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A federal system of government, by necessity, is engaged in continuing problems of adjusting and reappraising the relative jurisdictions of local and national power. Never simple, this adjustment in the United States has nevertheless been accomplished, until now, in an atmosphere where we could "afford" economic policies often characterized by guesswork, social irresponsibility, fragmentation, and even social invalidity. The green years, however, have passed. It would now seem that our complex and interdependent industrial society served by free business and free trade unions deserves, and indeed requires, a national labor policy. We have approached such a policy before, and some have considered it clearly established. Recent jurisdictional developments in the field of labor relations, however, have upset these premature assumptions and have clearly revealed the inadequacies of our present labor policy.

## I. THE ORIGINAL DEVELOPMENT

In contemplation of law collective bargaining, or more precisely trade unions, moved from a criminal conspiracy classification applied in the famous *Cordwainers*[1] case to that of a legitimate economic association[2] with additional rights of union security being permitted primarily on a state-by-state basis. It was not until the interpretations[3] of the Sherman Antitrust Act[4] provided the statutory basis for the issuance of federal injunctions and the

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1 Case of the Philadelphia Cordwainers, 3 COMMONS & GILMORE, DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY 59 (Philadelphia Mayor's Ct. 1806).

2 Commonwealth v. Hunt, 45 Mass. (4 Met.) 111 (1842). See also Nelles, *Commonwealth v. Hunt*, 32 COLUM. L. REV. 1128 (1932).

3 United States v. Debs, 64 Fed. 724 (C.C.N.D. Ill. 1894) (injunction issued), *appeal dismissed*, 158 U.S. 564 (1895). Loewe v. Lawlor, 208 U.S. 274 (1908) (damages allowed).

4 26 Stat. 209 (1890), 15 U.S.C. § 1 (1952).

assessment of treble damages in labor disputes, however, that a federal pattern of a modern law of unions developed. In an attempt to limit such injunctions—abortive because the federal courts misconstrued its provisions[5]—the Clayton Antitrust Act[6] was enacted, announcing for the first time a limited national legislative policy for labor generally.[7]

While it is mild doctrine today, the 1914 policy of the Clayton Act was an important departure from what had been considered the correct treatment of trade unions. For the first time since the period immediately following the Civil War, Congress recognized a distinction between property and men, stating that "the labor of a human being is not a commodity or article of commerce."[8] However, the importance of this legislative determination for present purposes is not in its content alone, but rather, in the fact that here was a national finding by the federal legislature not confined to any particular group or class of workers.

From their beginning the 1930's brought about a vigorous attempt to establish a broad national labor policy. State efforts in the 1920's had proved as unable to build strong trade unions as they were to prove unable to feed the starving in the 1930's. Accordingly, in each case, the people turned to the federal government.

After the electric-like shocks of depression forever banished from the national mind the peculiar societal illusions of the 1920's, a national labor policy was firmly announced in the National Industrial Recovery Act.[9] The famous pronouncement in section 7[10] of the legal right of employees to organize was in no way affected by the constitutional repugnance of other provisions of the act. It will be recalled that the same concept was enacted in the National Labor Relations Act (Wagner Act),[11] again as section 7.[12] With the establishment of the constitutionality of the Wagner Act in the *Jones & Laughlin Steel* case,[13] the United States at last had a firm national labor relations policy. Soon thereafter the concept of a national labor policy, first applied to labor relations, was extended to labor standards as well, by the enactment of the Fair Labor Standards Act of 1938.[14]

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5 The Clayton Act § 20, 38 Stat. 738 (1914), 29 U.S.C. § 52 (1952), did not prevent courts from issuing injunctions in labor disputes to restrain actions deemed illegal. Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921). As observed in United States v. Hutcheson, 312 U.S. 219, 229-31 (1941), agitation subsequent to the *Duplex* decision caused Congress to enact the Norris-LaGuardia Act, 47 Stat. 70 (1932), 29 U.S.C. § 101 (1952), which removed the fetters upon trade union activities resulting from the judicial construction and application of § 20 of the Clayton Act. Thus Congress determined that the intent of § 20, to limit the use of injunctions in labor disputes, had been nullified by court decision therefore necessitating corrective legislation. See H.R. REP. No. 669, 72d Cong., 1st Sess. 3 (1931).

6 38 Stat. 731 (1914), 15 U.S.C. § 12 (1952).

7 38 Stat. 731 (1914), 15 U.S.C. § 17 (1952). See also United States v. Hutcheson, 312 U.S. 219, 231 (1941).

8 Clayton Act § 6, 38 Stat. 731 (1914), 15 U.S.C. § 17 (1952).

9 48 Stat. 195 (1933).

10 48 Stat. 198-99 (1933).

11 49 Stat. 449 (1935), 29 U.S.C. § 151 (1952).

12 49 Stat. 452 (1935), 29 U.S.C. § 157 (1952).

13 Five cases decided April 12, 1937, upheld the constitutionality of the National Labor Relations Act. They were led by NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

14 52 Stat. 1060 (1938), 29 U.S.C. § 201 (1952).

Enforcement of the Wagner Act by the National Labor Relations Board rested from the beginning on the assumption that there could be either one or forty-eight labor relations policies but not both, and the NLRB noted that Congress had pre-empted control of labor relations both in interstate commerce as well as in industries "affecting" interstate commerce. The courts agreed with the Board that Congress had intended, and indeed had the right, to legislate such control of labor relations and that, once done, Congress' purpose could not be defeated by divergent state laws. This basic position is not only the most workable, it is the only position consonant with the concept of a federal system. Denial of this thesis implies a partial return to the monumental fragmentation of the Articles of Confederation.

## II. Federal Supremacy

The nature of the federal system and the place of the Constitution within it are explained in Article VI of the Federal Constitution. It will be recalled that this article is not only decisive but relatively definitive: "This Constitution, and the laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges of every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." From Article VI flows the doctrine of pre-emption, to wit: if Congress has constitutionally occupied a given field of regulation, the jurisdiction of the federal government is thereby exclusive, thus precluding the states from acting within the same area. As the doctrine of pre-emption developed, only one major exception was thought to apply. Where Congress specifically permitted state action in an area it had otherwise occupied, pre-emption by the federal government was to the same degree qualified.

The Wagner and Taft-Hartley Acts[15] were, of course, monumental assertions of federal jurisdiction over the field of labor relations. In the second enactment, Congress, in section 10(a) premised: "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice [enumerated in section 8] affecting commerce. *This power shall not be affected by any other means of adjustment or prevention that has been or may be established by* agreement, *law* or otherwise. . . ."[16] (Emphasis added.)

The exclusive character of federal pre-emption in the field of labor relations is emphasized by the provision in section 10(a) allowing the NLRB to cede jurisdiction to state agencies "unless the provision of the State or Territorial statute applicable . . . is inconsistent with the corresponding provisions of this [act]."[17] It is significant to note that no agreement of cession to a state agency has been made because no state law has been found to have the requisite consistency with the federal act.

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15 Labor Management Relations Act, 61 Stat. 136 (1947), 29 U.S.C. § 141 (1952).

16 61 Stat. 146 (1947), 29 U.S.C. § 160 (1952).

17 *Ibid.*

There is, however, in one area a clear statutory cession of jurisdiction to the states. This area is the vital field of union security.[18] Section 8(a)(3)[19] of the federal act outlaws the "closed shop" but permits the modified form of union security available in the "union shop." In section 14(b),[20] however, final determination of the right to the "union shop" is ceded to the states and territories. The law in nineteen states prohibiting the "union shop" — the so-called "Right-To-Work" laws — are valid in interstate industries *only* by reason of section 14(b) of the federal statute; they have no independent validity. There can be no question that the repeal of section 14(b) would immediately reduce such state enactments to intrastate effectiveness only.

Another factor in section 14(b) requires notice in the context of this discussion. The cession contained in that section is made not only to the States, but to the territories as well. Since territories are creatures of the federal government, it can scarcely be maintained that they have some "sovereignty" or inherent rights against the federal power. The day has not yet arrived when the United States must face, in addition to the cronic tenth-amendment problem of "States' Rights," a new issue of "Territories' Rights." Accordingly, it can be inferred that section 14(b) represents a voluntary decision of the 80th Congress, without respect to recognition of any reserved states' rights in interstate labor relations that might possibly be required by the ninth or tenth amendments.

One further point must be made on this controversial section of the Taft-Hartley Act. The conclusion that Congress has determined to leave the issue of union security in interstate commerce completely to local control is, at best, a half-truth. By the cession of section 14(b), the states are given the negative power only to *prohibit,* and not the power to *promote* actively, the various forms of union security. It is only where the state laws prohibit union security that they prevail over the federal act. In New York, for example, where the closed shop is permitted in intrastate commerce,[21] federal, rather than the state law, obtains as to interstate commerce. By granting the states power only to eliminate this form of union security in interstate commerce, Congress has released a very limited legislative power to the states.

## III. Exclusive Federal Jurisdiction

One would readily assume that the vast scope of federal authority in labor-management relations under the National Labor Relations Act of 1935 and the Labor Management Relations Act of 1947 would be definitely comprehensive and exclusive. There have been assertions of the Board and the courts under the language of the National Labor Relations Act, originally and as amended, that such is the law. Together with these assertions, however, there have been qualifications, limitations and nice distinctions which have

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18 For a discussion of "Right-to-Work" laws and their constitutionality, see Cosgrove, *Iowa's Labor Law,* 38 Iowa L. Rev. 65 (1952).

19 61 Stat. 140-41 (1947), 29 U.S.C. § 158(a)(3) (1952).

20 61 Stat. 151 (1947), 29 U.S.C. § 164(b) (1952).

21 N.Y. Labor Law § 704(5). See also Williams v. Quill, 277 N.Y. 1, 12 N.E.2d 547 (1938).

succeeded in obfuscating both the intent of Congress and the practice of the Board. Three recent decisions of the United States Supreme Court have crystallized the problem without aiding its solution. Particular notice will be taken of them later in this development.

Perhaps the best statement of the rule that the federal act's pre-emption is exclusive was contained in the unanimous opinion of *Garner v. Teamsters Union.*[22] In that case a lower court's injunction against peaceful picketing of a warehouse dock had been vacated by the Supreme Court of Pennsylvania. Of the twenty-four employees involved in the picketing, only four were members of the union involved. The purpose of the picketing was to obtain a union security agreement. Apparently the employer could have asked relief of the NLRB but he chose the state court instead. On appeal to the United States Supreme Court, two arguments were advanced in favor of the state court injunction. The first was that the state court retained jurisdiction to issue the injunction because the federal power had not been exclusively exercised in this situation. To this contention the Supreme Court agreed that "the state still may exercise its historic powers over such traditionally local matters as public safety and order and the use of streets and highways."[23] But nevertheless the Court recognized the exclusive character of federal jurisdiction in this area by announcing:

> Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these . . . conflicts likely to arise from a *variety of local procedures and attitudes toward labor controversies.*[24] (Emphasis added.)

The second argument advanced was that since the federal act protected only public rights, state remedies must be available to protect private rights. The Court answered that "even if . . . distinctly private rights were enforced by the state authorities, it does not follow that the state and federal authorities may supplement each other in cases of this type. The conflict lies in remedies not rights. . . . When two separate remedies are brought to bear on the same activity, a conflict is inevitable."[25] Not willing to sustain the conflict, the Court affirmed the state high court in vacating the order.

In summing up its grounds for decision, the Supreme Court stated the rule well:

> We conclude that when federal power constitutionally is exerted for the protection of public and private interests, or both, it becomes the supreme law of the land and cannot be curtailed, circumvented or extended by a state procedure merely because it will apply some doctrine of private right.[26]

The *Guss* series of cases[27] reasserted the exclusiveness of the federal pre-emption of labor relations under the federal act's full use of the Commerce Clause, but they raised the new problem of jurisdiction when the NLRB de-

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22 346 U.S. 485 (1953).

23 *Id.* at 488.

24 *Id.* at 490.

25 *Id.* at 498-99.

26 *Id.* at 500-01.

clined to act. In the chief case, the employer provided photographic equipment to the United States Air Force, specifically to air force bases both within and without the state of residence. This business came within the statutory jurisdiction of the NLRB but not within its self-imposed jurisdictional standards. Consequently, the NLRB declined to exercise jurisdiction when the United Steelworkers of America filed an application for certification. The union then filed its application with the Utah State Labor Relations Board which accepted jurisdiction and was upheld in so doing by the Utah Supreme Court. No cession agreement under section 10 existed between the NLRB and the state of Utah. Thus it was clear that *if* there had not been an NLRB declination, the State Board's action would be precluded under the *Garner*[28] rule.[29]

Although *Guss* could be distinguished from *Garner* in that no determination by the NLRB had occurred in the latter case, the United States Supreme Court reversed the Supreme Court of Utah, announcing through Chief Justice Warren that "since Congress' power in the area of commerce among the states is plenary, its judgment must be respected whatever policy objections there may be to creation of a no-man's-land."[30] The problem was stated even more succinctly in a Senate report summarizing the decisions: "In these cases the situation seems to be that the Board will not assert jurisdiction, the states are forbidden to do so, and the injured parties are deprived of any forum in which to seek relief."[31] While this may be an overstatement of the case, it does approximate the problem. The "easy" answer to this question is supplementary state-federal jurisdiction. However, the answer that will preserve a national labor policy is either a complete federal remedial system, or at least a congressional determination of the proper remedies that can issue from each source, state or federal.

A somewhat analogous problem is presented by the fact that the majority of the states have no labor-relations laws providing for peaceful determination of bargaining rights or representation in intrastate commerce. In thousands of such instances, workers desiring organization have been forced to strike or suffer a lockout to support their demand for collective action. In some cases they have prevailed and gained recognition. In other instances, however, they have had their unity destroyed by economic pressure and have either returned to their jobs on the best terms available as a result of individual "bargaining" with the employer or have had to seek a livelihood elsewhere. The intrastate business involved often may "affect" interstate commerce, but the Board's self-imposed jurisdictional standards generally leave such workers without those remedies which are federally exclusive.

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27 Guss v. Utah Labor Relations Board, 353 U.S. 1 (1957); Amalgamated Meat Cutters v. Fairlawn Meats, Inc., 353 U.S. 20 (1957); San Diego Building Trade Council v. Garmon, 353 U.S. 26 (1957). These three cases were all decided the same day, and the majority opinions are essentially similar. The dissent of Mr. Justice Burton, in which Mr. Justice Clark joined, is found in the Guss case but is applicable to all three cases.

28 Garner v. Teamsters Union, 346 U.S. 485 (1953).

29 Guss v. Utah Labor Relations Board, 353 U.S. 1, 6 (1957).

30 *Id.* at 11.

31 S. REP. No. 1211, 83d Cong., 2d Sess. 18 (1954).

While the *Guss* decisions lack utopian clarity as to what should be done to remedy this problem, they were judicial invitations for legislation. This invitation was based upon the insight that a national labor relations policy had merit in logic. The Court did not feel that the failure of congressional or agency action would justify the interposition of judicial authority — either state or federal — to fill the vacuum. Such a solution would amount to a denial of the separation of powers concept and ultimately constitute an attack on the federal system itself.

## IV. The Departure to Conflict

The relationship of the Taft-Hartley Act to state judicial authority and its limiting effect on state jurisdiction as established by the *Guss* cases was seriously revised during the 1957-58 term of the Supreme Court. Three decisions spelled out important exceptions to the pre-emption doctrine, partially destroying it.

### *A. The First Case*

The first of the three decisions in importance grew out of a strike by members of the United Automobile Workers at the Decatur, Alabama, division of the Calumet and Hecla Consolidated Copper Company, in 1951.[32] From July 18th to September 24th of that year, the UAW maintained a picket line in the street before the plant. The street was the normal means of ingress and egress. Plaintiff's amended complaint alleged that pickets stood or walked in a compact circle across the entire street and thereby prevented anyone from entering except for salaried workers who were allowed to pass.

One Paul S. Russell, employed at the plant as an electrician, was neither a member of the union nor had he applied for membership. In fact, he was a board member of the National Right-To-Work Committee, a group attempting to bring about enactment of state and federal laws which would proscribe the union security in collective bargaining agreements. It was alleged and subsequently found that Russell attempted to cross the picket line to return to work and found his way blocked by picketing workers. Someone among the pickets "took hold" of his car. Threats of harm to Russell's person and damage to his property were allegedly made. After being thus delayed, Russell returned to his home. While the strike continued, Russell initiated a back-to-work movement. For five weeks he solicited signatures on a petition urging re-opening of the plant and a return to work. His petition was presented to the company on August 20th; on August 22nd the plant was reopened with many police officers in attendance.

An action was filed in the Circuit Court of Morgan County, Alabama, by Russell against the UAW. He alleged that he had been kept from work, as noted, and in an amended complaint, added that the union and its agent had unlawfully conspired with others to wilfully and maliciously cause him to

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32 UAW v. Russell, 356 U.S. 634 (1958).

33 Goldberg, *Labor Loses Out*, 3 AFL-CIO Industrial Union Dep't Digest No. 4, 119, 123 (1958).

lose wages. For this he demanded a judgment of $50,000 which included damages for both loss of wages and mental anguish, as well as for punitive damages.

To Russell's complaint, the defendant union interposed a plea to the jurisdiction on the grounds that the NLRB's jurisdiction excluded that of the state court. The amended complaint had specifically charged a violation of section 8(b)(1)(A) of the federal act. When Russell demurred to this plea he was overruled and the issue was presented to the Supreme Court of Alabama. This tribunal reversed the trial court on the question.[34] Accordingly, on remand the union's plea to the jurisdiction was again demurred to, but this time the demurrer was upheld. The case was then tried before a jury which returned a verdict of $10,000, apparently representing $500 in lost wages and $9,500 punitive damages.[35] This verdict was affirmed by the Alabama Supreme Court, holding that there had been proved a tort of wrongful interference with a lawful occupation.[36] Certiorari was granted by the Supreme Court of the United States because of the vital jurisdictional question.[37]

The central issue before the Supreme Court was, of course, whether federal (NLRB) jurisdiction was exclusive. Mr. Justice Burton delivered the opinion of the Court, from which Chief Justice Warren and Justice Douglas dissented.

The Court affirmed the decision of the Alabama Supreme Court primarily on the basis of its decision in *United Construction Workers v. Laburnum Construction Corp.*,[38] which held generally that the NLRB did not have exclusive jurisdiction over a common law tort action so as to exclude a state court's jurisdiction in this area, despite the fact that the conduct complained of was also an unfair labor practice in contemplation of the federal act.

Since it formed the basis of decision in *Russell,* the *Laburnum* decision merits discussion. In that case the employer contracted to do certain construction work on some mining property, the work to be performed by AFL building tradesmen with whom the company had a collective bargaining agreement. The United Construction Worker's representative, despite the fact that the UCW had no members on the job, demanded sole bargaining rights for the UCW, an arm of the United Mine Workers of America. When this was refused, the representative re-appeared some days later with an armed mob which threatened the workers and closed the job. The Laburnum Corporation sued the UCW and recovered profits on the contract lost as a result of the union's action, as well as punitive damages. The United States Supreme Court affirmed.

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34 Russell v. UAW, 258 Ala. 615, 64 So. 2d 384 (1953).

35 Russell was paid $100 per week and was prevented from working for five weeks, Russell v. UAW, 356 U.S. 634, 652 (1958).

36 UAW, v. Russell, 264 Ala. 456, 88 So. 2d 175 (1956).

37 UAW v. Russell, 352 U.S. 915 (1956).

38 347 U.S. 656 (1954), *affirming* 194 Va. 872, 75 S.E.2d 694 (1953).

The precedent of the *Garner* case that a state court had no jurisdiction to enjoin picketing, was distinguished by the Court in the *Laburnum* case as follows: "In the *Garner* case, Congress had provided a federal administrative remedy, supplemented by judicial procedure for its enforcement, with which the state injunctive procedure conflicted. Here Congress has neither provided nor suggested any substitute for the traditional state court procedure for collecting damages for injuries caused by tortious conduct."[39] Justice Jackson did not participate in this decision and Justice Douglas dissented with Justice Black joining him. The dissent read in part: "A state court or a state labor board could not enjoin that conduct, as *Garner v. Teamsters Union* . . . teaches. And I think like reasons preclude a State from applying other sanctions to it."[40]

Returning to *Russell,* the majority opinion by Justice Burton held that the common law tort action can be adjudicated by a state court even though activities constituting the tort are also covered by the federal act. He compared the cases with *Laburnum* in that each involved a state court's award of compensatory and punitive damages against a trade union for tortious conduct which is also "assumed" to be an unfair labor practice. The opinion admitted that since the Board is "authorized, under section 10(c) of the Federal Act,[41] to award back pay under certain circumstances,"[42] there is a distinction between the two cases arising out of the fact that the *Russell* case was a suit for back wages while the *Laburnum* case was a suit for lost profits. But the opinion continued, "This section is far from being an express grant of exclusive jurisdiction superceding common-law actions, by either an employer or an employee, to recover damages caused by the tortious conduct of a union."[43]

The Court's point was that common law tort actions in state forums may provide punitive damages where the federal remedy would not, and that this justified their availability to those who would bring such actions. The federal remedy was, therefore, not intended to be exclusive. As to compensatory damages, the Court admitted that "there is a possibility that both the Board and the state courts have jurisdiction to award lost pay. However, that possibility does not create the kind of 'conflict' of remedies"[44] proscribed

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39 *Id.* at 663-64.

40 *Id.* at 670.

41 Section 10 of the Taft-Hartley Act provides:
> If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint was engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatment of employees with or without back pay, as will effectuate the policies of this Act: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination. . . . 61 Stat. 147, 29 U.S.C. § 160(c) (1952).

42 UAW v. Russell, 356 U.S. 634, 641 (1958).

43 *Id.* at 642.

44 *Id.* at 644.

since a completely identical remedy did not appear under the federal act. The Court was persuaded by the fact that the NLRB's awards of damages were discretionary.

The dissent by the Chief Justice, in which Justice Douglas joined, was long and carefully considered. After reviewing the law, the dissent distinguished the *Laburnum* decision from *Russell* on the facts in three respects. The dissent first pointed out that *Laburnum* was an action for damages resulting from interference with a contractual relationship between the employer and the parties ordering the construction work, and that the unfair labor practice was involved "only fortuitously."[45] In *Russell,* the plaintiff recovered damages for interference with his "right to work during a strike,"[46] a right protected by Section 8(b)(1)(A) of the Taft-Hartley Act. Here, in other words, the unfair labor practice *per se* was the gist of the complaint.

Secondly, the dissent asserted, *Laburnum* involved a "stranger's" interference, the UCW having not a single member on the job, whereas in *Russell* the UAW was the certified bargaining agent and the plaintiff's loss occurred incident to a strike to support economic demands. The Chief Justice argued that a continuing union-employer relationship was to be expected and, he wrote elsewhere in the opinion, that this should weigh crucially against permitting the continuing bitterness engendered by prolonged litigation and the allowance of punitive damages by state courts.

The dissent's final distinction was that the recovery of damages by the single plaintiff in the *Laburnum* situation would presumably terminate the litigation. In *Russell,* the Chief Justice noted, it would be only the beginning. He observed that, as of decision day, twenty-nine other employees of the struck firm had filed damage actions, in each case for $50,000.[47] The dissent further observed that, Alabama law appears to permit these multiple actions.[48] Thus as a result of this strike, the union was faced with actions demanding a total of $1,500,000, plus the legal expenses involved in defending them individually.

In support of his thesis that the states do not have power to award damages on the *Russell* facts, the Chief Justice referred to the legislative history of the federal act, noting Sentator Taft's and others' frequent references to the power retained in the states to act against criminal actions, but by contrast, the absence of references to any power retained by the states to award civil damages for harm arising from such conduct.[49] He pointed out that there is no issue in the *Russell* situation as to the states' admitted power to award damages for physical injury. He then pinpointed the real area of conflict in the jurisdictional question by posing the following social issue: "The unprovoked inflicting of personal injuries during a period of labor unrest is neither to be expected nor to be justified, but *economic loss inevitably attends*

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45 *Id.* at 655.

46 *Ibid.*

47 *Id.* at 656-58.

48 Alabama Power Co. v. Goodwin, 210 Ala. 657, 99 So. 158 (1924).

49 UAW v. Russell, 356 U.S. 634, 648 (1958).

*work stoppages.*"[50] (Emphasis added.) The central technical issue of a national labor policy is observed by his dissent in this passage:

> Even if we assume that the Board had no authority to award respondent back pay in the circumstances of this case, the existence of such a gap in the remedial schedule of federal legislation is no license for the States to fashion correctives.[51]

The Chief Justice's views are reflective of a judgment more valid than that of the majority. The effect of allowing the state courts to award compensation and to fix penalties for this and similar conduct will upset the pattern of rights and remedies established by Congress and will frustrate the very policies the federal act seeks to implement.

Relative to the contributions made by the views of local judges to industrial peace and their effect on the central issue of a national labor policy, the instructions of the trial judge to the jury, in the *Russell* case, are worthy of note. He charged, *inter alia,* on the question of punitive damages as follows:

> If, in this case, after considering all the evidence and under the instructions I have given you, you are reasonably satisfied that at the time complained of and in doing the acts charged, the defendant . . . actuated by malice and actuated by ill-will, committed the unlawful and wrongful act alleged, you, in addition to the actual damages, if any, may give damages for the sake of example and by way of punishing the defendant or *for making the defendant smart,* not exceeding in all the amount claimed in the complaint.[52] (Emphasis added.)

As Chief Justice Warren caustically observed in his dissent in *Russell:* "The parties to labor controversies have enough devices for making one another 'smart' without this Court putting its stamp of approval on another. I can conceive of nothing more disruptive of congenial labor relations than arming employees, union and management with the potential for 'smarting' one another with exemplary damages."[53]

### *B. The Second Case*

Marcons Gonzales, a marine machinist and a member of Local Lodge 68 of the International Association of Machinists, in California, was expelled from the union by an act which he claimed was wrongful and in violation of his rights under the union's constitution and by-laws. Accordingly, he brought suit for reinstatement, loss of wages, and damages for mental suffering, and was awarded this relief. Under established California law, union membership constituted a contract between the member and the organization, and reinstatement was in order. Affirmed in the state court,[54] the United States Supreme Court granted certiorari because the case raised another important question regarding the jurisdictional extent of the federal act.[55]

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50 *Id.* at 649.

51 *Id.* at 650.

52 *Id.* at 638.

53 *Id.* at 653.

54 Gonzales v. International Ass'n of Machinists, 142 Cal. App. 2d 207, 298 P.2d 92 (1956).

55 International Ass'n of Machinists v. Gonzales, 356 U.S. 617, 618 (1958).

Affirming the award, the opinion of the Supreme Court of the United States by Justice Frankfurter waxed eloquently that:

> The statutory implications concerning what has been taken from the States and what has been left to them are of a Delphic nature, to be translated into concreteness by the process of litigation elucidation.[56]

The process of litigation here, in terms of the *Gonzales* case, has resulted in a decision for dual authority. This conclusion is based upon the view of the majority opinion that "the protection of union members in their rights as members from arbitrary conduct by unions and union officers has not been undertaken by federal law, and indeed the assertion of any such power has been expressly denied,"[57] (citing section 8(b)(1) of the act which gives unions the authority to establish rules for union membership.) While this may be true narrowly, it is also true that the act does expressly assert some jurisdiction in this area by specifically forbidding the employer to deny employment for nonmembership in a union, where, in a union security situation, membership is not available to all equally at the same dues and initiation fee.[58] The gist of the decision is that even if the California action does constitute interference with federal jurisdiction, this must be tolerated.

The dissent, again by Chief Justice Warren joined by Justice Douglas, could not refrain from referring back to the eloquence in the majority opinion of Justice Frankfurter, stating: "And if elucidating litigation was required to dispel the Delphic nature of [the rule] the requisite concreteness has been adequately supplied."[59] Here, as in *Russell,* the minority asked for a return to the *Garner* rule, distinguished the *Laburnum* case, and pointed out the abrupt departure from the *Guss* line of decisions.[60]

### C. *The Third Case*

In *Youngdahl v. Rainfair, Inc.,*[61] the Court faced a substantially different factual situation. The state court had found extensive picket line violence, intimidation and threats of violence at a firm engaged in interstate commerce and, on this basis, issued an injunction restraining such activities and prohibiting *all* picketing. The Supreme Court announced that the restraints on violence, threats of violence and intimidation were within the province of the state judiciary but overturned the decree banning all picketing on the grounds that this invaded the NLRB's exclusive domain. The Court indicated that the entire state injunction would have found affirmation had the record shown the violence to have been so emeshed with the picketing that only a complete ban on collective activity could have restored the peace. This indication thus reaffirmed the original holding made in *Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.,* decided in 1941.[62]

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56 *Id.* at 619.
57 *Id.* at 620.
58 Labor Management Relations Act (Taft-Hartley Act) § 8(a)(3), 61 Stat. 140 (1947), 29 U.S.C. § 158(a)(3) (1952).
59 International Ass'n of Machinists v. Gonzales, 356 U.S. 617, 624 (1958).
60 *Id.* at 624-26.
61 355 U.S. 131 (1957).
62 312 U.S. 287 (1941).

In these cases the Court has employed a theory of divisibility of jurisdiction: that the maintenance of order is a state function which cannot be deprived by the federal power, and on the other hand, that the NLRB jurisdiction is a federal function which cannot be deprived by the states. That these rules have become respectable through vintage is unassailable. The problem is that they solve nothing, but merely recite a truism. Restatement of the problem cannot properly be called its solution. The reality is that a state court can, under these theories, effectively thwart federally-protected rights and consequently national labor policy. It has at least a *prima facia* case for so doing wherever the federal authority fails to exercise jurisdiction.

## V. An Assessment of Present Policy

The majority of the American people accept collective bargaining as a way of industrial life, since they have voted for it repeatedly. Neither national political party has openly questioned the desirability of collective bargaining nor the trade unions which make it possible. It is equally clear, unfortunately, that there are major divisions of opinion on even this basic question in various sections of the country. Two such groupings come to mind immediately

In the Central states, outside of the urban industrial centers, little is known first hand about trade unionism. Even at this late date misconceptions abound. Many people in small towns and rural areas feel that here is something alien, something not quite a proper part of the community or society. This attitude is easily overstated, but it does have a currency, as a vestigial remainder of the day when the trade union was virtually unknown in the rich farm regions and when agriculture was the chief income producer.

In the Southern states, again outside the great urban industrial and port centers, the union is a newcomer, the union organizer an oddity carrying his neolite rather than a carpet bag. Because many unions must be organized almost from scratch in this area, the representative of the union sent in to help the organizing drive is of necessity a man from a distant state. As if these handicaps were not enough, some employers have chosen to resist organization by injecting the inflammatory race issue. Capitalizing on the trade union's avowed espousal of full civil rights, such employers picture the union as primarily an agency for integration.

For the present purpose, the issue is not whether these preconceptions are right or wrong but whether the national labor policy can be implemented and the federally-guaranteed industrial rights can be effectively protected if they are to be measured in terms of local mores applied by local juries and judges.

In sum, the implications of expanded state powers over interstate labor relations in these three decisions just discussed — that is, the power in *Russell* to award damages for economic loss caused by a strike, the power in *Gonzales* to grant damages for wrongful dismissal from a union, and the reaffirmation in *Youngdahl* of the power to enjoin picketing when emeshed with violence — could be reasonably assessed by attempting to extend them logic-

ally. Obvious questions might be whether an employee, denied compensation in an NLRB proceeding can now enter the state court to receive compensatory and puntive damages, or whether an NLRB determination that there had been no discrimination in a union shop dismissal would preclude a recovery of damages for dismissal in the state court.

The queries might also be extended to other federal statutes under reasoning similar to that decisive in the majority opinions in these cases. With these inroads being made into federal pre-emption in labor relations that has traditionally found its source in the Taft-Hartley Act, it may be that the provisions of the Norris-LaGuardia Act depriving federal courts of the injunctive remedy in interstate labor disputes could be re-examined to serve as the basis of the pre-emption doctrine, at least as to the injunctive remedy. If such an argument of pre-emption could be gleaned from the Norris-LaGuardia Act, would these decisions limiting Taft-Hartley pre-emption apply equally as well to limit pre-emption of the injunctive remedy?[63]

Labor relations aside, one wonders whether the jurisdictional theories of these cases might be applied by analogy to give greater control to state commerce commissions over traffic between the states in areas where previously state action was presumed to conflict with the jurisdiction of the Interstate Commerce Commission. Another assessment might be made by taking the concept of concurrent jurisdiction which seems factually to broaden state power in all respects, and applying it to the use of arguments narrowing state jurisdiction in areas where it had previously been presumed to be exclusive. For example, though Congress grants restrictive power to the states over union security, could it be argued that the nature of dual jurisdiction would allow a union to obtain a permanent NLRB blessing of its union shop though such security is later outlawed by the state's Right-to-Work law — on the theory of a "first-come, first-served" jurisdiction? Obviously this could not result, the logical implications of the decisions notwithstanding.

While the answers to the above are sufficiently clear, it is just as clear that the decisions have opened a Pandora's box, the contents of which seriously becloud and may seriously harass labor-management relations.[64]

It is of course too soon to suggest with any certainty what these decisions imply for trade unions and the labor-management relation. It is already obvious, however, that unions will have to assess with utmost care the relation of their programs and actions to state laws and procedures. There is, as the Chief Justice pointed out in his *Russell* dissent, "a very real prospect of staggering punitive damages accumulated through successive actions by

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63 See a situation where such a theory might be advanced in Alabama Highway Express, Inc. v. Teamsters, Local 612, 27 U.S.L. WEEK 2345 (Ala. Jan. 8, 1959), where the state court enjoined Teamster activity because the leasing agreements under which they operated made them not employees, but independent contractors outside the scope of the Taft-Hartley Act. Contrast this decision with the more recent decision of the Supreme Court in Teamsters Union, Local 24 v. Oliver, 27 U.S.L. WEEK 4077 (U.S. Jan. 19, 1959).

64 See Pierce v. Otis Elevator Co., 331 P.2d 481 (Okla. 1958), where the court held on the authority of *Laburnum, Gonzales,* and *Russell* that the state court has jurisdiction to award damages for not only common law, but statutory torts as well, even though they constitute unfair labor practices under the Taft-Hartley Act.

parties injured by members who have succumbed to the emotion that frequently accompanies concerted activities during labor unrest."[65] Elaborating on this, one authority[66] has suggested that the *Russell* decision ". . . might imperil the very right to strike by making bankruptcy the penalty for engaging in this guaranteed, constitutional right."

Commenting on the two cases the *New York Times* asks whether ". . . it is sound public policy to leave open the floodgates to all the state courts to differing interpretations of what are 'unfair labor practices' in interstate commerce and of what the penalties should be for pursuing them. . . ."[67]

From the earliest days two factors were clear in American unions' struggle for existence and recognition: (1) jail sentences and fines against individuals could not prevent the growth of the trade unions and (2) unions required assets, such as strike funds, as well as money for organization, education, research and other activities. From this flowed the thesis that the way to weaken the labor movement was to attack its collective purse. Traditionally this came by way of contempt proceedings based on violations of shot-gun injunctions often issued without notice or hearing.[68] It now appears that since the injunction has been limited so effectively by the Norris-LaGuardia Act, and much of this limitation is still with us albeit the Taft-Hartley Act, another way has been discovered to attack the unions' funds. The device will now be to bring action after action, for punitive damages, in state courts.

That the idea of a national labor policy and law, or the threat to it by these decisions, is more than an abstract one seems clear. Under the *Russell* ruling the power of a union to carry on collective action is seriously impaired. How it is impaired varies from state to state. In some states, the economic loss occasioned by a strike may result in suits for punitive damages; in others, similar suits will not arise because punitive damages are severely restricted or prohibited altogether. Presumably the employer who implements a lock-out will also be subjected to such action where state laws permit. The danger here is the lack of certainty and clarity in the law.

Each and every union must, now, reassess its practices particularly in strike situations. While strikes are relatively infrequent (occurring in about 3% of all collective bargaining situations in 1957),[69] the right to strike is fundamental to the non-slave society. Accordingly, the impact of these decisions on that right will require the closest scrutiny.

That the above is no mere nightmare for the unions is readily seen from the fact above noted, that for the same strike action on which Russell recovered compensatory and punitive damages, separate suits were filed by other individuals for an aggregate sum of $1,500,000 against the UAW.

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65 UAW v. Russell, 356 U.S. 634, 652 (1958).

66 Goldberg, *op. cit. supra* note 33, at 124.

67 N.Y. Times, May 28, 1958, p. 30, col. 2.

68 The classic study of equitable judicial activity in labor disputes up to 1930 is FRANKFURTER & GREENE, THE LABOR INJUNCTION (1930).

69 Bureau of Labor Statistics figures applied in 3 AFL-CIO Collective Bargaining Report No. 11 (1958).

One would have hoped that we were progressing toward a day when the litigious atmosphere of organizing and bargaining would gradually be replaced by a more constructive approach; the day when the "two-sided" rectangular bargaining table might be replaced by a figurative if not physical "round table." Far from speeding the arrival of that happy day, the subject decisions have slowed whatever progress was being made and have invited a course of action that can well prolong and deepen industrial strife in given situations. Little contribution to good labor-management relations is spawned by the burdens, delays and uncertainties of continuing civil litigation.

## VI. The Role of Congress

While attachment of blame for the confusion which now exists in the federal-state jurisdictional equation is irrelevant, determination of the cause for such confusion is vital. In its recent decisions the Court has pointed out the serious problem still existing. Considering the number of exceptions recently made to the pre-emption doctrine, and the narrowing of its previously broad scope, one day the Court must exhaust its refinements. More immediately there is the grave threat to the continued existence of a labor policy national in character. It is by no means clear that the problem will be solved by expanding the NLRB's self-imposed jurisdictional standards quantitatively to cover all interstate business and thus to eliminate the no-man's land in those areas where remedies are exclusively federal.[70] This expansion is no doubt needed to carry out the general purposes of the act, but it offers no solution to the basic qualitative problem of defining what remedies are within the shrinking concept of exclusive federal jurisdiction.

It may be that the *Youngdahl* case and its predecessors need careful study by the Congress in terms of police power vis-a-vis proper union activity. If the law is to be as was held in that case, let it be established by legislation based upon careful investigation. The vital thing is to obtain some degree of certainty and clarity. More important than the issue of protected union activity is the basic issue of whether the federal act, and Board and the courts will implement our labor policy or whether forty-nine independent judiciaries will attempt to do so.

The Congress has a clear duty to decide these issues, and there are signs that the judiciary wishes that this would happen. It is for the national legislature to declare whether the United States is to have a national labor policy or the fragmentized gallimufry of provincial enactments and adjudications appropriate to a peaceful, pastoral society of the 18th Century. Lack of a national labor policy might help to bring us the pastoral society; that it would bring any tolerable "peace" is at best dubious.

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70 The 1954 jurisdictional standards of the NLRB were recently revised to fill the pre-emption vacuum. The 1954 standards for non-retail businesses were changed from $50,000 direct outflow, $500,000 direct inflow, or an indirect outflow and inflow amounting to $1,000,000, to the reduced amount of $50,000 outflow or inflow, direct or indirect. Jurisdiction will now be asserted in retail businesses with a gross yearly volume of $500,000, as compared with a direct inflow of $1,000,000; indirect inflow of $2,000,000; or direct outflow of $100,000 required under the 1954 yardstick. For other changes see N.L.R.B. R-576, 1 CCH Lab. L. Rep. ¶1610 (Oct. 2, 1958).