Michigan Law Review

Volume 53 | Issue 4

1955

Labor Law - State Jurisdiction Over Acts Which Are Unfair Labor Practices Under Federal Labor Legislation

Eugene Alkema S.Ed.
University of Michigan Law School

Follow this and additional works at: https://repository.law.umich.edu/mlr

Part of the Constitutional Law Commons, Jurisdiction Commons, Labor and Employment Law Commons, Legislation Commons, and the State and Local Government Law Commons

Recommended Citation

Eugene Alkema S.Ed., *Labor Law - State Jurisdiction Over Acts Which Are Unfair Labor Practices Under Federal Labor Legislation*, 53 MICH. L. REV. 602 (1955).
Available at: https://repository.law.umich.edu/mlr/vol53/iss4/6

This Response or Comment is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

LABOR LAW—STATE JURISDICTION OVER ACTS WHICH ARE UNFAIR LABOR PRACTICES UNDER FEDERAL LABOR LEGISLATION—Extensive federal labor legislation under the commerce clause has created a perplexing jurisdictional problem in the state courts, which are confronted increasingly with the critical issue of possible conflict with a federal preemptive area of operation. The extent to which the federal government has superseded state jurisdiction over labor matters has remained unsettled under the current case law and the legislative history of the federal acts, and the need for clarification is apparent at a time when labor cases are reaching the courts in increasing numbers. It is natural for unions to raise the issue of lack of jurisdiction in state courts to avoid sanctions dictated by local policies, and to resort to the National Labor Relations Board for uniform and comprehensive remedial action. Employers, on the other hand, depending on celerity

of action to prevent economic losses, tend to resort to state tribunals, which usually offer a swifter remedy than does federal administrative action. Two recent decisions by the Supreme Court are significant to the clarification of this area of federal-state relations. It is the purpose of this comment to consider the import of these decisions.

The State of the Law

In *Garner v. Teamsters Union*,[1] petitioner was engaged in a trucking business. It alleged that respondent union picketed its business for the purpose of forcing petitioner to coerce its employees into joining respondent union. No labor dispute existed at the time between petitioner and its employees. The state trial court found the picketing to be a violation of the Pennsylvania Labor Relations Act[2] and issued an injunction. The Pennsylvania Supreme Court reversed,[3] and the United States Supreme Court affirmed the Pennsylvania Supreme Court, holding that petitioner had alleged facts possibly constituting an unfair labor practice under section 8(b)(2) of the National Labor Relations Act[4] which the National Labor Relations Board is empowered to prevent, and that state procedures directed to the same end are precluded.

In *United Construction Workers v. Laburnum Construction Corp.*[5] plaintiff-building contractor was engaged in construction work for several mining companies, and held contracts with them for future work. Its skilled employees were members of an A.F.L. local, while its unskilled employees were unorganized. Defendant union demanded that plaintiff recognize it as the sole bargaining agent for all employees on the job, and attempted, with a show of violence, to persuade the employees to join it. As a result, the project was abandoned when plaintiff's employees feared to work, and plaintiff's contracts for future work were cancelled by the mining companies because of defendant union's threat to call out members of the United Mine Workers employed in the coal mines. In a tort action[6] it was held that a state court has jurisdiction to entertain an action for damages even though the alleged

[1] 346 U.S. 485, 74 S.Ct. 161 (1953).
[2] Pa. Laws (1937) 1168, Pa. Stat. Ann. (Purdon, 1952) tit. 43, §211.6.
[3] 373 Pa. 19, 94 A. (2d) 893 (1953).
[4] 61 Stat. L. 141 (1947), 29 U.S.C. (1952) §158.
[5] 347 U.S. 656, 74 S.Ct. 833 (1954).
[6] The nature of the tort was not discussed by the Supreme Court. However, from the state court's opinion, it seems the tort was that of unjustified interference with petitioner's business or contractual relations.

tortious conduct may also be an unfair labor practice under section 8(b)(1) of the NLRA. Two justices dissented.

The preemption doctrine is based upon the supremacy clause of the Constitution. Fundamentally, the proposition is that when Congress legislates in a field subject to its control, its power is superior to and may supersede state power in the same area. However, Congress is not required to displace entirely state jurisdiction. It can preempt only a part of it, leaving to the states concurrent jurisdiction over the remainder.[7] As a general rule, preemption of state police power by implication is not favored and will not be inferred unless the assertion of state authority would so conflict with the asserted federal power that it becomes necessary to exclude state power in order to make the federal policies effective.[8]

Congress in section 10 of the NLRA has empowered the NLRB "to prevent any person from engaging in any unfair labor practice (listed in sec. 8) affecting commerce," but, with certain exceptions, has not explicitly defined the scope of its exclusive control or the extent of the jurisdiction retained by the states. To determine the scope of implied preemption of state power, each provision of the federal law is usually examined and an attempt is made to determine the effect of the varying degrees of state authority on the execution of the federal policy. The results of this procedure are often inconclusive, and the "rules" can only be stated contingently, each resting upon assumptions as to interpretation of statutory language and the policy behind the law.[9] This inconclusiveness stems from the fact that Congress, in enacting this legislation, probably had no conscious or deliberate intention of formulating a rule to solve the federal-state relations problem. Obviously this jurisdictional problem is of extreme importance. If Congress had definite intentions as to the power to be left to the states, it

[7] Kelly v. Washington, 302 U.S. 1, 58 S.Ct. 87 (1937); Amalgamated Association v. Wisconsin Employment Relations Board, 340 U.S. 383, 71 S.Ct. 359 (1951).

[8] Texas and Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 27 S.Ct. 350 (1907); California v. Zook, 336 U.S. 725 at 733, 69 S.Ct. 841 (1949).

[9] See, e.g., the somewhat varying conclusions of the following writers: Smith, "The Taft-Hartley Act and State Jurisdiction over Labor Relations," 46 MICH. L. REV. 593 (1948); Rose, "The Labor Management Relations Act and the State's Power to Grant Relief," 39 VA. L. REV. 765 (1953); Cox, "Federalism in the Law of Labor-Relations," 67 HARV. L. REV. 1297 (1954); Handler, "The Impact of the Labor-Management Relations Act of 1947 upon the Jurisdiction of State Courts over Union Activities," 26 TEMPLE L.Q. 111 (1952); Hays, "Federalism and Labor Relations in the United States," 102 UNIV. PA. L. REV. 959 (1954); Cox and Siedman, "Federalism and Labor Relations," 64 HARV. L. REV. 211 (1950); Hornbein, "The Extent to which the Taft-Hartley Law Supersedes State Labor Laws," 28 DICTA 47 (1951); 27 N.Y. UNIV. L. REV. 468 (1952); 47 MICH. L. REV. 1201 (1949).

is reasonable to assume that these intentions would have been spelled out rather than left to inference. Thus, justification of a particular decision by reference to a fictitious "intent of Congress" simply is an attempt to rationalize a conclusion which the court thinks is wise, considering the general policy and purposes of federal labor legislation.

Prior to the *Garner* case the Court had several times faced the question of state injunctive power in other contexts. It held that states may enjoin violence even though it is union concerted activity,[10] and that they may prohibit unlawful types of nonviolent activity not protected by federal legislation.[11] Possibly states may also enjoin activity within the jurisdiction of the Board when the Board will not exercise that jurisdiction on policy grounds under its self-declared jurisdictional standards.[12] These rulings may be explained on the basis that the union conduct in question was not an unfair labor practice as defined in section 8 of the NLRA and that therefore there had been no federal assertion of control, thus leaving the activity subject to state regulation.[13] When, however, the activity is an "unfair labor practice," these cases are not necessarily controlling. Several state courts held that they did not have power to enjoin conduct which was an unfair labor

[10] Allen-Bradley Local No. 111 v. WERB, 315 U.S. 740, 62 S.Ct. 820 (1942); Hotel and Restaurant Employees' International Alliance v. WERB, 315 U.S. 437, 62 S.Ct. 706 (1942).

[11] International Union v. WERB, 336 U.S. 245, 69 S.Ct. 516 (1949) (recurrent unannounced walkouts). There are numerous state courts so holding: Goodwins, Inc. v. Hagedorn, 303 N.Y. 300, 101 N.E. (2d) 697 (1951); General Building Contractors' Assn. v. Local Union 542, 370 Pa. 73, 87 A. (2d) 250 (1952); Anheuser-Busch, Inc. v. Weber, (Mo. 1954) 265 S.W. (2d) 325; International Assn. of Machinists v. Goff-McNair Co., (Ark. 1954) 264 S.W. (2d) 48; S-M News Co. v. Simons, 279 App. Div. 364, 110 N.Y.S. (2d) 174 (1952).

[12] NLRB Press Release R-449 as reported in 34 L.R.R.M. 261 (1954). In Building Trades Council v. Kinard Construction Co., 346 U.S. 933, 74 S.Ct. 373, 33 L.R.R.M. 2394 (1954), the Supreme Court per curiam expressly refused to pass on the question of the jurisdiction of a state court in a case where the NLRB refused to exercise its jurisdiction. In the Garner case the Court had said, after finding that that case was not of the type which was within state jurisdiction, "Nor is there any suggestion . . . that the federal Board would decline to exercise its powers once its jurisdiction was invoked." Possibly this is a hint that if the Board were to refuse to exercise its jurisdiction, a state could supply injunctive relief. A Michigan circuit court, citing the Kinard case, held that it could issue an injunction in this situation on the ground that the NLRB, by establishing jurisdictional standards, ceded jurisdiction to those states having no inconsistent statutes, as provided in §10(a) NLRA as amended. Satin, Inc. v. Electrical Workers, (Cir. Ct. Calhoun County, Michigan 1954) 34 L.R.R.M. 2258. See also cases in 32 A.L.R. (2d) 1034-1036 (1953) holding that states can enjoin unfair labor practices pending Board action directed toward getting a temporary restraining order under §§10(j) or (l), on the theory that the state's jurisdiction is ancillary in that it preserves the status quo until the Board acts.

[13] See Anheuser Busch, Inc. v. Weber, (Mo. 1954) 265 S.W. (2d) 325; International Assn. of Machinists v. Goff-McNair Co., (Ark. 1954) 264 S.W. (2d) 48.

practice;[14] a court of appeals held that a federal court did not have such jurisdiction;[15] and a state court held that a state administrative board could not prevent the unfair labor practice under state law.[16] The Supreme Court had not expressly so ruled, however, prior to the *Garner* case, although in the *Plankinton* case[17] this was clearly the *ratio decidendi*. The latter case involved conduct constituting an unfair labor practice, and the Court's per curiam opinion summarily denied a state administrative board jurisdiction to prevent such conduct under state law. The *Garner* case, as interpreted in *Laburnum*, settles the matter by holding that when Congress provided its "preventive procedure," it displaced all state procedures directed to the same end.

The Court had never, before *Laburnum*, faced the question of state jurisdiction when one party seeks a damage remedy rather than an injunction. A federal court had held that it had jurisdiction under section 301 of the LMRA to give damages for breach of a collective bargaining agreement even though the violation involved a possible unfair labor practice.[18] Several state courts had upheld their jurisdiction to give damages when the activity complained of was both a tort and an unfair labor practice.[19] The *Laburnum* case confirms this result but cites none of these cases.

The Rule and Its Significance

The result of these cases seems anomalous. As a logical proposition, it is difficult to see how a state has jurisdiction to award compensation for the results of activity which it has no jurisdiction to prevent.[20] The

[14] Costaro v. Simons, 302 N.Y. 318, 98 N.E. (2d) 454 (1951); annotation, 32 A.L.R. (2d) 1027 at 1032 (1953). *Contra*, Montgomery Building and Trades Council v. Ledbetter Erection Co., 256 Ala. 678, 57 S. (2d) 112 (1951), cert. dismissed on jurisdictional grounds 344 U.S. 178, 73 S.Ct. 196 (1952), which held that a state court could enjoin a secondary boycott.

[15] Amazon Cotton Mill Co. v. Textile Workers Union of America, (4th Cir. 1948) 167 F. (2d) 183. See also United Packinghouse Workers of America v. Wilson and Co., (D.C. Ill. 1948) 80 F. Supp. 563.

[16] Pennsylvania Labor Relations Board v. Frank, 362 Pa. 537, 67 A. (2d) 78 (1949).

[17] Plankinton Packing Co. v. WERB, 338 U.S. 953, 70 S.Ct. 491 (1950).

[18] Textile Workers Union of America v. Arista Mills, (4th Cir. 1951) 193 F. (2d) 529. See also Reed v. Fawick Airflex Co., (D.C. Ohio 1949) 86 F. Supp. 822.

[19] Barile v. Fisher, 197 Misc. 493, 94 N.Y.S. (2d) 346 (1949); Russel v. International Union, 258 Ala. 615, 64 S. (2d) 384 (1953); Kuzuma v. Millinery Workers Union, Local No. 24, 27 N.J. Super. 579, 99 A. (2d) 833 (1953).

[20] In certain cases courts will award damages for activity they will not enjoin, as in the case of libel, or will give damages for failing to do what the court would not force the defendant to do, as in the case of specific performance of certain contracts. In these cases the court has jurisdiction to require or to restrain the performance, but refuses to exercise that jurisdiction. In the unfair labor practice situation, the Garner case held that the state court did not have the jurisdiction to act in the first instance, even if it so desired.

Court's explanation is that the conflict lies in the remedies[21] if both the states and the NLRB were held to have power to prevent the activity complained of, whereas there is no such remedial conflict in the damage case since the NLRB has no general power to award damages upon finding an unfair labor practice.[22] Taking these cases together, the rule for determining the jurisdiction of a state over activity constituting an unfair labor practice appears to be that a state has its traditional jurisdiction over any case, provided the type of remedy sought is not available under the federal act.[23] The Court rejects the argument that in defining unfair practices and providing but one remedy for them Congress "intended" this to be the exclusive remedy.[24] As noted above, the process of inferring intent where there likely was none is unsatisfactory at best. The validity of the rule ultimately will rest on considerations of policy and utility.

The constitutional justification for the federal labor legislation is that such legislation is needed to prevent obstructions of interstate commerce.[25] The effects of an unfair labor practice are not necessarily confined to state boundaries, and states are therefore believed to be unable to cope adequately with the problems presented. To facilitate the free flow of commerce, Congress entered the field and provided substantive rules and a central agency to apply procedures designed to

[21] Garner v. Teamsters Union, 346 U.S. 485 at 498, 74 S.Ct. 161 (1953).

[22] Under §10(a) "the Board is empowered, as hereinafter provided, to *prevent* any person from engaging in any unfair labor practice. . . ." Emphasis added. In preventing the proscribed practices, the Board under §10(c) can issue cease and desist orders and "take such affirmative action including reinstatement with or without back pay as will effectuate the policies of this Act. . . ." Thus the Board's power is to be exercised to "prevent" but not necessarily to "adjudicate" disputes concerning unfair labor practices. It may be that the Board's most drastic order, the order to cease and desist and to reinstate with back pay, is close to full compensation for damage done, close to a judgment for tort. Nevertheless the primary function of such order is preventive and not compensatory, the reinstatement and back pay components of the order being relegated to subsidiary status in order to make the preventive function fully effective by taking away the advantages of engaging in unfair labor practices. This preventive quality of the Board order was stressed in the Laburnum opinion where the phrase "preventive procedure" appears repeatedly to describe the Board function. If this is so, there is no remedial conflict until a state also attempts to give "preventive relief," and thus no supersedure until that time.

[23] "To the extent that Congress prescribed preventive procedure against unfair labor practices, that case [Garner] recognized that the Act excluded conflicting state procedure *to the same end.* To the extent, however, that Congress has not prescribed procedure for dealing with the consequences of tortious conduct already committed, there is no ground for concluding that existing criminal penalties or liabilities for tortious conduct have been eliminated." Emphasis added. United Construction Workers v. Laburnum Construction Corp., 347 U.S. 656 at 665, 74 S.Ct. 833 (1954).

[24] This was the argument of Justices Douglas and Black, dissenting in the Laburnum case.

[25] Findings and Policies of the LMRA, 61 Stat. L. 136 (1947), 29 U.S.C. (1952) §141.

produce uniform results. This is supposed to prevent the conflicts and confusion which would result from dispersion of authority among the states to handle what is said to be essentially an interstate or national problem. Keeping these considerations in mind, what effect on commerce will the *Garner* and *Laburnum* rules have?

It may well be argued that it takes longer to obtain an effective federal preventive order than to obtain a state injunction,[26] that the injurious effects of an unfair labor practice are felt shortly after it is begun,[27] and that quick relief to forestall this injury should be readily available in the interest of freeing the channels of interstate commerce from obstructions resulting from unfair labor practices. Under sections 10(j) and (l) of the NLRA a temporary restraining order pending a Board decision must be sought when violations of section 8(b)(4) are alleged and is optional in the case of the other unfair labor practices, but, as shown in *Oregon v. Dobson,*[28] even the mandatory restraining order may be too slow. If, then, a state is not allowed to enjoin a wrongful activity even when its injunction is speedier than the federal remedy, the rationale must be that the need for consistent application of uniform substantive rules to such cases outweighs the need for quick preventive relief. The principle must be that independent state and federal agencies might reach inconsistent results, and that this would frustrate the fundamental purpose of minimizing the disruptive effect of unfair labor practices on commerce more than the adverse effect of a slower but uniform federal remedy.

However, this basis for denying the states concurrent preventive authority applies with some force to the question of state authority to furnish a damage remedy. Certainly a lack of uniformity of substantive rules for handling unfair labor practices can develop just as readily out of damage actions as out of suits for injunctions. The *Laburnum* rule would leave each state free to develop its own rules as to damage actions growing out of unfair labor practices without regard to the substantive

[26] This was mentioned by Justice Day of the Pennsylvania Supreme Court in a dissenting opinion in Garner v. Teamsters Union, 373 Pa. 19, 94 A. (2d) 893 (1953).

[27] In the Laburnum case, all construction work stopped on the day the unfair labor practice began, and eight days later plaintiff's contracts for future work were cancelled. In the Garner case, within 2 days after the practice had commenced, petitioner's business had fallen off 95%, and it was causing a loss of $400-500 per day, in addition to which cancellation of its contracts with other carriers was threatened.

[28] 195 Ore. 533, 245 P. (2d) 903 (1952). Because facts were alleged which would constitute a secondary boycott under §8(b)(4)(A), the Board was required to seek a temporary restraining order under §10(l). However, it informed petitioner that it would take "a few weeks" to investigate the propriety of such action. The union's activity prevented unloading a ship and cost petitioner $5,000 per day. Upon these facts, the state court found it had jurisdiction to enjoin the conduct until the Board took its action.

rules of the NLRB or of sister states. In the *Garner* case the Court strongly intimated its belief that it is the congressional policy to treat all unfair labor practices alike. Granting this, to allow states to make independently their own rules regarding unfair labor practice disputes will frustrate the realization of that policy even when their power is limited to the damage action. Presumably they could award damages for activity which the NLRB would not condemn, and vice versa.

Furthermore, a rule emphasizing a conflict in remedies would allow state legislatures as well as state courts to enter actively the field of unfair labor practices. The Michigan Labor Mediation Act[29] provides that certain listed employer and union acts are misdemeanors, and for "appropriate legal or equitable" relief. Under *Laburnum* it would appear that Michigan could thus formalize in a statute its own policy in regard to unfair labor practices, and make them crimes or torts. To this extent there is no remedial conflict with the federal act, but there is no assurance that the state substantive rules will be the same as those which Congress has declared. Uniformity of policy implies that there will be one standard by which the propriety of given conduct is judged, and while it is true there would then be but one standard in Michigan for determining its criminal or tortious character, another standard must be resorted to in order to determine whether it can be enjoined. By limiting exclusive federal jurisdiction over unfair labor practices to those cases where the remedy sought is a prohibitory order, there can be no uniform way to determine absolutely the propriety of given conduct, and thus no really effective national policy as to unfair labor practices.

Moreover, the availability of a state damage remedy not only results in giving to the injured party an option of resorting to the federal agency if he desires, but reduces the economic pressure on him to do so. If the uniform federal preventive procedure were the only relief available, immediate resort to it by the party injured would be stimulated, for it would be the only way open to him to minimize his direct losses, and society's indirect losses as well. With an alternative damage remedy available, there is no such impetus to immediate settlement of disputes, and the public interest is not protected. As a policy matter, therefore, it is preferable to prevent or minimize such losses in the first instance than to allow them and then compensate the private party for his direct loss, but the *Laburnum* rule does not encourage such prevention in the first instance.

[29] Mich. Comp. Laws (1948) §423.22a, Mich. Stat. Ann. (1951) §17.454(23).

On the other hand, however, the basic fairness of providing some compensation for injury actually sustained is apparent. After the unfair labor practice has begun and damage is *fait accompli,* by definition federal preventive relief is no relief at all. As a practical matter, for the loss sustained before the unfair labor practice can be prevented, this is "conduct governable by the state or it is entirely ungoverned."[30]

The number of cases involving unfair labor practice charges already is enormous and shows no sign of decreasing. It would seem to be physically impossible for a five man administrative board to have exclusive jurisdiction over every dispute concerning unfair practices arising in all of the forty-eight states and to do an adequate job at the same time. Some sharing of this jurisdiction with the states is inevitable. The *Laburnum* rule of retaining exclusive jurisdiction in the NLRB only with respect to preventive relief then makes some sense in that it will tend to assure uniformity in regard to the sanction most frequently used and thus having the most immediate effect on commerce. There is a more urgent need for having uniform substantive rules governing its use than uniform rules as to recovery of tort damages.

Finally, the *Laburnum* rule arguably is consistent with the overall policy of the amended NLRA of making labor unions more, rather than less, responsible for their activity. The legislative history of that act clearly indicates this general policy.[31] Since the NLRB has no general power to award damages, if it is to have exclusive jurisdiction over the whole area of unfair labor practices, the result is to decrease the actual legal responsibility of the guilty party, a result incompatible with the above policy.

Conclusion

In the *Garner* case the Court spoke generally of the need for avoiding "a multiplicity of tribunals and a diversity of procedures [producing] incompatible or conflicting adjudications . . . ," possibly indicating that the whole field of activities constituting unfair labor practices was to be the exclusive domain of the NLRB. The *Laburnum* case by

[30] International Union v. WERB, 336 U.S. 245, 69 S.Ct. 516 (1949). In United Construction Workers v. Laburnum Construction Corp., 347 U.S. 656 at 664, the Court said, "for us to cut off the injured respondent from this right of recovery will deprive it of its property without recourse or compensation." This possibly suggests that there is present an element of due process which requires that some sort of compensatory relief be available.

[31] Conference Report on H.R. 3020, H. Rep. No. 510, 80th Cong., 1st sess., p. 52 (1947); H. Rep No. 245, 80th Cong., 1st sess., p. 8 (1947); S. Rep. No. 105, 80th Cong., 1st sess., p. 50 (1947); 93 CONG. REC. 4042 (1947).

emphasizing only remedial conflicts is a retreat from that extreme position. The *Laburnum* rule does appear to be a fair division of jurisdiction except for the two contingencies mentioned above: (1) it may encourage states to legislate actively in the field of labor-management relations; (2) it may discourage immediate resort to remedies which would prevent unfair labor practices in the first instance. As to the first, it has been suggested that the states' power to act in the field should be confined to cases where the tortious or criminal liability results from statutes or legal principles which have general application, rather than those applying only to labor-management relations as such.[32] This might be desirable, but it does not seem to be supported by the language of the *Laburnum* opinion.[33] Possibly it will be engrafted onto the rule in later cases. The second objection might be met by limiting the damage remedy to compensation only for those injuries sustained before federal preventive relief could have been obtained by a party acting with reasonable diligence. Furthermore, the other side of the coin is that the possibility of being subject to financial liability in addition to a cease and desist order should deter the guilty party in the first instance.

The basic problem is that Congress has not expressly settled the problem of federalism in regard to unfair labor practices, and the Court has had to deal with it within the limitations of the preemption doctrine. If the results do not measure up to congressional wishes or policy, it is now up to Congress to change the law and establish its intentions clearly and positively.

Eugene Alkema, S.Ed.

[32] Cox, "Federalism in the Law of Labor Relations," 67 HARV. L. REV. 1297 at 1321 et seq. (1954).

[33] But the Court did say, "to the extent . . . Congress has not prescribed procedure for dealing with the consequences of tortious conduct already committed, there is no ground for concluding that *existing* criminal penalties or liabilities for tortious conduct have been eliminated." Emphasis added. United Construction Workers v. Laburnum Construction Corp., 347 U.S. 656 at 665, 74 S.Ct. 833 (1954). The word "existing" may then preclude a state from affirmatively making such activity *new* crimes or torts. But on the rationale of the case, that state jurisdiction is superseded only to the extent of a remedial conflict, the state's power is not preempted because there is no conflict in the federal and state remedies in such a case.