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Labor Law: The "Compelling State Interest" Exception to the Federal Preemption Doctrine

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Labor Law: The "Compelling State Interest" Exception to the Federal Preemption Doctrine: The growth of national business and labor organizations greatly influenced political and economic change in the early 1900's. Strife between these giants eventually posed a clear threat to interstate commerce, an interest which Congress has express Constitutional authority to regulate. Prior to Congressional action, states passed laws regulating labor controversies, which were then invoked in such disputes. Therefore, when Congress finally enacted legislation, it became inevitable that questions of federal preemption of state enactments would arise.

One of the most recent cases raising the issue of preemption is *Linn v. United Plant Guard Workers of America.*[1] William C. Linn was an officer of a company which the defendant union sought to unionize. Linn instituted a libel action in a U.S. District Court based upon leaflets circulated by the defendant, accusing the employer and Linn, as a manager, of depriving union members of their right to vote. The written statements, Linn contended, were known by the defendant to be false and defamatory. No actual or special damage was alleged, but Linn prayed for recovery on the ground that the statements were libelous *per se.*

The District Court dismissed the complaint on the ground that the National Labor Relations Board had exclusive jurisdiction, and this decision was affirmed by the Court of Appeals.[2] On certiorari, the United States Supreme Court reversed the lower courts, holding that:

> . . . the exercise of state jurisdiction . . . would be a "merely peripheral concern of the Labor Management Relations Act," provided it is limited to redressing libel issued with knowledge of its falsity, or with reckless disregard of whether it was true or false. Moreover, . . . 'an overriding state interest' in protecting its residents from malicious libels should be recognized in these circumstances.[3]

To properly analyze the *Linn decision,* it is necessary to examine the background of federal preemption in labor regulation. Two views exist as to federal labor legislation. While one holds that labor regulation requires national laws to achieve consistency and uniformity, the other maintains that variances in local circumstances necessitate different laws in each state. Congress took a moderate view, though it leaned toward the former opinion, and enacted legislation adopting a policy of "positive protection of labors' right to organize"[4] with the passage of the Wagner

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[1] Linn v .United Plant Guard Workers, 383 U.S. 53, 55 (1966).
[2] Linn v. United Plant Guard Workers, 337 F.2d 68 (6th Cir. 1964).
[3] Linn v. United Plant Guard Workers, 383 U.S. 53, 61 (1966).
[4] MILLIS & BROWN, FROM THE WAGNER ACT TO TAFT HARTLEY, 3 (1950).

Act.[5] The later Taft-Hartley Act is credited with having "federalized the law,"[6] giving much authority to the National Labor Relations Board, as well as providing expressly that the Board's authority "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise."[7]

None of the federal labor laws, however, contain any express provisions preempting state legislation. Cox and Seidman have written that Congress should ideally define areas it desires preempted by its enactments, but they note that:

> . . . it is the practice for Congress to avoid the decision, thus leaving the problems to the Supreme Court. And the court, paradoxically, then draws the necessary lines by asking—in form if not in actuality—where Congress drew them.[8]

In addition, as the general rule is that Congress' intent to preempt state laws must be clearly manifested before the Supreme Court will preclude similar unconflicting state regulations,[9] one would expect to find much co-existence of state and federal labor laws. The general trend is, however, toward suspension of state authority,[10] and this trend has decreased the availability of state remedies not otherwise provided for in the federal law.

Several types of conduct that may be tortious were governed and thus preempted by the N.L.R.A. .[11] Section 8(a) of the Act states that: "it shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."[12] Section 8(b) reads: "it shall be an unfair labor practice for a labor organization or its agents . . . to restrain or coerce . . . employees in the exercise of the rights guaranteed in section 7."[13] Both of the preceeding relate to N.L.R.A. section 7 "rights of employees," which insures employees' freedom to join or refrain from participation in labor organizations.[14] Restraint and coercion, made unfair labor

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[5] National Labor Relations Act, 29 U.S.C. §151 *et seq.* (1935). The Wagner Act was supplemented by the Taft-Hartley Act, 29 U.S.C. §147 *et seq.* (Supp. 1950) and further amendments in 1959.

[6] MILLIS & BROWN, *supra* note 4, at 441.

[7] National Labor Relations Act, 29 U.S.C. §160 (a) (1964).

[8] Cox & Seidman, *Federalism and Labor Relations,* 64 HARV. L. REV. 211, 236 (1950).

[9] Auto Workers v. Wisconsin Board, 336 U.S. 245 (1949); Kelly v. Washington, 302 U.S. 1 (1937). *See* Mo. Pacific Railway v. Lavabee Mills, 211 U.S. 612 (1909); Cooley v. Board of Wardens, 12 How. 299 (U.S. 1851).

[10] Note, *Labor Law—Federal and State Jurisdiction,* 27 N.Y.U. L. REV. 468 (1952).

[11] *E.g.,* Oss v. Burmingham, 58 L.R.R.M. 2754 (1965); Linn v. United Plant Guard Workers, 337 F.2d 68 (1964); Plumbers Union v. Borden, 373 U.S. 690 (1963); Ornamental Iron Workers Union v. Perko, 373 U.S. 701 (1963); San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959).

[12] 29 U.S.C. §158 (a) (1) (1964).

[13] 29 U.S.C. §158 (b) (1) (1964).

[14] 29 U.S.C. §157 (1964).

practices by the preceeding two sections, are often accomplished by tortious acts. A person may be coerced by an assault, for example, and thus one act may be both a tort and an unfair labor practice concurrently. Congress was cognizant that some of these unfair labor practices were also tortious acts, but it had no intent to displace state remedies by the federal law.

That Congress believed state and federal remedies would still be available to victims of tortious conduct constituting unfair labor practices is evidenced by this statement of the committee in considering the Taft-Hartley Act:

> Some of these acts are illegal under state law, but we see no reason why they should not *also* constitute unfair labor practices. (Emphasis added.)[15]

Senator Taft, co-sponsor of the bill stated:

> . . . suppose there is duplication in extreme cases; suppose there is a threat of violence constituting violation of the law of the state, why should it not be an unfair labor practice? There is no reason in the world why there should not be *two* remedies for an act of that kind. (Emphasis added.)[16]

Because of this belief that two remedies were available, Congress made no attempt to provide general compensation for the victims of tortious acts. The N.L.R.B. was given no general compensatory powers at all, and its injunctive powers are clearly not useable to compensate victims.[17]

With Congress providing no compensation in the belief that states' remedies were still available to tort victims and with the Courts consistently holding that the federal labor enactments preempted state tort remedies, the law evolved to a position where only N.L.R.B. control remained. Thus the Board was without the power to grant victims adequate relief.[18]

The law of torts, designed to compensate victims in these situations, was unuseable here, save in two situations. First, the N.L.R.B. could cede jurisdiction to the state, thereby allowing victims access to tort remedies.[19] Secondly, a state could gain jurisdiction if it had a compelling interest in regulating the conduct involved.[20] Such state interest was found only in cases of violence or threats of violence.[21] In these two

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[15] S. REP. No. 105, 80th Cong., 1st Sess. 50 as to S. 1126 (1947).
[16] 93 CONG. REC. 4024 (1947) (80th Cong. 1st Sess.).
[17] Linn v. United Plant Guard Workers, 383 U.S. 53, 63 (1966); 29 U.S.C. §160 (c) (1964).
[18] International Union UAW v. Russell, 356 U.S. 634 (1958); United Construction Workers v. Laburnum, 347 U.S. 656 (1954); Amalgamated Utility Workers v. Consolidated Edison, 309 U.S. 261 (1940).
[19] Guss v. Utah Labor Board, 353 U.S. 1 (1957); 29 U.S.C. §160 (a) (1964).
[20] Plumbers Union v. Borden, 373 U.S. 690, 693-694 (1963).
[21] Liner v. Jafco, 375 U.S. 301 (1964); Plumbers Union v. Borden, 373 U.S. 690 (1963); San Diego Building Trades v. Garmon, 359 U.S. 236 (1959); also see cases cited in footnote 36.

instances, then, dual federal and state remedies were available,[22] but this left a large area without adequate available remedies.

A libel case not involving threats of violence could not be commenced in state courts if arguably involving unfair labor practices, since there would be no compelling state interest.[23] Such cases, when brought before the N.L.R.B., were found generally to involve acts protected by the liberal free speech provisions of the N.L.R.A., and thus no redress at all was available.[24]

More liberal free speech was allowed by the N.L.R.A. because invectives were traditionally employed in labor bargaining and were thought unavoidable.[25] Congress apparently felt that hampering speech in labor disputes could only result in a proliferation of law suits, stifling free bargaining.

Epithets have been common in labor disputes, and the Board, following Congress' intent, has generally found them protected by the N.L.R.A.'s free speech provision, section 8(c), even though the epithets were erroneous and defamatory.[26] The N.L.R.B. has drawn some limits, though, and it has indicated it would decide differently if statements were uttered with actual malice, "a deliberate intention to falsify" or a "malevolent desire to injure."[27] Section 8(c) provides:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.[28]

In interpreting this provision, the Board stated it "tolerates intemperate, abusive and inaccurate statements made by the union during attempts to organize employees," but it "does not interpret the act as giving either party license to injure the other intentionally by circulating defa-

[22] Brenan's Inc., 147 N.L.R.B. 1545 (1964); Monroe Auto Equipment Co., 146 N.L.R.B. 1267 (1964); Youngstown Cartage Co., 146 N.L.R.B. 305 (1964); Edro Corp., 144 N.L.R.B. 875 (1963).

[23] Record Chronicle Publishing Co. v. Seattle Typographical Union, 59 L.R.R.M. 2200 (Wash. Super. Ct. 1965); Teamsters Local 150 (Cal. Dist. Ct. App.) 56 L.R.R.M. 2993 (1964); Schnell Tool and Die Corp. v. United Steel Workers, 200 N.E.2d 727 (Ohio Com. Pl. 1964), 55 L.R.R.M. 2945; Blum v. International Association of Machinists, 42 N.J. 389, 201 A.2d 46 (1964); Hill v. Moe, 367 P.2d 739 (Alaska 1961), *cert. denied*, 370 U.S. 916 (1957).

[24] N.L.R.A., 61 Stat. 142, 29 U.S.C. §158 (c) (1964) provides "the expressing of any views, argument, or opinion, or the dissemination thereof . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit."

[25] N.Y. Times v. Sullivan, 376 U.S. 254 (1964).

[26] E.g., Bettcher Manufacturing Corp., 76 N.L.R.B. 526 (1948); Atlantic Towing Co., 75 N.L.R.B. 1169, 1170-73 (1948).

[27] Linn v. United Plant Guard Workers, 383 U.S. 53, 61 (1966). *See:* Stewart Warner Corp., 102 N.L.R.B. 1153, 1158 (1953); Bok, *The Regulation of Campaign Tactics in Representation Elections Under the N.L.R.A.*, 78 HARV. L. REV. 38, 66 (1964).

[28] 29 U.S.C. §158 (c) (1964).

matory or insulting material known to be false."[29] Thus, this section of the N.L.R.A. has generally protected name-calling in labor bargaining from N.L.R.B. sanctions.

At this juncture, with little chance of libel victims getting redress in state courts or from the N.L.R.B., the *Laburnum* case was decided by the United States Supreme Court.[30] The Court therein decided that an injured party was entitled to recover damages in a common-law tort action against three labor unions whose tortious acts were unfair labor practices at the same time. The language in the opinion appeared heartening as the court ruled state tort remedies were available to the victims of tortious conduct during labor bargaining. The Court's words seemed to extend state remedies to all tort victims. In rejecting the union's contention that the N.L.R.A. preempted state tort remedies, the Court said:

> . . . [t]he contrary view is consistent with the language of the Act and there is positive support for it in our own decisions and in the legislative history of the Act. . . . To the extent . . . that Congress has not prescribed procedure for dealing with the consequences of tortious conduct already committed, there is no ground for concluding that existing criminal penalties . . . for tortious conduct have been eliminated.[31]

But this ray of sunshine was quickly dispelled with the *Garmon* case,[32] decided shortly after *Laburnum,* which again denied the use of tort remedies to victims of tortious acts arguably constituting unfair labor practices absent violence or threats of violence. The Court again saw the need for uniform regulation of labor of primary importance and possible only through a single tribunal. Only exceptional circumstances were seen as permitting state tort remedies, and these circumstances were defined as "conduct marked by violence and imminent threats to the public order."[33] These apparent contradictory decisions were distinguished as *Laburnum* was pointed out to have been an action "based on violent conduct."[34] Thus, it was clear that absent a compelling state interest, found only in "intimidation and threats of violence,"[35] an activity arguably subject to the N.L.R.B.'s jurisdiction precluded state courts from exercising jurisdiction.

Courts considering the permissibility of state jurisdiction over acts arguably constituting unfair labor practices, absent violence or the threat of violence, concluded that the area had been preempted generally

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[29] Linn v. United Plant Guard Workers, 383 U.S. 53, 61 (1966); *See* Maryland Drydock Co. v. Labor Board, 183 F.2d 538 (1950).
[30] United Construction Workers v. Laburnum Corp., 347 U.S. 656 (1954).
[31] *Id.* at 664-665.
[32] San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959).
[33] *Id.* at 247.
[34] *Id.* at 248 (footnote 6).
[35] *Id.* at 248.

and cited *Garmon* as the controlling decisions.[36] It was generally concluded that even though the N.L.R.B. declined to exercise its jurisdiction, the state courts were still precluded from taking cases arguably subject to the Board's authority.[37] Only one court read the *Garmon* rule as allowing states to exercise jurisdiction over a libel action even though it appeared the acts were protected by the N.L.R.A.. This court exercised its jurisdiction, concluding that a valid state interest that did not transgress federal policy existed in the libel action.[38] In view of the Supreme Court's interpretation of the *Garmon* rule in the later *Linn v. United Plant Guard Workers,* this was a most perspicacious though singular opinion.

In the *Linn* decision, the Supreme Court discussed the exception to the preemption rule for cases of compelling state interests and stated: "We similarly conclude 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.*"[39] Inadequacy of the N.L.R.B. remedies were discussed as the Court stated, "The injury that the statement might cause to an individual's reputation—whether he be an employer or a union official—has no relevance to the Board's function."[40] A need for a private remedy in malicious libel was seen by the Court, as the "Board can award no damages, impose no penalty, or give any other relief to the defamed individual."[41]

> The fact that the Board has no authority to grant effective relief aggravates the State's concern since the refusal to redress an otherwise actionable wrong creates disrespect for the law and encourages the victim to take matters into his own hands. The function of libel suits in preventing violence has long been recognized.[42]

The Court, however, allayed opponents' fears that libel suits could be used "to dampen the ardor of labor debate" by limiting the availability

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[36] Liner v. Jafco, 375 U.S. 301 (1964); Teamsters Local 150 v. Superior Court of Sacramento County (Cal. Dist. Ct. App.) 56 L.R.R.M. 2993 (1964); Plumbers Union v. Borden, 373 U.S. 690 (1963); International Association of Iron Workers v. Perko, 373 U.S. 701 (1963); Construction and General Laborers v. Curry, 371 U.S. 542 (1963); Marine Engineers v. Interlake Co., 370 U.S. 173 (1962); *In* re Green, 369 U.S. 689 (1962); San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959); Youngdahl v. Rainfair, 355 U.S. 131 (1957); Meatcutters v. Fairlawn Meats, 353 U.S. 20 (1957); Guss v. Utah Labor Relations Board, 353 U.S. 1 (1957); Teamsters Union v. New York, New Haven and Hartford R.R. Co., 350 U.S. 155 (1956); Weber v. Anheuser Busch, Inc., 348 U.S. 468 (1955) (summarizes earlier cases on this point).

[37] San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959); Garmon v. San Diego Building Trades Council, 353 U.S. 26 (1957); See also Liner v. Jafco, Inc., 375 U.S. 301 (1964); Plumbers Union v. Borden, 373 U.S. 690 (1963); Guss v. Utah Labor Board, 353 U.S. 1 (1957); Amalgamated Meat Cutters v. Fairlawn Meats, Inc., 353 U.S. 20 (1957).

[38] Meyer v. Joint Council 53 Teamsters, 58 L.R.R.M. 2183 (Pa. Super. Ct., 1965).

[39] Linn v. United Plant Guard Workers, 383 U.S. 53, 62 (1966).

[40] *Id.* at 63.

[41] *Ibid.*

[42] *Id.* at 64 (footnote 6).

of suit to "those instances in which the complainant can show that the defamatory statements were circulated with malice and caused him damage."[43]

What then does the *Linn* decision change? It certainly broadens the concept of "compelling state interests." In examining several decisions it can be concluded that regulation of violence and threats of violence still arouse clearly compelling state interests,[44] whereas the control of peaceful picketing does not.[45] Obscuring the definintion of these areas, however, is the fact that most cases have contained several types of conduct in combination. These combined activities were decided to have (or not to have) aroused a compelling state interest in such regulation so that often no one action can be isolated and pointed to as singularly sufficient to arouse this interest. From Supreme Court decisions on this point, it is apparent that states may regulate combined activities involving or threatening: 1) the public safety and order and the use of streets or highways,[46] 2) massed name-calling, picketing, intimidation, and threats "calculated to provoke violence,"[47] 3) threats of physical injury, mass picketing, blocking egress and ingress to a place of employment, and blocking highways,[48] 4) mass picketing with threats of violence and the prevention of ingress to a non-union employer,[49] 5) the maintenance of domestic peace generally,[50] and now 6) malicious libels with actual damages caused thereby.[51] States have been found to have no overriding interest in the regulation of: 1) peaceful picketing or 2) picketing and pressuring prospective customers.[52]

The *Linn* decision is, to this author, a further step toward the proper treatment of labor disputes in a federal system, and for the present it outlines the extent of the compelling state interest in malicious libel as an exception to the preemption doctrine. Reconsideration and change of labor law concepts are not unheard of. In a decision after *Linn,* on March 28, 1966, the Supreme Court directed that in the area of violence and threats of violence "the permissible scope of state remedies . . . is strictly confined to the direct consequences of such conduct, and does

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[43] *Id.* at 64-65.
[44] U.A.W. v. Russell, 356 U.S. 634 (1958); Youngdahl v. Rainfair, 355 U.S. 131 (1957); United Construction Workers v. Laburnum Corp., 347 U.S. 656 (1954); Allen Bradley Local v. Wisconsin Employment Relations Board, 315 U.S. 740 (1942).
[45] Liner v. Jafco, Inc., 375 U.S. 301 (1964); Plumbers Union v. Borden, 373 U.S. 690 (1963); Local 438 Construction Laborers v. Curry, 371 U.S. 542 (1963); San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959).
[46] Allen Bradley Local v. Wisconsin Employment Relations Board, 315 U.S. 740 (1942).
[47] Youngdahl v. Rainfair, 355 U.S. 131, 139 (1957).
[48] Auto Workers v. Wisconsin Board, 351 U.S. 266 (1952).
[49] U.A.W. v. Russell, 356 U.S. 634 (1958).
[50] Linn v. United Plant Guard Workers, 337 F.2d 68 (6th Cir. 1964); Plumbers Union v. Borden, 373 U.S. 690, 693 (1963).
[51] Linn v. United Plant Guard Workers, 383 U.S. 53 (1966).
[52] San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959).

not include consequences resulting from associated peaceful picketing or other union activity."[53] The court stated that this rule only applies when peaceful and violent conduct are separable,[54] but, in view of this decision and the narrow majority in the *Linn* decision (5-4), the new *Linn* rule may be precariously perched, especially since the *Linn* majority saw fit to comment that if it should become necessary to "prevent impairment of the policy" needed for national labor regulation "the Court [would] be free to reconsider today's holding."[55]

WILLIAM J. DUNAJ

Constitutional Law: The Validity of Eavesdropping Under the Fourth Amendment: In *Berger v. State of New York*,[1] the petitioner was charged with and convicted of conspiracy to bribe the chairman of the New York Liquor Authority. The state's case against Berger was based upon information and leads obtained by means of eavesdropping devices surreptitiously concealed in the offices of two co-conspirators.[2] The eavesdropping[3] was authorized by ex parte court orders issued pursuant to section 813-a of the New York Code of Criminal Procedures.[4] The petitioner, in his defense, alleged that section 813-a is unconstitutional in that it (1) permits trespassory intrusions into Constitutionally

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[53] United Mine Workers v. Gibbs, 383 U.S. 715, 729 (1966).
[54] *Id.* at 730.
[55] Linn v. United Plant Guard Workers, 383 U.S. 53, 67 (1966).
[1] Berger v. State of New York, 87 S. Ct. 1873 (1967).
[2] *Id.* at 1876.
[3] The term eavesdropping used in this article shall refer to electronic "bugging" as distinguished from wiretapping.
[4] N.Y. Code Crim. Proc. 813-a. Ex parte order for eavesdropping: "An ex parte order for eavesdropping as defined in subdivisions one and two of section seven hundred thirty-eight of the penal law may be issued by any justice of the supreme court or judge of a county court or of the court of general sessions of the county of New York upon oath or affirmation of a district attorney, or of the attorney-general or of an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained, and particularly describing the person or persons whose communications, conversations or discussions are to be overheard or recorded and the purpose thereof, and, in the case of a telegraphic or telephonic communication, identifying the particular telephone number or telegraph line involved. In connection with the issuance of such an order the justice or judge may examine on oath the applicant and any other witness he may produce and shall satisfy himself of the existence of reasonable grounds for the granting of such application. Any such order shall be effective for the time specified therein but not for a period of more than two months unless extended or renewed by the justice or judge who signed and issued the original order upon satisfying himself that such extension or renewal is in the public interest. Any such order together with the papers upon which the application was based, shall be delivered to and retained by the applicant as authority for the eavesdropping authorized therein. A true copy of such order shall at all times be retained in his possession by the judge or justice issuing the same, and, in the event of the denial of an application for such an order, a true copy of the papers upon which the application was based shall in like manner be retained by the judge or justice denying the same. As amended L.1958, c. 676, eff. July 1, 1958."