# 1AR---Dartmouth---Round 5

## Adv---Filings

## Adv---Reorganziation

### AT: Turn---1AR

#### Bankruptcy…

Velazquez ’25 [Alvin; 2025; Associate Professor of Law, Indiana University Maurer School of Law; Stanford Law Review, “Bankrupting Labor Power,” vol. 78]

Even though there are no cases in which a union as a debtor has applied Kawaauhau, there have been several instances in which unions or their pension funds have litigated the matter as a creditor with mixed results. Even though the decisions reflect Norberg’s observations concerning what counts as dischargeable debt under §523(a)(6), they do not provide a basis from which to make observations about whether the cases serve to grow union power as an extension of collective worker power, or undermine it.63 For example, in one case, an employer attempted to use non-union labor in violation of a CBA.64 The employer continued to do so even after a court ruled against it.65 The Fifth Circuit held that the claim was not a tort claim because it did not injure the union, and there was no evidence that the employer wanted to injure the union.66 Instead, the court treated the breach of the CBA as ordinary dischargeable breach of contract claim.67 However, the fact that the employer continued in the prohibited conduct in violation of a second judgement rendered the claim non-dischargeable.68 In another instance, a union pension fund tried to collect on an employer’s failure to make a legally required contribution, but the court allowed for the debtor to discharge it because the failure to pay was done without intent to injure.69

Courts have not been afraid to punish unions though. In one case, the union brought an action seeking a declaration that a contract debt was non-dischargeable under §523(a)(6). Specifically, the union brought the action against a member who crossed a picket line and returned to work while the union was on strike in violation of the union’s constitution.70 The court denied the union’s request for relief and sanctioned the union (instead of its counsel) for bringing the case in violation of Rule 11 of the Federal Rules of Civil Procedure.71

Bankruptcy scholars have demonstrated that how corporations aggressively use bankruptcy to silence the voice of tort victims. Pamela Foohey and Christopher Odinet highlight “how for-profit and nonprofit organizations leverage dealing with future claims, using channeling injunctions, and asking for third-party releases to cabin people’s voices and cut short public scrutiny of alleged wrongdoing.” 72 The story they tell is a story about how large corporations use bankruptcy law to silence collective voice. However, §523(a)(6) has a silencing effect on those who protest as well. For example, in one case restaurant workers who were owed wages protested their employer only to be retaliated against. The court held that their claims were dischargeable because the discharged employees did not prove that their employer acted with actual malice toward them!73

#### That does not end bankruptcy filings, it weeds out economically extraneous cases.

Kimhi ’15 [Omer and Arno Doebert; August 15; Assistant Professor at the University of Haifa Faculty of Law; Doctoral candidate at Bucerius Law School, Associate at Reimer Rechtsanwälte, Hamburg; American Bankruptcy Institute Law Review, “Bankruptcy Law as a Balancing System: Lessons from a Comparative Analysis of the Intersection between Labor and Bankruptcy Laws,” vol. 23]

The first problem the labor modifications present is bankruptcy abuse. This means that debtors use bankruptcy proceedings in order to enjoy the labor law privileges bankruptcy law affords, even when there is no real financial or economic necessity for the filing. Since the employer cannot easily dismiss employees outside bankruptcy, he files for bankruptcy and thereby bypasses the general labor law hudles. The existence of bankruptcy abuse is damaging both to employees and to society as a whole. From the employees' perspective, they do not receive the protections they deserve. If outside bankruptcy dismissed employees are entitled to compensation, to a notice period, or to certain procedural benefits, the filing deprives them of these rights and forces them to accept less for their terminations. From a societal perspective the bankruptcy abuse is an unrequired cost. A bankruptcy process is very expensive (it involves lawyers, judges, economic consultants and more), and an unnecessary filing wastes resources with no social gains.225 The bankruptcy decreases firms' value and raises credit prices. 226 Judicial systems, therefore, should aim to minimize bankruptcy abuses, and decrease parties' incentives to file for bankruptcy when there is no financial or economic need to do so.

The European systems, however, seem to do the opposite. Although few empirical studies have been conducted on bankruptcy abuse in Europe, from the few studies that have been conducted, especially in the Netherlands, it is clear that the phenomenon is not negligible. In research conducted in 1996, for example, Roger Knegt examined this problem by looking into 286 bankruptcy cases (including interviews with administrators and debtors).227 He reports that in eight percent of the cases the need to reduce employment costs was indicated as an important motive for the bankruptcy filing.228 In all these cases, the firm filed for liquidation bankruptcy (in order to enjoy the labor law privileges),229 yet it was not liquidated but rather sold to a buyer that was linked to the firm's former management or shareholders. The firm continued as a new legal entity, but with similar or resembling ownership or leadership. 230 Knegt explains that, although formally prohibited, management and shareholders in these cases used the bankruptcy process in order to circumvent regular labor laws and reduce employment costs in ways unavailable outside of bankruptcy. 231 A more recent study conducted in 2005 confirms the existence of bankruptcy abuse, although on a smaller scale. This study, which focused on 868 bankruptcy cases, shows that approximately four percent of the bankruptcies were filed in order to cut employees' surplus.232 In addition, most of the trustees interviewed for the study said that they are inclined to almost always consider a "technical bankruptcy" as a legitimate way out of financial difficulties. 233 The vast number of trustees that consider bankruptcy abuse as a solution to a firm's economic distress may indicate that the number of unnecessary filings is even greater than the numbers Knegt et al., report.

But bankruptcy abuse is only part of the problem. Even when the bankruptcy filing is economically justified, forum-shopping among different bankruptcy proceedings can create social damage. When a jurisdiction offers several types of bankruptcy procedures-some with labor law modifications and others without-firms tend to choose the bankruptcy procedure that maximizes their labor law privileges, rather than choose the more economically efficient procedure. To better explain this argument, we first examine the different bankruptcy procedures we refer to, and then show the difficulties bankruptcy labor modifications create.

## K---Security

### Overview---1AR

### Complexity---1AR

#### Wrong.

Ward ’13 [Michael D. Ward received his B.S. degree in Chemistry from the William Paterson College of New Jersey in 1977 and his Ph.D. degree at Princeton University in 1981. He was a Welch postdoctoral fellow at the University of Texas, Austin, between 1981 and 1982. Dr Nils W. Metternich is an Associate Professor in International Relations at the School of Public Policy. He joined the Department in 2013 and holds a PhD in political science from the University of Essex. Prior to joining UCL he was a postdoctoral research fellow at Duke University (2011-12). "Learning from the Past and Stepping into the Future: Toward a New Generation of Conflict Prediction." https://experts.syr.edu/en/publications/learning-from-the-past-and-stepping-into-the-future-toward-a-new-]

Political events are frequently framed as unpredictable. Who could have predicted the Arab Spring, 9/11, or the end of the cold war? This skepticism about prediction reflects an underlying desire to forecast. Predicting political events is difficult because they result from complex social processes. However, in recent years, our capacity to collect information on social behavior and our ability to process large data have increased to degrees only foreseen in science fiction. This new ability to analyze and predict behavior confronts a demand for better political forecasts that may serve to inform and even help to structure effective policies in a world in which prediction in everyday life has become commonplace.

Only a decade ago, scholars interested in civil wars undertook their research with constrained resources, limited data, and statistical estimation capabilities that seem underdeveloped by current standards. Still, major advances did result from these efforts. Consider “Ethnicity, Insurgency and Civil War” by Fearon and Laitin (2003), one of the most venerated and cited articles about the onset of civil wars. Published in 2003, it has over 3,000 citations in scholar.google.com and almost 900 citations in the Web of Science (as of April 2013). It has been cited prominently in virtually every social science discipline in journals ranging from Acta Sociologica to World Politics; and it is the most downloaded article from the American Political Science Review. 2 This article is rightly regarded as an important, foundational piece of scholarship. However, in the summer of 2012, it was used by Jacqueline Stevens in a New York Times Op-Ed as evidence that political scientists are bad forecasters. That claim was wildly off the mark in that Fearon and Laitin do not focus on forecasting, and Stevens ignored other, actual forecasting efforts in political science. Stevens’ funding point—which was taken up by the US Congress—was that government on quantitative approaches was being wasted on efforts that did not provide accurate policy advice. In contrast to Stevens, we argue that conflict research in political science can be substantially improved by more, not less, attention to predictions through quantitative approaches.

We argue that the increasing availability of disaggregated data and advanced estimation techniques are making forecasts of conflict more accurate and precise, thereby helping to evaluate the utility of different models and winnow the good from the bad. Forecasting also helps to prevent overfitting and reduces confirmation bias. As such, forecasting efforts can be used to help validate models, to gain greater confidence in the resulting estimates, and to ultimately present robust models that may allow us to improve the interaction with decision makers seeking greater clarity about the implications of potential actions.

#### Every component of this is incoherent.

Hamilton, 17—Ph.D. candidate, The London School of Economics and Political Science (Scott, “Securing ourselves from ourselves? The paradox of “entanglement” in the Anthropocene, Crime Law Soc Change 68, 579–595 (2017), dml)

This brings us to the combination of “security” and “entanglement” in discourses of the Anthropocene. Although entanglement refers to the behavior of particles at the smallest of imaginable quantum levels, it is now used commonly as a metaphor linking disparate spatialities and entities from micro to macro levels in IR.Footnote5 Declarations of our “entangled Anthropocene condition” thus imply a quantum or paradigm-shifting transition away from classical understandings of localized, mechanistic, and bounded units such as bodies and states, to an understanding of politics and humanity as being as enmeshed with all life systems on Earth. Calls to incorporate geophysical sciences such as Earth system science (ESS) and its popular planetary boundaries model, are indicative of this move to re-conceptualize how security can and will operate: through complex and simultaneous entangled interconnections or intra-actions, rather than the classical buffering of the space(s) between a subject in need of protection, and the external object from which it must be secured.

Upon inspection, however, entanglement does not replace nor re-conceptualize our understanding of security in the Anthropocene. Ultimately, it tacitly embraces neo-Newtonian conceptual foundations that repeat classical scientific and metaphysical assumptions concerning humanity, physical security, and the manner in which a human self represents the Earth spatiotemporally as an object. In other words, entanglement secures the ontological insecurity prompted by the Paradox of the Anthropocene firmly upon Newtonian pillars. This can be argued by examining its relation to time, ESS, and planetary boundaries.

First, consider time. The Anthropocene relies upon sciences, epistemologies, and ontologies of a neo-Newtonian and classical understanding of geologic time. As Maslin has recently stressed, the basic concept of the Anthropocene is ultimately dependent upon the geologic sciences and their understanding of a linear stratigraphic history. There is a strict temporal hierarchy of ever-finer hierarchical units or stages (dating from the earliest eon, to the more recent era, period, and finally, ‘epoch’). Basically, “[d]ivisions represent differences in the functioning of Earth as a system and the concomitant changes in the resident life forms” ([9], p. 3). The point here is not to dispute the social construction of these dating practices, nor to ignore their historicity or the fact they were initially constructed by the co-constitution of Victorian sciences and politics imbued with racist and misogynistic understandings about nature and humanity (see [33]). Instead, the point is that, ultimately, the conceptual foundation of the Anthropocene depends upon the measurement and recognition of discrete units of time that must be placed in a temporally linear sequence in relation to the golden spike of anthropos, the human. Regardless of its planetary politics, the Anthropocene “revolves around a series of technical and evidential questions about how to determine the boundary of a distinct ‘human’ controlled geological time unit” ([9], p. 9). If there is no geologically and stratigraphically discrete and sedimented linear foundation to the Anthropocene, the concept loses its significance and impact. This raises the question of how an entangled human/nature hybrid can truly form, when its recognition and justification ultimately depends upon hierarchical and classical understandings of discrete temporal measurements, as well as the insertion, identification, and development of humanity and its impacts into a linear geologic timeframe. Rather than non- or a-temporal quantum entanglement, therefore, the conceptual root of the Anthropocene looks more like thin layers of rock, secured as objects in a layered and linear temporal hierarchy determined by the human subject.

Second, and following from this first point, the ESS that brings the Anthropocene into being depends upon complex mathematical computer simulations combining the physics of fluid (thermo)dynamics with economic theory [34]. “Socio-ecological models are built based on our understanding of real-world systems, grounded in physical laws for the biophysical components, and economic theory and observations for the socio-economic system components” ([16], p.332). Although the nature of complexity science and ESS will not be explored here, it is worth considering how these simulations operate: by quantifying nature as grids of small and discrete variables or ‘parameterizations’, which then model “direct cause-and-effect explanations through multivariate statistics of available datasets” ([16], p.332). In short, these models project nature outwards through the representational and neo-Newtonian metaphysics noted above, in which every ‘thing’ in nature becomes a calculable coherence of objective forces that are amenable to quantification and simulation (see [35, 36]). Note that these ESS models lack the capacity to parameterize and predict the inexorably unpredictable social events and drivers of change, and hence, rational-choice algorithms from “economic theory and observations for the socio-economic system components” are used ([16], p.332). If ESS struggles to integrate society and human behavior into its models, then layering quantum entanglement on top of them appears epistemologically and ontologically incongruous. Rather, it implies that entanglement is a way of ordering the human self in relation to nature, as computed through ESS; through a vague analogy implying the certainty of holism or unity, despite a quantified and representational root.

Although the basics of quantum physics also depends upon statistics and a type of quantum causality to make predictions, “quantum mechanics is incompatible with the view that physical observables possess pre-existing values independent of the measurement context” ([37], p. 259). Nature might be manifested in certain phenomena in the macro world, but conceived through entanglement, these manifestations would be so incommensurable to everyday neo-Newtonian thought that they would be “irreducibly beyond anything we can experience or beyond anything we can possibly conceive of” ([38], p. 1653). In other words, quantum uncertainty rules entanglement in a mind-boggling way, while classical certainty (i.e., causality) rules Newtonian metaphysics so uniformly that today we barely even notice it. Declaring classical sciences and renderings of nature to be “entangled”, therefore, does not actually make them so. It actually masks the certainty of a classical Newtonian causality still working beneath the Anthropocene’s discursive surface. One cannot overcome Western metaphysics simply by reading about how to overcome Western metaphysics, and then asserting it to be so. This only intensifies the underlying conceptual foundations that treat quantum entanglement itself as a concept, tool, or object that can be causally applied to a human subject and its world.

For example, following Maslin, take the concept best framing the effect of humanity upon the Earth system: planetary boundaries ([9], p. 2). These are discrete and quantitative boundaries, units, or limits, within which humanity should operate to achieve a safe space for human development. Notions of quantified “safe” spaces obviously retain the classical Newtonian epistemologies of calculating secure, bounded limits for the “future” of humanity; a predictive orderly security, designed to reduce uncertainty within discrete limits, to ensure survival from chaos outside these spatiotemoporal limits. Indeed, humanity must respect the limits of these linear thresholds as “Earth’s ‘rules of the game’ or, as it were,. .. the ‘planetary playing field’ for the human enterprise” (Röckstrom et al., 2009). The point here is that ESS and its planetary boundaries model replicates a Western secular cosmology that works by explicitly measuring the distance between an “objective” nature and humanity. Nature is once again placed into a structural numerical box as the background context from which humanity is contrasted in order to make itself secure [34]. As Fagan [6] has noted, an implicit human/nature dualism results from this. Any relation of the environment and security supposedly erasing the boundaries between humanity and nature becomes itself a violent act [6]. In this case, entanglement becomes, therefore, an analogy masking a neo-Newtonian ordering of subject to object that is actually inherent to the ESS, and thus to conceptualizing the Anthropocene. If we were actually entangled, not only should there be no boundaries, but it would be impossible to detect them. This new metaphysical orientation would have to replace or transcend thinkable subject/object binaries, rather than focus on or assert their interdependence or interconnection, which we still see in IR’s security discourses today.

### Framework---Plan Focus---1AR

#### ‘Should’ is policy

COR ’15 [County of Riverside; February 2015; Draft General Plan Amendment No. 960, http://planning.rctlma.org/Portals/0/genplan/general\_plan\_2015/GPA%20960/General%20Plan%20Elements/Ch01\_Intro.pdf]

For a policy to be useful, it must be clear. However, not all policies are the same; they differ in terms of expected results, commitment of resources, and indication of importance or urgency. Therefore, it is important to simplify the language used in the General Plan and understand the distinctions between the different levels of policy. The following definitions of terms provide guidance in interpreting the policy language of the General Plan:

Ÿ Shall: Policies containing the word “shall” indicate that an action must be taken in all cases. This represents absolute commitment to the policy, and the expectation is that the policy will always be carried out.

Ÿ Should: Policies containing the word “should” indicate that an action will be taken in most cases, but exceptions are acceptable for good reason.

### No War---1AR

#### No impact---securitization is delinked from war.

Zimmerman ’15 [Vera; May 23; research analyst at the Hudson Institute, graduate student of political science in the Department of Public and International Affairs at George Mason University; https://verair.wordpress.com/2015/05/23/the-theater-of-operations-national-security-affect-from-the-cold-war-to-the-war-on-terror-by-joseph-masco-durham-and-london-duke-university-press-2014/]

In chapter four, “Biosecurity Noir: WMDs in a World without Borders,” Masco singles out concrete evidence of the amplification of the invisible biothreat triggered by the receipt of a few anthrax letters in 2001 to support his argument about the made-up ambiguous link to WMD. The author highlights that by proliferating visions (depictions) of catastrophic danger, biosecurity created a militarized response of global preemption in the name of domestic defense. Masco argues his case well and sharply, providing compelling evidence, but his interpretations of evidence at times seems exaggerated and biased. Though Masco does not deny the existence of the real threats, his recognition of them is too brief, while consideration of an alternative view is rather weak. He acknowledges that terrorist violence is not fictitious but insists that for the most part the United States inflated threats and politically exploited potential danger to declare and maintain the state of emergency. Such focus on the amplification of threats seems to suggest that for the most part the threats are not that real. Masco suggests that the link between terrorists and WMD is mainly inflated. Yet there is a real global concern about 2,000 tons of highly-radioactive nuclear materials being stored in poorly secured civilian locations around the world. The book never mentions the threat of a dirty bomb, which today is viewed as a more likely occurrence than an atomic bomb explosion. The IAEA cites a hundred reported thefts of nuclear materials on average each year. There is a good chance terrorists can get their hands on enough nuclear materials to produce a dirty bomb. The United States meets these challenges with increased international cooperation. Masco’s main argument that “the US is no longer constrained by territorial limits” is exaggerated. The only two cases cited when the United States appeared unconstrained were the invasion of Iraq. Though the invasion of Iraq was opposed by some U.S. allies (France, Germany, and New Zealand), it was still a combined force coalition from the U.S., the UK, Australia, and Poland. The United States does not have an unrestricted reach as Masco wants to depict. It is constrained by sovereignty and territorial integrity of other stable states. The unstable nuclear regimes in North Korea and Iran present that existential nuclear threat to the U.S. described by Masco, but the United States is in no rush to invade these countries. According to the anticipatory and preemptive logic Masco prescribes to the United States, it could have already invaded those states to prevent the disaster. Another limitation of his argument is that he paints the nuclear and counterterror states as consistent through all the presidencies, thus, drawing all administrations under a common denominator. Under Obama, the counterterror state became a liberal democracy again. The ‘unrestrained’ theater of operation has shrunk by ending the presence in Iraq and withdrawing from Afghanistan, even though our presence there could have been extended based on the preemption logic. Obama recognized the faults of the Bush administration in acting unilaterally, scaled back stability operations, and emphasized sharing the costs and responsibilities of global leadership. The emergence of the real ISIL threat undermines the book’s core argument of threat amplification, the U.S. preemption logic of response, and unconstrained global reach. The U.S.-led global effort against ISIL amounts to more than 50 nations, which shows the unified nature of the fight. Masco asserts that U.S. superpower depends on the ability of the state to monopolize a discourse of danger, but he doesn’t discuss how the United States succeeded in doing that. Masco could have developed his argument by tracing how the United States was able to use its soft power to mobilize like-minded states to agree with U.S. hegemony on WOT. It will be interesting to trace the U.S. internalization of fear and terror. He could have examined how allies responded to U.S. domestic mobilization of its population and whether other states imitated U.S. emotional management projects to mobilize their own populations. This would boost his argument that the U.S. was able to project its power on the global scale. In Theatre of Operations, Masco makes a compelling argument about the creation of the unrestrained theater of operations via domestication of fear and terror carried over from the Cold War days. His anthropological study reveals the extent to which a democracy is willing to use fear to assure the core principle of the social contract, defined by Hobbes as the exchange of public obedience for collective security. A democracy that chooses to be preoccupied with security risks to forgo core democratic values resulting in the lack of transparency, restriction of free flow of information, and negligence of non-military threats—no less threatening than nuclear terrorism. Making criticism of U.S. actions the main focus of the book, however, Masco’s interpretations are not properly balanced and sometimes appear biased. Still, reading Masco’s insight of the purpose of U.S. actions in the post-9/11 context offers opportunities to think critically about the effects of 9/11 emotional reprogramming of society and state of emergencies in U.S. history.

#### Security logic is inevitable and good---policy is prior to epistemic critique, which is demobilizing and incapable of spilling up---nuclear war.

Lipschutz ’11 [Ronnie; February 18; Professor of Politics at the University of Santa Cruz; “Cal Round Robin – Policy,” tr. Osh Clark, <http://nfltv.org/2011/02/24/cal-round-robin-policy/>]

RONNIE LIPSCHUTZ: Well, many, many years ago…one day when I was reading the San Francisco chronicle, I clipped a little phrase. I’ve never been able to find it, but it was something like, one of the emperor Fredricks said, “The surest way to ruin your country is to put it under the charge of college professors.” I have to say that I am now fully convinced of the truth of that statement. But since I have been charged here with taking on the philosophical side of things, I want to make a few points about – in particular the negative arguments – but also I think about the affirmative. I’m not a debater, by the way, so I don’t quite understand what’s been going on. But what I think in particular is a problem is, first of all, we have incommensurate conceptual categories going on here; that the affirmative is taking a very narrow policy question and proposing a change to it. The negative then raises these questions of epistemology and ontology which, in a way, are not obviously confronting the policy question which, and I agree with Erin, is very, very narrowly construed. I mean, there was no question about – well, let me put it this way: that although there was a discussion of the virtues of the alliance with Japan, it was largely taken as a given, and therefore of course that causes a problem, and by taking this epistemological and ontological approach, it is…ships passing in the night. And then, of course, the theory question came up and that, I thought, was problematic for both sides. A couple of things I want to say: the first one is that social constructions can kill. And I think this is a very important thing to remember that, threats can be socially constructed but threats, social constructions have material components, and they are aimed in particular directions. So the fact that something is a social construction or is epistemologically and ontologically questionable does not mean that there aren’t missiles being deployed, and that those missiles are not going to go off. These arguments are, I think, operating at a somewhat different space, and it does raise the question: how is it that we judge what is a threat in the first place? And of course we have nuclear friends and nuclear enemies. You ought to ask the question, “Why is it that Great Britain has nuclear weapons and yet there is nobody, as far as I know, that is planning a war with Great Britain?”. Now I could be wrong about this, since the Pentagon probably has plenty of analysts who have nothing to do.

ERIN SIMPSON: They make Powerpoints.

LIPSCHUTZ: Yeah, they make Powerpoints. So that, then, of course raises some of these epistemological questions. Which, I think if you want to somehow deploy the stuff that it seems like, sadly, I have said somewhere, it is important to take that much more carefully into account. The other thing that I am struck by is that I’ve become in recent – in the last year or so – a great fan of Pierre Bourdieu. All of these guys, all of my "friends" that you were citing – though I don’t consider Mearsheimer a friend – as I listen to this I think, “What patent nonsense it is that they are basically spouting.” But this is the way that the academic realm goes. I mean, it’s attack and counter-attack. And, I think you have to be very careful, again, in interrogating. So, if you’ve got to be critical, you should be very critical of those who are critical, to ask what is the politics behind the critique. Because there are politics in all of this. Not just politics in the policy—interests and all kinds of deeply imbedded commitments, which are impossible to change. If you watch Congress in action right now, you can see that. But also that there is a kind of…I mean it is – academics is war by other means, I guess, to take a leaf from both Clausewitz and Foucault. Anyway, to go back to Bourdieu. Bourdieu, who’s a sociologist who died several years ago, has a very interesting approach to some of these things which is oriented around practice. What are the practices that groups and societies engage in, and how do we understand those practices reinforcing normative beliefs and policies and approaches. And if you really are interested in “how do things change?,” you have to look at how practices change rather than intellectual arguments on the one hand or arming to the teeth on the other. So perhaps I would encourage, if you are to go on with debate, you should probably take a look at Bourdieu. I’m done.

## Delaware

### Delaware CP---Preemption---1AR

#### State protections will be struck down by implicit field preemption AND the Bankruptcy Clause.

Harner ’17 [Michelle; 2017; Professor of Law at the University of Maryland Francis King Carey School of Law, United States Bankruptcy Judge for the District of Maryland; William and Mary Law Review, “Rethinking Preemption and Constitutional Parameters in Bankruptcy,” vol. 59]

D. The Preemption Doctrine, Bankruptcy, and State Debtor- Creditor Laws

State debtor-creditor laws and federal bankruptcy laws have coexisted in one form or another since Congress enacted the first Bankruptcy Act in 1800. 124 Nevertheless, both federal bankruptcy and state debtor-creditor laws have evolved since the Court's last opinions addressing their coexistence in the 1930s. 125 This changing landscape has created new potential preemption issues, particularly in the context of field and conflict preemption, doctrines under which preemption is implied rather than set out in the language of a federal statute. 126

In bankruptcy, as in other disciplines, field preemption speaks to federal law that is sufficiently comprehensive "to make reasonable the inference that Congress left no room for" supplementary state regulation. 127 Conflict preemption, on the other hand, applies "when 'compliance with both federal and state regulations is a physical impossibility,' or when state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" 128 The following Sections first discuss recent Supreme Court precedent on the preemption doctrine involving disciplines other than bankruptcy and then turn to lower courts' application of the preemption doctrine in the bankruptcy context.

1. The Supreme Court and the Preemption Doctrine

The Supreme Court's jurisprudence on the federal preemption doctrine is extensive, not always consistent, 129 and the subject of much commentary. 130 This Section focuses on the Court's discussions of implied preemption--specifically, field and conflict preemption--given the limited nature of any statutory preemption language in the Bankruptcy Code. That said, the Bankruptcy Clause itself authorizes Congress to occupy the field of bankruptcy, which should inform any analysis of congressional intent as to the scope, purposes, and objectives of the Bankruptcy Code. 131

The Court's decision in Arizona v. United States is a good example of the often-overlapping inquiry of implied field and conflict preemption. 132 The case involved certain laws passed by Arizona in an attempt to unilaterally address the issue of illegal immigration. 133 The Court considered four provisions of the Arizona statute, finding three of the provisions preempted and one constitutional. 134 Similar to the Bankruptcy Clause, Congress's authority to enact federal immigration legislation also stems, in part, from Article I, Section 8, of the U.S. Constitution, which provides that Congress has the power "[t]o establish an uniform Rule of Naturalization." 135 Also akin to the purpose of the Bankruptcy Clause, the Naturalization Clause was meant to protect commerce. As the Court in Arizona explained, "The federal power to determine immigration policy is well settled. Immigration policy can affect trade, investment, tourism, and diplomatic relations for the entire Nation." 136

One of the provisions at issue in Arizona involved additional penalties imposed by the state for violations of the federal law. 137 The Court considered the federal statutory scheme for the registration of aliens, and it determined that the scheme was comprehensive and addressed all aspects of alien registration, including the consequences of noncompliance. 138 According to the Court, the scheme "was designed as a 'harmonious whole.'" 139 The Court observed, "Where Congress occupies an entire field, as it has in the field of alien registration, even complementary state regulation is impermissible." 140 In doing so, the Court rejected the State's argument that its penalty provisions were simply in aid of the federal law. 141

The two other provisions of the Arizona statute struck down in the case attempted to criminalize conduct that was not addressed by the federal statute and to supplement the authority of state police officers with respect to the removability of aliens under the federal statute, respectively. 142 In both instances, the Court held that the state law created "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." 143 In reaching this conclusion, the Court analyzed and relied on the "text, structure, and history" of the federal legislation. 144

Not all of the members of the Supreme Court support a broad implied preemption doctrine. For example, in his dissent in Arizona 145 and his concurrence in Wyeth v. Levine, 146 Justice Clarence Thomas posited that preemption analysis should be based solely on the language of the applicable statutes. He explained that it "should not be '[a] freewheeling judicial inquiry into whether a state statute is in tension with federal objectives, but an inquiry into whether the ordinary meanings of state and federal law conflict.'" 147 Nevertheless, the Court has continued to invoke the field preemption doctrine and a somewhat expansive consideration of the purposes and objectives of the federal statute at issue. 148 Notably, however, the Court's willingness to engage in a purposive analysis does not always result in federal preemption of the state law at issue. 149

The Court's preemption analysis--whether or not solely textual--is guided by two long-standing preemption principles. "First, 'the purpose of Congress is the ultimate touchstone in every preemption case.'" 150 The Court frequently analyzes the history and context of the federal legislation at issue in making this determination. 151

Second, "[i]n all pre-emption cases, and particularly in those in which Congress has 'legislated … in a field which the States have traditionally occupied,' … we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" 152

At least one court of appeals has suggested that such a presumption is weaker in cases involving the Bankruptcy Clause and the regulation of creditors' rights, which "has 'a history of significant federal presence.'"

#### Preemption is absolute---states can’t touch creditors AND it’s independently illegal under the Contract Clause.

Harner ’17 [Michelle; 2017; Professor of Law at the University of Maryland Francis King Carey School of Law, United States Bankruptcy Judge for the District of Maryland; William and Mary Law Review, “Rethinking Preemption and Constitutional Parameters in Bankruptcy,” vol. 59]

Over time, states have amended their receivership and ABC statutes to enlarge the role and powers of the receiver or assignee and the purpose of the receivership or ABC in the distressed company context. 237 For example, state receivership laws may authorize the receiver to pursue not only claims and causes of action held by the debtor, which constitute part of the debtor's assets, but also individual creditor remedies such as fraudulent transfer and preference actions. 238 Moreover, some states have modified and expanded their receivership statutes (and, in at least two states, extended these powers to assignees in ABCs) to look like mini Bankruptcy Codes. 239 These enhanced statutes include, for example, the imposition of an automatic stay, the unilateral treatment of contracts and leases, and the sale of the business as an operating entity (or going concern) free of the debtor's obligations. 240 Several of these changes in particular raise questions concerning the Bankruptcy Clause and federal preemption and potential violations of the Contract Clause.

The State of Washington's Receivership Act is a good example of the various changes being incorporated into an integrated scheme of receivership that mimics the Bankruptcy Code. As one summary of the statute explains, "The 2004 amendments greatly improved the Act, and were largely aimed at making it function more like the Bankruptcy Code." 241 The Washington statute authorizes a court to appoint both general and custodial receivers. 242 The statute further explains, "A receiver must be a general receiver if the receiver is appointed to take possession and control of all or substantially all of a person's property with authority to liquidate that property and, in the case of a business over which the receiver is appointed, wind up affairs." 243 Both the court and the receiver (which includes an assignee in an ABC) have broad powers under the Receivership Act. 244

In addition, the amendments to the Receivership Act adopted in 2004 introduced, among other things, an automatic stay, the ability to sell assets free of liens and encumbrances, and the assumption or rejection of executory contracts and unexpired leases. Each of these provisions generally tracks the language of the Bankruptcy Code, but as noted here and below, there are important differences throughout the statute. For example, the Receivership Act implements a stay of litigation and collection actions against the debtor and its property for a period of sixty days, which may be extended by the court. 245 This stay does not, however, extend to pending litigation initiated by a creditor who sought the receivership. 246

The Receivership Act also authorizes the "receiver [to] assume or reject any executory contract or unexpired lease of the person over whose property the receiver is appointed upon order of the court  [\*190]  following notice to the other party to the contract or lease upon notice and a hearing." 247 This provision overrides ipso facto clauses--allowing the receiver to assume or reject a contract or lease despite a provision terminating the agreement upon certain conditions relating to the debtor's financial condition--and relegates any claims of the counterparty upon rejection to a pre-receivership claim. 248 Moreover, subject to certain limited exceptions, the Receivership Act permits the sale of the debtor's property "free and clear of liens and of all rights of redemption, whether or not the sale will generate proceeds sufficient to fully satisfy all claims secured by the property." 249

A receiver under the Washington Receivership Act is authorized to operate the debtor's business, obtain receivership financing, pursue the debtor's claims and causes of action, invoke the rights of individual creditors, and object to claims submitted in the receivership. 250 The statute also limits the rights of utilities upon the commencement of the receivership in a manner similar to section 366 of the Bankruptcy Code, 251 and it bars creditors who fail to submit timely proofs of claim from participating in distributions. 252 The Act purports to bind all creditors, providing that

[c]reditors and parties in interest to whom written notice of the pendency of the receivership is given in accordance with RCW 7.60.210, and creditors or other persons submitting written claims in the receivership or otherwise appearing and participating in the receivership, are bound by the acts of the receiver with  [\*191]  regard to management and disposition of estate property whether or not they are formally joined as parties. 253

Under the Act, a receiver can sell the debtor's business as a going concern free of all liens and encumbrances, as well as reject burdensome executory contracts and leases. 254 This process allows the distressed business to continue in operation post-receivership while barring pre-receivership creditors from pursuing claims against the business. Yet creditors do not receive the same treatment and protections as under the Bankruptcy Code.

For example, under the Washington statute, a secured creditor's after-acquired property clause extends to post-receivership property; this treatment differs from the scope of permissible after-acquired property clauses in bankruptcy. 255 The priority scheme for distribution purposes varies, 256 and contract rights may be terminated without certain protections typically afforded to counterparties by the Bankruptcy Code or the Constitution. 257 Creditors are not able to depose, or conduct an inquiry of, the debtor as under Bankruptcy Rule 2004, which often allows individual creditors to determine issues relating to their claims and the location of various assets, wherever located. 258 The state law does not provide full "safe harbor" protections for qualified financial contracts (for example, swap agreements, securities contracts, forward contracts, commodities contracts, and repurchase agreements), subjecting these contracts and any payments made thereunder to the powers of the receiver. 259  [\*192]  In addition, it is unclear whether state law provides the same robust noticing of creditors or the same level of court oversight as under the Bankruptcy Code; 260 state law certainly does not provide for the appointment of a creditors' committee or oversight by an independent party, such as the U.S. Trustee or Bankruptcy Administrator, thus limiting protections available for unsecured creditors. 261

Notably, Washington is not the only state to expand its receivership laws to foster the continuation of distressed businesses through a process that alters the rights of creditors and other stakeholders. 262 Minnesota and Missouri have each enacted receivership statutes that contain some, if not all, of the provisions included in the Washington statute discussed above. 263 Moreover, as noted above, the Washington and Minnesota statutes grant assignees in ABCs rights and powers akin to receivers under these receivership acts. 264 Commentators readily note the strong resemblance between these amended state statutes and federal bankruptcy law. 265

C. Potential Implications of Changes to State Debtor-Creditor Laws

States historically have adopted laws to facilitate the liquidation of debtors' assets. These laws allow states to assist their residents, including business entities, with a timely and cost-effective distribution of a debtor's assets in satisfaction of creditors' claims. That kind of basic liquidation mechanism is an important component of debtor-creditor law. But the extension of these laws to include processes that enable a distressed business to continue despite not paying its creditors raises serious preemption questions that are underdeveloped in the existing literature. This is not to say that laws promoting the rehabilitation of distressed businesses are ill-advised. Rather, the critical question is whether federal and state bankruptcy laws that facilitate such relief can coexist in light of the Bankruptcy Clause and other constitutional concerns.

The following Section analyzes these state law developments in light of the Bankruptcy and Contract Clauses, along with the Supreme Court's jurisprudence on the enforcement of these constitutional provisions. Although Congress could expressly preempt state bankruptcy laws, 266 it has not yet chosen to do so other than in the limited context of chapter 9. 267 Accordingly, the inquiry focuses on implied preemption under the field and conflict preemption doctrines. 268 State bankruptcy laws not only conflict with federal bankruptcy law in certain instances, but they also subject creditors to disparate treatment and undermine the uniformity of bankruptcy laws.

III. The Need to Rethink Boundaries to Achieve the Objectives of the Bankruptcy Clause

The Bankruptcy Clause gives Congress the authority to establish uniform laws "on the subject of Bankruptcies." 269 The concept of a "fresh start" that allows a debtor to rehabilitate its financial affairs and remove its future assets from the reach of creditors is the essence of bankruptcy law. 270 As the Supreme Court has explained in the consumer debtor context, "'One of the primary purposes of the bankruptcy act' is to give debtors 'a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.'" 271 Congress adopted this core principle for business debtors as well when it enacted chapter 11 of the Bankruptcy Code. 272 In doing so, it left no room for states to legislate concerning a change of control of distressed businesses that replicates a chapter 11 result. State laws that conflict with, or pose an obstacle to, bankruptcy protections also undermine the purposes of chapter 11. This Section explains the implied preemption issues created by state statutes authorizing going concern sales in an environment akin to chapter 11 and explores the appropriate roles for federal and state laws in the context of distressed businesses.

A. Congress's Intended Purpose in Enacting Chapter 11

Congress enacted chapter 11 to allow distressed businesses to continue to operate and ultimately reorganize, thereby saving jobs and preserving the business's role in its industry and community. 274 Chapter 11 also contains protections for creditors, and it seeks to treat all creditors fairly throughout the process and in distributions. 275 State laws that attempt to replicate chapter 11 reorganizations--whether a plan or sale reorganization--directly compete with the federal platform created by Congress and conflict with chapter 11's core objectives and purposes. State laws that facilitate a transfer of a debtor's business as an operating entity (or going concern), free of existing obligations and without counterparty consents, compromise the interests of both debtors and creditors, particularly creditors junior in a debtor's capital structure.

A business that is facing a liquidity crisis or is otherwise unable to pay its debt obligations can liquidate (sell its assets on a piecemeal basis, using the proceeds to pay creditors), or it can try to continue to operate while reorganizing its financial and ownership structure. The latter can be accomplished through a variety of schemes, including a debt-for-equity exchange, a capital infusion for new equity interests, or a going-concern sale. 276 In each of these approaches the business continues, usually under new ownership. If the new owners assume all of the existing debt obligations, or all creditors and contract parties consent to the transaction, then the restructuring can be done by private contract and under applicable non-bankruptcy law. 277 However, if the new owners want to unilaterally strip some (or all) existing obligations from the business, pick and choose contracts necessary to continue to operate the business, and obtain a court order protecting themselves and the business from liability, the transaction must be accomplished through a federal bankruptcy case. 278 That result flows directly from the purpose of chapter 11 and the Supreme Court's precedent eschewing state laws that free debtors' assets from the claims of existing creditors. 279

#### It forecloses all state regulation, even if consistent with federal law.

Harner ’17 [Michelle; 2017; Professor of Law at the University of Maryland Francis King Carey School of Law, United States Bankruptcy Judge for the District of Maryland; William and Mary Law Review, “Rethinking Preemption and Constitutional Parameters in Bankruptcy,” vol. 59]

1. Implied Field Preemption

As discussed above, the Bankruptcy Clause is closely related to the Commerce Clause and, among other things, protects parties from discrimination and unfair treatment in commercial transactions and debtor-creditor relations. 280 Congress was mindful of these issues and of due process concerns in considering a federal bankruptcy law that freed a debtor and its assets from creditors' claims. 281 The Bankruptcy Code, including chapter 11, incorporates significant protections for creditors in cases that cut off the creditors' rights against the debtor and its assets. For example, the Code requires that all creditors (not just lienholders) receive notice and an opportunity to be heard, and the Code establishes a process and imposes limitations on unilateral treatment of contracts and leases. 282 The bankruptcy court also has expansive jurisdiction over the debtor's assets wherever located and offers a national forum to resolve disputes concerning any proposed plan, sale, or discharge. 283 Consequently, creditors doing business with an entity understand, and have certainty regarding, their rights if the debtor defaults and wants to avoid liability through a nonconsensual transaction in bankruptcy.

Although the Bankruptcy Code does not expressly preempt state law in the context of the reorganization of a business by either a plan or sale, the overall scheme of the Bankruptcy Code, and its history, strongly support a finding of implied field preemption. 284 Congress clearly intended to foster business reorganization under chapter 11 of the Bankruptcy Code. 285 Congress did not define "reorganization" in the Code, but courts have "interpret[ed] 'reorganization' to include all types of debt adjustment, including going-concern asset sales." 286 When a state scheme imposes an automatic stay on creditors' and other parties' rights against the debtor, allows a third party to operate and sell the business free of claims, and permits that third party to unilaterally assume or reject contracts or leases, the scheme addresses precisely the same reorganization subject matter as the Bankruptcy Code. 287 The Supreme Court found this kind of parallel regulation impermissible in Arizona v. United States. 288 In that case, the Court explained, "Field preemption reflects a congressional decision to foreclose any state regulation in the area, even if it is parallel to federal standards." 289

The Court also has repeatedly described a discharge of a debtor's financial obligations as one of the hallmarks of a bankruptcy law that is within the exclusive purview of Congress under the Bankruptcy Clause. 290 A "discharge" is commonly defined as an act that liberates, frees, or releases a person or thing. 291 For example, section 1141 of the Bankruptcy Code provides that a plan "discharges the debtor from any debt" and that all "property dealt with by the plan is free and clear of all claims and interests." 292 This formal discharge falls squarely within the preemption lines drawn by Stellwagen v. Clum, 293 International Shoe Co. v. Pinkus, 294 and Pobreslo v. Joseph M. Boyd Co. 295 Consequently, chapter 11 would preempt any state law that provided a discharge to the debtor, its ongoing business, or its property under a plan or arrangement.

#### It violates federal rights for creditors.

Harner ’17 [Michelle; 2017; Professor of Law at the University of Maryland Francis King Carey School of Law, United States Bankruptcy Judge for the District of Maryland; William and Mary Law Review, “Rethinking Preemption and Constitutional Parameters in Bankruptcy,” vol. 59]

2. Implied Conflict Preemption

In addition, state law schemes of this nature create an actual conflict with the Bankruptcy Code. 301 These schemes essentially give debtors and creditors an option to file a state or federal reorganization case, with each having potentially different results. State law schemes may differ from key aspects of the Bankruptcy Code, such as whether a secured creditor's after-acquired property clause continues after the proceeding is commenced. 302 A difference in this one small provision may make a state proceeding more favorable for the secured creditor and significantly worse for the unsecured  creditors. 303 To the extent that an after-acquired property clause is limited in bankruptcy under section 552 of the Bankruptcy Code, the value of the property may flow to the unsecured creditors. 304 Yet, this value would not be available to unsecured creditors in the state court proceeding.

In addition, the state court may have limited jurisdiction if the business is involved in interstate commerce. 305 Although, in theory, creditors not subject to the state court's jurisdiction should not be harmed by its rulings, those creditors would have little recourse in practice. Moreover, state receivership and ABC laws lack many of the protections provided to creditors in federal bankruptcy cases, including extensive noticing provisions; 306 protections for qualified financial contracts; 307 protection from the dissipation of the debtor's assets by creditors (for example, the creditor invoking the receivership) not subject to the stay; 308 oversight by the U.S. Trustee (or Bankruptcy Administrator); 309 the right to examine the debtor; 310 and the potential appointment of a creditors' committee to monitor the debtor and represent the interests of the debtor's general unsecured creditors. 311

Even these few examples of inconsistencies and nuances between certain state receivership and ABC laws and the Bankruptcy Code show an actual conflict—state laws facilitating going-concern sales of businesses "stan[d] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." 312 As discussed above, chapter 11 was designed to help distressed businesses continue in operation while protecting the rights of that business's creditors to the extent possible and consistent with the rehabilitation goal. 313 Likewise, the Bankruptcy Clause was intended to ensure fair and nondiscriminatory treatment of parties in matters concerning debtor-creditor relations. 314 Notably, this latter concern--fair treatment and certainty for creditors--also encouraged Congress to consolidate the reorganization chapters of the Bankruptcy Act into chapter 11 of the Bankruptcy Code. 315 The legislative history explains, "Under [the Bankruptcy Act], creditors are constantly at the mercy of debtors who may file under two or more reorganization chapters. Each chapter proceeding has different rules and affects creditors in a different way." 316 This concern increases dramatically if creditors are now subject to different reorganization processes in each of the fifty states. 317

Although lower courts considering similar preemption issues have viewed state receivership and related laws as "complementary" to the Bankruptcy Code, 318 schemes replicating aspects of the Bankruptcy Code that impair creditors' rights and affect distributions to creditors go too far and should be treated differently. Allowing a state law receiver to operate a debtor's business, benefit from an automatic and broad stay, assume or reject contracts unilaterally, and sell the business as a going concern free of all claims, conflicts with the "fresh start" concept and the related protections for creditors codified in the Bankruptcy Code. 319 As discussed further below, state legislatures and courts may have the power to grant relief to entities or assets subject to their jurisdiction, but any such power is suspended once Congress chooses to act under the Bankruptcy Clause. 320 Lower court decisions suggesting otherwise ignore the practical effects of these state laws and elevate the artificial label of "discharge" over substance.

3. The Contract Clause

State law schemes that facilitate going-concern reorganization sales also raise issues under the Contract Clause in cases such as Sturges v. Crowninshield321 and Ogden v. Saunders. 322 For example, these schemes allow a receiver to alter the parties' contractual bargain by, among other things, avoiding performance of contractual obligations--including promises to pay in full and to not assign the contract, not be subject to an ABC or receivership, and take (or refrain from taking) other specified actions. These schemes in turn arguably violate the Contract Clause. 323 Admittedly, the Supreme Court has gradually increased deference to state legislatures under the Contract Clause, particularly with respect to the impairment of  obligations under private contracts. 324 This deference is not, however, without limits. As the Court has explained,

Yet private contracts are not subject to unlimited modification under the police power. The Court in Blaisdell recognized that laws intended to regulate existing contractual relationships must serve a legitimate public purpose. A State could not "adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them." 325

A state law that overrides an ipso facto clause, nullifies an anti-assignment clause, or reduces or limits a claim (for example, by deeming claims under rejected contracts to be incurred prior to the receivership) under a private contract falls squarely within this language. 326 As commentators have observed, "State debtor relief legislation, to be sure, was passed during the economically troubled period between the end of the Revolution and the framing of the Constitution. Therefore, there is little doubt that such legislation was one of the major evils that the Clause was designed to eradicate." 327

#### States can’t alter contracts.

Luo ’8 [Vivian; 2008; J.D. Candidate at Emory University, B.A. and B.S. from the University of California at San Diego; Bankruptcy Developments Journal, “A Preference for States? The Woes of Preempting State Preference Statutes,” vol. 24]

State ABC laws stem from the common law right of assignment. 59 This right "results from that absolute ownership which every man claims over that which is his own." 60 Moreover, the fact that many states accept that

parties may make and enter into such contracts, bargains, and agreements as they may deem best for their interests, and neither the Legislature nor the courts have the power or right to restrict them in the exercise of that privilege, so long as their contracts are not immoral or tainted with positive illegality 61 further fortifies the "venerable common-law pedigree" 62 of ABC laws.

Today, most states have enacted a statutory scheme of assignment. 63 Assignment statutes "may be mandatory, replacing common law assignments entirely, or permissive, allowing common law assignments to continue," 64 and many jurisdictions continue to recognize common law assignment. 65 Typically, "state assignment statutes … prohibit preferences to creditors and award priority to favored creditors." 66 However, assignment does not discharge the debtor of any unpaid debt; the federal bankruptcy laws have preempted a state's ability to discharge. 67

#### Defendants will remove the case to federal court, making state law unenforceable.

Berridge ’54 [George; 1954; University of Michigan Law School; Michigan Law Review, “Labor Law—Use of Federal Removal Jurisdiction to Defeat State Court Injunction Suits,” vol. 52]

The use of the injunction in labor disputes is by no means a thing of the past. Although equitable relief against union activities is no longer generally available in the federal courts, such relief may often be obtained by application to the courts of the states. In response to state court injunction suits involving parties subject to the National Labor Relations Act, astute union counsel have fairly recently adopted an approach which has thus far achieved some degree of success. This new strategy is simply to remove the case to the appropriate federal district court, where, it is anticipated, the limitations on federal equity jurisdiction contained in the Norris-LaGuardia Act will normally lead the court to vacate any temporary restraining order which may have been issued by the state court, and then to dismiss the action. The success of this maneuver hinges almost entirely on a procedural question-is the case properly removable? But before attempting to analyze this procedural problem it is necessary to give some consideration to the basic substantive law involved.

I. Substantive Principles

The instances are few in which federal law grants to a private party the right to secure injunctive relief in a labor dispute. The original NLM was interpreted as creating only public rights and as conferring upon the National Labor Relations Board exclusive primary authority to remedy unfair labor practices by an employer.3 That the Labor- Management Relations Act4 did not change this situation except as it expressly provided for private remedies is :6.rmly established.5 At present private injunctive relief is authorized by the LMRA only (1) to restrain payments to employee representatives in violation of the terms of the act,6 and (2) to enjoin breaches of collective agreements.7 Furthermore, not only do these statutes fail to provide any general private right to equitable relief, but by force of the restrictions contained in the Norris-LaGuardia Act federal courts are, with a few exceptions, unable to grant injunctions even to enforce rights accruing under state law.

By necessity, therefore, employers have turned to state law as enforced in state courts. Here the main problem is the extent to which state authority over labor controversies in industries affecting interstate commerce has been superseded by the federal labor relations legislation. Supreme Court decisions suggest that in general the states have no power to regulate activities which are either made unfair labor practices by the NLRA9 or are "protected" by that statute.10 However, a few state courts have indicated their disagreement with this interpretation of the Supreme Court's position by claiming concurrent juris diction over unfair labor practices in some situations.11 The law with respect to conduct which is neither federally prohibited nor "protected" is far from settled.12 Adding to the uncertainty in this whole area is the sharp disagreement that exists as to the classification of certain types of collective action as prohibited, "protected," or neither. The effect of this confusion is that in many cases the trial judge will exercise a broad initial discretion in passing upon the validity of the preemption defense. Consequently, it would not be surprising to find union defendants eager to effect removal of injunction suits to the federal courts, where defenses based upon the exclusiveness of the NLRB's authority are likely to command maximum respect. And when account is taken of the limited equity powers of federal courts the question of removability clearly assumes decisive importance.