redress of the union's trespass.

The Court then examined the other side of the balance, the risk that the state court would misinterpret federal law and restrain protected conduct. The Court found slight weight on this side of the balance for two reasons. First, federal courts rarely protect trespassory activity, so there is only a small chance that a state court would restrict federally protected activity.⁸¹ The standard for protection of trespassory picketing was developed by the Supreme Court in *NLRB v. Babcock & Wilcox Co.*⁸² In *Babcock & Wilcox*, the

⁷⁴ 436 U.S. at 200.

⁷⁵ *Id.* at 206.

⁷⁶ *Id.* at 201. The Court specifically added the converse as well: "The primary jurisdiction rationale unquestionably requires that when the same controversy may be presented to the state court or the NLRB, it must be presented to the Board." *Id.* at 202.

⁷⁷ 29 U.S.C. § 158(b)(4)(D) (1976). See note 59 *supra*.

⁷⁸ 29 U.S.C. § 158(b)(7)(C) (1976). See note 60 *supra*.

⁷⁹ See text and note 76 *supra*. The gravamen of the employer's unfair labor practice charge would be that the purpose of the picketing was to force work reassignments or to organize the employees. The Board could find that the picketing was not for these objectives, find no § 8(b)(4)(D) or § 8(b)(7)(C) violation, and still not make a determination whether the picketing was protected by § 7. 436 U.S. at 198 n.28, 201 n.31.

⁸⁰ *Id.* at 201, 207 n.43. The union could have brought the issue of the location of the picketing before the Board by filing a § 8(a)(1) charge after Sears' security manager requested that the union pickets leave Sears' property. If the Board determined that the trespassory picketing was protected by § 7, the request to leave would have constituted an unfair labor practice under § 8(a)(1). See *Broomfield, Preemptive Federal Jurisdiction Over Concerted Trespassory Union Activity*, 83 HARV. L. REV. 552, 568 (1970); Come, *Federal Preemption of Labor-Management Relations: Current Problems in the Application of Garmon*, 56 VA. L. REV. 1435, 1437 (1970).

⁸¹ 436 U.S. at 205 n.41.

⁸² 351 U.S. 105 (1956). In *Babcock & Wilcox*, the company prevented nonemployee union organizers from distributing union literature on company property. *Id.* at 106. The Supreme Court upheld the Fifth Circuit Court of Appeals' refusal to allow trespassory organizational efforts. *Id.* at 144.

Court held that an employer may enforce a rule prohibiting nonemployee solicitation on company property, unless the employer discriminatorily applies the rule to union organizers or the union has no effective, alternative means of communicating with the employees.⁸³ Since unions rarely meet the *Babcock & Wilcox* standard,⁸⁴ the Court in *Sears* determined that state courts probably will not misapply the standard and restrain federally protected conduct.⁸⁵ Second, the Court found that the risk of state court misinterpretation is reduced further by the unions' having the choice of forum.⁸⁶ If a union considers its conduct protected, it can file a section 8(a)(1)⁸⁷ charge with the Board after the employer asks the union pickets to leave.⁸⁸ The Board then can resolve the issue of the protected nature of the trespassory picketing.⁸⁹ Based on these two considerations, the *Sears* Court found that allowing state courts to entertain trespass actions does not substantially increase the risk of misinterpretation of federal law. The anomaly of denying employers a forum to protect their property rights outweighs the small risk that state courts will restrain protected activity. The Court, therefore, was "unwilling to presume that Congress intended the arguably protected character of the Union's conduct to deprive the California courts of jurisdiction to entertain *Sears*' trespass action."⁹⁰

In summary, the Court in *Sears* acknowledged that, under the primary jurisdiction approach, a finding that the disputed activity was either arguably protected by section 7 or arguably prohibited by section 8 triggered preemption of state court jurisdiction by the NLRB.⁹¹ However, although the Court assumed that the trespassory picketing was both arguably protected and arguably prohibited by the NLRA,⁹² it did not preempt state court jurisdiction.⁹³ Instead, the Court rejected the primary jurisdiction approach. To replace the arguably protected prong of the primary jurisdiction approach, the Court de-

⁸³ *Id.* at 112. The Court in *Babcock & Wilcox* stated that "[w]hen the inaccessibility of employees makes ineffective the reasonable attempts by non-employees to communicate with them through the usual channels, the right to exclude from property has been required to yield to the extent needed to permit communication of information on the right to organize." *Id.* See also Scott Hudgens, 230 N.L.R.B. 414, 418, 95 L.R.R.M. 1351, 1355 (1977) (trespass by nonemployee union organizers protected activity under *Babcock & Wilcox*).

⁸⁴ 436 U.S. at 205.

⁸⁵ *Id.*

⁸⁶ *Id.* at 206.

⁸⁷ 29 U.S.C. § 158(a)(1) (1976). Section 8(a)(1) provides in relevant part: "It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [section 7]."

⁸⁸ *Id.* The NLRB in an amicus curiae brief indicated that an employer's request to leave would be a § 8(a)(1) violation, where the picketing was protected. 436 U.S. at 208-09 (Blackmun, J., concurring).

⁸⁹ Justice Powell, in his concurring opinion, disagreed with this conclusion. *Id.* at 212. See text and notes 139-40 *infra*.

⁹⁰ 436 U.S. at 207.

⁹¹ See text at note 37 *supra*.

⁹² 436 U.S. at 187.

⁹³ *Id.* at 198, 207.

veloped a balancing test which weighs the anomaly of denying an employer a forum against the risk that a state court will misinterpret federal labor law.⁹⁴ The Court replaced the arguably prohibited prong of the primary jurisdiction approach with another balancing test, this time weighing the state's interest in regulating the conduct at issue against the risk of interference with the regulatory jurisdiction of the Labor Board.⁹⁵ In *Sears*, the Court performed both balancing tests and found that the anomaly of denying *Sears* a forum for its trespass complaint outweighed the risk of state court misinterpretation of federal labor law,⁹⁶ and the state's interest in regulating trespassory picketing outweighed the risk of interference with the jurisdiction of the NLRB.⁹⁷ The Court therefore held that the California Superior Court had jurisdiction to enjoin the union's picketing.⁹⁸

III. THE *SEARS* DISSENT

Justice Brennan, joined by Justices Stewart and Marshall,⁹⁹ dissented in *Sears*, arguing that the Court should retain the primary jurisdiction approach and deny the California Superior Court jurisdiction over *Sears*' request for injunctive relief.¹⁰⁰ The dissent contended that the primary jurisdiction approach is "an entirely acceptable, and probably the best possible accommodation of the competing state-federal interests."¹⁰¹

The dissent warned of several dangers in deviating from the primary jurisdiction approach. Allowing state courts to entertain suits involving arguably prohibited activity creates the risk that state courts will misapply federal law and restrain conduct that Congress intended to be free from any governmental restraint.¹⁰² Even where a state court correctly determines that a particular activity is prohibited by federal labor law, the court's adjudication of matters relating to that activity may disrupt the congressional scheme if the court imposes forms of relief that the NLRB would not impose.¹⁰³ Furthermore, state court jurisdiction over arguably protected activity creates the risk of a more direct interference with national labor policy. The dissent reasoned that state courts, due to their bias against organized labor, their lack of expertise in labor issues, and their insensitive procedures, probably will restrain

⁹⁴ *Id.* at 206.

⁹⁵ *Id.* at 196.

⁹⁶ *Id.* at 206.

⁹⁷ *Id.* at 198.

⁹⁸ *Id.* at 207-08.

⁹⁹ *Id.* at 214 (Brennan, J., dissenting).

¹⁰⁰ *Id.* at 215.

¹⁰¹ *Id.* at 216.

¹⁰² *Id.* at 219. In *International Association of Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 140 (1976), a case involving organizational activities by a supervisors union, the Court indicated that some activities are outside both the protections and prohibitions of the national labor laws and should properly be left unregulated by both federal and state authorities.

¹⁰³ 436 U.S. at 219.

conduct that is protected by section 7, and thereby destroy rights which the NLRA was created to protect.¹⁰⁴ Finally, the dissent characterized the majority's balancing approach as unworkable because it requires state courts to evaluate three incalculable factors: the probability that they can properly determine the underlying labor law issue, the strength of the argument that section 7 protects the activity in question, and the strength of the state's interest in affording the employer a state remedy.¹⁰⁵ The dissent also found no positive social harm in an employer's lack of a forum for a trespass claim under the old primary jurisdiction approach.¹⁰⁶ Rather, for the dissenters the denial of a forum was justified by the ease of application of the primary jurisdiction approach and its "effect of averting the danger that state courts may interfere with national labor policy."¹⁰⁷

The dissenters in *Sears* were concerned that the majority had created "an exception of indeterminate dimension to a principle of labor law preemption that courts have followed for at least two decades."¹⁰⁸ Moreover, in the dissenters' view, the majority's new balancing approach "promises to be applied by the lower courts so as to disserve the interests protected by the national labor laws."¹⁰⁹

IV. THE SIGNIFICANCE OF THE NEW APPROACH TO PREEMPTION

The *Sears* decision is a significant development in labor law since it grants state courts subject matter jurisdiction over trespassory picketing that is arguably protected by section 7 of the NLRA. *Sears* is the first case since the Court established the primary jurisdiction approach in *Garmon* where state courts have been granted subject matter jurisdiction over conduct that is arguably protected by section 7 of the NLRA.¹¹⁰ Previous cases in which the Court recognized exceptions to the primary jurisdiction approach involved conduct which was either prohibited¹¹¹ or unprotected¹¹² by the NLRA.¹¹³

Prior to *Sears*, in *Hudgens v. NLRB*,¹¹⁴ the Court gave the Board primary responsibility for determining whether trespassory concerted activity is pro-

¹⁰⁴ *Id.* at 224.

¹⁰⁵ *Id.* at 216.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 215.

¹⁰⁹ *Id.* at 217.

¹¹⁰ The distinction drawn in *Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969), would seem no longer applicable: "[I]n referring to decisions holding state law preempted by the NLRA, care must be taken to distinguish preemption based on federal protection of the conduct in question, . . . from that based predominantly on the primary jurisdiction of the National Labor Relations Board" *Id.* at 383 n.19 (citations omitted).

¹¹¹ See notes 38-39 *supra*.

¹¹² See *Linn v. Plant Guard Workers Local 114*, 383 U.S. 53, 61 (1966).

¹¹³ *Sears*, 436 U.S. at 223 (Brennan, J., dissenting).

¹¹⁴ 424 U.S. 507 (1976). *Hudgens* concerned employees of a shoe manufacturer who were picketing at a retail outlet of the manufacturer located in a privately owned shopping mall.

ected under section 7.¹¹⁵ The *Hudgens* Court held that "the primary responsibility for making this accommodation [between employees' section 7 rights and employers' private property rights] must rest with the Board in the first instance."¹¹⁶ In *Sears*, however, the Court shifted the primary responsibility for accommodating employees' section 7 rights and employers' private property rights to state courts. In deciding whether to enjoin trespassory picketing, a state court now must determine whether picketing is protected by section 7.¹¹⁷ Thus, although the Court in *Sears* never mentions *Hudgens*, it overrules the case by eliminating the Board's primary jurisdiction to protect employees' section 7 rights in trespassory picketing situations¹¹⁸ and by simultaneously allowing state courts to exercise jurisdiction over arguably protected conduct.¹¹⁹

The Court accomplishes this shift by replacing the primary jurisdiction approach with an approach based on two balancing tests.¹²⁰ Under the primary jurisdiction approach a simple finding by a state court that the activity in dispute was arguably protected or arguably prohibited by federal labor law triggered NLRB preemption of state court jurisdiction.¹²¹ The Court in *Sears* makes the determination of whether a state court has jurisdiction more complex. If the state court finds that the conduct is arguably prohibited by section 8, the court must determine if the state interest in regulating the conduct at issue outweighs the risk of interference with the regulatory jurisdiction of the Labor Board.¹²² Where the state court finds that the disputed conduct is arguably protected, the court must determine if the employer has a "reasonable opportunity"¹²³ to bring the issue before the Board. If the employer does not have such an opportunity, the state court must determine whether the anomaly of denying the employer a forum outweighs the risk of state court misinterpretation of federal law.¹²⁴

The repercussions of the new balancing approach not only affect the immediate issue of state jurisdiction over trespassory picketing, but also indicate a shift in the theoretical basis of federal labor law preemption. The primary jurisdiction approach was grounded in the theory that peace and stability in labor-management relations are best achieved by a centralized, expert, federal agency applying national labor laws.¹²⁵ Jurisdiction over nearly all labor dis-

¹¹⁵ *Id.* at 522.

¹¹⁶ *Id.*

¹¹⁷ 436 U.S. at 201. See note 83 *supra*. The dissent argued that state courts are incapable of properly making this determination. See text at note 104 *supra*.

¹¹⁸ *Hudgens* may still be good law on its facts. Trespassory picketing by manufacturing employees of a shoe company, at a retail outlet of the company located in a large shopping center, is protected by § 7. However, this determination was made by the Board, on remand from the Supreme Court, *Scott Hudgens*, 230 N.L.R.B. 414, 95 L.R.R.M. 1351 (1977), and need not be followed by state courts.

¹¹⁹ *Sears*, 436 U.S. at 207.

¹²⁰ See text at notes 63 & 75 *supra*.

¹²¹ See text at note 37 *supra*.

¹²² *Sears*, 436 U.S. at 197.

¹²³ *Id.* at 201-02.

¹²⁴ *Id.* at 206.

¹²⁵ *Garmon*, 359 U.S. at 242 (1959).

putes, therefore, was preempted by the NLRB.¹²⁶ By shifting jurisdiction from the Board to state courts, *Sears* heralds a movement away from this theory that broad, NLRB preemption is a requirement for stability in labor relations.¹²⁷

V. IMPACT OF SEARS

A recent Massachusetts case, *Commonwealth v. Noffke*,¹²⁸ illustrates the impact of *Sears* on a state court's consideration of NLRB preemption. Steven Noffke, a union organizer, was arrested while he was soliciting employee support prior to a representation election ordered by the Board.¹²⁹ Noffke was tried and convicted of criminal trespass.¹³⁰ The Massachusetts Supreme Judicial Court held that under *Sears*, the NLRB did not preempt state court jurisdiction over Noffke's conduct.¹³¹

The *Noffke* case is a significant expansion of *Sears* because the remedy in *Noffke*, unlike that in *Sears*, was not injunctive relief but a criminal sanction.¹³² Through its interpretation of *Sears*, the Massachusetts Supreme Judicial Court has expanded state jurisdiction into the central concerns of the NLRA,¹³³ and has allowed state courts to impose far greater penalties than the NLRB is authorized to administer. Thus, *Noffke* provides employers with a new and potent weapon against union organizers.

The impact of *Sears* on labor disputes involving issues other than trespassory picketing is unclear. The Court may reevaluate other areas of NLRB preemption through the use of its new balancing approach and further ex-

¹²⁶ See generally *Cox*, *supra* note 13.

¹²⁷ The Court is led to this shift in jurisdiction by a conception that state courts are better able than the Board to protect significant employer interests and will not substantially misinterpret federal labor law. See *Sears*, 436 U.S. at 205-07.

¹²⁸ 1978 Mass. Adv. Sh. 2225, 379 N.E.2d 1086 (1978).

¹²⁹ *Id.* at 2226, 379 N.E.2d at 1087.

¹³⁰ *Id.*

¹³¹ *Id.* at 2233, 379 N.E.2d at 1090.

¹³² The Court in *Garner v. Teamsters Union*, 346 U.S. 485 (1953), a case where state court jurisdiction over union pickets was preempted by the NLRB, specifically noted the inherent difficulty of two forums with disparate remedies considering the same issue.

[I]t does not follow that state and federal authorities may supplement each other in cases of this type. The conflict lies in remedies, not rights. The same picketing may injure both public and private rights. But when two separate remedies are brought to bear on the same activity, a conflict is imminent.

Id. at 498-99.

¹³³ In *Sears*, the San Diego County District Council of Carpenters argued that the union activity was arguably protected as area standards picketing. 436 U.S. at 206 n.42. By contrast, Steven Noffke was engaged in union solicitation in connection with a Board ordered election. As the *Sears* Court noted, "the right to organize is at the very core of the purpose for which the NLRA was enacted." *Id.* Perhaps restrictions on organizational solicitation should be scrutinized more carefully than restrictions on area standards picketing.

pand state jurisdiction over labor disputes.¹³⁴ Alternatively, the Court may limit application of the balancing approach of *Sears* to disputes involving trespassory picketing, thus maintaining NLRB preemption over other labor disputes. The issue of labor law preemption, unfortunately, is heading into another period of "elucidating litigation."

Not only is the substantive reach of NLRB labor law preemption unclear after *Sears*, but the procedural impact of the *Sears* decision is also largely unknown. Among the questions raised by *Sears* is whether a state court can issue an injunction if the union files a section 8(a)(1) charge with the NLRB after being requested to leave the employer's property, and continues picketing during a Board investigation.¹³⁵ *Sears* also leaves unanswered the question whether a state court can enjoin picketing if the union files a section 8(a)(1) charge with the NLRB after the employer files its complaint in court.¹³⁶

Justice Blackmun, concurring in the decision of the Court,¹³⁷ argued that the answer to both these questions is no. For Justice Blackmun, the key to the majority's analysis is that the employer could not bring the trespass issue before the Board. Thus, where the union presents the trespass issue to the Board, the rationale for state court jurisdiction disappears; the Board, the forum best suited to resolve the conflicting interests, should resolve the dispute.¹³⁸ Justice Powell, also concurring in the decision of the Court,¹³⁹ disagreed with Justice Blackmun's assertion that state court jurisdiction is preempted when the union files a charge with the Board. Justice Powell as-

¹³⁴ One probable effect of the *Sears* decision is that only trespassory picketing which is actually, not merely arguably, protected by federal law will be protected in state court. This may indicate that the Court is moving toward the position articulated by Justice White in his concurring opinion in *Longshoremen's Local 1416 v. Ariadne Shipping Co.*, 397 U.S. 195, 201 (1970), that state court jurisdiction is preempted only where the conduct in question is *actually* protected. *Id.* at 202. *Cf. Sears*, 436 U.S. at 200 ("several considerations persuade us that the mere fact that the union's trespass was *arguably* protected is insufficient to deprive the state court of jurisdiction in this case." (emphasis in the original)).

¹³⁵ See note 88 *supra*.

¹³⁶ The questions arise because, as the dissent noted, the majority avoided holding that resort to the Board ousts state court jurisdiction. 436 U.S. at 233 n.14.

¹³⁷ 436 U.S. at 208 (Blackmun, J., concurring).

¹³⁸ Justice Blackmun argued that:

[T]he logical corollary of the Court's reasoning is that if the union *does* file a charge upon being asked by the employer to leave the employer's property and continues to process the charge expeditiously, state court jurisdiction is pre-empted until such time as the General Counsel declines to issue a complaint or the Board, applying the standards of *NLRB v. Babcock & Wilcox Co.*, rules against the union and holds the picketing to be unprotected. Similarly, if a union timely files a § 8(a)(1) charge, a state court would be bound to stay any pending injunctive or damage suit brought by the employer until the Board has concluded, or the General Counsel by refusal to issue a complaint has indicated, that the picketing is not protected by § 7.

Id. at 209 (Blackmun, J., concurring) (citations omitted) (emphasis in original).

¹³⁹ *Id.* at 212.

serted that the *Sears* decision shifts the balance of federalism in this area; it does not merely reduce procedural difficulties for employers, as Justice Blackmun suggested.¹⁴⁰

A realistic commentary on this dispute between concurring opinions is provided by the dissent. Whatever the ultimate result of the dispute, said the dissent, "state and federal courts around the country will answer these questions in a variety of ways."¹⁴¹ Thus, the procedural aspects of labor law preemption are as unsettled as the substantive accommodation between state and federal interests.

CONCLUSION

In *Sears*, the Court held that state courts have jurisdiction to enjoin trespassory union picketing where the pickets have been requested to leave, and the property owner does not have a reasonable opportunity to bring the dispute before the NLRB. *Sears* creates the first instance of state court jurisdiction over activity which is arguably protected by section 7 of the NLRA. This broadening of state court jurisdiction over labor disputes is achieved by effectively replacing the primary jurisdiction approach, developed in *Garmon*, with two balancing tests. After nearly twenty years of relative stability based on almost total federal preemption of state jurisdiction over labor disputes, the pendulum is swinging back toward increased state jurisdiction. *Farmer* hinted that change was imminent; *Sears* speeds the pendulum on its way.

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¹⁴⁰ Justice Powell was succinct in his disagreement: "In sum, I do not agree with Mr. Justice Blackmun that 'the logical corollary of the Court's reasoning' in its opinion today is that state court jurisdiction is preempted forthwith upon the filing of a charge by the union." *Id.* at 214 (Powell, J., concurring).

¹⁴¹ *Id.* at 233 n.14 (Brennan, J., dissenting). The dissent predicts that a consequence of these unanswered questions "will be that erroneous determinations of nonpre-emption will occur and rights and interests protected by the Act will be irreparably damaged before any corrective action can be taken by this court." *Id.*