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THE PREEMPTION DOCTRINE—EVISCERATION
OF UNION MEMBER RIGHTS

I. Introduction

After more than eighty years of state courts adjudicating internal union disputes, the United States Supreme Court has effectively denied a union member recourse to litigation in his state jurisdiction and now requires him to take his dispute with his union to the National Labor Relations Board. The case used to severely limit the remedies of individual union members is *Motor Coach Employees v. Lockridge.* The *Lockridge* decision puts new vitality into the preemption doctrine which the court firmly established in *San Diego Unions v. Garmon.* Essentially the preemption doctrine means that when conduct is "arguably" protected or prohibited by the National Labor Relations Act the "States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." Prior to the *Lockridge* decision, the leading case concerning state jurisdiction over disputes between members and their union was *International Association of Machinists v. Gonzales.* Gonzales held that the protection of union members in their contractual rights with the union was not undertaken by federal law and that state jurisdiction was not precluded by the fact that the union's conduct might also involve an unfair labor practice or because of the remote possibility of conflict with the enforcement of national labor policy by the National Labor Relations Board.

Mr. Justice Douglas, who had joined Chief Justice Warren's dissent in *Gonzales,* dissented in *Lockridge.* After stressing the inequities of the *Lockridge* situation, he remarked: "While I joined the dissent in *Gonzales,* experience under *Garmon* convinces me that we should not apply its rule to the grievances of individual employees against a union." It is the intent of this article to examine the harsh effects of the application of the preemption doctrine to *Lockridge*-type disputes, to analyze the broad discretion of the National Labor Relations Board's General Counsel and to offer some suggestions for needed changes in the National Labor Relations Act.

II. History of the Dispute

With the enactment of the National Labor Relations Act (NLRA), Congress envisioned a policy of national uniformity in labor relations and estab-

1 For cases dealing with state adjudication of internal union disputes, see People ex rel. Deverell v. Musical Mut. Protective Union, 118 N.Y. 101, 23 N.E. 129 (1889) (expulsion); Wicks v. Monihan, 130 N.Y. 232, 29 N.E. 139 (1891) (suspension of local).
2 403 U.S. 274 (1971).
7 Id.
8 403 U.S. at 302 (Douglas, J., dissenting).
lished the National Labor Relations Board (NLRB) to guarantee uniformity of the Act's application. In *Garmon* the Supreme Court adopted a principle of broad preemption in order to assure uniform application of the national labor laws. Although *Garmon* has brought relative stability to the preemption problem, some of its consequences have been open to much criticism. The keystone of *Garmon* is whether or not an activity is "arguably" subject to section 7 or section 8 of the National Labor Relations Act. *Garmon* held that states could not act in any case involving conduct "arguably subject" to sections 7 or 8, because, to take jurisdiction, the state court would first have to interpret those sections to find whether or not the activity was subject to federal regulation. The Court's reasoning was that the regulatory scheme established by Congress requires that only the NLRB can make an initial determination whether an activity is governed by sections 7 or 8. However, under *Garmon*, when the Board refuses to assert its jurisdiction, the state does not have the power to act.

In *Garmon*, the Board declined to assert jurisdiction in a peaceful picketing dispute and the California court then asserted jurisdiction and granted an injunction and awarded damages. The Supreme Court held that the state could not assert its jurisdiction, because the activity was "arguably" subject to sections 7 and 8, even though the Board declined jurisdiction for policy reasons. The decision again raised the question of the existence of a "no-man's land"—which first became apparent in the notorious *Guss* opinion. In order to remedy the "no-man's land" problem, Congress in 1959 amended the NLRA to permit the states to assert jurisdiction in labor disputes over which the Board so declines.

It must be noted that the language of this amendment is addressed to situations in which the Board declines to assert jurisdiction because, in the opinion of the Board, the effect of such labor disputes on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction. There is no provision for permitting state jurisdiction where the Board refuses to assert jurisdiction for "policy reasons," as where the General Counsel refuses to issue a complaint because he is not convinced of the merits of the case. In such situations the *Garmon* principle "that the failure of the Board to define the legal significance under the Act of a particular activity does not give the states the power to act," appears to apply. Thus, there still remains the problem of the "no-man's land".

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11 359 U.S. at 245.
12 Id. at 244-45.
13 Id. at 246.
14 In *Guss v. Utah Labor Board*, 353 U.S. 1, 10-11 (1957), the Supreme Court held that a state court was barred from asserting jurisdiction against federally protected conduct, even though the NLRB, in its discretion, refused to assert jurisdiction. The case established the existence of a "no man's land" in the regulation of concerted employee activity.
15 29 U.S.C. § 164 (c) (2), amending 29 U.S.C. § 164 (1964), provides:
   Nothing in this subchapter shall be deemed to prevent or bar any agency or the courts of any State or Territory (including the Commonwealth of Puerto Rico, Guam, and the Virgin Islands), from assuming and asserting jurisdiction over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction.
16 359 U.S. at 246.
It is unclear what the Congressional intent was in regard to this situation, but apparently the case is barred from either the federal or state courts.\footnote{17}

Initially the Court carved out two exceptions to the \textit{Garmon} doctrine:

Where the activity regulated is a merely peripheral concern of the Labor Management Relations Act. \ldots Or where the regulated conduct touche[s] interest so deeply rooted in local feelings and responsibility that, in the absence of compelling Congressional direction, we [can] not infer that Congress [has] deprived the states of the power to act.\footnote{16}

The Court cited \textit{Gonzales} as an example of the first exception.\footnote{19} \textit{Gonzales} was decided a year before \textit{Garmon} but its rationale was not rejected by \textit{Garmon}. In \textit{Gonzales} the Court demonstrated its concern for providing a remedy for the individual union member and recognized that:

\ldots to preclude a state court from exerting its traditional jurisdiction to determine and enforce the rights of union membership would in many cases leave an unjustly ousted member without remedy for the restoration of his important union rights.\footnote{20}

However, the \textit{Gonzales} exception was limited and distinguished in 1963 when the Court decided \textit{Plumbers' Union v. Borden}\footnote{21} and \textit{Iron Workers v. Perko}.\footnote{22} In \textit{Borden}, a member of a local plumbers' union was refused a job because the local business agent of the union refused to give him a job reference. Borden brought suit in the Texas state court seeking damages for the union's refusal to give a reference and alleging that the local's action constituted a willful, malicious and discriminatory violation of his right to contract for employment, and a breach of an implicit promise in the union membership arrangement not to discriminate unfairly or deny any member the right to work. The union challenged the state court jurisdiction on the grounds that the subject matter of the suit was within the exclusive jurisdiction of the NLRB. The Supreme Court held that the union's conduct was "arguably" protected or prohibited by sections 7 and 8 of the National Labor Relations Act, and that state court jurisdiction must yield to the NLRB in accordance with the \textit{Garmon} doctrine. The Court distinguished \textit{Gonzales} on the grounds that the \textit{Gonzales} suit focused on internal union matters and "that the principal relief sought was restoration of union membership rights."\footnote{23} The Court further noted that the thrust of Borden's suit "focused principally, if not entirely, on the union's actions with respect to Borden's efforts to obtain employment."\footnote{24} In \textit{Perko}, a union member brought a suit in the Ohio state court against his union local, alleging that he had been employed as a foreman when the union conspired to deprive him of

\begin{itemize}
\item \textit{Garmon} doctrine (1947)
\item \textit{Gonzales} (1962)
\item \textit{Borden} (1963)
\item \textit{Perko} (1963)
\end{itemize}
the right to work as a foreman and forced the company to discharge him as a foreman and that the union had prevented him from obtaining work. Once again, the Court, applying the *Garmon* doctrine, held that the state must yield its jurisdiction because the crux of the action was not directed to internal union affairs.

The result of *Borden* and *Perko* was to severely limit the *Gonzales*-type exception to *Garmon*. This limitation can have the effect of leaving an individual union member without a remedy. The Court was provided with an opportunity to re-evaluate the *Gonzales*-type exception when it granted certiorari in *Lockridge*, but the results of that re-evaluation were disappointing.

III. The *Lockridge* Case

*Lockridge* represents a further evisceration of *Gonzales* and demonstrates the squeeze the preemption doctrine has placed on union members. *Lockridge* was discharged from his employment on the ground that he had forfeited his good standing membership in his union because of a dues arrearage of one month and was therefore subject to dismissal under a union security clause in the collective bargaining agreement which made union membership a condition of continued employment. He brought suit in the Idaho state court against his union and employer, who was later dropped as a party, charging that the union acted wrongfully, deprived him of his employment and that his suspension was in violation of the union’s constitution and bylaws which constituted a contract under Idaho law. Lockridge was awarded $32,678.56 as actual damages for the loss of his employment.

In affirming the judgement, the Idaho Supreme Court noted that the union

\[\ldots\] did most certainly violate section 8(b) (2) and probably caused the employer to violate section 8(a) (3), all of which constitute unfair labor practices, all of which are subject to the exclusive cognizance of the NLRB and are not subject to adjustment by, or interference with, Idaho courts.\]

Nevertheless, the Idaho court asserted jurisdiction because the union “did commit a breach of the contract between itself and W. P. Lockridge, a member.” The court’s rationale was that Lockridge was attempting to regain his membership and thus the suit was focused on purely internal union matters and “the only relationship his employment has to this case is a means by which damages can be computed.” The court held that the dispute was governed by *Gonzales* rather than *Borden* or *Perko*. In citing *Gonzales*, the court noted “the purpose for which we exercise jurisdiction is to avoid leaving ‘an unjustly ousted member without remedy for the restoration of important union rights.’” *Borden* and *Perko* were distinguished on the grounds that in those cases the union members

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26 Id. at 299, 460 P.2d at 724-25.
27 Id. at 300, 460 P.2d at 725.
28 Id.
29 Id. at 301, 460 P.2d at 725-26.
never sought reinstatement in the union and that "they had never been denied their membership."320

The United States Supreme Court, in reversing the Idaho Supreme Court, held that the respondent's complaint involved a matter that was "arguably" protected by section 7 or prohibited by section 8 of the National Labor Relations Act and thus the state court was preempted from asserting jurisdiction under the Garmon doctrine.31 It was emphasized that the proper focus of concern for determining whether a suit falls within the preemption doctrine is the conduct sought to be regulated rather than the theory upon which the case is tried in the state court.32 Moreover, the Court held the suit was governed by Borden and Perko rather than Gonzales. The Court concluded that Lockridge did not fall within the "peripheral concern" exception of Gonzales because the case turned on the construction of the applicable union security clause as to which federal concern was pervasive.33 Lockridge certainly reaffirms the rationale of Borden and Perko and leaves no doubt that the preemption doctrine is still a very viable one. Where "the crux of [an] action . . . concern[s] alleged interference with the plaintiff's existing or prospective employment relations and [is] not directed to internal union matters,"324 state jurisdiction must yield.

The consequences of Lockridge can be particularly harsh for the individual union member. An examination of the National Labor Relations Board Procedures sheds additional light on the problem. The Labor Management Relations Act (LMRA) separates the prosecutory and adjudicatory functions of the Board, by placing the former under the exclusive direction of the General Counsel.35 Under section 10(b) of the Act, an aggrieved party has six months within which to file an unfair labor practice charge.36 When an unfair labor practice charge has been filed and answered by the party charged, a regional office field examiner conducts an informal investigation of the alleged facts of the dispute.37 After the investigation, the Regional Director must decide if there is sufficient evidence to substantiate the charge.38 He can refuse to issue a complaint if he finds that there is insufficient evidence of the facts alleged, or that the facts alleged do not constitute a violation of the Act.39 The Regional Director will request the complainant to withdraw his charge, but if it is not withdrawn, then he will dismiss it.40 The dismissal may be appealed within ten days to the General Counsel, whose decision is final.41 If the General Counsel declines to issue a complaint, it is generally believed that the charging party has no further recourse.42 The

30 Id. at 303, 460 P.2d at 728.
32 Id. at 292.
33 Id. at 296.
34 Id. at 295-296.
38 Id. at § 101.5.
39 Id. at § 101.6.
40 Id.
41 Id. at § 101.6, 102.19.
42 For cases that have held the General Counsel's refusal to issue a complaint is final and unreviewable, see United Electrical Contractor's Ass'n v. Ordman, 258 F. Supp. 758, aff'd per curiam, 366 F.2d. 767 (2d Cir. 1966), cert. denied, 385 U.S. 1026 (1967); Retail
Supreme Court has never ruled on the reviewability of the General Counsel’s refusal to issue a complaint. The independent authority of the General Counsel in issuing complaints has been criticized, but survived Congressional intent to repeal it in 1950. Even if the decision not to issue complaints was reviewable, it would not be a satisfactory remedy because of the backlog of unfair labor practice cases before the Board.

Justice Douglas made the following remarks concerning the backlog of the Board and the plight of the individual:

> When we hold that a grievance is ‘arguably’ within the jurisdiction of the National Labor Relations Board and remit the individual employee to the Board for remedial relief, we impose a great hardship on him, especially where he is a lone individual not financed out of such a lush treasury. I would allow respondent recourse to litigation in his home tribunal and not require him to resort to an elusive remedy in distant and remote Washington, D.C. which takes money to reach.

He further remarked:

> From the viewpoint of an aggrieved employee, there is not a trace of equity in this long-drawn, expensive remedy. If he musters the resources to

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43 See Office Employees v. Labor Board, 353 U.S. 313 (1957), where the Court held that the Board’s refusal to assert jurisdiction, as to a class, when acting as employers was contrary to the intent of Congress, was arbitrary, and beyond the Board’s power. However, the Court of Appeals for the D.C. Circuit, refused to accept this case as authority for review of the General Counsel’s discretion, in Division 1267. Amal. Ass’n of Street & El. Ry. Emp. v. Ordman, 320 F.2d 729 (D.C. Cir. 1963).


46 For the backlog of cases before the Board, see THIRTY-FIFTH ANNUAL REPORT OF NATIONAL LABOR RELATIONS BOARD FOR THE FISCAL YEAR ENDED JUNE 30, 1970. Table 1 A, p. 155, shows the following number of unfair labor practice cases:

<table>
<thead>
<tr>
<th>Pending July 1, 1969</th>
<th>17,152</th>
</tr>
</thead>
<tbody>
<tr>
<td>Received fiscal 1970</td>
<td>13,601</td>
</tr>
<tr>
<td>On docket fiscal 1970</td>
<td>18,756</td>
</tr>
<tr>
<td>Closed fiscal 1970</td>
<td>12,915</td>
</tr>
<tr>
<td>Pending June 30, 1970</td>
<td>5,941</td>
</tr>
</tbody>
</table>

Table 8, p. 169 shows how 19,851 unfair labor practice cases in fiscal 1970 were closed.

Before issuance of complaint | 17,152 |
| After issuance of complaint, before opening of hearing | 1,188 |
| After hearing opened, before issuance of trial examiner’s decision | 181 |
| After trial examiner’s decision, before issuance of Board decision | 25 |
| After Board order adopting trial examiner’s decision in absence of exceptions | 201 |
| After Board decision, before circuit court decree | 619 |
| After circuit court decree, before Supreme Court action | 421 |
| After Supreme Court action | 64 |

The chart on p. 4 reveals the following concerning the above statistics:

29.8% were dismissed before complaint.
26.3% were settled and adjusted.
36.2% were withdrawn before complaint.
5.5% of cases in which the Board orders were issued.

exhaust the administrative remedy, the chances are that he, too, will be exhausted. If the General Counsel issues a complaint, then he stands in line for some time waiting for the Board's decision. If the General Counsel refuses to act, then the employee is absolutely without remedy.48

IV. The Need for a Change

The national labor policy of the United States is an embodiment of the policies and provisions of the major federal labor laws. Under the subject of labor relations, there are essentially two broad categories of relationships among employers, labor unions and union members. The first, labor-management relations, concerns the relationship between employers and employee who have chosen to be represented by a union. The second, union-member relations, encompasses the relationship between the union and its members. The thrust of the first national labor laws was primarily job-related and not confined to union-member relations. The National Labor Relations Act (NLRA) had as one of its primary objectives the promotion of industrial peace.49 The Act recognized the inequality of bargaining power between employees and employers and acknowledged the right of employees to self-organization, to engage in collective bargaining through their own choosing or to refrain from any of the activities enumerated in the Act. It further defined and prohibited certain unfair labor practices by employers in order to assure protection of employee rights. Congress realized that industrial strife was also caused by undesirable practices on the part of labor unions as well as employers and amended the National Labor Relations Act in 1947 to provide protection to employers and additional protection to employees.50 In enacting the National Labor Relations Act, Congress established the National Labor Relations Board (NLRB) as a centralized administrative agency entrusted with the administration of a uniform national labor policy.51 In order to alleviate conflicts between the national policy and state laws and to assure uniformity of enforcement, the Supreme Court devised a broad preemption doctrine. This doctrine was first enunciated in Garner v. Teamsters Union52 and further elaborated in Garmon. In Garner the Court expressed its rationale in the following manner:

Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply laws generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules to avoid those diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. . . . A multiplicity of tri-

48 Id. at 304.
bunals and a diversity of procedures are quite apt to produce incompatible or conflicting adjudications as are different rules of substantive law. The same reasoning which prohibits federal courts from intervening in such cases, except by way of review of an application of the Federal Board, precludes state courts from doing so.53

This reasoning was reiterated in Garmon and later reaffirmed in Lockridge. One of the problems with the preemption doctrine is that the Court has never made a serious attempt "to discover whether particular sanctions imposed by state courts under particular circumstances would interfere with the federal program."54 Preemption may indeed be "designed to shield the system from conflicting regulation of conduct"55 by emphasis on the conduct regulated rather than on the remedy provided; but in effect, as it applies to individual union members, the inequities often outweigh the possibilities of conflict. Rarely are the individual union members given access to the state courts. Individual interests which are of concern to the state, as for example the enforcement of a contract between a member and his union are unprotected simply because as a procedural matter it is impossible for a state to acquire the necessary determination that the case is an appropriate one for state adjudication.56 Before enactment of the LMRA, states regulated unprotected union activity.57 In light of this state regulation, it is unlikely that Congress would have attempted to completely preempt it without explicitly saying so. Congressman Hartley, the co-sponsor of the NLRA, was aware of the need to preserve state regulation, as is evidenced by the following dialogue:

Mr. Kersten: Wisconsin and other states have their own labor relations laws. We are very anxious that disputes be settled at the State level in so far as it is possible. Can the gentleman give us assurance in that proposition... that that is the sense of the language of the report?

Mr. Hartley: That is the sense of the language of the bill and the report. That is my interpretation of the bill, that this will not interfere with the State of Wisconsin in the administration of its own laws. In other words, this will not interfere with the validity of the laws within that state.

Mr. Kersten: And it will permit as many of these disputes to be settled at the State level as possible?

Mr. Hartley: Exactly.58

It appears that the LMRA sought to protect the equilibrium between state and federal regulation. Under the preemption doctrine, even where the NLRB cannot provide complete relief to an aggrieved party, the state may not act where the conduct is "arguably" protected or prohibited by the Act. As an example, the Board under section 10(c) can order reinstatement and back pay, but it

53 Id. at 490.
56 Michelman, supra note 54, at 650.
cannot order the union to reinstate a member arbitrarily expelled. The NLRB cannot order the union to reinstate a member arbitrarily expelled. Reinstatement in the union may be the key to one's livelihood in this age of vast expanding unionism. The NLRB cannot award damages for mental or physical suffering, but the state courts can under local laws of contracts and damages. The preemption doctrine emphasizes the possibility of some entanglement with the Board's enforcement of national policy and ignores the possibility of an unjustly ousted union member left without a remedy. While it is true that punitive damages and criminal penalties are likely to have a regulatory effect on conduct within the Board's jurisdiction, it does not follow that the award of compensatory damages, for injuries resulting from conduct that is "arguably" an unfair labor practice, will produce substantial conflict or have a regulatory effect on conduct within the Board's competence. If state courts were permitted to apply federal law and were limited to application of those remedies open to the Board, the likelihood of conflict would be minimal and a more equitable balance would be struck between individual rights and the need for a uniform national labor policy.

In *Lockridge*, the Court emphasized that the "crux" of the complaint did not involve a "purely internal union affair." However, it is rare that a dispute between a member and his union will involve a "purely internal union affair." An analysis of the Court's rationale reveals that their emphasis may be misplaced. In *Gonzales*, the union breached its contract by expulsion of a member and the Court upheld the jurisdiction of the state court because of the possibility a member might be left without a remedy. The Court felt "potential conflict [was] too contingent, too remotely related to the public interest expressed in the Taft-Hartley Act, to justify depriving state courts of jurisdiction to vindicate the personal rights of an ousted union member." Because of his expulsion, Gonzales was unable to obtain employment. The end result in *Lockridge* is essentially the same. A member was suspended from his union and his job was terminated. The difference was that Lockridge was unable to bring a suit in state court. The Court acknowledged that he could have brought a civil suit to enforce the collective bargaining agreement between his employer and the union even if "the conduct alleged was arguably protected or prohibited by the National Labor Relations Act." This would be permissible "because the history of the enactment of section 301 reveals that Congress deliberately chose to leave the enforcement of collective agreements to the usual process of law." The possibility of conflict between the courts and the NLRB is also present in the use of a section 301 suit but the Court has held that the state courts retain concurrent jurisdiction to adjudicate such claims. Section 301 has been inter-
preted by the Court to permit state courts to assert jurisdiction in order to enforce collective bargaining agreements.\(^7\) There appears to be an inconsistency in permitting state courts to enforce collective bargaining agreements, even where there is "arguably" an unfair labor practice, but to deny the states jurisdiction in enforcing contracts between a member and his union. In *Vaca v. Sipes*, the Court held:

The federal labor laws seek to promote industrial peace and the improvement of ways and working conditions by fostering a system of employee organization and collective bargaining. The collective bargaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit. . . . The duty of fair representation has stood as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law. Were we to hold . . . that the courts are foreclosed . . . from this traditional supervisory jurisdiction, the individual employee injured by arbitrary or discriminatory union conduct could no longer be assured of impartial review of his complaint, since the Board's General Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint. The existence of even a small group of cases in which the Board would be unwilling or unable to remedy a union's breach of duty would further frustrate the basic purposes underlying the duty of fair representation doctrine. For these reasons, we cannot assume from the NLRB's tardy assumption of jurisdiction in these cases that Congress, when it enacted NLRA § 8(b) in 1947, intended to oust the courts of their traditional jurisdiction to curb arbitrary conduct by the individual employee's statutory representative.\(^8\)

It appears that the Court, rather than Congress, has ousted the state courts of their traditional jurisdiction. *Garmon* involved a union-employee dispute. To extend the preemption doctrine to an individual employee who seeks to redress his grievance against his union is to deny the courts their traditional jurisdiction. Many state courts have held that membership in a labor union constitutes a contract between the union and member.\(^9\) Traditionally the state courts have protected disciplined members through the contract theory. The rationale of this theory is that a member, by joining a union, enters into a contract, the terms of which are expressed in the union constitution and by-laws. Theoretically the member consents to expulsion or suspension according to the provisions of the contract, and if he is disciplined in violation of the union constitution or by-laws, the court can order his reinstatement.

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68 Id. at 182-183.
The contract theory is a legal fiction and it has its problems. For example, some courts have held that the contract is with the member and union but in some states the union may not be a legal entity. Some courts have attempted to bypass the problem by holding that the contract is with the other members. However, this second theory may be unrealistic where union membership numbers in the thousands. Union membership is a complex host of rights and duties and is a special relationship which may be far removed from the traditional approach of contract law. Nevertheless, the imperfections of the contract theory do not outweigh the alternative of no remedy for the individual union member. If the court is willing to extend the use of section 301 suits to state courts in order to curb arbitrary conduct by unions, despite the possibility of conflict with the NLRB, it would seem that it can also sanction suits for breach of union contracts. The Court held in Dowd Box Co. v. Courtney that state courts still retain jurisdiction to enforce contracts made by labor organizations. It stated:

The legislative history makes clear that the basic purpose of § 301(a) was not to limit, but to expand, the availability of forums for the enforcement of contracts made by labor organizations. Moreover, there is explicit evidence that Congress intended not to encroach upon the existing jurisdiction of state courts.

In the interests of a uniform national labor law, the Court has required state courts to apply federal law in section 301 suits. It is wooden logic to suggest that state courts are capable of applying federal law in suits involving the enforcement of arbitration or collective bargaining agreements but that the same state courts are incapable of applying federal law in suits which involve a breach of contract between a union and a member. The Supreme Court's rationale in Dowd Box Co. v. Courtney appears to be in harmony with Justice White's view "that the perceived interests in judicial adjudication of contractual disputes is more important than the interests of uniformity that would be promoted by preemption." In Lockridge, Justice White stated:

[The 'rule' of uniformity that the Court invokes today is at best a tattered one, and at worst little more than a myth. In the name of national labor policy, parties are encouraged by the Board, by Congress, and by this Court to seek other forums if the unfair labor practice arises in an arbitrable dispute, violates the collective bargaining agreement, or otherwise qualifies as one of the exceptions. . . . Until today, Machinists v. Gonzales had been thought to stand for the proposition that Garmon did not reach cases 'where the possibility of conflict with federal policy is . . . remote'. . . . I see no reason why this exception has not, for all practical purposes, expired."

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71 Elfer v. Maine Engineers Beneficial Ass'n, 179 La. 383, 154 So. 32 (1934); State ex rel. Dane v. Le Fevre, 251 Wis. 146, 28 N.W.2d. 349 (1947).
72 Dowd Box Co. v. Courtney, 368 U.S. 502 (1962).
73 Id. at 508.
75 368 U.S. 402 (1962).
77 Id. at 318-19.
The Labor Management Relations Act through sections 8(a)(3) and 8(b)(2) attempted to furnish limited protection for disciplined union members. These sections essentially protect the right to work. If an expelled union member is discharged, the Board may prosecute his case and he can obtain back pay either from the union, or from the employer if there has been a § 8(a)(3) violation. However, because of the backlog of work, it may be months before the Board will act and the lack of interim relief may make the delay intolerable. State courts can provide a remedy for the disciplined member but the preemption doctrine forecloses this relief. The Gonzales case and the other Court-made and Congressional-made exceptions to the preemption doctrine provided an opportunity for relief to the individual member, but the Supreme Court has narrowly limited the exceptions to the detriment of the union member.

V. Suggested Solutions

The solution to the problems created by the Court's Garmon doctrine can come from either the Court or the Congress. The Court has itself noted that the Garmon doctrine is not without imperfection but has suggested that it will be continued to be applied unless altered by Congress. Before suggesting a proposed amendment to the National Labor Relations Act, the possibility of the Court solving its own created dilemma should be further explored. The question still remains whether Congress intended to federalize the whole area of labor relations. It is apparent from the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA) that Congress did not attempt to preempt traditional state remedies. It was not until the passage of the LMRDA that Congress directed its attention primarily to union-member relations. Title I of the LMRDA provides a Bill of Rights for union members which purports to give them equal rights and privileges to nominate candidates, to vote in elections, to attend membership meetings, to express freely any views and the right to institute suit against the union. Congress did not make the Board the arbitrator of these rights but provided for civil enforcement in the federal courts.

It should be noted that Senator John F. Kennedy, one of the sponsors of the bill, imposed the inclusion of the Bill of Rights because he felt that union mem-

78 The Labor Management Relations Act, 29 U.S.C. § 158 (a) (3), (b) (3) (1964), provides in part:
(a) It shall be an unfair labor practice for an employer
    (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.
(b) It shall be an unfair labor practice for a labor organization or its agents
    (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.
81 29 U.S.C. §§ 401-531 (1964) [hereinafter cited as LMRDA].
bers were provided with those rights more satisfactorily by existing state law and by the Taft-Hartley Act. Senator Kennedy understood Title I to raise the question of preemption which he feared might wipe out the common law remedies of the various states and then only those rights contained in Title I would be available to union members. The response to Senator Kennedy's concern was the adoption of section 603(a) which expressly retained state rights and remedies.

In light of Congressional intent not to deprive members of state remedies, perhaps the Court should attempt to reach an accommodation between the LMRDA and the Garmon doctrine in order to provide a more efficacious remedy for individual members. The language of section 603(a) explicitly retains the existing rights of members under state law. There appears to be an incompatibility between section 603(a) and the Court's application of the preemption doctrine. Justice White took notice of this incompatibility when he stated:

Beyond any doubt whatever, although Congress directly imposed some far reaching federal prohibitions on union conduct, it specifically denied any preemption of rights or remedies created by either state law or union constitutions and by-laws. Thus, as to union member relations, any parallel rights created by the State, either directly or indirectly through enforcement of union constitutions or by-laws, were to stand at full strength.

Section 102 of the LMRDA provides that a union member who charges that his union has violated his rights under Title I of the Act may bring a civil action in a United States district court for appropriate relief. The language of section 102 clearly indicates that the cause of action must arise under the provisions of the Act. However, even where the cause of action might involve an unfair labor practice, the courts are not preempted by the NLRB jurisdiction because the section specifically allows suits in the federal courts. In Boilermakers v. Hardeman, a member alleged unlawful expulsion under section 101(a)(5)

85 29 U.S.C. § 523 (1964), provides:
Except as explicitly provided to the contrary, nothing in this chapter shall reduce or limit the responsibilities of any labor organization or any officer, agent, shop steward, or other representative of a labor organization, or of any trust in which a labor organization is interested, under any other Federal law or under the laws of any State, and, except as explicitly provided to the contrary, nothing in this chapter shall take away any right or bar any remedy to which members of a labor organization are entitled under such other Federal law or law of any State.
87 29 U.S.C. § 412 (1964), provides:
Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.
89 29 U.S.C. § 411 (a) (5) (1964) provides:
No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.
of the LMRDA but sought only damages for wrongful expulsion, consisting of loss of income, loss of pension and insurance rights, mental anguish and punitive damages, rather than reinstatement. The Court held that the critical issue in Hardeman's complaint was a union denial of a full and fair hearing within the meaning of section 101(a)(5). Despite the type of damages which Hardeman sought, the Court held that the "claim was not within the exclusive competence of the National Labor Relations Board." As previously stated, Congress did not attempt to preempt traditional state remedies with the enactment of the LMRDA. Section 102 provides that a member may bring a civil action in the federal district court. When this is viewed along with section 603, which explicitly retains state rights and remedies, it appears that Congress did not foreclose the possibility of bringing an action for breach of a union contract or unlawful expulsion in the state courts.

If the Court is unwilling to accept this accommodation, then Congressional action is necessary. Since it has been generally accepted by the courts that the discretion of the General Counsel is unreviewable, Congress should amend section 3(d) of the National Labor Relations Act. This section should be amended to divest the General Counsel of his final authority in the investigation of charges and issuance of complaints. It has been generally recognized that law enforcement, or the decision to prosecute, is not subject to judicial review at the suit of interested parties. This can be justified on the ground that enforcement or prosecution is a function of intangibles over and above the purely legal considerations, such as staff limitations, backlogs, time factors or other tactical considerations. However, the private parties usually have other remedies. For example, if a prosecutor refuses to prosecute an assault charge, a civil suit is available to the victim. This is not true under the National Labor Relations Board procedure. When the General Counsel refuses to issue a complaint, there is no alternative protection, at least of the employee interest, under the National Labor Relations Act. This absolute discretion can have drastic and extraordinary consequences for the employee. Justice Douglas summarizes the problem in this manner:

When the basic dispute is between a union and an employer, any hiatus that might exist in the jurisdictional balance that has been struck can be filled by resort to economic power. But when the union member has a dispute with his union, he has no power on which to rely.

Professor Jaffe, speaking in favor of mandatory jurisdiction, noted "the point that the claim of the individual to enforce somewhere in some way what is

90 401 U.S. at 238.
92 29 U.S.C. § 153 (d) (1964) provides in part: "[H]e [General Counsel] shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints . . . ."
apprehended psychologically as a right is an important claim..." Jaffe states further:

[N]ormally the courts should tolerate agency law making which does not in the courts' opinion seem clearly contrary to the statutory purposes as the courts understand them. But the statute under which an agency operates is not the whole law applicable to its operation. An agency is not an island entire of itself. It is one of the many rooms in the magnificent mansion of the law. The very subordination of the agency to judicial jurisdiction is intended to proclaim the premise that each agency is to be brought into harmony with the totality of the law; the law as it is found in the statute at hand, the statute book at large, the principles and conceptions of the 'common law' and the ultimate guarantees associated with the constitution.

An amendment to section 3(d) would at least afford the individual his day in court. However, this is not the most efficacious remedy because of the expense and time involved in exhaustion of the administrative remedy. Congress should also amend section 14(c) (2) of the NLRA. This section permits the states to assert jurisdiction over labor disputes in which the Board declines to assert jurisdiction. It is proposed that section 14(c) (2) be amended to read as follows:

Nothing in this Act shall be deemed to prevent or bar any agency or the courts of any State or Territory (including the Commonwealth of Puerto Rico, Guam, and the Virgin Islands), from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction or where the General Counsel fails to issue a complaint on behalf of a union member who has alleged the commission of an arguably unfair labor practice or alleges arbitrary suspension or expulsion from any labor organization.

Essentially, what the above amendment does is to permit the state courts to assert jurisdiction only where the General Counsel has failed to issue a complaint. The thrust of the amendment is to provide an ousted union member an opportunity for a hearing. The jurisdiction of the Board is not bypassed because the aggrieved member must first go to the Board to file his grievance. When the General Counsel refuses to issue a complaint because of the merits of the plaintiff's cause then the plaintiff may go to the state courts for hearing. The proposed amendment in no way undermines the vitality of the preemption doctrine.

VI. Conclusion

The Garmon doctrine has definitely promoted uniformity in the administration of the federal regulatory scheme, but in doing so it has created some serious difficulties. Under the preemption doctrine, there is no device or procedural safeguard to ensure that a grievance will be adjudicated. When conduct is "arguably" protected or prohibited by the National Labor Relations Act, the

95 L. Jaffe, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 590 (abr. ed. 1965).
states cannot assert jurisdiction and the aggrieved party must bring his dispute before the National Labor Relations Board. However, the Board may refuse to assert jurisdiction, the General Counsel may refuse to issue a complaint or the Board may not define the status of the dispute "with unclouded legal significance." Lockridge makes this situation all the more apparent—even if the General Counsel had refused to issue a complaint, the Idaho state court could not assert its jurisdiction. The Court demonstrated its sensitivity to the possibility of a member left without a remedy in Vaca v. Sipes and held that in cases involving arbitrary or discriminatory conduct, an individual could go to the state court. This was permitted despite the fact that an unfair labor practice might be involved. While it is true that the issue in Vaca was a breach of the union's duty of fair representation, the Court recognized that the state courts traditionally exercised jurisdiction in this area. The state courts have also traditionally exercised jurisdiction in the area of union-member relations. To deny this traditional jurisdiction after the General Counsel has refused to issue a complaint is to deny a member a remedy. It is not suggested that the Court eviscerate the Garmon doctrine. The exceptions to the preemption doctrine have not undermined the national uniformity which Congress sought to establish through enactment of the federal labor laws. A continuation of the Gonzales exception would have minimal effect on national uniformity. This de minimis effect would be greatly outweighed by the benefit to the individual union member.

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