Duquesne Law Review

Volume 33 | Number 4 Article 5

1995

NLRA Preemption Put Simply: *Livadas v. Bradshaw*

Kevin J. McKeon

Follow this and additional works at: https://dsc.duq.edu/dlr

 Part of the Law Commons

Recommended Citation
Kevin J. McKeon, *NLRA Preemption Put Simply: Livadas v. Bradshaw*, 33 Duq. L. Rev. 887 (1995).
Available at: https://dsc.duq.edu/dlr/vol33/iss4/5

This Comment is brought to you for free and open access by Duquesne Scholarship Collection. It has been accepted for inclusion in Duquesne Law Review by an authorized editor of Duquesne Scholarship Collection.

Comments

NLRA Preemption Put Simply: *Livadas v. Bradshaw*

INTRODUCTION

During its last term, the United States Supreme Court once again took the opportunity to examine the extent to which state law is preempted by the National Labor Relations Act (the "NLRA" or the "Act")[1] in *Livadas v. Bradshaw*.[2] Contrary to the criticisms mounted by commentators such as National Labor Relations Chairman William B. Gould, IV,[3] to the effect that the current makeup of the Court is somehow politically driven to deprive employees of state-conferred protections,[4] in *Livadas*, a

---

1. 29 U.S.C. §§ 151-168 (1988).

2. 114 S. Ct. 2068 (1994).

3. Chairman Gould was appointed by President Clinton. Carl T. Hall, *Clinton's Choice to Head NLRB*, S.F. CHRON., June 29, 1993, at C1.

4. See text accompanying notes 115-17. Others have criticized the Court on related topics. *See, e.g.*, Herbert N. Bernhardt, *Affirmative Action in Employment: Considering Group Interests While Protecting Individual Rights*, 23 STETSON L. REV. 11, 12 n.5 ("Despite the increasingly conservative membership of the U.S. Supreme Court, employers, under pressure from the U.S. Department of Labor, are moving in the direction of utilizing affirmative action for the higher executive positions where women and minorities have made less of an impact thus far."); Michael K. Braswell et al., *Affirmative Action: An Assessment of its Continuing Role in Employment Discrimination*, 57 ALB. L. REV. 365, 365 (1993) (stating that, "the conservative majority of the U.S. Supreme Court appears to be on a course to limit affirmative action as a component of antidiscrimination policy"); K.G. Jan Pillai, *Affirmative Action: In Search of a National Policy*, 2 TEMP. POL. & CIV. RTS. L. REV. 1, 4-5 (1992) (discussing how the "successive appointment of several conservative Justices by Presidents Ronald Reagan and George Bush," have marked an "intense and divisive political debate over the fairness of affirmative action," which will only be made

unanimous Court in a single opinion by Justice Souter, applied simple and sound preemption jurisprudence to protect state-conferred employee benefits.

What commentators like Chairman Gould neglect in their zeal to slap the current composition of the Rehnquist Court with a conservative label, is that not every Supreme Court opinion is an expression of a political agenda. For example, in *Livadas*, none of the justices even saw the need to clarify their particular position on the political continuum with a concurring opinion.

Preemption doctrine is not the talisman of a conservative Court bent on slashing state-conferred employee benefits and protections that some commentators make it out to be. The folly of this thesis is reflected in *Livadas*. When presented with the opportunity to preempt California Labor Code provisions granting protections to terminated employees and providing penalties against employers for violation of those protections, the Court instead preempted the California Labor Commissioner's policy of refusing to enforce those protections when the terminated employee happened to be covered by a collective bargaining agreement with an arbitration clause.[5]

While law professors and other commentators typically predict the outcome of Supreme Court cases simply by considering the political label of each justice and counting how the votes should fall out with respect to a particular issue, sometimes perhaps the Court just makes a decision based on sound jurisprudence. The point is that this sort of "vote-counting," based on political labels, breeds a kind of cynicism toward the Court which affects not only law students, but lay persons as well. Breeding this excessive entanglement of politics and the judicial function is perhaps the kind of notion that someone like Learned Hand, the greatest judge never appointed to the Court, would have frowned upon.[6] In *Livadas*, the Supreme Court countered the "vote counters" by applying a simple preemption doctrine flowing directly

---

"worse for the proponents of affirmative action" by the appointment of Justices Souter and Thomas); Amy R. Tabor, *Civil Rights in the '90s: The Supreme Court Overruled*, 41 R.I. B.J. 21, 21 (1993) (indicating that "[d]uring its 1989 term, the U.S. Supreme Court, with its new, more conservative majority, issued a series of decisions which made it much more difficult for minorities and women to challenge discriminatory employment practices."); Debra L. Willen, *Now States Act as Champions for Religion*, NAT'L L.J., March 2, 1992, at 15 (stating that "[a]s the conservative appointees of President Reagan and Bush solidify their control over the Supreme Court, individuals seeking protection for civil liberties have begun to turn increasingly to other forums").

5. *Livadas*, 114 S. Ct. at 2071.

6. *See* GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 459 (1994) ("For Hand, excessively politicized judging remained a central evil.").

from the Supremacy Clause.

NLRA PREEMPTION FROM AN HISTORICAL PERSPECTIVE[7]

The doctrine of federal preemption of state law arises from the Supreme Court's long-standing interpretation of the Supremacy Clause of the United States Constitution.[8] For example, in *Nash v. Florida Industrial Commission*,[9] the Court held that the NLRA preempted a state statute which terminated the petitioner's unemployment compensation benefits because she had filed an unfair labor practice charge.[10] The Court plainly stated that "[i]n holding that this Florida law as applied in this case conflicts with the Supremacy Clause of the Constitution we but follow the unbroken rule that has come down through the years."[11] In so holding, the Court concluded by summarily citing to line of cases[12] not specifically resting on the Supremacy Clause, but nevertheless providing precedential authority, flowing from *McCulloch v. Maryland*,[13] through *Davis v. Elmira Savings Bank*,[14] to *Hill v. Florida*.[15]

Generally, the Supreme Court has developed preemption doctrine according to two theories; federal preemption occurs: (1) when an act of Congress is in "actual conflict" with a state law, or (2) when there is no clear conflict between state and federal law, but Congress has passed legislation intending to "occupy the field."[16]

---

7. For a more lengthy and detailed discussion of the historical development of NLRA preemption, see 2 THE DEVELOPING LABOR LAW 1654-1728 (Patrick Hardin ed., 3d ed. 1992), upon which much of this section is based.

8. The Supremacy Clause provides that "the laws of the United States shall be the supreme law of the land." U.S. CONST. art. VI, cl. 2. *See also* WILLIAM B. GOULD, A PRIMER ON AMERICAN LABOR LAW 32 (3d ed. 1993) ("The courts have fashioned a doctrine of preemption that is based on the Supremacy Clause and the Commerce Clause.").

9. 389 U.S. 235 (1967).

10. *Nash*, 389 U.S. at 236-37.

11. *Id.* at 239-40.

12. *Id.* at 240.

13. 17 U.S. (4 Wheat.) 316, 436 (1819) (not specifically citing the Supremacy Clause, but indicating that because of "the supremacy which the constitution has declared," the state of Maryland had no power "to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government").

14. 161 U.S. 275, 283 (1896) (not specifically citing the Supremacy Clause, but indicating that where a New York banking statute and a Federal statute "cover exactly the same subject-matter," the "law of New York is from the nature of things inoperative and void as against the dominant authority of the Federal statute").

15. 325 U.S. 538, 541-42 (1945) (holding that a Florida law which placed certain requirements on obtaining a license to act as a "business agent" to a labor union, was not "repugnant to the [NLRA]."); See also text accompanying notes 22-23.

16. *See* Stephen I. Locke, *Fine Tuning Preemption or Rewriting the Market*

These two theories of preemption have held true in the Supreme Court's analysis of the more limited area of federal preemption of state law caused by the National Labor Relations Act. Despite the clearly established supremacy of federal law, Congress left the matter of labor relations regulation nearly entirely to the states until the 1930's.[17] In 1935, acting under the auspices of the Commerce Clause[18] power, Congress adopted the NLRA and assumed federal control over a broad and unclearly defined body of law.[19] Almost immediately the tension between this new federal law and the substantial body of state law regulating the same field manifested itself in cases such as *NLRB v. Jones & Laughlin Steel Corp.*[20] In *Jones & Laughlin Steel*, the Court upheld Congressional power, based on the authority of the Commerce Clause and as delineated in the NLRA, to provide for the right to organize as a union and to choose a representative for collective bargaining.[21]

One of the earliest significant decisions considering the scope of NLRA preemption was *Hill v. Florida*.[22] In *Hill*, the Court held a Florida law, placing restrictions on who could fill the role of "business agent" to a labor union, preempted by the NLRA on the theory that such restrictions conflicted with the NLRA Section 7 right of employees to select their bargaining representatives.[23] Other early cases indicated the following: (1) Where there was a potential for conflict between state law and the NLRA, the National Labor Relations Board ("NLRB" or "Board") had primary jurisdiction to adjudicate the matter.[24] (2) In some areas, even though a potential conflict existed, states could permissibly regulate matters of intense local concern.[25] (3) States

---

Participant Exception?, 45 LAB. L.J. 3, 5 (1994).

17. Locke, cited at note 16, at 3.

18. U.S. Const. art. I, § 8.

19. *See* National Labor Relations Act, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-168 (1988)).

20. 301 U.S. 1 (1937).

21. *Jones & Laughlin Steel*, 301 U.S. at 43 (stating "we have no doubt that Congress had constitutional authority to safeguard the right of respondent's employees to self-organization and freedom of choice of representatives for collective bargaining").

22. 325 U.S. 538 (1945).

23. *Id.* at 544 (Stone, C.J., concurring). The pertinent language of Section 7 provides that, "[e]mployees shall have the right . . . to bargain collectively through representatives of their own choosing." 29 U.S.C. § 157 (1988).

24. *See, e.g.*, Garner v. Teamsters Local 776, 346 U.S. 485 (1953) (holding that a Pennsylvania state court could not issue an injunction pursuant to the Pennsylvania Labor Relations Act, because the NLRB also could have sought an injunction in federal court while the petitioners's grievance was being considered).

25. *See, e.g.*, Construction Workers v. Laburnum Constr. Corp., 347 U.S. 656

could also regulate in areas which were of only peripheral concern under the NLRA (usually relating to internal union matters).[26] (4) But states could not regulate certain areas, even where the NLRB had never exercised the full extent of its possible jurisdiction.[27]

Essentially though, NLRA preemption doctrine has adhered to the two basic theories mentioned above, the "actual conflict" and "intent to occupy the field" notions of preemption. For example, the decision forming the cornerstone of the Court's NLRA preemption doctrine is *San Diego Building Trades Council v. Garmon* ("*Garmon II*").[28] The *Garmon II* rationale is said to be analogous to the "actual conflict" theory of general federal preemption.[29]

In *Garmon II*, the NLRB declined to exercise jurisdiction when the employer had filed a petition requesting that the NLRB resolve the question of the employees' proper representative.[30] The petition had been filed during the course of peaceful picketing aimed at forcing the employer to sign a union shop provision into the labor contract.[31] The California Supreme Court sustained the holding of the California Superior Court which enjoined two separate unions from picketing until one union had been clearly established as the proper bargaining representative.[32] The California state courts reasoned that be-

---

(1965) (holding that the state court properly exercised jurisdiction over a common law tort action for damages resulting from union conduct which would also have constituted an unfair labor practice); United Automobile Workers v. Russell, 356 U.S. 634 (1958) (holding that the state court properly exercised jurisdiction over an employee's action against a union for malicious interference with his occupation when the union's conduct would have also constituted an unfair labor practice).

26. *See, e.g.*, International Ass'n of Machinists v. Gonzales, 356 U.S. 617, 621 (1958) (finding that the "potential conflict [between state court and NLRB jurisdiction] is too contingent, too remotely related to the public interest expressed in the [] Act, to justify depriving state courts of jurisdiction").

27. *See, e.g.*, San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959). See also notes 26 to 58 and accompanying text discussing the case in detail.

28. 359 U.S. 236 (1959) [hereinafter *Garmon II*]. *See also* Walter E. Oberer, *The Regulation of Union Economic Power*, *in* AMERICAN LABOR POLICY 270, 283 (Charles J. Morris ed., 1987). Professor Oberer has written:

> The federal preemption doctrine, *brought to peak fruition in Garmon*, is itself an important aspect of the regulation of union economic power under the American scheme. That doctrine, *at its Garmon peak*, grants to the Board the exclusive primary jurisdiction for the adjudication of the issue of whether the subject union activity is either protected or prohibited under the Act, and, if prohibited, the remedy to be provided.

Id. (emphasis added).

29. *See* Locke, cited at note 16, at 5.

30. *Garmon II*, 359 U.S. at 238.

31. *Id.* at 237.

32. *Id.* at 237-38.

cause the NLRB had declined to exercise jurisdiction over the matter, jurisdiction resided properly in the state courts.[33] The state courts even went so far as to hold one union liable for an unfair labor practice under Section 8(b)(2) of the Act.[34]

Certiorari was granted,[35] and in the Court's first opinion in the *Garmon* matter it held that the refusal of the NLRB to exercise jurisdiction did not automatically vest the state courts with jurisdiction over activities they would otherwise be preempted from adjudicating.[36] *Garmon I* was issued simultaneously with and controlled by the rationale provided in *Guss v. Utah Labor Relations Board*,[37] and *Amalgamated Meat Cutters v. Fairlawn Meats, Inc.*[38] All three opinions were authored by Chief Justice Warren and rested on the language of the proviso to Section 10(a) of the Act,[39] which was added to the Act as part of the Taft-Hartley amendments.[40]

On remand, the California Supreme Court set aside the injunction, but allowed an earlier damage award to stand based on the violation of state law amounting to a state law-based unfair labor practice.[41] The Supreme Court granted certiorari for a

---

33. *Id.* at 238.

34. *Id.* Section 8(b)(2) provides:

> It shall be an unfair labor practice for a labor organization or its agents — to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

29 U.S.C. § 158(b)(2) (1988).

35. San Diego Building Trades Council v. Garmon, 351 U.S. 923 (1956).

36. San Diego Building Trades Council v. Garmon, 353 U.S. 26, 29 (1957) [hereinafter *Garmon I*]. *See also Garmon II*, 359 U.S. at 238.

37. 353 U.S. 1 (1957).

38. 353 U.S. 20 (1957). *See also Garmon II*, 359 U.S. at 238.

39. 29 U.S.C. § 160(a) (1988). Section 10(a) provides:

> The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.*

29 U.S.C. § 160(a) (emphasis added).

40. *See Guss*, 353 U.S. at 7.

41. *Garmon II*, 359 U.S. at 239.

second time in the case,[42] this time to consider the issue of "whether the California court had jurisdiction to award damages arising out of peaceful union activity which it could not enjoin."[43]

In this second *Garmon* opinion, the Court acknowledged that it had in the past attempted to delineate the extent to which state regulation must yield to superior federal authority.[44] In reviewing these past opinions, the Court stressed that:

> [T]he unifying consideration of our decisions has been regard to the fact that Congress has entrusted administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience.[45]

The Court specifically reflected back to its decision in *International Association of Machinists v. Gonzales*[46] and its indication that the states could permissibly regulate matters of "merely peripheral concern" to federal labor relations policy.[47] The Court also looked to the reasoning of *United Automobile Workers v. Russell*,[48] which allowed for state regulation in the absence of specific Congressional action, over "conduct [which] touched interests so deeply rooted in local feeling and responsibility."[49]

The Court finally held that the California state courts lacked jurisdiction because the activity in question was "arguably within the compass of Section 7 or Section 8 of the Act."[50] Thus, it was exclusively within the domain of the NLRB to determine the status of the conduct which the state courts sought to remedy.[51]

In modern terms, *Garmon* holds state action preempted when it regulates conduct which is "arguably protected" or "arguably prohibited" by the NLRA.[52] This standard has been construed to fit into the "actual conflict" standard of general preemption theory,[53] and is said to be "based predominantly on the primary ju-

---

42. San Diego Building Trades Council v. Garmon, 357 U.S. 925 (1958).
43. *Garmon II*, 359 U.S. at 239.
44. *Id.* at 241.
45. *Id.* at 242.
46. 356 U.S. 617 (1958). See also note 26.
47. *Garmon II*, 359 U.S. at 243-44 (citing International Ass'n of Machinists v. Gonzales, 356 U.S. 617 (1958)). See also text accompanying note 26.
48. 356 U.S. 634 (1958). See also note 25.
49. *Garmon II*, 359 U.S. at 244 (citing United Automobile Workers v. Russell, 356 U.S. 634 (1958)).
50. *Garmon II*, 359 U.S. at 246.
51. *Id.*
52. *See* Locke, cited at note 16, at 5-6.
53. *Id.*

risdiction of the [Board]."[54]

The theory of Congressional "intent to occupy the field" is also exhibited in the area of NLRA preemption and manifested in what is sometimes called the *Machinists* doctrine.[55] In *Lodge 76 Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n*,[56] the employer filed an unfair labor practice charge under Section 8(a)(3)[57] when the union ordered employees not to work overtime during a dispute over the hourly length of the work week.[58] The NLRB dismissed the charge, but the employer had also filed with the state employment relations commission.[59] The state commission adopted its examiner's finding that the refusal to work overtime was neither conduct arguably protected by Section 7 nor conduct arguably prohibited by Section 8, so that the state commission's jurisdiction was not preempted.[60] The highest court of the state then affirmed the state commission's order directing the union to cease from instructing its employees to refuse to work overtime.[61] The Supreme Court granted certiorari[62] on the issue of whether federal labor policy preempted the state commission's authority to issue such an order when the union's objective was to place economic pressure on the employer.[63]

The Court reviewed the line of NLRA preemption cases culminating in *Garmon II*,[64] and then turned to a second line of cases which focused upon whether Congress intended that the conduct in question be left unregulated and controlled *only* "by the free play of economic forces."[65] The Court indicated that it had recognized in the past that Congress may have intended certain activities to be "unrestricted by *any* governmental power to regulate."[66] Thus, under this broad rationale, the Court indicated a

---

54. Lodge 76 Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132, 138 (1976).

55. *See* Locke, cited at note 16, at 6.

56. 427 U.S. 132 (1976).

57. 29 U.S.C. § 158(a)(3) (1988).

58. *Machinists*, 427 U.S. at 133-35.

59. *Id.* at 135.

60. *Id.*

61. *Id.* at 136.

62. Lodge 76 Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n, 423 U.S. 890 (1975).

63. *Machinists*, 427 U.S. at 133.

64. *Id.* at 138-39.

65. *Id.* at 140 (quoting NLRB v. Nash-Finch Co., 404 U.S. 138, 144 (1971)).

66. *Machinists*, 427 U.S. at 141 (quoting NLRB v. Insurance Agents, 361 U.S. 477, 488-89 (1960) (alteration in original)). The Court's reasoning may be better reflected in its entirety as it stated that it had:

[R]ecognized that a particular activity might be "protected" by federal law not

deference towards preemption when Congress intended to occupy the field — not by *regulating* the entire field, but by an intent to leave the area completely regulation-free, being only "controlled by the free play of economic forces."[67]

To broadly but succinctly summarize, today the NLRA will preempt state law either when the conduct in question is "arguably protected" by Section 7 or "arguably prohibited" by Section 8, or when Congress has intended to leave the field entirely regulation-free, allowing for the unrestricted free play of economic forces.[68] These theories of preemption played out interestingly in *Livadas*.

LIVADAS V. BRADSHAW

In *Livadas v. Bradshaw*,[69] Karen Livadas was employed by a Safeway supermarket in Vallejo, California as a grocery clerk until her termination on January 2, 1990.[70] Upon being notified of her discharge, Livadas requested immediate payment of all earned wages pursuant to Section 201 of the California Labor Code.[71] Section 201 simply provides that upon discharge, a California employee is entitled to all earned wages immediately.[72] But the Safeway store manager refused the request, indicating that payroll records were not available at the store[73] and citing

---

only when it fell within § 7, but also when it was an activity that Congress intended to be "unrestricted by *any* governmental power to regulate" because it was among the permissible "economic weapons in reserve . . . actual exercise [of which] on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized."

Machinists, 427 U.S. at 141.

67. *Machinists*, 427 U.S. at 140 (quoting NLRB v. Nash-Finch Co., 404 U.S. 138, 144 (1971)).

68. Although this comment deals with the two major trends in preemption theory, Stephen I. Locke has argued recently that the Supreme Court's NLRA preemption decision immediately preceding *Livadas*, the opinion delivered by Justice Blackmun for a unanimous Court in *Building and Construction Trades Council v. Associated Builders and Contractors of Massachusetts/Rhode Island, Inc.*, indicates a new trend in preemption theory. *See* Building and Constr. Trades Council v. Associated Builders and Contractors of Massachusetts/Rhode Island, Inc., 113 S. Ct. 1190 (1993); *see also* Locke, cited at note 16, at 12. Locke argues that the Court has "extended the market participation exception to the dormant commerce clause doctrine to a situation where Congress has enacted legislation." Locke, cited at note 16, at 12-13. However, Locke's argument is inapplicable to *Livadas*, and beyond the scope of this discussion.

69. 114 S. Ct 2068 (1994).

70. *Livadas*, 114 S. Ct. at 2071.

71. *Id.* at 2071-72.

72. Section 201 provides in relevant part, that "[i]f an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately." CAL. LAB. CODE § 201 (West 1989).

73. Livadas v. Aubry, 987 F.2d 552, 554 (9th Cir. 1993), *rev'd* 114 S. Ct. 2068

the company's practice of paying all wages by check from the company's corporate payroll office.[74] Three days later, on January 5, Livadas received a check for her wages earned through the date of her termination.[75]

On January 9, Livadas filed a claim against her former employer through the California Division of Labor Standards Enforcement (the "DLSE").[76] Livadas based her claim on Section 203 of the Labor Code which penalized an employer for willfully failing to pay wages in accordance with Section 201; the penalty being that an employee was to continue earning wages at the same rate until actually paid or until an action for the withheld wages was commenced.[77] In her claim, Livadas did not question her employer's calculation of the amount of wages owed, but only sought the penalty for willfully withholding payment.[78]

Livadas requested that the California Labor Commissioner prosecute the claim on her behalf as permitted by Section 98.3,[79] but by a form letter dated February 7, 1990, the DLSE declined to do so.[80] The DLSE's reason for declining to pursue the claim was not due to any weakness in the claim itself, nor to any failure of Livadas to qualify under Section 98.3, but rather only to the fact that Safeway employees, including Livadas, were covered by a collective bargaining agreement containing an arbitration clause.[81] Because Section 203 required wages to continue at the

---

(1994). The change in the parties' names from the Ninth Circuit's opinion to the Supreme Court's opinion was due to the fact that Victoria Bradshaw succeeded Lloyd Aubry as the California Labor Commissioner and was substituted as the respondent before the Supreme Court in accordance with Supreme Court Rule 35.3. *Livadas*, 114 S. Ct. at 2071 n.1.

74. *Livadas*, 114 S. Ct. at 2072.

75. *Id.* at 2072.

76. *Id.*

77. Section 203 provides:

> If an employer willfully fails to pay, without abatement or reduction, in accordance with Sections 201, 201.5, and 202, any wages of an employee who is discharged or who quits, the wages of such employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced.

CAL. LAB. CODE § 203 (West 1989).

78. *Livadas*, 114 S. Ct. at 2072 n.4.

79. *Id.* at 2072. Section 98.3(a) provides:

> The Labor Commissioner may prosecute all actions for the collection of wages, penalties, and demands of persons who in the judgment of the Labor Commissioner are financially unable to employ counsel and the Labor Commissioner believes have claims which are valid and enforceable.

CAL. LAB. CODE § 98.3(a) (West 1989).

80. *Livadas*, 114 S. Ct. at 2072. The Labor Commissioner is the chief of the DLSE and possesses all duties and powers of that office. *See* CAL. LAB. CODE §§ 79, 82(b) (West 1989).

81. *Livadas*, 114 S. Ct. at 2072. The text of the DLSE's form letter embodied

"same rate," in order for the Commissioner to pursue the claim, it would be necessary to "look to the collective bargaining agreement and 'apply' that agreement."[82] It was the Commissioner's position that such an "application" of a collective bargaining agreement was prohibited by Labor Code Section 229[83] and judicial interpretations thereof, so that any action taken by the Commissioner in enforcing this particular claim under Section 203 would be impermissible.[84] In fact, this construction of Sections 203 and 229 was simply "the Commissioner's policy of not enforcing Section 203 claims for employees who worked under collective bargaining agreements," as the Ninth Circuit termed it.[85]

Livadas brought suit in the United States District Court under title 42, section 1983 of the United States Code[86] alleging that the Commissioner's non-enforcement policy infringed upon her

---

the Commissioner's reasoning and read as follows:

> It is our understanding that the employees working for Safeway are covered by a collective bargaining agreement which contains an arbitration clause. The provisions of Labor Code Section 229 preclude this Division from adjudicating any dispute concerning the interpretation or application of any collective bargaining agreement containing an arbitration clause.
>
> Labor Code Section 203 requires that the wages continue at the "same rate" until paid. In order to establish what the "same rate" was, it is necessary to look to the collective bargaining agreement and "apply" that agreement. The courts have pointed out that such an application is exactly what the provisions of Labor Code Section 229 prohibit.

Id.

82. *Id.*

83. Section 229 provides:

> Actions to enforce the provisions of this article for the collection of due and unpaid wages claimed by an individual may be maintained without regard to the existence of any private agreement to arbitrate. This section shall not apply to claims involving any dispute concerning the interpretation or application of any collective bargaining agreement containing such an arbitration agreement.

CAL. LAB. CODE § 229 (West 1989).

84. See note 80 for the Commissioner's position as illustrated in the form letter to Livadas.

85. *See Livadas*, 987 F.2d at 555.

86. 42 U.S.C. § 1983 (1988). Section 1983 has been interpreted as providing a cause of action for the infringement of an employee's NLRA rights. *See Livadas*, 987 F.2d at 555. The Ninth Circuit addressed and affirmatively answered the issue of whether Livadas could assert a cause of action under section 1983 by citing *Golden State Transit Corp. v. City of Los Angeles*. *See Livadas*, 987 F.2d at 555-57 (citing Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103 (1989) [hereinafter [*Golden State II*]). In that case, the Supreme Court allowed an employer to bring a section 1983 action for a city's interference with the process of collective bargaining by applying a two part test for section 1983 actionability: (1) "the plaintiff must assert the violation of a federal right," and (2) "even when the plaintiff has asserted a federal right, the defendant may show that Congress 'specifically foreclosed a remedy under § 1983,' by providing a 'comprehensive enforcement mechanis[m] for protection of a federal right.' " *Golden State II*, 493 U.S. at 106 (citations omitted).

federally protected right to collectively bargain under Section 7 of the NLRA.[87] Livadas' theory was that the Commissioner's policy of refusing to enforce Section 203 claims for employees covered by collective bargaining agreements was in effect a penalty for exercising her Section 7 statutory right.[88]

After granting a motion for reconsideration, the district court granted summary judgment for Livadas and the Commissioner appealed.[89] A panel of the Ninth Circuit Court of Appeals reversed.[90]

Despite recognizing that Livadas was entitled to a cause of action under Section 1983 for deprivation of her right to bargain collectively,[91] the majority of the Ninth Circuit panel simply did not believe that the Commissioner had actually deprived her of that right.[92] The majority concluded that the Commissioner's action did not even implicate Livadas' federal rights,[93] and instead believed that Livadas' case boiled down to a "simple claim that the Commissioner erroneously interpreted his own policy. . . . [Which] amounts only to a state law claim."[94] The circuit court asserted that this claim could not be "transformed into a deprivation of a federal right."[95] After the court of appeals denied Livadas' petition for rehearing and suggestion for rehearing en banc,[96] the Supreme Court granted certiorari.[97]

Writing for a unanimous Court, Justice Souter indicated that the questions of whether California Labor Code Section 229 was constitutionally valid or whether the Commissioner's policy was a proper interpretation of Section 229, were both irrelevant.[98] Instead, as Judge Kozinski had argued in dissent below, the preemption analysis in the case turned "on the actual content of [the Commissioner's] policy and its real effect on federal rights."[99]

---

87. *Livadas*, 114 S. Ct. at 2073. NLRA Section 7 provides that, "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, *to bargain collectively* through representatives." 29 U.S.C. § 157 (1988) (emphasis added).

88. *Livadas*, 114 S. Ct. at 2073.

89. *Livadas*, 987 F.2d at 555.

90. *Id.* at 560. Judge Kozinski was the sole dissenter. *Id.*

91. *Id.* at 557.

92. *Id.* at 558.

93. *Id.* at 558.

94. *Livadas*, 987 F.2d at 559.

95. *Id.* at 560.

96. *Id.* at 554. In keeping with his fervent dissent, Judge Kozinski voted affirmatively on both the petition for rehearing and the suggestion for rehearing en banc. *Id.*

97. Livadas v. Aubry, 114 S. Ct. 907 (1994).

98. *Livadas*, 114 S. Ct. at 2076.

99. *Id.* (citing *Livadas*, 987 F.2d at 561 (Kozinski, J., dissenting)).

The Supreme Court held the present case to be indistinguishable from *Nash v. Florida Industrial Commission*[100] because the policy in question amounted to a "state rule predicating benefits on refraining from conduct protected by federal labor law."[101] The policy left petitioner Livadas with the "unappetizing choice" between remaining eligible to receive the benefits conferred under California Labor Code Sections 201 and 203, or entering into a collective bargaining agreement which contained an arbitration clause.[102] Thus, the Court held that the Commissioner's policy was preempted because this choice was not intended by Congress and could not be "reconciled with a statutory scheme premised on the centrality of the right to bargain collectively and the desirability of resolving contract disputes through arbitration."[103]

ANALYSIS

In defending against petitioner Livadas' claim, the Commissioner's strongest argument was that the challenged policy was not preempted, but instead was actually compelled by the Court's preemption jurisprudence on Section 301 of the Labor Management Relations Act (the "LMRA").[104] The Commissioner cited *Allis-Chalmers Corp. v. Lueck*,[105] for the notion that courts should avoid adjudicating disputes between parties to collective bargaining agreements which provide for arbitration.[106] The Commissioner argued that because resolution of Livadas' claim would require interpretation of a collective bargaining agreement (in order to discern what the "same rate" of pay would be in computing the penalty) which contained an arbitration clause, to

---

100. 389 U.S. 235, 239 (1967) (holding a state policy that withheld unemployment benefits from any employee who had filed an unfair labor practice charge with the NLRB was preempted).

101. *Livadas*, 114 S. Ct. at 2074.

102. *Id.* at 2075. Justice Souter cited comparatively to *Metropolitan Life Insurance Co. v. Massachusetts*, for the opposite but supportive proposition that a state law was not preempted because it neither encouraged nor discouraged the process of collective bargaining. *Id.* (citing Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 755 (1985)).

103. *Livadas*, 114 S. Ct. at 2075. The Court later asserted that, "the Commissioner's unusual policy is irreconcilable with the structure and purpose of the [NLRA]." *Id.* at 2082.

104. *Id.* at 2077 (stating that "[w]e begin with the most complete of the defenses mounted by the Commissioner, one that seems (or seemed until recently, at least) to be at the heart of her position"). Section 301 of the LMRA provides that, "[s]uits for violation of contracts between an employer and a labor organization representing employees . . . may be brought in any district court of the United States having jurisdiction of the parties. 29 U.S.C. § 185(a) (1988).

105. 471 U.S. 202 (1985).

106. *Livadas*, 114 S.Ct. at 2077.

resolve the claim would lead into an area which Congress intended to be governed by arbitrators.[107]

But the Commissioner's interpretation of case law was off the mark. As Justice Souter pointed out, the Court had made it clear that when the meaning of a contract term does not form the basis of the suit, the mere fact that a collective bargaining agreement will have to be consulted during the course of state litigation did not extinguish the state law-based claim.[108] In this case, the need to refer to the collective bargaining agreement was irrelevant to the dispute (if one really existed) between Livadas and her former employer.[109] Therefore, even the Commissioner's best argument failed.

But what was interesting about *Livadas v. Bradshaw* was how the preemption analysis applied to the California Labor Commissioner's policy itself. The Commissioner had argued that the case fell within the *Machinists* doctrine,[110] but the Court found preemption of the policy to be compelled according to the method of *Nash*, where the preemption rationale made a simple and direct reference to the Supremacy Clause.[111] The reference to *Nash* appears to represent a resort to "standard federal preemption principles,"[112] much like those used in cases like *Brown v. Hotel Employees Local 54*.[113]

In *Brown*, the Court contended that the primary jurisdiction rationale of *Garmon II* was inapplicable, and instead reasoned that "the state law regulates conduct that is actually protected by federal law," such that "pre-emption follows not as a matter of protecting primary jurisdiction, but as a matter of substantive right."[114] This was indeed similar to the situation presented in *Livadas*: the Commissioner's policy affected conduct which was actually protected by federal law — the right to be party to a collective bargaining agreement. Thus, preemption of the policy followed closely as a matter of substantive right; as a California employee, Livadas possessed the statutory right to the Section 203 penalty for withheld wages. At the very least, she could not be penalized for exercising her federal right.

---

107. *Id.*

108. *Id.* at 2078 (citing Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399, 413 n.12 (1988)).

109. *Livadas*, 114 S. Ct. at 2079.

110. *Id.* at 2075 n.11. See also notes 55-67 and accompanying text discussing the *Machinists'* doctrine.

111. *Id.* at 2074. See also note 8 and accompanying text.

112. THE DEVELOPING LABOR LAW 1672 (Patrick Hardin ed., 3d ed., 1992).

113. 468 U.S. 491 (1984).

114. *Brown*, 468 U.S. at 503.

Regardless of the Court's rationale for holding the California Labor Commissioner's anti-union employee policy preempted, *Livadas* is probably most significant because it is a unanimous decision upholding an individual's *state statutorily provided right through the use of federal preemption doctrine.* This concept is interesting because in recent years, commentators have encouraged the Court to retreat from the expansive preemption doctrine having peaked with *Garmon II*, in an effort to secure *greater* employee rights. The idea is that less federal preemption equals greater employee rights through revitalization of state-conferred benefits and protections.

For example, NLRB Chairman Gould has pointed out that although there has been a recent trend among the states to enact statutes to protect individual employees and to supplement federal protection, this trend has encouraged employers to challenge such statutes on preemption grounds.[115] If the state statute is preempted, the employer wins and the employee's rights are limited.

Chairman Gould seems to attribute the existence of this trend to an effort by the Supreme Court to expound a politically conservative agenda. He has argued that the Republican appointments to the Supreme Court have caused the Court to apply preemption doctrine liberally to circumscribe the degree to which a state can provide additional protections to employees. He has written:

> Not surprisingly, the Supreme Court, now populated by a solid Nixon-Reagan-Bush majority, has become supportive of the doctrine of preemption when states attempt to protect the welfare of their employees in a manner that is more ambitious than that provided for by the federal government.[116]

Indeed, the Supreme Court has become supportive of the doctrine of preemption. But respectfully, in his zeal to criticize the Court as being politically slanted against labor organizations and individual employee rights, Chairman Gould forgets that the Nixon-Reagan-Bush appointees are also traditionally federalism or state's rights advocates.[117] This author suggests that the cur-

---

115. *See* WILLIAM B. GOULD, IV, AGENDA FOR REFORM 107 (1993).

116. GOULD, cited at note 115, at 107.

117. *See, e.g.*, New York v. Sullivan, 112 S. Ct. 2408 (1992). In *Sullivan*, Justice O'Connor, writing for a majority composed of Justices Rehnquist, Scalia, Kennedy, Souter, and Thomas, respectively, stated that, "Congress may not simply 'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.' " *Sullivan*, 112 S. Ct. at 2420 (quoting Hodel v. Surface Mining & Reclamation Ass'n Inc., 452 U.S. 264, 288 (1981)). Justice O'Connor also wrote that, "the Constitution has never been under-

rent make-up of the Supreme Court is not out to deprive or even to circumscribe the rights of individual employees through the talisman of preemption, as Chairman Gould seems to indicate. Rather, the Court recognizes the virtues of federalism and allows states to provide for additional employee rights within the bounds of federal law. The support for this argument is found in *Livadas*, where a unanimous Court has effectively resorted to sound and simple preemption jurisprudence to *protect* state-conferred employee benefits.

CONCLUSION

Although critics may view every Supreme Court opinion with an eye for discerning political motivation, perhaps they should not be so quick to do so. Especially in the area of federal preemption of state law, and specifically preemption by the National Labor Relations Act, there is room for apolitical consistency. In recent times, it seems rare that a Supreme Court case is decided by a unanimous court in a single opinion. But in *Livadas v. Bradshaw*, the Court unanimously applied a simple yet authoritative preemption analysis to achieve the serendipitous result of protecting an employee's state-conferred rights.

Kevin J. McKeon

---

stood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *Id.* at 2421. *See also* Rebecca L. Hill, Note, *California v. F.E.R.C.: Federal Preemption of State Water Laws*, 12 J. ENERGY NAT. RESOURCES & ENVTL. L. 261, 262 (1992) (stating that, "in recent years the Court has leaned more and more toward respecting state's rights by narrowly construing federal statutory language").