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## THE FEDERAL ANTI-INJUNCTION ACT

By EDWIN E. WITTE\*

THE present Congress has been doing the unexpected ever since it convened in December, but the most surprising of its unpredictable actions was the overwhelming majority by which it passed the Norris-La Guardia anti-injunction bill. For more than a generation organized labor has sought relief through legislation from "government by injunctions."<sup>1</sup> From 1895, when the first anti-injunction bill was introduced, to 1914, this was an important question in every Congress. Three times—in 1897, 1902, and 1912—anti-injunction bills passed one house only to fail in the other. President Roosevelt recommended action to curb the "abuse" of injunctions in no less than five of his messages to Congress. Because Republican Congresses refused to pass such a law, the American Federation of Labor launched its nonpartisan political policy and in 1908 and 1912 endorsed the Democratic candidates for president. Finally, when the Democrats gained control of all branches of the government, the Clayton Act<sup>2</sup> was enacted and labor heralded the labor sections of this measure as a combined magna charta and bill of rights. Within a few years, these sections were construed by the Supreme Court to have made no change in the law except to confer the right of trial by jury in a restricted class of contempt cases.

There followed a period, in the first half of the decade of the twenties, in which organized labor seems to have lost hope of remedial legislation. The American Federation of Labor, in desperation, called upon trade unionists to disregard injunctions and supported the plan for the congressional recall of the decisions of the federal courts proposed by the elder La Follette. Not until 1927 did the Federation again endorse an anti-injunc-

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\*Chief of Legislative Reference Library, Madison, Wis.

<sup>1</sup>For a detailed discussion of the anti-injunction bills introduced in Congress, see Felix Frankfurter and Nathan Greene, *The Labor Injunction*, ch. iv, The Macmillan Company, New York and the author's *The Government in Labor Disputes* 265-276, McGraw-Hill Book Company, New York.

<sup>2</sup>38 Stat. at L. 730, secs. 6 and 17-25. The leading cases upon these sections of the Clayton Act are *Duplex Printing Press Co. v. Deering*, (1921) 254 U. S. 443, 41 Sup. Ct. 172, 65 L. Ed. 349 and *Michaelson v. United States*, (1924) 266 U. S. 42, 45 Sup. Ct. 18, 69 L. Ed. 162.

tion bill, when it brought forward the Shipstead bill.<sup>3</sup> Extensive hearings were conducted on this by a subcommittee of the Senate Committee on the Judiciary, composed of Senators Norris, Blaine, and Walsh (Montana), after which the subcommittee called into consultation "attorneys and economists who had made special study of the question"<sup>4</sup> and then, in May, 1928, recommended an entirely new bill to the full committee, upon which further hearings were conducted in December.<sup>5</sup> Because the American Federation of Labor failed in its next convention to endorse the bill, nothing further was done with this substitute at the time.

The next year the Federation changed its attitude and came out strongly for the Norris (subcommittee) bill, with but minor changes. In the spring of 1930 this bill was reported out by the committee, but with an adverse (ten to seven) majority report, and got no further.<sup>6</sup> In the congressional elections of the fall, all candidates in industrial districts were asked by the Non-Partisan Political Campaign Committee of the American Federation of Labor to state their attitude on this measure, and definite promises of support were secured from a large percentage of the successful candidates. The numerous changes brought about through this election were nearly all favorable to labor and aroused hopes that final victory in the campaign for anti-injunction legislation was not far off.

Yet the odds appeared against favorable action before another election. Organized labor was now almost solidly behind the measure and regarded it as their "immediate and foremost task." The Norris bill had the endorsement also of the Committee on the Study of the Injunction in Labor Disputes of the National Civic Federation, headed by James W. Gerard, and of an organization calling itself the "committee on labor injunctions," com-

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<sup>3</sup>S. 1482, 70th Cong., 1st Sess. In the next Congress this bill was reintroduced as S. 2497.

<sup>4</sup>The committee in all its reports on this bill made particular mention of assistance rendered by Donald R. Richberg, Professor Felix Frankfurter, Professor Herman Oliphant, Professor Francis B. Sayre, and the author of this article.

<sup>5</sup>The hearings in February-March, 1928 were published by the Senate Committee on the Judiciary with the title *Limiting Scope of Injunctions in Labor Disputes*, Parts 1 to 4, and the December hearings on the committee substitute with the same title as Part 5.

The subcommittee bill was first printed for use of the committee and then published in the *Congressional Record*, 70th Cong., 1st Sess., 10050-51 (May 26, 1928).

In the next Congress this bill (slightly modified) was known as the Committee Substitute to S. 2497, 71st Cong., 2d Sess.

<sup>6</sup>Senate Report No. 1060, Parts 1 and 2, 71st Cong., 2d Sess.

posed mainly of liberals not connected with the labor movement. On the other side were the employers' associations of the country, the United States Chamber of Commerce, and the American Bar Association.<sup>7</sup> With such opposition and the many other measures requiring congressional action, it was most uncertain, when the session opened in December, whether the anti-injunction bill would reach a vote, and no one could predict President Hoover's action if the bill should reach him. W. M. Kiplinger, one of the best informed of the Washington correspondents, who writes a monthly letter ("What's Likely in Congress") in *Nation's Business*, the organ of the United States Chamber of Commerce, said in January that the Norris bill had "no chance" and even in the March number predicted: "Can't get through." Similarly, the *New York*

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<sup>7</sup>In 1928, the American Bar Association adopted the recommendation of the Committee on Jurisprudence and Law Reform that the Shipstead bill (70th Cong., S. 148) be opposed because it proposed to prohibit the issuance of injunctions "except for damage to property and then only when the property is 'tangible and transferable.'" When this action was taken, the subcommittee of the Senate Committee on the Judiciary had already drafted its substitute which proceeded on an entirely different theory from the original Shipstead bill and contained no prohibition limiting injunctions to the protection of tangible and transferable property. In the 1929 and 1930 conventions, however, the committee again condemned the original Shipstead bill without noticing the Norris bill—the anti-injunction bill really under consideration—and on its recommendation the Association went on record as opposed to "all legislation radically limiting the jurisdiction of the federal courts or decreasing the power thereof."

When the Norris bill came up for consideration in the present Congress, Chairman Howland of the Committee on Jurisprudence and Law Reform of the American Bar Association sent a letter to Vice President Curtis, which was inserted in the Congressional Record of February 25, 1932, reciting the adoption of the above resolution and implying that the Bar Association was on record against the Norris bill. Following this lead, numerous local bar associations and members of the bar wrote senators protesting against this bill.

Any effect which these protests might otherwise have had was destroyed when Senator Walsh (Montana), reviewing the entire record of the action of the American Bar Association on anti-injunction legislation, pointed out that it had confused the Shipstead and Norris bills. That this criticism of the communication of Chairman Howland was a valid one is shown not only by the fact that the Norris bill was not once mentioned, by name or number, in the Proceedings of the American Bar Association, but by the further fact that one of the members of the Committee on Jurisprudence and Law Reform who signed its report in 1930 condemning the Shipstead bill was Senator J. Hamilton Lewis, who spoke as well as voted for the Norris bill. The most charitable comment which can be made on the part played by the American Bar Association in the consideration of anti-injunction legislation is the observation offered by Professor Charles E. Clark of the Yale School of Law and Attorney Joseph F. O'Donnell of Boston in dissenting (in 1930) from the report of the Committee on Jurisprudence and Law Reform: "Our committee, faced as it is with the necessity of considering at one meeting a vast mass of bills, many, perhaps most, of them unimportant, is not well organized for study."

*Journal of Commerce*, as late as February 26, 1932, was hopeful of amendments "which would take the sting out of the legislation and make it more acceptable to finance."

By that time the anti-injunction bill was already far on the road to enactment. It had been reintroduced in each house by Senator Norris and Congressman La Guardia, respectively, almost immediately after Congress convened.<sup>8</sup> For nearly two months it was allowed to sleep quietly in the committees on the judiciary, but at the end of January was reported favorably (eleven to five) by the Senate committee.<sup>9</sup>

Consideration of the Norris bill by the Senate itself began on February 23 and continued for the better part of a week. The case for the bill was presented most ably by Senators Norris, Blaine, Walsh (Montana), Wagner, Johnson, and others; while the brunt of the opposition fell upon Senators Hebert and Reed. As the debate progressed, the opposition seemed to disintegrate. The minority of the committee had recommended a long list of amendments forming collectively a complete substitute for the Norris bill. These amendments were voted down, one after the other, with eighteen votes as the maximum in favor of any of them. Several amendments offered by friends of the bill, however, were adopted, the most important being a section prohibiting mandatory clauses in temporary restraining orders and temporary injunctions and an amendment to the section specifying the conditions for the issuance of injunctions in labor disputes, which authorized the courts to intervene not only when unlawful acts have been committed but whenever they are threatened. When the final vote was taken, on March 1, only five senators voted against passage, as against seventy-five for passage. Even the minority members of the Committee on the Judiciary all voted for the bill on final passage.

The House disposed of the companion La Guardia bill with an even more one-sided majority and in much shorter time. When the Senate passed the Norris bill, the House Committee on the Judiciary had not yet noticed the companion bill for a hearing. It now did so at once, gave a day to the opponents of the measure, and then unanimously reported the bill for passage, with amend-

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<sup>8</sup>S. 935 and H. R. 5315, 72d Cong., 1st Sess.

<sup>9</sup>Senate Report No. 163, 72d Cong., 1st Sess.

The committee vote of 11 to 5 in favor of the anti-injunction bill in this Congress represented only one shift from the 10 to 7 adverse report in the preceding Congress, the reversal of the majority being mainly attributable to changes in the membership of the committee.

ments not identical to those adopted by the Senate but differing only in minor respects.<sup>10</sup> Promptly, the Rules Committee brought in a special rule for the immediate consideration of the bill as reported. This rule, and the bill itself, were adopted on March 8, after but one day's discussion. The debate was far less one-sided than in the Senate, but all amendments not recommended by the committee were rejected and the bill passed with only thirteen nays to three hundred sixty-three yeas.

The La Guardia bill as passed by the House differed from the Norris bill passed by the Senate principally in two respects: It did not include the section relating to mandatory clauses in injunctions added by a Senate amendment, and it had a more restricted section on jury trial in contempt cases. As passed by the Senate, this section allowed jury trial in all indirect contempt cases; as passed by the House, only in indirect criminal contempt cases growing out of labor injunctions. The point at issue was whether jury trial should be accorded persons charged with violations of "padlock" injunctions issued in enforcement of the Prohibition Act. This difference delayed final action for a week, and in the end the Senate had to yield. The conferees also dropped the Senate amendment relating to mandatory injunctions but in all other respects followed the Senate bill—the measure finally enacted, however, bearing the House number.

President Hoover signed the bill on March 23, but added as a memorandum an opinion given him by Attorney General Mitchell. In this opinion, the bill is criticised as being "not as clear as it might be," and it is stated that there are provisions whose constitutionality can be settled only by the courts. More important, the Mitchell memorandum expressed the opinion that the bill does not "prevent the maintenance by the United States of suits to enjoin unlawful conspiracies or combinations under the anti-trust laws to outlaw legitimate articles of interstate commerce."<sup>11</sup> This memorandum led Senator Norris to comment

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<sup>10</sup>House Report No. 669, 72d Cong., 1st Sess.

<sup>11</sup>The same construction was given to the bill by Congressman La Guardia in response to a question during the debate in the House. Congressman James M. Beck, who made the principal argument against the bill, denied the validity of this construction, after which Congressman Blanton offered an amendment specifically providing that the act should not apply to suits "where the United States government is the petitioner," which was rejected by a vote of 21 to 125. Aside from Congressman La Guardia, no one throughout the debates in Congress claimed that the bill does not have application to injunctions secured under the anti-trust laws, and there are numerous statements which imply that it applies in

bitterly that the president dared not veto the bill but did everything he could to weaken its effect; and the labor press characterized President Hoover's action as "the kiss of death." At the same time, there is in labor union circles considerable exultation over the passage of the anti-injunction bill, although no one regards it as a magna charta or a bill of rights.

## II

The anti-injunction act bears the title: "To amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes." As this title indicates, most of its provisions deal with the conditions under which the inferior federal courts may issue injunctions in labor disputes and the procedure which is to be followed in such cases. There are only three provisions which have a broader application than to injunctions: section 3, directed against using "yellow dog contracts" as a basis for relief in the federal courts, applies to legal as well as to equitable relief; section 6, stating the principles on which the relationship of principal and agent is to be determined in labor cases, applies to all such cases regardless of how they may have come into the federal courts; and section 12, relating to the trial of contempt cases premised upon criticism of a judge before a second judge.

The restrictions on injunctions apply to all federal courts below the Supreme Court and to all cases "involving or growing out of a labor dispute." No restraining order or injunction is to be issued in any such case in violation of the public policy set forth in section 2. This public policy is to accord workmen "full freedom of association, self organization, and designation of representatives of his (their) own choosing." "Involving or growing out of a labor dispute" is defined so as to include every controversy growing out of the employer-employee relationship except remote sympathetic strikes or lockouts involving persons not employed in the same industry, trade, craft, or occupation or by the same employer and not members of the same or an affiliated union or employers' association. The restrictions in conformity with which restraining orders and injunctions in cases involving or growing out of labor disputes must be issued by the federal courts relate to the conditions under which they may be granted,

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such cases precisely as it does in other cases "involving or growing out of a labor dispute." The rejection of the Blanton amendment appears conclusive upon the intent of Congress, and there is nothing in the text of the bill which supports the construction of the attorney general.

the procedure to be followed, the content of the orders, and the trial of persons charged with having violated their provisions.

The statement of the conditions under which injunctions may be issued in labor disputes is in the main merely a repetition of familiar rules of equity but with some additions which are likely to reduce greatly the frequency of resort to injunctions. The familiar rule that no injunction shall be issued unless it is established that unlawful acts are threatened or have been committed and will occur or be continued unless restrained is supplemented by a proviso that only the person or organization making the threat or committing the unlawful act or authorizing or ratifying the same after actual knowledge thereof shall be restrained. In addition, there is the novel provision that it must be shown that the ordinary law-enforcing officers have failed or are unable to prevent the unlawful acts complained of, and the sheriff of the county or police chief of the city must be notified of the action and given an opportunity to present his view of the situation to the court. Similarly, not only must the complainant show that the unlawful acts charged will cause substantial and irreparable injury to his property and that he has no adequate remedy at law but also that, as to each item of relief sought, greater injury will be inflicted upon him than the defendants will sustain if the petition is granted. Further, relief is not to be allowed to any employer who does not come into court with clean hands—specifically, who has violated a requirement of law which is involved in the dispute or who has failed to make every reasonable effort to settle the difficulty.

The procedural requirements are at least equally significant. *Ex parte* temporary restraining orders are not absolutely prohibited, but are limited to not more than five days and may not be renewed or extended. No restraining order or injunction may be issued without oral examination of the witnesses in open court and (except in the case of *ex parte* restraining orders) opportunity for cross examination. The court must make, reduce to writing, and file, before a restraining order or injunction can be issued, findings of fact supporting every prohibition. Before a temporary restraining order or temporary injunction becomes effective, the complainants must furnish a bond sufficient to recompense the defendants for all loss, expense, and damage, including attorneys' fees and other expenses incurred in the defense, if it shall later be established that they were in the right, and it is



provided that recovery on such bond may be had in the original action. Prompt review of temporary injunctions is facilitated by providing that as soon as an appeal is taken the court shall certify the entire record to the circuit court of appeals, where the case shall have precedence over all other matters except older cases of the same character.

On the content side, the most important change made is that individual non-union contracts shall not furnish a basis for any equitable (or legal) relief and the corollary, that no injunction shall forbid any workman to become or remain a member of any labor organization nor any other person to persuade workmen to join such an organization. These clauses do not, like the earlier anti-discrimination laws, make it a criminal offense for an employer to require his employees to sign individual non-union contracts, but deprive such "yellow dog contracts" of all value as far as the federal courts are concerned. "Yellow dog contracts" are, to all intents and purposes, unenforceable against the workmen who sign them, but are made the bases for injunctions prohibiting unions from attempting to organize the plants where such contracts are in use.<sup>12</sup> By forbidding such injunctions, this act outlaws "yellow dog contracts" quite as effectively as if they were prohibited under criminal penalties.

Besides these provisions designed to prevent interference with attempts to organize workmen, this act sets forth eight other courses of conduct in labor disputes which are not to be enjoined. This enumeration is in many respects similar to section 20 of the Clayton Act, to which it is supplemental, but avoids the frequent use of the qualifying "lawfully" or "in a lawful manner," which render that section all but meaningless. Section 4 of the new act, in contrast, provides positively that injunctions issued by federal courts shall not forbid striking, calling or aiding strikes, or inducing others without threats, fraud, or violence to join in strikes. It prohibits enjoining workmen for "ceasing or refusing to perform any work or to remain in any relation of employment" or from "assembling peaceably . . . in promotion of their interests in a labor dispute." It forbids injunctions directed against unions, union officers, and organizers which enjoin them from giving publicity to the facts of labor disputes and from financially supporting or otherwise aiding workmen engaged in

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<sup>12</sup>Upon this point, see the author's "Yellow Dog Contracts," in (1931) 6 Wis. L. Rev. 21-32 (1931).

such disputes. It provides further that no injunction shall be allowed on the theory that the doing in concert of any of the enumerated acts constitutes a conspiracy. But this action is quite as remarkable in what it does not include as in what it includes. It does not refer to injunctions against boycotting, and deals with picketing only under the term "patrolling." Most important, it does not declare the enumerated acts to be lawful, but merely denies equitable relief against them.

Finally, the Norris-La Guardia Act introduces two new provisions governing contempts which, again, are supplemental to the existing statutes. The first is the jury trial section, which applies to all charges of contempt arising under injunctions "involving or growing out of labor disputes"<sup>13</sup> except contempts committed in the presence of the court or so near thereto as to interfere with the administration of justice and contempts involving disobedience by officers of the court in respect to its orders. In all such indirect contempt cases, the accused is declared entitled upon demand to trial by jury, this provision being considerably broader than the corresponding section of the Clayton Act, which is limited to indirect contempts where the offense charged is an indictable crime. The other section governing contempts was called in the debates on this measure the "newspaper section"<sup>14</sup> and provides that in all contempt cases premised upon an attack made (elsewhere than in the presence of the court) on the character or conduct of the judge, the accused shall have a right to trial before another judge.

Viewed as a whole, the Norris-La Guardia act is not a complete labor code, although it is the longest and most detailed anti-injunction measure ever enacted. At many points it bears evidence of being a compromise drafted with several, somewhat conflicting, objects in view: satisfying labor, getting the measure

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<sup>13</sup>As section 11 was amended in the House and agreed to in conference, it applies to "all cases arising under this act." This expression is obscure, since this act is a measure limiting the jurisdiction of the federal courts and not a law conferring a right to injunctions. Complainants in labor injunction cases presumably will continue to base their right to injunctions not upon this act but upon the common law, state statutes, and the federal anti-trust acts. It is evident, however, that by the expression, "all cases arising under this act," Congress meant all cases to which this act is applicable; that is, all injunction cases "involving or growing out of a labor dispute."

<sup>14</sup>Section 12 was originally a separate bill introduced in the 70th Congress by Senator Vandenberg of Michigan. It is of broader application than injunctions in labor cases, applying to all contempts premised upon criticisms of courts, whether based on injunctions or not.

through Congress, and having it sustained by the courts. Probably no one who had anything to do with this measure is entirely satisfied with it; it certainly is not a cure-all. At the most, it is a politically and constitutionally practical bill which will operate to make injunctions in labor disputes infrequent and put an end to the most serious abuses.

### III

The new injunction act was attacked before its passage both by those who believe that it does not go far enough and by those who believe that it goes too far. The latter group was much the larger, but the former had quite as much influence in holding up final action for nearly four years after this bill was drafted.

Two radically different attacks were made on the anti-injunction bill by people who believed that it did not go far enough. Mr. Andrew Furuseth and a few others attacked it because they believed that anti-injunction legislation should be approached through a definition of property; some "liberal" law professors felt that the approach should be through changes in the substantive law.

Andrew Furuseth is one of the most vivid figures in the labor movement. He has been president of the seamen's union for several decades, but has spent most of his time in Washington. The author of the Seamen's Act and the labor leader who has written most about injunctions, he enjoys great prestige both in the ranks of labor and among members of Congress, particularly the "progressives."

Mr. Furuseth's view is that injunctions in labor disputes can be completely outlawed by compelling the courts to return to the original basis for equitable relief.<sup>15</sup> Injunctions should be issued only to protect property, and property should be defined to embrace only tangible and transferable objects. This doctrine originated with lawyers soon after injunctions were first used in labor disputes and for ten years preceding the enactment of the Clayton act was the essence of the anti-injunction bills supported by the American Federation of Labor.<sup>16</sup> Long since, it has ceased

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<sup>15</sup>The best presentations of Mr. Furuseth's criticisms of the Norris bill are Senate Document No. 327, 71st Cong., 3d Sess., and the pamphlet, *Injunction Legislation, Is It?*, an open letter by Andrew Furuseth to the Executive Council of the American Federation of Labor, dated Nov. 23, 1931.

<sup>16</sup>The author of this line of attack on injunctions in labor disputes

to have any substantial support outside of the ranks of labor, but Mr. Furuseth has clung to it tenaciously. The original Shipstead bill of the 70th Congress was premised upon this theory and drafted by Mr. Furuseth himself. When the subcommittee of the committee on the Judiciary reached the conclusion that this bill would be meaningless, and drafted the substitute which has now been enacted into law, Mr. Furuseth and the one attorney now known to share his views, Mr. Winter S. Martin of Seattle, drafted a new measure<sup>17</sup> phrased quite differently but in substance coming back to the proposition that injunctions are premised upon a mistaken concept of the nature of property. In the 1928 convention of the American Federation of Labor, Mr. Furuseth prevented endorsement of the Norris bill and thereby held up action on this measure in the Congress in which it was first introduced. In all conventions of the Federation thereafter, he was a minority of one against the bill, but the manifest sincerity of his determined opposition created doubt as to the efficacy of the Norris bill not only in the ranks of labor but among the progressives in Congress. Mr. Furuseth did not cease fighting for his point of view until his proposal was presented as an amendment to the Norris bill during its consideration in the Senate. It received, however, only six votes.

More substantial from a legal point of view but of far less practical importance was the criticism of the law professors who believed that the injunction problem should be dealt with through changes in the substantive law. "The cure to be effective must go to the root, and not simply to the legal remedy."<sup>18</sup> These

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appears to have been T. C. Spelling, author of the well-known *Injunctions and Other Extraordinary Remedies*. It is worthy of note that in his most recent book, *Spelling and Lewis, A Treatise on the Law Governing Injunctions*, pp. 224-229, Spelling, while still insisting that his views are historically correct, acknowledges that the courts have so strongly committed themselves to regarding the expectancies arising from the employer-employee relationship as property that there is no longer anything to be gained by legislation attempting to define property to exclude these expectancies.

The first bill introduced in Congress embodying this idea was the Pearre bill, H. R. 18752, of the 59th Congress. This measure was backed by the American Federation throughout the period 1906 to 1913. See the author's *The Government in Labor Disputes*, p. 267.

<sup>17</sup>The Martin bill has not actually been introduced in Congress but was published in Senate Document No. 327, 71st Cong., 2d Sess. Back of the formula in this bill relating to involuntary servitude is the assumption that the issuance of injunctions in labor disputes implies that employers have a property right in the workmen of the country, which has been the essence of the Spelling-Furuseth attack on injunctions throughout.

<sup>18</sup>Sayre, *Labor and the Courts*, (1930) 39 *Yale L. Jour.* 682-705, 684.

critics wished to have written into the federal statutes positive declarations that both strikes and boycotts are lawful and urged that the conspiracy and other doctrines which are fundamental in the law of labor combinations should be specifically annihilated.

This approach was rejected not so much because of differences over social policies as from political considerations. While the overwhelming majority by which the Norris-La Guardia bill was finally passed may be considered evidence that a much more radical bill would have also received congressional sanction, this seems very doubtful even now to all who have been in close touch with the situation. But really determining was the fear that any bill framed on such lines would be held unconstitutional. The theory which underlies the act passed is that since the Constitution vests in Congress the power to create inferior federal courts (article III, section 1) Congress can define and limit the jurisdiction of these courts as it sees fit.<sup>19</sup> This is a theory which the Senate minority virtually conceded, although Congressman James M. Beck took a different position in the House. No one, however, has ever argued that Congress has power to determine the substantive rights of the parties in litigation which comes into the federal courts by reason of diversity of citizenship. In such cases, the law of the jurisdiction where the action arose is controlling on points of substantive law, and any attempt on the part of Congress to leave undisturbed the jurisdiction of the inferior federal courts but to say what the substantive law to be applied in such cases shall be would be utterly futile. In state anti-injunction legislation, a general revision of the substantive law of labor combinations may properly be attempted, but Congress can deal with the problem only through jurisdictional and procedural restrictions.<sup>20</sup>

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A recent article presenting this point of view is J. F. Christ, *The Federal Anti-Injunction Bill*, (1932) 26 *Ill. Law Rev.* 516-539.

<sup>19</sup>"Only the jurisdiction of the Supreme Court is derived directly from the constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress. That body may give, withhold, or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the constitution." *Kline v. Burke Construction Company*, (1922) 260 U. S. 235, 43 *Sup. Ct.* 118, 67 *L. Ed.* 232.

<sup>20</sup>Congress, of course, also might amend the federal anti-trust laws to prevent their being made the basis for any injunction in connection with a labor dispute. Failure to do so is perhaps a weakness in the Norris-La Guardia act, but it was the view of the framers that the restrictions of the act apply to cases arising under the federal anti-trust laws in the same manner as to injunction actions brought into the federal courts on grounds of diversity of citizenship. See note 11 ante.

## IV

The most formidable opposition to the Norris-La Guardia bill, naturally, came from the other side — from people opposed to any anti-injunction legislation.<sup>21</sup> Every conceivable line of attack was adopted by these opponents. They denied the necessity for legislation, claimed the bill to be clearly unconstitutional, extremely radical, and grossly discriminatory, and criticized many of its detailed provisions. At one and the same time, concern was expressed for the workingmen who would be prevented from getting injunctions against contract-breaking employers, and the bill was denounced because it conferred special privileges on labor. Even the red herring of Communism was brought forth:

“You have made a long march away from that Philadelphia where the Constitution of the United States was formed and in the direction of Moscow, and do not be oblivious of that fact.”<sup>22</sup>

Two fundamental ideas underlie most of these arguments, that this measure represents an attack upon the courts and that it confers special privileges on labor unions. The basis for the argument that the anti-injunction act is an attack upon the courts is, of course, that it limits the equitable jurisdiction of the inferior federal courts; the ground for the claim that it confers special privileges on labor unions, that most of its provisions relate exclusively to cases “involving or growing out of a labor dispute.”

The conception which so many lawyers have of anti-injunc-

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<sup>21</sup>Good presentations of this point of view include the majority report, adverse to the Norris bill, made by the Committee on the Judiciary in the 71st Congress (Senate Report No. 1060, Pt. 1); Part 5 of the Senate hearings on Limiting the Scope of Injunctions in Labor Disputes in the 70th Congress, 1st Session; the hearings on the La Guardia bill, H. R. 5315, conducted by the House Committee on the Judiciary in the present session (72nd Cong., 1st Sess.); Newlin, Proposed Limitations Upon Our Federal Courts, (1929) 15 Amer. Bar Ass'n Jour. 401-403; Norton, Grave Questions Are Raised by Pending Anti-Injunction Bill, (1930) 16 Amer. Bar Ass'n Jour. 792-794 and Further Light on Pending Anti-Injunction Measure, (1931) 17 Amer. Bar. Ass'n Jour. 59-62; and the editorials, The Shipstead Substitute Anti-Injunction Bill, (1929) 11 Law and Labor 3-5. The Anti-Injunction Bill in Congress, (1932) 14 Law and Labor 19-21, and The Anti-Injunction Measure, (1932) 18 Amer. Bar Ass'n Jour. 248-249. See also the speeches made by Representatives Beck and Blanton in the House of Representatives, March 8, 1932. The minority report of the Senate Committee on the Judiciary in the present Congress (Senate Report No. 163, Pt. 2, 72d Cong., 1st Sess.) and the speeches made by Senators Hebert and Reed during the debates in the Senate, while critical of the Norris bill, conceded that some anti-injunction legislation was called for.

<sup>22</sup>From the speech of Representative James M. Beck in the House of Representatives on March 8, 1932.

tion legislation as an attack upon the courts is a natural consequence of the criticism to which many judges have been subjected for issuing injunctions in labor disputes. Lawyers resent the charge that courts are unfair and judges biased in favor of capital. They argue, plausibly, that limitations upon the jurisdiction of the federal courts such as are prescribed in the Norris-La Guardia act are unconstitutional. Section 2 of article III of the constitution provides that "the judicial power shall extend to all cases in law and equity;" and this, it is argued, means that the courts cannot be deprived of the power to restrain interference with the rights of litigants by injunction, the power to preserve the status quo while cases are being litigated, and the right to punish summarily violations of the court's orders. It is acknowledged that under section 1 of article III the inferior federal courts are the creatures of Congress, but it is contended that, once inferior courts have been established by Congress, they cannot be deprived of any part of the "judicial power" defined in the next section, although Congress may abolish these courts altogether. This position seems untenable to the author, but it is certain to be strongly urged when this legislation comes before the Supreme Court.<sup>23</sup>

The opposition to anti-injunction legislation on the score that it limits the jurisdiction of the courts has merit when the case for such restrictions is based upon the alleged unfairness of the courts. While there have been instances of unfairness, judges, by and large, have honestly tried to administer even-handed justice in labor, as in all other, cases. It is another question whether injunctions in labor disputes have not put the courts in an anomalous position. Even Senator Reed, who fought hard for amendments to take out the most drastic features of the Norris bill and in the end voted for it only "with shame," said:

"I have always felt convinced that a court of equity ought not by that method be converted into a police court, that the burden of enforcing such injunctions as those [in labor cases] is too great for the court to be asked to assume."

Labor disputes are mass phenomena, in which it is difficult to get at the true facts. Feelings run high, and witnesses are often

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<sup>23</sup>Many of the opponents of the Norris-La Guardia bill argued that this measure is unconstitutional on still another ground, namely, that it is discriminatory and makes possible the deprivation of property without due process of law. No specific clause in the Constitution, however, prevents discriminatory federal legislation, and Representative James M. Beck, in the ablest attack made upon the Norris-La Guardia bill in either house, claimed only that in this respect this measure was against "the spirit, if not the letter, of the constitution."

biased — a fact which renders vitally necessary the provisions of the new law requiring oral examination of all witnesses in open court and limiting *ex parte* temporary restraining orders to five days. Interference of the courts is often decisive as to the outcome of the dispute — which justifies the condition that the court must consider the effect of its order upon the defendants and may grant relief only when satisfied that the injury to the defendants will not exceed that sustained by the complainants if relief is denied. Courts of equity do not control the law-enforcing officers, who necessarily must bear the burden of the enforcement of law and order in strikes; hence, it is entirely proper that inquiry should be made before injunctions are issued as to whether the ordinary law-enforcing officers can handle the situation. Restrictions like these are not an attack upon the courts; they are measures to relieve the courts from the situation in which they have been placed through the frequent resort to injunctions by employers in labor disputes. The much-debated clause allowing jury trial in indirect contempt cases growing out of labor injunctions is neither a reflection upon the courts nor an unwarranted limitation of their powers. There is no evidence whatsoever that trial by jury will prevent the courts from enforcing their decrees,<sup>24</sup> and certainly provisions for jury trial in contempt cases will relieve the courts of much criticism. To the average American, jury trial seems a most important civil right, and it is not necessary for the courts to violate this concept of a fair trial to enforce their orders.

The other principal argument against the new injunction act, that it confers special privileges on labor unions, has merit to the extent that undoubtedly this act does provide special rules and a

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<sup>24</sup>Upon this point, the following statement made by John W. Davis, during a debate in the House of Representatives in 1912 on a bill providing for jury trial in contempt cases growing out of labor disputes, is illuminating:

"If Congress were to take away from the district courts, whether in law or in equity, all the power to enforce their judgments and decrees, the name might remain but the substance would have disappeared. But will even the most prejudicial opponent of trial by jury in contempt cases contend that provision for such a trial is equivalent to the abolition of all power to carry out the court's decrees? Such a contention would assume—

"First. That the word 'court' is synonymous with 'judge,' and that any power taken from the judge is necessarily taken from the court.

"Second. That because a jury is charged to investigate the facts, the commission of a contempt would therefore cease to be punishable.

"The mere statement of these propositions is enough to show without further argument how utterly untenable they are." (Cong. Rec. V, 48, Pt. XII, Appendix, p. 318.)



special procedure for labor injunction cases. It has often been claimed that the courts apply rules in labor cases very different from those in others, but this is an unwarranted claim. The real ground for anti-injunction legislation is not that the courts apply special rules in labor cases, but that such cases present situations which cannot fairly be disposed of under the same rules and procedure as other cases.

Special treatment adapted to the essential differences between labor cases and ordinary equitable actions does not constitute class legislation. Some of the peculiar problems presented in labor disputes have already been noted, but two fundamental differences between labor injunction cases and ordinary equitable actions need to be further stressed.

Labor disputes present far more of a social than a legal problem. Public opinion plays a large part in their outcome, and it is this fact which gives a peculiar significance to the action of the courts in labor injunction cases, since the public associates injunctions with violence and other unlawful conduct. The allowance of an injunction brands the strikers as law breakers and is likely to have a most disastrous effect upon their morale. The merits of the dispute are not before the court, and of course are not given consideration; yet the court's action has a great influence upon the final outcome.

A further important difference between labor injunction cases and ordinary equitable actions lies in the time element. Strikes normally last only a short time, which makes the first action of the courts in labor injunction cases all but decisive in its effects upon the dispute. There is no way of measuring or compensating workmen for loss of a strike, which means that if an *ex parte* temporary restraining order is issued improvidently the injury to the defendants is truly irreparable.<sup>25</sup>

*Ex parte* temporary restraining orders constitute one of the outstanding abuses of injunctions in labor disputes. Very generally, these orders are drafted by the complainants' attorneys and

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<sup>25</sup>Through the requirement of a bond, when restraining orders or temporary injunctions are issued improvidently, it is possible to reimburse the defendants for court costs, witness and attorney fees, and similar items, but not for the effects of the court's order upon the outcome of the dispute, which is the most important item. Adequate bond provisions such as occur in the Norris-La Guardia act are important but cannot overcome the fundamental difficulty in labor injunction cases that the intervention of the courts affects the outcome of the labor dispute fully as much as the matters which are immediately in litigation.

signed by the judge without taking any testimony. Often they are found after a hearing to have been unwarranted or too broad in scope,<sup>26</sup> but a modification, coming as it usually does months after the order was issued, is of little practical benefit to the defendants. In many cases there never is any hearing, as the strike is over before the appointed day. Ever since Equity Rule 73 was promulgated by the Supreme Court in 1912, all federal courts have been required to set immediately a date for a hearing on applications for injunctions, which was to be not more than ten days after filing. But in spite of this rule, the average time elapsing between the date of the issuance of *ex parte* temporary restraining orders and the court's decisions on the propriety of allowing temporary injunctions has been about thirty days, and in many this period has been much longer.<sup>27</sup>

Most of the opponents of the Norris-La Guardia bill conceded the abuse of *ex parte* temporary restraining orders and favored reducing their effective period to five days. They strongly opposed, however, the provision that such orders might not be renewed, urging that the courts should have discretionary power to extend such orders from time to time, for periods not exceeding five days. In support of this amendment, they pointed out the difficulty, and in some cases the impossibility, of completing the hearing within five days. But so long as temporary restraining orders can be renewed from time to time, it matters very little whether they are initially issued for five days or for ten days, and there is grave danger of the continuance of the old abuse. Even with an absolute five-day limit on temporary restraining orders, some defendants will never have their day in court. Under the circumstances presented in labor cases, the issuance of restraining orders without a notice ought to be most extraordinary. The deviation from the general equitable practice in this respect is clearly justified by the very different situation presented in labor cases, and fundamentally the same justification exists for every other special rule incorporated in the Norris-La Guardia act.

The new act is not a radical measure. The two principal purposes which it seeks to accomplish are to outlaw "yellow dog con-

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<sup>26</sup>In *The Government in Labor Disputes*, Appendix B, the author has listed 120 cases in which *ex parte* temporary restraining orders were either dissolved or materially modified after a hearing by the court which issued them—in most of these cases, more than a month after the order was issued.

<sup>27</sup>*The Government in Labor Disputes*, 91-92.

tracts" and to prevent injunctions from being used as a method to discredit and handicap labor in contests with employers.

"Yellow dog contracts" were almost literally without a friend in either house of Congress. Only Representative Blanton — the most bitter opponent of labor unions in public office — spoke in justification of contracts in which employers require their employees to promise that they will not join a labor union. Every other opponent of the bill took the position of the minority of the Senate Committee on the Judiciary, who argued that it is socially desirable to outlaw "yellow dog contracts" but that this cannot be done under the decisions of the Supreme Court.

"In our opinion, this form of agreement deprives employees of the right of free association with their fellows, and takes away from them the opportunity to deal on a basis of equality with those by whom they are employed."

"Yellow dog contracts" represent an overreaching by anti-union employers. A decade ago, neutral public opinion in this country was strongly against the labor unions. Numerous strikes and the general aggressive attitude of the unions accounted for much of this feeling, but probably still more damaging were the slogans "Open Shop" and "American Plan."

The great reduction in the number of strikes and the attitude of the unions<sup>28</sup> has allayed the fears of the neutrals, and the "Yellow Dog" slogan has put the employers on the defensive. There is nothing "open" or "American" about contracts which deny employees the right to belong to labor unions and furnish an excuse for injunctions to prevent attempts at union organization. The "yellow dog contract" has taken all popular appeal from the open shop.

Walter Gordon Merritt, counsel of the League for Industrial Rights, who has argued and won more cases for employers than any other lawyer, warned employers more than ten years ago that this would be the inevitable result of the use of "yellow dog contracts."

"To tell a red-blooded citizen he cannot join a union while society holds that unions are lawful and useful, but whets the desire to join and creates a spirit of sullen hostility which but

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<sup>28</sup>Three conservative members of the House, Representatives Michener, Nelson (Maine) and Yates, cited the conservative attitude of the American Federation of Labor as a reason for their support of anti-injunction legislation. Congressman Nelson, a member of the Fish Committee, which investigated Communistic activities, praised the American Federation of Labor as being the principal factor in neutralizing Communistic propaganda in this country.

waits Der Tag to join the enemies of existing institutions."<sup>29</sup>

The overwhelming majority by which the anti-injunction bill was passed is evidence that "Der Tag" has come—not for the enemies of existing institutions but for enemies of this instrument of oppression.

The provision of the new act that "yellow dog contracts" shall not furnish the basis for any legal or equitable relief in the federal courts will, of course, be attacked as unconstitutional. A strong case can be made for this view under the *Coppage* and *Hitchman Coal and Coke Company* decisions,<sup>30</sup> but these were rendered before Congress declared "yellow dog contracts" to be against public policy and before it was realized that through this means employers could use the courts to destroy labor unions. It is unthinkable that when the issue is squarely presented the United States Supreme Court will fail to take cognizance of the almost undivided public opinion of the country which condemns "yellow dog contracts" as violative of "the interests of justice and fair dealing."<sup>31</sup>

The restrictions on injunctions reflect likewise the trend of informed public opinion. Lawyers in general have been strongly prejudiced against anti-injunction legislation, but those who have studied this question from a public point of view have nearly all reached the same conclusion as laymen who have made such studies—that restrictions are essential. Both the Democratic and Republican national platforms of 1928 promised legislation to prevent the abuse of injunctions in labor disputes. Congressional investigations have repeatedly established the need for action. While fewer injunctions have been issued in recent years (because there have been fewer strikes), some of the most extreme ever issued have come from federal courts within the past six years.<sup>32</sup>

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<sup>29</sup>Merritt, *Public Policy and Anti-Union Contracts*, (1920) 2 *Law and Labor* 166.

<sup>30</sup>*Coppage v. Kansas*, (1915) 236 U. S. 1, 35 Sup. Ct. 240, 59 L. Ed. 441; *Hitchman Coal and Coke Company v. Mitchell*, (1917) 245 U. S. 229, 38 Sup. Ct. 65, 62 L. Ed. 260.

<sup>31</sup>Quoted from a speech of Senator Borah on March 1, 1932. Able and exhaustive speeches on those sections of the anti-injunction act dealing with "yellow dog contracts" were made by Senator Walsh (Montana) on February 25 and by Senator Wagner on February 29.

<sup>32</sup>Among these are *Indianapolis Street Railway Co. v. Armstrong*, Dist., Ind., July 3, 1926; *Pittsburgh Terminal Coal Corp. v. United Mine Workers*, West Dist. Pa., Oct. 11, 1927, 9 *Law and Labor* 267, 311; *Clarkson Coal Mining Co. v. United Mine Workers*, (D.C. Ohio, 1927) 23 F. (2d) 208; *Bedford Cut Stone Co. v. Journeymen Stone Cutters*, (C.C.A.

Representative James M. Beck said, in opposing the anti-injunction bill, that Congress was passing this measure because it has become tired of having this subject come up session after session. Senator Johnson more truly expressed the view of the overwhelming majority of the members who voted for this bill in this brief statement:

"I recognize the difficulties in the way ultimately of having it [the anti-injunction bill] administered as we would like to have it; but, sir, if it is nothing more than a gesture by the United States Senate, if it is nothing more than an endeavor as a deterrent to a United States court, let us pass this bill at least and put ourselves on record as against the inhuman and outrageous injunctions that have been granted in the past against workingmen."

A strong case can be made for barring injunctions in labor disputes altogether.<sup>33</sup> They have proved of doubtful value in preserving law and order. As frequently as not, they have been disappointing to employers. They have been a source of extreme bitterness and discontent, and, more than any other factor, have been responsible for the widespread conviction among workingmen that the courts are the allies of employers.

The anti-injunction act does not attempt to destroy injunctions. What it aims to do is to prevent employers from gaining through injunctions an unfair advantage in labor disputes. It seeks to keep the courts from interfering when ordinary law-enforcing methods are adequate, and to compel them to give consideration to the probable effects of the orders they are asked to issue. It aims to give the defendants a fair opportunity to present their side of the case and requires the courts to weigh carefully the testimony. It makes the right of appeal really effective and accords trial by jury to persons accused of violations.

These and other restrictions upon injunctions in this act are aimed at practices which have made possible resort to the courts to defeat labor. They represent modifications of rules and procedure which, while proper enough in ordinary equitable actions, have actually worked out very unfairly in labor cases. There is

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7th Cir. 1925) 9 F. (2d) 40, (1927) 274 U. S. 37, 47 Sup. Ct. 522, 71 L. Ed. 916; *Alco-Zander Co. v. Amalgamated Clothing Workers*, (D.C. Pa. 1929) 35 F. (2d) 203; *N. Y. Trust Co. v. Amalgamated Assoc.*, East Dist., Ia., July 9, 1929; *U. S. Gypsum Co. v. Heslop*, (D.C. Ia. 1930) 39 F. (2d) 228.

<sup>33</sup>On the practical results of injunctions in labor disputes, consult: *McCracken, Strike Injunctions in the New South*; *Pepper, Injunctions in Labor Disputes*, (1924) 49 Amer. Bar Ass'n Rep. 174-180; and the author's *The Government in Labor Disputes* 111-133, and *Social Consequences of the Use of Injunctions in Labor Disputes*, (1930) 24 Ill. Law Rev. 772-785.

nothing revolutionary in these modifications, but they represent the most comprehensive and concrete attempt yet made to prevent the misuse of injunctions.

This federal legislation, of course, will be supplemented by the states, where the great majority of injunctions in labor cases are issued. Passage of the Norris-La Guardia bill is certain to prove a powerful stimulus. A model state anti-injunction bill adapted from the federal bill was offered in many legislatures in 1931 and was passed in toto in one state (Wisconsin).<sup>34</sup> Five states already have laws against "yellow dog contracts;" four either forbid or greatly restrict the issuance of *ex parte* temporary restraining orders; five go at least part way in according the right of jury trial in contempt cases.<sup>35</sup> The federal bill was crucial, and, now that it has been enacted into law, great progress in state anti-injunction legislation may confidently be expected.

Contests in the courts over construction and constitutionality are inevitable. There are some obscurities in the bill, particularly in amendments which were offered from the floor, but the general intent of Congress is clear and the great majority of the provisions do not require construction. The new act is not a magna charta nor a comprehensive labor code, but it is a practical measure which will put an end to "yellow dog contracts" and to at least the most serious abuses of injunctions.

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<sup>34</sup>The so-called model state anti-injunction bill was drafted by Nathan Greene, co-author of Frankfurter and Greene, *The Labor Injunction*, and has been published and promoted by the National Committee on Labor Injunctions, 100 Fifth Ave., New York. This bill, however, has never been given approval by the American Federation of Labor.

The Wisconsin law incorporating the model state anti-injunction bill with some additions is Wis. Laws 1931, ch. 376.

<sup>35</sup>States having "anti-yellow dog" laws are Ariz. Laws 1931, ch. 19; Colo. Laws 1931, ch. 112; Ohio, Laws 1931, p. 562; Or. Laws 1931, ch. 247; Wis. Laws 1929, ch. 129. *Ex parte* temporary restraining orders are prohibited or restricted in Minn. Laws 1929, ch. 260; New York, Laws 1930, ch. 378; Pa. Laws 1931, Act. 310; Wis. Stats. 1931, sec. 133.07 (2). Jury trial in certain classes of contempt cases under injunctions in labor disputes are N. J., Laws 1925, ch. 169; Okla. const. art. II, sec. 25 and Okla. Rev. L. 1909, sec. 2229; Pa. Laws 1931, Act 311; Utah, Laws 1917, ch. 68, sec. 5; Wis. Laws 1931, sec. 113.07 (4).