Missouri Law Review

Volume 26
Issue 2 *April 1961*

Article 5

1961

State Common Law Actions for Damages and the National Labor Relations Act--The Problem of Federal Pre-Emption

Thomas I. Osborne

STATE COMMON LAW ACTIONS FOR DAMAGES AND THE NATIONAL LABOR RELATIONS ACT—THE PROBLEM OF FEDERAL PRE-EMPTION

The question of whether state courts may entertain common law actions for damages when the conduct in dispute is also governed by the National Labor Relations Act[1] has been before the United States Supreme Court in four recent cases—*United Constr. Workers v. Laburnum Constr. Corp.*,[2] *International Union, UAW v. Russell*,[3] *International Ass'n of Machinists v. Gonzales*,[4] and *San Diego Bldg. Trades Council v. Garmon*.[5] The issue, of course, is federal pre-emption, based on the supremacy clause of the federal constitution,[6] and on the exclusion of the states from areas of commerce national in scope, demanding national uniformity, because the federal government has occupied the field.[7]

The foundation case of pre-emption in the field of labor law is *Garner v. Teamsters Union*,[8] in which a Pennsylvania trial court had enjoined peaceful picketing as coercive in violation of the state labor act. The state supreme court reversed because of federal pre-emption;[9] on appeal to the United State Supreme Court, this decision was unanimously affirmed. Speaking through Justice Jackson, the Court said that Congress had made the same conduct unlawful[10] in practically the same terms as the Pennsylvania statute; and that it was for the National Labor Relations Board, not a court, to say whether there was a federal unfair labor practice, because Congress had put primary jurisdiction in the Board. The Court recognized that Congress wanted a uniform application of the federal act rather than the conflict of decisions that would inevitably result if many tribunals

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1. 49 Stat. 449 (1935), as amended, 29 U.S.C. §§ 141-188 (1952).
2. 347 U.S. 656 (1954).
3. 356 U.S. 634 (1958).
4. 356 U.S. 617 (1958).
5. 359 U.S. 236 (1959).
6. U.S. CONST. art. VI, cl. 2: "This constitution and the laws of the United States which shall be made in pursuance thereof, . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.
7. Hill v. Florida *ex rel.* Watson, 325 U.S. 538 (1945).
8. 346 U.S. 485 (1953).
9. Garner v. Teamsters Union, 373 Pa. 19, 94 A.2d 893 (1953).
10. 61 Stat. 141 (1947), 29 U.S.C. § 158(b) (1952): "It shall be an unfair labor practice for a labor organization or its agents— . . . (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) . . . or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some other ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership." 29 U.S.C. § 158(a) (1952): "It shall be an unfair labor practice for an employer— . . . (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ."

PA. STAT. ANN. tit. 43, § 211.6 (1952): "It shall be an unfair labor practice for an employer— . . . (c) By discrimination in regard to hire or tenure of employment, or any term or condition of employment to encourage or discourage membership in any labor organization . . . ."

had jurisdiction. In answer to plaintiff's contention that the Board enforced only public rights, the Court said that it was immaterial that the state was enforcing a private right while the Board was enforcing a public one, for the conflict lay in remedies, not in rights. Distinguished were *Allen-Bradley Local 1111, UEW v. Wisconsin Employment Relations Bd.*,[11] where the Supreme Court had allowed the state to enjoin violence and mass picketing, and *International Union, UAW v. Wisconsin Employment Relations Bd.*,[12] where the Court had allowed the state to enjoin quickie work stoppages, said to be ungoverned by the federal act.

The *Garner* case, involving an injunction, laid down the principle that state action was precluded if the activity was also regulated by the federal act because such dual jurisdiction might lead to a conflict of remedies, a thing which Congress had intended to avoid. The question of whether this principle would be applied to actions for damages in the state courts was answered in *United Constr. Workers v. Laburnum Constr. Corp.*[13]

In *Laburnum* the union demanded that the employer give it recognition as the sole bargaining representative, and that all employees be required to join it. When the employer refused the demands, the union created such violence that the employer was forced to abandon several of its projects. The Virginia court in a common law tort action awarded the employer $175,437.19 in compensatory damages and $100,000 in punitive damages.[14] In affirming, the United States Supreme Court assumed that the union had violated the federal act,[15] but held that there was no pre-emption.

Speaking for the Court, Justice Burton said:

> . . . In the *Garner* case, Congress had provided a federal administrative remedy, supplemented by judicial procedure for its enforcement, with which the state injunctive procedure conflicted. Here Congress has neither provided nor suggested any substitute for the traditional state court procedure for collecting damages for injuries caused by tortious conduct. For us to cut off the injured respondent from this right of recovery will deprive it of its property without recourse or compensation. To do so will, in effect, grant petitioners immunity from liability for their tortious conduct. We see no substantial reason for reaching such a result. The contrary view is consistent with the language of the Act and there is positive support for it in our decisions and in the legislative history of the Act.[16]

After saying that the states could not duplicate federal preventive measures, the Court said there was no reason to exclude state remedies for tortious conduct already committed, when Congress had not provided for it. The Court actually used the *Garner* case to support its decision:

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11. 315 U.S. 740 (1942).
12. 336 U.S. 245 (1949).
13. *Supra* note 2.
14. United Constr. Workers v. Laburnum Constr. Corp., 194 Va. 872, 75 S.E.2d 694 (1953).
15. 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(1)(A) (1952).
16. 347 U.S. at 663-664.

> The care we took in the *Garner* case to demonstrate the existing conflict between state and federal administrative remedies in that case was, itself, a recognition that if no conflict had existed, the state procedure would have survived.[17]

The federal act had "no general compensatory procedure except in such minor supplementary ways as the reinstatement of wrongfully discharged employees with back pay,"[18] and it did allow both state and federal courts to grant damages for secondary boycotts; to avoid inconsistency damages should be allowed for direct tortious conduct. Support for the decision was also found in the legislative history, the Court pointing out that Senator Taft, a sponsor of the bill, had said that for acts of violence two remedies, state and federal, should be allowed.

In his dissent, Justice Douglas[19] said that the federal act was violated, and since a state could not enjoin the conduct, it should not be allowed to give damages. The Act's purpose was to promote peaceful settlement of labor disputes; to put both sides on an equal footing the remedies supplied were meant to be exclusive. Justice Douglas commented that if litigation were allowed to drag on in the courts, the curative effect of the Act would be lost.

The Court was still following the "conflict of remedies" test in *Laburnum,* but split on its meaning. While Justice Burton felt that there must be two comparable remedies before there is a conflict, Justice Douglas felt that if the federal act regulated the conduct it was conflict enough. But even assuming the correctness of *Laburnum,* were the state courts pre-empted where there was a partial conflict of remedies? *United Auto Workers v. Russell*[20] was the answer.

In *Russell* the union had called an economic strike. After mass picketing and threats of violence prevented Russell, a non-union and non-striking employee, from working, he sued in tort in the Alabama court, recovering $500 for lost wages and $9,500 punitive damages for malicious conduct.[21] Upon appeal the United States Supreme Court affirmed, holding that there was no pre-emption. The case was similar to *Laburnum,* except that by section 10(c) of the Act, Russell could have recovered lost wages, but no punitive damages, through the Board.[22]

Again speaking through Justice Burton, the Court said that the activity was not federally protected, and could have been enjoined by the state. Referring specifically to section 10(c) the Court said that it was "far from being an express grant of exclusive jurisdiction superseding common-law actions . . . to recover

17. *Id.* at 665.
18. *Ibid.*
19. Joined by Justice Black.
20. *Supra* note 3.
21. International Union, UAW v. Russell, 264 Ala. 456, 88 So.2d 175 (1956).
22. *But see* Local 983, United Brotherhood of Carpenters & Joiners, 115 N.L.R.B. 1123 (1956), where the NLRB refused back pay to a worker barred from employment because of threats of violence by the union in violation of 8(b)(1)(A); see also Progressive Mine Workers v. N.L.R.B., 187 F.2d 298 (1951), sustaining the Board in its refusal to require the union to indemnify the employee for loss of earnings caused by interference with his entrance into the plant.

damages caused by tortious conduct of a union,"[23] for relief under the federal act was discretionary and granted primarily to prevent unfair labor practices, not to award full compensatory relief. Although both federal and state forums might possibly award back pay, "that possibility does not create the kind of 'conflict' of remedies referred to in *Laburnum*,"[24] as that occurs only when the state tries to restrict conduct that the federal act would protect. In conclusion, the Court further said that there would be no "conflict" if one sovereign gave recovery and the other denied it, since there was no inconsistency in a state recovery in tort, and denial of a federal recovery because it would not effectuate the policies of the federal Act; and partial alternative relief from the Board was not intended by Congress to preclude a state action for full relief.

In dissenting, Chief Justice Warren,[25] said that it was clear from the legislative history that pre-emption was not intended to be all inclusive, for Senator Taft had specifically mentioned duplicate state and federal remedies for violations of the state criminal law, but he had made no mention of state awards for damages. Since there was no clear Congressional intent, the result should depend upon what would best effectuate the Act's purpose. The Chief Justice insisted that a distinction should be made between recovery for physical injury and economic injury that "inevitably attends work stoppages,"[26] for the merits of the labor dispute need be inquired into only in the latter; since the state remedy for the economic injury duplicated the federal one, there was a conflict of remedies. But even if the Board could provide no remedy, state action should still be precluded, since

> a gap in the remedial scheme of federal legislation is no license for the States to fashion correctives. . . . The Federal Act represents an attempt to balance the competing interests of employee, union and management. By providing additional remedies the States may upset that balance as effectively as by frustrating or duplicating existing ones.[27]

The Chief Justice was quick to point out how allowing the states to provide an additional remedy would upset the balance intended by Congress. First, state awards result in a lack of uniformity of treatment due to the multiplicity of tribunals involved, counter to the purposes of the federal act to create a uniform scheme of national labor regulation. Second, the fear of state damage awards would deter even protected union conduct; and, finally, punitive damages were inimicable to the Act which was designed to be "curative" in effect and to promote labor peace.

In distinguishing *Laburnum*, Chief Justice Warren said that while in *Laburnum* an unfair labor practice was only "fortuitously" involved, in *Russell* it was inherently so. Further, since a stranger union was involved in *Laburnum*, there was "no need for concern over the climate of labor relations,"[28] but in *Russell*,

23. 356 U.S. at 642.
24. *Id.* at 644.
25. Joined by Justice Douglas, Justice Black not participating.
26. 356 U.S. at 649.
27. *Id.* at 650.
28. *Id.* at 656.

since a recognized union was involved, there was need for such concern. And perhaps more important from the practical standpoint, the Chief Justice pointed out that punitive damages could be recovered only once under the facts of *Laburnum,* while they might be recovered many times under the facts of *Russell;* thus allowance of punitive damages would have a far different effect in *Russell* and might bankrupt the union for activity it could not control.[29]

In *Russell* the majority adhered to the "conflict of remedies" test. It was re-defined, however, to mean that the state could not provide a remedy for conduct that was federally protected. Violence, or the absence of it, seemed to be immaterial. For as one commentator has said:

> Conceptually, such a restriction would not be justifiable. The presence or absence of violent union conduct . . . has no necessary connection with the commission of tortious unfair labor practices warranting local, civil remedies. The character and severity of a given tort and the comparative adequacy of federal remedies for the damaged plaintiff do not depend on whether the union engages in violence—as when a union published a libel in connection with a nonviolent unfair labor practice. Furthermore, state jurisdiction over union violence is premised on the need for maintaining order in a civilized community. Tort damages, on the other hand, fulfill the entirely different function of redressing private wrongs.[30]

This notion was re-enforced by *International Ass'n of Machinists v. Gonzales,*[31] where there was no violence and no pre-emption.

In *Gonzales,* after the plaintiff had been wrongfully expelled from the union and denied use of its hiring hall, he sued in the California court for breach of contract[32] and was awarded reinstatement plus $6800 for lost wages and $2500 for physical and mental suffering.[33] Appealing only the award of damages, the union lost; the United States Supreme Court held that there was no pre-emption.

In the opinion handed down the same day as *Russell,* but written by Justice Frankfurter, the Court said that possibly the federal act had been violated,[34] but that it did not govern a union member's rights:

> . . . indeed the assertion of any such power has been expressly denied. The proviso to § 8(b)(1) of the Act states that 'this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . . .'

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29. Twenty-nine more suits, totaling $1,500,000, were pending, said Chief Justice Warren in his dissent. *Id.* at 657.

30. *State Jurisdiction Over Torts Arising from Federally Cognizable Labor Disputes,* 68 YALE L.J. 308, 315-316 (1958).

31. *Supra* note 4.

32. California had for over fifty years considered the relationship between a member and a union to be contractual insofar as the constitution, rules and by-laws of the union are concerned. See Dingwall v. Amalgamated Ass'n of Street Ry. Employees, 4 Cal. App. 565, 88 Pac. 597 (Dist. Ct. App. 1906).

33. Gonzales v. International Ass'n of Machinists, 142 Cal. App. 2d 207, 298 P.2d 92 (Dist. Ct. App. 1956).

34. 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(2) (1952).

> . . . The present controversy is precisely one that gives legal efficacy under state law to the rules prescribed by a labor organization for 'retention of membership therein.'[35]

Thus to take away the state remedy would leave the member with no protection for his important membership rights, and such a result, in the absence of compelling Congressional intent, should not be allowed:

> The National Labor Relations Board could not have given respondent the relief that California gave him according to its local law of contracts and damages. Although, if the unions' conduct constituted an unfair labor practice, the Board might possibly have been empowered to award back pay, in no event could it mulct in damages for mental or physical suffering. And the possibility of partial relief from the Board does not, in such a case as is here presented, deprive a party of available state remedies for all damages suffered.[36]

In concluding, Justice Frankfurter said that since *Russell* had allowed tort damages, contract damages should also be allowed "when the possibility of conflict with federal policy is similarly remote."[37] As the state suit did not purport to deal with an unfair labor practice, but only with breach of contract, it further shows a lack of potential conflict.

Again dissenting, Chief Justice Warren[38] said that to allow the states to supplement the relief available under the federal act was just as much a "conflict" as to allow relief in derogation of it; the "conflict" here was a probable violation of section 8(b)(2), which necessitated a referral to the Board in the first instance. To allow the states to grant the additional relief in the form of damages for emotional disturbances, assuming the Board could compensate for lost wages, was not in keeping with the purpose of the federal act; for Congress, in providing only for lost wages, had given all the relief it thought necessary, and any additional state relief would upset that balance between employer, employee, and union that the federal act had sought to create. Again the Chief Justice emphasized that the alternative additional relief would deter employees from using the "curative" federal machinery, and then summed up the position of the dissenters by saying it was immaterial that a common law action for breach of contract was involved, for pre-emption depended on "the effect of state action on the aims of federal legislation, not a game that is played with labels or an exercise in artful pleading."[39]

The rationale of *Gonzales* follows that of *Russell*—where there is only partial alternative relief available from the Board, there is no pre-emption because there is no "conflict of remedies." Justice Frankfurter had gone even further, however, in saying there was no conflict with federal policy since the suit was not to remedy an unfair labor practice and since the federal act was not concerned with intra-

35. 356 U.S. at 620.
36. *Id.* at 621.
37. *Ibid.*
38. Again joined by Justice Douglas, Justice Black not participating.
39. 356 U.S. at 632.

union affairs. This lack of federal concern was to take on new significance in *San Diego Bldg. Trades Council v. Garmon,*[40] hereinafter referred to as *Garmon II.*

In the first *Garmon*[41] case the union's demand for a union shop was turned down by the employer because the employees did not want to join. Contending that it was for publicity only, the union peacefully picketed; the California court, however, found that the purpose was to force a union shop contract, enjoined the picketing and awarded $1000 in damages. Upon appeal, the United States Supreme Court, which considered the case along with the famous *Guss v. Utah Labor Relations Bd.,*[42] reversed the injunction, holding that even though the Board had refused to take jurisdiction, the state court was nevertheless precluded from enjoining peaceful picketing; but the case was remanded on the question of damages to have the California court decide if that remedy was available under local law.

On remand the California court[43] again allowed recovery of damages, saying that the picketing was both a tort and an unfair labor practice under local law. Four judges held that since there was no relief available from the Board, there was no conflict of remedies. Three justices dissented, however, on the basis that the picketing was possibly federally protected activity, and because of the doctrine of primary Board determination. Upon appeal the United States Supreme Court unanimously held that the state was precluded from awarding damages, but split five to four on the reasoning.

Justice Frankfurter, for the majority, said that the question of pre-emption had frequently been before the Court, and that:

> We have been concerned with conflict in its broadest sense; conflict with a complex and interrelated federal scheme of law, remedy, and administration. Thus, judicial concern has necessarily focused on the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted.[44]

Although state action that threatened interference with federal policy had not been allowed, due regard for the states left them "power to regulate where the activity regulated was a merely peripheral concern of the Labor Management Relations Act,"[45] citing *Gonzales,* and power where there were "interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act,"[46] citing *Russell* and *Laburnum.*

Justice Frankfurter then boldly set forth a series of principles to aid in the determination of whether the state courts were free to act:

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40. *Supra* note 5.
41. San Diego Bldg. Trades Council v. Garmon, 353 U.S. 26 (1957).
42. 353 U.S. 1 (1957).
43. Garmon v. San Diego Bldg. Trades Council, 49 Cal. 2d 595, 320 P.2d 473 (1958).
44. 359 U.S. at 243.
45. *Id.*
46. *Id.* at 244.

> When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law.[47]

Next, in speaking of the effect of the doctrine of primary Board determination, Justice Frankfurter said that if the conduct was arguably subject to either section 7 or 8, state and federal courts must defer to the Board, and if the Board decides it is subject to either section, the states are displaced. Even further, "the Board may decide that an activity is neither protected nor prohibited, and thereby raise the question whether such activity may be regulated by the States."[48] Recognizing that if the Board should either refuse to file charges or assert jurisdiction, it might still be unknown whether the activity was protected, prohibited, or neither protected nor prohibited, the Court said:

> . . . In the absence of the Board's clear determination that an activity is neither protected nor prohibited or of compelling precedent applied to essentially undisputed facts, it is not for this Court to decide whether such activities are subject to state jurisdiction. The withdrawal of this narrow area from possible state activity follows from our decisions in *Weber* and *Guss*. The governing consideration is that to allow the States to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy.[49]

The Court then applied these principles to the facts, and said the answer was clear; the Board had not determined the status of the activity, and since it was arguably within sections 7 and 8, the state had no jurisdiction. Nor did it make any difference that the state remedy was for damages, for "regulation can be effectively exerted through an award of damages as through some form of preventive relief."[50] The final word on *Laburnum* and *Russell* was: "State jurisdiction has prevailed in these situations because the compelling state interest, in the scheme of federalism, in the maintenance of domestic peace is not overridden in the absence of clearly expressed congressional direction."[51]

Justice Harlan[52] concurred on the "narrow ground that the Unions' activities . . . may fairly be considered protected . . . and that therefore state action is precluded"[53] until the Board had decided to the contrary. Clearly, if the activity

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47. *Ibid.*
48. *Id.* at 245. The Court then footnoted the following: "See Auto Workers v. Wisconsin Board, 336 U.S. 245. The approach taken in that case, in which the Court undertook for itself to determine the status of the disputed activity, has not been followed in later decisions, and is no longer of general application."
49. 359 U.S. at 246.
50. *Id.* at 247.
51. *Ibid.*
52. Joined by Justices Clark, Whittaker and Stewart.
53. 359 U.S. at 249.

were unprotected *Laburnum* and *Russell* "would require that the California judgment be sustained, even though such conduct might be deemed to be federally prohibited";[54] the basis upon which *Laburnum* and *Russell* were decided was not violence, but upon an absence of a conflict of remedies.

> Speaking of the consequences of the majority opinion, Justice Harlan said: . . . [T]his case cuts deeply into the ability of States to furnish an effective remedy under their own law for the redress of past nonviolent tortious conduct which is not federally protected, but which may be deemed to be, or is, federally prohibited. Henceforth the States must withhold access to their courts until the National Labor Relations Board has determined that such unprotected conduct is not an unfair labor practice, a course which, because of unavoidable Board delays, may render state redress ineffective. And in instances in which the Board declines to exercise its jurisdiction, the States are entirely deprived of power to afford any relief.[55]

In concluding, Justice Harlan said that he was at a "loss to understand, and [could] find no basis on principle or in past decisions for the Court's intimation that the States may even be powerless to act when"[56] the conduct is neither federally protected nor prohibited, because former cases[57] had already determined that issue; the principles of past cases should be adhered to—except when the conduct was, or might be, federally protected, state remedies for damages should be allowed.

Garmon II, according to the concurring justices, changed the law, so that the states are now pre-empted from regulating activity that is either federally protected or prohibited. And coupled with this is the doctrine of primary Board determination. The result is that, until the Board has determined the category of conduct involved in a particular case, or in prior cases on essentially similar facts, state action is precluded; after Board determination, if the conduct is federally protected or prohibited, such action is still precluded.

If the Board decides the conduct is neither protected nor prohibited, according to Justice Frankfurter there arises a question whether the states can regulate. Since the concurring justices thought this category was conduct federally ungoverned, they were completely baffled by the statement. Possibly it could mean that sections 7 and 8 are not the sole test of what is federally governed by the National Labor Relations Act—that any activity that is federally regulated by the Act is pre-empted, and what it is will have to be determined by future court decisions. What was actually meant, of course, is unknown; Justice Frankfurter did not say.

The two exceptions to pre-emption relate to conduct "deeply rooted in local feeling and responsibility," presumably violence and criminal conduct, and activity

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54. *Id.* at 250.
55. *Id.* at 253.
56. *Ibid.*
57. Allen-Bradley Local 1111, UEW v. Wisconsin Employment Relations Bd., *supra* note 11; International Union, UAW v. Wisconsin Employment Relations Bd., *supra* note 12.

which is of "merely peripheral concern" to the federal act. What this latter exception comprehends is unknown. It should be mentioned, however, that subsequent to *Gonzales* Congress, by the Labor-Management Reporting and Disclosure Act of 1959,[58] has undertaken regulation of intra-union conduct. But the Act of 1959 says any state remedies previously available to abused union members remain available.[59] This seems to cover *Gonzales* but how far it reaches is as yet unknown.

In grappling with the problem of pre-emption, and as a corrolary the right of the injured party to full redress, the Court has been concerned with four principles: (1) by enacting a uniform, comprehensive scheme of federal labor regulation, Congress has completely occupied the field; (2) where Congress has provided a remedy the state cannot provide a conflicting remedy; (3) to insure orderly administration of the federal act, Congress has vested the power of initial determination of the status of the conduct in the Board; (4) private rights under state law may differ from and be subordinated to public rights under federal law. Which of these principles weighed most heavily in the mind of a majority of the Court in the particular case determined the result. Although *Garner* was the basis of all four principles, all four being mentioned therein, the emphasis there was placed upon occupancy of the field and primary Board determination. When the issue was switched to damages in *Laburnum,* however, the Court emphasized the lack of conflicting affirmative remedies, rejecting the dissenting justices' idea that any state remedy that would upset the balance intended to be created was a conflicting remedy. In *Russell* and *Gonzales* the Court followed the theory of the absence of conflicting remedies, but refined it to absence of a co-extensive conflicting remedy, and said the state could regulate all the federal act would not protect. Also, in saying that when the purpose of the state suit was not to remedy an unfair labor practice there was no conflict, the Court seemed to be favoring private state rights over public federal rights—despite the language in *Garner* to the effect that whether private state rights were involved was immaterial. The dissenting justices in *Laburnum, Russell,* and *Gonzales* had steadfastly adhered to the principles emphasized in *Garner,* and in *Garmon II* were back in the majority—occupancy of the field and primary Board determination were again a part of the criteria for determining the absence of conflicting remedies.

Although some writers have disputed it,[60] the Court seems committed to the idea that Congress intended to create a uniform scheme of federal labor regulation that, except for matters of local or peripheral concern, has occupied

58. §§ 101-105, 73 Stat. 522 (1959).

59. Labor-Management Reporting and Disclosure Act § 603(a), 73 Stat. 540 (1959): ". . . except as explicitly provided to the contrary, nothing in this Act shall take away any right or bar any remedy to which members of a labor organization are entitled under such other Federal law or law of any State."

60. Favoring pre-emption and saying Congress intended it is Cox, *Federalism in the Law of Labor Relations,* 64 HARV. L. REV. 1297 (1954). *Contra,* Maltzer, *The Supreme Court, Congress and State Jurisdiction Over Labor Relations,* 59 COLUM. L. REV. 6 (1959).

the field. Underlying this principle is the Congressional desire for a balance of interest and uniformity of treatment between labor and management that is possible only when one sovereign can govern. To allow the states to regulate what is governed by the federal act means that the remedy applied will be determined not by the type of conduct involved, but by the locality of occurrence. If the federal remedy is inadequate, still the states should not be allowed to supply a remedy that can be as various as their number. Instead, the federal act should be amended to meet any inadequacies. On this basis *Russell* and *Gonzales* were wrongly decided; an exception can be made for *Laburnum,* since allowing state power to regulate such extreme violence and extortion would create little, if any, interference with federal policy.[61]

By the Labor-Management Reporting and Disclosure Act of 1959, both *Garmon* cases have been modified somewhat; the states may now exercise jurisdiction over conduct outside the asserted jurisdiction of the Board.[62] To further aid state jurisdiction the Board will grant advisory opinions in specific cases.[63] The second *Garmon* case is still the law, however, for cases within the Board's jurisdiction.

A problem created, but not decided, by the Act of 1959 is whether state or federal law applies in the new area ceded to the states. If state law applies the Act operates as a grant of jurisdiction itself, and that this is the result intended is possibly indicated by the refusal of Congress to enact the "Prouty Amendment,"[64] which would have required that federal law be applied. Since most states have no comprehensive labor regulation, and since the common law recognized few if any union and employee rights,[65] it could be argued that federal law should be applied. Otherwise, the rights involved will depend on the size of the business, and the state law may prohibit what the federal law would protect.

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61. This distinction was made by Justice Traynor dissenting in *Garmon II* at the state level, Garmon v. San Diego Bldg. Trades Council, *supra* note 43.

62. § 701(a), 73 Stat. 541 (1959): "Section 14 of the National Labor Relations Act . . . is amended by adding . . . the following new subsection: . . . (c)(1) The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: *Provided,* That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.

"(2) Nothing in this Act shall be deemed to prevent or bar any agency or the courts of any State or Territory . . . from assuming and ascertaining jurisdiction over labor disputes over which the Board declines . . . to assert jurisdiction."

63. Statements of Procedure, 29 C.F.R. §§ 102.98-.110 (Supp. 1961).

64. 105 CONG. REC. 5949 (daily ed. April 24, 1959); for a full discussion of whether state or federal law applies see McCoid, *Notes on a "G-String": A Study of the "No-Man's Land" of Labor Law,* 44 MINN. L. REV. 205, 230-246 (1959).

65. Blumrosen, *Common Law Limitations on Employer Anti-Union Conduct: Protection of Employee Interests in Union Activity by Tort Law,* 54 NW U.L. REV. 1 (1959).

From a look at the state cases decided subsequent to *Garmon II*, it is evident that the principles there laid down are not clear and easy to follow. In five cases arising subsequent to *Garmon II* and involving wrongful expulsion from a union, the decisions are irreconcilable, two having resulted in a holding that state action was precluded and three having reached the opposite conclusion. In *Keller v. Huffman Full Fashioned Mills, Inc.*,[66] decided in October 1959, the employee sued his employer for damages because he was discharged for joining a labor union in violation of state law.[67] The trial court, on demurrer of the defendant, dismissed on the basis that there was also a violation of federal law,[68] but the Supreme Court of North Carolina reversed on the authority of *Willard v. Huffman*,[69] its own case of June 1958. In *Willard* the employee had been discharged in violation of state and federal law when he joined a union. The Board had declined jurisdiction for monetary reasons; the employee had thereafter sued in the state court and recovered $1000 in damages. The award was affirmed by the North Carolina supreme court, which held there was no conflicting remedy and thus no federal pre-emption on the basis of *Laburnum*.

In *Green v. Folks*,[70] decided in September 1960, the employee sought to recover damages from the union for wrongful expulsion and from his former employer for wrongful discharge, and further alleged a conspiracy between them to deprive him of rights under the federal act.[71] The New York trial court refused to dismiss on the basis that the wrongful expulsion from the union was a breach of contract as in *Gonzales*, and that the conspiracy was a tort. The only case in point, said the court, was *Gonzales*, and there state jurisdiction had been upheld.

In *Taylor v. United Ass'n of Journeymen & Apprentices*,[72] decided in June 1960, the plaintiff was expelled from the union for non-payment of dues. He contended the dues were illegal as a political assessment, and sought damages and reinstatement. The trial court dismissed because of federal pre-emption. Upon appeal, the dismissal as to the question of reinstatement was affirmed for lack of equity because the employee had not pursued the union machinery open to him; the dismissal of damages was reversed on the theory that a cause of action would lie if the assessment proved illegal. Nor did it matter that the case had previously been before the Board, for the Board had not decided the issue and res judicata did not bar the action in the state court.

In *Dempsey v. Great Atlantic & Pacific Tea Co.*,[73] decided in November 1960, after the employee was discharged and expelled for non-payment of dues he sued his former employer and union, alleging a conspiracy between them to require all employees to join the union and pay dues as a condition of employment. The

66. 251 N.C. 92, 110 S.E.2d 480 (1959).
67. Right to Work Act, N.C. Sess. Laws 1947, ch. 328.
68. 61 Stat. 140 (1947), 29 U.S.C. § 158(a)(3) (1952).
69. 250 N.C. 396, 109 S.E.2d 233 (1959).
70. 208 N.Y.S.2d 559 (Sup. Ct. 1960).
71. 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(2) (1952).
72. 337 S.W.2d 421 (Tex. Civ. App. 1960).
73. 208 N.Y.S.2d 18 (Sup. Ct. 1960).

trial court, which had earlier decided *Green v. Folks,* held there was no pre-emption; the tort was not arguably within sections 7 and 8 of the federal act and all doubts should be resolved in favor of jurisdiction to avoid irreparable injury to the litigant. Upon appeal this was reversed; the tort alleged was arguably subject to the federal act, for the exception to the rule of federal pre-emption—torts that threaten the domestic pease with violence—was not met.

In *Wax v. International Mailers Union,*[74] decided in June 1960, the employee sought damages and reinstatement from his former union for wrongful expulsion, alleging that the union had persuaded the employer to discharge him for reasons other than non-payment of dues in violation of his rights under the federal act. The trial court held for the plaintiff, relying on *Gonzales.* Upon appeal this was reversed. The court said it read *Garmon II* as did Justice Harlan in his dissent—it has either undercut or severely limited *Gonzales* and the state courts have jurisdiction only when the conduct is neither protected nor prohibited by the federal act.

Two other cases, one involving a suit for breach of contract and the other the imposition of a fine, have been decided by state courts since the decision in *Garmon II.* Here, as in the cases referred to above, there does not seem to be any particular consistency in the results reached.

In *Lucas Flour Co. v. Local 174, Teamsters Union,*[75] decided in October 1960, the union had gone on strike after the employer discharged an employee for unsatisfactory work. The employer sued for damages and recovered $6,501.60. Upon appeal, the court, in affirming, held there was no pre-emption. Although the collective bargaining agreement did not have a no-strike clause, the strike was a breach because the employee was rightfully discharged; the conduct was not covered by the federal act.

In *Local 248, UAW v. Wisconsin Employment Relations Bd.,*[76] decided in October 1960, the defendant union had fined members who crossed the strike picket line. The Wisconsin Board fined the union officers, saying the strike fines were unlawful because they were coercive of members' rights under state law.[77] Upon appeal the Board cited the proviso to section 8(b)(1) on intra-union activity, (relied upon by Justice Frankfurter in *Gonzales*), to show that the conduct was not within the scope of the federal act. The court held the conduct was arguably protected under section 7 because one purpose of the federal act was to correct inequality of bargaining power. A union that cannot enforce its rules cannot bargain collectively; therefore, it was not a matter of "peripheral concern" and *Gonzales* did not apply.

Conclusion

The question of federal pre-emption discussed in this comment remains a vital issue today. By virtue of the 1959 Act the no-man's land problem posed by Justice Frankfurter in *Garmon II* has been largely settled; state courts may

74. 400 Pa. 173, 161 A.2d 603 (1960).
75. 356 P.2d 1 (Wash. 1960).
76. 11 Wis. 2d 277, 105 N.W.2d 271 (1960).
77. Wis. Stat. Ann. § 111.06(2)(a) (1957).

now exercise jurisdiction where the Board has declined to assert its jurisdiction. In addition the Court in *Garmon II* set forth some guiding principles—where the conduct is clearly subject or even arguably subject to the Board's jurisdiction, state courts may not act. But the overriding principle here is one of deference to the Board for this determination, and, while this aids the state courts to some extent, it nevertheless leaves the very real problem to the state courts of deciding when conduct is arguably subject to the Act. How much the new practice of the Board's granting of advisory opinions will help to solve this problem remains to be seen. The confusion in this area is perhaps compounded by the Court's suggestion in its most recent opinion in *Garmon II* that there are two areas where the state courts are free to act, irrespective of the jurisdictional standards of the Board: (1) where there is "conduct deeply rooted in local feeling and responsibility," and (2) where activity is of "merely peripheral concern" to the Act. It may be questioned whether these exceptions did not arise more from a change of heart on the part of some of the members of the Court, than from any sound precepts of federalism. But whatever the reason for them, what one may see in the future is an attempt on the part of state courts to bring many cases within the two exceptions because of their reluctance to leave their litigants with what is believed to be an inadequate federal remedy. If so, the provident granting of certiorari will most likely be the Supreme Court's method of control; this, done with an eye to fulfilling the purposes of the Act while at the same time respecting the state's interest in protecting its own citizens, may actually prove satisfactory. On the other hand, it is equally possible that it may prove imperative that a more definitive decision be handed down by the Supreme Court.

THOMAS I. OSBORNE