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State Anti-Strikebreaker Laws: Unconstitutional Interference with Employers' Right to Self-Help

I. Walter Fisher

James J. McDonald Jr.
STATE ANTI-STRIKEBREAKER LAWS: UNCONSTITUTIONAL INTERFERENCE WITH EMPLOYERS’ RIGHT TO SELF-HELP

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More than half of the states today have laws that impede or in some way regulate the hiring of replacements for striking employees. The extent of such regulation varies. Some states impose blanket prohibitions upon the hiring of certain kinds of striker replacements, while others require only that striker replacement recruits be informed that a labor dispute is in progress at their new place of employment. Most states which have anti-strikebreaker laws provide misdemeanor criminal penalties, including fines and imprisonment, for their violation.

Recently, however, a growing number of courts have struck down state anti-strikebreaker laws as unconstitutional. Courts in New Jersey, Michigan and Illinois have invalidated laws regulat-
ing the hiring of striker replacements. While courts and commentators have advanced several grounds for the constitutional invalidity of such laws, chief among them is that they are pre-empted by the National Labor Relations Act (NLRA). This pre-emption theory holds that state anti-strikebreaker laws interfere with an employer's right, protected by the federal labor laws, to engage in economic self-help during a strike by hiring replacements for striking employees. This article will examine the various state anti-strikebreaker laws and the states' experiences in enforcing these laws. It will also explore the development of the doctrine of pre-emption in the context of labor law and the trend among courts toward invalidating anti-strikebreaker laws on the basis of this doctrine. It will also offer an appraisal of the validity of various anti-strikebreaker laws under the pre-emption doctrine.

I. ANTI-STRIKEBREAKER LAWS TODAY

Pennsylvania enacted the first state anti-strikebreaker law in 1937. In 1960, the International Typographical Union, following a series of strike defeats as a result of newspapers' use of trained striker replacements, drafted a model "citizens' job protection bill" which it distributed to state legislatures. Through joint efforts of the ITU, the AFL-CIO and other labor groups in the 1960s, anti-strikebreaker legislation was enacted in several states.

Today approximately one-half of the states have laws that regu-
late or prohibit the hiring of striker replacements. Louisiana, Michigan, New Jersey and Washington prohibit the importation of any employee into the state for the purpose of replacing strikers. Arkansas, California, Delaware, Hawaii, Louisiana and New Jersey bar third parties not involved in the labor dispute from recruiting, procuring, supplying or referring any person for employment in the place of a striking employee.

Other states only prohibit the hiring or referral of "professional strikebreakers," employees who "customarily and repeatedly" offer themselves as replacements for strikers. Although many states fail to define the term "customarily and repeatedly," a few provide more precise definitions of the term "professional strikebreaker." Connecticut, for example, defines a "professional strikebreaker" as "any person who has been employed anywhere two or more times in the same craft or industry in place of employees involved in strikes or lockouts." Wisconsin's prohibition of the hiring and referral of "strikebreakers" only applies to individuals who have served as striker replacements during the previous twelve-month period. California defines a "professional strikebreaker" as an individual who has been employed as a striker replacement on three or more previous occasions by two or more employers in the preceding five years.

In addition to placing restrictions upon employers and referral services, many states directly prohibit the "professional strikebreaker" or one who "customarily and repeatedly" offers himself as a striker replacement from accepting employment as a replacement for a striking employee. The "professional strikebreaker," as well

as the struck employer, is liable for violations of anti-strikebreaker laws. A number of states require employers who advertise for striker replacements, and employment agencies and other third parties that refer individuals for employment as striker replacements, to notify the new employees in writing of the existence of the strike or labor dispute.

In addition to state laws, there are a number of municipal ordinances which prohibit or regulate the hiring of striker replacements. Most notable is a New York City ordinance which makes it "unlawful for . . . any employer . . . to employ any strikebreaker to replace employees who are . . . on strike." A "strikebreaker" is defined as one who "customarily and repeatedly offers himself for employment for the duration of a strike or lockout" in the place of striking employees. One of the few reported cases involving a prosecution of an employer for violating an anti-strikebreaker law arose out of this ordinance. In People v. Eastern Airlines, Eastern Airlines was prosecuted for replacing striking flight engineers at its Idlewild (now John F. Kennedy) Airport facility. The court upheld the validity of the ordinance generally but found Eastern Airlines not guilty on the basis of the evidence in the case. The court specifically avoided the pre-emption issue, however, leaving that question

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22. A list of such municipalities may be found in Comment, Anti-Strikebreaking Legislation, supra note 8, at 191 n.8.


24. Id. at § 900-2.0(a).

25. Id. at § 900-1.0(a)(6).

II. THE DOCTRINE OF LABOR LAW PRE-EMPTION

Although substantial restrictions upon employers' right to employ replacements for striking employees exist in a significant number of states, these laws conflict with the freedoms rooted in the supremacy clause of the U.S. Constitution, and reserved to employers by the federal labor laws. A doctrine of federal pre-emption unique to the field of labor law has developed over recent decades. This doctrine holds generally that the states may not interfere with the scheme that Congress has established to regulate labor relations. Underlying this doctrine is a concern for uniformity manifest both in a single body of federal labor law and in a single enforcement mechanism, the National Labor Relations Board (NLRB). While this common theme of a uniform national labor policy runs throughout all labor pre-emption cases, two distinct theories, or tests, of labor law pre-emption have emerged: the Garmon theory and the Machinists theory.

A. The Garmon Theory

In San Diego Building Trades Council v. Garmon, the Court established the rule that state statutes or regulations, or state law-
based causes of action, are pre-empted if they concern conduct that is either protected by Section 7 of the NLRA\textsuperscript{35} or prohibited by Section 8 of the NLRA.\textsuperscript{36} In \textit{Garmon}, a union picketed a business in order to force the employer to enter a union shop agreement. The state court found the picketing to constitute a tort under California law as well as an unfair labor practice under the California Labor Code,\textsuperscript{37} and awarded damages. The Supreme Court reversed, reasoning that the possibility that such picketing was either protected by Section 7 or prohibited as an unfair labor practice under Section 8 of the NLRA would be sufficient to deprive the state courts of jurisdiction.\textsuperscript{38}

The \textit{Garmon} rule of pre-emption is not absolute, however. The Court in \textit{Sears, Roebuck & Co. v. San Diego County District Council of Carpenters},\textsuperscript{39} treated the \textit{Garmon} rule as only a presumption; that is, a state statute, regulation or cause of action is presumed to be pre-empted if it addresses conduct actually or arguably prohibited by Section 8 of the NLRA. This presumption may be overcome, however, if the conduct involved is (1) of only "peripheral concern" to the federal law and (2) "touch[es] interests . . . deeply rooted in local feeling and responsibility."\textsuperscript{40} \textit{Sears} concerned an alleged violation of state trespass laws, which the Court determined was properly within the jurisdiction of the state court to enjoin. The Court like-

\begin{footnotesize}
35. Section 7 provides in relevant part:
Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .
36. Section 8(a) provides in relevant part that:
It shall be an unfair labor practice for an employer
(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7];
(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . . ;
(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ;
(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this [Act];
(5) to refuse to bargain collectively with the representatives of his employees . . . .
40. Id. at 188-89 n.13 (citation omitted).
\end{footnotesize}
wise has not invalidated under the pre-emption doctrine state laws concerning such issues of local concern as strike violence,\(^4\) mass picketing,\(^2\) malicious libel,\(^4\) and intentional infliction of emotional distress.\(^4\)

**B. The Machinists Theory**

As situations have arisen that have not fit neatly into the Gar-
mon scheme, a second theory of labor law pre-emption has emerged. In *International Union, UAW v. Wisconsin Employment Relations Board (Briggs & Stratton Corp.)*,\(^4\) the union, in order to exert pressure on the employer during contract negotiations, adopted a plan under which special union meetings would be called repeatedly during working hours. After twenty-six such meetings, the employer obtained a cease-and-desist order against such activity from the state labor relations authority.\(^4\) The Supreme Court allowed the state ac-
tion to stand, reasoning that since “intermittent, unannounced [work] stoppages” were neither forbidden nor sanctioned by federal law, the state police power was not superseded by the NLRA.\(^4\)

The Briggs & Stratton rule was eroded, however, as the case law developed. In *Garner v. Teamsters, Local 776*,\(^4\) union members picketed an employer in an attempt to force recognition of the union as collective bargaining representative. A state court of equity granted an injunction against the picketing,\(^4\) partly to avoid the risk that the less immediate procedures of the NLRB would not prevent imminent and irreparable damage. The Pennsylvania Supreme Court’s reversal of the injunction\(^4\) was affirmed by a Supreme Court decision that the matter was within the sole jurisdiction of the NLRB.\(^5\) The Court also suggested for the first time that certain picketing, though not explicitly protected activity under the Labor Management Relations Act (LMRA), might still have been intended by Congress to be free from judicial interference.\(^5\) 

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46. *Id.* at 250 n.8.
47. *Id.* at 264-65.
52. The detailed prescription [in the LMRA] of a procedure for restraint of speci-
ognized that Congress intended to protect the use of certain means of self-help although it did not expressly provide for such protection by statute.

The Court explicitly recognized a union’s right to engage in economic self-help activity in support of its collective bargaining demands, even though such activity is not expressly protected by the NLRA, in *NLRB v. Insurance Agents’ International Union.* In *Insurance Agents,* the union commenced a number of tactics designed to harass the employer during negotiations for a new contract. The employer filed a grievance under Section 8(b)(3) charging that the union refused to bargain. The NLRB ordered the union to cease and desist.

The Supreme Court reversed the Board. It held that the NLRB is not empowered to regulate the economic self-help methods that a union might seek to undertake where such tactics are not expressly prohibited by the NLRA. The Court concluded by observing that the national labor policy does not contain a charter for the NLRB to “act at large in equalizing disparities of bargaining power between employer and union.”

Fied types of picketing would seem to imply that other picketing is to be free of other methods and sources of restraint. For the policy of the National Labor Management Relations Act is not to condemn all picketing but only that ascertained by its prescribed processes to fall within its prohibitions. Otherwise, it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing. 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.

*Garner,* 346 U.S. at 499-500.


54. These tactics included refusals to solicit new business, reporting late for work, leaving at noon as a group and engaging in “sit-in mornings” and “doing what comes naturally.” *Id.* at 480-81.

55. Section 8(b)(3) provides that it shall be an unfair labor practice for a labor organization “to refuse to bargain collectively with an employer.” 29 U.S.C. § 158(b)(3) (1982).


58. *Insurance Agents,* 361 U.S. at 498-99. The Court reasoned that if the NLRB could declare that certain forms of economic pressure constitute bad faith bargaining, the Board in the guise of determining good or bad faith in negotiations could regulate what economic weapons a party might summon to its aid. And if the Board could regulate the choice of economic weapons that may be used as part of collection bargaining, it would be in a position to exercise considerable influence upon the substantive terms on which the parties contract.

*Id.* at 490. The Court did not, however, decide whether or not the union’s tactics were protected under the NLRA. *Id.* at 483 n.6.

59. *Id.*
In *Teamsters, Local 20 v. Morton*, an employer sued a union for damages suffered as the result of the union's secondary activities directed at the employer's suppliers and customers during a strike. The federal district court awarded the employer damages, pursuant to section 303 of the LMRA based on a finding that the union had encouraged employees of a supplier and a customer to force their employers to cease doing business with the struck employer. As a result of the union's appeal to another of the employer's customers, the court also awarded damages under Ohio common law that prohibited "making direct appeals to a struck employer's customers or suppliers to stop doing business with the struck employer." Thus, Ohio law banned appeals to a struck employer's customers and suppliers themselves, while the NLRA prohibits only appeals to employees of such customers and suppliers.

The Supreme Court in *Morton* ruled that the district court's award of damages pursuant to Ohio common law was invalid under the pre-emption doctrine. It found Congress' decision to proscribe only appeals to employees of secondary employers an indication of its intention to leave the remainder of the field of secondary activity open and available to unions. The Court thus concluded that while

60. 377 U.S. 252 (1964).
62. Section 303 of the LMRA, 29 U.S.C. § 187 (1982) provides a damage remedy to anyone injured as the result of a union's secondary boycott activity that is prohibited by § 8(b)(4) of the NLRA. Section 8(b)(4) provides in relevant part that it shall be an unfair labor practice for a labor organization or its agents

(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or

(ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person.

64. Id. at 656, 661.
66. The Court stated:

This weapon of self-help, permitted by federal law, formed an integral part of the petitioner's effort to achieve its bargaining goals during negotiations. Allowing its use is a part of the balance struck by Congress between the conflicting interests of the union, the employees, the employer and the community. If the Ohio law of secondary boycott can be applied to proscribe the same type of conduct which
choosing to proscribe only some forms of secondary activity, Congress nonetheless had occupied the entire field and had closed it to state regulation.

The Court synthesized many of these cases, and formally established a second theory of labor law preemption, in Lodge 76, International Association of Machinists & Aerospace Workers v. Wisconsin Employment Relations Commission ("Machinists"). In Machinists, after the expiration of the collective bargaining agreement, the employer unilaterally implemented its proposal for a forty-hour workweek and an eight-hour day. The union responded by adopting a resolution requiring all members to refuse to work overtime, defined as work in excess of seven and one-half hours per day or thirty-seven and one-half hours per week. The employer filed a section 8(b)(3) charge against the union, which was dismissed by the Regional Director on the authority of Insurance Agents. The employer then filed a complaint with the Wisconsin Employment Relations Commission, charging that the refusal to work overtime was an unfair labor practice under state law. The Commission denied the union's motion to dismiss on pre-emption grounds, maintaining that the concerted refusal to work overtime was neither arguably protected by section 7 nor arguably prohibited under section 8, and thus was not preempted.

The Supreme Court reversed, interpreting the state's action not as "filling a regulatory void" left by Congress, but as interference in the substantive aspects of the collective bargaining process that Congress had not intended to permit.

Congress focused upon but did not proscribe when it enacted § 303, the inevitable result would be to frustrate the congressional determination to leave this weapon of self-help available, and to upset the balance of power between labor and management expressed in our national labor policy. 

Id. at 259-60.

68. See supra note 55.
69. 361 U.S. 477.
70. Machinists, 427 U.S. at 135.
71. Id. at 136.
72. The employer in this case invoked the Wisconsin law because it was unable to overcome the Union tactic with its own economic self-help means. Although it did employ economic weapons putting pressure on the Union when it terminated the previous agreement . . . it apparently lacked sufficient economic strength to secure its bargaining demands under "the balance of power between labor and management expressed in our national labor policy." But the economic weakness of the affected party cannot justify state aid contrary to federal law for, as we have developed, "the use of economic pressure by the parties to a labor dispute is not a grudging exception [under] . . . the [federal] Act; it is part and parcel of the process of
Briggs & Stratton was specifically overruled by Machinists. By so doing, the Court formally acknowledged that action by any governmental authority, including state and federal courts and the NLRB, will be pre-empted if it regulates the choice of economic weapons that may be used in the course of collective bargaining. Thus, economic self-help activity need not specifically be protected under section 7 of the NLRA, nor already prohibited under section 8, to be protected from state regulation.

An important distinction exists between these two categories of protection, however. Section 7 protects employees from employer re-prisals for engaging in activity which the NLRB and the courts have deemed to have been covered by Congress in enacting section 7. The Machinists theory of pre-emption, by contrast, only protects such activity against attempts by the states or other governmental authorities to regulate or prohibit it; it does not protect employees themselves from the consequences of their undertaking such activity. Therefore, an employer's right to discharge or discipline employees for engaging in sit-down strikes, or disloyal activities, for example, remains unaffected by the doctrine of pre-emption.

The Machinists theory of pre-emption was again at issue in New York Telephone Co. v. New York State Department of Labor, in which some members of the Court unsuccessfully sought to modify that theory. New York Telephone involved a pre-emption claim against a New York law that authorized payment of unemployment insurance benefits to strikers. Since these benefits were

collective bargaining.

Id. at 148-49 (footnotes and citations omitted).

74. Machinists, 427 U.S. at 154.
75. Id. at 153-54.
76. The right to engage in economic self-help activity similarly is protected against state encroachment under the Railway Labor Act (RLA). For example, in Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369 (1969), the Court ruled that state courts cannot enjoin economic self-help activity, including secondary boycotts, even though the RLA does not delineate which kinds of economic self-help are to be allowed and which are to be barred.
77. See, e.g., NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963) (right to strike); NLRB v. Teamsters, Local 639, 362 U.S. 274 (1960) (right to form and join labor organization); NLRB v. Interboro Contractors, 388 F.2d 495 (2d Cir. 1967) (right to refuse unsafe work).
81. Section 592(1) of the New York Labor Law provides that a person unemployed because of a "strike, lockout, or other industrial controversy in the establishment in which he
financed largely through employer contributions, struck employers found themselves providing funding for their opposition.

While the Court upheld the New York law, there was no majority opinion and members of the Court differed sharply over the reasons for validating the law and the meaning of the Machinists theory. A plurality of the Court, consisting of Justices Stevens, White and Rehnquist, first recognized that the New York law had altered the economic balance between labor and management. The plurality distinguished the New York law from those laws applied in Morton and Machinists, asserting that the New York law had been designed to distribute benefits to certain members of the society, not to regulate private conduct in the field of labor relations. Moreover, the plurality found that the enactment of the NLRA in 1935 expressed no congressional intent to deny to the states the power to provide unemployment benefits to strikers. The Court noted that the Social Security Act, also enacted in 1935, provides that states may not deny compensation to an otherwise qualified applicant because he has refused to work as a strikebreaker, and that, in considering the Social Security Act, Congress rejected suggestions by certain citizens and business groups that states be prohibited from providing unemployment compensation benefits to strikers.

The New York Telephone plurality sought to modify the Machinists theory of pre-emption in two critical respects. First, according to Machinists, states are presumed to be prohibited from regulating self-help activity even though such activity is not specifically protected under section 7 of the NLRA. This presumption may be rebutted only by an express Congressional purpose to allow state

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82. Id. at §§ 570(1), 581.
83. 440 U.S. 531-32.
84. Id. at 532.
87. 440 U.S. at 543 n.41. The Court also noted that on two previous occasions Congress had considered and rejected amendments to existing laws that would have denied unemployment benefits to strikers. In 1947, the House version of the LMRA would have denied § 7 rights to any striker who accepted unemployment compensation benefits. The Senate rejected this provision and it was deleted by the Conference Committee. In 1969, the Nixon Administration proposed an amendment to the Social Security Act to exclude strikers from unemployment compensation eligibility. Congress also rejected this proposal. Id. at n.44.
regulation. Thus, for example, in the Fair Labor Standards Act, while Congress has established minimum wages and a maximum workweek to apply nationwide, it also has explicitly provided that states may set minimum wages higher than the federal minimum or a maximum workweek lower than the federal maximum. Similarly, in *Malone v. White Motor Corp.*, the Court upheld state pension regulations because it found that Congress, prior to enacting the Employee Retirement Income Security Act, had expressly recognized and preserved state authority to regulate pension plans.

The *New York Telephone* plurality, however, sought to shift the *Machinists* presumption of pre-emption that is to be inferred from Congressional silence in the area of economic self-help activity. The plurality held that Congress’ silence on the issue of payments to strikers implies that it intended that states be free to authorize or prohibit such payments, even where such payments may alter the economic balance between labor and management.

The remaining Justices (a majority of the Court) declined to adopt the plurality’s approach in *New York Telephone*. Justices Blackmun and Marshall, joined by Justice Brennan, concurred in the result, finding that New York’s law was valid. They expressly refused to alter the *Machinists* principle that state regulation of economic self-help activity is pre-empted unless Congress expressly intends to allow such regulation. The concurring Justices upheld the

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89. *Id.* at 254.
95. [T]here 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. *Far from the compelling congressional direction on which pre-emption in this case would have to be predicated*, the silence of Congress in 1935 actually supports the contrary inference that Congress intended to allow the states to make this policy determination for themselves.

96. *Id.* at 547-51. (Blackmun, J., concurring).
97. Justice Blackmun wrote:

    This requirement that petitioners must demonstrate “compelling congressional direction” in order to establish pre-emption is not, I believe, consistent with the pre-emption principles laid down in *Machinists* . . . . I believe *Machinists* compels the conclusion that Congress intended to pre-empt such state activity, unless there is
New York law, however, because they found sufficient evidence in the legislative history of Congress’ intent to allow states to provide unemployment compensation to strikers.\(^9\) Dissenting Justices Powell and Stewart and Chief Justice Burger likewise refused to break from the *Machinists* rule, and voted to invalidate the New York law because they found insufficient evidence of Congress’ intent to allow states to pay unemployment compensation benefits to strikers.\(^9\)

The *New York Telephone* plurality additionally attempted, again unsuccessfully, to import an intent requirement into the *Machinists* test. It found New York’s law to be one of “general applicability” designed to ensure employment security.\(^{100}\) The unemployment compensation law, according to the plurality, was valid because it was not *intended* to regulate bargaining relationships between management and labor.\(^{101}\)

The remainder of the Court rejected this analysis, however. Justice Blackmun wrote that “[t]he crucial inquiry is whether the exercise of state authority ‘frustrate[s] effective implementation of the Act’s processes,’ not whether the State’s purpose was to confer a benefit on a class of citizens.”\(^{102}\) The dissenting Justices agreed, stating, “The Court has recognized . . . that preemption must turn not on the generality of purpose or applicability of a state law but on the *effect* of that law when applied in the context of labor-management relations.”\(^{103}\)

Thus, a majority of the Court rejected the plurality’s attempt to modify the *Machinists* doctrine, *Machinists* survived *New York Telephone* and its principles remain good law.\(^{104}\) State regulation of

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8. *Id.* at 548-49 (emphasis added in first paragraph).
9. *Id.* at 549.
10. *Id.* at 560-67 (Powell, J., dissenting).
11. *Id.* at 533.
12. *Id.* at 550 (Blackmun, J., concurring).
13. *Id.* at 558 (Powell, J., dissenting) (emphasis added).
14. The Court has addressed the *Machinists* doctrine in two cases subsequent to *New York Telephone*. In Belknap, Inc. v. Hale, 463 U.S. 491 (1983), the Court held that *Machinists* did not bar suits for misrepresentation and breach of contract by striker replacements who were promised permanent employment but were subsequently laid off to make way for rein-
the use of economic self-help methods is presumed to be pre-empted absent express Congressional intent to the contrary, and a state law’s effect on labor relations, rather than its intended purpose, is controlling.

III. PRE-EMPTION AND THE EMPLOYER’S RIGHT TO ECONOMIC SELF-HELP

Most pre-emption cases have involved attempts by states to restrict unions’ ability to engage in economic self-help. The decisions repeatedly have verified the rights of unions and employees to exert economic pressure on employers in support of their collective bargaining objectives.\(^{106}\) It is clear, however, that employers enjoy a corresponding right to engage in economic self-help. As the Court in Machinists illustrated:

resort to economic weapons should more peaceful measures not avail is the right of the employer as well as the employee and the State may not prohibit the use of such weapons or “add to an employer’s federal legal obligations in collective bargaining” any more than in the case of employees.\(^{106}\)

A variety of economic self-help methods are available to an employer, including unilateral implementation of its final offer upon impasse,\(^{107}\) an offensive lockout,\(^{108}\) and subcontracting of bargaining unit work.\(^{109}\)

Perhaps the most potent method of self-help available to an employer in the course of an economic strike is permanent replacement of strikers.\(^{110}\) This right was affirmed early in the history of the

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\(^{105}\) E.g., Morton, 377 U.S. at 252; Garner, 346 U.S. at 485.

\(^{106}\) 427 U.S. at 147 (citations omitted).


\(^{109}\) E.g., NLRB v. King Radio Corp., 416 F.2d 569 (10th Cir. 1969); Puerto Rico Tel. Co. v. NLRB, 359 F.2d 983 (1st Cir. 1966).

\(^{110}\) The right to permanently replace striking employees exists only in an economic, as opposed to an unfair labor practice, strike. In the latter case, strikers must be reinstated imme-
NLRA, in *NLRB v. Mackay Radio & Telegraph Co.* In *Mackay,* a struck employer brought in replacements from its branches in other cities. When the strikers offered to return to work, the employer refused to displace those replacements it hired to fill the strikers' jobs. The employer based its choice of those employees who would not be reinstated, however, upon those employees' union activities. The NLRB found that the employer had violated Sections 8(1) and 8(3) of the NLRA.

The Supreme Court affirmed the Board's finding that the employer had unlawfully discriminated against those strikers it refused to reinstate solely because they had been active in the union. The Court denied, however, that it was an unfair labor practice to replace the striking employees in order to carry on the business. The right to permanently replace economic strikers has been recognized repeatedly by courts throughout the history of the NLRA, and was reaffirmed recently by the Supreme Court in *Belknap, Inc. v. Hale.*

Moreover, the NLRB rule in *Hot Shoppes, Inc.* that an employer's motive for hiring permanent replacements is immaterial, absent evidence of some independent unlawful purpose. The Board reversed the trial examiner, who had found that the employer, in hiring replacements, acted pursuant to a "contrived scheme" to de-

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111. 304 U.S. 333 (1938).
112. Now §§ 8(a)(1) and 8(a)(3). See supra note 36.
114. Id. at 346.
115. Although section 13 [of the act, 29 U.S.C.A. § 163] provides, "nothing in this Act [chapter] shall be construed so as to interfere with or impede or diminish in any way the right to strike," it does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them. The assurance by respondent to those who accepted employment during the strike that if they so desired their places might be permanent was not an unfair labor practice nor was it such to reinstate only so many of the strikers as there were vacant places to be filled. *Id.* at 345-46 (footnote omitted).
117. 463 U.S. 491 (1983). The Court explained that the refusal to fire permanent replacements because of commitments made to them in the course of an economic strike satisfies the requirements of *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 380 (1967), that the employer have a "legitimate and substantial justification" for his refusal to reinstate strikers. 463 U.S. at 504 n.8.
feat the strikers' rights to reinstatement. The Board declared: "We . . . disagree with the trial examiner's premise that an employer may replace economic strikers only if it is shown that he acted to preserve efficient operation of his business." Thus, a struck employer need not show that each striker replacement hired is essential to maintaining continued business operations. In addition to hiring replacements for primary strikers, employers may likewise replace sympathy strikers where the primary strike is economic in nature.

Employers also have other rights with respect to hiring striker replacements. An employer may train striker replacements in anticipation of a strike so long as the trainees do not actually perform bargaining unit work and the training program does not interfere with normal operations. In addition, where necessary to attract a sufficient number of replacements, an employer may offer compensation at rates higher than those contained in the applicable collective bargaining agreement.

IV. APPLICATIONS OF THE PRE-EMPTION DOCTRINE TO STATE ANTI-STRIKEBREAKER LAWS

The issue of the validity of anti-strikebreaker laws under the pre-emption doctrine has been litigated thus far in four states: New

119. Id. at 805, 55 L.R.R.M. (BNA) at 1420.
120. Id.
121. The rights of airline and railroad employers subject to the Railway Labor Act may be more limited in this respect. In Empresa Ecuatoriana de Aviacion v. District Lodge No. 100, 690 F.2d 838 (11th Cir. 1982), the court ruled that an RLA carrier may permanently replace only so many employees as are necessary to continue operations and the federal district court, in exercising its equitable power, may determine the propriety of each replacement. Id. at 846, Accord National Airlines v. International Ass'n of Machinists (National Airlines I), 430 F.2d 957 (5th Cir. 1970). Courts do not impose the NLRA on replacement of strikers "wholesale into the railway labor arena," because the RLA is "more concerned with the continuance of the employer's operations and the employer-employee relationship" than is the NLRA. National Airlines v. International Ass'n of Machinists (National Airlines II), 416 F.2d 998, 1004 (5th Cir. 1969).
122. E.g., NLRB v. Southern Greyhound Lines, 426 F.2d 1299 (5th Cir. 1970). By contrast, employees who strike in sympathy with an unfair labor practice strike are entitled to reinstatement at the conclusion of the strike. NLRB v. C.K. Smith & Co., 569 F.2d 162 (1st Cir. 1977).
123. Teamsters v. World Airways, 99 Lab. Cas. (CCH) ¶ 10,600 (N.D. Cal. 1982). See also San Diego Newspaper Guild v. NLRB, 548 F.2d 863 (9th Cir. 1977) (striker replacement trainees were not part of bargaining unit and employer was not obligated to provide their names to union). Cf. Illinois Cent. R.R. v. Brotherhood of Locomotive Eng'rs, 422 F.2d 593 (7th Cir. 1970) (pre-strike training program unlawful where trainees rode in cars of operating locomotives and regular engineers were required to turn the controls over to the trainees and threatened with discharge if they refused to do so).
New Jersey's anti-strikebreaker statute prohibits importing into the state any person to replace striking employees or those who have been locked out. The statute also prohibits the recruitment, within the state, of striker replacements, and restricts employment agencies from referring applicants to employers whose employees are involved in a strike or lockout. The statute also prohibits the importation into the state of any person who is to be employed in order to interfere by force, violence, threats, coercion or intimidation with lawful picketing, or to coerce, intimidate, or interfere by force, violence or threats with the right of employees to form, join or assist a union or engage in collective bargaining.

The United States Chamber of Commerce and the New Jersey Chamber of Commerce brought suit in 1980 for a judgment declaring those sections of the New Jersey statute which prohibit the im-
portation, and the referral by employment agents of striker replacements to be unconstitutional. The principal basis for challenging these provisions was the pre-emption doctrine, although challenges to the state laws were additionally brought under the due process, equal protection, commerce, and privileges and immunities clauses of the U.S. Constitution. The trial court declared that those sections of the statute which prohibit employer importation of striker replacements and third-party recruitment of such replacements were indeed pre-empted as to those employers and employees covered by the NLRA. Even those sections which addressed the use of force and violence could not withstand Constitutional attack. The court held that the statutory scheme was not a valid exercise of the state’s police powers.

The New Jersey Supreme Court, taking the case on direct certification to the trial court, affirmed on the issue of pre-emption. The court applied the theory of pre-emption developed in Morton and Machinists in invalidating the law. The court found that the state anti-strikebreaker law was “directed specifically at labor-

135. N.J. STAT. ANN. § 34:13C-1 (c) (West 1965).
136. Id. at § 34:13C-2.
137. Id. at § 34:13C-3.
139. “[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . .” U.S. CONST. amend. XIV, § 1.
140. “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.
142. “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. . .” U.S. CONST. amend., XIV. § 1.
143. 104 L.R.R.M. (BNA) at 2751.
144. Id.
146. See supra text accompanying notes 60-66.
147. See supra text accompanying notes 67-79.
148. The statute involved in this case is directly related to the balance of economic power between labor and management. The right to hire replacements for striking workers is an economic weapon that can play a significant role in the collective bargaining process. If available, it strengthens the employer’s position. If unavailable, the union’s bargaining position would be enhanced. The irresistible conclusion under the Morton rationale is that the federal framework structuring the economic balance between employer and union has pre-empted state action that would interfere with, modify, or alter an employer’s right to hire replacements for striking employees.

management relations, rather than at a general matter of local concern, such as trespass or nuisance." As such, the court noted, the law contravened the "labor-management economic balance established by the federal Act." The New Jersey Supreme Court also found to be pre-empted those provisions of New Jersey's anti-strikebreaker law covering parties other than employers who were governed by the NLRA. Thus, New Jersey's anti-strikebreaker law was held to be preempted as it applied to employment agencies and similar organizations.

Finally, the court refused to perform "judicial surgery" in order to construe the anti-strikebreaker law as valid only when applied to situations involving force or violence. The court was unable to discern whether the legislature would have enacted so limited a bill. It reasoned that to apply the statute only in cases involving force or violence would be impractical, since in many cases strike violence does not occur until after the employer has hired replacements and such replacements have attempted to cross the picket line. The court however, was willing to apply such a limitation to those employers and employees not covered by the NLRA, noting that in-

149. Id. at 149, 445 A.2d at 362.
150. Id.
152. Noting that such third parties would be acting on behalf of, or in support of an employer, the court explained:
This regulation directly affects management practices and is aimed at their control.
The methods an employer sees fit to use in obtaining replacements are part and parcel of his federal right. The primary effect could be to make replacement virtually impossible for some employers, such as those who had to obtain highly skilled workers of which there was an insufficient number available in a single area.
89 N.J. at 150, 445 A.2d at 362-63.
153. State employment services, the court pointed out, are still barred from referring individuals to employers to serve as striker replacements because state employment services subject to the federal Wagner-Peyser Act, are bound to observe rules and regulations promulgated by the Secretary of Labor. 29 U.S.C. § 49 (1982). One such regulation promulgated by the Secretary prohibits state employment agencies from making a job referral which will aid directly or indirectly in the filling of a job opening which is vacant because the former occupant is on strike, or is being locked out in the course of a labor dispute, or the filling of which is otherwise an issue in a labor dispute involving a work stoppage.
20 C.F.R. 652.9(a) (1982).
155. Certain employees are excluded from coverage of the NLRA: agricultural laborers, domestic servants, independent contractors and supervisory employees. 29 U.S.C. § 152(3) (1982). Moreover, the NLRB has the authority to decline jurisdiction over labor disputes where the effect on commerce is not substantial. 29 U.S.C. § 164(c)(1) (1982). For example, the NLRB presently exercises jurisdiction only over employers engaged in retail sales having annual gross volume in excess of $500,000. Carolina Supplies Cement Co., 122 N.L.R.B. 88,
dications were strong that the legislature would have enacted such a limited provision with respect to such individuals.\textsuperscript{156}

In summary, the New Jersey Supreme Court’s treatment of the pre-emption issue\textsuperscript{157} indicated that an anti-strikebreaker statute which directly affects the balance of economic power between labor and management is pre-empted, in spite of the fact that it may also advance local interests. The New Jersey court thus considered the \textit{Machinists} theory to have been left untouched by \textit{New York Telephone}. Moreover, the New Jersey Court’s pre-emption ruling prevents enforcement of anti-strikebreaker laws against private employment agencies and other third parties who provide striker replacements to struck employers, by equating third party recruitment of replacements to recruitment by the struck employer itself.

\section*{B. Michigan}

The Michigan Strikebreaker Act proscribes a variety of conduct relating to the recruitment and employment of striker replacements. It prohibits a struck employer from knowingly employing as a striker replacement any person who “customarily and repeatedly” offers himself for hire as a striker replacement.\textsuperscript{158} It also restrains a person who “customarily and repeatedly” works as a striker replacement from replacing employees involved in a strike or lockout.\textsuperscript{159} The law

\begin{itemize}
\item \textsuperscript{156} 89 N.J. at 154, 445 A.2d at 365.
\item \textsuperscript{157} The court additionally ruled that New Jersey’s anti-strikebreaker law was valid under the due process clause, since it bore “a rational relationship to a constitutionally permissible objective” (i.e., the desire to modify the power balance between management and labor), \textit{Id.} at 155, 445 A.2d at 365-67, and valid under the equal protection clause, since it was not “palpably arbitrary or capricious” or completely lacking any rational basis. \textit{Id.} at 159, 445 A.2d at 367-68. The court held, however, that the anti-strikebreaker provision violated the commerce clause, since on its face it discriminated against interstate commerce by a prohibition against supplying any person from without the state to a prospective employer within the state. \textit{Id.} at 161, 445 A.2d at 368-70.
\item \textsuperscript{158} \texttt{MICH. COMP. LAWS ANN. § 423.251} (West 1978) provides:
No person, partnership, firm or corporation, or officer or agent thereof, involved in a strike or lockout shall knowingly employ in place of an employee involved in the strike or lockout any person who customarily and repeatedly offers himself for employment in the place of employees involved in a strike or lockout.
\textit{Id.}
\item \textsuperscript{159} \texttt{MICH. COMP. LAWS ANN. § 423.252} (West 1978) provides: "No person who customarily and repeatedly offers himself for employment in place of employees involved in a strike or lockout shall take or offer to take the place in employment of employees involved in a strike or lockout."
prohibits the importation of any striker replacement into the state, and requires that all advertisements for new employees announce the existence of the strike or lockout. A firm or organization who violates the Act is subject to misdemeanor penalties.

Michigan's Strikebreaker Act has been invalidated on pre-emption grounds by two different courts. In UAW v. C.M. Smillie Co., a union brought suit to enjoin an employer from advertising for striker replacements in Detroit newspapers without providing sufficient notice of the existence of a strike, in violation of Section 3(a) of the Act. The trial court granted summary judgment to the employer on the ground that that provision was pre-empted by the NLRA.

Citing Morton and Machinists, the Michigan Court of Appeals affirmed. The court also considered the “state interest” exception to the pre-emption rule under the Garmon test and considered whether the regulated activity touches interests deeply rooted in local feeling and responsibility. The court perceived “no state interest that would overcome the presumption of pre-emption.”

It

No person, partnership, firm or corporation, or officer or agent thereof, involved in a lawful strike or lockout shall hire and import or contract or arrange with any other person, partnership, agency, firm or corporation to hire and import from another state or country, for the purpose of strikebreaking, persons for employment in place of employees involved in the strike or lockout.

Id.

No person, partnership, agency, firm or corporation, or officer or agent thereof, shall recruit, solicit or advertise for employees, or refer persons to employment, in place of employees involved in a lawful strike or lockout, without adequate notice to the person, and in the advertisement, that there is a strike or lockout at the place at which employment is offered and that the employment offered is in place of employees involved in the strike or lockout.

Id.

164. 362 N.W.2d at 781.
165. See supra text accompanying notes 60-79.
166. 362 N.W.2d at 782-83. The Court held:
[w]e believe that advertising for strike replacements cannot realistically be separated from the employer’s right to hire replacements, which indisputably is “part and parcel of the process of collective bargaining” that Congress intended to be governed by the free play of economic forces . . . [R]egulation of advertising directly affects the employer’s success in hiring replacements.
362 N.W.2d at 782.
168. 362 N.W.2d at 782-83.
noted that the Strikebreaker Act "cannot be construed as a general truth-in-advertising act which is designed to protect people from misleading advertisement schemes." The court reasoned that a finding that the Strikebreaker Act is pre-empted would not deny to employees who had been misled any of the generally applicable remedies for fraud or misrepresentation. Moreover, the court rejected the argument that the notice provision was necessary to prevent violence. It noted that if preventing violence was the aim of the notice requirement, the requirement would apply to all strikes, not just "lawful" ones. The court concluded that the notice provision was pre-empted as it applied to employers governed by the NLRA.

In Michigan Chamber of Commerce v. State, the Michigan Chamber of Commerce sought a declaratory judgment that the entire Michigan Strikebreaker Act was unconstitutional, primarily on the ground of federal pre-emption. The state argued that pre-emption was not appropriate since the Strikebreaker Act covered only "professional strikebreakers." The court rejected this distinction, however, finding that even a limitation on the application of the act to "professional strikebreakers" is "an unacceptable impairment of the employer/employee balance struck by Congress. It impinges on the employer's recognized right to hire replacements for striking or locked out workers." The court continued that "the reasoning in Morton prevents any encumbrances from being put on the employer's acknowledged right to hire replacements for strikers."

The Michigan Chamber of Commerce court also rejected the argument that the Michigan Strikebreaker Act was intended to prevent violence. The court was able to find "no reason why this Act, as written would prevent any violence," and maintained that the mere assumption that the hiring of "professional strikebreakers" would

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169. Id. at 783.
170. Id.
171. Id.
172. Id. The court declined to address the claims by an intervening defendant that the entire Strikebreaker Act was pre-empted, because the broader issue was not before the court on appeal. Id. at 783 n.6.
174. The Chamber of Commerce also sought to invalidate the Strikebreaker Act on the ground that it violated the commerce clause and the privileges and immunities clause of the United States Constitution, and the equal protection and due process clauses of the Michigan Constitution. Id. at 2888. The court did not address these claims.
175. Id. at 2889. See also MICH. COMP. LAWS ANN. § 423.252 (West 1978).
176. 115 L.R.R.M. (BNA) at 2889.
177. Id.
precipitate violence is insufficient to warrant a pre-emption exemp-
tion.\textsuperscript{178} Thus, the court ruled that the entire Michigan Strikebreaker Act is pre-empted.\textsuperscript{179}

These two Michigan cases illustrate that regulation short of out-
right prohibition, such as notice requirements in advertisements for striker replacements, is no less vulnerable to pre-emption attacks. Nor, as the court in \textit{Michigan Chamber of Commerce} held, will the fact that a statute is directed only at “professional strikebreakers” vindicate such a law in the face of a pre-emption claim.

\textbf{C. Illinois}

Illinois’ strike notice law requires that any employer advertise-
ment for striker replacements state in such advertisement that a strike or lockout is in progress at the employer’s place of business.\textsuperscript{180} In 1975 the Illinois Supreme Court held this law to be pre-empted, affirming a lower court dismissal of a complaint brought against an employer for violation of the statute.\textsuperscript{181} The court recognized that the Illinois General Assembly might have enacted the statute to pro-
tect the public peace and order and avoid violence.\textsuperscript{182} It also noted that a “truth in advertising” principle could have motivated the legis-
lature.\textsuperscript{183} Nonetheless, the court, which found the statute inapplicable to the general public and operative solely during “acute” labor disputes, held the statute to be void because it infringes on labor activity which should be unrestrained.\textsuperscript{184}

\begin{itemize}
\item \textsuperscript{178} \textit{Id.}
\item \textsuperscript{179} \textit{Id.}
\item \textsuperscript{180} The law provides:
\begin{quote}
No employer shall advertise seeking to hire employees to replace employees on strike or locked out during any period when a strike or lockout is in progress, which strike or lockout has arisen out of a dispute between the management of the business and persons employed by such management at the time of such dispute who strike or are locked out as the result of failure in settling such dispute, unless it shall be stated in such advertisement that a strike or lockout is in progress at such place of business.
\end{quote}
\end{itemize}


\begin{itemize}
\item \textsuperscript{181} \textbf{People v. Federal Tool and Plastics}, 62 Ill. 2d 549, 344 N.E.2d 1 (1975).
\item Citing \textbf{Morton}, the court explained that an employer’s right to hire striker replacements constitutes an important economic weapon left to the employer by Congress when it struck the balance of power between labor and management. The statute requires that notice that a strike is in progress be included in any advertisement for employ-
es, and thus encumbers the employer’s right to hire employees with a requirement that he publicize the existence of the strike.
\end{itemize}

\begin{itemize}
\item \textsuperscript{182} 344 N.E.2d at 4.
\item \textsuperscript{183} \textit{Id.}
\item \textsuperscript{184} \textit{Id. at 5.}
\end{itemize}
Illinois also has enacted a statute prohibiting the employment of “professional strikebreakers.” The Act both restricts employers from hiring such “professional strikebreakers” during a strike, and prohibits a “professional strikebreaker” from replacing a striker.

In 1982 the Archer Daniels Midland Co. of Peoria, Illinois hired non-union contractors to replace striking employees of union contractors. The state’s attorney filed suit against Archer Daniels Midland in Illinois state court, claiming the company’s action violated the Strikebreakers Act. The state’s attorney then sought a declaratory judgment in federal district court that the statute withstood pre-emption. The NLRB intervened as a defendant and moved for summary judgment on the issue of pre-emption, which the court granted. Citing People v. Federal Tool and Plastics, but without extensive further analysis, the court ruled that the anti-strikebreaker law was pre-empted because federal law delegated regulation of the conditions for replacement of strikers or locked out employees to the NLRB.

The Seventh Circuit vacated the district court's judgment, holding that the lower court lacked subject-matter jurisdiction to issue a declaratory judgment on the validity of the Illinois law, but did not address the merits of the preemption question.

D. Louisiana

Louisiana’s anti-strikebreaker law has three principal aspects. It prohibits the importation into the state of any person who is employed for the purpose of interfering by force or threats with peaceful picketing or employees' exercise of their other rights under the labor laws. It proscribes recruitment of striker replacements by

185. A “professional strikebreaker” is defined in the Illinois Strikebreakers Act as any person “who repeatedly and habitually offers himself for employment on a temporary basis where a lockout or strike exists.” ILL. ANN. STAT., ch. 48, § 2e (Smith-Hurd 1969).

186. ILL. ANN. STAT., ch. 48, § 2f (Smith-Hurd 1969) provides: “No person shall knowingly employ any professional strikebreaker in the place of an employee during any period when a lockout or strike is in progress. Nor shall any professional strikebreaker take or offer to take the place of employees involved in a lockout or strike.”


188. Id. at 3321-22 (citing People v. Federal Tool & Plastics, 61 Ill. 2d 549, 344 N.E.2d 1 (1975)). The court specified, however, that its decision did not apply to situations beyond the jurisdiction of the NLRB. Id. at 3322 n.2.

189. People v. Archer Daniels Midland Co., 704 F.2d 935 (7th Cir. 1983).

190. LA. REV. STAT. ANN. § 23:898 (West 1985) provides:

It is unlawful to transport or cause to be transported from without the State of Louisiana into this state any person who is employed or is to be employed for the purpose of obstructing or interfering by force or threats with
third parties not directly involved in a labor dispute, and it prohibits the importation into the state of any person for the purpose of replacing a striking employee.

Several employers, who were served with subpoenas by the Louisiana Department of Labor during investigations into employment of striker replacements, sought an injunction against the investigations. The trial court found the second and third aspects of Louisiana's anti-strikebreaker law to be pre-empted by the federal labor laws, but held that its first aspect was a permissible exercise of state jurisdiction. On appeal, the Louisiana Attorney General conceded the unconstitutionality of the Louisiana statutes' prohibition on the recruitment and importation of striker replacements. However, he did defend the statute's proscription against the importation of persons into the state for the purpose of interfering with picketing or other lawful activity.

The Louisiana Court of Appeals affirmed the trial court and upheld the validity of that statute. It agreed with the trial judge's determination that the statute fit squarely within the local interest exception to the federal doctrine of pre-emption. The court also

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(1) Peaceful picketing by employees during any labor controversy affecting wages, hours, or conditions of labor; or
(2) The exercise by employees of any of the rights of self-organization or collective bargaining.

Id.

191. LA. REV. STAT. ANN. § 23:901A (West 1985) provides:
It shall be unlawful for any person, firm or corporation, not directly involved in a labor strike or lockout, to hire or recruit for employment any person, or to secure or offer to secure for any person any employment, when the purpose or effect of such hiring, recruiting, securing, or offering to secure employment, is to have such person or another person take the place in employment of the striking employee in a business or industry where a labor strike or a lockout exists.

Id.

192. LA. REV. STAT. ANN. § 23:902 (West 1985) provides:
It is unlawful for any person, firm or corporation not directly involved in a labor strike or lockout, to import or bring into Louisiana, or to send or transport into Louisiana, or to arrange for or cause such importation or transportation into Louisiana, of any person for the purpose of such person taking the place in employment of the striking employee in a business or industry where a labor strike or a lockout exists.

Id.

196. Warren, 313 So. 2d at 8.
197. The court explained: "[O]n its face, this statute deals with preservation of peace, order and domestic tranquillity. We can perceive no matter more clearly within the concept of an overriding state interest, or, in the Garmon language, more 'deeply rooted in local feeling
rejected the argument that the statute was pre-empted by the Byrnes Act, the federal statute prohibiting the interstate transportation of strikebreakers in order to obstruct, by force or threats, lawful concerted activity.\textsuperscript{198} It noted that while the doctrine of federal labor law pre-emption prohibits state regulation that duplicates federal law, state criminal laws often parallel federal laws.\textsuperscript{199}

V. CURRENT ANTI-STRIKEBREAKER LAWS: AN APPRAISAL

Presently, state anti-strikebreaker laws remain unchallenged in the vast majority of states. In order to consider the validity of these laws in light of the pre-emption doctrine, the \textit{Machinists} theory must be applied. Unlike some means of employee self-help (such as the right to strike) expressly sanctioned by the NLRA, the employer's right to engage in economic self-help has not been granted by the NLRA, but can be said to have existed prior to the enactment of that statute.\textsuperscript{200} Consequently, the \textit{Garmon} theory or pre-emption is not applicable, since state anti-strikebreaker laws do not duplicate or deny any rights expressly granted employers by the NLRA.

In those remaining states in which the constitutionality of the anti-strikebreaker laws has not yet been litigated, anti-strikebreaker statutes nonetheless appear quite vulnerable when subject to the \textit{Machinists} theory of pre-emption. The \textit{Machinists} theory, essentially affirmed by a majority of the Court in \textit{New York Telephone}, has two basic premises: (1) state regulation which affects the balance of power between management and labor is pre-empted unless Congress specifically has manifested a contrary intent; and (2) the mere effect of interference by state regulation upon the exercise of eco-

\textsuperscript{198} The Byrnes Act, provides:

Whoever willfully transports in interstate or foreign commerce any person who is employed or is to be employed for the purpose of obstructing or interfering by force or threats with (1) peaceful picketing by employees during any labor controversy affecting wages, hours, or conditions of labor, or (2) the exercise by employees of any of the rights of self-organization or collective bargaining; or

Whoever is knowingly transported or travels in interstate or foreign commerce for any of the purposes enumerated in this section—

Shall be fined not more than $5,000 or imprisoned not more than two years, or both.

This section shall not apply to common carriers.

\textsuperscript{18} U.S.C. § 1231 (1982).

\textsuperscript{199} \textit{Warren}, 313 So. 2d at 10.

\textsuperscript{200} See \textit{American Ship Bldg. Co. v. NLRB}, 380 U.S. 300, 316 (1965) ("a primary purpose of the National Labor Relations Act was to redress the perceived imbalance of economic power between labor and management, [and] it sought to accomplish that result by conferring certain affirmative rights on employees and by placing certain enumerated restrictions on the activities of employers.") \textit{Id.}. 

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nomic self-help by management and labor will give rise to a presumption of pre-emption, notwithstanding the state’s intent to create a law of “general applicability.”

Current state anti-strikebreaker laws may be grouped into four classifications: (1) those that prohibit the hiring or referral of any striker replacement; (2) those that regulate employment of “professional strikebreakers;” (3) those that regulate advertisements for striker replacements or require advance notice to new hires of the existence of a labor dispute; and (4) those that prohibit recruitment of strikebreakers for the purpose of interfering, by threats or violence, with lawful strike activity.

State laws that impose a blanket ban on the hiring, or referral by third parties, of all striker replacements clearly appear to be pre-empted. Such laws directly interfere with the right of employers, granted by Congress in the federal labor regulatory scheme, to hire replacements for strikers. While restrictions upon third party referrals of striker replacements are not immediately directed at the struck employer, such restrictions, as noted by the New Jersey Supreme Court, affect an employer’s access to a supply of replacement employees, particularly in industries where highly-skilled employees are needed.

State laws that regulate employment of “professional strikebreakers” or individuals who “customarily and repeatedly” act as striker replacements similarly are quite vulnerable to a pre-emption attack. Courts in two states have held such laws to be pre-empted. While the assumption underlying such laws is that employment of “professional strikebreakers” is more likely to lead to violence, a Michigan court, as previously noted, rejected the asserted link between a prohibition of the hiring of “professional strikebreakers” and the prevention of violence. Thus, in order to sustain such a law, a state would have to make a clear showing that the employment of “professional strikebreakers” has in fact lead to violence in the state.

State laws requiring actual notice to potential striker replacements of the existence of a labor dispute likewise have been held pre-empted. Although these laws present a closer question, their invali-
dation appears consistent with the Supreme Court’s present position on pre-emption. Proponents of these laws argue that because the Supreme Court in *Belknap, Inc. v. Hale*\(^{206}\) permitted striker replacements to sue their employers for misrepresentation and breach of contract arising out of the employment relationship,\(^{206}\) states should be free to take the positive step of preventing such mischief by regulating the content of employer communications to replacements.\(^{207}\) The state laws in this category, however, do not merely proscribe misrepresentation or fraud, generally,\(^{208}\) but are directed specifically at employer action in labor disputes. Their immediate effect is to make procurement of replacements in order to continue operating during a strike more difficult for employers. *Belknap* held that an employer may not use the federal labor laws to shelter itself from claims brought under normal common law theories by innocent third parties injured by acts of the employer,\(^{209}\) but nothing in the case suggests that states may impose statutory restrictions upon employers to prevent such claims from arising. The Court in *Belknap*, in fact, reaffirmed the *Machinists* theory of pre-emption without modification.\(^{210}\) *Belknap* thus is of no aid to proponents of such notice provisions.

Moreover, even if such laws were to be considered laws of “general applicability”, it is likely that they still would not survive a pre-emption attack. A majority of Justices in *New York Telephone* rejected the plurality’s attempt to create an exception to the *Machinists* doctrine for laws of “general applicability.”\(^{211}\) Where such laws have a direct impact upon the freedom of labor or management to engage in economic self-help, they should be found to be pre-empted.

\(^{205}\) 463 U.S. 491, 103 S. Ct. 3172 (1983).

\(^{206}\) In *Belknap*, the employer repeatedly promised striker replacements that their employment status was permanent. The employer subsequently was charged with committing various unfair labor practices, and as part of a settlement of the charges with the NLRB, agreed to reinstate all strikers. This necessitated the layoff of the striker replacements, who subsequently sued for breach of contract and misrepresentation. The Supreme Court held that the federal labor laws did not pre-empt the replacements’ state-court lawsuits, reasoning that an employer should not be permitted to shelter itself in the federal labor laws from common law actions brought by innocent striker replacements. *Id.* at 500, 103 S. Ct. at 3177-78.


\(^{209}\) 463 U.S. at 509, 103 S. Ct. at 3177-78.

\(^{210}\) *Id.* at 500, 103 S. Ct. at 3177.

\(^{211}\) *New York Tel. Co. v. New York State Dep’t of Labor*, 440 U.S. 519, 546, (1979) (Brennan, J., concurring); *Id.* at 547 (Blackmun, J., concurring); *Id.* at 551 (Powell, J., dissenting).
Finally, those state laws that on their face prohibit the hiring or importation of strikebreakers for the purpose of interfering, by threats or violence, with lawful strike activity appear to be valid under the pre-emption doctrine.\textsuperscript{212} Such laws fit squarely within the "local interest" exception to the pre-emption doctrine which permits state regulation of violence and disturbances of the peace. Courts have proven reluctant, however, to read state laws that only generally regulate the employment of striker replacements as dealing with the prevention of violence.\textsuperscript{213} A state law must be explicit in its concern with prevention of violence in order to withstand scrutiny under the pre-emption doctrine.

VI. CONCLUSION

The development of the Machinists doctrine, a second doctrine of federal labor law pre-emption, has left many state anti-strikebreaker laws extremely vulnerable to constitutional attack. The trend in the state courts has been to invalidate as pre-empted by the federal labor laws those laws that address the right of a struck employer to hire striker replacements but address the issue of preventing violence in only the most general of terms. This trend may be expected to continue in the future as more constitutional challenges are brought to invalidate these laws.
