

1979

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Mary L. Schuette, *Labor Law: Federal Preemption: State Payment of Unemployment Compensation to Strikers Upheld. (New York Telephone Co. v. New York State Labor Department)*, 63 Marq. L. Rev. 331 (1979).

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LABOR LAW—Federal Preemption—State Payment of Unemployment Compensation to Strikers Upheld *New York Telephone Co. v. New York State Labor Department*, 440 U.S. 519 (1979). Since the passage of the National Labor Relations Act on July 5, 1935, the United States Supreme Court has been faced with the task of delineating the field preempted by federal law from the area remaining subject to state regulation. Although the Act leaves much to the states, "Congress has refrained from telling us how much,"¹ and the Court, "with no less politeness, has stated that it will follow the 'intent of the Congress.'"² Most of the definitive cases have found state regulations to be preempted by the Act, yet the Court has repeatedly indicated that, not all state laws which touch the bargaining process should be preempted.³ This "penumbral area"⁴ of permissible state action must be determined "from conflicting indications of congressional will"⁵

One such "penumbral area" covers state unemployment compensation programs. Commentators⁶ had hoped that *New York Telephone Co. v. New York State Department of Labor*⁷ would conclusively resolve the question of whether laws allowing the payment of unemployment compensation to strikers were preempted by the National Labor Relations Act

1. *Garner v. Teamsters Local 776*, 346 U.S. 485, 488 (1953).

2. Cox, *Federalism in the Law of Labor Relations*, 67 HARV. L. REV. 1297, 1348 (1954).

3. *Lodge 76, Machinists & Aerospace Workers v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 156 (1976) (Powell, J., concurring): "[T]he Court's opinion, does not, however, preclude the States from enforcing, in the context of a labor dispute, 'neutral' state statutes or rules of decision." *Street, Elec. Ry. & Motor Coach Employees v. Lockridge*, 403 U.S. 274, 289 (1970): "We cannot declare pre-empted all local regulation that touches or concerns in any way the complex interrelationships between employees, employers, and unions; obviously, much of this is left to the States."

4. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 240 (1958) (quoting *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 480-81 (1955)).

5. *Garner v. Teamsters Local 776*, 346 U.S. 485, 488 (1953).

6. See O'Donnell & Mandel, *Benefit Rights During A Strike: A Management View*, 31 N.Y.U. CONF. ON LAB. 165, 168 (1978) [hereinafter cited as O'Donnell & Mandel]; Note, *Labor Preemption: Striking Workers' Rights to Collect Unemployment Benefits*—*New York Telephone Co. v. New York Department of Labor*, 556 F.2d 388 (1977), 4 U. DAYTON L. REV. 239, 240 (1979).

7. 440 U.S. 519 (1979).

(NLRA).⁸ No conclusive answer was provided. Six Justices⁹ voted to uphold New York's payment of benefits to strikers basing their decision primarily on the legislative history of the NLRA in conjunction with that of the Social Security Act.¹⁰ Three Justices concurred, agreeing with the plurality's interpretation of the history of the NLRA and the Social Security Act, but they questioned the plurality's treatment of earlier federal labor law preemption cases. The three dissenting Justices thought that preemption was definitely required. Unfortunately, the Court failed to use the opportunity to establish a test which could be applied to any state statute which, while not regulating the private conduct of either party to a labor dispute, interfered with the "free play of economic forces."¹¹

This note will first examine prior United States Supreme Court labor law preemption cases and the effect which *New York Telephone* has had on them. Second, it will discuss (admittedly from a promanagement stance) whether this decision precludes preemption challenges to other states' unemployment compensation provisions as these provisions relate to strikers.

I. PRIOR LAW

Cases holding that state regulation of labor is preempted by federal labor law can be divided into two categories: those based on the primary jurisdiction of the National Labor Relations Board and those based on the NLRA's underlying policy of maintaining the free play of economic forces between employers and employees. *San Diego Building Trades Council v. Garmon*¹² exemplifies the jurisdictional approach. Whenever the regulated conduct is subject to the NLRA,¹³ or "[w]hen an

8. 29 U.S.C. §§ 151-68 (1976).

9. Justice Stevens announced the opinion of the Court; he was joined by Justices White and Rehnquist. Concurring opinions were entered by Justice Brennan and Justice Blackmun, joined by Justice Marshall. Justice Powell, joined by Chief Justice Burger and Justice Stewart, dissented. (The Stevens opinion will also be referred to as the plurality opinion).

10. 42 U.S.C. §§ 301-1397 (1976).

11. 440 U.S. at 531.

12. 359 U.S. 236 (1958).

13. 29 U.S.C. § 157 (1976) (NLRA § 7) is titled "rights of employees." It provides:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own

activity is arguably subject to [section] 7 or [section] 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted."¹⁴ The *Garmon* rule does not apply to general activities which are "a merely peripheral concern of the Labor Management Relations Act,"¹⁵ and the Court has recognized that "where the regulated conduct touches 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."¹⁶ Very few exceptions, however, have been recognized; generally, these exceptions are malicious libel,¹⁷ threats of violence¹⁸ and violence.¹⁹

In *Local 20, Teamsters Union v. Lester Morton Trucking Co.*,²⁰ the Court extended preemption to an activity which was not even arguably protected or prohibited by the NLRA.²¹ Preempting the Ohio law against secondary boycotts, the Court concluded that for a state to proscribe secondary boycotts, which Congress had considered but not proscribed,

choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C. § 158 (1976) (NLRA § 8) is titled "unfair labor practices." Although this provision is too lengthy to quote verbatim, the areas covered include: (a) Unfair labor practices by employer; (b) Unfair labor practices by labor organization; (c) Expression of views without threat of reprisal or force or promise of benefit; (d) Obligation to bargain collectively; (e) Enforceability of contract or agreement to boycott and other employer; exception; (f) Agreements covering employees in the building and construction industry; (g) Notification of intention to strike or picket at any health care institution.

14. 359 U.S. at 245.

15. *Id.* at 243.

16. *Id.* at 244 (footnote omitted).

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

18. *United Constr. Workers v. Laburnum Constr. Corp.*, 347 U.S. 656 (1954).

19. *UAW v. Russell*, 356 U.S. 634 (1958); *Youngdahl v. Rainfair, Inc.*, 355 U.S. 131 (1957).

20. 377 U.S. 252 (1964).

21. *See also Garner v. Teamsters Local 776*, 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."

would "frustrate the congressional determination to leave this weapon of self-help available"²² and upset the balance of power "struck by Congress between the conflicting interests of the union, the employees, the employer and the community."²³ The Court did not look to the jurisdiction of the NLRB, but rather, it looked to the question of whether the state statute "would operate to frustrate the purpose of the federal legislation."²⁴

In its application of this frustration of purpose approach in *Lodge 76, Machinists & Aerospace Workers v. Wisconsin Employment Relations Commission*,²⁵ the Court not only reaffirmed *Morton* but "adopted a per se rule that Congress must be deemed to have intended all economic self-help activities which it chose not to prohibit to be free of regulation by the states."²⁶ *Machinists* made clear the preemption test to be applied to state control of conduct not arguably protected or prohibited by the NLRA was "the exercise of plenary state authority to curtail or entirely prohibit self-help [which] would frustrate effective implementation of the Act's processes."²⁷ When state regulation of an economic weapon interfered with the NLRA's balanced process of collective bargaining "controlled by the free play of economic forces"²⁸ preemption would be required. Neither *Morton* nor *Machinists* placed limits on the application of this rule;²⁹ the type and degree of frustration which would require preemption was not set out, although *Machinists* stated that Wisconsin had entered into "the substantive aspects of the bargaining process."³⁰

22. 377 U.S. at 260.

23. *Id.* at 259.

24. *Id.* at 258.

25. 427 U.S. 132 (1976). Justices Stevens and Rehnquist, members of the plurality in *New York Telephone*, dissented in *Machinists*. See note 9 *supra*.

26. Comment, *Federal Preemption of State Welfare and Unemployment Benefits for Strikers*, 12 HARV. C.R.-C.L. L. REV. 441, 447 (1977) [hereinafter cited as *Federal Preemption*]. For a complete discussion of *Morton* and *Machinists*, see *id.* at 444-50.

27. 427 U.S. at 147-48 (quoting *Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 380 (1969)).

28. 427 U.S. at 144.

29. See *Federal Preemption*, *supra* note 26, at 449.

30. 427 U.S. at 149 (quoting *NLRB v. Insurance Agents*, 361 U.S. 447, 498 (1960)).

II. THE *New York Telephone* DECISION

New York Telephone presented to the United States Supreme Court for the first time the question of whether the payment of unemployment compensation for strikers was preempted by the NLRA. Following a brief nationwide strike by the Communication Workers of America (CWA) in July, 1971, against the Bell telephone system, 38,000 CWA members employed by New York Telephone remained on strike for seven months. Pursuant to New York's unemployment compensation law, which requires payment to strikers after a waiting period of seven weeks,³¹ the employer paid a major share of the \$49 million in unemployment benefits claimed by striking employees.

As a result, the company instituted suit seeking a declaration that the New York statute conflicted with the policies of the NLRA. The district court³² agreed with the company, stating that "[f]ree collective bargaining, under federal labor policy, is premised on the concept of government non-interference and neutrality."³³ It also said that cases such as *Morton* clearly teach "that any state activity that 'creates a substantial risk of conflict with policies central to federal labor law' is preempted and barred."³⁴ The Court of Appeals for the Second Circuit reversed.³⁵ Although the Second Circuit realized the general rule of *Morton*, it concluded that Congress had "evinced an intention to leave the States free to regulate in this area."³⁶

The Supreme Court affirmed the decision of the Second Circuit. In so doing, Justice Stevens, announcing the judgment of the Court, stated that of the preemption cases, only *Morton* and *Machinists* were relevant here, and that the *Garmon* line of cases concerned only the question of the NLRB's

31. N.Y. LAB. LAW § 592.1 (McKinney 1977): "The accumulation of benefit rights by a claimant shall be suspended during a period of seven consecutive weeks, beginning with the day after he lost his employment because of a strike, lockout, or other industrial controversy in the establishment in which he was employed . . ."

32. 434 F. Supp. 810 (S.D.N.Y. 1977).

33. *Id.* at 820.

34. *Id.* (quoting *Connell Constr. Co. v. Plumbers Local 100*, 421 U.S. 616, 636 (1975)).

35. 566 F.2d 388 (2d Cir. 1977).

36. *Id.* at 395.

primary jurisdiction.³⁷ The Stevens opinion also accepted the findings of the district court "that New York's law, like the state action involved in *Morton* and *Machinists*, has altered the economic balance between labor and management."³⁸ At this point, it would appear that preemption was clearly called for under the *Machinists* frustration of purpose approach;³⁹ however, the Stevens opinion distinguished *Morton* and *Machinists*. Stevens' distinction rested on the basis that those decisions involved state regulation of private conduct in the labor-management field, whereas *New York Telephone* "involve[d] a state program for the distribution of benefits to certain members of the public . . . the general purport of [which] is not to regulate the bargaining relationships between the two classes but instead to provide an efficient

37. 440 U.S. at 530.

38. *Id.* at 531-32 (footnote omitted). In fact, its impact was twofold. "[T]hey substantially cushioned the economic impact of the lengthy strike on the striking employees, and also made the strike more expensive for employers." *Id.* at 556 (Powell, J., dissenting).

39. See text accompanying notes 27 & 28 *supra*. On initial hearing, *Hawaii Tel. Co. v. Hawaii State Dep't of Labor & Indus. Relations*, 405 F. Supp. 275 (D. Hawaii 1976), strictly applied the rule in *Morton*. The court struck down a work stoppage statutory scheme for unemployment assistance to strikers because "it irreconcilably intrudes into the federal process of free collective bargaining." *Id.* at 290. Since the work stoppage provision inquired directly into the success or failure of a strike during an ongoing labor dispute, it impinged into the field preempted by the NLRA. *Id.* at 284. The Hawaii district court's interpretation of *Morton* was based on a test proposed by Archibald Cox who extended the *Morton* approach to create a broader test of preemption than the arguably protected or prohibited test of *Garmon*. Recognizing that Congress created its framework for self-organization and collective bargaining within the larger context of state laws promoting public health and welfare, Cox believed that

where the state law is based upon accommodation of the special interests of employers, unions, employees, or the public in employee self-organization, collective bargaining, or labor disputes . . . the likelihood that its application to persons under NLRB jurisdiction will upset the balance struck by Congress is so great as to require exclusion of state law unless Congress had provided otherwise.

Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337, 1356 (1972), quoted at 405 F. Supp. at 284. The Ninth Circuit Court of Appeals reversed the district court in *Hawaii Telephone*, concluding that based on *New York Telephone*, Hawaii should also be allowed to implement its own policy regarding unemployment compensation, No. 76-1584, 9th Cir., Mar. 10, 1980. For further discussion of the Cox formula see Comment, *Pennsylvania's Lockout Exception to the Labor Dispute Disqualification from Unemployment Compensation Benefits: Federal Challenges and Issues*, 80 DICK. L. REV. 70, 85 (1975) [hereinafter cited as *Lockout Exception*].

means of insuring employment security.”⁴⁰ Having categorized the New York statute as one of broad, general application, Stevens concluded that it would be more appropriate to treat this statute with the same deference afforded the state interest exceptions to the *Garmon* rule,⁴¹ a case earlier labelled as being of “limited relevance.”⁴²

By making this distinction the Stevens opinion avoided the preemption result which would otherwise have been mandated under *Morton* and *Machinists*. Those decisions called for preemption whenever the state had interfered with the free play of economic forces, unless there was congressional direction to the contrary. The plurality in *New York Telephone*, however, stated that state law of general application which incidentally affected the bargaining process would not be preempted “‘in the absence of compelling congressional direction.’”⁴³ The Stevens opinion observed that although the NLRA is silent on the issue, the legislative histories of that Act and the Social Security Act reveal that payment of unemployment benefits to strikers was omitted from the NLRA. The opinion concluded that such deliberate silence represented congressional intent that the states be free to authorize such payments and therefore, the New York statute would not be preempted.⁴⁴

40. 440 U.S. at 532-33.

41. See text accompanying notes 15-19 *supra*. This approach also raises a question as to the impact this “likening” will have on the current restrictive application of exceptions to the *Garmon* rule when the conduct is subject to NLRA §§ 7-8.

42. 440 U.S. at 527.

43. *Id.* at 540 (quoting *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244 (1958)).

44. 440 U.S. at 540. This apparently raises a contradiction. In *Morton* and *Machinists*, silence was interpreted as acceptance of all economic weapons not specifically proscribed. In *New York Telephone*, silence may be interpreted as acceptance of interference with the free play of economic weapons. Additionally, it was *Morton* and *Machinists* that required evidence of toleration in order to avoid preemption. By choosing to use the *Garmon* rule, the plurality was apparently searching the legislative histories of the NLRA and Social Security Act for “compelling congressional direction,” to preempt rather than as evidence of toleration. *Id.* Consequently, the finding of congressional silence was sufficient to meet the plurality’s test. It is ironic, however, that they went beyond their own requirement of silence and found evidence of toleration, especially since evidence of toleration would satisfy the rule of *Morton* and *Machinists*.

III. CONFLICT: THE PREEMPTION TEST

The first question raised by *New York Telephone's* treatment of conduct not arguably protected or prohibited by the NLRA, but having an impact on the bargaining process, is its effect on the rule so recently enunciated in *Morton* and *Machinists*. The concurring opinion of Justices Blackmun and Marshall best states the major problem raised by the Stevens opinion:

The difference between *Machinists* and this case, . . . is in the initial premise. In the present case, the plurality appears to be saying that there is no pre-emption unless "compelling congressional direction" indicates otherwise. . . . In *Machinists*, on the other hand, the Court said . . . that there is pre-emption unless there is evidence of congressional intent to tolerate the state practice. . . . The distinction is not semantic [and] . . . could prove important in some other preemption case. Where evidence of congressional intent to tolerate a State's significant alteration of the balance of economic power is lacking, *Machinists* might still require a holding of pre-emption notwithstanding the lack of compelling congressional direction that the state statute be pre-empted.⁴⁵

A. *Statutes of Broad, General Application*

One conclusion that can be made is that the rule so recently enunciated in *Morton*, and confirmed in *Machinists*, will be applied whenever the state conduct in question attempts to directly regulate the private conduct of the parties and the economic weapons used by employers and employees. The *Morton-Machinists* rule will not be applied, though, when the state statute is one of broad, general application, having only an incidental effect on the bargaining process. In other words, a finding of general applicability would relieve a court from determining whether the state activity frustrates "effective implementation of the Act's processes."⁴⁶ On the other hand, earlier decisions finding preemption have held that it makes no difference "whether the States have acted through laws of broad general application rather than laws

45. *Id.* at 549 (Blackmun, J., concurring) (emphasis deleted).

46. *Id.* (quoting *Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 380 (1969)).

specifically directed towards the governance of industrial relations.'"⁴⁷

B. *An Unemployment Compensation Case*

A second conclusion that can be reached is that *New York Telephone* will have little impact on the role of *Morton* and *Machinists* in future litigation in the federal labor law pre-emption area. This conclusion is based on the fact that *New York Telephone* is more easily viewed as an unemployment compensation decision, consistent with the Court's interpretation of the Social Security Act and the Court's analysis in prior unemployment compensation cases. Reliance on the history of the Social Security Act pervades the plurality opinion⁴⁸ and both concurring opinions agree with the plurality's interpretation of that Act.⁴⁹

Although *New York Telephone* is the first time an unemployment compensation provision paying benefits to strikers has been challenged in the Supreme Court, it is not the first time that the Court has ruled on the payment of unemployment compensation to those involved in labor disputes. In *Ohio Bureau of Employment Services v. Hodory*,⁵⁰ the Court upheld the denial of unemployment compensation to the claimant whose disqualification was "due to a labor dispute other than a lockout at any factory . . . owned or operated by the employer" ⁵¹ The claimant was laid off by United

47. 440 U.S. at 550 (quoting *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244 (1938)). It should also be noted that the broad, general status of strikers in the New York provision can be challenged. Justice Brennan indicates that he is "not at all sure the New York statute is a law of general applicability." 440 U.S. at 546 n.* (Brennan, J., concurring). The dissent also points out that the challenged provision is not "the entire New York unemployment compensation law but only that portion of it that provides for benefits for *striking employees*." *Id.* at 557 (Powell, J., dissenting) (emphasis added).

48. "The voluminous history of the Social Security Act made it abundantly clear that Congress intended the several States to have broad freedom in setting up the types of unemployment compensation they wish." 440 U.S. at 537 (footnote omitted). "[T]he scheme of the . . . Act has always allowed the States great latitude in fashioning their own programs." *Id.* at 542.

49. See *id.* at 546-47 (Brennan, J., concurring); *id.* at 547 (Blackmun, J., concurring). For a comprehensive view of the conflicting interpretations of the legislative histories of the Social Security Act and the NLRA see *id.* at 536-38, 542-43, 560-64 (Powell, J., dissenting).

50. 431 U.S. 471 (1977).

51. OHIO REV. CODE ANN. § 4141.29 (D)(1)(a) (Page 1973).

States Steel due to a fuel shortage at its Youngstown plant, caused by a United Mine Workers strike at coal mines owned by United States Steel. The complainant urged that the state could not deny benefits to one unemployed under circumstances not within his control. Relying on a report by the Committee on Economic Security,⁵² the Court upheld the denial of benefits stating that "[t]he fact that Congress has chosen not to legislate on the subject of labor dispute disqualifications confirms our belief that neither the Social Security Act nor the Federal Unemployment Tax Act was intended to restrict the States' freedom to legislate in this area."⁵³

The reliance in the Stevens opinion on the Court's earlier interpretations of the Social Security Act and cases such as *Hodory* is clearly evident:

The analysis in *Hodory* confirmed this Court's earlier interpretation of Title IX of the Social Security Act in *Steward Machine Co. v. Davis*, 301 U.S. 548, and was itself confirmed by the Court's subsequent interpretation of Title IV of the Act in *Batterton v. Francis*, 432 U.S. 416. These cases demonstrate that Congress has been sensitive to the importance of the States' interest in fashioning their own unemployment compensation programs and especially their own eligibility criteria.⁵⁴

The concurring opinion of Justices Blackmun and Marshall also relies on *Hodory* and its indication that "Congress has been sensitive to the need to allow the States leeway in fashioning unemployment programs . . ."⁵⁵

C. Hypothesis: A Missed Opportunity

The issue raised in *New York Telephone* provided an excellent opportunity for the Court to set down a method for determining the enforceability of state "laws that are not directed toward altering the bargaining positions of employers or unions but which may have an incidental affect on relative

52. Report of the Committee on Economic Security, reprinted in Hearings on S. 1130 Before the Senate Comm. on Fin., 74th Cong., 1st Sess., 1311, 1328 (1955), cited at 431 U.S. at 482.

53. 431 U.S. at 488-89.

54. 440 U.S. at 538-39 (footnotes omitted).

55. *Id.* at 548 (Blackmun, J., concurring) (citations omitted).

bargaining strength.”⁵⁶ Due to its dependence on the legislative history of the Social Security Act and its likening of the New York statute to the *Garmon* exceptions, however, the Court failed to take advantage of this opportunity.

A third possible conclusion that can be made as to the effect of *New York Telephone* on the *Morton-Machinists* rule is at once more heuristic and more tenuous. In *Grinnell Corp. v. Hackett*,⁵⁷ the First Circuit Court of Appeals suggested an approach which other courts might follow in answering the preemption question, and which at best, the Supreme Court impliedly used in *New York Telephone*.⁵⁸

1. The Balancing Test

In *Grinnell* the court chose not to rigidly apply the frustration of purpose approach of *Morton* and *Machinists*,⁵⁹ because “the asserted conflict is not an invasion by the state into an area of conduct regulated by a national instrumentality but a tangential frustration of the national policy objective of unfettered collective bargaining”⁶⁰ Since unambiguous congressional intent was lacking,⁶¹ the court called for a two-pronged balancing test.⁶²

The first question to be answered concerns the payment of benefits to strikers as palpably infringing upon federal labor policy. If infringement is found, the second question is if the state’s interest in “cushioning the impact of unemployment is stronger than the federal interest in untrammelled collective

56. 427 U.S. at 156 (Powell, J., concurring).

57. 475 F.2d 449 (1st Cir. 1973).

58. The Supreme Court cited *Grinnell*, although not with reference to the “balancing test.” 440 U.S. at 534 n.24, 540 n.34.

59. See note 39 *supra*.

60. *International Tel. & Tel. Corp. v. Minter*, 435 F.2d 989, 992 (1st Cir. 1970). Although the First Circuit was dealing with a New Jersey statute providing welfare benefits to strikers, it applied much of the *Minter* analysis in *Grinnell*.

61. “The most that can fairly be said, in the face of this legislative record, is that Congress has been and presently is aware of the problem, has had the opportunity to resolve it, and has acted in closely analogous circumstances.” 475 F.2d at 457.

62. The First Circuit was familiar with the test suggested by Archibald Cox, see note 39 *supra*. The court indicated that it was impressed by Cox’s suggestions, but felt it was in no position to adopt or reject such a formula. The court did state, however, that the Cox formula would require an analysis of impact similar to the one adopted in *Grinnell*. 475 F.2d at 461 n.13.

bargaining.”⁶³ A strong yes to the second question would result in preemption. Furthermore, if the court finds “that the state and federal interests are closely balanced it could properly decline to find preemption because of the historical and continuing Congressional awareness, opportunity, and demonstrated willingness [of Congress] to act in this field.”⁶⁴

2. Application of the Balancing Test

The balancing test suggested in *Grinnell* appears to pervade the language of the decision even though the Stevens opinion did not give voice to it. After carefully distinguishing the decision from *Morton* and *Machinists*,⁶⁵ the Stevens opinion states that by implementing its broad unemployment compensation policy New York is not primarily concerned with the labor dispute. Additionally, “New York has concluded that the community interest in the security of persons directly affected by a strike outweighs the interest in avoiding any impact on a particular labor dispute.”⁶⁶ In *New York Telephone* it appears that the answer to the second question of the *Grinnell* balancing test is yes: the state’s interest is stronger than the federal, and preemption is not required despite the state’s interference with federal labor policy. Arguably, federal and state interests are closely balanced; therefore, it is proper to decline to find preemption in light of apparent congressional intent to tolerate the state activity.⁶⁷

Viewing *New York Telephone* in light of the *Grinnell* balancing test would allow the conclusion that the rule to be applied to conduct which is not arguably protected or prohibited by the NLRA, but which has an effect on the free play of economic forces, remains the frustration of purpose approach enunciated in *Morton* and reaffirmed in *Machinists*. This rule, however, could not be mechanically applied because the extent of frustration upon federal labor policy would have to be determined and then balanced against the state interest being exerted.

63. *Id.* at 457.

64. *Id.*

65. See text accompanying notes 40 & 41 *supra*.

66. 440 U.S. at 534.

67. See text accompanying note 64 *supra*. This analysis also prevents the broad application of this decision to all states’ provisions. See text at part IV *infra*.

IV. CHALLENGES TO OTHER STATES' PROVISIONS

The second, and most crucial question, raised by *New York Telephone* is if the underlying premise—evidence of congressional toleration of state unemployment compensation programs—precludes challenges to other states' eligibility provisions which have a greater impact on the bargaining process than New York's.

The sweeping language of the plurality opinion makes it virtually impossible to reach any other conclusion but that the *New York Telephone* decision does not preclude future challenges to other states' unemployment compensation provisions which provide benefits to strikers. In choosing to treat New York's law with the deference afforded state laws "rooted in local feeling and responsibility,"⁶⁸ the Stevens opinion declared that "Congress has decided to tolerate a substantial measure of diversity,"⁶⁹ and, that the "pre-emption doctrine should not 'hinge on the myriad provisions of state unemployment compensation laws.'"⁷⁰ But there are a myriad of state provisions, and not all are identical to New York's in their impact on the bargaining process or their statement of interests; it is possible that the concurring Justices might not join the plurality in the next analysis of a particular state's provision providing unemployment compensation benefits to strikers.

A. Impact

Although Rhode Island and New York are the only two states which grant unemployment benefits to strikers after a prescribed waiting period, sixteen states do not disqualify claimants if the labor dispute is caused by a lockout; four states do not disqualify claimants if the dispute is based on the employer's breach of contract or failure to conform to labor laws. Twenty-nine states disqualify strikers only if a stoppage of work occurs.⁷¹ Due to this myriad of state provisions,

68. 440 U.S. at 540 (quoting *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244 (1958)).

69. 440 U.S. at 546.

70. *Id.* at 535 (quoting *NLRB v. Gullett Gin Co.*, 340 U.S. 361, 365 (1951)).

71. For a complete statistical breakdown of state disqualification provisions see U.S. DEP'T OF LABOR, COMPARISON OF STATE UNEMPLOYMENT INS. LAWS § 445 (rev. ed. 1974).

it is likely that some of these provisions "impermissibly interfere with free collective bargaining"⁷² to an extent beyond which Congress might have intended to tolerate, and beyond the extent of interference created by the New York provision.

Most of these work stoppage provisions are based on the strikers' disqualification provision proposed in the 1936 Draft Bills promulgated by the Social Security Board.⁷³ Ironically, the New York provision may be more effective in attempting to preserve the "traditional judicial neutrality in labor disputes,"⁷⁴ than this recommended version. Whereas the Draft Bill provisions would disqualify an individual for any week that his unemployment is due "to a stoppage of work which exists because of a labor dispute at the factory . . .,"⁷⁵ the New York statute suspends the accumulation of benefits "during a period of seven consecutive weeks beginning with the day after he lost his employment because of a strike, lock-out, or other industrial controversy in the establishment in which he was employed"⁷⁶

If a work stoppage does not occur, a striker could begin collecting benefits after the brief initial waiting period in states which have adopted the work stoppage provisions;⁷⁷ furthermore, in other states he could continue to receive benefits if the labor dispute was due to a lockout or employer contract violation.⁷⁸ Surely these lockout provisions intrude into collective bargaining to an extent that probably should not be tolerated; the effect of such provisions is to deprive the employer from using the lockout as an effective economic weapon.⁷⁹

72. O'Donnell & Mandel, *supra* note 6, at 173.

73. Social Security Board, Draft Bills for State Unemployment Compensation Plans of the Pooled Income Fund and Employer Reserve Account Type (1936 & rev. ed. 1937) [hereinafter cited as Draft Bills] quoted in Comment, *Labor Dispute Disqualification — The Function of "Grade or Class" Provisions in State Unemployment Compensation Statutes*, 18 St. Louis U.L.J. 629, 630 n.13 (1974) [hereinafter cited as *Labor Dispute Disqualification*].

74. *Labor Dispute Disqualification*, *supra* note 73, at 631.

75. Draft Bills, *supra* note 73, at § 5(d).

76. N.Y. LAB. LAW § 592.1 (McKinney 1977). See note 31 *supra*.

77. See *Labor Dispute Disqualification*, *supra* note 73, at 630, for an example of a work stoppage provision.

78. *Id.*

79. *Lockout Exception*, *supra* note 39, at 86.

New York, on the other hand, attempts to remain neutral⁸⁰ for an extended period by failing to base eligibility rules on whether the unemployment is due to the employees' use of an economic weapon (strike) or the employer's use of an economic weapon (lockout). It is only after this extended period that New York feels its interest in the welfare of its citizens outweighs the peripheral infringement on the federal act. Even advocates of unemployment benefits for strikers recognize that the New York statute is likely to have less impact on collective bargaining than work stoppage or lockout provisions:

The impact on collective bargaining of the payment of unemployment compensation to strikers is difficult to measure. But whatever it may be when payment is made from the outset of a strike, the overall impact is not likely to be as great when payment is begun only after seven or eight weeks, as it is in Rhode Island and New York Since most strikes do not last as long as seven or eight weeks, employers and employees ordinarily will not give much weight in their bargaining to the fact that unemployment compensation benefits will be available if there is a strike and it does last that long.⁸¹

B. State Interest

The balancing test previously discussed not only inquires into the degree of impact that the state activity has on national labor policy, but it also inquires into the state's interest and the degree to which it might outweigh the interest of federal policy. State provisions also vary in this aspect. Whereas New York has determined that after seven weeks the "[e]conomic insecurity due to unemployment is a serious menace to the health, welfare, and morale of the people . . . ,"⁸²

80. *In re Burger*, 277 App. Div. 234, 236, 98 N.Y.S.2d 932, 934 (1950): "The main purpose of section 592 is clear. The State is to stand aside for a time, pending the settlement of differences between employer and employees, to avoid the imputation that a strike may be financed through unemployment insurance benefits."

81. *Federal Preemption*, *supra* note 26, at 486. "Between 1961 and 1972 the average annual duration of strikes ranged from 22-27 days." *Id.* at 486 n.218 (citing U.S. DEP'T OF LABOR, MANPOWER REPORT OF THE PRESIDENT, at table G-4 (1974)). See Comment, *Striker's Eligibility for Public Assistance: The Standard Based on Need*, 52 J. URB. L. 115, 131 (1974).

82. N.Y. LAB. LAW § 501 (McKinney 1977).

other states⁸³ provide a policy which does not preface their unemployment compensation statutes with any statement of public policy.⁸⁴

Lockout provisions and employer contract breach provisions generally reflect an absence of any compelling state interest. "Under those statutes eligibility for benefits depends upon the labor relations policies of the employer, rather than on the economic needs, or the unemployed status, of the employees."⁸⁵

V. LIMITING *New York Telephone*

Recognition that each state's unemployment compensation provision, regarding payment of benefits to strikers differs in its impact on the collective bargaining process, necessitates (at least from the management attorney's point of view) limiting *New York Telephone* to New York's extended waiting period provision. By basing its decision primarily on congressional intent found in the Social Security Act and failing to voice the balancing test arguably present, and whose fundamental question is "how greatly the plan frustrates national labor policy,"⁸⁶ "[t]he plurality's sweeping view of the [NLRA] lays open the way for any State to undermine completely the collective-bargaining process within its borders."⁸⁷

Admittedly, limiting this decision is not an easy task. Establishing the underlying rationale of the Stevens opinion as the *Grinnell* balancing test, and finding that this test should be applied in the analysis of all other unemployment compensation provisions will most likely be unsuccessful, especially since the Court was aware of this test and explicitly declined

83. ALASKA STAT. § 23.05.010 (1962): "Purpose. The Department of Labor shall foster and promote the welfare of the wage earners of the state, improve their working conditions, and advance their opportunities for profitable employment."

84. See, e.g., HAW. REV. STAT. §§ 386-1-181 (1975). The Hawaii statute contains no statement of public policy. Perhaps this explains the district court's decision in *Hawaii Telephone*, that its work stoppage provision was preempted by federal law. See note 39 *supra*. It is also arguable that the Hawaii law implements any necessary state purpose. "The striker picketing a closed-down shop is just as in need of benefits as the striker picketing a shop in full operation. Nevertheless, Hawaii now gives aid to the latter but none to the former." 405 F. Supp. at 290.

85. O'Donnell & Mandel, *supra* note 6, at 173.

86. Note, *Federal Preemption of State Payments of Unemployment Compensation to Strikers*, 64 GEO. L.J. 1343, 1347 (1976).

87. 440 U.S. at 565-66 (Powell, J., dissenting).

to use it.⁸⁸ Pointing out that this clearly was not a majority opinion will be of little assistance, since the Stevens and concurring opinions agreed as to the latitude granted the individual states by the Social Security Act.⁸⁹

In addition, the language of both concurring opinions appears to specifically limit the evidence of congressional toleration of the New York statute. Justice Brennan states that there is "sufficient evidence of congressional intent to decide this case"⁹⁰ Justice Blackmun's concurring opinion reveals the same limiting aspect, and also indicates an underlying balancing test rationale: "[T]he evidence justifies the conclusion that Congress has decided to permit New York's unemployment compensation law, notwithstanding its impact on the balance of bargaining power,"⁹¹ to stand.

There is, finally, the dissenters key argument that there is "[n]othing in the NLRA or its legislative history [which] indicates that Congress intended unemployment compensation for strikers, let alone employer financing of such compensation, to be part of the legal structure of collective bargaining."⁹² In fact, the plurality plainly admits that Congress was silent on the payment of benefits to strikers when it enacted the NLRA in 1935,⁹³ and that their finding of congressional toleration was not based on any direct evidence but on "inferences drawn from only the most fragmentary evidence."⁹⁴

VI. CONCLUSION

It may be that *New York Telephone Co. v. New York State Labor Department* has provided support for proponents of unemployment benefits for strikers. This decision appears to hold that no state unemployment compensation plan will be preempted, notwithstanding its impact on the collective bargaining process. Additionally, this conclusion will be reached without the necessary and crucial inquiry into the extent to which the specific state disqualification provisions

88. See note 58 *supra*.

89. See notes 48 & 49 and accompanying text *supra*.

90. 440 U.S. at 547 (Brennan, J., concurring).

91. *Id.* at 551 (Blackmun, J., concurring).

92. *Id.* at 556 (Powell, J., dissenting) (footnote omitted).

93. *Id.* at 540.

94. *Id.* at 567 (Powell, J., dissenting).

“‘would frustrate effective implementation of the Act’s processes.’”⁹⁵ Perhaps it is time for Congress, which is arguably aware of the problem⁹⁶ created by payments to strikers, and their effect on the free play of economic forces, to act, by either declaring such payments to be a matter of state concern or by finding that these benefits frustrate federal labor policy.

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95. *Id.* at 549 (quoting *Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 380 (1969)).

96. *See* note 61 *supra*.