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Labor Law-Federal Pre-Emption-State Power to Exclude Ex-Felons From Union Office

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LABOR LAW — FEDERAL PRE-EMPTION — STATE POWER TO EXCLUDE EX-FELONS FROM UNION OFFICE — A New York statute, implementing a congressionally-approved interstate compact,[1] prohibits a waterfront union from collecting dues if any officer of the union has been convicted of a felony, unless he has been subsequently pardoned or given a certificate of good conduct by the parole board.[2] In response to a threat of prosecution by the defendant district attorney, plaintiff's international union suspended him from his local union office on a showing that he had been convicted of grand larceny in 1920. Plaintiff sought in a declaratory suit to have the statute declared unconstitutional and to have its operation enjoined. The New York trial court granted defendant's motion for judgment on the pleadings;[3] this was affirmed by the appellate division[4] and by the court of appeals.[5] On appeal to the United States Supreme Court, *held,* affirmed, three Justices dissenting.[6] Despite potential conflict with the National Labor Relations Act[7] and the Labor-Management Reporting and Disclosure Act of 1959,[8] the state statute does not violate the supremacy clause of the

1 Interstate Waterfront Commission Compact, N.J REV. STAT. § 32:23-1 (Supp. 1960); N.Y. UNCONSOL. LAWS § 6700-aa (McKinney 1960); approved by Congress, 67 Stat. 541 (1953).

2 N.Y. UNCONSOL. LAWS § 6700-ww (McKinney 1960).

3 11 Misc. 2d 661, 166 N.Y.S.2d 751 (Sup. Ct. 1957).

4 5 App. Div. 2d 603, 174 N.Y.S.2d 596 (1958).

5 5 N.Y.2d 236, 157 N.E.2d 165, 183 N.Y.S.2d 793 (1959).

6 The Chief Justice and Justices Douglas and Black, dissenting, found that Congress had intended to regulate the qualifications for union office by federal not state law.

7 Wagner Act, 49 Stat. 449 (1935), as amended, 29 U.S.C. §§ 151-68 (1958).

8 Landrum-Griffin Act, 73 Stat. 519 (1959), 29 U.S.C. §§ 401-531 (Supp. I, 1959).

Constitution[9] since Congress has demonstrated its intent to permit this form of state regulation of labor activities. *De Veau v. Braisted,* 363 U.S. 144 (1960).

Fifteen years ago the Court held in *Hill v. Florida ex rel. Watson*[10] that Florida could *not* prohibit ex-felons from acting as union business agents in opposition to the federal statutory policy of allowing employees full freedom to select their bargaining representatives.[11] Although the Court distinguished the *Hill* case[12] on its facts, the reasoning of the principal case serves to underscore the change which has occurred in the Court's method of determining whether Congress meant to preclude state power.[13] A presumption in favor of a congressional intent to pre-empt, implicit in the *Hill* decision, became fully developed in a series of cases which treated the potential conflict between state and federal regulation in terms of "occupation" of the area by Congress; this, correspondingly, was said to displace state power.[14] In contrast, the present view is that "the doctrine of pre-emption does not present a problem in physics but one of adjustment because of the interdependence of federal and state interests and of the interaction of federal and state powers."[15] In balancing the national and state interests, the Court has consistently recognized an overriding state interest in the control of violence arising from labor disputes.[16] Although there was no imminent threat of violence endangering the public safety, the principal case can be interpreted as an extension of the violence rule to state labor regulation designed to have a direct curative effect upon a crime-infested local situation which has been perpetuated by intimidation and violence.[17]

In addition to the compelling state interest, a specific national interest in the exclusion of ex-felons from union office was expressed by Congress

[9] The Court also rejected contentions that the statute violated the due process clause, and the provisions prohibiting bills of attainder and ex post facto laws. This note is limited to a discussion of the question of federal pre-emption.

[10] 325 U.S. 538 (1945).

[11] National Labor Relations Act §§1, 7, 49 Stat. 449, 452 (1935), as amended, 29 U.S.C. §§ 151, 157 (1958).

[12] "An element most persuasive here, congressional approval of the heart of the state legislative program explicitly brought to its attention, was not present in that case." Principal case at 155. While this finding of congressional approval of the state legislation in 1953 may overcome objections relating to potential conflict with the precedent NLRA, the Court does not attempt to project that approval forward to the LMRDA of 1959. Professor Hays suggests that restrictions of other states on employees' choice of bargaining agent will continue to be pre-empted by the NLRA when they have not been approved by Congress. Hays, *The Supreme Court and Labor Law — October Term, 1959,* 60 COLUM. L. REV. 901, 908 (1960).

[13] See generally Cox, *Federalism in the Law of Labor Relations,* 67 HARV. L. REV. 1297 (1954); Hays, *Federalism and Labor Relations in the United States,* 102 U. PA. L. REV. 959 (1954); Meltzer, *The Supreme Court, Congress, and State Jurisdiction Over Labor Relations,* 59 COLUM. L. REV. 6 (1959).

[14] See International Union, UAW v. O'Brien, 339 U.S. 454 (1950) and authorities cited therein at 457.

[15] Principal case at 152.

[16] See San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 247-48 (1959) and authorities there cited.

[17] See principal case at 158.

in section 504 (a) of the LMRDA.[18] This provision bars most, but not all, ex-felons from union office, and only for a limited period. When a state restricts a federally-guaranteed right more narrowly than Congress itself has restricted it, the state action has been held to be in conflict with the federal law and hence unconstitutional.[19] However, where the federal legislative history indicates that Congress intended to allow such state regulation, the more stringent state restrictions are permissible.[20] Thus, in the principal case the strict New York law barred plaintiff from his union office, although he would not have been excluded by section 504 (a) of the LMRDA. Nevertheless, the Court found in an express provision of the act that Congress did not intend to limit the responsibilities of union officials under state law.[21] Significantly, the Court also found that Congress, aware of the possible pre-emption implications when it enacted this statute,[22] expressly provided for state exclusion when it intended to pre-empt in order to avoid pre-emption by inference.[23] The labor pre-emption pendulum has thus swung

[18] 73 Stat. 536 (1959), 29 U.S.C. § 504 (a) (Supp. I, 1959) provides: "No person who . . . has been convicted of . . . [specific serious felonies] . . . shall serve — (1) as an officer . . . of any labor organization . . . for five years after such conviction or after the end of such imprisonment, unless prior to the end of such five-year period . . . the Board of Parole of the United States Department of Justice determines that such person's service . . . would not be contrary to the purposes of this Act."

[19] Amalgamated Ass'n of Street Ry. Employees v. Wisconsin Employment Relations Bd., 340 U.S. 383, 394 (1951).

[20] Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Bd., 336 U.S. 301 (1949).

[21] LMRDA § 603 (a), 73 Stat. 540 (1959), 29 U.S.C. § 523 (a) (Supp. I, 1959) 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 . . . under the laws of any State. . . ." The Court considered it a legal responsibility of the union and the plaintiff under the laws of New York to keep the plaintiff from holding union office. *But see* dissent at 164 n.4 where Justice Douglas argues that § 603 (a) was intended to apply only to the fiduciary responsibilities imposed by § 501 of the act.

[22] The extent to which the entire act was framed with the pre-emption problem clearly in mind is uncertain. "The final enactment, as Congressman Griffin has candidly stated, was a 'scissors and paste' job conjoined with the results of intensive, high-pressure bargaining in the conference committee. . . . The report filed by the house managers of the conference contains much that is confusing as well as clarifying. Thus, resort to legislative history will at best be difficult, and may serve more to obscure than to illuminate legislative intent." Smith, *The Labor-Management Reporting and Disclosure Act of 1959*, 46 VA. L REV. 195, 197-98 (1960). For a discussion of the difficulties of ascertaining congressional intent in labor pre-emption cases, see Cox & Seidman, *Federalism and Labor Relations*, 64 HARV. L. REV. 211, 223-31 (1950).

[23] Principal case at 156 referring to LMRDA §§ 205 (c), 403, 73 Stat. 528, 534 (1959), 29 U.S.C. §§ 435 (c), 483 (Supp. I, 1959). *Compare* H.R. 3, 86th Cong., 1st Sess. (1959) passed by the House of Representatives (but not the Senate) while the LMRDA was under consideration — "No act of Congress shall be construed as indicating an intent on the part of Congress to occupy the field in which such Act operates, to the exclusion of all state laws on the same subject matter, unless such Act contains an express provision to that effect, or unless there is a direct and positive conflict between such Act and a State law so that the two cannot be reconciled or consistently stand together"—*with* Amalgamated Ass'n of Street Ry. Employees v. Wisconsin Employment Relations Bd., *supra* note 19, at 397-98—"Congress knew full well that its labor legislation 'preempts the field that the act covers insofar as commerce within the meaning of the act is concerned' and demonstrated its ability to spell out with particularity those areas in which it desired state regulation to be operative."

from a presumption of displacement of state power wherever Congress legislates, through a middle-ground balancing-of-interests test, toward a presumption against pre-emption unless Congress otherwise indicates its intent.

The prospect of an express pre-emption doctrine for the LMRDA raises hopes that this act may be spared the pre-emption confusion that continues to plague the NLRA. This possibility may prove to be an illusion. The literal language of the Court,[24] if applied to other provisions of the act, would compel a result that Congress may not have anticipated. For example, it could be construed to allow the states to impose additional bonding requirements on union officers,[25] prohibit *all* loans by unions to their officers or employees,[26] or require additional detailed financial and other reports concerning labor activities.[27] Congressional intent to allow such state regulation will surely prove more difficult to divine than in the principal case, and the Court may be expected to revert to the *ad hoc* balancing of state and national interests in order to reconstruct hypothetically Congress' pre-emption intent. Thus, use of an express pre-emption doctrine for the LMRDA should be confined to situations like the principal case where the pre-emption intent of Congress on a specific provision is readily discernible, or the application of an express pre-emption rule would not reach a different result from the balancing-of-interests test because of an overriding state interest in the control of violence.

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24 "When Congress meant pre-emption to flow from the 1959 Act it expressly so provided. . . . No such pre-emption provision was provided in connection with § 504(a). That alone is sufficient reason for not deciding that § 504(a) pre-empts § 8 of the Waterfront Commission Act." Principal case at 156.

25 LMRDA § 502(a), 73 Stat. 536 (1959), 29 U.S.C. § 502(a) (Supp. I, 1959), provides for personal bonds in amounts not less than ten percent of the funds handled by a union officer per year, but the bond is not to exceed $500,000.

26 LMRDA § 503(a), 73 Stat. 536 (1959), 29 U.S.C. § 503(a) (Supp. I, 1959), prohibits only those loans in excess of $2,000.

27 LMRDA §§ 201-203, 73 Stat. 524 (1959), 29 U.S.C. §§ 431-433 (Supp. I, 1959), requires extensive reports to be filed with the Secretary of Labor by labor organizations, their officers and employees, and by employers. Although § 205(c), 73 Stat. 528 (1959), 29 U.S.C. § 435(c) (Supp. I, 1959), expressly precludes the states from requiring the same information required by the act, there is no provision relating to other information which might be required by states concerning labor activities.