Duties and Rights of California Unions: A Study in Policy Changes

Ephraim B. Margolin
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A STUDY IN POLICY CHANGES

By Ephraim B. Margolin*

The development of California Labor Law discloses at once a careful elaboration of the institutional status of the union, consisting of a net of obligations of the union to its membership, and a current contraction of the right of the union to engage in the basic activities of organization and striking. While the California Supreme Court has defined a democratic mechanism for the unions it has also jeopardized their effectiveness in collective bargaining by restricting the right to strike which is a necessary and prime condition to that function.

This paper will endeavor to outline briefly, first, the decisions which structure the union as a democratic institution. Next, the Court's decisions, culminating in Garmon1 and Chavez,2 which curtail the power of the union to organize workers and its decisions interpreting the Jurisdictional Strike Act3 which limit the union's power to strike for hours, wages and conditions will be discussed. Finally, it will be submitted that a collective bargaining agency which cannot safely organize workers in a non-union industry nor engage in a strike for wages, hours and conditions can not fully perform the activity for which it was designed.

The analysis of this problem will be developed through California cases omitting the decisions dealing with federal preemption, which is to be regarded as a separate subject. The following applies only to California intra-state labor relations.

I

The history of the California Supreme Court decisions structuring the union as an institution is an impressive one.

From the days of King v. Journeymen-Taylors of Cambridge4 in the England of 1721 until Parkinson v. Building Trades Council,5 the 1908

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4 8 Mod. 10, 88 Eng. Rep. 9 (K.B. 1721).
5 154 Cal. 581, 98 Pac. 1027 (1908).
California leading case, the unions fought an uphill fight for recognition.\(^6\) Combinations of working men devoted to the ends of promoting better labor conditions, analogized to bands of merchants intent on price fixing or malefactors attempting a crime, were treated as criminal conspiracies.\(^7\) The courts regarded concerted interferences in another’s business as prima facie unlawful. The fact of such interference, rather than its motivation, constituted the actionable evil.\(^8\)

The landmark Parkinson case refined the application of the conspiracy doctrine to labor activity. While reasserting that “Any injury to a lawful business is ... prima facie actionable,”\(^9\) the court proceeded to formulate an exception. The case developed the test of the lawfulness of the objective of the union. The action might be upheld “upon the ground that it was merely the result of lawful efforts of the defendants to promote their own welfare.”\(^10\)

During the subsequent half century the California Supreme Court proceeded by means of this test to hold certain actions of the union unlawful.\(^11\) In this manner the court set up a series of requirements as to the union’s composition (i.e. its membership), the union’s internal government and the local union’s relationship with its parent body; obligations which, in toto, went far toward composing the legal requisites of a democratic union.

Thus in James v. Marinship Corp.\(^12\) the court held that a union which had a closed shop contract or which monopolistically controlled the oppor-
tunity for employment could not arbitrarily refuse membership to qualified applicants. In *Williams v. Int'l Brotherhood of Boilermakers* the court defined the concept of monopoly as applicable to control of the labor supply of a single plant. In *Hughes v. Superior Court*, holding that limitations on membership must relate to individual qualifications for the job rather than to arbitrary discrimination based on race or color, the court enjoined the union from picketing for that unlawful objective. On the other hand, the court in *Dotson v. Int'l Alliance of T.S. Employees* upheld the requirement that the individual workman meet reasonable standards for membership including the ability to perform the job. Even though *Marinship* stated that the union need not accept persons "having interests inimical to the union and who may destroy it from within," a mere conflict of interests as between an independent distributor, a foreman, a business-

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15 34 Cal. 2d 362, 210 P.2d 5 (1949). The court held that failure to allege that such requirements were met constitutes a failure to state a cause of action.
17 See *Zepeda v. International Hodcarrier's Union*, 143 Cal. App. 2d 609, 300 P.2d 251 (1956) (dictum). Plaintiff was 73 years old, allegedly an epileptic, unable to perform heavy work and otherwise not a "qualified, competent and skilled worker." He was permitted by the union to seek employment on his own, but since the union maintained a hiring hall, the gesture amounted to practical denial of the right to work. The court decided the case on other grounds stating that the union has duties towards the employer which may require it to discriminate against the plaintiff.
18 James v. Marinship Corp., *supra* note 16.
19 Of the two cases dealing with the subject, only one, *Emde v. San Joaquin County Central Labor Council*, 23 Cal. 2d 146, 143 P.2d 20 (1943), mentions the problem. "The particular controversy between the dairy and the union ... involving as it does the dissatisfaction of organized labor with a system of distributing milk products which avoids minimum wages and hours, workmen's compensation and social security benefits, is a legitimate matter of labor dispute." The other case, *Bautista v. Jones*, 25 Cal. 2d 746, 155 P.2d 343 (1944), distinguishes the *Emde* case on the grounds that the independents in *Bautista* were bona fide businessmen which, however true, still leaves the problem unsolved. The economic background of the case is stated only in the dissent. "... [T]he plaintiffs here, by insisting upon continuing their activities as peddlers, were actually competing with union workers on unequal terms and under conditions which the union, not unjustifiably considered to be obnoxious to its legitimate objects." The majority avoids deciding which interest should be granted preference granting the plaintiffs their wish by default. The court also assumes that plaintiffs are a minority which, like any other minority, should be granted protection since their activities "are not fundamentally inimical to the public interest or to the special interest of organized labor!" The *Bautista* case leaves the union with the alternative of admitting competitors into its rank (said competitors not being under obligation to conform with union practices) or acquiescing in their competition. The decision contains the statement that "Milk is only one commodity distributed by retail delivery, and not all businessmen-workers are engaged in retail distribution of commodities. The Union's position would have an identical effect on the laundry and dry cleaning driver, the barber and the plumber, the watchmaker and the grocer, the service station operator, and the farmer. In a word, all businessmen workers operating without the aid of employees ... ."
20 The California Supreme Court has held that managers of stores owe their undivided loyalty to their principal and should not be compelled to hold membership in a union repre-
man-employee and a temporary worker and the union representing the rank and file will not excuse exclusion from membership.

Similar conclusions must be drawn from the examination of cases dealing with the internal government of the unions. The union may not expel or suspend its members in violation of its own rules, on an improper majority vote or by an improperly constituted tribunal. It must afford

senting the grocery clerks. Safeway v. Retail Clerks Int’l Ass’n, 41 Cal. 2d 567, 261 P.2d 721 (1953). Superintendents were considered “employees” in Davis v. Morris, 37 Cal. App. 2d 269, 99 P.2d 345 (1940). See also cases collected in Safeway v. Retail Clerks Int’l Ass’n, supra at 580.

In discussing the right of a union to assert its pressure against independent working entrepreneurs operating in the same fields and competing with the union, the organizational drive was held a lawful objective provided only that full and equal membership in the union is guaranteed to the independents. Riviello v. Journeymen Barbers, 109 Cal. App. 2d 123, 240 P.2d 361 (1952); Riviello v. Journeymen Barbers, 88 Cal. App. 2d 499, 199 P.2d 400 (1948). Compare Rubin v. American Sportsmen, etc., Soc., 40 Cal. 2d 412, 254 P.2d 510 (1953).

Union constitutions and by-laws are “a contract” between the union and its members, Lawson v. Hewell, 118 Cal. 613, 50 Pac. 763 (1897), binding on the employee as long as his union follows its own rules. Carson v. Glass Bottle Blower’s Ass’n, 37 Cal. 2d 134, 231 P.2d 6 (1951); DeMille v. Am. Fed. of Radio Artists, 31 Cal. 2d 139, 187 P.2d 769 (1947); Smith v. Kern County Med. Ass’n, 19 Cal. 2d 263, 120 P.2d 874 (1942); DeGonia v. Building Material and Dump Truck Drivers, 155 Cal. App. 2d 573, 318 P.2d 486 (1957); Smetherman v. Laundry Workers Union, 44 Cal. App. 2d 131, 111 P.2d 948 (1941). The union’s interpretation of its own rules must be “practical and reasonable.” DeMille v. Am. Fed. of Radio Artists, supra at 147, 187 P.2d at 775. Words must be construed not in their abstract meaning with the aid of a dictionary, but in the context of the constitution as a whole, Brown v. Hook, 79 Cal. App. 2d 781, 785, 180 P.2d 982, 985 (1947), i.e., “with a view to accomplishing the objectives disclosed by the instrument as a whole.” DeMonbrum v. Metal Sheet Workers, 140 Cal. App. 2d 546, 558, 295 P.2d 881, 891 (1956). Unlawful imposition of a new union constitution in substitution for a previous lawful one was enjoined in Weber v. Marine Cooks and Stewards Union, 93 Cal. App. 2d 327, 208 P.2d 1009 (1949), the court allowing attorney’s fees to class plaintiffs who instituted suit for protection of the common fund and the original constitution. In Gonzales v. Int’l Ass’n of Machinists, 142 Cal. App. 2d 207, 216, 298 P.2d 92, 98 (1956), the president’s power to mete out a new penalty in lieu of the penalty determined by the lodge was curbed, the court stating that “A clearly erroneous administrative construction of a definite and unambiguous provision of the constitution cannot operate to change its meaning.” See also cases cited.

The grave effects of expulsion or suspension (discussed in Gonzales, supra note 23) impose certain duties on the disciplining union. “No member can be expelled and thus deprived of his interest in the property of the association, except for violation of some provision of the law of the association creating the offense charged and prescribing expulsion as a penalty or, in the absence of such provision, for offenses of an infamous character indictable in Common Law, or for offenses against the member’s duty to the organization.” Smetherman v. Laundry Workers Union, supra note 23, at 137, 111 P.2d at 951. See also Cason v. Glass Bottle Blowers Ass’n, supra note 23. Expulsion or other sanctions are upheld “for such conduct as clearly violates the fundamental objects of the association, and if persisted in and allowed would thwart those objects or bring the association into disrepute.” Otto v. Tailors P & B Union, 75 Cal. 308, 314, 17 Pac. 217, 219 (1888).

Gonzales v. Int’l Ass’n of Machinists, supra note 23, at 216, 298 P.2d at 98. The constitution of the union was violated by substitution of a standing vote for the secret vote required and the vote of 29 out of 44 voting in expulsion proceedings was held not to satisfy the requirement of a two-thirds majority.

the defendant a fair trial including notice, hearing, the right to confront witnesses and accusers, the right to cross-examine them and the opportunity to refute their evidence. These requirements of due process in union trials will be judicially imposed even if the union rules fail to provide for them. The insistence of the courts upon the applicability of due process reflects the philosophy that the union must be treated less as an autonomous private body than an organization subject to regulation analagous to that of a public utility.

The courts have similarly imposed rules as to exhaustion of remedies entirely independent of those agreed upon by the members themselves. While ordinarily the courts will decline jurisdiction when internal remedies are still available to the petitioner, no exhaustion of remedies is necessary to object, discussed in Hopson v. Marine Cooks & Stewards, 116 Cal. App. 2d 320, 253 P.2d 733 (1953) but held harmless where there is no question that a violation of a union rule has occurred. DeMille v. Am. Fed. of Radio Artists, supra note 23 (upholding automatic suspension for non-payment of dues or assessments). Where plaintiff denies most, if not all, of the charges against him, automatic suspension will violate due process. Cason v. Glass Bottle Blowers Ass'n, 37 Cal.2d 134, 145, 231 P.2d 6, 12 (1951).

27 Cases cited notes 26 to 32
29 Ibid. Where the union acted after a hearing, the courts tend not to evaluate the evidence upon which the action was taken, e.g., McConville v. Milk Wagon Drivers, 106 Cal. App. 696, 289 Pac. 852 (1930), but it is otherwise where no evidence was presented. An order of reinstatement to membership due to faulty hearing was too broad and was amended to remand to the union for rehearing since such a penalty may be justified if insubordination is proved. Cason v. Glass Bottle Blowers Ass'n, supra note 26 at 147, 231 P.2d at 13.
31 Ibid.
33 Attention should be directed to the apparent inconsistency in the treatment of the problems of admission in and exclusion from the union. While the first problem is considered by the courts in conjunction with the closed shop and, consequently, in terms of labor monopoly or "quasi governmental" stature, the second problem frequently is equated with "unincorporated associations," citing cases and precedents relating to fraternal orders, lodges, professional associations, etc. The tendency to equate labor unions with such associations is obvious, also, in cases dealing with relations between a local and the international. The courts never determined where one analogy begins and the other one ends.
35 This rule is analogous to the rule requiring the exhaustion of administrative remedies as a condition precedent to resorting to the courts (see 2 Cal. Jur. 2d 304) and to the rule
where appellate review is denied improperly,\textsuperscript{36} conditioned on unauthorized requests,\textsuperscript{37} unable to assure substantial justice,\textsuperscript{38} futile\textsuperscript{39} or rendered impractical by the behavior of union officers themselves.\textsuperscript{40} Furthermore, in

requiring the parties to a contract for arbitration of disputes to exhaust these remedies before seeking judicial relief (see Cone v. Union Oil Co., 129 Cal. App. 2d 558, 277 P.2d 464 (1954) and cases collected on p. 563).” Holderby v. Int'l Union of Operating Eng'rs, \textit{supra} note 32 at 846, 291 P.2d at 466; DeGonia v. Building Material and Dump Truck Drivers, 155 Cal. App. 2d 573, 318 P.2d 486 (1957).

\textsuperscript{36} In cases where the union is compared to an unincorporated association, its conclusive ruling will be binding on the court if (1) authorized by the constitution; (2) rendered in good faith; (3) no illegalities are involved. McConville v. Milk Wagon Drivers, 106 Cal. 696, 289 Pac. 852 (1930) citing Otto v. Tailors P & B Union, \textit{supra} note 34. “If the decision arrived at was contrary to natural justice, such as . . . not having an opportunity to explain misconduct, if the rules of the club have not been observed, and if the action of the club was malicious and not bona fide . . .” McConville v. Milk Wagon Drivers, \textit{supra}; Lawson v. Hewell, \textit{supra} note 34; Zepeda v. Int'l Hodcarriers, etc., \textit{supra} note 34. “When a voluntary association has violated its own laws and has arbitrarily violated a member's property right, the rule of exhaustion of remedies in administrative tribunals has not always been resorted to before a direct resort to the court, but (the field of court interference should be a very narrow one) 'so that only upon the clearest kind of showing, either that the constitution and rules are violated by the decision of the tribunals set up by them, or that the remedies provided by the parties in their agreements for appeal . . . are nonexistent or unreasonable . . .', Local 7, Bricklayers Union v. Bowen, 278 Fed. 271, 274.” Zepeda v. Int'l Hodcarriers, etc., \textit{supra} at 614, 300 P.2d at 253. Mooney v. Bartenders Union, 48 Cal. 2d 841, 313 P.2d 857 (1957) extends the application of this rule to all financial matters of the union. For materials on unions and unincorporated associations, see Sultan, \textit{supra} note 6, at 231, n.26. Compare Summers, \textit{The Right to Join a Union}, 47 CALIF. L. REV. 33, 42 (1947). “To exclude a man from a club may be to deny him pleasant dinner companionship, but to exclude a worker from a union may be to deny him the right to eat.”

\textsuperscript{37} Gonzales v. Int'l Ass'n of Machinists, 142 Cal. App. 2d 207, 298 P.2d 92 (1956). The right to appeal was conditioned on a fine and on making an apology, neither of which were authorized by the constitution, and the apology, in addition, being an act difficult to revoke once it is done. The court held that the petitioner had an immediate right to resort to the courts.


\textsuperscript{39} Ibid.

\textsuperscript{40} Schou v. Sotogome Tribe, 140 Cal. 254, 73 Pac. 996 (1903) presents an example extreme beyond comparison. All possible steps for securing an internal appeal were taken but no one seemed to know whom to contact next, in whose jurisdiction the appeal lay, or what other steps could be taken, as a practical matter, before the remedies were formally exhausted. In that case, it was “the organization that failed” to provide access to its remedial system. This case was followed in Weber v. Marine Cooks & Stewards Union, 93 Cal. App. 2d 327, 208 P.2d 1009 (1949), relaxing the rule in cases of violation of the organization's own rules, but it was modified in Holderby v. Int'l Union of Operating Eng'rs, \textit{supra} note 32, to apply only to violation of such rules as deal with the right to appeal. See Mooney v. Bartenders Union, 48 Cal. 2d 841, 313 P.2d 857 (1957); DeGonia v. Building Material and Dump Truck Drivers, \textit{supra} note 38; Zepeda v. Int'l Hodcarriers, etc., \textit{supra} note 38; Gonzales v. Int'l Ass'n of Machinists, 142 Cal. App. 2d 207, 298 P.2d 92 (1956).
cases involving financial records\textsuperscript{41} or “property rights”\textsuperscript{42} the members may petition the courts without exhausting internal remedies.

In the field of the relations of local and international unions,\textsuperscript{43} the international union or federation cannot arbitrarily revoke a charter of a union or put it into receivership.\textsuperscript{44} However, in cases of insubordination,\textsuperscript{45} financial strain\textsuperscript{46} or general failure to serve the membership in a proper manner,\textsuperscript{47} the parent organization may charter new locals or suspend old ones. It is

\textsuperscript{41}Mooney v. Bartenders Union, \textit{supra} note 40, dealt with the right to inspect union financial records. The court cited Cason v. Glass Bottle Blowers Ass'n, 37 Cal. 2d 134, 231 P.2d 6 (1951), for the proposition that “In the application of these principles we must weigh both the protection of the rights of the individual members in the specific matter involved and the right of the union to govern itself.” The case held that since inspection of the books was a preliminary matter, incapable of harming union activity, directed at an aim in which the unions themselves are interested, and likely to cause irreparable harm if delayed, exhaustion of internal remedies was unnecessary. Mr. Justice Carter concurred, arguing that \textit{Mooney v. Bartenders Union} overrules Holderby v. Int'l Union of Operating Eng'rs, 45 Cal. 2d 843, 291 P.2d 463 (1955), and accepts, in effect, his dissent in that case. It is submitted that this view is unduly optimistic if \textit{Mooney} remains confined to its facts.

\textsuperscript{42}The term “property rights” as used in some of the decisions is misleading and should be construed in the sense of “rights to financial accounting” in the preceding note.


\textsuperscript{44}Where the Grand Lodge improperly dissolved a subordinate lodge, it was not entitled to the local’s assent, Most Worshipful Lodge v. Sons, etc., Lodge, \textit{supra} note 43, and cases cited, the propriety of such dissolution depending on the constitution of the organization.

\textsuperscript{45}In Pizer v. Brown, 133 Cal. App. 2d 367, 283 P.2d 1055 (1955), the local refused to expel totalitarian minded officers (specifically, members of the communist party and those advocating its ideas) contrary to the directives of the International. Where the consequence of such refusal was a decline in membership and the loss in the local’s ability to represent its membership effectively, the parent body was justified in chartering a new local. This on the theory that the duty of the International is to the worker and not to its locals. Suspension for insubordination in general is discussed in Lawless v. Brotherhood of Painters, 143 Cal. App. 2d 474, 300 P.2d 157 (1956).

\textsuperscript{46}Lawless v. Brotherhood of Painters, \textit{supra} note 45. In this case the local (and noteholders) sued for declaratory judgment as to the local's obligations to third parties and demanded enjoining the International from taking over. The International dissolved the local because, due to a series of strikes, it got itself into financial difficulties and gave promissory notes in excessive sums until the parent organization decided to intervene. After discussing the several bases of privilege, the court held that the parent organization had the right to the net assets of the local after payment of its debts. The situation is essentially analogous to a transfer without consideration by a corporation of all its assets to a successor corporation without there ever having been a statutory merger. In such a situation, an unsatisfied judgment creditor and the transferor may trace the transferor's assets into the hands of the transferee and satisfy unpaid debts to the extent of those assets. Thus, by dissolving the local and assuming control of its assets, the International undertakes the responsibility of paying the just debts of the local to the extent of those assets. In the present case, it should be noted, the debts totaled $50,000 and the assets were $250.

\textsuperscript{47}See notes 43 to 46 \textit{supra}.
the duty of the parent organization to the workers, not to the local, that
underlies the propriety of such actions, contract theories notwithstanding.

The above cases illustrate the California courts’ remarkable sensitivity
and foresight in framing a legal structure which may not act arbitrarily
in derogation of the rights and interests of its membership. And these
strictures emanate from court-created law rather than from statute or
contract. Cumulatively, the cases compose an approach that makes of the
union, as to its internal affairs, a new kind of public utility of labor rela-
tions. The consistent effort to restrict the unions in their internal dealings
in order to equate their action with that of a public utility was not
paralleled by as consistent an effort in the realm of external dealing with
the employers. There, the analogy to a public utility was forgotten. A
recent reversal of the court which fractures the union operative machin-
ery is the apparent negation of the right of the union to organizational pick-
etering, hitherto protected under sections 920 to 923 of the Labor Code.

II

Like most recent labor legislation, and indeed the later Jurisdictional
Strike Act, sections 920 to 923 of the Labor Code represent an attempt
to reconcile the competing values of the three major parties to labor dis-
putes. The interest of the unions lies in organization on an industry-wide
level which protects minimum standards against the incursion and competi-
tive advantage of individual employers. Yet, industry-wide organization is
bound to curtail the local autonomy of the employees on the plant level.
The employees in a single plant, if they choose to disassociate themselves
from the rest of the employees in a larger unit, will insist on their inde-
dependent right to choose or reject unionism even though such rejection may
impair their own well-being as well as that of other employees whose
economic protection depends on industry-wide pressure. The employers’
interests are diverse. Some would prefer to defeat unionism entirely. Others
would want to deal only with the majority representative. Still others
would, if possible, keep unionism to a minimum and deal with local, small
and ineffective unions rather than with powerful, industry-wide organiza-

48 See note 45 supra.
50 CAL. LAB. CODE §§ 1115-1120.
52 Sultan, Historical Antecedents to the Right to Work Controversy, 31 So. CAL. L. REV. 221, 243 (1958). "Proposals designed to increase the power of the individual in the labor market
are built on the illusory premise that an individual can exert substantial bargaining power as an
individual. We must be ever mindful that the alternative to collective bargaining is no barg-
ing . . . power in the labor market cannot be destroyed; it can only be re-distributed". Also Chavez v. Sargent, 52 Cal. 2d . . . , 339 P.2d 801 (1959).
53 In the past days the "right" of the worker to work 17 hours a day was as seriously
defended.
tions. Clearly, any unlimited endorsement of the interests of one group must come at the expense of others. Just as clearly, a policy of compromise which attempts to reconcile the conflicting views will encroach on the more extreme demands of the remaining parties. Sections 920-923 of the Labor Code attempt to establish such a policy of compromise.

Section 921 prohibits the enforcement of promises relating to membership in labor organizations between employees and “their employer, prospective employer or any other person.” The term “or any other person” creates a problem of construction. The rule of *ejusdem generis* points towards construing it as “other such like” and the word “agent” used in section 923 seems to fit the specification.

Section 922 states that “any person, or agent or officer thereof” will be guilty of a misdemeanor if he uses coercion to prevent another from joining or remaining in a labor organization “as a condition of securing employment or continuing in the employment of any such person.” This last limitation seems to restrict the employers in their attempt to coerce their employees in matters of membership in labor organizations. The section was originally construed to apply to yellow dog contracts only, excluding legitimate union endeavors to organize a non-union plant. In *Shafer v. Reg. Pharmacists Union* sections 920 to 923 were held to “lay no statutory restraint upon the workers’ efforts to secure a closed shop contract from the employer. . . .” The Court weighed the argument that pressuring the employer to influence his recalcitrant employees to join a labor union would place the employer in a position of exerting pressure prohibited under section 921, but, “considering the history and purpose” of the sections, it concluded that this variety of pressure was not covered by the act.

Section 923 states the policy applicable in construing the preceding sections, and reads in part:

> Negotiation of terms and conditions of labor should result from voluntary agreement between employer and employees. Governmental authority has permitted and encouraged employers to organize in the corporate and other forms of capital control. In dealing with such employers, the individual unorganized worker is helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment. *Therefore*, it is necessary that the individual workman have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives of in self-organization or in other con-

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55 16 Cal.2d 379, 388, 106 P.2d 403, 408 (1940).
certain activities for the purpose of collective bargaining or other mutual aid and protection.\textsuperscript{56}

Significantly, the legislators used the word “therefore” in linking their statement about “freedom of association and self-organization” and the reasons advanced for the promulgation of the statute. Thus, freedom of employees’ self-organization was linked to the objective of equalizing labor’s position to that of the management’s for the sake of better and more effective collective bargaining. In the following section, dealing with interference, restraint and coercion, the source of these evils was identified and implicitly limited to “employers of labor or their agents.” In this light, the opening sentence about voluntary dealing between the employer and the employees must have used the term “voluntary” in the meaning of “unrestrained by the employer.” Any other construction of this statute would be inconsistent with the basic philosophy of section 923 and the language of its preceding sections.

For, as suggested above, the crux of sections 920 to 923 is the philosophy of the statute as embodied in all its provisions and as stated in section 923; the realization that under conditions of modern industrialism the individual working man is helpless in his dealings with the organized management. The policy of the act is directed towards encouraging unionism as a means of counter-balancing the economic power inhering in the employers and of equalizing labor’s opportunity to engage in meaningful collective bargaining. In construing this section the courts recognized that the organization of the employees at the single plant level may not be sufficient to accomplish the goals of realistic bargaining. Economic pressures brought to bear on an isolated plant can easily be neutralized where the plant is merely one unit in a multi-unit industry. Management could easily find ways for circum-ambulating the stricken area without seriously impairing its total production. In situations involving several plants integrated under a common management, striking in one leaves management strongly entrenched in the others. To bargain with its employers the union must be able to apply pressure corresponding roughly to that exerted by its opponents. In short, the philosophy of section 923, unless it is to be construed out of any practical meaning, presupposes a right to an industry-wide organizational drive.

This conclusion holds true even where the union does not attempt to organize an industrial giant but a multitude of independent entrepreneurs. In the first place, many “small” one-unit enterprises may form or participate in employer associations, organized for collective bargaining, or engage in active cooperation among themselves, so that the unit cannot be considered in isolation. Secondly, in small plants competing in one field of economic endeavor a non-union employer will enjoy a competitive advan-

\textsuperscript{56} The word “therefore” is italicized by the author.
tage over organized employers, threatening the union's retention of the organized employers. Thirdly, even where union standards and scale are adopted in a non-union plant, the union must contend with the specter of organized employees benefiting automatically from the union's efforts and retaining all the benefits of union membership without contributing their share of the expense or burden carried by union members. Thus, when organizing on a local, sporadic level, the union contends with both the resentful employers, who find themselves in an unfavorable position vis-à-vis the unorganized competitors, and the unhappy rank and file, who enjoy paying dues to the unions about as much as they cherish paying income taxes.

The foregoing considerations led the California courts to construe the right to effective bargaining to contain and imply the right to an industry-wide organization. The organizational drive could be launched from outside a plant regardless of the number of employees subscribing to it at the time and the objectives sought by the union could include organizational pressure, a demand for exclusive bargaining status or a closed shop. In either case, sections 920 to 923 made it clear that in peaceful and proper use of pressure, either directly on the employees or, indirectly, on the employer, hoping to induce him thereby to influence his employees to join the union, the union could not be obstructed. Consequently, "...The balance of values (was) found to weigh in favor of judicial self-restraint in enjoining or penalizing union activities reasonably calculated to achieve (union welfare and objectives)."

For eighteen years, the above understanding of sections 921 to 923 was accepted by the courts of California. In McKay v. Retail Auto. S. L. Union, the court held that it was legal for the union to picket in an organizational drive even though the employees were satisfied with their working conditions and refused to join with the union. Under similar conditions, the court found the "closed shop" a lawful union objective in Shafer. In Shafer, Wicks v. Southern Pacific Co. and DeMille v. Am. Fed. of Radio Artists, the courts held that there is no constitutional right inhering in the individual employee which guarantees him the right to work as a non-

58 16 Cal. 2d 311, 326, 106 P.2d 373, 381, cert. denied, 313 U.S. 566 (1940). "The closed union shop is an important means of maintaining the combined bargaining power of the workmen. Moreover, advantages secured through collective action redound to the benefit of all employees, whether they are members of the union or not, and members may resent non-members sharing in the benefits without liability for the obligations. Hence, a closed shop policy is of vital importance in maintaining not only the bargaining power, but also the membership of trade unions . . . ."
union employee. In *Pezold v. Amalgamated Meat Cutters and Butcher Workmen,* as in *McKay,* the picketing union did not represent the employees which it sought to organize. And a long line of cases, on the facts or in dicta, supported the right to engage in such picketing. As stated in *C. S. Smith Met. Market Co. v. Lyons:* The members of a labor organization may have a substantial interest in the employment relations of an employer although none of them is or ever has been employed by him. The reason for this is that the employment relation of every employer affects the working conditions and bargaining power of employees throughout the industry in which he competes. Hence, where union and non-union employees are engaged in a similar occupation and their respective employers are engaged in trade competition one with another, *the efforts of the union to extend its membership to the employments in which it has no foothold* is not an unreasonable aim. [Italics added]

The importance of collective bargaining as expressed in section 923, outweighs the considerations of possible injury to the employer and to his employees.

It is in line with this philosophy that in a series of six cases rendered in 1940, three of which, *McKay, Shafer* and *Smith,* were cited above, the court construed the right to organizational and recognitional drive in its broadest form. Although in many subsequent cases the courts followed these decisions without question, they eventually imposed certain adjustments and limitations. In *Park and Tilford Import Corp. v. Int'l Brotherhood of Teamsters,* etc., the court restated the prevailing construction of sections 920 to 923, asserting that organizational and recognitional picketing were valid under the laws of the state, but placed limitations upon such picketing in cases where it would force the employer to acquiesce in or commit an action prohibited by federal law. At the time of this decision section 8(3) of the NLRA forbade employer compliance with a closed shop demand by a union representing only a minority of his employees. Under the "lawful objective" doctrine, the California court accepted the federal condemnation of that objective and enjoined the union from picketing for a closed shop until it reached majority status in the plant.

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61 54 Cal. App. 2d 120, 128 P.2d 611 (1942).


63 16 Cal. 2d 389, 106 P.2d 414 (1940).

64 *Id.* at 401, 106 P.2d at 421. See also *Fortenbury v. Superior Court,* 16 Cal. 2d 405, 409, 106 P.2d 411, 413 (1940). "One who sells a product of a merchant or manufacturer engaged in a labor dispute with his employees, inescapably becomes an ally of the employer. He has a direct unity of interest with (such employer). By providing an outlet for that product, he enables the employer to maintain the working conditions against which labor is protesting."

65 27 Cal. 2d 599, 165 P.2d 891 (1946).

Park and Tilford is a precedent for prohibiting union action for a closed shop in advance of attaining majority representation in a given plant. However, it prohibits only the immediate demand for such a clause and permits continued picketing of the employer in order to pressure his employees to join the union with the objective of a closed shop as an express, though ultimate, end of the picketing.

A union would be deprived of one of the most effective means of obtaining a majority if it could not picket and boycott an employer's business with the object of so discouraging public support of the business that non-union workers would face the prospect of loss of their jobs . . . .

With this statement, Park and Tilford goes on the record as another authority in support of the public policy statement of section 923.

In 1955 the Supreme Court of California rendered its decision in Benton Inc. v. Painters Local Union which in substance reaffirmed the previous rulings. In that case, decided on the same day as Garmon v. San Diego Building Trades Council (in its first incarnation), the court denied injunctive relief on the grounds that the plaintiff failed to exhaust his remedies before the NLRB stating that “under California decisions an employer may not obtain relief from economic pressure asserted in an effort to compel him to sign a union shop agreement.” The court denied not only injunctive relief but damages as well, even though in the twin case of Garmon it argued that such picketing was tortious under California laws. Since the court stated in Benton that “The state court has jurisdiction to award damages to the employer if the evidence shows that it is entitled to them under state law . . . .” and since it had the precedents of both Park and Tilford and the Garmon case to enable it to characterize the conduct as unlawful under state law, the only conclusion that can be drawn from the Benton case is that the court followed the established precedents holding that peaceful picketing for a union shop contract was not unlawful per se in California.

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67 This view seems logically implied in Plant, Recognitional Picketing by Minority Unions in California, 9 Stan. L. Rev. 100 (1956). The author discusses Shafer v. Reg. Pharmacists Union, 16 Cal.2d 379, 106 P.2d 403 (1940), McKay v. Retail Auto. S.L. Union, 16 Cal.2d 311, 106 P.2d 373, cert. denied, 313 U.S. 566 (1940), and C.S. Smith Met. Market Co. v. Lyons, 16 Cal.2d 389, 106 P.2d 414 (1940) suggesting that in organizational strikes it is possible to save the legality of unions' demands from the employer by construing them as not intended to be fulfilled until the union gains a majority. In discussing Garmon v. San Diego Building Trades Council, 49 Cal.2d 595, 320 P.2d 473 (1958) and Park & Tilford Import Corp. v. Int'l Brotherhood of Teamsters, etc., 27 Cal.2d 599, 165 P.2d 891 (1946), it is submitted that the same approach could have been adopted.

70 45 Cal. 2d at 661, 291 P.2d at 16.
71 45 Cal. 2d at 666, 291 P.2d at 7.
72 45 Cal. 2d at 681, 291 P.2d at 16.
Into this impressive array of cases descended the recent *Garmon* case with a truly "off with their heads" attitude. Justice Schenk, writing for a majority of four, did not begin his argument with a discussion of public interest in collective bargaining. Instead, he opened with the citation of section 1708 of the Civil Code which imposes the general duty "to abstain from injuring the person or property of another or infringing upon any of his rights." The exception to this duty, said the court, is "proper and lawful" conduct. However, in discussing what is lawful for a labor organization "under the statutory and decisional law" of this state and in concluding that the union shop does not belong with the lawful objectives, the court failed to cite a single case in its support! Its "decisional law" non-existent, the sole remaining ground was the "statutory law," or more precisely, section 923. This, however, was cited with the symptomatic omission of the whole part dealing with collective bargaining as the rationale for the act and the assertion that it is "therefore" that the right to self-organization should be protected.

Thereafter, sailing was easy. Under the emasculated section 923, cited in part and without reference to the preceding sections, the request of the outside union for closed shop was enjoined and damages were assessed. The court also invoked in its aid section 1667 of the Civil Code stating "[t]hat is not lawful which is . . . contrary to the policy of express law though not expressly prohibited. . . ."

Surprisingly enough, nowhere in the decision did the court address itself directly to the actual meaning of section 923. In discussing the *McKay* case it simply assumed that "the conduct of the defendants was directly contrary to the policy of the state, as set forth in section 923" even though

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74 It should be noted that almost all the labor cases in California are 4 to 3 decisions and, consequently, a minority (having acquired one additional vote for its point of view) could over-rule 18 years of precedents by simply reiterating its old and consistently defeated position. In the Jurisdictional Strike Act cases Mr. Justice Schenk seems to be writing a minority opinion, as he usually declines to cite, let alone accept, any case in which his views do not prevail. But this opinion, suddenly becoming a majority decision, wrecks more than even its author presumably intended.
75 *Garmon* v. San Diego Building Trades Council, *supra* note 73 at 606, 320 P.2d at 480. The court cites Loup v. Cal. Southern R.R. Co., 63 Cal. 97 (1883) in support of its statement that infringement of *absolute rights* by acts not authorized by law is a tort. It then uses the anti-discrimination cases, Park & Tilford and *Marinship*, to prove that only lawful actions are exempt from this policy. The statements in C. S. Smith Met. Market Co. v. Lyons, *supra* note 67, and McKay v. Retail Auto. S.L. Union, *supra* note 67, Shafer v. Reg. Pharmacists Union, *supra* note 67, and other cases that there is no absolute right in the employer not to be interfered with in his employment policies is rejected by implication since the court cites the Jurisdictional Strike Act in support of its position that such a right is now established in the California law.
76 *Id.* at 607, 320 P.2d at 480.
77 *Ibid.* The court could have cited, for instance, the dissenting opinion of Justice Marks in *McKay* v. Retail Auto. S.L. Union, *supra* note 67, but, instead, it chose to rely on no precedents whatever.
every specific instance of application of section 923 spelled the opposite result. The majority stated that the McKay case was overruled on its facts by the Jurisdictional Strike Act and proceeded with the statement that “it would serve no useful purpose to review the numerous other decisions of this court cited by the parties [since] those decisions have been superseded, in many respects, by later law both statutory and decisional. To engage in the task of distinguishing and discussing them now would be a work of supererogation.” All this in spite of the fact that the Garmon decision conflicts with the basic philosophy expressed in the Smith case, overrules the traditional construction of section 923 as first established in the Shafer case, brushes aside the inferences of Park and Tilford, and strikes out the long line of cases resting on them.

The key to this novel approach—or, rather, to this reincarnation of long defunct theories—can be found in the court’s statement that section 923 (as emasculated) should be read in pari materia with the Jurisdictional Strike Act. Until the present case section 923 was read in pari materia with sections 920–922. As will be suggested in the following pages, the Jurisdictional Strike Act was originally designed for the limited purpose of protecting the employers from a bona fide jurisdictional strike. As initially understood, the act would have created a new compromise between the basically pro-labor policy of sections 920–923, under which no amount of injury to the employer would justify court intervention in a lawfully conducted labor activity, and the effort to help the unfortunate employer caught up between two warring unions. The uncompromising stand taken by the Legislature in sections 920 to 923 was to be modified by exempting from its application a situation involving a jurisdictional dispute, which was eminently deserving such consideration.

As construed by the court in Garmon the Jurisdictional Strike Act went actually further than intended and became something of an antithesis to the philosophy of section 923. By considering the broad policy of 923 in pari materia with a narrow exemption of the Jurisdictional Strike Act, the court accomplished something akin to completely overruling section 923 instead of merely amending it. Admitting that in the present case there was no factual ground for invoking the Jurisdictional Strike Act, the court

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78 Id. at 614, 320 P.2d at 484.
79 Id. at 608, 320 P.2d at 481.
80 Id. at 608, 320 P.2d at 481. "In the present case it does not appear clearly whether the plaintiff's employees had or had not selected a committee or unit or other agency for the purpose of collective bargaining. However, it does appear that they preferred to deal directly with their employers pursuant to their individual bargaining rights. If they had exercised their rights under the law and chosen to deal with their employers through some committee or organization they would have come directly within the provisions of the Jurisdictional Strike Act." Compare with Chavez v. Sargent, 52 Cal.2d 614, 339 P.2d 801 (1959).
cited the Act only because of its obvious policy implications—the protection of the employers. Disregarding the history of section 923 and its inner logic, the court asserts that it, like the Jurisdictional Strike Act, was designed “to protect the rights of individual workman and employer in this important field of labor management relationship.” [italics supplied] 81 Yet, the right of the unions to organizational action is as conspicuously absent from the court’s analysis as this gravamen of section 923 was absent from the court’s quotation from that section. Furthermore, the Garmon case goes the Jurisdictional Strike Act one better in stating that mere preference of the employees to deal directly with the employer pursuant to their “individual bargaining rights,” even where it is not acted upon, suffices to block the organizational activities of a union.

IV

At the latest Court Session Garmon was augmented with Chavez v. Sargent, 82 a Right To Work Ordinance case. The pertinent sections of Chavez are a short statement of law applicable to local Right To Work ordinances. On top of that, however, Chavez incorporates a sixty page textbook of dicta ranging over the whole field of California labor relations. 83 Technically, the case was decided on the grounds of State preemption and conflict with legislative and decisional law, either one of which would appear to be sufficient to uphold the judgment. 84 However, in view of the inherent ambiguity of the twice reversed Garmon and the fear of the debilitating effect the latest reversal might have had on the authority of the local aspects of Garmon, 85 is it is not surprising that Chavez became a virtual re-argument of Garmon. 86 In spite of its dictum character, the case is an authority at least as to the present thinking of the Supreme Court and, accordingly, it merits a brief examination.

First, Chavez undertook the task of “supererogation” refused in Garmon 87 and confirmed that the court’s new reading of section 923 in pari materia with the Jurisdictional Strike Act 88 supersedes all the decisional law dealing with the subject matter. McKay, Shafier, Smith, and even Park

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81 Id. at 608, 320 P.2d at 481.
83 Id. at ........., 339 P.2d at 818. For an extreme example, see Headnote 20.
84 Id. at ........., 339 P.2d at 810.
86 Id. at ........., 339 P.2d at 829. “... proper interpretation of those sections ... is for the first time reexamined in the case at bar.”
88 Chavez v. Sargent, supra note 87 at ........., 339 P.2d at 823.
and Tilfords were all supplanted in so far as they hold that sections 920-923 do not proscribe demands for a "union shop" in organizational drives or that the policy enunciated in them protects the entire community of workers rather than local employees in any given plant. The reasoning and philosophy of the Shafer case, for instance, was dismissed as "a recitation of, and comment on, one of the arguments which was presented to the court but not as forming the controlling basis for its conclusions." (italics supplied)

The court considered section 923 in a historical setting as reflecting the process of labor's emergence "from weakness to power" and seemingly concluded that with the "increasingly powerful" union pressures and the "growing public concern over the clashes arising from the proscribed activities," a re-evaluation of lawful labor objectives is in point. This, however, is a question of factual analysis and general policy, both clearly legislative tasks. To avoid flagrant judicial "legislation" the court construed past legislative action and precedents imputing to them its own ideas. In retrospect we learn, suddenly, that both section 923 and cases appurtenant to it espouse the cause of an individual employee and not of his union. "Organization and collective bargaining are but tool to that end." The need to equalize labor's bargaining power to that of the employers is suddenly altered to read that "the issue is not between labor and management (but) it is between the workmen and the unions . . . ." All the court had to say of labor-management relations is that "[a]n effect to be desired is to decrease activities in the wasteful arena of economic combat . . . strikes, lockouts, work stoppages, mass picketing, or acts of physical or economic violence which if not specially protected, would constitute torts or other violation of laws, state and federal."

Admitting that collective bargaining is an important right of the employees, the present majority feels that the employee's right to "self determination" outweighs his right to economic security. From the practical

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89 Id. at ........, 339 P.2d at 826, n.12.
90 Id. at ........, 339 P.2d at 814, 826.
91 Id. at ........, 339 P.2d at 816.
92 Id. at ........, 339 P.2d at 811.
93 Id. at ........, 339 P.2d at 811. This is the policy underlying the Jurisdictional Strike Act. For its proper construction, see p. 43, infra.
94 Id. at ........, 339 P.2d at 816. Granting that on policy grounds if union strength is misused or grows to intolerable proportions it may well come under appropriate legislative control, the controlling question remains whether or not the time for such intervention arrived, and who, in the final account, must intervene to accomplish the change?
95 Id. at ........, 339 P.2d at 824. "... the state of California . . . made the welfare of the individual workmen, through the principle of freedom to associate, organize and bargain collectively, the paramount principle of its legislation." Id. at ........, 339 P.2d at 811, 816.
96 Id. at ........, 339 P.2d at 824.
97 Id. at ........, 339 P.2d at 825.
98 Id. at ........, 339 P.2d at 824.
point of view, the court, trying to hold on to both "rights," goes far towards denying them altogether. "By looking only to the workmen immediately involved . . . the majority opinions blind themselves to the essential interrelation of working conditions in competitive business and choose as a relevant group whose majority may govern, not all of the workmen with interest in common, but only a small fraction of them." Thus, a practical right of a union is jeopardized in order to avail to individual workers an ephemerally beautiful "right to self expression" for which no enforcement machinery is available and which, moreover, is circumscribed when and if local elections take place.

The right to "self determination" rests on the absolute prohibition of employer interference with employees' organizational choice. Once this approach is selected, the *Garmon* case logically proscribed all employer interference with his employees' rights "in the designation of . . . representatives or in self organization or in other concerted activities." *Chavez* endorses the rationale of *Garmon* but, faced with the resulting prohibition of all collective bargaining, it backtracks to a position that "an established union may, but an outside union may not, demand a closed union shop."

Neither an unauthorized union or pretending employee's (sic) agent nor an employer acting alone or in concert with any unauthorized employee (sic) representative may lawfully attack an established employer-employee (sic) relationship and compel the unwilling employee (sic) to join the particular unchosen union as a condition of retaining or obtaining employment.

The gist of the above quotation seems to be that there is no difference in compulsion directed at "retaining" or "obtaining" a job and that, in either case, only an authorized union may demand it. It follows that an "established union" may be able to demand a closed shop, but no organizing unions may ever avail themselves of this objective.

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90 Retail Clerks' Union v. Superior Court, 52 Cal. 2d 839, 847 (1959). Dissent by Traynor, J. extending also to Chavez v. Sargent, supra note 87.

100 Chavez v. Sargent, supra note 87 at 823. "This problem" says the court "could well have legislative attention." Meanwhile, the court adopts an incredible attitude stating that "... it well may be that the means of enforcement towards legitimate ends can be greatly strengthened if attacks by organizers cease, and if labor and employer tactics are carefully screened..." Id. at 829.

101 If organizational pressure can be declared as "essentially a jurisdictional strike dispute" solely on the grounds of individual employees' "self determination," why should not this right extend also to rejection of an elected union? And obversely, if a minority forfeits its rights once it is defeated in elections and becomes bound by the elected union in its collective bargaining, why should the minority retain its rights to defeat negotiations in industry wide bargaining?

102 Retail Clerks' Union v. Superior Court, 52 Cal. 2d 839, 844 (1959) (dissent).

103 Ibid.

The difficulty with this view is that if section 923 proscribes employer intervention at all, it must proscribe it under all conditions. Employer's recognition of a union shop would assist the recognized union in controlling the labor market and in recruiting recalcitrant members regardless of the "outside" or "inside" status of the union. It makes little difference to the unwilling employee under what pressure he is compelled to join the "unchosen union." The right of the non-union employee to remain unorganized would be violated in either case. Permitting employer intervention at all must hinge, of necessity, on some authority, but neither the Act nor the judicial precedents provide it.

In the past the problem was solved by confining the prohibition of employer's intervention to the "yellow dog" situations. This was based on the history of section 923 and amply proved as the reason for passing it. The present effort seems to have no other authority than the majority's solicitude for the unwilling employee, unsupported by either legislative or decisional authority and questionable on both its policy and its practical application.

The next difficulty is with the statement that any organizational drive for a closed shop is "essentially a jurisdictional dispute pressure." The Jurisdictional Strike Act is brought into play, not by virtue of actual encroachment by the organizing union on other union's domain, but, since "section 923 makes no distinction between organized and unorganized workmen," by the mere act of organizing which is objected to by some of the employees engaged in the plant. Presumably this is true even if the local employees have no intention of bargaining with their employer. It is

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105 Id. at 827. “Section 923 makes no distinction between organized and unorganized workmen. The freedom of the workmen from employer influence is the same in both cases.”

106 Retail Clerks' Union v. Superior Court, 52 Cal.2d 839, 844-46 (1959) (dissent).

107 Id. at 844.


109 The dissent points out another contradiction in Chavez. Presumably the majority is not eager to reverse its own decisions under the Jurisdictional Strike Act. But the JSA employs the test of preventing a new union from attacking the settled one while Chavez introduces a new test turning on the majority. If the organizational strike is "essentially a jurisdictional dispute," Id. at 829, then the employer in a bona fide jurisdictional situation may find himself protected only against the weaker antagonist!

110 Id. at 827.

111 Id. "Collective bargaining agreements would seem to be scarcely worth the time and effort of negotiation if the first labor organization to thereafter come along with a view to recruitment could impose concerted pressure against the employer to induce the latter to agree that he will discharge his employees unless they pay dues to the union and accept it in the place of their established organization as their sole bargaining agent." (Italics supplied.) It is illuminating that in its examples the majority assumes an existing organization while in its narrative no such organization is necessary.
true if they are indifferent to the point where the possibility of organizing never occurred to them. In respect to this point the majority weaves its way around the requirement of section 1118 that the controversy must arise "between two or more labor organizations" by declaring that workers who decide not to organize are also an "organization."\textsuperscript{112} It then approaches the requirement in section 1117 that the organization must exist for the purpose of "dealing with employers concerning grievances, labor disputes, wages, hours of employment or conditions of work"\textsuperscript{113} and announces that this requirement is satisfied where the employees wish not to do any of the aforementioned acts.

The illegality of demanding a closed shop turns on the success already achieved by the union.\textsuperscript{114} What happens, however, where a minority of local employees object to an organizational drive? Does the logic of 

Chavez carry the court far beyond where it professes willingness to go? Does the language of 

Chavez mean, as Justice Traynor's dissent in Retail Clerks' Union v. Superior Court seems to suggest, that two employees forming a "local union" may enjoin an organizational effort from outside?\textsuperscript{2115} Does it mean that two un-organized employees may accomplish the same? Could these two employees be "newly employed," hired after the initiation of the organizational drive? Is it possible that the case means to permit the union shop when, and only when, the union, the employer and all the local employees agree to it unanimously, but not otherwise?

In California there are no procedures for certification of a union, such as are provided in the NLRA as amended. Moreover, there are no enforcement procedures compelling the employer to bargain with the union that

\textsuperscript{112} Id. at ........, 339 P.2d at 826. This is accomplished by designating the employees as "employee representation committee" and yet, the fact findings in Chavez were that "Most of the employees of plaintiff are not members of the defendant labor organization and the employees of plaintiff have not at any time demanded from plaintiff a union shop or union recognition, nor have such employees participated at any time in the negotiations for collective bargaining agreements, nor have the employees of plaintiff designated the defendants or any of them as their representatives for collective bargaining." Retail Clerks' Union v. Superior Court, 52 Cal. 2d ........, 339 P.2d 839, 846 (1959) (dissent).

\textsuperscript{113} Informing the employer of unwillingness to accede to the union's demands is enough. Chavez v. Sargent, supra note 108, at ........, 339 P.2d at 826. But what of the employer's burden of proof as to the existence of a labor organization? See Retail Clerks' Union v. Superior Court, supra note 112, at ........, 399 P.2d at 846 (dissent).

\textsuperscript{114} Retail Clerks' Union v. Superior Court, supra note 112, at ........, 339 P.2d at 844 (dissent). If a union shop agreement is proscribed at all times on the grounds of unlawful employer intervention, then the intervention remains unlawful when made on behalf of an established union. Chavez repudiates Garmon in so far as Garmon permits the union shop for established unions. "Majority rule" says Traynor, dissenting, "is the creation of majority opinion." Id. at ........, 339 P.2d at 846.

\textsuperscript{115} Id. at ........, 339 P.2d at 846. But Traynor, too, errs in not pressing his logic home. "No concerted activity . . . is lawful unless the employees involved achieve substantial unanimity." Surely, he meant "unanimous decision."
proves it does represent a majority. Nor is there any statutory procedure to prohibit an employer from discharging employees who have urged union organization, and hiring more compliant workers in their place. But until Garmon and Chavez, the union could react to the employer's action by invoking the strike, picketing the plant, or boycotting the employer. With the Damocles sword of Garmon hanging over them and its unclear language lending itself to elaboration by Superior Court judges almost at will, what way remains open to labor unions in California to proceed with organizational activity?

V

As suggested in the introduction to this paper, the Supreme Court has seriously impaired the effective functioning of the union by the Garmon decision and has left little doubt as to its attitude toward future cases by its decision in Chavez. The union cannot demand recognition from an employer or obtain it by economic action. It cannot attempt unionization of non-union plants which are competitive to those organized. In summary the union cannot engage in collective bargaining if it cannot get recognition from the employer. Its bargaining will be ineffective if it cannot win industry-wide organization.

These court-wrought strictures upon the California union are only half the picture of negation. The other half, etched on the canvass of the Jurisdictional Strike Act, prohibits effective strike action by the unions.

The Jurisdictional Strike Act was enacted in 1947.118 It was designed to prohibit union interference with employers in disputes "arising out of controversies between two or more labor organizations as to which of them has, or should have, an exclusive right to represent the employees, or to have the members of such an organization perform work for the employer." On the face of it, the Act is limited to cases where controversy between the unions precedes the activity which the employer seeks to enjoin, where the parties to the controversy are bona fide labor organizations "not found to be financed in whole or in part, interfered with, dominated or controlled by the employer," and where the dispute is either a "representation" dispute, with each union claiming to represent the employees, or a "work assignment" dispute, predicates on the demand that a given union replace others in performing a certain type of work.119 As to the other types of union activity generically subsumed under

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118 CAL. LAB. CODE §§ 1115–1120. Section 1115 declares the Jurisdictional Strike as "being against the public policy" of the state, and "unlawful." Section 1116 entitles any person suffering injury from a violation of the act to damages and injunctive relief.

117 CAL. LAB. CODE § 1118.


the title of "collective bargaining," section 1119 specifically excludes them from the coverage of the Act.\textsuperscript{120}

At first glance there could have been little quarrel with the objectives of such an act.\textsuperscript{121} It appeared to uphold the right of the unions to engage in concerted union activity—strikes, picketing, boycotts—so long as these activities are not a result of a jurisdictional dispute.\textsuperscript{122} It is true that in outlawing disputes of the work assignment type, the employer was given a chance to create "jurisdictional" difficulties by an artificial distribution of jobs among the different unions, calculated to arouse local jealousies and provide the management with easy methods of incapacitating all the unions so involved. Despite this criticism the Act apparently granted the employer a limited and defensible right to self-protection in cases where he was an innocent by-stander caught between two warring unions.

Further analysis, however, exposes both the term "jurisdictional strike" and the Act itself, as fatally vague. Suffice it to consider, merely as an example, the term "arising out of controversies." The phrase "out of," if limited to its express portent, excludes situations where jurisdictional pressures do not arise from pre-existing, multi-union quarrels for power, but culminates in them. On the other hand, if this semantic guide is discarded in favor of some overriding policy of enjoining all jurisdictional strikes, no matter how initiated, the courts undertake a grave responsibility to determine how far this new policy should extend short of infringing on the express protection of the right of collective bargaining.\textsuperscript{123}

In Voeltz v. Bakery, etc., Union,\textsuperscript{124} an AFL Bakery Workers Union

\textsuperscript{120} Cal. Lab. Code § 1119. "Nothing in this chapter shall be construed to interfere with collective bargaining subject to the prohibitions herein set forth, nor to prohibit any individual voluntarily becoming or remaining a member of a labor organization, or from personally requesting any other individual to join a labor organization."

\textsuperscript{121} The California State Federation of Labor raised no noticeable protest against the bill, which Governor Warren signed, although its secretary voiced considerable misgivings. See 6 Stan. L. Rev. 188.

\textsuperscript{122} Seven Up v. Grocery Union, 40 Cal. 2d 368, 381, 254 P.2d 544, 553 (1953). "[A]n independent union is not prevented from endeavoring to organize an employer's employees when they belong to an employer controlled union or to no union."

\textsuperscript{123} Thus the minority's prognosis is to limit the application of the act to the intervenor unions only on the theory that it is the second union's intervention which converts the previously legitimate labor-management "a deux" bargaining into a jurisdictional dispute. However, this solution is necessarily limited to the facts in Voeltz v. Bakery, etc., Union, 40 Cal. 2d 382, 388, 254 P.2d 553, 557. It would be inapplicable in the context of Seven Up v. Grocery Union, supra note 122, and is specifically modified in In re Kelleher, 40 Cal. 2d 424, 254 P.2d 572, 577 (1953).

\textsuperscript{124} 40 Cal. 2d 382, 254 P.2d 553 (1953). But see Globe D. Lunch Co. v. Joint, etc., Culinary Workers, 117 Cal. App. 2d 190, 255 P.2d 94 (1953) presenting a difficult situation where the winning union stopped picketing and, subsequently, after a management reorganization, 86 of the 93 employees joined the other union. The employer recognized the second union,
claimed to represent the company's employees and demanded of the management a collective bargaining agreement embodying improved wages, hours and conditions of work. When the management refused, the union called a strike and established a peaceful picket line outside the plant. Only ten out of the forty-nine employees in the plant joined in the walkout. The employer refused to yield and hired replacements. Eleven months later, with the strike still on, an "independent" union composed of non-striking employees bowed into the picture. The new union contended that it represented the majority of those then employed by the company. The employer sought an injunction against the original strikers asserting that he was caught between two threats. If he persisted in defying the original union, it would continue to picket him. If he acceded to its demands, the new union, representing the majority of the employees, would strike. The injunction was duly granted.

In *In re Kelleher* a steamship company conducted its own election to determine which union had the support of the marine engineers. The CIO union, with which the employer had a collective bargaining contract, won a majority over its AFL rival. When the contract expired two months later, the CIO majority union demanded a hiring hall clause in the new contract and, upon the employer's refusal to accede to its demands, struck. The employer filled the vacant jobs with new employees who were immediately organized by the rival AFL union which then represented the majority of the employees (the replacements supplanting those workers who went on strike). The employer entered into a contract with the AFL union in which, parenthetically, a hiring hall provision was not included. A suit to enjoin the CIO union from picketing followed and the injunction was granted.

In both cases above, the striking union was engaged in a lawful activity. In *Voeltz* the dispute between the original union and the employer at the time of the strike could not possibly be characterized as "arising out of a controversy between two or more unions" simply because there were not two unions present at the time the strike began. The second union did not appear on the scene until eleven months later. In the *Kelleher* case the striking union won the election and the right to exclusive representation of the employees in negotiations over a new contract. In both cases the employer endeavored successfully to break an otherwise lawful strike by

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125 40 Cal. 2d 424, 254 P.2d 572 (1953).
recognizing a rival union. In each case the rival union had no prior claim to represent the employees. In each case that union included replacements, many of whom owed their jobs to the fact that the originally employed workers were on strike and, accordingly, had a vested interest in voting for any organization but the one representing the original employees. In each case the new union demanded of the employer substantially less than the striking union.

The dissenting minority in both cases viewed the situation realistically. They stated that the dispute between the employer and the original union arose, after all, from a cause unrelated to the intervention of another union later in the dispute. They submitted that section 1119 of the Labor Code, dealing with the right to collective bargaining, would be rendered meaningless unless the nature of the dispute were recognized. Accordingly, they concluded that no amount of subsequent interference by other unions could change the fact that these were bona fide disputes between the employer and his organized employees. In the words of the dissent in Kelleher:

... I do not believe that the statute was ever meant to protect an employer who is engaged in a dispute with his employees and the union of their choice over legitimate labor objectives, and who seeks a ban on otherwise lawful picketing on the ground that he has signed a contract with another union willing to fill the jobs of the striking workers, thereby himself creating the jurisdictional dispute from which he seeks relief. ...

The majority of the court, however, saw it differently. They construed the Act to apply to any labor-management disputes which in time developed into jurisdictional situations. "To place defendant's construction on..."
the Act would make it practically never applicable” said the court. “[T]he
unions would have to act simultaneously in their demands or disputes with
the employer before there would be an interference with the employer’s
business. . . . If one of them made the demand any time before the other,
then the interference would arise out of a dispute between the employer
and the union rather than between the unions. It would rest wholly within
the power of the unions to arrange the chronology of their demands, and
to escape the force of the act.”129

The effect of this majority position is simply to allow the employer to
decide when a “proper case” for an injunction arises.130 A legitimate union
with a long history of labor negotiations behind it may enter upon a strike
for what are admittedly lawful objectives and find itself suddenly enjoined,
not because of anything it did or could avoid doing, but merely because
the employer, at his will, invoked the claims of a rival union thereby creat-
ing a “jurisdictional” dispute. Even if it could have been assumed that
the rival union recognized by the employer was a bona fide labor organiza-
tion, which frequently it is not, it still remained with the employer to be the
sole judge of which union, if either, he recognized, regardless of past history
of labor relations in the plant. This would mean that the union which is
more aggressive, more active and, therefore, least acceptable to the em-
ployers, could be eliminated. Instead of fostering collective bargaining, such
a construction frustrates it. In the hands of the employer who regards union
activity as a paralytic agent, the Jurisdictional Strike Act has become akin
to a “super Salk Vaccine,” enabling him to inject dead labor anti-bodies into
the dispute in order to forestall any live bargaining in his plant.

This construction of the Act by the majority of the court is difficult to
accept for a variety of reasons. In the first place, the writer believes that
the Act does not initiate a new policy of protection for management “at all
costs,” but a limited amendment to the existing legislation. It purports to
remedy a specific situation. The stressing of only such strikes which arise
“out of” inter-union controversies, and the plain reading of section 1119
reasserting the right of collective bargaining, permit of no other inference.
The conclusion reached by the court that the choice is between a construc-
tion which may permit the unions to render the act “never applicable” and
the construction favored by it, which will enable the employer to apply
the act in all cases of labor dispute, is based on an erroneous dichotomy.
It is true that the act itself is unclear concerning its implementation, but
the reference to cases arising “out of controversy” could be construed to

129 See Voeltz v. Bakery etc. Union, supra note 124, at 387, 254 P.2d at 556.
130 See Voeltz v. Bakery etc. Union, supra note 124, at 387, 254 P.2d at 556. Some years
ago this situation was summarized in an article (6 Stan. L. Rev. 188) to mean that a “proper
case” for the purposes of the Jurisdictional Strike Act exists whenever an employer has an
agreement with one union and seeks an injunction against another.
mean that the background and the history of the preexisting relations is to be taken into account before the employer could make his exceptional case warranting a Jurisdictional Strike injunction. If so construed, the acceptance of the defendants' position would result in the formulation of definite criteria for allowing injunctions. It would foster issuing injunctions in cases where the past history of the dispute proves its jurisdictional character, but it would deny them where the record shows evidence of a legitimate labor-management dispute camouflaged by the employer to enjoin effective labor pressures.

If the court wished seriously to consider the advisability of delineating fixed criteria for enjoining a union in jurisdictional disputes, it could, for instance, confine the Voeltz case to its facts. In both the Voeltz and the Kelleher cases the second union represented a majority of the employees working in the plant at the time of the injunction. The court could decree that the lawful conduct of the original union would cease to be lawful and protected under law when the union ceases to represent the majority of the employees but knowingly continues to picket the plant. As harsh and questionable as such a decision might seem to the unions, it would have been at least consistent with the Garmon case's approach and the test would have had the additional appeal of appearing to serve the interests of the majority of the employees in the plant and protecting their right to self organization, rather than backing the employer in all cases with nary an exception.

But in both cases the court made no reference to the employees' choice. The sole ground for the decisions was the fact that the employer chose to deal with an independent labor organization, thereby determining, by his own choice, at what point the strike against him would become unlawful. Furthermore, as pointed out in the dissenting opinion in the

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131 Compare with Seven Up v. Grocery Union, 40 Cal. 2d 368, 254 P.2d 544 (1953). A labor association existed and had a contract with the employer at the time of the second union's organizational action. The unanimous decision in the Seven Up case is later distinguished by the minority in its dissent in Voeltz v. Bakery, etc., Union, supra note 124.

132 But see supra on election procedures. Compare with the language cited above and followed by note 81. This language is contradicted in Seven Up v. Grocery Union, supra note 131, at 376, 254 P.2d at 549, where the court states that "the main purpose of the Act" is to "protect an employer against interference with his business and the public from disturbances resulting from a dispute between unions . . . ."

133 In Seven Up v. Grocery Union, supra note 131, at 372, 254 P.2d at 547 the court came close to implying that the employees' choice is of significance. In that case a national union struck to compel the employer to recognize it as a bargaining agent, when the employer had a contract with a local association "not financed, interfered with, dominated or controlled" by him. The court inferred a controversy between two unions out of an allegation that a collective bargaining agreement existed with the association and that the union's efforts would necessarily tend to replace the association. The problem of what constitutes employer "domination" is largely unsolved.

134 See In re Kelleher, supra note 125, at 430, 254 P.2d at 575.
Voeltz case and affirmed in a dictum in the Garmon case, "... there is no requirement that the union in fact represent any of the employees; all that is required is that more than one union claim the right to represent them." In addition, the court did not demand that the employer's recognition of the rival union be in good faith. It abdicated its duty of balancing the equities of the dispute and substituted the employer's choice for court inquiry. Yet, if the court wished to impose safeguards on this incredible delegation of powers to the employer, it could have easily stressed that its decision in Kelleher was motivated, be it in part, by the employer's good faith in recognizing a majority union. The court could, but refused to, establish, as a basic criterion in the application of the act, the innocence of the employer caught between two bona fide unions. The mere existence of a second or challenging union secretly sired by the employer, midwifed by the court after a weekend's gestation period and delivered to inherit the rightful position of the legitimate union seems to be all that is required for the purposes of the Jurisdictional Strike Act, its antidomination language notwithstanding.

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135 Voeltz v. Bakery, etc., Union, supra note 124, at 390, 254 P.2d at 558. Compare: "... if the Act were to be read as plaintiffs contend, it would be impossible for any labor organization legitimately to conduct a strike unless each and every employee engaged in the strike, and no strikebreaker belonging to another organization were hired by the employer. Obviously, if the hiring of a single strikebreaker who desired an alleged second organization were enough to enable the employer to enjoin the strike, there would not remain in the State of California the right to strike." Defendant's Supplemental Memorandum, p. 3, Bowman Beverages Inc. v. General Teamsters, Butte County Super. Ct., No. 32441 (1957).

136 Consider, for instance, the once hypothetical situation, suggested by the Secretary of State Federation of Labor, cited in 6 SLR 187 n.28, where an employer discharges some organized men and hires others with the tacit understanding that they will form an independent union. The employer sponsors the new organization but carefully refrains from financing it, interfering with it or dominating it. Such action by the employer could result in an injunction against bona fide labor strikers. Compare infra note 146.

137 But see In re Kelleher, supra note 125, at 431, 254 P.2d at 576 (dissent).

138 "Ex Parte" refers to the practice of granting temporary restraining orders upon request of the plaintiff's attorney without as much as a notice to the defendant. The time the defendant presents its side of the picture, the effect of such an order might have disposed of its chances to win the strike. See note 142 infra. For a weekend gestation period see Bowman Beverages, Inc. v. General Teamsters, supra note 135. Compare the following observations of Professor Aaron (The California Jurisdictional Strike Act, 27 So. Cal. L. Rev. 237, 259-60, (1954)). "During the past year, there have been at least five instances in which requests for injunctions were denied on the ground that the plaintiff had failed to present sufficient evidence of the existence of a bona fide jurisdictional dispute. The situations in these cases generally conform to a common pattern: union organizational activities among employees of small concerns, accompanied by demands for recognition; rejection of the union demands by the employer; commencement of peaceful picketing by the outside union; sudden organization of an allegedly independent employees' association; prompt recognition of that organization by the employer; and the application for an injunction against the outside union under the Jurisdictional Strike Act." Note his conclusion, at 262, arguing for care and deliberation in granting preliminary injunctions.
The results of such policy were not long in coming. In *Paradise Corporation v. Theatrical Employees*, the plaintiff discharged all his unionized employees and in their place hired non-union workers. The union struck. The Superior Court found that there was no jurisdictional dispute, that no second union was in evidence, that there could have been no possible reason for injunction under the Act. However, these findings were made on the hearings for preliminary injunction, a temporary restraining order having been granted! In other words, even as clear-cut a situation as that present in the case above was not immune from the temporary restraining order. In *Hidden Harbor, Inc. v. Waiters Local 500, AFL*, where 15 out of 18 employees went out on a strike organized by their union, the employer hired replacements and, while instructing them in their duties, requested that they appoint a chairman "to negotiate with management." The new "union" was "organized," a strikebreaker was elected as its representative and the employees signed their contracts; all within one hour's time and without any bargaining about labor conditions. A temporary injunction issued and was dismissed later on, the court stating that the employer's interference with his employees was self evident. It is not recorded what happened to the strike after the temporary injunction was issued.

In a more recent case, *Bowman's Beverages, Inc. v. General Teamsters and Warehousemen*, a union representing all the employees in the plant went on strike for increased wages and better working conditions. The evidence is uncontroverted that the strike was pursuant to legitimate bargaining, that the union had represented the employees for many years and that no dissatisfaction with it had previously been recorded. Within three days after the strike was ordered an "independent" union propitiously made its entrance upon the scene. It was hastily recognized by the employer even before it had a chance to prove actual membership, much less take genuine action. The employer signed an exclusive contract with it and sued for an injunction and damages against the original union which was just starting its strike. The court granted the injunction on the affidavits with no evidence before it relative to the existence of a genuine jurisdictional dispute except for the bare existence of a contract with a second union.

The cases just cited are the *reductio ad absurdum* of the *Voeltz* and *Kelleher* doctrine. Whereas in the *Voeltz* case eleven months elapsed before the recognition of the second union, raising the possibility of an honest change in opinions among the employees in the plant, in the *Bowman* case three days were found sufficient. Where in the *Voeltz* and *Kelleher* cases a second union appeared in the end to assure the employer of his success,
in the *Paradise Corporation* case the strike was broken without any second union in evidence. Where in the *Kelleher* case the employer could plead his good faith in recognizing the majority union, in the *Hidden Harbor* case he had actively interfered with his employees' decisions, and yet a temporary injunction was granted. Where in *Voeltz* and *Kelleher* a majority of employees seemed to back the new union, the *Bowman* case permitted an injunction against a union clearly representing a majority of the employees. In most of these cases the temporary injunction is granted on the affidavits and before actual determination of the facts in the case even though the employer must meet the obligation of the burden of proof as well as the requirement of establishing that the denial of the injunction would injure him more than its issuance would hurt the union.

It is true, of course, that the difficulty stems from the omissions in the act itself and not merely from faulty judicial construction. For instance, the act excludes employer dominated unions from its coverage yet it fails to establish any method for defining what exactly belongs in that category. Obviously, more extreme cases of employer domination need no analysis, but "... there may be interference of more subtle character which achieves its objects less obviously." After reading the decisions in the *Hidden Harbor* or the *Bowman* cases, it seems almost impossible to make a stronger case of circumstantial evidence of employer domination, and yet the courts seem to take no notice. Appellate court decisions fail to clarify the issue since, naturally, only such instances reach the appellate courts as fail to establish domination. With the superior court all but free of the tradi-

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142 "Theoretically, such temporary restraining orders are granted only to prevent irreparable injury; (C.C.P. 526(2)) but the frequency with which they are issued in L.A. county indicates that 'irreparable injury' is given so broad a definition as to render the distinction between it and less serious damage virtually meaningless." Aaron & Levin, *Labor Injunctions in Action*, 39 Cal.L. Rev. 42, 49. It must be remembered that in organizational strikes, "injunctions are usually the decisive factor in the employer's favor, at least for the short run." Id. at 66.

143 "It is well settled that a preliminary injunction will not issue in a doubtful case. The rule has been frequently laid down broadly that a preliminary injunction will not issue where the right which the complainant seeks to have protected is in doubt, when the right to the relief asked is doubtful, or except in a clear case of right. (36 CJ. 36) This rule is well recognized in this state." Hueneme, etc., Ry. v. Fletcher, 65 Cal. App. 698, 703, 224 Pac. 774, 776 (1924). See also Aaron, *The California Jurisdictional Strike Act*, 27 So. Cal. L. Rev. 237, 260 (1954).

144 The holding in *Isthmian S.S. Co. v. Nat'l Marine, etc., Ass'n*, 40 Cal. 2d 433, 254 P.2d 578 (1953) illustrates the point. In spite of the rather obvious facts, the court held that "the case is not necessarily close on its facts when we review the evidence most favorable to plaintiffs, as we must do since the trial court made the order in plaintiff's favor."


146 *Culinary Alliance & Hotel Service Emp. Local Union v. Beasley*, 135 Cal. App. 2d 186, 286 P.2d 894 (1955) presents an extreme case in point, since the court held there that, where the by-laws of the union prohibited striking or picketing (1) such clause was not conclusive to show employer domination! The case contains assorted lists of facts which, *seriatim et separatim* were held not constitute proof of domination.
tional weariness in granting injunctions and mistaking the Jurisdictional Strike Act for a blanket "protection for the employer," more and more union actions are being enjoined whether or not they should have been enjoinable on the facts under any logical reading of the law. For all practical purposes there are no strikes today that cannot be easily broken by management acting under the Jurisdictional Strike Act as construed by the courts.

Part of the blame must go to the Supreme Court for its failure to establish reasonable criteria for application of the Act, yet there are problems of enforcement of the Act which properly belong with the legislature because of their policy making import. Take for example the problem (mentioned before without due examination) of assuring proper election in inter union disputes. In the Voeltz and Kelleher cases the number of the employees voting in the elections exceeded the total of employees in the plant since the employees voting for the striking union and for the second union were not the same employees. Usually, the original union had the endorsement of the employees in the plant, at least part of whom were out on a strike, and the second union had the endorsement of the replacements hired to supplant the striking employees. Theoretically, it is possible that twice the number of the employees which the plant could employ would be entitled to vote in such elections. Nowhere is the frame of reference for elections determined and no one knows who, exactly, should be permitted to vote. In practice this means that the employer can regulate the number of employees qualified to vote by deliberate hiring and firing or by hiring replacements for employees on strike and, thereafter, defeating the rightful union in elections in which more employees could participate than are actually employable in the plant.147

In the light of this basic problem it is easy to overlook other deficiencies in the voting procedure. For instance the Act does not provide that a vote, if taken, will be secret.148 The union is faced with the choice of submitting to its rival without an election (since a mere claim to represent the employees is enough) or insisting on an election. In the latter situation there is nothing to stop the employer from firing the employees voting against

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147 Marion Plant states in his Recognitional Picketing by Minority Unions in California, 9 STAN. L. REV. at 116, n.71, that union claims of majority "... can be easily substantiated if valid by the introduction in evidence of 'authorized cards' signed by a majority of the employees and designating the union as their bargaining representative." A case cited in support is ... a federal case! Plant overlooks the problems involved in California procedures that it is unclear who may vote, that, even if this problem was decided, California has no provision against unfair employer practices and, with no protection for the voting union members, court elections may do no more than inform the employer what employees are to be fired next. Accordingly, the author takes exception to Plant's statement that "The question whether the picketing union represents a majority of the employees in an appropriate unit is no more difficult to answer than most of the questions with which the State's trial courts are confronted, and much less difficult than many." Id. at 166.

148 The facts in the published report never disclose the procedure taken in voting.
except in the rare cases where the election is under the auspices of the court (enabling it to use contempt power to enforce its decision).

In conclusion, it is submitted that the Jurisdictional Strike Act, as construed, is an almost infallible strike-breaking device available to the employer in all circumstances regardless of the actual existence of a jurisdictional strike. There seem to be no limitations on the use of the Act for strike-breaking purposes and even where the situation lies clearly outside of the Act's purview, the tendency of the Superior Courts is to issue blanket temporary injunctions which, in many cases, dispose of the strike as effectively as if a permanent injunction were to follow them up.

The fatal deficiencies of the Act are many. In the first place, as construed by the courts, its scope seems unlimited, extending to any organized labor activity whatever with the employer in the position of a final arbiter and converting legitimate strikes into unlawful action. Secondly, no criteria for extending its application are established. It may apply to stop a majority as well as a minority union regardless of the past history of the dispute, regardless of the motivations of the intruding group and the employer's part in recognizing it prematurely or otherwise using it to destroy legitimate unionism, regardless of its actual bona fides or membership. It provides no election procedures, no protection against deliberate firing and unfair employer practices. Finally, whatever the decision controlling the permanent injunction, it presents the employer with a carte blanche in temporary injunctions. Add to it that in addition to the injunction the employer may sue for damages and the picture becomes complete. In breaking actual strikes and in frightening unions from engaging in contemplated pressure for wage adjustment, shorter hours, hiring hall or other labor objectives, the Jurisdictional Strike Act surpasses by far the Taft-Hartley restrictions without affording the unions its protection of enjoining unfair management practices and supervising the election procedures for the benefit of the majority union.

In the world of the three to four decisions it would take only one replacement on the Supreme Court to repeat the pattern of abrupt reversal with the minority again delivering the binding construction of California labor law. In the world of legislative politics the first unsuccessful attempt has been made to express legislative intentions and correct the abuses permitted under the present state of law. The time has arrived when California's labor law must face the disparity between its statutory policy and its judicial reversal.

149 See Sommer v. Metal Trades Council, 40 Cal. 2d 392, 254 P.2d 559 (1953) where the employer refused to recognize any union, either local or national.

150 See Seven Up v. Grocery Union, supra note 131, at 372, 254 P.2d at 547 where the employer asked $100,000 in damages on the fourth count alone.

151 In this connection, the recent replacement of the late Justice Schenk by Justice Thomas P. White should be noted.