Hastings Law Journal

Volume 10 | Issue 3 Article 6

1-1959

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LIMITATIONS ON STATE JURISDICTION OF UNFAIR LABOR PRACTICES: EMPLOYEE SUITS AGAINST UNIONS IN INTERSTATE COMMERCE

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The traditional concept of a labor dispute is a controversy between union and management. Society and government are becoming increasingly aware of the rights of a third party, who may be either a non-member employee or a union member, asserting a wrong by the union. This discussion will deal primarily with the forum and remedies available to the employee who suffers as a result of arbitrary action by the union.

Most states hold that membership in an unincorporated association, such as a union, creates enforceable property rights which are violated by wrongful expulsion or other arbitrary action.[1] The theory is that union membership constitutes a contractual relationship, the terms of which are contained in the by-laws and constitution of the union.[2] California and a few other jurisdictions have also imposed tort liability.[3]

The states have developed these remedies from traditional equitable protection in analagous fields; they cannot be said to be the manifestation of comprehensive state labor legislation. Federal remedies, on the other hand, are a result of an attempt to formulate a broad program of regulation of labor problems involving interstate commerce.

Federal Labor Legislation

To what extent do the federal labor acts affect state relief? As to union-management disputes these acts provide a comprehensive scheme of federal policy and regulations. The Wagner Act (NLRA) provides federal relief for *employer* unfair labor practices. The Taft-Hartley (LMRA) amendments add federal regulation of *union* unfair labor practices.[4] The Supreme Court has held that together these acts evidence congressional intent to pre-empt the field of union-management disputes in interstate commerce.[5]

The basic problem dealt with here is to what degree the same congressional intent is manifest in the area of employee-union disputes. The answer will disclose the extent to which the state remedies mentioned earlier will be pre-empted. The supremacy of the federal government in matters involv-

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* Members, Third-Year Class.

1 See generally, Stone, *Wrongful Expulsion From Trade Unions: Judicial Intervention at Anglo-American Law,* 34 CAN. B. REV. 1111 (1956).

2 *Ibid.*

3 Cason v. Glass Bottle Blowers Ass'n, 37 Cal. 2d 134, 231 P.2d 6 (1951); Otto v. Journeymen Tailors' Union, 75 Cal. 308, 17 Pac. 217 (1888); Tesoriero v. Miller, 274 App. Div. 670, 88 N.Y.S. 2d 87 (1949).

4 61 Stat. 136–59 (1947), 29 U.S.C. §§ 141–88 (1952).

5 Guss v. Utah Labor Relations Bd., 353 U.S. 1 (1957); see Cox, *Federalism in the Law of Labor Relations,* 67 HARV. L. REV. 1297 (1954); Isaacson, *Federal Pre-emption Under the Taft-Hartley Act,* 11 IND. & LAB. REL. REV. 391 (1957–58).

ing interstate commerce is well established.[6] Pre-emption, where congress has not stated specifically whether a federal statute has occupied a field in which the states otherwise would be free to act, can occur under various circumstances:[7] when the scheme of federal regulations is so pervasive that the reasonable inference is that congress left no room for the states to supplement it; when the field is one in which the federal interest is so dominant that it precludes state action on the same subject; when enforcement of state law would present a serious danger of conflict with the administration of the national program.[8] To clarify the extent to which federal law has occupied the area of protection of the employee in relation to the union, the following paraphrasings of the pertinent sections of the NLRA as amended by the Taft-Hartley Act are set forth.[9]

By section 7 of the Taft-Hartley Act employees are given the right of self-organization, to form or join labor organizations, and also the right to refrain from doing so except as that right may be affected by a collective bargaining agreement under the provisions of section 8 which authorizes a union shop agreement.

By subsection (a)(3) of section 8, it is an unfair labor practice for an employer to discriminate in regard to hire or tenure of employment or any terms or conditions of employment, or to encourage or discourage membership in any labor organization; except that an employer may enter into an agreement with a labor organization, which is the collective bargaining agent of its employees, by which membership in the union, on or after the 30th day of employment, shall be a condition of employment. This is the union shop provision.

In subsection (b)(1) of section 8 of the act it is made an unfair labor practice for a labor organization to restrain or coerce an employee in the exercise of the rights guaranteed him by section 7. By subsection (b)(2) it is an unfair practice for a union to cause, or attempt to cause, an employer to discriminate against an employee to whom membership in the union has been denied on grounds other than failure to tender periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership. Section 8(b)(1) also provides that the right of the union to prescribe its own rules with respect to the acquisition or retention of membership shall not be impaired.

By section 8(b)(5) the employees covered by an agreement authorized under 8(a)(3) (the union shop provision) are protected from the exactment by the union of excessive or discriminatory fees.

Subsections (A) and (B) of section 8(a)(3) provide that an employer cannot justify discrimination against an employee for non-membership in a union if he knows that either membership was not available to the employee

[6] *Ibid.*

[7] See NLRB v. Fainblatt, 306 U.S. 601 (1939).

[8] See Pennsylvania v. Nelson, 350 U.S. 497 (1956).

[9] See 61 Stat. 136–59 (1947), 29 U.S.C. §§ 141–88 (1952).

on the same terms generally required, or that membership was denied or terminated for any reason other than the failure to tender the usual dues and initiation fees.

Section 10(c) authorizes the NLRB, upon the finding of an unfair labor practice, to issue a cease and desist order and to take such affirmative action, including ordering reinstatement of the employee with or without back pay, as will effectuate the policies of the act.

These provisions provide an outline of the rights and remedies available in the employee-union situation, with the exception of those regarding election procedure. Until recently the Supreme Court had not determined the superseding effect of this federal legislation.

The Gonzales Decision

Gonzales, a member of a union in interstate commerce, brought an action in the California Superior Court claiming to have been expelled from membership in violation of his rights under the union constitution and by-laws. The court ordered reinstatement in the union and awarded damages for lost wages and physical and mental suffering. The District Court of Appeal affirmed.[10] The United States Supreme Court granted certiorari. In *International Assosciation of Machinists v. Gonzales*,[11] Justice Frankfurter, speaking for six members of the Court, ruled that nothing in the NLRA, as amended, displaced state power to award a wrongfully expelled union member damages resulting from breach of his union membership contract. Chief Justice Warren, joined by Justice Douglas, dissented on the grounds that to sustain a state court damage award against the union for conduct, which is also subject to an unfair labor proceeding under the NLRA, is to sanction an improper duplication and conflict of remedies.[12]

Note that the *Gonzales* case involved a union member who had a cause of action in the state court for wrongful expulsion and arbitrary union conduct.[13] The dissent conceded this, but argued that the California court was in error in giving relief for lost wages when a parallel relief was available in the NLRB under section 10(c) of the NLRA. This rests on the assumption that the union refusal to dispatch Gonzales for work was an unfair labor practice under section 8(b)(2) of the act. As Gonzales had tendered his dues and fees, union action causing the employer to discriminate would have been a violation of that section. It is questionable whether the facts in the Gonzales case constitute an unfair labor practice. Furthermore, there is some doubt whether the defendant raised the issue of exclusive NLRB jurisdiction at the proper time or in the correct procedural manner. However, this is not decisive here. The majority opinion indicates that whether or not there is available relief in the NLRB for an unfair labor practice, the state court did not err by filling out the remedy of reinstatement in the union by an award of damages for back wages.

[10] Gonzales v. International Ass'n of Machinists, 142 Cal. App. 2d 207, 298 P.2d 92 (1956).
[11] 356 U.S. 617 (1958).
[12] *Id.* at 623 (dissenting opinion).
[13] See note 3 *supra*.

On the same day *Gonzales* was decided, the Supreme Court held in *International Union U.A.W. v. Russell*[14] that the Alabama court could grant parallel relief, *i.e.*, back pay for union action that was clearly an unfair labor practice under the federal act. In this decision, as in *Gonzales*, the state court had determined that a cognizable state cause of action existed independent of the unfair labor practice, in this case violent and mass picketing interfering with a non-union employee's right to work.[15] (As will be indicated ahead, the Supreme Court affirmance of an existing state cause of action in *Russell* may represent a departure from previous cases.)[16] Warren, again dissenting, rested upon much the same grounds as expressed in *Gonzales*, but took particular exception to the grant, in *Russell*, of punitive damages.[17]

The dissenters in *Gonzales* and *Russell* raised a vigorous protest that the decisions are at odds with prior cases. They said in *Gonzales*:[18]

> Since the majority's decision on the permissibility of a state-court damage award is at war with the policies of the Federal Act and contrary to the decisions of this Court, it is not surprising that the bulk of its opinion is concerned with the comforting irrelevancy of the State's conceded power to reinstate the wrongfully expelled. . . .

Together, these cases indicate that the Supreme Court may not apply the same broad doctrine of pre-emption in the area of unfair labor practices that has been applied in union-management controversies. Do the decisions of the Court prior to these cases support a doctrine of pre-emption broad enough to justify this dissenting view?

Pre-emption Before Gonzales

Exclusive NLRB jurisdiction for unfair labor practices in union-management litigation is supported by an extensive line of cases.[19] The essence of this doctrine is distilled in several significant decisions. *Hill v. Florida ex. rel. Watson*[20] held that a state could not fix the requirements for collective bargaining agents in interstate commerce. A state cannot impinge on the full exercise of federally created rights. In *Garner v. Teamsters Union*,[21] the Supreme Court held that a state court could not enjoin picketing, which was in violation of a state statute. As the activity was prohibited by federal act, NLRB relief was exclusive. In *Weber v. Anheuser-Busch*,[22] the Court overruled the application of a Missouri restraint of trade statute against a union because the union conduct was subject to NLRB sanction. The ambit

[14] 356 U.S. 634 (1958).
[15] International Union, UAW v. Russell, 264 Ala. 456, 88 So.2d 175 (1956).
[16] See notes 26 and 34 *infra*.
[17] 356 U.S. at 647 (dissenting opinion).
[18] *Id.* at 623, 631 (dissenting opinion).
[19] See note 5 *supra*.
[20] 325 U.S. 538 (1945).
[21] 346 U.S. 485 (1953).
[22] 348 U.S. 468 (1955).

was reached in *Guss v. Utah Labor Relations Board*[23] where the Court held that a state had no power to deal with matters within the jurisdiction of the NLRB, even though the Board had expressly declined to exercise its jurisdiction.

It is clear from the foregoing decisions that the Supreme Court has found parallel relief to be an intolerable interference with the federal scheme. The Court does not rest its position either on the particular facts in any case or on the parties involved, but rather on the paramount consideration of protecting national interests in the area, regardless of the consequences in any particular situation. Whether the conduct falls within the prohibitions of section 8 of the Taft-Hartley Act, or within the protection of section 7 as "concerted activity," state action is prohibited.[24] As indicated in *Garner*:[25]

> ... [W]hen two separate remedies are brought to bear on the same activity, a conflict is imminent. It must be remembered that petitioners' state remedy was a suit for an injunction prohibiting the picketing. The federal Board, if it should find a violation of the national Labor Management Relations Act, would issue a cease-and-desist order and perhaps obtain a temporary injunction to preserve the *status quo*. Or if it found no violation, it would dismiss the complaint, thereby sanctioning the picketing. ...

The only extant exception to the rule enunciated above is found in *United Constr. Worker v. Laburnum Constr. Corp.*[26] The union's violent actions caused property damage to the employer. The state's award of tort damages was upheld by the Supreme Court. The decision was grounded in the view that this was an area in which there was no comparable federal relief, and that the wrong was within the scope of the traditional state police power. The *Russell* case may be entirely explicable in terms of this exception. It also involved violence, but to an employee. The majority in *Russell* place considerable weight on the fact that there, as in *Laburnum,* the only federal relief available was injunctive, which does not compensate for injuries already suffered. Regardless of whether the point is well founded, there is the common element of violence and in both cases the state award of punitive damages was sustained.

In *Garmon v. San Diego Bldg. Trades Council*[27] the California Supreme Court applied section 923 of the Labor Code as modified by the state Juris-

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[23] 353 U.S. 1 (1957).

[24] See notes 19–23 *supra*. See Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees v. Wisconsin Employment Relations Bd., 340 U.S. 383 (1951); International Union of UAW v. O'Brien, 339 U.S. 454 (1950). See also Building Trades Council v. Kinard Constr. Co., 346 U.S. 933 (1954); Plankington Packing Co. v. Wisconsin Employment Relations Bd., 338 U.S. 953 (1950).

[25] 346 U.S. at 498–99.

[26] 347 U.S. 656 (1954). *Accord,* UAW v. Wisconsin Employment Relations Bd., 351 U.S. 266 (1956); Allen-Bradley Local 1111, UEW v. Wisconsin Employment Relations Bd. 315 U.S. 740 (1942).

[27] 49 Cal. 2d 595, 320 P.2d 473 (1958). See also Seven Up Bottling Co. v. Grocery Driver's Union, 49 Cal. 2d 625, 320 P.2d 492 (1958).

dictional Strike Act[28] to award damages for conduct which the Supreme Court of the United States had, in a previous disposition of the same case, held was an unfair labor practice.[29] *Garmon* was based on the proposition that a state can supplement federal injunctive relief with damages where state law has been violated. The case is distinguishable from the *Laburnum* facts as there was no violence or property damage.

It should be noted that the *Garmon* case involved a prior declination of jurisdiction by the NLRB. This is reminiscent of the *Guss* case. While *Guss* is the strongest of the pre-emption cases, it may have had an erosive effect on the breadth of federal power in the mind of the Court.[30] By disallowing state relief even where the NLRB has declined to exercise its jurisdiction, the decision created the unfortunate anomaly of a right without a remedy. It is possible that this may lead the Court to seek substantial justice indirectly: by searching for exceptions to the pre-emption doctrine. The "no man's land" of *Guss* may have presaged the *Gonzales* decision.[31]

Pre-emption in Employee v. Union Controversy

Should the Supreme Court apply a broad doctrine of pre-emption in the employee-union cases? The lower court decisions prior to *Gonzales* and *Russell* suggest an affirmative answer. As Chief Justice Warren, dissenting in *Gonzales,* pointed out:[32]

> The state and federal courts that have considered the permissibility of damage actions for the victims of job discrimination lend their weight to the foregoing conclusion. *While most sustain the State's power to reinstate members wrongfully ousted from the union, they are unanimous in denying the States power to award damages for the employer discriminations that result from non membership.* (Emphasis added.)

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[28] See CAL. LAB. CODE §§ 1115–20.

[29] San Diego Building Trades Council v. Garmon, 353 U.S. 26 (1957).

[30] See note, 72 HARV. L. REV. 142 (1958).

[31] See note, 46 CALIF. L. REV. 643 (1958). See also Tobriner and Grodin, *Taft-Hartley Pre-emption in the Area of NLRB Inaction,* 44 CALIF. L. REV. 663 (1956). Written before *Guss* was decided, these authors appear to question NLRB withdrawal of jurisdiction, especially if construed to allow state action where a federal scheme clearly exists.

[32] 356 U.S. at 623, 628–29 (dissenting opinion) citing: Born v. Laube, 213 F.2d 407 (9th Cir. 1954) (holding a federal court has no jurisdiction to award plaintiff loss of wages against union-exclusive jurisdiction in the NLRB); McNish v. American Brass Co., 139 Conn. 44, 89 A.2d 566 (1956); Morse v. Local 1058 Carpenters and Joiners, 78 Idaho 405, 304 P.2d 1097 (1956); Sterling v. Local Union 438, Liberty Ass'n of Steam & Power Pipe Fitters, 207 Md. 132, 113 A.2d 389 (1955); Real v. Curran, 285 App. Div. 552, 138 N.Y.S. 2d 809 (1955); Mahoney v. Sailors' Union of the Pacific, 45 Wash. 2d 453, 275 P.2d 440 (1954). *Contra:* Selles v. Local 174, Int'l Bhd. of Teamsters, 50 Wash. 2d 660, 314 P.2d 456 (1957). California, by *Gonzales,* appears to be also contra. California district courts of appeal are in line with that decision. See International Sound Technicians v. Superior Ct., 141 Cal. App. 2d 23, 296 P.2d 395 (1956); Taylor v. Marine Cooks & Stewards Ass'n, 117 Cal. App. 2d 556, 256 P.2d 595 (1953). See also, for the view of the California Supreme Court: Thorman v. International Alliance of Theatrical Stage Employees and Motion Picture Machine Operators, 49 Cal. 2d 629, 320 P.2d 494 (1958). (Three members of the court dissented on the grounds that exclusive jurisdiction for the unfair labor practice causing lost wages was in the NLRB, and the Int'l Sound Technicians above is no longer law as a result of *Guss* and other pre-emption decisions.)

In *Mahoney v. Sailors' Union of the Pacific*[33] (one of the cases cited by the Chief Justice in support of the above statement) a member of a union in interstate commerce brought an action in a state court for wrongful expulsion from the union. Such union conduct is not the basis of an unfair labor practice. However, the plaintiff sought lost wages resulting from union pressure causing the employer to discriminate against him. *This* union conduct was a violation of section 8(b)(2) of the act and under section 10(c) the NLRB can award job reinstatement and back wages. The Washington Supreme Court split the lower court's decision, affirming the grant of reinstatement in the union and damages for injury to property rights arising out of union membership, but reversing the grant of back wages on the grounds that the NLRB had exclusive jurisdiction to give relief for the unfair labor practice.

Is the utility of pre-emption in this area sufficient to warrant the procedural problem involved in requiring the plaintiff to resort to two forums for a complete remedy? When a state court entertains an action for wrongful expulsion, the rights and duties of the employee and the union are based on state law of general application as to the consequences of union membership. The employee and the union are involved in a conflict independent of a bona fide labor dispute. In contrast, when a state is asked to award lost wages, the court must examine a conflict with which the federal acts are concerned. In *Mahoney,* for example, to grant back wages the court must decide; one, was the union causing the employer to discriminate; two, did the employer discrimination damage the plaintiff? These questions are components of a bona fide labor dispute. Preclusion of state action in such disputes, as has been illustrated, is the policy of the federal labor acts. A state grant of relief, even though combined with a state cause of action, necessitates state court determination of such a dispute. To condone this is contrary to the policy of the acts.[34]

As indicated above the majority of the state court decisions prior to *Gonzales* are confined to the *Mahoney* approach, thus avoiding the application of state law to unfair labor practices covered by the Taft-Hartley Act. Further, *Gonzales* is divergent from the line of Supreme Court cases which develop pervasive federal jurisdiction of labor disputes in interstate commerce. It is incongruous for the Supreme Court to open the door to parallel state relief when state courts, as in *Mahoney,* have confined their jurisdiction to membership rights. The *Gonzales* decision entails the interference of state law with national uniformity in the regulation of bona fide labor disputes. We conclude that in view of the limited precedent and preferable policy the decision is an unfortunate departure.

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[33] See note 32 *supra. Cf.* Youngdahl v. Rainfair, 355 U.S. 131 (1957).

[34] 356 U.S. at 623, 631–32 (dissenting opinion). *Cf. Cox, op. cit. supra,* note 5 at 1322–23, 1334–35. See Warren dissenting in *Russell,* 356 U.S. at 649 to the effect that state causes of actions involving interstate commerce are permissible only when they can be determined "without regard to the merits of the labor controversy. . . ."

Furthering the Aims of the Federal Act

The *Gonzales* and *Russell* decisions illustrate the dangers of parallel relief in employee-union suits. Section 1 of Taft-Hartley declares that one purpose of the Act is the protection of "the rights of individual employees in their relations with labor organizations whose activities affect commerce."[35] There is nothing in this express declaration which would lead the reader to believe that the above purpose is any less an integral part of the scheme than the other objectives. Yet Justice Frankfurter, the author of the *Gonzales* majority opinion, states that "Protection of union members in their rights . . . from arbitrary conduct by unions . . . has not been undertaken by federal law, . . ."[36] The express provisions in the NLRA dealing with the employee viz-à-viz the union have already been indicated.[37] In section 10(c), where it specifically provides for employee suits against unions, it most certainly has undertaken what Justice Frankfurter says it has not. To the extent that such a federal scheme exists, the dissents in both *Russell* and *Gonzales* were espousing sound doctrines of pre-emption in holding that state action is precluded if it will disrupt an established national policy.[38] The *Russell* case did not involve an expulsion. The state cause of action can only rest on the grounds of a violent unfair labor practice under *Laburnum*.[39] Even so, as Chief Justice Warren points out, federal tolerance of state action where a federal plan exists, does not extend to state exercise of remedies which destroy national uniformity.[40] Though violent, the union conduct was an unfair labor practice touched by the federal act. As the Chief Justice indicates in referring to the excessive punitive damages in *Russell*:[41]

> . . . [T]he element of deterrence inherent in the imposition or availability of punitive damages for conduct that is an unfair labor practice ordinarily makes such a recovery repugnant to the Federal Act. . . .

In *Gonzales* the cause of action for expulsion is encompassed in no specific provision of the NLRA. However, the allowance of a state award of back wages in the decision subjects to divergent state law labor disputes for which the NLRA attempts national uniformity. For example, relief of the nature applied by the Alabama court is at great variance with that which the NLRB would have brought to bear on the same activity.[42] The board's grant of back wages under section 10(c) is discretionary. By ex-

[35] 61 Stat. 136 (1947), 29 U.S.C. § 141 (1952).
[36] 356 U.S. at 617, 620.
[37] See note 4 *supra*.
[38] See note 34 *supra*.
[39] See note 26 *supra* and accompanying text.
[40] *Ibid.*
[41] 356 U.S. at 647, 652 (dissenting opinion).
[42] The court awarded $10,000 in punitive damages. Russell was only one of thirty employees bringing suit for $50,000 punitive damages aside from compensatory relief. At the time of the *Russell* decision in the Supreme Court, an appeal was pending in the Alabama Supreme Court on a verdict and judgment given in one of those suits for $18,450.

amining all the elements of a labor conflict, it can use the federal means provided to fully develop and preserve the policy of promoting industrial peace in industries affecting interstate commerce.[43]

Conclusion

We have discussed what we feel to be undesirable recent developments in the area of federalism in labor law. In so doing, the *Mahoney* decision was presented as a more desirable alternative, but it is far from a complete solution. The employee-union relationship involves a complex of rights and duties, many aspects of which require statutory regulation. The same reasons which necessitate a uniform federal control of union-management disputes are persuasive here. The *Gonzales* and *Russell* decisions interpret the federal statutes as bearing very little upon the employee-union relationship. *Mahoney,* while less restrictive, allows the application of state law to determine union membership rights. Inconsistent state determination of even *these* rights conflicts with an important aspect of the federal plan.

Congressional creation of a bargaining agent which must be respected by all the employees contemplates some concern for the protection of members in the union. On the matter of wrongful expulsion, section 10(c) of the act provides redress for arbitrary union conduct and empowers the Board to take any affirmative action necessary to effectuate the policies of the act. The act permits a union to set up its own standards for membership; but it does not follow from this that, in accordance with the above section, the Board should not be concerned with this fundamental element; *i.e.,* union membership. Of even more grave consequence, the state may fail to afford the employee justice against the organization with which federal law insists he must deal.

The Supreme Court has held that under both the NLRA as amended by Taft-Hartley and under the Railway Labor Act,[44] congressional condonation of monopoly collective bargaining power makes fair representation and non-discrimination obligatory for member and non-member alike.[45] A certified union cannot discriminate against a non-member employee on the basis of race.[46] Nor can a bargaining agent seek higher wages for only its own members. These are but a few graphic examples of federal concern that the union respect the rights of non-members.[47] Supreme Court refusal to extend federal protection to union membership rights on similar grounds stems from a reluctance to interpret the federal acts as bearing heavily on

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[43] See Tobriner and Grodin, *op. cit. supra,* note 31 at 680–84.

[44] 44 Stat. 577–87 (1926), 45 U.S.C. §§ 151–64 (1952).

[45] Conley v. Gibson, 355 U.S. 41 (1957); Syres v. Local 23, Oil Workers' Union, 350 U.S. 892 (1955); Steele v. Louisville & N.R.R., 323 U.S. 192 (1944); Choate v. Grand Int'l Bhd. of Locomotive Engineers, 314 S.W.2d 795 (Tex. 1958).

[46] Syres v. Local 23, Oil Workers Union, *supra,* note 45. *Cf.* Wallace Corp. v. NLRB, 323 U.S. 248 (1944).

[47] Radio Officers' Union v. NLRB, 347 U.S. 17 (1954), discussed in 68 HARV. L. REV. 145 (1954).

the member-union relationship.[48] Yet, prevailing state law affords an employee no means of redress against refusal of union membership on such intolerable grounds as race.[49] Was it the congressional intent to endow the union with the exclusive right of representaton, while leaving to the states the arbitrary power to exclude persons from participation in the representative agency? If that be the case, congressional amendment is the indicated solution.

[48] Oliphant v. Brotherhood of Locomotive Firemen, 156 F. Supp. 89 (N.D. Ohio), *cert. denied,* 355 U.S. 893 (1957). It was unsuccessfully argued that federal certification was sufficient to change the character of the union to a federal agency, thus warranting application of the fifth amendment sanctions against union exclusion on the basis of race. See Note, 43 MINN. L. REV. 942 (1958).

[49] See generally: Aaron and Komaroff, *Statutory Regulation of Internal Union Affairs,* 44 ILL. L. REV. 425, 451–56 (1949). California has held that a union cannot maintain a union shop and a closed union at the same time. See James v. Marinship Corp., 25 Cal. 2d 721, 155 P.2d 329 (1944). See also Thorman v. International Alliance of Theatrical Stage Employees and Motion Picture Machine Operators, 49 Cal. 2d 629, 320 P.2d 494 (1958), cited by one writer as standing for the proposition that California has extended the James case to become the only state in absence of legislation to order a union to admit an employee to membership. See 67 YALE L. J. 1327 (1958). See also Note, 9 HASTINGS L. J. 211 (1958) (arguing that the functions of a labor union are state action and subject to the fourteenth amendment).