

LABOR LAW—PREEMPTION—SUPREME COURT APPROVES UNEMPLOYMENT COMPENSATION FOR THE BENEFIT OF STRIKING EMPLOYEES—*New York Telephone Co. v. New York State Department of Labor*, 99 S. Ct. 1328 (1979).

INTRODUCTION

The enactment of the National Labor Relations Act¹ (NLRA) transferred jurisdiction over labor disputes from the state to the federal level.² However, Congress refrained from delineating the complete scope and reach of the NLRA.³ While the supremacy clause⁴ of the United States Constitution generally provides for the preemption of conflicting state law by a federal enactment,⁵ there remains the dilemma of defining such conflicts. Only then can it be determined whether the doctrine of preemption will apply.

The United States Supreme Court made such a determination in *New York Telephone Co. v. New York State Dept't of Labor*,⁶ where it upheld a New York statute that expressly grants unemployment compensation to striking employees.⁷ The Court's decision, holding the doctrine of preemption inapplicable, seems to conflict with fundamental policies of the National Labor Relations Act, as well as basic preemption policies recognized in the labor law arena.⁸

The Supreme Court had not previously addressed the precise preemptive issues presented in *New York Telephone*. Some federal courts, however, touching upon the conflict caused by payments to striking workers,⁹ have leaned toward a preemptive

1. 29 U.S.C. §§ 151-169 (1973).

2. A. COX & D. BOK, *LABOR LAW* 1169 (7th ed. 1969).

3. R. GORMAN, *BASIC TEXT ON LABOR LAW* 766 (1976). Congress, when it enacted the Wagner Act in 1935, expressed its belief that the disruptions caused by strikes and other industrial strife had an alarming impact on interstate commerce. Because of this impact, they decided to replace the multitude of state laws in existence at that time with a single uniform scheme of regulation which would foster the process of collective bargaining. In enacting the statute, Congress did not address the full preemptive implications involved, but rather has left this task to the courts. The Supreme Court has considered this issue in more than 30 cases since 1945, and its decisions have been both unclear and inconsistent. *Id.*

4. U.S. CONST. art. 6, cl. 2.

5. Note, *Preemption of State Unemployment Compensation Statute by Federal Labor Law*, 10 SUFFOLK L. REV. 1194, 1196 (1976).

6. 99 S. Ct. 1328 (1979).

7. N.Y. LAB. LAW § 592.1 (McKinney 1977).

8. See R. SMITH, L. MERRIFIELD, & T. ST. ANTOINE, *LABOR RELATIONS LAW* 489-531 (5th ed. 1974).

9. *Grinnell Corp. v. Hackett*, 475 F.2d 449, 453 (1st Cir. 1973), *cert. denied*, 414

intent.¹⁰

In *Garner v. Teamsters, Local 776*,¹¹ the Supreme Court noted that the NLRA "leaves much to the states, though Congress has refrained from telling us how much."¹² The *Garner* Court explained that its task was to weigh the conflicting indices of congressional intent in the area to determine just how much power the states are to retain over labor-related conflicts.¹³ This article will analyze *New York Telephone* in light of the express terms of the National Labor Relations Act, the congressional intent behind the Act, and a few basic constitutional tenets.

FACTS AND JUDICIAL HISTORY

In June of 1971 contract negotiations between the Communication Workers of America (CWA) and Bell Telephone and its affiliates reached impasse, at which time the CWA recommended a nationwide strike.¹⁴ On July 14, 1971, all CWA affiliated employees went out on a strike that lasted only one week for most employees.¹⁵ In New York, however, the 38,000 New York Telephone employees that were CWA-affiliated remained on strike for approximately seven months.¹⁶

New York law generally grants the payment of unemployment benefits to a worker after approximately one week of unemployment.¹⁷ If the worker's loss of employment is caused by a "strike, lockout, or industrial controversy in the establishment in which he was employed," the benefits are paid after an additional seven week period.¹⁸ In the instant case, New York Telephone's striking employees began to collect unemployment compensation after the statutory eight week period.¹⁹ During the five months following the commencement of these payments, more than forty-nine mil-

U.S. 858 (1973); *Hawaiian Tel. Co. v. Hawaii Dep't of Labor and Indus. Relations*, 405 F. Supp. 275, 290 (D. Hawaii 1976).

10. *Grinnell Corp. v. Hackett*, 475 F.2d 449, 457 (1st Cir. 1973); *Hawaiian Tel. Co. v. Hawaii Dep't of Labor and Indus. Relations*, 405 F. Supp. 275, 290 (D. Hawaii 1976).

11. 346 U.S. 485 (1953).

12. *Id.* at 488.

13. *Id.*

14. 99 S. Ct. at 1332.

15. *Id.*

16. *Id.* Petitioners actually included four Bell Telephone Company affiliates: New York Telephone Co., American Telephone & Telegraph Co. Long Lines Department, Western Electric Co., and Empire City Subway Co. *Id.* at 1332 n.1. For purposes of this article, the name New York Telephone Co. will encompass all four of the corporate entities.

17. N.Y. LAB. LAW § 590.7 (McKinney Supp. 1978).

18. *Id.* § 592.1.

19. 99 S. Ct. at 1332.

lion dollars in benefits were paid to about 33,000 striking employees.²⁰ This amounted to an average weekly salary of about \$75.00 per employee.²¹

New York's unemployment insurance system is financed primarily by employer contributions based on past payments to employees.²² All but a fraction of the benefits were paid out of New York Telephone Company's account with the state unemployment insurance fund. In addition, the company's tax rates were increased subsequent to the strike.²³ Thus it was New York Telephone rather than the State of New York, which effectively paid the striker's benefits.

New York Telephone brought suit in the United States District Court against the state administrators of the unemployment compensation fund.²⁴ The company sought a declaratory invalidation of the state statute on the grounds that it conflicted with established federal policy.²⁵

The district court found that the fact that unemployment compensation was available bore heavily on the striker's decision to remain out on strike,²⁶ and thus had a substantial impact on the

20. *Id.*

21. *Id.* The highest figure for these payments was \$95.00. *New York Telephone Co. v. New York State Dep't of Labor*, 434 F. Supp. 810, 814 n.6 (S.D.N.Y. 1977).

22. 99 S. Ct. at 1332.

23. *Id.* at 1349 (Powell, J., dissenting). The unemployment fund in New York is divided into several accounts. Employer accounts, which made up the bulk of the payments in the instant case, consist of contributions by the employers based on their past contributions to employees. Thus, not only were New York Telephone Company's credits in the state fund depleted but their tax rates were subsequently raised as a result. *See id.* at 1332-33 n.4; *id.* at 1349 n.6 (Powell, J., dissenting).

24. 99 S. Ct. at 1333.

25. *Id.*

26. 434 F. Supp. at 813-14. The district court noted some interesting communication between the union and the employees that lends credence to the position that the benefits afforded by New York's statute were instrumental in lengthening the strike.

Morton Bahr, Vice-President of union affairs in the Communication Workers of America, wrote a letter to each of the New York employees involved in the strike shortly after it had ended. In this letter he flatly admitted that the unemployment compensation scheme in New York was determinative as to the total length of the strike. In this letter he said: "The fact that more than 80% of the membership stood together for 218 days is simply incredible. In my judgment, it is a testimonial to three phenomena:

1. Dedication and support by the strikers
2. *Unemployment insurance*
3. Effectiveness of CWA's defense fund."

Id. at 814 (emphasis added).

During the course of the strike, Bahr had written another letter to a local union president noting that the extended length of the strike was in large part, a result of payments of unemployment compensation made by the State of New York. In this letter Bahr said: "The strike against the New York Telephone Company enters the

bargaining relationship between the company and the strikers.²⁷ The court held that the unemployment compensation in this case conflicted "with the policy of free collective bargaining established in federal labor laws and [was] therefore invalid under the Supremacy Clause of the United States Constitution."²⁸

The Second Circuit Court of Appeals reversed,²⁹ noting that Congress had not expressly forbidden the payment of state employment compensation to strikers.³⁰ The court felt, from its reading of the NLRA and Title IX of the Social Security Act,³¹ and various later developments, that such a provision was deliberately excluded from the NLRA.³² This court said that Congress had decided to tolerate this type of conflict between state and federal statutes.³³ Notably, the district court's finding that the New York statute "alters the balance in the collective bargaining relationship and therefore conflicts with the federal labor policy favoring the free play of economic forces in the collective bargaining process,"³⁴ was not expressly questioned.³⁵

On certiorari the Supreme Court affirmed the judgment of the Court of Appeals.³⁶

ANALYSIS

PURPOSE AND HISTORY OF THE NLRA

Through its decision in *New York Telephone*, the Supreme Court has seemingly rewritten the very principles on which the

18th week today. The stamina and spirit of our members in the New York Tel [sic] and those respecting picket lines in Western Electric and Long Lines, is simply amazing. . . . *New York State Unemployment Compensation is a tremendous assist [sic] to our members.*" *Id.*

27. *See id.* at 813-17.

28. 434 F. Supp. at 819. Interestingly, the court did not examine the state's interest in making the payments, apparently feeling that it was not of sufficient significance to be a relevant factor in the determination. *Id.*

29. *New York Tel. Co. v. New York State Dep't of Labor*, 566 F.2d 388, 396 (2d Cir. 1977).

30. *Id.* at 392.

31. Pub. L. No. 74-271, §§ 901-910, 49 Stat. 639-85 (1935) (current version at 26 U.S.C. §§ 3301-3311 (1976) and 42 U.S.C. §§ 501-504, 1101-1108 (1976)).

32. 566 F.2d at 391-95.

33. "[T]he conflict between New York's statute and the broad federal policy of free collective bargaining does not render the State statute unconstitutional. The conflict is one which Congress has decided to tolerate." *Id.* at 395.

34. 566 F.2d at 390; *see* 99 S. Ct. at 1334. This "free play of economic forces" argument can also be found in *Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 147-48 (1976).

35. 566 F.2d at 390-96. Although the district court finding was reversed by this court, a reading of the opinion shows little discussion of the free play of economic forces argument. *Id.*

36. 99 S. Ct. at 1344.

National Labor Relations Act was built.³⁷

Prior to the passage of the NLRA, courts relied on state statutes and case law for the resolution of disputes stemming from industrial conflict.³⁸ Congress, prompted by a concern that the disruptions caused by strikes and other industrial conflicts could have an adverse affect on commerce, decided to replace the multitude of state laws with a single, uniform scheme of regulation.³⁹

In doing so Congress sought to promote the "equality of bargaining power between employers and employees"⁴⁰ and to encourage the process of collective bargaining.⁴¹ However, the product of the congressional concern, the National Labor Relations Act, did not fully address the preemptive implications involved, leaving the final determination of such disputes to the courts.⁴²

PREEMPTION IN THE LABOR ARENA

Historically, cases dealing with labor law preemption have involved activities either protected under section seven or prohibited under section eight of the Act.⁴³ The import of these cases is that where an activity protected under section seven or prohibited

37. See 29 U.S.C. § 151 (1976). See also *NLRB v. Insurance Agents*, 361 U.S. 477, 488 (1960). "It is apparent from the legislative history of the whole Act that the policy of Congress is to impose a mutual duty upon the parties to confer in good faith with a desire to reach agreement, in the belief that such an approach from both sides of the table promotes the overall design of achieving industrial peace." *Id.*

38. *A. COX & D. BOK*, *supra* note 2, at 1169; *R. GORMAN*, *supra* note 3, at 766.

39. See note 3 *supra*.

40. 29 U.S.C. § 151 (1976); see 434 F. Supp. at 820. Free collective bargaining is premised on government neutrality. While the government acts to oversee and protect the process of collective bargaining it leaves the results of that bargaining to the economic strengths of those parties. *H. K. Porter v. NLRB*, 397 U.S. 99, 108 (1970); 434 F. Supp. at 820.

41. 434 F. Supp. at 820.

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

43. *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 470 (1955); see *Garner v. Teamsters Local 776*, 346 U.S. 485, 488-89 (1953); *Hill v. Florida*, 325 U.S. 538, 544 (1945) (*Stone, C.J.*, concurring).

In the above cases, state jurisdiction was preempted upon the finding that the conduct sought to be protected or prohibited was actually protected or prohibited by the federal act. Under section seven of the act, employees are protected from reprisals in the exercise of concerted activities (i.e. the right to organize and bargain collectively). Section eight of the act, which speaks in negative terms, prohibits certain practices by either the employer or the union. 29 U.S.C. §§ 157-58 (1976). The Supreme Court decisions go one step further and preempt state regulation of conduct which is even "arguably protected or . . . prohibited" under section seven or eight of the Act. *R. GORMAN*, *supra* note 3, at 776, 786. It should be noted at this point that this article is not advancing the theory that *New York Telephone* was an arguably protected or prohibited case. Rather, it will be argued simply that the state law in the instant case directly contravenes the policies behind the whole of the NLRA.

under section eight is clearly at issue, the policies of the National Labor Relations Act should control.⁴⁴ These are the more easily defined cases however.

While no clear guidelines manifest themselves in the Act or in the Court's decisions, some clues may be found as to what criteria the Court will consider in making a preemptive decision. In *Local 20, Teamsters Union v. Morton*⁴⁵ the Court emphasized that the balance of power between labor and management critical to our national labor policy should be a consideration.⁴⁶ The court has also adhered to the principle that the bargaining process should be free of outside economic pressures. This "free play of economic forces" argument was brought forth in *Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n*⁴⁷ and in *Morton*.⁴⁸ Other cases speak of leaving to the states the right to regulate traditional areas of concern such as tort law.⁴⁹ The decision in *San Diego Building Trades Council v. Garmon* espoused the view that the states should be left to themselves in regulating "conduct touch[ing] interests . . . deeply rooted in local feeling and responsibility. . . ."⁵⁰ These general guidelines, along with those from other cases in the labor preemption areas, are the only tools available to the Court in *New York Telephone* other than the provisions of the NLRA itself.

The typical cases, then, involving labor law preemption are those that deal with activities protected under section seven or prohibited under section eight of the Act, or at least arguably so.⁵¹ The majority in *New York Telephone* did note that these cases had dealt almost solely with state regulatory schemes which involve efforts to regulate the private conduct of employees covered by section seven or section eight.⁵² No such regulation of private conduct was involved in the instant case;⁵³ rather, the State of New

44. See *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244 (1959).

45. 377 U.S. 252 (1964).

46. *Id.* at 260; see *Amalgamated Ass'n of St. Employees v. Lockridge*, 403 U.S. 274, 286 (1970); Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337, 1352 (1972).

47. *Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relation Comm'n*, 427 U.S. 132, 147-48 (1976).

48. *Local 20, Teamsters Union v. Morton*, 377 U.S. 252, 260 (1964).

49. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959).

50. *Id.* at 244.

51. See *id.*

52. 99 S. Ct. at 1335.

53. *Id.* In contrast to the section seven and section eight decisions mentioned in the opinion, there is no claim here that New York has "sought to regulate or prohibit any conduct subject to the regulatory jurisdiction of the Labor Board under § 8." *Id.* Neither, were any of the petitioners pursuing a theory that there was any interference with section seven protected employee rights. *Id.*

York was simply authorizing payments to strikers that came out of an employer-financed fund.⁵⁴ Hence, the Court stated that "beyond identifying the interest in national uniformity underlying the doctrine, the cases comprising the main body of labor pre-emption law are of little relevance in deciding this case."⁵⁵

While it is agreed that the express holdings in most of the classic labor law preemption cases are inapplicable here, one should not ignore their message of uniformity,⁵⁶ or of the balance of power between labor and management.⁵⁷

THE MAJORITY'S VIEW

Justice Stevens, in his plurality opinion,⁵⁸ upheld the New York law on two grounds.

The first argument was that this case did not involve regulation of any private conduct under section seven or eight of the NLRA.⁵⁹ Justice Stevens found authority for the proposition that Congress intended to forbid state regulation of economic warfare in collective bargaining,⁶⁰ even though no such language was expressly contained in the NLRA.⁶¹ The court, after making this observation, went so far as to uphold the district court's finding that the New York statute "has altered the economic balance between labor and management."⁶² This seems, at best, inconsistent.

The Court then found that the New York law did not meet the criteria for preemption set forth in *Sears, Roebuck & Co. v. Carpenters*.⁶³ In other words, the unemployment compensation scheme was not a state law "regulating the relations between em-

54. *Id.*

55. *Id.*

56. *Id.*

57. *Local 20, Teamsters Union v. Morton*, 377 U.S. 252, 260 (1964). *See also Amalgamated Ass'n of St. Employees v. Lockridge*, 403 U.S. 274, 286 (1970); *Cox, Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337, 1352 (1972).

58. Justice Stevens wrote the opinion of the Court in which he was joined by Mr. Justice White and Mr. Justice Rehnquist. Mr. Justice Powell wrote the dissenting opinion in which he was joined by Chief Justice Burger and Mr. Justice Stewart. The balance of the court concurred for various reasons.

59. *See* note 53 *supra*.

60. *Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976); *Teamsters Union v. Morton*, 377 U.S. 252 (1964).

61. 29 U.S.C. §§ 151-169 (1973).

62. 99 S. Ct. at 1337.

63. 436 U.S. 180 (1978). This recently decided case dealt with state power to entertain an action by an employer to enjoin picketing which was arguably protected or prohibited under sections 7 and 8 of the NLRA. The Supreme Court held that there was no preemption in that case, because of differences in framing the controversy. That is, the issue presented to the state court was different from the one that would have been presented to the Board, thus the state could entertain the suit. *Id.* at 225-26.

ployees, their union and their employers," which, according to *Sears*, gives "greatest force" to the doctrine of preemption.⁶⁴

In the plurality's view, the New York law was one of general applicability which did not have as its primary purpose the regulation of bargaining relationships.⁶⁵ But the plurality felt this reason alone was insufficient to exempt the New York law from preemption.⁶⁶ Consequently, the plurality gave the most weight to the congressional intent argument.⁶⁷

The second major argument propounded by Justice Stevens was that a congressional intent was shown to allow such a state compensation system to exist.⁶⁸ Most of the authority for this premise is drawn from Title IX of the Social Security Act.⁶⁹ The Court noted that the history of that Act made it clear that Congress intended that the states be free to set up any type of unemployment compensation they wish.⁷⁰ The opinion cited a number of cases which purportedly demonstrated that Congress was sensitive to the State's interest in setting up their own program for compensation.⁷¹

REFUTATION OF THE MAJORITY'S POSITION—THE CASE IN FAVOR OF PREEMPTION

This article will deal with four different points which will arguably demonstrate that the NLRA was indeed meant to preempt a law such as New York's. To be examined are: whether this bargaining relationship is actually governed by the free play of economic forces; some general supremacy clause considerations; the

64. 99 S. Ct. at 1337.

65. *Id.*

66. *Id.* The Court says that the fact that this "law of general applicability" does not fit the *Sears* mold should not automatically exempt the statute from preemption. Rather, the Court says that congressional intent to deprive the states of their power to enforce such generally applicable laws is only more difficult to infer than the laws directed toward specific activity. *Id.*; see *Farmer v. Carpenters Local 25*, 430 U.S. 290, 300 (1977).

67. 99 S. Ct. at 1335-44.

68. *Id.* at 1343-44.

69. *Id.* at 1339-44; see note 31 *supra*.

70. 99 S. Ct. at 1339. Justice Stevens looked to the history of a completely different and separate act for this authority. Citing the Social Security Act, Stevens said that it's legislative history indicates that "Congress intended the several states to have broad freedom in setting up the types of unemployment compensation that they wish." *Id.* This statement, while generally true, does not take into account the conflict here between the two statutes. Here the relevant provisions of the Social Security Act and the intent of those provisions are examined within the confines of a vacuum.

71. 99 S. Ct. at 1340-41 (citing *Batterton v. Francis*, 432 U.S. 416 (1977); *Ohio Bureau of Employment Servs. v. Hodory*, 431 U.S. 471 (1977); *Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937)).

relevance, if any, of the general applicability of the New York statute; and the congressional intent on which the majority relies. The discussion below will illustrate potential problems that could arise under the decision in *New York Telephone*.

Interestingly, the court of appeals as well as the Supreme Court saw fit to sustain the finding by the district court that the award of benefits to the strikers has altered the economic balance between labor and management.⁷² It is obvious that when an employer is forced to finance, almost entirely,⁷³ the strike of his employees, there is going to be an imbalance created on the scales of bargaining.⁷⁴ Not only must the employer endure his usual strike-time hardship—that is, the slowdown and disorganization of his business—but here he is made to endure the hardship which usually lies on the employees' side of the bargaining balance. It can hardly be said that this arrangement leaves any kind of bargaining power in the hands of an employer.

The crucial inquiry in such cases has been whether the state law "would frustrate effective implementation" of the Act.⁷⁵ One of the primary purposes of the Act is to reconcile and equalize the power of the competing economic forces between labor and management.⁷⁶ Indeed, the Act itself speaks of the blockades on commerce that develop during any industrial strife.⁷⁷ The National Labor Relations Act seeks to free up these clots in the stream of commerce by "restoring equality of bargaining power between employers and employees," and by "encouraging the practice and procedure of collective bargaining."⁷⁸ Even one naive in the affairs of labor law would be able to recognize an imbalance in bargaining positions created by the factual situation in this case. Just as obvious is the conclusion one must draw as to whether the New York law encourages one to actively bargain. Clearly, a striker making nearly fifty percent of his wage will not be as anxious to reach a settlement as one who is not receiving any income during the strike.⁷⁹ The New York statute requires an employer to pay a sub-

72. 99 S. Ct. at 1336-37.

73. *Id.* at 1349 n.6 (Powell, J., dissenting); see note 23 and accompanying text *supra*.

74. 99 S. Ct. at 1349 (Powell, J., dissenting).

75. *Id.* at 1350 (Powell, J., dissenting) (quoting *Lodge 76 v. Wisconsin Employment Relations Comm'n.*, 427 U.S. 132, 147-48 (1976); *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 380 (1969)).

76. 29 U.S.C. § 151 (1976). See also *Preemption: A Judicial Headache*, 7 N.C. CENT. L.J. 358, 369 (1975).

77. 29 U.S.C. § 151 (1976).

78. *Id.*

79. A. COX & D. BOK, *supra* note 2, at 1169. "In the final analysis collective bargaining works as a method of fixing terms and conditions of employment only

stantial portion of the wages of employees who are performing no services even though these employees have voluntarily gone on strike.⁸⁰ In effect, the employer's bargaining leverage, his ability to use his own economic weapons, is severely curtailed.

The resolution of any bargaining impasse under the New York law could not involve, as it should, the equal competing forces of labor and management trying to forge a mutually agreeable contract. Rather, it would be an exercise in how long management could afford to allow the payments to be made, coupled with the disruption and loss of business caused by the strike. The striker's only concern would be how to live within a budget of half of his normal wage.

The Supreme Court's recognition of the imbalance in the bargaining relationship between the parties,⁸¹ viewed in concert with its premise that the decision upholds the principles of the NLRA mandating equality of bargaining power,⁸² seems inconsistent.

The second point to be dealt with involves general supremacy clause considerations. The Court's decision in *New York Telephone* seems to overlook some of the basic principles involved in resolving supremacy clause cases.⁸³ As Justice Blackmun noted in his concurring opinion:

[t]he Court appears to be saying that there is not pre-emption unless "compelling congressional direction" indicates otherwise. The premise is therefore one of assumed priority on the state side. In *Machinists*, on the other hand, the Court said, I thought, that there is pre-emption unless there is evidence of congressional intent to tolerate the state practice. That premise, therefore, is one of assumed priority on the federal side. The distinction is not seman-

because there comes a time when both sides conclude that the risks of losses through a strike are so great that compromise is cheaper than economic battle." *Id.*

80. 99 S. Ct. at 1355 (Powell, J., dissenting); see notes 92-94 and accompanying text *infra*.

81. 99 S. Ct. at 1336-37.

82. The NLRA speaks of practices by both employers and employees (or unions) which burden commerce. These include the economic imbalance historically on the side of the employer as well as the strike weapon available to the employee. The Act calls for the: "promo[tion] [of] the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring *equality of bargaining power between employers and employees.*" 29 U.S.C. § 151 (1976) (emphasis added).

83. A.H. MYERS & D. TWOMNEY, LABOR LAW AND LEGISLATION 131 (5th ed. 1975); J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW 267-70 (1978); Note, *Federal Pre-emption of State Laws: The Effect of Regulatory Agency Attitudes on Judicial Decision Making*, 50 IND. L.J. 848 (1975); Note, *Preemption: A Judicial Headache*, 7 N.C. CENT. L.J. 358, 369 (1975).

tic.⁸⁴

Justice Blackmun's recognition of this basic principle of constitutional adjudication is not without authority.⁸⁵ Throughout the history of the United States Constitution courts have recognized the presumption in favor of federal law.⁸⁶ No one disputes the existence of this principle in, for example, cases involving the commerce clause.⁸⁷

But Justice Blackmun's insight stops short of swaying him toward a preemptive opinion in *New York Telephone*. It is his contention that the type of analysis used in this case, whether giving the benefit of the doubt to federal or state law, would make no difference in the outcome.⁸⁸ This premise appears fallacious since the burdens of proof are so vastly different.⁸⁹

As most of the commerce clause litigation indicates, where there is a conflict evident between the state and federal law, then there is a presumption in favor of the federal law absent a showing of an overbalancing interest by the state.⁹⁰ It is arguable that the State of New York has failed to present any evidence showing an interest in allowing payments to be made to voluntarily unemployed workers at the expense of their employers.⁹¹

84. 99 S. Ct. at 1346 (Blackmun, J., concurring).

85. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 376-77 (1978).

86. See notes 83 & 85 and accompanying text *supra*.

87. *Hunt v. Washington Apple Adv. Comm'n*, 432 U.S. 333, 353 (1977); *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 373 (1976); *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 767-69 (1944); *accord*, *Dean Milk v. City of Madison, Wis.*, 340 U.S. 349, 354 (1951). In *Hunt* Chief Justice Burger said that: "When discrimination against Commerce . . . is demonstrated, the burden falls on the State to justify it both in terms of the local benefits flowing from the statutes and the availability of nondiscriminatory alternatives adequate to preserve the local interests at stake." 432 U.S. at 352. Arguably welfare would serve the purpose of providing basic needs with less adverse effect on NLRA policies. 99 S. Ct. at 1353-54 n.19 (Powell, J., dissenting). This use of commerce clause case law as supporting authority is particularly appropriate since the NLRA seems to have been promulgated under its authority. See 29 U.S.C. § 151 (1976).

88. 99 S. Ct. at 1346 (Blackmun, J., concurring).

89. If the presumption is on the side of preemption by the federal policy, then at least arguably, the state of New York has failed to meet the burden of showing a congressional intent that the state law ought to be allowed to stand. Mr. Justice Stevens says that "there is no evidence that the Congress that enacted the National Labor Relations Act in 1935, intended to deny the States the power to provide unemployment benefits for strikers." 99 S. Ct. at 1341. Justice Stevens has put the burden of proof on the federal government, rather than the states. This would amount to an assumption of state supremacy, unless otherwise shown by Congress.

90. L. TRIBE, *supra* note 85, at 326; see note 87 *supra*.

91. See 99 S. Ct. at 1353-54 n.19 (Powell, J., dissenting). Another piece of evidence that bears on a lack of state interest to regulate in this area is the fact that Rhode Island is the only other state with a provision substantially like New York's. R.I. GEN. LAWS § 28-44-16 (Reenactment 1966).

Many states do allow the payment of benefits to striking employees who have

One argument apparently ignored by the State of New York is that the unemployment scheme was designed to give stability to their state economy as a whole. That is, by providing unemployed persons with a minimal income the economy would not suffer from decreased spending. However, the statute appears to promote a different policy.⁹² The stated policy of the statute is to relieve the burdens on the unemployed worker caused by an *involuntary* work stoppage.⁹³ Protection of the individual seems to be the goal for which New York was striving. Certainly, by no stretch of the imagination could the unemployment in *New York Telephone* be viewed as anything but voluntary.⁹⁴

Another flaw in the state's case is the fact that it seems oblivious to the benefits available to the striker under the welfare system.⁹⁵ As Justice Powell pointed out in his dissent, unemployment compensation is linked only to an interruption in income, while food stamps and other general welfare programs become available only when income and assets have become insufficient.⁹⁶ Granted, the receipt of only fifty percent of one's wages can be a hardship, but that should not be the inquiry in this case. Rather, the state must show an interest in paying the benefits to its voluntarily un-

been replaced by other nonstriking employees. Other states will allow strikers to collect benefits so long as their activities do not affect the production of the employer. 99 S. Ct. at 1338 n.24. However, it is clear that there would be no blanket recovery for the New York Telephone employees under either of these schemes.

The Circuit Court also noted that the District of Columbia, whose laws are promulgated by Congress, denies benefits to strikers. 566 F. 2d at 395.

92. It is interesting to note that the public policy behind the New York statute directly contradicts the allowance of benefits through section 592.

The policy states:

Economic insecurity due to unemployment is a serious menace to the health, welfare, and morale of the people of this state. Involuntary unemployment is therefore a subject of general interest and concern which requires appropriate action by the legislature to prevent its spread and to lighten its burden, which now so often falls with crushing force upon the unemployed worker and his family . . . [T]his measure [is] for the compulsory setting aside of financial reserves for the benefit of persons unemployed through no fault of their own.

N.Y. LAB. LAW § 501 (McKinney 1977).

93. *Id.*

94. 99 S. Ct. at 1354 (Powell, J., dissenting).

95. *Id.* at 1353-54 n.19 (Powell, J., dissenting). Compare *Super Tire Eng'r Co. v. McCorkle*, 550 F.2d 903 (3d Cir. 1977) (upholding a New Jersey regulation permitting welfare payments to strikers). The McCorkle Court said that payments of unemployment compensation were more disruptive of the bargaining process than were welfare payments. See 99 S. Ct. at 1338 n.23.

96. 99 S. Ct. at 1353-54 n.19. "Unlike unemployment compensation, which is linked only to an interruption in the employees income, food stamps and other general welfare programs are available only when income and assets have become insufficient to supply necessities." *Id.*

employed strikers.⁹⁷ At the same time, it must be able to show that the adverse effects of such a scheme—that is, the artificial strengthening of the employees bargaining power—is outweighed by the state benefit. Arguably, New York has not met that burden. Given this lack of state interest viewed in light of the enumerated purposes of the National Labor Relations Act, a different result in *New York Telephone* appears warranted.

The third point deals with the general applicability of the New York statute. As Justice Stevens maintained in the plurality opinion, the New York law was meant to regulate the *general* area of unemployment compensation and thus, it should not be preempted.⁹⁸ It is the Court's opinion that, since the New York law was promulgated to deal with the hardships of unemployed workers, the fact that the law incidentally awards compensation to strikers is not a sufficient reason for preemption.⁹⁹ But, as Justice Powell points out, the fact that the New York law sets the strikers apart by requiring an additional seven week waiting period shows that the law is not as generally applicable as the Court would suggest.¹⁰⁰

Indeed, the provision is truly a separate component of a larger unemployment scheme.¹⁰¹ A literal reading of the Court's opinion would lead one to believe that an unconstitutional provision in any

97. See note 90 and accompanying text *supra*. The available indicia of legislative purpose and intent surrounding the adoption of state unemployment compensation legislation plainly show that the primary purpose of such legislation was to relieve workers and their families from some of the consequences of unemployment due to the cyclical nature of the economy. Haggert, *Unemployment Compensation During Labor Disputes*, 37 NEB. L. REV. 668, 694-95 (1958). The causes of this type of unemployment are entirely beyond the control of the individual and the workers' unemployment therefore, is entirely involuntary as far as he is concerned.

Provisions for the payment of benefits when unemployment is due to a labor dispute, are somewhat anomalous when this purpose for unemployment compensation programs is considered, because such unemployment is neither involuntary nor impersonal in the same sense as when it is caused by external forces such as a depressed economy. *Id.*

98. 99 S. Ct. at 1338. *Contra, id.* at 1350 (Powell, J., dissenting). It should also be noted that the plurality relies on an exception to preemption which states that state law may govern when the law at issue is promulgated to protect interests "deeply rooted in local feeling and responsibility." 99 S. Ct. at 1341 (Powell, J., dissenting). However, as Justice Powell notes the New York statute involved here has "nothing in common with the state laws protecting against personal torts or violence to property that have defined that 'local feeling and responsibility' exception to preemption." *Id.* at 1351 (Powell, J., dissenting).

99. *Id.* at 1337-38. Justice Powell rebutted this by saying that "[i]t would be difficult to think of a law more specifically focused on labor-management relations than one that compels an employer to finance a strike against itself." *Id.* at 1350 (Powell, J., dissenting).

100. *Id.* at 1350 n.10 (Powell, J., dissenting).

101. *Id.*

statute can pass constitutional muster simply by placing it within the boundaries of an acceptable general statute.

The fourth and final point hinges on the intent of Congress to allow unemployment compensation payments to strikers under the terms of the NLRA. A large part of every opinion in *New York Telephone* deals with the congressional intent behind the National Labor Relations Act in the area of unemployment compensation. The plurality concluded that no preemptive intent existed.¹⁰²

If one takes strict view of supremacy clause analysis, there would be no need to reach the question of congressional intent. The presumption of supremacy is with the federal government and the provisions of the NLRA, unless an overbalancing interest is shown by the state.¹⁰³

Even if it were necessary to show congressional intent, probably the clearest and most authoritative evidence is a literal reading of the National Labor Relations Act itself.¹⁰⁴ In order to relieve the burdens on commerce caused by an industrial controversy, Congress mandated the "equality of bargaining power between employers and employees"¹⁰⁵ as well as the encouragement of collective bargaining.¹⁰⁶ One could not find a more simple and straightforward gauge of intent.

Another method frequently used to fathom congressional intent behind a legislative act is to examine prepassage debates and discussions of the legislators.¹⁰⁷ Both the plurality and the dissent seem to agree that the examination of the legislative intent found in the reports and debates prior to the passage of the NLRA are fruitless.¹⁰⁸ Most of the authority, then, comes from the history and discussion behind the Social Security Act.¹⁰⁹ Although searching for the answer to this question by examining the intent

102. 99 S. Ct. at 1344. *But see* Grinnell Corp. v. Hackett, 475 F.2d 449, 457 (1st Cir.), *cert. denied*, 414 U.S. 858 (1973). In *Grinnell*, the First Circuit concluded that "unambiguous Congressional intent is [sic] lacking" when courts deal with a statute such as this. 475 F.2d at 457. The *Grinnell* case dealt with the application of the Rhode Island statute. *See* note 91 *supra*.

103. L. TRIBE, *supra* note 85, at 326; *see* notes 86 & 87 and accompanying text *supra*.

104. 29 U.S.C. §§ 151-169 (1976).

105. 29 U.S.C. § 151 (1976).

106. *Id.*

107. C. NUTTIG, S. ELLIOTT, & R. DICKERSON, LEGISLATION 412-14 (4th ed. 1969).

108. 99 S. Ct. at 1352 (Powell, J., dissenting). Although Justice Stevens does not expressly state that the search for Congressional intent is fruitless, he does draw his inference of intent, for the most part, from the silence of Congress. *Id.* at 1341. Justice Powell, however, expressly denies that any intent to allow states to pay unemployment compensation to strikers is shown in the entire history of the NLRA. *Id.* at 1349 (Powell, J., dissenting).

109. 99 S. Ct. at 1334.

of a wholly different and much broader act is questionable,¹¹⁰ it was nevertheless the course of action pursued by the Court.

It is interesting to note that the only positive bit of evidence brought to the forefront by either side clearly supported a preemptive intent.¹¹¹ Taken from the Senate Finance Committee, the passage read simply: "To serve its purposes, unemployment compensation must be paid to workers involuntarily unemployed."¹¹² The State of New York countered by demanding a reading of the sentence in context.¹¹³ New York quoted the committee as having said: "The plan for unemployment compensation that we suggest contemplates that the States shall have broad freedom to set up the type of unemployment compensation they wish."¹¹⁴

Certainly no one would argue with that general premise.¹¹⁵ But, New York also cited the next sentence of that report, limiting that premise by saying: "We believe that all matters in which uniformity is not absolutely essential should be left to the States."¹¹⁶ Any rational reading of that passage, taken in concert with the general striving for uniformity found in the NLRA, suggests that federal law should preempt the New York law.¹¹⁷

A final method used by the plurality in fathoming a congressional intent not to preempt warrants some discussion here. The Court pointed to Senator Robert Wagner,¹¹⁸ a principal sponsor of both the Social Security Act and the National Labor Relations Act. It was said that since the junior Senator from New York was aware of the New York law, and even expressly mentioned the law in the Senate debates,¹¹⁹ he had to have been aware of the controversial

110. The Court's use of the Social Security Act as an index of Congress' intent in a wholly different statute should at least be termed questionable. After all, it is the policies of the NLRA that are being tested here and not the broad policies of the Social Security Act. *See id.* at 1354 (Powell, J., dissenting).

111. REPORT OF THE COMMITTEE ON ECONOMIC SECURITY, *reprinted in Hearings on § 1130 before the Senate Committee on Finance, 74th Cong., 1st Sess., 1311, 1328 (1935), quoted in 99 S. Ct. at 1339 n.28.*

112. *Id.*; *see note 97 supra.*

113. 99 S. Ct. at 1339-40 n.28.

114. *Id.*

115. But, it is only the general premise that is safe from attack here. General premises, as such, are constructed in a vacuum. Consequently, although deference must be given to the states in setting up their unemployment compensation scheme, it cannot be carried out at the expense of our national labor policy. *See 434 F. Supp. at 820-21.*

116. 99 S. Ct. at 1340 n.28.

117. 29 U.S.C. § 151(1976); *see Cox, Federalism in the Law of Labor Relations, 67 HARV. L. REV. 1297, 1317 (1954).*

118. Senator Wagner (N.Y.) had, for a long time, taken an interest in the design of social welfare and labor law in his home state of New York. 99 S. Ct. at 1342 n.38.

119. *Id.* at 1341-42. In Senate discussions on the Social Security Act, and more

nature of such a provision.¹²⁰ However, the Court also said that no specific mention was made of payments to strikers, but only to the example of the New York law in general.¹²¹ The plurality concluded that Congress must have considered the impact of the payment of unemployment compensation on the bargaining process, and thus its silence on the matter necessarily imports the idea that the states should be free to act.¹²²

One must question the Court's rationale which infers a toleration of state laws of this type from the silence of Congress and the unexpressed knowledge of one senator.¹²³ Even the most zealous of senators cannot keep abreast of all of the legislation coming out of their home state. Thus, even if Senator Wagner was aware of this controversial provision in the New York law, his unexpressed awareness can hardly be imparted to his colleagues through a process of osmosis. The fact that the New York unemployment compensation statute was cited as a model in hearings does *not* necessarily support the idea that the striker's benefit provisions were scrutinized.

It would seem to be the better conclusion that, in the absence of a showing of clear intent, one must resort to the law itself for guidance.¹²⁴ As mentioned above, the provisions requiring a balanced bargaining system assume a position of added significance in light of the imbalanced circumstance in the instant case.

CONCLUSION

The Supreme Court's disposition of *New York Telephone* lays open a path for the potential erosion of some core policies of the National Labor Relations Act. Criticism of the decision derives not so much from the general holding by the Court, but rather, from

specifically, the state's freedom of choice with regard to creation of their own unemployment compensation laws, Senator Wagner expressly referred to the New York statute as an example. *Id.* (citing S. REP. NO. 628, 75th Cong., 1st Sess. 13 (1935)).

120. 99 S. Ct. at 1342.

121. *Id.*

122. *Id.* at 1342-43. The Court appears to say that since Senator Wagner knew of the New York law and its provisions for payment of unemployment compensation to strikers, the passing general reference to the New York statute imports knowledge of the strikers clause and its problems to the other member of Congress. *Id. Contra, id.* at 1349-50 n.8 (Powell, J., dissenting).

123. *Id.* at 1352 n.16 (Powell, J., dissenting). "It is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law." *NLRB v. Plasterers' Local 79*, 404 U.S. 116, 129-30 (1971); *Girouard v. United States*, 328 U.S. 61, 69 (1946).

124. This actually would be working the process in reverse logical sequence. It would not require a trained constitutional mind to know that before one looks in the nooks and crannies of legislative history, the best place to look would be the law itself.

the setting aside of some recognized precedential analytical techniques and the sometimes contradictory nature of the Court's arguments.

In one breath the Court admits the propensity of the New York statute to create an imbalance in the bargaining process.¹²⁵ However, the Court then denies that a preemptive intent exists within the NLRA, which expressly demands balanced bargaining,¹²⁶ making that determination only on "the most fragmentary evidence."¹²⁷

The New York law does not act as a subsistence for the striking family. Indeed, were there any grave need for basic necessities, the welfare system would suffice.¹²⁸ This statute, instead, gives to voluntarily unemployed strikers a large percentage of their regular earnings as a supplement, financed by the employers, the receipt of which admittedly creates a bargaining atmosphere most favorable to the employee.

If the several states were to follow New York's lead into this previously untouched area, the potential burdens on interstate commerce could be awesome. The seven month strike by the Communication Workers of America affiliated employees is but a small omen of what strains would be placed on the economy were the employees of larger, more critical industries allowed to prolong strikes at the expense of their employer. Such deleterious effects of labor strife were in fact what the NLRA was designed to prevent.

Perhaps the impact of unemployment compensation on the collective bargaining process could be significantly reduced by funding from general tax revenues, relieving employers of their burden in such cases. To alleviate the confusion created by the decision in *New York Telephone* and to avoid potential adverse effects on national labor policy, Congress should move to clarify its intent in this area and hopefully formulate a less burdensome alternative.

Robert F. Rossiter, Jr.—'81

125. 99 S. Ct. at 1336-37.

126. *Id.* at 1344.

127. *Id.* at 1355 (Powell, J., dissenting).

128. See note 96 *supra*. See also Note, *Preemption of State Unemployment Compensation Statute by Federal Labor Law*, 10 SUFFOLK L. REV. 1194, 1206 (1976). "If the purpose of unemployment compensation is to protect workers from a temporary interruption in the flow of income, then it could conceivably be argued that a state's interest in unemployment compensation is that of providing for the welfare of its citizens." *Id.*

