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FEDERALISM AND LABOR RELATIONS IN THE UNITED STATES

Paul R. Hays †

INTRODUCTION

A federal constitution may carefully define the spheres in which the Federal Government or the constituent states shall operate to the exclusion of the other, or it may leave the allocation of functions to future determination. In the United States the allocation of control over labor relations under the constitutional power of Congress "to regulate commerce with foreign nations, and among the several states" [1] may be looked upon as a continuing process of adjustment of the Federal relation. The power to regulate may be left to the states, prohibited to the states, taken over by the Federal Government or given or returned to the states from time to time as occasion for change arises.

Until 1937 the Supreme Court assumed the power to allocate control of labor relations between states and Federal Government. By means of a generally restrictive, though somewhat flexible, definition of "commerce," the Court gave extensive powers to the states to the exclusion of the Federal Government. However, influenced by the trend toward national integration, particularly notable in the increase in size of operating economic units which was greatly accelerated by economic depression, and recognizing the inadequacy of judicial machinery and doctrinaire solutions for meeting the growing complexity of economic problems, the Court, by broadening its definition of "com-

† Professor of Law, Columbia University School of Law. This Article was presented as a paper at the Second Bicentennial Conference at Columbia University which was held January 11-14, 1954. It will appear in The Columbia University Bicentennial Conference Series, Vol. II, FEDERALISM, to be published by Doubleday & Co. in December, 1954.

1. U.S. CONST. Art. I, § 8.

merce," finally relinquished to Congress the power to allocate control over labor relations.

The Supreme Court's action was generally considered to be a part of a growing tendency toward "centralization," and it is probable that the Court looked upon its transfer of power to Congress as in fact a recognition of the need for national rather than state regulation of labor relations. There is, however, nothing in the American constitutional system which designates the Court as the sole guardian of the federal system. After all, the framers of the Constitution provided that the legislature, not the Court, would reflect in its structure the continuing existence of the states. There are many instances of congressional action, such as those involving state regulation of intoxicating liquor,[2] insurance[3] and tidelands oil,[4] which indicate that on occasion Congress can be an even more zealous guardian of federalism than the Court. The federalist idea is deeply rooted in the American people. It is shared alike by presidents, judges, administrators and members of Congress, and it is always a major factor in the actual process of allocation of power, wherever the power to make that allocation may lie. Moreover, the non-ideological pressures which favor "centralization" and "uniformity" are frequently balanced by other pressures which favor state control and local variation. Study and experience have shown that the exercise of power by one government has been ineffective or less effective than when exercised by the other. These considerations lead in practice to the accommodation of the constitutional system to new and changing needs with no major impairment of basic aspects of its federal structure. The method of entrusting to the Federal Government the function of continuous constitutional revision, whether the power of allocation of control is in the hands of the Court or of the legislature, does not by any means necessarily lead to the concentration of power in that government to the exclusion of the states.

There are, moreover, extremely important reasons for preferring that Congress rather than the Court administer the federalist system in a field as complex as labor relations. The allocation of power in such a field must be worked out for each situation with careful consideration of a large number of economic, sociological, political and administrative factors. The legislative method is better adapted to the requirements of this type of thoughtful planning than is the judicial method.

2. Webb-Kenyon Act, 37 STAT. 699 (1913), 27 U.S.C. § 122 (1946).

3. 59 STAT. 33, 34 (1945), 15 U.S.C. §§ 1011-5 (1946), as amended, 61 STAT. 448 (1947), 15 U.S.C. §§ 1012-3 (Supp. 1952).

4. Submerged Lands Act, 67 STAT. 29, 43 U.S.C.A. §§ 1301-3, 1311-5 (Supp. 1953).

At the present moment there is a constitutional crisis in the field of labor relations. In exercising its new function Congress has made what has proved in experience to be an unsatisfactory allocation of power as between state and Federal Government. The problem of reallocation is now before it as possibly the most important problem in labor relations facing the country today. It is equally important as a problem in federalism since it involves the question of whether a flexible federalist system can be successfully administered by the national legislature in a field of intricate complexity.

I

THE COURT TRANSFERS POWER TO CONGRESS

In 1937, the Supreme Court relinquished its control over the administration of the federal system in the field of labor relations.[5] The Court, in ceding to Congress practically unlimited power to control all aspects of the production and distribution of goods, left no significant elements of regulation in this field to the exclusive power of the states. Not only may Congress regulate labor relations in interstate commerce but it may regulate those relations which "affect" interstate commerce.[6] Its power, moreover, does not depend on "any particular volume of commerce affected more than that to which the courts would apply the maxim *de minimis*." [7]

> "Congress' power to keep the interstate market free of goods produced under conditions inimical to the general welfare . . . may be exercised in individual cases without showing any specific effect upon interstate commerce . . .; it is enough that the individual activity when multiplied into a general practice is subject to federal control . . . or that it contains a threat to the interstate economy that requires preventive regulation." [8]

Almost simultaneously with the Court's relinquishment to Congress of the function of allocating power over labor relations under the Commerce Clause, the long history of the Court's regulation of this field under the "economic" interpretation of the Due Process Clauses also came to an end. Beginning in 1940, however, the Court, now basing its action on the constitutional protection of personal freedoms, resumed its power to regulate an important segment of labor relations. In a series of cases involving picketing the Court undertook to formu-

5. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).
6. *Ibid.*
7. NLRB v. Fainblatt, 306 U.S. 601, 607 (1939).
8. Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 236 (1948).

late a new system of limitations on legislative controls.[9] The allocation of this power to the Court promptly proved to be unworkable and unrealistic and it was generally disregarded by the states, which continued to regulate picketing with little change from former practice. After a few years the Court in effect abandoned its "picketing doctrine" and returned the regulation of picketing substantially to the status in which it stood prior to 1940.[10]

Other efforts to induce the Court to return "to the due process philosophy that has been deliberately discarded" have been largely unsuccessful.[11] The power of the Court over regulation of the right to organize and the right to strike have been confined to very narrow limits.[12] The Court, however, has decided certain cases involving racial discrimination in such a way as to suggest the possibility of its playing a role of great importance in the regulation of the whole field of collective bargaining.[13] Faced with this possibility in a recent case which did not present the element of racial discrimination, the Court, while denying recovery and somewhat limiting the implications of its prior decisions, did not indicate clearly a disposition to forego regulation of collective bargaining.[14] But some of the lower federal courts have shown decided reluctance to accept further regulatory power.[15]

Whatever may develop to be the Court's future course in accepting or rejecting the temptations afforded by the Due Process Clauses, there can be no doubt that the general field of regulation of labor relations is now within the power of Congress.

II

Congress as Guardian of the Federal System

The advantages of a flexible federalism which permits the allocation and reallocation by varying methods and in varying degrees of

9. Thornhill v. Alabama, 310 U.S. 88 (1940); Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc., 312 U.S. 287 (1941); AFL v. Swing, 312 U.S. 321 (1941); Bakery and Pastry Drivers v. Wohl, 315 U.S. 769 (1942); Carpenters and Joiners Union v. Ritter's Cafe, 315 U.S. 722 (1942); Cafeteria Employees Union v. Angelos, 320 U.S. 293 (1943).

10. International Brotherhood of Teamsters v. Hanke, 339 U.S. 470 (1950). See also Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949); Hughes v. Superior Court, 339 U.S. 460 (1950); Building Service Employees International Union v. Gazzam, 339 U.S. 532 (1950).

11. Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 537 (1949).

12. See Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., *supra* note 11; International Union v. Wisconsin Employment Relations Board, 336 U.S. 245 (1949); Thomas v. Collins, 323 U.S. 516 (1945).

13. Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944); Brotherhood of Railroad Trainmen v. Howard, 343 U.S. 768 (1952).

14. Ford Motor Co. v. Huffman, 345 U.S. 330 (1953).

15. *E.g.*, Williams v. Yellow Cab Co., 200 F.2d 302 (3d Cir. 1952); Courant v. International Photographers, 176 F.2d 1000 (9th Cir. 1949).

the power to regulate labor relations have not in practice been fully realized. Congress has not yet understood fully the implications of the Court's transfer to it of the duty of allocating power. It has been slow to grasp the fact that the long history of the guardianship of federalism in this area by the Court has ended. In adopting the Labor-Management Relations Act of 1947 (Taft-Hartley Act),[16] Congress failed to give necessary consideration to the problem of allocation of power in the federal system. Confusion has resulted in the absence of clear allocation in the statute itself, and practical difficulties have arisen where allocations have proved to be unworkable. The Court, in its effort to complete the task of allocation which Congress left half-done, has added to the number of practical difficulties. Congress now has before it the problems raised by its original failure to give sufficient attention to the federalist impact of its action.

The picture thus presented does not reveal any weakness in the federal structure itself or, indeed, provide any basis for doubt as to the advantages of the flexibility in that structure which is applicable to the regulation of labor relations. If all decisions as to allocation of power were invariably made with the most carefully reasoned consideration for the best possible operation of the federal system, there would still arise situations in which the careful calculations proved to be wrong, as well as situations in which changes in the facts on which calculations were based demanded revision of the scheme of allocation. Moreover, the method of leaving to the courts or to administrative tribunals the working out of some of the details of distribution of power may provide in many instances an opportunity to complete the allocation of power in accordance with demonstrated needs in particular situations. But, although flexibility provides the possibility of keeping a federal constitutional system workable in its application to the complex and changing demands of the regulation of labor relations, the implications of this federalism must be understood and carefully considered by Congress if unnecessary confusion and difficulty are to be avoided.

As practical problems have multiplied the need for careful consideration of the many interrelated factors which must enter into a decision concerning the manner in which power should be allocated, the processes of case-by-case decision have come to be less and less adequate to the demands of the situation. The Court has done well to leave larger and larger areas to Congress and, by the enormous enlargement of the concept of interstate commerce and, to some extent, the withdrawal from the field of "economic due process," to turn over to Congress a large part of its duties as keeper of the federal system.

16. 61 STAT. 136 (1947), 29 U.S.C. § 141 *et seq.* (Supp. 1948).

The failure of Congress fully to assume its new obligations and the inadequacy for practical purposes of the methods available to the Court for supplementing the action of Congress are illustrated in ten cases arising out of the National Labor Relations Act.[17] The Court has twice taken occasion to remark on the failure of Congress to indicate clearly in the NLRA the boundaries of state and federal power. "Congress has not seen fit," said Mr. Justice Jackson, "to lay down even the most general of guides to construction of the Act, as it sometimes does, by saying that its regulation either shall or shall not exclude state action." [18]

The legislative history of the Wagner Act shows that little attention was paid to the federalist aspects of the statute. And, though the Labor-Management Relations Act of 1947, because of its greater reach, added enormously to the problems of federalism, it contributed no more to the solution of these problems than had legislation of the earlier period. The legislative history of the 1947 act contains a few quotable generalizations about federal preemption and makes some references to state action, but the opinion [19] which most confidently relied on this language almost certainly misinterpreted the congressional intent.

The difficulties arising from lack of a clear allocation of power by Congress and from unworkable allocations made by the Court in some cases, have alerted Congress and interested parties to the problem and, in the 1953 hearings [20] before the Senate Committee on Labor and Public Welfare on proposed revision of the Labor-Management Relations Act, much consideration was given to it. The record of these hearings, however, indicates that there still is little comprehension on the part of either senators or others of the complexities inherent in the application of a flexible federalism to the field of labor relations.

Once the Court had surrendered to Congress the duty of allocating between state and Federal Government the power of regulation in this

17. Allen-Bradley Local v. Wisconsin Employment Relations Board, 315 U.S. 740 (1942); Hill v. Florida, 325 U.S. 538 (1945); Bethlehem Steel Co. v. New York Labor Relations Board, 330 U.S. 767 (1947); La Crosse Telephone Corp. v. Wisconsin Employment Relations Board, 336 U.S. 18 (1949); Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board, 336 U.S. 301 (1949); International Union v. Wisconsin Employment Relations Board, 336 U.S. 245 (1949); Plankinton Packing Co. v. Wisconsin Employment Relations Board, 338 U.S. 953 (1950); International Union v. O'Brien, 339 U.S. 454 (1950); Amalgamated Ass'n v. Wisconsin Employment Relations Board, 340 U.S. 383 (1951); Garner v. Teamsters Union, 346 U.S. 485 (1953).

18. Bethlehem Steel Co. v. New York State Labor Relations Board, 330 U.S. 767, 771 (1947); International Union v. Wisconsin Employment Relations Board, 336 U.S. 245, 252 (1949).

19. Amalgamated Ass'n v. Wisconsin Employment Relations Board, 340 U.S. 383 (1951).

20. *Hearings before Committee on Labor and Public Welfare on Proposed Revisions of the Labor-Management Relations Act of 1947*, 83d Cong., 1st Sess. (1953).

field, theoretically the only duty of the Court was to determine what allocation Congress had decided to make. The Court had already developed certain guides supposedly applicable to this situation: Had Congress "laid hold" of the very matter which the state sought to regulate? Did the attempted state regulation "conflict with" the federal regulation which Congress had adopted? But the concept of identity of subject matter is itself an abstraction since in the cases which came before the Court, the state was not seeking to regulate situations in which the Federal Government had already acted, but rather situations in which state regulation seemed desirable because the Federal Government had *not* acted. The Court has had to decide whether Congress intended "to preempt the whole field" or whether congressional silence with respect to particular situations meant that those situations were appropriate subjects for state regulation or were to be left "unregulated."

Mr. Justice Frankfurter, particularly in dissent, has argued that the Court should accord a presumption of validity to regulation by the state in these matters.[21] Whatever virtue this position may have when supported by argument based upon implications from the federal system itself, it seems to be a sound reflection of congressional intent. The legislative history and the structure of the two acts lead to the conclusion that Congress discharged its new function as guardian of federalism in this field largely by taking for granted a complete system of state regulation and seeking to superimpose on the state regulation federal regulation of some aspects of the field. Although, as has been said, there is little discussion of the problems of federalism, what little exists is almost invariably in defense of particular provisions of the Taft-Hartley Act as *not* depriving the states of power to regulate.

If congressional "intent" concerning state regulation of labor relations may be derived not only from express comments on particular aspects of the problem but also from the attitude of congressmen in general, then the legislative history of the two acts taken as a whole and the comments of the senators at the 1953 hearing on proposed amendments support the contention that Congress intended to supplement state regulation rather than to displace it. For example, Mr. Hartley said, in answer to a question about the effect of the federal act on Wisconsin Law: ". . . this will not interfere with the State of Wisconsin in the administration of its own laws." [22] Senator Taft said: "I may say that we never intended any preemption of the field.

21. See especially Hill v. Florida, 325 U.S. 538, 547 (1944) (dissenting opinion); Bethlehem Steel Co. v. New York State Labor Relations Board, 330 U.S. 767, 777 (1946) (concurring opinion).

22. 93 CONG. REC. 6383 (1947).

The Supreme Court has gone beyond what we intend." [23] "In general, I am quite willing to leave it to the states, the control of anything that we can do." [24] "Of course, I do not offhand see why the states cannot handle a local public utilities strike, a street car strike, or anything else, as well, as the Federal Government. . . . Do you think there should be some legislation at least to stop this preemption doctrine"? [25] Senator Smith (N. J.) said: "Of course, if you say to any section of this country, not necessarily to the South, but also to some of the Western States, 'we are going to tell you what kind of law you are going to have for the relationship between management and labor in your state,' you are not going to create a healthy atmosphere by such legislation being forced down their throats. . . . Let me remind you that, as we all know, we had a problem in the South that led to our Civil War, and we are still trying to heal the wounds of that conflict. We have here in our Congress, in our own Senate, representatives of the Southern States. We are trying to heal those differences and bring about mutual understanding. But the mere passage of legislation, to be superimposed on any one area of the country is not going to solve the problem." [26] Senator Goldwater demanded to know the basis for a witness' statement that "the laws of the United States shall be supreme law of the land." When told that the statement was based on the Constitution, Senator Goldwater asked, "The Congress has to be given that right by the States by agreement; is that right?" [27] The Senator was so deeply shocked by the statement that he later repeated it to another witness and asked, "Do you feel, as attorney general of Nebraska, that that is a true statement, that in this particular field the federal law is the supreme law of the land?" [28] The hearings before the House Judiciary Committee on the recent New Jersey-New York Waterfront Commission Compact [29] contain repeated indications of impatience with any questioning concerning the provisions of the Compact, on the ground that what the states want to do is no concern of Congress, although the Compact regulates labor relations in an industry of vital importance to interstate and foreign commerce.

Yet a majority of the Court, in passing on state legislation which was claimed to be beyond state power under the Labor-Management

23. *Hearings, supra* note 20, at 284.
24. *Id.* at 286.
25. *Id.* at 721.
26. *Id.* at 1538.
27. *Id.* at 606.
28. *Id.* at 879.
29. *Hearings before Sub-Committee No. 3 of the House Committee on Judiciary on H.R. 6286, H.R. 6321, H.R. 6343, and Sen. 2383,* 83d Cong., 1st Sess. (1953).

Relations Act, has tended consistently to find that Congress intended to allocate power to the Federal Government to the exclusion of the states.

Although the National Labor Relations Act declares in the most general terms the rights of "employees" to engage in collective bargaining and other types of "concerted activities," the system of regulation set up by the Act protects them in the exercise of these rights only from interference by employers. It seems possible that Congress "intended" to regulate rights between employers and employees which were not the subject of affirmative regulation by the states at the time of the adoption of the Act. That it "intended" to deny to a state the power to regulate, for example, by requiring a majority vote of employees before strike action can be taken, is highly doubtful. Yet it is the Court's view that Congress has excluded the states from the regulation of all those activities which the Act declares to be the rights of employees.[30]

Congress has created an administrative tribunal, the National Labor Relations Board, to determine in situations involving alleged interference by employers whether the activities interfered with are within the protection of the NLRA, and, in situations where the employer claims that he interfered with employees because they engaged in activities which are not so protected, to determine whether the employees did in fact engage in such activities. But where it is the state, rather than the employer, which attempts to regulate, the National Labor Relations Board will frequently have no power to act at all because no employer interference is alleged. Under the Court's interpretation of the Act, a question arises as to who is to decide in such a case whether the activities are of the type protected by the Act and whether the employees engaged in such activities.[31]

The National Labor Relations Act gives employees the right "to bargain collectively through representatives of their own choosing" [32] and provides a procedure for protecting them in such choice from interference by their employer. Did Congress "intend" to exclude a state from regulating such choice by, for example, providing that an ex-convict could not serve as a representative? It seems unlikely; yet the Court appears to believe that the Act is so to be interpreted.[33]

30. See especially Amalgamated Ass'n v. Wisconsin Employment Relations Board, 340 U.S. 383 (1951).

31. See International Union v. Wisconsin Employment Relations Board, 336 U.S. 245 (1949).

32. 49 STAT. 452 (1935), 29 U.S.C. § 157 (1946), as amended, 61 STAT. 140 (1947), 29 U.S.C. § 157 (Supp. 1952).

33. See Hill v. Florida, 325 U.S. 538 (1944).

A holding of the Court that Wisconsin could regulate mass picketing and violence was based largely on the view that the National Labor Relations Act did not purport to regulate these activities.[34] This is only partly true since in deciding a question of employer interference the National Board must frequently determine whether employees engaged in such activities. But more important, the amended Act, which added certain direct prohibitions on the activities of labor organizations,[35] *does* regulate mass picketing and violence. Does this mean, by the Court's criterion, that Congress intended to withdraw from the states the power to control violence on a picket line,—that, for example, the state's police could not keep pickets from destroying the plant? Obviously Congress had no such intention.

The Court has held that, where the Congress chose to regulate strikes which create a national emergency, its rejection of proposed legislation which would have regulated local emergencies as well indicates an intention that local emergencies should be "unregulated." [36] It seems much more likely that Congress "intended" to leave such regulation to the states.

The Court, like Congress, has not fully realized the implications of its surrender of power over the administration of federalism in the field of regulation of labor relations. It has failed to recognize that Congress, too, can be a keeper of federalism. The Court appears to have assumed that, once Congress was given the duty of allocation of power between state and nation, it would promptly allocate power to the Federal Government. By tending to construe the intent of Congress in the direction of taking power rather than of leaving it to the states, the Court underestimates the power of federalism as an affirmative concept of government and as a basic element in American political thought.

III

The Administration of the Federal System by Congress

The very complexities which have made it impossible for the Court to administer the federalist system on a case-by-case basis in this field have also made impossible the simple solution which Congress apparently intended for the federalist aspects of the problem it faced. The elements of federal regulation can be carefully fitted into a system of state regulation. They cannot be superimposed on it.

34. Allen-Bradley Local v. Wisconsin Employment Relations Board, 315 U.S. 740 (1942).

35. 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158(b) (Supp. 1948).

36. Amalgamated Ass'n v. Wisconsin Employment Relations Board, 340 U.S. 383 (1951).

The difficulties which the Labor-Management Relations Act poses for the federal system are not to be solved, then, by the Court's seeking to ascertain the intent of Congress, but only by Congress itself. Congress now has the duty of "accommodating" federal and state power in this field and, as the long history of federalism indicates, it is not a duty which can properly be discharged in any off-hand way.

General formulas will not suffice. In the course of the 1953 hearings on proposed amendments to the Labor-Management Relations Act,[37] representatives of management advocated again and again "a stronger federal law" and at the same time one which would leave "more room for the states to act." The Senators, like Taft, who were beginning to realize the complexities of federalism, tried without success to induce these witnesses to suggest specific applications of their general formulas. Frequently the non-lawyers seemed to be parroting the opinions of their counsel. The lawyers were little more helpful. Their formulas were derived from the decisions which the Court had been forced to abandon as inadequate when it relinquished to Congress the administration of federalism in this field.

The fact is that, as the Court recognized, the old distinctions such as "local and national" are no longer sufficient and Congress cannot allocate power on the basis of such distinctions any more successfully than could the Court. Certain aspects of activities which under the old formulas are "national" in character should be subject to state control; some "local" activities must be controlled by the Federal Government. After all, the formula "local or national," was invented, and was useful, only in determination of the now-settled issue of limitation on congressional power. The present issue is an entirely different one—the issue of where power can most desirably be allocated in a federal system such as ours.

The National Labor Relations Board has formulated certain rules of thumb based on size to govern its determinations of when it will and when it will not take jurisdiction. But distinctions of mere size of operation have already been found insufficient. Not only did the Board, even in its original formulation, treat some categories, such as war industries, on bases other than mere size, but also from time to time it has been forced to depart from the rules as originally formulated.

In order to be successful in its administration of federalism in the field of labor relations, Congress will have to give up reliance on pre-existing formulas and on simple solutions and turn to such basic considerations as the effect of specific allocations of power on the national economy. The simple solution, for example, of the problem of

37. *Hearings, supra* note 20.

economic competition among the states is uniform federal regulation. Forty years ago manufacturers operating in Massachusetts felt that they could not compete with those operating in North Carolina if they were not as free as those in North Carolina to employ young children at low wages. Today the same problem of competition is raised with relation to state limitations on the closed shop. In fact, every difference in wages, hours and working conditions is to some extent relevant to competitive status. Since the simple solution of total federal regulation is not acceptable and since the federal system is going to be preserved in the field of labor relations, Congress has the problem of determining which aspects require national regulation in order to eliminate or reduce competition and which may be allocated to state regulation, either because the preservation of federalism is more important than the elimination of competition or because their effect on competitive status is so slight as not to justify national regulation.

There are also basic problems which may be called sociological. However narrowly the policy of the NLRA is defined in terms of preventing interruptions to the free flow of commerce, actually it must be looked upon in a much larger way as free enterprise's answer to socialism. It assures the freedom of the worker to organize, to increase his bargaining power and to participate in the determination of his own economic destiny. And by giving him this status it gives him the *opportunity* to better his economic condition instead of granting him benefits directly through the machinery of government. But control and regulation of this power are as necessary with respect to the organizations of labor as they are with respect to the organizations of capital. The problem of federalism is, then, what part the federal government and what part the states should play in protecting and in limiting these rights.

In the decision of these basic questions there is the need to consider the problem of effective administration of standards. Which government is better able to achieve results which both are seeking? In some particulars the answer is obvious. For example, effective control of violence in connection with labor disputes is going to continue to be the duty of the state merely because Congress is not going to create a national police force for this purpose. Such a conclusion can be thought of as arising from basic assumptions of the federalist system itself. But there are other problems to be solved in empirical terms. State labor relations boards where they exist have, in general, acted more promptly and, therefore, more effectively, than has the National Board. Are there not some aspects of the labor relations picture where prompt and effective action is more important than that the action

should be exactly the same action which the National Board would have taken in the same circumstances? There is an obvious need for more careful supervision of the large and ever-increasing union "welfare" funds. Has state supervision of insurance in general, which Congress has in a sense endorsed,[38] proved sufficiently effective so that power over these funds should be allocated to the states? Is there in fact such a need for uniformity in the administration of collective agreements that the federal courts must be given a mandate to develop a body of law applicable to this matter? What role can state mediation and conciliation agencies play in the peaceful settlement of disputes?

This is not the place to suggest solutions for these problems. The important point is that there is no single simple solution. Labor relations is a field of enormous, varied complexities. The Court, as it began to realize the complex nature of the problem of allocation of power, also realized that the facilities available to it in the judicial process of case-by-case decision were inadequate to provide solution. Congress has the facilities and is now called upon to use them thoughtfully and wisely in the discharge of its duty to administer the federal system.

IV

Methods of Allocation of Power

Congress has available to it and has used a number of different methods of allocating the power to control labor relations between the state and the Federal Government. It has sometimes given that power to the Federal Government and expressly excluded the states as in Section 14 (a) of the National Labor Relations Act, which provides that "no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local relating to collective bargaining." It has sometimes expressly allocated power to the states as in Section 14 (b) of the National Labor Relations Act, which provides that "nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law." Congress has sometimes itself established certain minimum standards, leaving to the states regulation in the area above these minima, as in the Fair Labor Standards Act, Section 18 of which provides that:

> "No provision of this Act or of any order thereunder shall excuse noncompliance with any . . . State law . . . establishing a

38. 59 Stat. 33, 34 (1945), 15 U.S.C. §§ 1011-5 (1946), as amended, 61 Stat. 448 (1947), 15 U.S.C. §§ 1012-3 (Supp. 1952).

> minimum wage higher than the minimum wage established under this Act or a maximum workweek lower than the maximum workweek established under this Act, and no provision of this Act relating to the employment of child labor shall justify noncompliance with any . . . State law . . . establishing a higher standard than the standard established under this Act. . . ." [39]

Congress has also used the method, as in the case of unemployment compensation, of allocating control to the states while at the same time securing, through the "spending" power, the adoption by the states of certain minimum standards.

There are cases in which Congress may properly employ the method of leaving some details of power allocation to be completed by the Court. For example, the Fair Labor Standards Act regulates wages and hours only in the case of employees who are "engaged in commerce or in the production of goods for commerce." [40] The Court must complete the allocation of power by determining on a case-by-case basis to which employees the statute applies and which employees are left subject to regulation by the states.[41] Whether or not this is the best method of allocation, it is one in which the Court should have special skill after its many years of defining commerce for purposes of power allocation. The Court also properly participates in the allocation of power in cases in which, for example, it interprets the express exemptions of congressional legislation, such as the exemption of agricultural labor under the Fair Labor Standards Act [42] or of independent contractors under the Labor-Management Relations Act.[43] This type of determination is, of course, thought of as "statutory interpretation," and in fact it shades off at one end of the scale into a mechanical application of a determination actually made by Congress. But frequently it is much more, and the Court, applying the same types of criteria as Congress itself applies to the problem, is actually partcipating jointly with Congress in the distribution of power. The real difference between the Court's function when it is determining allocation on the fundamental bases of constitutional power, *e. g.*, deciding that the states shall have the power of regulation to the exclusion of the national government, and when it is determining allocation on some other basis, is, of course, that its determination is conclusive in the former instance, whereas in the latter instance Congress may decide upon a different

39. 52 STAT. 1069 (1938), 29 U.S.C. § 218 (1946).

40. 52 STAT. 1062 (1938), as amended, 29 U.S.C. § 206 (Supp. 1952).

41. See, *e.g.*, Kirschbaum Co. v. Walling, 316 U.S. 517 (1942); Borden v. Borella, 325 U.S. 679 (1945); 10 East 40th Street Bldg., Inc. v. Callus, 325 U.S. 578 (1945).

42. 52 STAT. 1063 (1938), as amended, 29 U.S.C. § 207(e) (Supp. 1952).

43. 61 STAT. 138 (1947), 29 U.S.C. § 152(3) (Supp. 1948).

distribution.[44] It is interesting to note in this connection that while the Court clearly has the final word on the allocation of power exclusively to the states, Congress appears to have the final word in the converse situation. If, for example, a state should by statute require that every theater have an orchestra of live musicians, theoretically the Court could determine that the state had the power so to regulate with respect to small local theaters, but that such a regulation of large theaters or chain theaters was an unwarranted burden on commerce.[45] The determination of the Court, giving to the state the power over local theaters, to the extent that this determination was based on constitutional power to regulate, would be final. But Congress could reject that part of the determination which *excluded* the state from regulating the larger theaters and reallocate that power to the state.[46]

There is no fundamental objection to Congress' using the technique of delegating to the Court the duty of completing an incomplete allocation of power. It is in fact frequently a useful technique, since it can provide a certain flexibility for the treatment of special situations. The difficulty arises when Congress fails to provide proper guidance to the Court for making such determinations. The National Labor Relations Act, for example, regulates certain aspects of labor relations but does not clearly provide whether the power is given to the states to regulate other related aspects. It regulates some matters in certain ways and does not make it clear whether the states are to have power to regulate those same matters in other ways. It gives employees the right to choose bargaining representatives but does not indicate what power the states may have to limit the choice by, for example, forbidding convicted criminals from acting as such representatives.[47] It gives power to a national agency, the National Labor Relations Board, to determine the employees' choice of representatives when application is

44. *E.g.,* Congress—dissatisfied with the allocation of power made by the Court in NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944)—provided for a different distribution by an amendment to Section 2(3) of the National Labor Relations Act. See H.R. REP. No. 245, 80th Cong., 1st Sess. 18 (1947) (Report of House Committee on Education and Labor on the Labor-Management Relations Act of 1947). (In deciding on the content of classifications of employees who are included in the Act or exempted from its provisions, the Court does not necessarily determine the question of whether Congress "intended" that employees not covered by the Act should be subject to state regulation or should be "unregulated." *But cf.* Utah Valley Hospital v. Industrial Comm'n, 199 F.2d 6 (10th Cir. 1952) (non-profit hospitals which are exempted from the Act are subject to state jurisdiction).)

45. See Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945), where the Court so held with respect to a state law limiting the length of trains, one of many such laws passed by legislatures under the guise of safety legislation, but actually largely at the instance of the railroad unions whose purpose was to make more work for their members.

46. See Prudential Insurance Co. v. Benjamin, 328 U.S. 408 (1946).

47. See Hill v. Florida, 325 U.S. 538 (1945).

made to that Board for such a determination, though there is no requirement whatever that any such application be made and no prohibition on the functioning of a bargaining representative in the absence of such a determination. Since the Act is silent on the subject, the question arises whether a labor organization which wishes to function as a bargaining representative and which may do so without any recourse to the Board, can properly apply to a state agency for a determination of the question of whether it is the choice of the employees.[48] The Act provides (Section 7) that "employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or for other mutual aid or protection, and shall also have the right to refrain from any or all such activities." Other sections of the Act set up an elaborate system to protect employees from interference by employers and labor organizations in the exercise of these rights. Except in the one instance of Section 14, already referred to, nothing is said about state power to regulate these same rights. May a state forbid certain types of concerted activities such as recurrent work stoppages?[49] May a state require a majority vote before employees can strike[50] or by substitution of compulsory arbitration forbid strikes in essential industries?[51] The Act empowers the National Labor Relations Board to determine whether there has been violence in connection with a strike and in certain cases to prohibit such violence. Are the state police and the state courts, therefore, deprived of the power to deal with violent conduct where it is a part of a labor dispute?[52]

Congress left the Supreme Court to complete these imperfect allocations of power, and in the cases cited in the foregoing footnotes the Court undertook this function. In these instances the result of the joint work of Congress and the Court has proved to be unsatisfactory and unworkable. The states have, in the main, disregarded the allocation and, in the absence of a more practical definition of their powers, continued to regulate most matters in accordance with former prac-

48. See La Crosse Telephone Corp. v. Wisconsin Employment Relations Board, 336 U.S. 18 (1949).

49. See International Union v. Wisconsin Employment Relations Board, 336 U.S. 245 (1949).

50. See International Union v. O'Brien, 339 U.S. 454 (1950).

51. See Amalgamated Ass'n v. Wisconsin Employment Relations Board, 340 U.S. 383 (1951).

52. See Matter of Thayer Co., 99 N.L.R.B. 165 (1952). In this case the Massachusetts courts prohibited a strike on the ground that it was (1) in violation of a contract and (2) accompanied by violence. The Board subsequently held the contrary as to both counts. In effect the Board holding was that the Massachusetts courts had prohibited the exercise of a right guaranteed by federal law.

tice.[53] The problem of reallocation has become, and is recognized to be, one of the major problems of revision of the Taft-Hartley Act.

Congress has also allocated to the Federal Government a large segment of the regulation of labor relations by Section 301 of the Labor-Management Relations Act, which gives the federal courts jurisdiction in cases involving breach of collective agreements. Although the full implications of this section are not yet clear, it appears that the effect of the statute is to create a new uniform federal common law applicable to all collective agreements and to displace existing state regulation of this subject.[54] It seems probable that, although the state courts will have the power to continue to pass upon such cases, they will be required to apply the new federal law.

The allocation of power to the Federal Government through the method of giving jurisdiction to the federal courts, without at the same time providing by statute for the substantive rights to be enforced in those courts, is novel. There is considerable doubt that Congress actually intended to give the federal courts exclusive power to provide substantive regulation for this important area of the field of labor relations, since the principal evil which the Congress sought to correct was the impossibility of suing incorporated unions as legal entities under the procedure of some states.[55] It may be that Congress intended to employ a different method of distributing power between state and Federal Government by merely making the federal courts available for the enforcement of state substantive regulation. However, not only are there serious analytical objections to this view, since it is hard for

53. Montgomery Bldg. & Construction Trades Council v. Ledbetter, 256 Ala. 678, 57 So.2d 112, *appeal dismissed on ground that cert. improvidently granted,* 344 U.S. 178 (1952); Kincaid Webber Motor Co. v. Quinn, 362 Mo. 375, 241 S.W.2d 886 (1951); Erwin Mills v. Textile Workers Union, 234 N.C. 321, 67 S.E.2d 372 (1951); Wortex Mills v. Textile Workers Union, 369 Pa. 359, 85 A.2d 851 (1952); Williams v. Cedartown Textiles, Inc., 208 Ga. 659, 68 S.E.2d 705 (1952); Lion Oil Co. v. March, 220 Ark. 678, 249 S.W.2d 569 (1952); Sommer v. Metal Trades Council, 40 Cal.2d 392, 254 P.2d 559 (1953); Russell v. International Union, 258 Ala. 615, 64 So.2d 384 (1953); Kinard Construction Co. v. Building Trades Council, 258 Ala. 500, 64 So.2d 400 (1953); Goodwins Inc. v. Hagedorn, 303 N.Y. 300, 101 N.E.2d 697 (1951); State v. Dobson, 195 Ore. 533, 245 P.2d 903 (1952). *But cf.* Norris Grain Co. v. Nordaas, 232 Minn. 91, 46 N.W.2d 94 (1950); Fairibault Daily News v. International Typographical Union, 236 Minn. 303, 53 N.W.2d 36 (1952); State v. Montgomery Ward, 233 P.2d 685 (Utah), *cert. denied,* 342 U.S. 869 (1951); Ryan v. Simons, 302 N.Y. 742, 98 N.E.2d 707, *cert. denied,* 342 U.S. 897 (1951); Costaro v. Simons, 302 N.Y. 318, 98 N.E.2d 454 (1951); McNish v. American Brass Co., 139 Conn. 44, 89 A.2d 566 (1952).

54. See Shirley-Herman Co. v. International Hod Carriers, 182 F.2d 806 (2d Cir. 1950); Textile Workers Union v. Aleo Mfg. Co., 94 F. Supp. 626 (M.D.N.C. 1950); International Union v. Dahlem Construction Co., 193 F.2d 470 (6th Cir. 1951); Fay v. American Cystoscope Makers, 98 F. Supp. 278 (S.D.N.Y. 1951); Hamilton Foundry & Machine Co. v. International Molders & Foundry Workers, 193 F.2d 209 (6th Cir.), *cert. denied,* 343 U.S. 966 (1951).

55. See SEN. REP. No. 105, 80th Cong., 1st Sess. 15 (1947) (Report of Senate Committee on Labor and Public Welfare on the proposed Federal Labor Relations Act of 1947).

lawyers to believe in the existence of substantive regulations for which there is no method of enforcement, but also there is some doubt as to whether, under Article III, Section 1 of the Constitution, Congress has the power to provide that questions arising under the common law of a state become questions arising under the laws of the United States by merely giving jurisdiction over such questions to the federal courts.

Another method of allocation of control over labor relations which Congress has used is that of delegating to an administrative tribunal discretion to determine within a limited area which powers should be exercised by the Federal Government and which by the states. Before the adoption of the Taft-Hartley Act, though no express statutory basis for the practice existed, the National Labor Relations Board by agreement with state boards, and particularly with the New York State Labor Relations Board, shared with these boards a number of fairly important aspects of the regulatory power.[56] Section 10(a) of the Taft-Hartley Act provides that:

> "the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the Corresponding provision of this Act or has received a construction inconsistent therewith."

In the Board's view none of the state statutes is consistent with the national act. The agreements which existed prior to the inclusion of this provision in the Act have, therefore, been abrogated and no cession has been made.

The Board, which has had at all times since its inception more cases than it could handle effectively and expeditiously, has adopted the practice of declining to accept jurisdiction in instances where, in the Board's view, the effect of the activities involved is primarily local rather than national. This practice apparently has the approval of the courts. The Supreme Court has said of it, "Even when the effect of activities on interstate commerce is sufficient to enable the Board to take jurisdiction of a complaint, the Board sometimes properly declines to do so, stating that the policies of the Act would not be effectuated by its assertion of jurisdiction in that case." [57] Since the Board does

56. See Bethlehem Steel Co. v. New York State Labor Relations Board, 330 U.S. 767, 783-97 (1947).

57. NLRB v. Denver Building & Construction Trades Council, 341 U.S. 675 (1951). See also Haleston Drug Stores v. NLRB, 187 F.2d 418 (9th Cir.), *cert.*

not "cede" jurisdiction to any state agency in these cases and since presumably a state agency cannot act in the absence of such cession—if it could (so runs the argument) there would be no need to provide expressly for cession—these cases are left to a limbo of non-regulation by either power, although there is clearly no policy justifying this result; actually, the only reason they are not handled by the Board is that the Board is too busy to handle them. In order to illustrate the defective operation of this allocation of power, we may assume that on a small local building project there is activity which amounts to a secondary boycott of the type which is prohibited by Section 8(b)(4) of the National Labor Relations Act. The Board declines jurisdiction, not on the ground that the activity does not affect commerce but on the ground that the project is essentially local in character. The state cannot act because Congress has allocated the power to the Federal Government. Therefore, an activity which both the nation and the state have made unlawful is permitted to continue because the details of the allocation of power have not been adequately worked out in the joint action of Congress and the Board. Naturally the states have rejected this result and have continued to act in the absence of effective federal regulation.[58]

Delegation to the Board of power to allocate to state agencies certain aspects of labor relations is a highly useful device in the administration of a flexible system of federalism in this field. Unfortunately Congress failed to make wise use of it in the Taft-Hartley Act. There are now before Congress several bills which would give the Board this power. These bills, however, fail to take full advantage of the opportunity to develop a plan for division of power based upon thoughtful study of relevant political, economic and social factors. They reflect rather the simplistic interstate-intrastate analysis which the Supreme Court discarded as inadequate. To the extent, however, that the bills suggest a division based on considerations of administrative convenience, and therefore permit reinstitution of the former "agreement" system, they would free the Board from the restrictions imposed by the Act in its present form.

A novel method of allocation of the power to regulate labor relations is the recent New Jersey-New York Waterfront Commission Compact. In this instance Congress gave its consent to a statute enacted by the legislatures of the two states which regulates certain im-

denied, 342 U.S. 815 (1951). In Joliet Contractors' Ass'n v. NLRB, 193 F.2d 833 (7th Cir. 1952), the court held that the Board had abused its discretion in refusing to exercise its jurisdiction in a case involving certain building operations which the Board had found to be "essentially local in character."

58. See cases cited note 53 *supra*.

portant aspects of labor relations in one industry. Although, contrary to testimony presented at the hearing before the House Committee on the Judiciary,[59] the provisions of the Compact conflict with provisions of the National Labor Relations Act in a number of important particulars, the Compact is presumably a law of the United States within the meaning of Article VI of the Constitution.

Congress, then, has available to it a number of techniques for solution of its federalist problems, including establishment of minimum standards, encouragement of state legislation and delegation of discretionary powers of allocation in limited fields to courts and administrative tribunals. Doubtless others can be devised. It may be that a procedure resembling Madison's rejected notion of a veto on state legislation would permit a large measure of state regulation and at the same time protect against extreme action by individual states.

V

Flexible Federalism and Multiple Solutions

Congress also has facilities for breaking this problem down into many parts and treating them separately and differently where the realities of the situation require separate and different treatment. The variety of problems is endless and each type may require a different federalist solution. Congress has given to the Federal Government control over the basic right to organize and to bargain collectively. What limitations should states be permitted to impose on the activities incident to those rights? The states have been given power with respect to compulsory union membership. Are there other powers which the states can best handle, such as the power to regulate strikes, picketing and secondary boycotts? How should power be divided with respect to the proper subjects of collective bargaining? What of the myriad problems which arise in connection with intra-union affairs, the right to membership, the right against discrimination, the right to have a voice in the union government? What of welfare funds and the check-off and bribery of union officials? What of inter-union relations and rivalries, such as jurisdictional strikes? Each of these problems is in fact a host of problems and it may be desirable to treat each separately and differently in respect to distribution of power.

It may develop that different types of industries require different treatment. The problem of compulsory union membership on the railroads is governed by federal law. In respect to other industries Congress has allocated power over this matter to the states. Congress has

59. *Hearings, supra* note 29.

chosen to regulate strikes in certain types of industries which create a "national emergency." Would it be well to leave to the states the control of strikes in these same industries which create a "local emergency"?

The changes which develop with the passage of time may indicate that particular distributions of power should be revised from time to time. During war, for example, it may be thought necessary to allocate the Federal Government certain powers which during peace are given to the state, as when the orders of the National War Labor Board superseded the Wisconsin law on compulsory unionism, while the state law automatically regained validity with the conclusion of hostilities.[60]

This flexible federalism also allows for trial and error. The allocation by the Court of power to the Federal Government through "interpretation" of the Labor-Management Relations Act has proved unworkable in several respects. Congress is now called upon to reallocate these powers to the states. There is no reason why this should not be a continuous process as particular allocations are shown to be desirable or undesirable in the way in which they actually work out.

60. See Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board, 336 U.S. 301 (1949).