NOTES AND COMMENTS

LABOR INJUNCTIONS AND JUDGE-MADE LABOR LAW: THE CONTEMPORARY ROLE OF NORRIS-LAGUARDIA*

SUBSTANTIAL changes in federal labor policy since the passage of the Norris-LaGuardia Act [1] in 1932 cast doubt upon the continued vitality of that statute and its underlying policies. Although narrowly framed as a limitation upon the power of federal courts to issue labor injunctions, Norris-LaGuardia represents a far broader policy of circumscribing the judiciary's role in regulating labor-management disputes. But with the enactment of the amended Railway Labor Act in 1934,[2] the National Labor Relations Act in 1935,[3] and the Taft-Hartley Act in 1947,[4] congressional policy appears to have disregarded these aims, since the regulatory framework created under the new acts assigns far-reaching adjudicatory and enforcement responsibilities to the federal courts. Effective enforcement of these later statutes may require the use of injunctive relief in situations where Norris-LaGuardia explicitly prohibits it. Moreover, the presence of unforeseen conflicts or omissions in later statutes may lead courts, now closely associated with the enforcement process, to reassume policy-making functions which Norris-LaGuardia sought to abolish. Similarly, courts enforcing statutes such as the antitrust laws whose regulatory sphere overlaps with the area of labor management relations may attempt to engage in this prohibited formulation of labor policy.

This Comment will attempt to determine the extent to which Norris-LaGuardia has been rendered inoperative by subsequent federal legislation. A prerequisite for measuring the actual degree of conflict is an understanding of the full range of Norris-LaGuardia's policies and the evils it was intended to correct. This analysis will lay the groundwork for analyzing the conflict between Norris-LaGuardia and other apparently inconsistent statutes. Where conflicting policies seem to require the courts to override Norris-LaGuardia in a particular case, the reasons for that decision will be examined carefully in order to determine whether similar conflicts with other statutes will in fact require the same disposition.

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1. 47 Stat. 70 (1932), as amended, 29 U.S.C. §§ 101-15 (1958).
2. 48 Stat. 1185 (1934), as amended, 45 U.S.C. §§ 151-63, 181-88 (1958).
3. 49 Stat. 449 (1935), as amended, 29 U.S.C. §§ 141-68 (1958).
4. Labor Management Relations Act, 61 Stat. 136 (1947), as amended, 29 U.S.C. §§ 141-87 (1958).

THE NORRIS-LAGUARDIA ACT

The Norris-LaGuardia Act embodies policies designed to effect profound changes in the role of the federal government and federal institutions in the regulation of labor disputes. Prior to 1932, federal courts had jurisdiction, mainly in diversity and Sherman Act cases,[5] over a broad range of union activities. Acting without legislative guides, federal judges were inclined to decide labor controversies according to their own predominantly conservative social and political views, and rendered decisions which were generally hostile to the union's use of economic power.[6] Under the prima facie tort doctrine, an intentional injury inflicted through the use of economic pressure was unlawful unless a court found it justified by the self-interest of the defendant union.[7] Moreover, even if the objectives were found to be legitimate, economic pressure could be exerted only through means receiving judicial approbation.[8] The imprecise terms of the Sherman Act furnished another vehicle for restraining union activity, since "restraint of trade" could be found in almost any effective use of economic pressure.[9] Both the tort and Sherman Act doctrines were used to prohibit activities such as secondary boycotts,[10] recognition strikes,[11] make-work practices,[12] and picketing.[13] Attempts to organize nonunion employees were brought within the tort of interference with beneficial contractual relations by judicial protection of the "yellow dog" contract—the

5. Federal courts regulated labor disputes under three heads of original jurisdiction. The first was diversity of citizenship between the opposing parties, under 36 Stat. 1091 (1911), now 28 U.S.C. § 1332 (1958). Before Erie R.R. v. Tompkins, 304 U.S. 64 (1938), federal courts were free to fashion the law applicable to these suits.

The second head was federal question jurisdiction over suits for injunctions under § 16 of the Clayton Act, 38 Stat. 737 (1914), 15 U.S.C. § 26 (1958), against violations of the Sherman Anti-trust Law, 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1-7, 10 (1958).

Federal courts also exercised jurisdiction over labor disputes affecting interstate commerce and the statutes pertaining thereto. See, *e.g.*, *In re* Debs, 158 U.S. 564 (1895).

For a full discussion of federal jurisdiction over labor disputes, see generally FRANKFURTER & GREENE, THE LABOR INJUNCTION 5-17 (1930) [hereinafter cited as FRANKFURTER & GREENE].

6. See WITTE, THE GOVERNMENT IN LABOR DISPUTES 12-45 (1932) [hereinafter cited as WITTE]; FRANKFURTER & GREENE 1-46.

7. See, *e.g.*, Vegelahn v. Guntner, 167 Mass. 92, 44 N.E. 1077 (1896). See also Holmes, *Privilege, Malice and Intent*, 8 HARV. L. REV. 1 (1894).

8. See, *e.g.*, American Steel Foundries v. Tri-City Central Trades Council, 257 U.S. 184 (1921); Atchison, T. & S.F. Ry. v. Gee, 139 Fed. 582, 584 (S.D. Iowa 1905) (no such thing as "peaceful picketing"); Levy & Devaney, Inc. v. International Pocketbook Workers Union, 114 Conn. 319, 158 Atl. 795 (1932).

9. See notes 97-102 *infra* and accompanying text.

10. Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n, 274 U.S. 37 (1927); Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921); Loewe v. Lawlor, 208 U.S. 274 (1908).

11. Alco-Zander Co. v. Amalgamated Clothing Workers, 35 F.2d 203 (E.D. Pa. 1929).

12. United States v. Painters Dist. Council, 44 F.2d 58 (N.D. Ill. 1930), *aff'd*, 284 U.S. 582 (1931); Hopkins v. Oxley Stave Co., 83 Fed. 912 (8th Cir. 1897).

13. American Steel Foundries v. Tri-City Central Trades Council, 257 U.S. 184 (1921).

employee's promise not to join a union, extracted as a condition of employment.[14] Thus, through this often amorphous body of law, the courts themselves undertook to define the "area of allowable economic conflict."[15]

The foundation of this judicial regulation was the labor injunction. Damage suits had proved unsatisfactory to employers seeking relief against illegal union activities.[16] Unions were often judgment-proof;[17] there were procedural difficulties in suing labor organizations as entities;[18] juries were available to the defendant unions;[19] and such actions rarely provided relief until long after the dispute was over.[20] The injunction, however, did not suffer from these handicaps and provided relatively swift and comprehensive relief. A temporary restraining order against the union could be obtained within a matter of hours.[21] Because decrees often enjoined a broad class of persons [22] and a wide range of activities, including even peaceful persuasion and leaving the job,[23] these prohibitory clauses served as a vehicle for detailed judicial policing of

14. Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229 (1917); UMW v. Red Jacket Consol. Coal & Coke Co., 18 F.2d 839 (4th Cir. 1927). Any employer willing to compel employee acquiescence could effectively foreclose all union organizational efforts directed at his business. See WITTE 220-30.

15. Stillwell Theatre, Inc. v. Kaplan, 259 N.Y. 405, 412, 182 N.E. 63, 66 (1932) (Pound, C.J.).

16. Before 1928 only one damage suit brought against a union under the Sherman Act resulted in a substantial monetary award, while 52% of the criminal prosecutions brought by the government resulted in convictions, and private suits for injunctions brought under § 16 of the Clayton Act were successful in 71% of the cases. BERMAN, LABOR AND THE SHERMAN ACT 212-15 (1930).

17. See GREGORY, LABOR AND THE LAW 94-95 (2d rev. ed. 1958).

18. See WITTE 141-44.

19. See BERMAN, *op. cit. supra* note 16, at 217; GREGORY, LABOR AND THE LAW 95 (2d rev. ed. 1958).

20. BERMAN, *op. cit. supra* note 16, at 215-17.

21. See WITTE 90.

22. See, *e.g.*, *In re* Debs, 158 U.S. 564, 570 (1895) ("all . . . persons whomsoever"). See generally FRANKFURTER & GREENE 86-89; WITTE 96.

23. For injunction of peaceful persuasion, see United States v. Railway Employees' Dept., 283 Fed. 479 (N.D. Ill. 1922) (decree printed in *Hearings Before the Senate Committee on the Judiciary on Limiting the Scope of Injunctions in Labor Disputes*, 70th Cong., 1st Sess. 113 (1928) [hereinafter cited as *1928 Hearings*]. See also Gompers v. Bucks Stove & Range Co., 221 U.S. 418 (1911).

For injunctions prohibiting leaving the job, see Western Union Tel. v. Local 134, IBEW, 2 F.2d 993 (N.D. Ill. 1924), *aff'd*, 6 F.2d 444 (7th Cir. 1925) (decree printed in *1928 Hearings* 112). For other kinds of activity enjoined, see United States v. Railway Employees' Dep't, 283 Fed. 479 (N.D. Ill. 1922) (enjoining payment of strike benefits) (decree printed in *1928 Hearings* 113); Clarkson Coal Mining Co. v. UMW, (S.D. Ohio Sept. 1927) (requiring that all pickets be able to speak the English language) (unreported, decree printed in *1928 Hearings* 553-56); UMW v. Red Jacket Consol. Coal & Coke Co., 18 F.2d 839 (4th Cir. 1927) (enjoining use of union funds to help strikers fight eviction from company houses); Clarkson Coal Mining Co. v. UMW, 23 F.2d 208 (S.D. Ohio 1927) (enjoining strikers from living in company houses). See generally FRANKFURTER & GREENE 89-105; WITTE 97-99.

labor disputes. Moreover, violators of the order might be subject to criminal and civil contempt proceedings held without a jury and before the same judge who had issued the original decree.[24]

The initial stages of the injunctive process were particularly subject to procedural inadequacies and substantive error. Since to be effective the temporary injunction had to be issued swiftly, the trial judge's decision was made hastily in an atmosphere often highly-charged with emotion. The amorphous character of the substantive law also contributed to the possibility of error, as did the inadequacy of evidence before the judge.[25] To achieve speed, temporary restraining orders were issued ex parte upon the filing of standardized form-book complaints,[26] and, at the preliminary hearing, temporary injunctions were often issued solely on the basis of slanted, vague affidavits, whose allegations were safe from cross-examination.[27] Errors made in the early stages of the proceedings could, in theory, be corrected by the subsequent full dress trial necessary to the issuance of a permanent injunction, or on appeal. In practice, however, such corrective action would be ineffective, for such proceedings ordinarily came too late to repair the damage to the union. Rather than maintaining the status quo, the temporary injunction usually effected a final settlement of the dispute, for even a brief interruption of the strike could break union morale and hold the union's economic power in check while the employer was free to retaliate.[28] The finality of this remedy was demonstrated by the relative infrequency with which employers sought permanent injunctions.[29]

The Norris-LaGuardia Act can be viewed as a three-pronged attack on judge-made labor law and its administration. First, the act rejected the injunction as a remedy in labor disputes. Second, it declared that federal courts were not the proper agency of the government to formulate substantive labor policy. Third, it repudiated the federal common law of labor relations and established a policy of governmental neutrality in labor disputes as a means of aiding the growth of organized labor.[30] Although the act's policy of govern-

24. *E.g.*, United States v. Taliaferro, 290 Fed. 906 (4th Cir. 1923) (criminal contempt); Gompers v. Bucks Stove & Range Co., 221 U.S. 418 (1911) (civil contempt); see WITTE 100-01.

25. FRANKFURTER & GREENE 79-80, 200-02.

26. *Id.* at 63-64. Of the 118 labor injunction cases reported in the federal courts from 1901-1928, 70 *ex parte* orders were issued. *Id.* at 64.

27. *Id.* at 66-81. However, lower court judges could at their discretion require oral testimony subject to cross-examination. See Great No. Ry. v. Brosseau, 286 Fed. 414 (D. N.D. 1923).

28. See WITTE 121; FRANKFURTER & GREENE 201.

29. Of the 88 temporary injunctions reported from 1901-1928, only 32 reached the permanent injunction stage. *Id.* at 79, Appendix II.

30. During the debates on Norris-LaGuardia, Senator Wagner remarked:

> The policy and purpose which give meaning to the present legislation is its implicit declaration that the government shall occupy a neutral position, lending its

mental neutrality has given way to pervasive federal regulation, its remedial proscriptions and strictures on the role of the judiciary remain fundamental to the scheme of federal labor law.

The view that injunctions per se are an inappropriate remedy in labor disputes is reflected in the broad and unequivocal prohibitions imposed by the act. Federal courts are denied all power to issue both temporary and permanent injunctions in nonviolent labor disputes.[31] In addition to this general statement, section 4 of the act explicitly immunizes specific activities such as refusal to work, picketing, and payment of strike benefits.[32] No distinction is drawn between "lawful" and "unlawful" nonviolent activities;[33] the act renders federal judges powerless even to enjoin action prohibited by substantive law. Moreover, in the limited area where injunctions are permitted in order to prevent violence, the act prescribes detailed procedures which the court must follow. Under section 7,[34] no temporary or permanent injunction may be issued unless supported by oral testimony subject to cross-examination. Furthermore, ex parte orders are available only if necessary to prevent injury to property and lapse after five days. In addition, section 11 [35] grants a jury trial to persons charged with contempt for violations of orders issued under the act.

Withdrawal of the injunctive power not only abolished the use of a particular remedy—it also put federal courts out of the business of making labor policy. Shorn of their only meaningful enforcement powers, federal courts were no longer looked to by litigants as an effective check upon economic coercion.[36] The legislative history of Norris-LaGuardia indicates that the Congress intended this result, believing that institutionally courts were ill-suited to make policy in labor matters. Excessive intervention in labor strife had

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> extraordinary power neither to those who would have labor unorganized nor to those who would organize it and limiting its action to the preservation of order and the restraint of fraud.

75 CONG. REC. 4915 (1932). This policy is reflected in § 2 of Norris-LaGuardia, 47 Stat. 70 (1932), 29 U.S.C. § 102 (1958).

31. The only exception to the broad prohibition, "[N]o court of the United States . . . shall have jurisdiction to issue any . . . injunction in a . . . labor dispute," 47 Stat. 70 (1932), 29 U.S.C. 101 (1958), is in § 7, 47 Stat. 71 (1932), 29 U.S.C. 107 (1958). But since § 7 requires a finding that public officers cannot protect complainant's property, the exception seems inapplicable to situations not involving violent conduct. See note 33 *infra*.

32. 47 Stat. 70 (1932), 29 U.S.C. 104 (1958).

33. Local 753, Milk Wagon Drivers' Union v. Lake Valley Farm Prods., Inc., 311 U.S. 91 (1940); Wilson & Co. v. Birl, 27 F. Supp. 915 (E.D. Pa.), *aff'd*, 105 F.2d 948 (3d Cir. 1939).

> [T]he words "unlawful acts" in section 7(a) . . . do not constitute a reference to anything that may be considered illegal, but specifically to the acts of violence which the authority of the executive is calculated to control.

105 F.2d at 952.

34. 47 Stat. 71 (1932), 29 U.S.C. § 107 (1958).

35. 47 Stat. 72 (1932), 18 U.S.C. § 3692 (1958).

36. See S. Doc. No. 7, 81st Cong., 2d Sess. 3-4 (1951).

tarnished the prestige of the federal courts.[37] Entanglement in a struggle between opposing economic classes had destroyed the aura of impartiality essential to a rule of law and had made judges and judicial decisions in this area the center of political debate.[38] This loss of prestige, moreover, was the unavoidable result of judicial interference in labor disputes, for such intervention leads to the assumption of partisan positions. While courts making law in areas such as tort or contract may draw upon generally accepted values, there are few such shared principles in the field of labor relations. Every decision tended to be a political statement, favoring one camp or the other.[39] By immobilizing the judiciary, the act attempted to remove courts from this political stage, leaving the controversial task of formulating labor policy to a more appropriate political institution—the Congress itself.[40]

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37. The Senate report observed:

> It cannot be successfully claimed that the courts have not written into these injunction cases a new law of labor disputes, fitting the law to each particular case, and then enforcing this new law made by the court. . . .
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> It is difficult to see how any civilized people could indefinitely submit to such tyrannical procedure. It is not difficult to understand how such cruel laws, made not by any legislature but by a judge upon the bench, should bring our Federal courts into disrepute.

S. REP. No. 163, 72d Cong., 1st Sess. 18 (1932).

> This judge-made law has developed in the past 40 years. The judges have themselves enforced the penalties for the violations of the laws made by them. . . . It is because of this development of law made on the bench that our federal courts have lost a great deal of respect.

75 CONG. REC. 5463 (1932) (remarks of Representative O'Connor). See also, WITTE 131 ("The most important aspect of the reaction of labor injunctions upon the courts is their weakened prestige.").

38. In both Houses of Congress the debate over the passage of Norris-LaGuardia focused on the role of the courts. Senator Norris observed:

> [I]t is because we have now on the bench some judges—and undoubtedly we will have others—who lack that judicial poise necessary in passing upon the disputes between labor and capital that such a law as is proposed in this bill is necessary.

75 CONG. REC. 4510 (1932). See also *id.* at 5478 (remarks of Representative LaGuardia). One appointee to the Supreme Court was denied confirmation by the Senate in 1930 principally because of his injunction record. WITTE 127-28. Representative LaGuardia observed that the injunction had been used "to break a strike; to take one side of an issue; to determine wages and standards of living by the brute force of judicial power—instead of leaving it to a matter of adjustment by free American workers." 75 CONG. REC. 5480 (1932).

39. See GREGORY, LABOR AND THE LAW 83-88 (2d rev. ed., 1958).

40. See Marine Cooks v. Panama S.S. Co., 362 U.S. 365, 370 n.7 (1960) (Norris-LaGuardia "was prompted by a desire . . . to withdraw federal courts from a type of controversy for which many believed they were ill-suited and from participation in which, it was feared, judicial prestige might suffer").

The legislative history of Norris-LaGuardia is replete with statements which support the Supreme Court's interpretation:

> We are trying to reestablish a system of laws for the government of the courts. We are writing a law binding the courts to a definite course of action with reference

Interpretation of Norris-LaGuardia as a broad prohibition on judicial formulation of labor policy finds support in specific provisions of the statute. The act outlaws both permanent and temporary injunctions, although the permanent injunction suffered from none of the procedural flaws which marred the temporary decree.[41] And section 13, defining the term "labor dispute" in exceedingly broad terms,[42] radically changed the role of the courts in analyzing labor cases. While older theories, such as the prima facie tort doctrine, had required courts to determine the extent to which a union's self-interest justified coercive action,[43] judicial inquiry under Norris-LaGuardia is limited to the narrow question of whether the union has such an interest in the dispute.[44] Moreover, the broad prohibitions of the act, encompassing almost all labor-management controversies and ignoring all distinctions between lawful and unlawful peaceful activity, indicate congressional fear of judicially created exceptions [45] and a desire to limit judicial discretion in applying the act.

Norris-LaGuardia and the Railway Labor Act

The Norris-LaGuardia prohibition against labor injunctions first came into conflict with the provisions of the Railway Labor Act,[46] passed in 1926 and substantially amended in 1934. Although the RLA establishes substantive rights and duties which require judicial enforcement, the draftsmen of the

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to injunctions. We are not disturbing the government of laws but we are taking away from the courts their right to act as if they were a government of men.

75 Cong. Rec. 4509 (1932) (Representative Oliver).

> The public policy laid down in the bill, I think, is essential, because there should be some standard by which the courts may know, at a time when they are in such confusion, what it is proper to do. I think the most fitting and, in reality, the only proper tribunal to express such a policy is the Congress.

Id. at 5470 (Representative Browning).

41. See notes 25-28 *supra* and accompanying text.

42. [A]ny controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating . . . or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

47 Stat. 73 (1932), 29 U.S.C. § 113(c) (1958).

43. See note 7 *supra.*

44. See Marine Cooks v. Panama S.S. Co., 362 U.S. 365 (1960); Local 33, Bakery Sales Drivers v. Wagshal, 333 U.S. 437 (1948); Local 753, Milk Wagon Drivers v. Lake Valley Farm Prods., Inc., 311 U.S. 91 (1940); New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552 (1938); Aetna Freight Lines, Inc. v. Clayton, 228 F.2d 384 (2d Cir. 1955), *cert. denied,* 351 U.S. 950 (1956); Diamond Full Fashioned Hosiery Co. v. Leader, 20 F. Supp. 467 (E.D. Pa. 1937).

45. The House Report described the broad provisions of § 13 as necessary "in order that the limitation may not be whittled away by refined definitions of what persons are to be regarded as legitimately involved in labor disputes . . . ." H. Rep. No. 669, 72d Cong., 1st Sess. 11 (1932). See also 75 Cong. Rec. 4510 (1932) (Senator Norris); *id.* at 4774-78 (same).

46. 44 Stat. 577 (1926), as amended, 45 U.S.C. §§ 151-63, 181-88 (1958).

1934 amendments gave no indication of the extent to which the anti-injunction statute would limit the remedial power of courts in RLA cases. In some cases, injunctive relief may be necessary to enforce these rights and duties. If Norris-LaGuardia were held to prohibit injunctions in all railway labor disputes, therefore, some policies of the RLA must be subordinated to the policy of the anti-injunction statute.

The Railway Labor Act regulates collective bargaining on the railroads and airlines. Like the National Labor Relations Act, it guarantees the right to organize [47] and establishes an employer duty to recognize and bargain with the majority union;[48] unlike the NLRA, the RLA does not create an agency empowered to guarantee these rights, but leaves their enforcement to the courts.[49] Nor does the RLA place express limitations on union use of economic force or regulate the parties by a detailed system of unfair labor practices. Certain responsibilities, however, are entrusted to two agencies, the National Railway Adjustment Board (NRAB) and the National Mediation Board (NMB).[50] Their functions are divided along lines corresponding to the statutory distinction between so-called "minor" disputes—grievances involving the interpretation or application of existing collective agreements—and "major" disputes—controversies over the negotiation of terms for future agreements.[51] The NRAB is empowered to render a "final and binding" decision over a "minor" dispute; arbitration of such grievances is compulsory upon submission by either party.[52] The resolution of "major" disputes, on the other hand, is left to free collective bargaining and the use of economic force, subject only to certain procedural requirements. The power of the NMB in these disputes is limited to mediation.[53]

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47. Section 2 Fourth, as amended, 48 Stat. 1187 (1934), 45 U.S.C. § 152 Fourth (1958). The corresponding NLRA provision is § 7, as amended, 61 Stat. 140 (1947), 29 U.S.C. § 157 (1958).

48. Section 2 Ninth, 48 Stat. 1188 (1934), 45 U.S.C. § 152 Ninth (1952), corresponding to NLRA § 8(a)(5), as amended, 61 Stat. 140 (1947), 29 U.S.C. § 158(a)(5) (1958).

49. Virginian Ry. v. System Fed'n No. 40, 300 U.S. 515 (1937); Texas & N.O.R.R. v. Brotherhood of Ry. Clerks, 281 U.S. 548 (1930).

50. Section 3, as amended, 48 Stat. 1189 (1934), 45 U.S.C. § 153 (1958) establishes and defines the jurisdiction of the NRAB. Section 4, as amended, 48 Stat. 1193 (1934), 45 U.S.C. § 154 (1958) establishes the NMB while § 5, as amended, 48 Stat. 1195 (1934), 45 U.S.C. § 155 (1958) defines its functions.

51. For a discussion of this jurisdictional bifurcation, see Elgin, J. & E. Ry. v. Burley, 325 U.S. 711, 722-28 (1945).

52. See Railway Labor Act § 3(i) & (m), as amended, 48 Stat. 1191 (1934), 45 U.S.C. § 153(i) & (m) (1958); Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R., 353 U.S. 30 (1957).

53. Order of R.R. Telegraphers v. Chicago & N.W. Ry., 362 U.S. 330 (1960) (refusing to enjoin a strike over a major dispute).

The RLA contains several provisions designed to maintain the status quo during the early stages of a major dispute. Railway Labor Act § 6, as amended, 48 Stat. 1197 (1934), 45 U.S.C. § 156 (1958), provides that parties desiring changes in agreements give 30 days notice and that "rates of pay, rules, or working conditions shall not be altered . . . until

Before Norris-LaGuardia stripped federal courts of injunctive power, injunctions were granted when necessary to implement the RLA's policies.[54] When the RLA was subsequently amended, the draftsmen's failure to consider the effects of Norris-LaGuardia raised the possibility that injunctive relief might no longer be available. In *Virginian Ry. v. System Fed'n No. 40*,[55] however, the Supreme Court held that Norris-LaGuardia does not forbid issuance of a mandatory injunction commanding an employer to bargain with a certified union. The Court found that while Norris-LaGuardia outlawed use of broad prohibitory injunctions against labor unions, it did not prohibit a mandatory injunction against an employer.[56] This position finds no support in the language of that act, for the statute does not distinguish between mandatory and prohibitory orders [57] and applies to suits against employers as well as unions.[58] But the Court also relied upon the canon of construction that specific provisions of later statutes must prevail over conflicting provisions which are earlier and more general.[59] This approach seems not to depend upon a finding that Congress explicitly intended to repeal portions of Norris-LaGuardia; rather, it postulates two independent statutory provisions inconsistent with each other—here, that the employer's duty to bargain under the RLA

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the controversy has been finally acted upon as required by section 5 of this Act, by the Mediation Board . . . ." Railway Labor Act § 5, as amended, 48 Stat. 1195 (1934), 45 U.S.C. § 155 (1958), orders continuance of the status quo until 30 days after NMB notice of the failure of its mediatory efforts. Section 10, 44 Stat. 586, as amended, 45 U.S.C. § 160 (1958), provides for the establishment of an emergency board after mediation fails and states that "[a]fter the creation of such a board, and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose." The NMB, unlike the NRAB, has no power to adjudicate and determine the merits of a dispute. Railway Labor Act § 5 First, limits the NMB's function to mediation and recommendation of arbitration, which either party may refuse. The Board, however, is empowered by § 2 Ninth, 48 Stat. 1186 (1934), 45 U.S.C. § 152 Ninth (1958), to certify majority bargaining representatives, a determination which has been held to be nonreviewable by the courts. Switchmen's Union v. National Mediation Board, 320 U.S. 297 (1943).

54. Texas & N.O.R.R. v. Brotherhood of Ry. Clerks, 281 U.S. 548 (1930).

55. 300 U.S. 515 (1937).

56. *Id.* at 563.

57. The statutory language distinguishes only between restraining orders and temporary and permanent injunctions. See, *e.g.*, Norris-LaGuardia Act § 1, 47 Stat. 70 (1932), 29 U.S.C. § 101 (1958). This language, moreover, seems broad enough to include mandatory decrees.

The court did not mention the fact that the original anti-injunction bill approved by the conference committee contained a provision specifically prohibiting the issuance of mandatory injunctions in labor disputes. Without explanation, the bill was withdrawn, sent back to conference, and that provision was eliminated. 75 CONG. REC. 6188, 6240, 6327-29, 6334-37 (1932).

58. The Senate Report stated, "[T]he same rule throughout the bill, wherever it is applicable, applies both to employers and employees, and also to organizations of employers and employees." S. REP. No. 163, 72d Cong., 1st Sess. 19 (1932).

59. 300 U.S. at 563.

is meaningless without the injunctive sanction to enforce it. The Court must choose between the competing provisions, using whatever guides it can find to approximate the decision Congress would have made if faced with the choice. The Court focused upon the facts that the Railway Labor Act was more specific than Norris-LaGuardia and that, as amended, it was the more recent statute. If the conflict were only between two provisions giving different answers to the same question, and if one answer had been specifically adopted by a later Congress, this canon would seem adequate to the problem. But the conflict between Norris-LaGuardia and the Railway Labor Act is not of this order. Norris-LaGuardia disapproves of the injunction as a remedy, even when the acts enjoined would be, in result, undesirable or unlawful. It is not enough, therefore, to find that a later Congress specifically intended that management should be made to bargain; the Court must find that Congress would have desired that result even at the cost of using an undesirable remedy. In order to judge how far Congress would have been willing to go in order to effectuate its RLA policy, a court must introduce another factor into the analysis—the importance or significance of the RLA provision. Although *Virginian Ry.* did not consider this additional factor, the Court's holding can be reconciled with this view. The Court could have found that the provision ordering the employer to bargain was so crucial that inability to enforce it would have entirely undermined this major policy of federal labor legislation. By comparison, the encroachment upon Norris-LaGuardia's anti-injunction policy can be held to a minimum. While an injunctive decree must be granted, the courts may still insist upon compliance with the Norris-LaGuardia provisions framed to secure procedural fairness: guarantees of adequate notice, hearing with oral testimony subject to cross-examination, and jury trials for contempt proceedings.[60]

60. Norris-LaGuardia Act § 7, 47 Stat. 71 (1932), 29 U.S.C. § 107 (1958); § 11, 47 Stat. 72 (1932), as amended, 18 U.S.C. § 3692 (1958).

Because the RLA was drafted without consideration of Norris-LaGuardia's prohibitions, courts should not employ the all-or-nothing approach implicit in the labels "repeal" or "takes precedence" when attempting to harmonize the two pieces of legislation. *Cf.* State of Georgia v. Pennsylvania R.R., 324 U.S. 439, 456-57 (1945) ("[I]t is elementary that repeals by implication are not favored. Only a clear repugnancy between the old law and the new results in the former giving way and then only pro tanto to the extent of the repugnancy."). *But see* Missouri-Kansas-Texas R.R. v. Brotherhood of Locomotive Eng'rs, 266 F.2d 335 (5th Cir. 1959) (alternative holding), *rev'd on other grounds*, 363 U.S. 528 (1960) (holding the "oral testimony" requirement of § 7 inapplicable to an RLA injunction because the RLA "takes precedence" over Norris-LaGuardia). Some procedural requirements, of course, may not be compatible with RLA policies. The required finding of danger to property under § 7(e), 47 Stat. 71 (1932), 29 U.S.C. § 107(e) (1958), would frustrate relief in situations like *Virginian Ry.* Similarly, § 8's requirement that parties make "every reasonable effort" to settle the dispute by arbitration, 47 Stat. 72 (1932), 29 U.S.C. § 108 (1958), would seem inapposite when the conduct enjoined is a strike to enforce an NRAB order. Such a strike violates § 3(p) of the RLA, which provides the exclusive remedy for refusals to obey NRAB decisions. Denver & R.G.W.R.R. Co. v. Brotherhood of R.R. Trainmen, 40 CCH Lab. Cas. ¶ 66772 (D. Colo. 1960).

Injunctions under the Railway Labor Act have also been granted to protect employees' rights to fair representation by the bargaining representative. In *Steele v. Louisville & Nashville Ry.*,[61] the Court, in order to avoid serious constitutional questions presented by the act's establishment of the majority union as exclusive bargaining representative, found that the RLA obligated unions to bargain fairly on behalf of those they represent. Because this duty, fundamental to the RLA's concept of collective bargaining, cannot be enforced by either the NRAB or the NMB,[62] the Supreme Court held that Norris-LaGuardia does not prevent the issuance of injunctions to enforce the *Steele* doctrine, relying on *Virginian Ry.*[63]

Another explanation of both the *Virginian Ry.* and *Steele* lines of cases has been the observation that neither involved activity specifically immunized by section 4 of Norris-LaGuardia. Although the activities were admittedly "labor disputes" within the literal scope of section 1's interdiction against injunctions in all labor disputes, later decisions have held that section 1 may be circumscribed when protection of the activity in question seems inconsistent with the procedures and policies of Norris-LaGuardia. For example, mandatory injunctions compelling arbitration have been permitted because the procedures of section 7 are patently inapplicable to such disputes and because section 8 of Norris-LaGuardia demonstrates that Congress looked favorably on arbitration.[64]

But in *Brotherhood of R.R. Trainmen v. Chicago River & Ind. Ry.*[65] the Supreme Court affirmed the issuance of an injunction against a strike—activity protected by section 4. The union struck over grievances after the railroad had submitted the disputes to the NRAB. Norris-LaGuardia, the Court found, did not prohibit injunctive relief against a strike designed to defeat the compulsory jurisdiction of the NRAB. *Chicago River* recognized that Norris-LaGuardia and the RLA were "part of a pattern of labor legislation"[66] and that the two statutes must be accommodated "so that the obvious purpose in the enactment of each is preserved."[67] Norris-LaGuardia, the Court reasoned, freed labor from federal regulation and allowed it to pursue its goals through

61. 323 U.S. 192 (1944).

62. The NMB has no adjudicatory or enforcement powers other than certification of bargaining representatives. See note 53 *supra*. And, in *Steele*, where the question for adjudication is the validity of a collective agreement, the NRAB is powerless, for it is authorized only to interpret and apply contracts. Railway Labor Act, § 3(i), 48 Stat. 1191 (1934), 45 U.S.C. § 153(i) (1958).

63. Graham v. Brotherhood of Locomotive Firemen, 338 U.S. 232 (1949).

64. Local 205, UEW v. General Elec. Co., 233 F.2d 85 (1st Cir. 1956), *aff'd*, 353 U.S. 547 (1957) (specific performance of arbitration clause ordered under Taft-Hartley, § 301). The Supreme Court has cited this case with approval, Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 458 n.8 (1957).

65. 353 U.S. 30 (1957).

66. *Id.* at 42.

67. *Id.* at 40.

the free use of economic force; but where the RLA provides mechanisms to canalize economic struggle through compulsory arbitration of grievances, the noninterference policy of Norris-LaGuardia is no longer applicable.[68]

The view that Norris-LaGuardia's primary purpose was to guarantee labor's freedom by allowing free interplay of economic force greatly oversimplifies the problem of accommodating that statute with later labor legislation. Under this interpretation, the prohibition against injunctions can be lifted wherever Congress, in a later statute, has indicated a contrary wish to limit or redirect economic warfare.[69] This view ignores Norris-LaGuardia's hostility to the labor injunction itself as a regulatory sanction, a policy which the draftsmen of the 1934 RLA amendments did not consider. The Court must ask, therefore, not whether Congress intended to replace economic warfare with peaceful arbitration (as it did), but whether that policy is sufficiently important in this instance to warrant use of an otherwise undesirable remedy. Moreover, since the congressional hostility to injunctive relief has not been contradicted by later legislation, the court must also make certain that other remedies cannot be used to avoid conflict with Norris-LaGuardia. If these criteria had been applied in *Chicago River*, the result might still have been the same. The NRAB's grievance machinery is essential to the regulatory scheme of the act, and an integral part of the collective bargaining machinery developed in industries affected by the act.[70] And the finding that NRAB procedure would be rendered "nugatory" without injunctive relief [71] indicates the Court's belief that other relief, such as damage actions against the union, was not available under the RLA or, if available, would be ineffectual in securing compliance

68. *Id.* at 41. An injunction is not available under *Chicago River* unless one of the parties has submitted the dispute to the NRAB. Manion v. Kansas City Terminal Ry., 353 U.S. 927 (1957) (per curiam) (injunction granted by Missouri court under RLA vacated without prejudice to its reinstatement if either party to the "minor" dispute submitted it to the NRAB within a reasonable time). Moreover, a strike cannot be enjoined, however undesirable its purpose, unless the union's aim is to violate the RLA. Order of R.R. Telegraphers v. Chicago & N.W. Ry., 362 U.S. 330 (1960) (extreme form of feather-bedding).

69. Commentators who regard government neutrality in labor disputes as the dominant policy of Norris-LaGuardia thus tend to simplify the conflict between that statute and later acts as a clash between policies of *laissez faire* and governmental intervention. See Loeb, *Accommodation of the Norris-LaGuardia Act to Other Federal Statutes*, 11 LAB. L.J. 473, 476 (1960), 72 HARV. L. REV. 354, 356-57 (1958).

70. Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency*, 46 YALE L.J. 567, 598 (1937).

71. 353 U.S. at 41.

For evaluation of the damage action as a remedy in these circumstances, see note 165 *infra*.

Although the RLA does not authorize damage actions to compensate for violations of the act, the availability of such relief would seem implicit in the *Chicago River* decision, which allows similarly unauthorized equitable relief to a private party. On the other hand, one court has held that the lack of specific authorization for damage actions, when contrasted to § 301 of Taft-Hartley, indicates that such actions cannot be brought under the RLA. Louisville & N.R.R. v. Brown, 252 F.2d 149 (5th Cir. 1958). In this event, the *Chicago River* finding that injunctive relief is necessary would be unquestionable.

with the statutory grievance procedure. Nevertheless, enunciating the decision to override Norris-LaGuardia in this manner would make it clear that Norris-LaGuardia is not repudiated by every statute which seeks to limit the free use of economic power, and that even when the anti-injunction statute must be set aside, the court should cut away only so much of the statute as is necessary to avoid the conflict. Provisions such as the act's procedural safeguards, which do not hamper enforcement of the RLA, should be retained in deference to the still vital policy against injunctions.[72]

Post-Accommodation Problems

When deciding whether to subordinate Norris-LaGuardia's policies to those of another statute, courts should also be aware that new legal problems may be created by the availability of the injunction. Many substantive legal rules developed before injunctive relief was made available may take on a different complexion after the barriers of Norris-LaGuardia have been lowered. For example, certain inequities of the existing law might have been tolerated in the past because of an implicit belief that, in the last resort, the union could overcome its disadvantage by resort to economic force. When this ultimate safeguard is withdrawn, courts may feel compelled to tinker with the existing legal rules in order to redress the resulting imbalance, reassuming the policy-making function which Norris-LaGuardia attempted to reserve to Congress. The difficulties inherent in this corrective process are illustrated by the subsequent history of the *Chicago River* problem.

The *Chicago River* decision raised the fear that management could make extensive unilateral changes in the collective bargaining agreement shielded by the strike injunction from union reprisals. Although the *Chicago River* injunction is permitted only in the case of "minor" disputes[73]—"growing out of grievances or out of the interpretation or application of agreements"[74]—and thus would seem not to affect the union's power to strike over changes in terms of the agreement (so called "major disputes"), the limitation was feared to be illusory. Arguably, management could bring any disputed change under the "minor" disputes jurisdiction of the NRAB by finding an ambiguity in the contract to support its position. The typical railway labor dispute involves the vague management-prerogatives provisions of the contract.[75] The carrier,

72. See note 61 *supra* and accompanying text.

73. See note 68 *supra. But see* Comment, *Enjoining Strikes and Maintaining the Status Quo in Railway Labor Disputes*, 60 COLUM. L. REV. 381, 391 (1960) (strike over "major dispute" before compliance with procedures required by §§ 5, 6, 10, should be enjoined despite Norris-LaGuardia).

74. Railway Labor Act § 3(i), as amended, 48 Stat. 1191 (1943), 45 U.S.C. § 153(i) (1958).

75. See Baltimore & O.R.R. v. United R.R. Workers, 271 F.2d 87 (2d Cir.), *vacated*, 364 U.S. 278 (1960); Butte, A. & Pac. Ry. v. Brotherhood of Locomotive Firemen, 268 F.2d 54 (9th Cir.), *cert. denied*, 361 U.S. 864 (1959); In the Matter of Hudson & M.R.R., 172 F. Supp. 329 (S.D.N.Y.), *aff'd per curiam sub. nom.* Stichman v. General Grievance Committee, 267 F.2d 941 (2d Cir. 1959); Missouri-Kansas-Texas R.R. v. Brotherhood of

in the interests of efficiency, makes operational or technological changes resulting in lay-offs or otherwise affecting working conditions. If the contract grants management all prerogatives not explicitly surrendered, the contract permits the change; if, on the other hand, all existing working conditions are incorporated into the contract, management is changing the terms of the agreement. Thus, the dispute is "minor" in the sense that there is an ambiguity which may be resolved only by "interpretation or application of the agreement," and the union can be enjoined from striking until the NRAB resolves the interpretation dispute.

In theory, the union is protected against unilateral changes by this procedure, for if the NRAB decides that the contract did not allow management to make the change, the union can receive retroactive relief for damages suffered while the change was in force. And if management continues to insist upon the change, the union can then use economic force to resist it.[76] It has been argued, however, that the excessive delay of NRAB procedures tends to make both these protective remedies ineffective.[77] Discharged workers cannot afford to wait out the five-year NRAB adjudication in the hope of reinstatement and back pay.[78] And since existing case law allowed management to institute its proposed changes during the NRAB proceeding,[79] the union will find it difficult to rouse economic pressure five years later over a dead issue. For these reasons, the argument concludes, the injunction destroys the unions right to use economic force to resist unilateral changes.

Because the alleged hardship to the union arises from the delay between the institution of proposed changes by management and the NRAB's final decision, corrective measures would seem to require either that management be ordered to postpone changes until after adjudication, or that delay be eliminated by permitting the federal court to resolve contract ambiguities immediately. Before *Chicago River*, both of these alternatives had been rejected. In *Order of Ry. Conductors v. Pitney*, the Supreme Court had stated that ambiguities of collective agreements must be resolved initially by the NRAB, even though the dispute may involve section 6 changes.[80] Because interpretation rests on

Locomotive Eng'rs, 266 F.2d 335 (5th Cir. 1959), *rev'd on other grounds*, 363 U.S. 528 (1960); Norfolk & P.B.L.R.R. v. Brotherhood of R.R. Trainmen, 248 F.2d 34 (4th Cir. 1957), *cert. denied*, 355 U.S. 914 (1958).

76. After the NRAB interprets the contract to provide that management does not have power to make the change, further attempts at change become "major disputes." The union may strike over major disputes, Order of R.R. Telegraphers v. Chicago & N.W. Ry., 362 U.S. 330 (1960).

77. See Comment, *Enjoining Strikes and Maintaining the Status Quo in Railway Labor Disputes*, 60 COLUM. L. REV. 381, 393 (1960).

78. In In the Matter of Hudson & M.R.R., 178 F. Supp. 106, 107 (S.D.N.Y. 1959), the court quoted from a letter from the Executive Secretary of the NRAB which stated that "5¼ years is the present average period of time between the docketing of a case and rendition of an award." Cases currently remain on the Board's docket from 3 to 7 years. See, *e.g.*, 137 NRAB AWARDS, 1ST DIV. (1958).

79. Order of Ry. Conductors v. Pitney, 326 U.S. 561 (1945).

80. 326 U.S. 561 (1945).

considerations of usage, practice, and custom in the industry, the question was "intricate and technical" and had been left by Congress to the specially constituted NRAB.[81] Also, the Court apparently rejected the union's plea for a temporary injunction against the proposed changes, and permitted the employer to make the changes pending final adjudication by the NRAB.[82]

After *Chicago River*, however, the Supreme Court modified the minor-disputes procedure, apparently in the belief that the availability of strike injunctions had created the alleged hardship and thus had altered the balance of power. In *Brotherhood of Locomotive Eng'rs v. Missouri-Kansas-Texas Ry. Co.*, it authorized courts issuing strike injunctions under *Chicago River* to condition injunctive relief upon preservation of the status quo by management pending final adjudication by the NRAB.[83] The holding relies principally on the traditional power of equity courts to impose conditions upon issuance of extraordinary remedies when necessary to avoid injustices. The decision requires, therefore, that the court may not impose the status quo condition unless it finds that the immediate institution of proposed management changes will cause irreparable injury to the union. In addition, the Court commented that the status quo condition may be necessary to preserve the integrity of NRAB procedures, reasoning that the prolonged impact of changed conditions may so weaken the union's position that final victory before the NRAB would be meaningless. Since the condition comes into force only when a strike has been enjoined,[84] it seems intended as a device to compensate for the potential hardships caused by the *Chicago River* decision.

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81. *Id.* at 567.

The Court's conclusion in *Pitney* seems necessary to avoid involving the judiciary in a task for which it is ill suited. See Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999 (1952); Summers, *Judicial Review of Labor Arbitration or Alice Through the Looking Glass*, 2 BUFFALO L. REV. 1, 18-19 (1952); Wellington, *Judge Magruder and the Labor Contract*, 72 HARV. L. REV. 1268 (1959).

82. Although the court does not deal with the issue of temporary relief in its opinion, the dissent of Justice Rutledge, 326 U.S. at 568, arguing for such relief demonstrates that the issue was before the Court.

83. 363 U.S. 528 (1960).

This device is not an injunction in the usual sense, for the word "condition" seems to indicate that retention of the status quo by the employer is merely a prerequisite to injunctive relief against union economic pressure. If the employer refuses to fulfill this requirement, he would not, therefore, be subject to contempt proceedings, but the union would be free to strike.

84. The Court stated that it was not deciding the question whether a status quo injunction could be issued against employer changes in the absence of a suit for equitable relief against a strike. *Id.* at 531 n.3. The Court had, however, denied such relief *sub silentio* in *Pitney*. See note 82 *supra* and accompanying text. And the grievance procedure established by the RLA would not seem to authorize such relief. See notes 88-89 *infra* and accompanying text.

The Court's argument that the "condition" may be necessary to preserve the NRAB's jurisdiction, while appearing to furnish an independent ground for the status quo injunction under the *Chicago River* rationale, see text accompanying note 65 *supra*, seems instead intended to show that when such conditions are imposed upon issuance of a *Chicago River* injunction, the policy underlying injunctive relief will be fostered by the condition.

In attempting to compensate, however, the Court may have defeated the Railway Labor Act policies which *Chicago River* sought to promote. Availability of the status quo order will probably discourage compulsory arbitration and use of the NRAB. If an employer wishes to effectuate technological changes in an area where his authority is unclear, submission of the question to the NRAB will, after *M-K-T*, mean a delay of several years before the change can be made. Because such delay may destroy the value of the change, the carrier may prefer either to eschew relief under *Chicago River* or to bypass the NRAB entirely. Unless the union is too weak to resist by economic force, it too will prefer to avoid the delay of NRAB proceedings, for the status quo condition is available to it only at the cost of the corollary strike injunction. Since the NRAB cannot act unless one of the parties invokes its jurisdiction,[85] such disputes are likely to be settled outside the statutory grievance machinery, by resort to economic force.

Moreover, the *M-K-T* decision assigns to the courts the power to re-evaluate and reject traditional procedures of grievance arbitration which Congress had incorporated into the RLA. Recognizing management's continuing need to seek more efficient methods, traditional procedure leaves management free to act immediately on good faith interpretations of the collective agreement. The union may protest such determinations only through grievance proceedings,[86] which protect the union from violations of the collective agreement by awarding retroactive relief to injured employees. Although such relief may not fully compensate injured employees, there is no better alternative—management cannot be compensated for opportunities lost when changes are delayed.[87] This practice antedated the RLA,[88] and that act, by establishing detailed provisions for compulsory arbitration of grievances without explicitly reversing the traditional pattern, apparently incorporated it.[89] The need for such management freedom is particularly apparent in the declining railway industry, where con-

85. Railway Labor Act § 3(i), added by 48 Stat. 1191 (1934), 45 U.S.C. § 153(i) (1958).

86. See, *e.g.*, the arbitration opinions of Harry Shulman, umpire for the Ford Motor Co. and the UAW, reprinted in CHAMBERLAIN, SOURCEBOOK ON LABOR 638-43 (1958).

87. See Baltimore & O.R.R. v. United R.R. Workers, 271 F.2d 87 (2d Cir. 1959), *vacated*, 364 U.S. 278 (1960).

88. See, *e.g.*, Brotherhood of Locomotive Eng'rs v. Western Md. Ry., 1925 U.S.R.R. LAB. BD. 720 (Decision No. 3340, 1925); Brotherhood of Locomotive Eng'rs v. Missouri-Kansas-Texas Lines, 1925 U.S.R.R. LAB. BD. 852 (Decision 3473, 1925).

89. Section 3(i), 44 Stat. 578 (1926), as amended, 45 U.S.C. § 153(i) (1958), provides that grievances are to be "handled in the usual manner" before submission to the NRAB. This provision would seem by its terms to allow the parties to formulate the early stages of the grievance procedure through collective bargaining and, therefore, to incorporate past practices not explicitly changed by collective agreements. Moreover, §§ 3(m) & (o), 44 Stat. 576 (1926), as amended, 45 U.S.C. §§ 153(m) & (o) (1958), clearly indicates that money awards and other relief (presumably reinstatement) may be given to injured employees, thus creating the inference that employers may act before a final interpretation is rendered and that the union's remedy lies in retroactive relief from the NRAB. Other provisions, such as §§ 5, 6, 10, 44 Stat. 580, 582, 586 (1926), as amended, 45 U.S.C. §§ 155, 156,

tinual technical innovation is essential to the industry's survival.[90] *M-K-T* seems to disregard the congressional approval of this grievance procedure; the Supreme Court authorized district courts to balance "competing claims of irreparable hardship"[91] in each dispute and to come to their own conclusion as to which party should bear the burdens of grievance arbitration. Comparison of relative hardships ultimately forces a court to decide how much hardship labor or management ought to bear in the collective bargaining process and thus injects the judiciary into precisely that delicate policy-making area which Norris-LaGuardia preserves to Congress. The dangers of judicial intervention are clearly demonstrated by the result in *M-K-T*. The *status quo* condition does not correct the imbalance supposedly engendered by the *Chicago River* decision; rather, it enlarges and reverses it by shifting the risk of loss to management, the party without any remedy in the NRAB.[92]

While the disturbance of basic RLA policies is itself a sufficient ground for questioning the wisdom of judicial tinkering, the attempted correction in *M-K-T* was particularly inappropriate because it was unnecessary. Closer examination of the precise impact of *Chicago River* reveals that the union's power to strike over "minor" disputes was not seriously curtailed by that decision. A union anxious to strike over a "minor" dispute can do so simply by terminating the contract after 30 days notice and proposing new contract provisions which would retroactively prohibit the changes instituted by management. In a post-*Chicago River* decision, the Supreme Court held that this tactic creates a "major" dispute in which injunctive relief is not available.[93] Thus, the restrictive effect of *Chicago River* upon which *M-K-T* seems predicated, is in fact nominal, for a union may still, after following the proper procedures, resort to economic force to win its point.

The problems raised by superimposing injunctive relief upon the provisions of the Railway Labor Act demonstrate that accommodation of Norris-LaGuardia involves more than the task of weighing conflicting indications of legislative intent. Courts must also attempt to gauge the dislocating effect which the availability of injunctive relief may have upon established statutory rules and procedures. This problem should not have affected the *Chicago River* decision, for the dislocation later found in *M-K-T* was in fact illusory.

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160 (1958), governing procedures for the resolution of "major" disputes, indicate that when Congress desired that the *status quo* be maintained during a dispute, the draftsmen so provided in explicit terms.

90. See Horowitz, *Labor's Role in the Declining Railroad Industry*, 9 LAB. L.J. 473 (1958).

91. 363 U.S. at 535.

92. Railway Labor Act § 3(o), 44 Stat. 578 (1926), as amended, 45 U.S.C. § 153(o) (1958), directing the carrier "to pay the employee the sum to which he is entitled under the award," indicates that the NRAB may not compensate carriers for losses suffered as a result of the *status quo* injunction. Moreover, NRAB awards to employers would pose difficulties—it is not clear whether the union or the workers who retained employment pending NRAB determination would pay. For employees, this would be an intolerable risk.

93. Order of R.R. Telegraphers v. Chicago & N.W. Ry., 362 U.S. 330 (1960).

On the other hand, if the court is convinced that injunctive relief will require further corrective adjustments in the regulatory statute, this possibility should weigh against the initial decision to abandon Norris-LaGuardia. The results of judicial adjustment in *M-K-T* demonstrate that the need to make further corrections will reinstall the courts squarely in the role of labor policy-making, as well as jeopardize the very policies which seem to require injunctive relief. In this event, courts might better effectuate the overall scheme of national labor policy by choosing to abide by Norris-LaGuardia from the beginning.

JUDICIAL REGULATION OF LABOR UNDER THE ANTITRUST LAWS

Conflicts between the policies of Norris-LaGuardia and those of the Sherman Act [94] compel courts to reconcile statutes dealing with different, but overlapping, spheres of economic activity. While the anti-injunction statute deals solely with union activity, the antitrust law's primary concern is with the promotion of business competition.[95] Indeed, it is doubtful that Congress, in passing the Sherman Act, intended to bring unions within its prohibitions.[96] Judicial interpretation of the Sherman Act's vague mandates, however, brought many union activities within their ambit.[97] Federal judges, unfettered by any statutory standard, enforced their policy preferences by the application of vague, abstract doctrines essentially unrelated to the fundamental policy decisions being made.[98] In the labor provisions of the Clayton Act, Congress

94. 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1-7, 10 (1958).

95. ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 1 (1955).

96. The principal argument for the inclusion of labor organizations was that Congress had rejected a proposed amendment explicitly exempting unions. See Loewe v. Lawlor, 208 U.S. 274 (1908). A thorough search of the legislative history of the Sherman Act, however, has led one author to conclude that the proposed amendment was offered before a substantially revised bill was submitted by the Senate Judiciary Committee and that Congress assumed that this latter measure did not reach union activities. BERMAN, LABOR AND THE SHERMAN ACT 3-54 (1930).

97. United States v. Painters Dist. Council, 44 F.2d 58 (N.D. Ill. 1930), *aff'd*, 284 U.S. 582 (1931) (make-work practices); Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n, 274 U.S. 37 (1927) (refusal to work on blacklisted goods); United States v. Brims, 272 U.S. 549 (1926) (union-employer combination to boycott nonunion goods); Coronado Coal Co. v. United Mine Workers, 268 U.S. 295 (1925) (organization strike against a nonunion mine whose low labor costs were endangering the competitive standing of unionized firms); Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921) (secondary boycott).

98. On the one hand, the Supreme Court stated that the "mere reduction in the supply of an article to be shipped in interstate commerce by the illegal or tortious prevention of its manufacture or production is ordinarily an indirect and remote obstruction to that commerce. But when the intent of those unlawfully preventing the manufacture or production is shown to be to restrain or control the supply entering and moving in interstate commerce, or the price of it in interstate markets, their action is a direct violation of the Anti-Trust Act." Coronado Coal Co. v. United Mine Workers, 268 U.S. 295, 310 (1929). Nevertheless, in Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n, 274 U.S. 37, 47 (1927), a refusal to work on "blacklisted" goods was found to be a violation because it was "an attack upon the use of the product in other states . . . with the intent and purpose of

apparently attempted to modify these judicial restrictions,[99] but the Supreme Court effectively nullified the provisions in *Duplex Printing Press Co. v. Deering*[100] by construing them as a codification of existing law. Moreover, some lower federal courts, shielded from effective review because labor disputes seldom survived issuance of the injunction,[101] extended the doctrines beyond even the decidedly anti-union precedents of the Supreme Court, and applied the antitrust laws to any activity the judiciary considered harmful.[102]

After 1930, however, congressional approbation of collective bargaining expressed in Norris-LaGuardia and the Wagner Act, coupled with increased Supreme Court awareness of the need for judicial self-restraint in the labor field, caused a reversal of the restrictive precedents. The Court held in *Apex Hosiery Co. v. Leader* that union activities did not violate the antitrust laws unless they resulted in a "restraint upon commercial competition."[103] In a well-considered dictum, the Court indicated that organizational and recognitional efforts would not be such a restraint even if aimed at protecting unionized employers from competition with nonunion goods produced at a lower labor cost.[104] While *Apex* was an attempt to narrow the Sherman Act's pro-

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bringing about the loss or serious reduction of petitioners' interstate business. . . ." Although the opinion clearly implies that some strikes are lawful, all work stoppages are designed to terminate the manufacture and shipment of goods or otherwise prevent the employer from engaging in his normal operations.

Moreover, decisions under the Sherman Act were necessarily determined by definitions of interstate commerce, a criterion having no relation to labor policy. The situation became ludicrous when mechanical notions of interstate commerce were applied. *Compare* Anderson v. Shipowners' Ass'n, 272 U.S. 359 (1926), *with* Industrial Ass'n v. United States, 268 U.S. 64 (1925). *Compare* Aeolian Co. v. Fischer, 40 F.2d 189 (2d Cir. 1930), *with* Levering & Gerrigues Co. v. Morrin, 289 U.S. 103 (1933).

99. Clayton Act § 6, 38 Stat. 731 (1914), 15 U.S.C. § 17 (1958); § 20, 38 Stat. 738 (1914), 29 U.S.C. § 52 (1958). See Duplex Printing Press Co. v. Deering, 254 U.S. 443, 479 (1924) (dissent of Brandeis, J.). The intent of Congress, however, in passing the Clayton Act was by no means clear. FRANKFURTER & GREENE 141-45.

100. 254 U.S. 443 (1924).

101. See note 28 *supra* and accompanying text.

102. *Compare* Dail-Overland Co. v. Willys-Overland, Inc., 263 Fed. 171 (N.D. Ohio 1920) (violence), *and* Williams v. United States, 295 Fed. 302 (5th Cir. 1932) (putting quicksilver in locomotive engines), *and* United States v. Norris, 255 Fed. 423 (N.D. Ill. 1918) (picketing for purposes of extortion), *and* O'Brien v. United States, 290 Fed. 185 (6th Cir. 1923) (per curiam) (preventing delivery of one piece of steel across state line), *with* United Leather Workers v. Herkert & Meisel Trunk Co., 265 U.S. 457 (1924), *and* United Mine Workers v. Coronado Coal Co., 259 U.S. 344 (1922). In another line of cases, the lower federal courts enjoined strikes which they felt created public emergencies. United States v. Railway Employees' Dep't, 283 Fed. 479 (N.D. Ill. 1922) (railroad strike); Western Union Tel. v. Local 134, IBEW, 2 F.2d 993 (N.D. Ill. 1924) (telegraph strike); Wagner Elec. Mfg. Co. v. District Lodge No. 9, IAM, 252 Fed. 597 (E.D. Mo. 1918) (munitions plant strike). These cases, however, might have been approved by the Supreme Court. *Cf. In re* Debs, 158 U.S. 564 (1895) (enjoining a widespread railway stoppage under the laws governing carriage of the mails and interstate commerce).

103. 310 U.S. 469, 497 (1940).

104. *Id.* at 503-04.

hibitions, its "commercial restraints" test provided no standards by which antitrust violations could be identified.[105] Thus the decision left courts free to continue evaluating the legitimacy of labor objectives, preserving much of the Sherman Act's impact on labor. Opportunities for enforcing the remaining antitrust restrictions seemed limited, however, by Norris-LaGuardia's prohibition of injunctive relief, for the injunction bar was held applicable to antitrust suits against unions.[106]

Avoiding this restriction, the Attorney General's office began a series of criminal prosecutions against unions engaging in certain activities felt to be especially detrimental to the economy.[107] The first such prosecution to reach the Supreme Court, *United States v. Hutcheson*, was brought against the Carpenters Union for striking to secure jobs which, under the terms of a collective agreement, were reserved for members of the Machinists Union.[108] The Court held that Norris-LaGuardia, although on its face applicable only to injunction suits, was intended to restore the broad purpose of the Clayton Act which *Duplex* had nullified.[109] Reasoning that the Sherman, Norris-LaGuardia, and Clayton Acts must be read together "as a harmonizing text of outlawry of labor conduct,"[110] the Court held that it was incongruous to prohibit by criminal penalties conduct allowable in equity.[111] Consequently, union activities specified in section 20 of the Clayton Act were held immune from Sherman Act liability regardless of the remedy sought.

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105. The opinion itself is unclear, for it attempts to reconcile most of the older cases with its new approach and suggests at one place that the size of the strike may be determinative. *Id.* at 512-13.

106. Local 753, Milk Wagon Drivers Union v. Lake Valley Farm Prods., Inc., 311 U.S. 91 (1940).

The "commercial restraints" distinction led the Attorney General's Committee to comment,

> From this decision there emerges a distinction . . . between union activities aiming, on the one hand, at furthering *rightful union objectives* and, on the other, at directly "suppressing [commercial competition] or fixing prices" of commercial products.

ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 296 (1955). (Emphasis added.)

107. The labor activities attacked were:

> 1. Unreasonable restraints designed to prevent the use of cheaper material, improved equipment, or more efficient methods. . . .
> 2. Unreasonable restraints designed to compel the hiring of useless and unnecessary labor. . . .
> 3. Unreasonable restraints designed to enforce systems of graft and extortion. . . .
> 4. Unreasonable restraints designed to enforce illegally fixed prices. . . .
> 5. Unreasonable restraints designed to destroy an established and legitimate system of collective bargaining. . . .

Public letter From Assistant Attorney General Thurman W. Arnold to the Central Labor Union of Indianapolis, reprinted in ARNOLD, BOTTLENECKS OF BUSINESS 251-52 (1940).

108. 312 U.S. 219 (1941).

109. *Id.* at 236.

110. *Id.* at 231.

111. *Id.* at 234-35.

> [S]o long as a union acts in its self-interest and does not combine with non-labor groups, the licit and illicit under section 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.[112]

While the language and legislative history of Norris-LaGuardia give no evidence of specific congressional intent to grant this immunity, policies of that statute and the National Labor Relations Act seem to compel the result reached in *Hutcheson*. Both Norris-LaGuardia, withdrawing the injunctive source of judicial regulation, and the NLRA, through the establishment of a specialized agency, reflect congressional desire to depose the judiciary from their self-appointed role as arbiters of the labor-management struggle and to make the formulation of labor policy solely a legislative and administrative responsibility.[113] *Apex*, focusing solely on the modification of legal rules, sanctioned a continuation of judicial regulation and thus failed to recognize this new policy. *Hutcheson*, however, looking to the institutional structure established by Congress, accommodated the new policies by reasserting the limitations of section 20 to eliminate the Sherman Act as a vehicle for unwanted judicial policy making.

The Court has found an exception to *Hutcheson*'s broad exemption when unions act in concert with nonlabor groups. In *Allen-Bradley Co. v. Local 3, IBEW*,[114] the local union secured closed shop contracts with manufacturers and contractors dealing in electrical equipment in New York City, and all three groups established a system under which the contractors bought only from unionized manufacturers, and the manufacturers, in turn, sold only to unionized contractors. A board was created to bring recalcitrant employers into line, the union enforcing the system through strikes and picketing. The boycott extended to all goods not manufactured by Local 3, excluding from the New York market even products of firms organized by other locals of the same international union. The Court found that the conspiracy between the employers alone would have been a clear violation of the antitrust laws.[115] It also found that the union's activities were a "labor dispute" as defined by section 13 of Norris-LaGuardia.[116] Under *Hutcheson*, therefore, such union activities would normally have been exempted from the antitrust laws. Facing the question whether collusion with an employer combination took labor outside the *Hutcheson* shelter, the Court reasoned that the immunity from anti-

112. *Id.* at 232.

113. A conflict in substantive law also existed. Section 7 of the NLRA gave employees "the right . . . to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection." 49 Stat. 452 (1935), as amended, 29 U.S.C. § 157 (1958). Sherman Act case-law outlawed many such activities. See notes 97-98 *supra*. This conflict, however, might have been resolved by attempting to redefine the Sherman Act's limitations on labor activities—as *Apex* apparently attempted to do.

114. 325 U.S. 797 (1945).

115. *Id.* at 800.

116. *Id.* at 807 n.12.

trust prosecutions had been granted only for the purpose of aiding the union's collective bargaining and was never intended to be used as a shield to protect businessmen in achieving monopoly conditions forbidden by antitrust law.[117] The Court seemed to assume that a finding of union immunity would have allowed the entire conspiracy to continue, for in enjoining the union it failed to consider the alternative of dissolving the conspiracy simply by enjoining employers from combining with each other or with the union. That the *Allen-Bradley* decision turned on the Court's fear of shielding business participants from antitrust prosecution is further emphasized by the Court's holding that collusion with nonlabor organizations is essential to the union's liability.

> [T]he same labor union activities [having the same economic effect] may or may not be in violation of the Sherman Act, dependent upon whether the union acts alone or in combination with business groups. . . . A business monopoly is no less such because a union participates, and such participation is a violation of the Act.[118]

Although an exception to *Hutcheson, Allen-Bradley* does not raise the dangers of judicial policy-making which were present under the courts' general Sherman Act jurisdiction. The immunities granted by Norris-LaGuardia and *Hutcheson* [119] were in part motivated by the fear that, in the absence of antitrust standards applicable to union conduct, courts would use Sherman Act jurisdiction to make their own policy judgments about the legitimacy of union conduct. In *Allen-Bradley,* however, the existence of the antitrust violation was based upon an analysis of management conduct, according to antitrust principles dealing with business activities. The union's activity was found to be one part of a much larger inter-employer conspiracy.[120] Thus the Court was able to resolve the problem of the union violation by reference to principles of business conduct which bore no relation to the legitimacy or desirability of the union activity involved. Indeed, the Court admitted that the union was furthering its own legitimate interest in jobs and wages,[121] but apparently considered such motives irrelevant in light of the employer conspiracy. Under this reading of *Allen-Bradley,* a union's liability would rest solely upon the

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117. *Id.* at 809-10.

The Court's finding that Norris-LaGuardia is inapplicable may be overstated. Even if federal business policy warrants imposition of the injunction in such cases, there seems no reason for denying unions the various procedural safeguards afforded by Norris-LaGuardia by holding that act totally inapplicable. See note 61 *supra.*

118. 325 U.S. at 810-11; *accord,* United States v. Employing Plasterers' Ass'n, 347 U.S. 186 (1954); United States v. Employing Lathers' Ass'n, 347 U.S. 198 (1954); Lumber Prods. Ass'n, Inc. v. United States, 144 F.2d 546 (9th Cir. 1944), *aff'd sub nom.* United Brotherhood of Carpenters v. United States, 330 U.S. 395 (1947); Local 175, IBEW v. United States, 219 F.2d 431 (6th Cir. 1955); United States v. Chattanooga Chapter, Nat'l Elec. Contractors' Ass'n, 116 F. Supp. 509 (E.D. Tenn. 1953).

119. See text accompanying note 110 *supra.*

120. 325 U.S. at 809.

121. *Id.* at 801.

question whether it participates in a management conspiracy, aiding the forbidden practices.

Separating the employer's action from the union's conduct in order to resolve the antitrust problem may be difficult, however, when there is not an independent and far-reaching management conspiracy as in *Allen-Bradley*. Many terms of collective agreements tend to restrict competition within an industry, providing uniform wage rates, work rules, and provisions against labor saving devices.[122] These terms may meet with the approval of a majority of the employers who prefer to suppress cost-cutting practices of a competitor for the purpose of obtaining higher prices. The *Allen-Bradley* distinction between practices engaged in by the union alone or as part of an employer conspiracy would seem to require a determination whether management somehow conspired to obtain anticompetitive terms, or whether it submitted to them through the process of collective bargaining. Cases dealing with such problems after *Allen-Bradley* have looked to evidence indicating whether the employers favored or opposed the union's objective.[123] While such standards are difficult to apply when union and management have a mutual interest, they have at least the advantage of remaining neutral to the legitimacy of the union objective involved. On the other hand, the substantive nature of the union's demand might in some cases raise a presumption of management collusion. A contractual provision fixing prices or restricting the suppliers or distributors with whom a group of employers may deal[124] by virtue of its uniqueness and apparently predominant benefit to management, may itself be evidence that the employers have actively conspired to secure such terms, and in turn render the union's conduct an antitrust violation. In judging the peculiarity of any particular term of a collective agreement for this purpose, the court will be judging union conduct according to some unspecified norm of traditional union objectives and practices.[125]

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122. The problem has arisen in areas where a union has organized all the major competing businesses in a trade, and one of these, through a particular method of operations, is able to secure a competitive advantage over the other firms. The union, in order to protect jobs, may then, with or without the "collusion" of the other employers, attempt to secure contract provisions destroying this advantage. See Jewel Tea Co., Inc. v. Local 189, 274 F.2d 217 (7th Cir. 1960); Adams Dairy Co. v. St. Louis Dairy Co., 260 F.2d 46 (8th Cir. 1958); Philadelphia Record Co. v. Manufacturing Photo-Engravers Ass'n, 155 F.2d 799 (3d Cir. 1946).

123. See cases cited note 122 *supra*. Some courts seem to adopt a more mechanical test. See United States v. Local 471, Milk Drivers Union, 153 F. Supp. 803 (D. Minn. 1957) (incorporation in collective agreement constitutes *Allen-Bradley* collusion).

124. See United States v. Hamilton Glass Co., 155 F. Supp. 878 (N.D. Ill. 1957) (wage differential depending upon source of supply). *But see* Davis Plating & Button Co. v. California Sportswear & Dress Ass'n, 145 F. Supp. 864 (S.D. Cal. 1956).

125. *Allen-Bradley* may also apply to cases involving one employer and one union. See, *e.g.*, United States v. Bitz, 179 F. Supp. 80 (S.D.N.Y. 1959) (agreement to exclude competitors from the market). Since the employer in *Bitz* was attempting to monopolize and thus was guilty of an employer violation acting alone, the case does not raise the issue whether an employer-union conspiracy will satisfy the conspiracy requirement of § 1 of the

Broader exceptions to *Hutcheson* have been urged by the Attorney General's Report and are reflected in several lower court decisions after *Allen-Bradley*. The Report reasons that activity aimed at "direct commercial restraint" may not be a labor dispute within the meaning of Norris-LaGuardia,[126] whether or not there is collusion with nonlabor groups. This interpretation seeks to keep the *Apex* doctrine in force. Similarly, courts examining joint activity have emphasized the legitimacy of the labor objective involved rather than looking to the existence of a management violation.[127]

These exceptions would inject judges into matters of labor policy without sufficient legislative guidance, contrary to the Norris-LaGuardia policy explained in *Hutcheson*. The importance and continued vitality of that policy is underscored by congressional action since the *Hutcheson* decision,[128] for Congress has continued to assume the task of regulating union activity which affects competitive market conditions. In the Taft-Hartley Act, Congress subjected a wide range of union activity to NLRB regulation; and, in passing that statute, it considered problems of anticompetitive union behavior. A proposal to withdraw the Clayton Act's exemption of labor unions when they engaged in direct market restraint was specifically rejected in conference. The conference report explained,

> Since the matters dealt with in this section have to a large measure been effectuated through the use of boycotts, and since the conference agreement contains effective provisions directly dealing with boycotts themselves, this provision is omitted from the conference agreement.[129]

Further congressional regulation of this area is found in the Labor Management Reporting and Disclosure Act of 1959 which deals with two other sources of union market control—"hot cargo" clauses and organizational picketing.[130] The increasing activity of Congress in defining labor's responsibilities under the antitrust policies gives an even stronger reason for judicial self-limitation in this area.

Sherman Act, 26 Stat. 209 (1890), 15 U.S.C. § 1 (1958), or whether two or more employers must conspire to restrain trade. *Compare* ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 297-98 (1955), *with* Cox, *Labor and the Antitrust Laws—A Preliminary Analysis*, 104 U. PA. L. REV. 252, 270-72 (1955). The *Allen-Bradley* distinction between a union acting "alone" or "in combination with business groups," 325 U.S. at 810-11, seems to require a separate conspiracy between employers, for the word "alone" is used in a context referring to union relations with an individual employer.

126. ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 299-300 (1955); *cf.* I.P.C. Distribs., Inc. v. Local 110, Chicago Moving Picture Mach. Operators, 132 F. Supp. 294 (N.D. Ill. 1955) (dictum).

127. Adams Dairy Co. v. St. Louis Dairy Co., 260 F.2d 46, 54 (8th Cir. 1958); Pevely Dairy Co. v. Local 603, Milk Wagon Drivers Union, 174 F. Supp. 229 (E.D. Mo. 1959).

128. Prior to Taft-Hartley, the unfair labor practice provisions of the NLRA, § 8, 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158(a) (1958) regulated only management conduct.

129. H. CONF. REP. No. 510, 80th Cong., 1st Sess. 65 (1947).

130. 73 Stat. 542, 29 U.S.C.A. §§ 158(b)(7), 158(e) (Supp. 1959).

INJUNCTIVE RELIEF UNDER TAFT-HARTLEY

Problems of accommodating Norris-LaGuardia to the Taft-Hartley Act [131] are radically different from those encountered under either the Sherman Act or the Railway Labor Act, for Taft-Hartley was enacted by a Congress aware of the limitations of Norris-LaGuardia. The act permits use of injunctions in certain situations but surrounds their issuance with elaborate procedures and safeguards. Under sections 10(j) and (*l*), the NLRB is empowered to seek injunctions against suspected unfair labor practices prior to final Board adjudication.[132] Because such relief is not available to private parties and may be sought only after a specialized agency has made preliminary findings of fact and law justifying issuance of an unfair labor practice complaint,[133] many of the evils associated with the private use of injunctions in labor disputes are thus eliminated. Sections 206 to 210, dealing with "national emergency strikes," also allow injunctive relief for a period of eighty days, but only upon the discretionary order of the President.[134] Only section 302, dealing with employer payments to union representatives and the management of pension and welfare funds, explicitly allows private parties to seek injunctions;[135] but these areas are peripheral to the labor objectives and activities protected by Norris-LaGuardia, and the controversies under this section often may not be section 13 "labor disputes."[136] In all these provisions, Congress stated explicitly that Norris-LaGuardia was not applicable. Moreover, analysis of the debates on Taft-Hartley reveal a congressional belief that Norris-LaGuardia would remain in effect where not specifically overruled.[137] Finally, the restrictions placed upon use of injunctive relief and the importance of the issue in legislative debates [138] demonstrate the continued suspicion of injunctions as a remedy in labor disputes.

These limitations, however, have not prevented federal courts from issuing injunctions, without express statutory authorization, to compel majority rep-

131. Labor-Management Relations Act, 61 Stat. 136 (1947), as amended, 73 Stat. 519 (1959), 29 U.S.C. §§ 141-52, 155-57, 161-63, 165-85 (1958), 29 U.S.C.A. §§ 153-54, 158-60, 164, 186-87 (Supp. 1959).

132. Labor-Management Relations Act §§ 10(j) & (*l*), 61 Stat. 149 (1947), as amended, 72 Stat. 945 (1959), 29 U.S.C. § 160(j) (1958), 29 U.S.C.A. § 160(*l*) (Supp. 1959). Section 10(j) authorizes the NLRB to seek in its discretion an injunction against alleged unfair labor practices after issuance of a complaint by the General Counsel; 10(*l*) requires that such relief be sought as a prerequisite to issuing a complaint against alleged violations of §§ 8(b)(4)(A-C),-(b)(7),-(e).

133. See 29 C.F.R. § 101.8 (Supp. 1960).

134. 61 Stat. 155 (1947), 29 U.S.C. §§ 176-80 (1958).

135. 73 Stat. 537 (1959), 29 U.S.C.A. § 186 (Supp. 1960).

136. See generally Note, *Taft-Hartley Regulation of Employer Payments to Union Representatives: Bribery, Extortion and Welfare Funds Under Section 302*, 67 YALE L.J. 732 (1958).

137. See the remarks of Senator Taft in 2 NLRB LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT OF 1947, at 1365, 1396.

138. *Id.* at 1365 (Senator Taft).

resentatives to bargain fairly on behalf of those they represent.[139] This duty, derived from an identical duty imposed on railway unions by the *Steele* doctrine,[140] has been read into the exclusive representation provisions of the National Labor Relations Act. Arguably, use of injunctions to enforce the *Steele* mandate can be reconciled with Taft-Hartley's intent to preserve Norris-LaGuardia on the ground that none of these cases involve activities specifically immunized by section 4 of the anti-injunction statute.[141] Section 4 has been used as a guide to discover the activities which Congress particularly wished to shield from injunctive relief.[142] But the legislative history and statutory language of Norris-LaGuardia clearly indicate that injunctions are prohibited in all "labor disputes," regardless of whether such activities are enumerated in section 4.[143] A further attempt to distinguish these cases rests on the view that injunctive relief under *Steele* is necessary to avoid a challenge to the constitutionality of the NLRA. Without injunctive relief, it is argued, the right to fair representation would be inefficacious and the statutory system of exclusive representation would violate rights of the minority.[144] Since the *Steele* duty was created by the courts and is not explicitly mentioned in the act it may be possible to infer that Congress never considered the question of remedies to enforce that duty. Thus, the Court's approval of *Steele* injunctions would not repudiate the general congressional policy to limit injunctive relief under the Taft-Hartley Act. It would not, for example, serve as a precedent for allowing injunctive relief to enforce duties specifically enumerated in the act.

The explicit statutory duty most likely to invite further encroachment upon Norris-LaGuardia is section 301 [145] which gives federal courts apparently

139. Syres v. Local 23, Oil Workers Union, 350 U.S. 892 (1955).

140. See text accompanying notes 62-64 *supra*.

141. See Wellington, *Judge Magruder and the Labor Contract*, 72 HARV. L. REV. 1268, 1274-81 (1959).

142. Textile Workers v. Lincoln Mills, 353 U.S. 448, 458 (1957) (Norris-LaGuardia does not prevent specific enforcement of an agreement to arbitrate).

143. Norris-LaGuardia's statutory language by prohibiting all injunctions in nonviolent labor disputes, see note 33 *supra* and accompanying text, does not limit the act's protections to the activities specified in § 4. Thus, the Senate Report stated, "The same rule throughout the bill, wherever applicable, applies both to employers and employees." S. REP. No. 163, 72d Cong., 1st Sess. 19 (1932). Since § 4 specifies activities engaged in only by unions, the scope of the act may not be limited to their protection without violating congressional intent.

144. See, *e.g.*, Steele v. Louisville & N. Ry., 323 U.S. 192, 208-09 (1944) (concurring opinion). Mr. Justice Murphy, although concurring in the result, rejected the majority opinion because he wanted to state explicitly that the RLA would be unconstitutional without incorporation of the *Steele* doctrine.

145. Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.
61 Stat. 156 (1947), 29 U.S.C. § 185(a) (1958).

plenary jurisdiction over suits between unions and employers for violation of contracts.[146] Prior to section 301, it was generally assumed that Norris-LaGuardia protected strikes in breach of contract.[147] In 1932, legal enforceability of labor contracts was not regarded as crucial to effective bargaining; indeed, the prevailing philosophy, most clearly demonstrated by Norris-LaGuardia itself, was that the law should play only a minimal role in labor relations.[148] Moreover, the legislative history and statutory language of Norris-LaGuardia indicate a strong congressional desire to avoid judicially-created exceptions to its broad prohibitions,[149] and, since a strike in breach of contract is usually a section 13 labor dispute involving activities protected by section 4, the act seems to leave federal courts powerless to enjoin such conduct. But section 301's mandate to enforce collective agreements may compel relaxation of Norris-LaGuardia's limitations. In *Chicago River*, the Supreme Court enjoined a strike intended to evade the compulsory arbitration provisions of the RLA, reasoning that policies of later legislation may take precedence over Norris-LaGuardia.[150] Strikes in violation of the arbitration provisions of a collective agreement might be analogous to the *Chicago River* situation, for, if permitted, they might destroy the effectiveness of contractual arbitration. Moreover, the establishment of a clear federal policy to protect and enforce these contracts erases the danger that judges enjoining strikes in derogation of contract provisions would be fashioning law according to their own views of social policy.[151] Indeed, the very prohibition against judicial lawmaking may be inapplicable in contract actions, for section 301, as construed in *Textile*

146. Although § 301 is framed in jurisdictional terms, Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 456 (1957) held that the section authorized the creation of a corpus of federal contract law to be fashioned "from the policy of our national labor laws."

147. Relevant pre-Taft-Hartley decisions indicated that Norris-LaGuardia barred injunctive relief against strikes in breach of contract, but their holdings are unclear. See Wilson & Co. v. Birl, 27 F. Supp. 915 (E.D. Pa.), *aff'd*, 105 F.2d 948 (3d Cir. 1939); Wilson Employees' Representation Plan v. Wilson & Co., 53 F. Supp. 23 (S.D. Cal. 1943); Colorado-Wyoming Express v. Denver Local 13, 35 F. Supp. 155 (D. Colo. 1940); Moreschi v. Mosteller, 28 F. Supp. 613 (W.D. Pa. 1939).

The legislative history of Norris-LaGuardia also seems inconclusive. The issue was raised only by those opposing the bill who stated that its provisions would prohibit injunctions against stoppages violative of contract provisions. S. REP. No. 163, 72d Cong., 1st Sess. 9 (1932) (statement of minority views); 75 CONG. REC. 5471 (1932) (remarks of Representative Beck). Those who drafted and led the fight for passage remained mute on this point.

But see GREGORY, LABOR AND THE LAW 455-56 (2d rev. ed. 1958).

148. See note 30 *supra*; Cox, *Current Problems in the Law of Grievance Arbitration*, 30 ROCKY MT. L. REV. 247, 253 (1958).

149. See note 45 *supra*.

150. 353 U.S. 30 (1957). See Cox, *supra* note 148, at 255.

151. See Teamsters v. Yellow Transit Lines, 46 L.R.R.M. 2915 (10th Cir. 1960). The *laissez faire* philosophy of Norris-LaGuardia may be incompatible with § 301. It seems clear that the section was intended to increase the sanctions against union conduct violative of contract provisions, thus giving the law a broader role in the regulation of labor-management relations. See H.R. REP. No. 245, 80th Cong., 1st Sess. 46 (1947).

Workers Union v. Lincoln Mills,[152] names the judiciary as a body of special competence to make law in this area.[153] Thus, even though a section 301 injunction would not be surrounded by the procedural safeguards of other Taft-Hartley injunctions, nor conditioned upon the exercise of discretion by other governmental agencies, perhaps such restrictions are unnecessary when courts act in contract matters. A final reason urged for allowing injunctive relief relies on the *Lincoln Mills* holding that courts may specifically enforce the employer's contractual promise to arbitrate grievances in spite of the anti-injunction statute.[154] Denial of similar relief for breach of a no-strike clause—labor's *quid pro quo* for management's acceptance of arbitration[155]—would seem incongruous.[156]

The argument that the congressional intent expressed in Norris-LaGuardia has been superceded by the basic policy of section 301 misconceives the problem, for, unlike the *Chicago River* situation, section 301 was passed with full awareness of Norris-LaGuardia and the evils of labor injunctions. The primary inquiry, therefore, must be directed to the specific intent of Congress when Taft-Hartley was enacted. The legislative history of section 301 indicates that this provision was not intended as a *sub silentio* authorization of injunctive relief. The Senate version of the bill made breaches of collective agreements unfair labor practices and gave the NLRB power under section 10(j) to enjoin violations.[157] The House, on the other hand, gave jurisdiction over collective agreements to the courts and explicitly authorized issuance of injunctions to private parties.[158] The conference committee accepted this House version, which became section 301, but eliminated the provision repealing Norris-LaGuardia.[159] In view of Congress' explicitly stated belief that Norris-LaGuardia forbade the enjoining of strikes in breach of contract,[160] and that Norris-LaGuardia remained in force unless explicitly repealed,[161] omission of the in-

152. 353 U.S. 448, 456-57 (1957).

153. Moreover, although the original Senate bill entrusted enforcement of collective agreements to the NLRB by treating conduct in violation of a contract as an unfair labor practice, S. 1126, 80th Cong., 1st Sess. § 8(b)(5) (1947), the Conference Committee transferred responsibility to the courts through the medium of § 301, H. CONF. REP. No. 510, 80th Cong., 1st Sess. 545-46, 569-70 (1947).

154. 353 U.S. 448 (1957); see text accompanying note 64 *supra*.

155. United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 455 (1957).

156. Cox, *supra* note 150, at 252-56, see Teamsters v. Yellow Transit Lines, *supra* note 151.

157. S. 1126, 80th Cong., 1st Sess. § 8(b)(5) (1947).

158. H.R. 3020, 80th Cong., 1st Sess. § 302(e) (1947).

> In actions and proceedings involving violations of agreements between an employer and a labor organization or other representative of employees, the provisions of . . . [Norris-LaGuardia] shall not have any application in respect of either party.

159. H.R. CONF. REP. No. 510, 80th Cong., 1st Sess. 67 (1947).

160. S. REP. No. 105, 80th Cong., 1st Sess. 17 (1947).

161. See 2 NLRB LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT OF 1947, at 1396 (1948) (debate between Senators Taft and Morse over § 303, a provision

junction clause from section 301 indicates a refusal to allow injunctive relief.[162] Lower federal courts have generally adopted this position.[163]

Admittedly, retention of Norris-LaGuardia in section 301 actions will render judicial enforcement of that section's policy less effective. The threat of damage actions, provided by section 301,[164] may not curtail all strikes in derogation of arbitration; the union may decide that the value of the objective sought outweighs the cost of damages.[165] Nevertheless, the damage action would be a deterrent in many cases,[166] and the congressional rejection of more effective injunctive relief[167] seems to indicate satisfaction, or at least unwillingness, to go beyond this method of enforcement.

Even if the legislative history did not contain evidence of a specific refusal to allow injunctive relief, congressional awareness of the possibility that Nor-

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analogous to § 301 in terms of the injunction problem, indicating that Senator Taft believed that injunctions were not available without specific authorization). See also 2 *id.* at 1365.

162. H.R. CONF. REP. No. 510, 80th Cong., 1st Sess. 66 (1947) (stating that, after the amendment to § 301(e), only § 6 of Norris-LaGuardia is not applicable).

163. A. H. Bull S.S. Co. v. Seafarers' Union, 250 F.2d 326 (2d Cir.), *cert. denied*, 355 U.S. 932 (1957); W. L. Mead, Inc. v. Teamsters Union, Local 25, 217 F.2d 6 (1st Cir. 1954); *In re* Third Ave. Transit Corp., 192 F.2d 971 (2d Cir. 1951); Alcoa S.S. Co. v. McMahon, 81 F. Supp. 541 (S.D.N.Y. 1948), *aff'd per curiam*, 173 F.2d 567 (2d Cir. 1949), *cert. denied*, 338 U.S. 821 (1949); Sound Lumber Co. v. Local 2799, Lumber Workers, 122 F. Supp. 925 (N.D. Cal. 1954). *Contra*, Teamsters Union v. Yellow Transit Lines, 46 L.R.R.M. 2915 (10th Cir. 1960); American Smelting & Ref. Co. v. Tacoma Smeltermen's Union, 175 F. Supp. 750 (W.D. Wash. 1959); Johnson & Johnson v. Textile Workers' Union, 184 F. Supp. 359 (D.N.J. 1960).

164. Breach of a no-strike clause may be remedied by recovery of the accrued and anticipated losses and lost profits resulting from the work stoppage. Teamsters Union, Local 25 v. W. L. Mead, Inc., 230 F.2d 576 (1st Cir. 1956), *cert. denied*, 352 U.S. 802 (1956) ($359,000 damage award for breach of an "implied no-strike clause").

165. Also, the damage suit may not achieve the most desirous settlement of the dispute. The statute does not specify the remedy but an injunction is the only practical relief against a strike. Damages are inadequate because the injury to the business cannot be measured accurately. Furthermore, an employer can rarely afford to exacerbate labor-management relations by suing a union made up of his employees after the end of the strike.

Cox, *supra* note 148, at 255.

166. In addition, Congress may have assumed that situations requiring injunctive relief could be dealt with by state courts who are not affected by Norris-LaGuardia. After enactment of § 301, it has been held that that section does not bar state injunctive relief. McCarroll v. Los Angeles County Dist. Council of Carpenters, 49 Cal. 2d 45, 315 P.2d 322 (1957), *cert. denied*, 355 U.S. 932 (1958). See text accompanying notes 175-83 *infra*.

Injunctive relief may also be available under NLRB doctrines holding strikes in derogation of arbitration procedures established by collective agreements to be an unfair labor practice under § 8(b)(3), 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(3) (1958). See International Union, UMW (Boone County Coal Corp.), 117 N.L.R.B. 1095 (1957), *enforcement denied*, 257 F.2d 211 (D.C. Cir. 1958); UMW, Local 9735 (Westmoreland Coal Co.), 117 N.L.R.B. 1072 (1957), *enforcement denied*, 258 F.2d 146 (D.C. Cir. 1958). But the Supreme Court has cast some doubt on the validity of the NLRB's theory in these cases. See NLRB v. Insurance Agents' International Union, AFL-CIO, 361 U.S. 477, 491 (1960).

167. See notes 157-59 *supra* and accompanying text.

ris-LaGuardia might cripple enforcement of new policies, and the failure explicitly to resolve this conflict raise a strong presumption in favor of retaining the injunction bar, despite its potentially harmful effect. Because of this awareness, accommodation of Taft-Hartley with Norris-LaGuardia does not afford the judiciary the same freedom to choose appropriate remedies that was necessarily allowed under the Railway Labor Act, where absolutely no indication of congressional preference for either of the conflicting policies can be found.

Moreover, authorizing strike injunctions in breach of contract suits would raise again the danger of unfairness implicit in the hasty adjudication of temporary injunction cases. While contract law presents a more precise standard than the old common law of labor, doctrines created under section 301, arising out of the labor-management struggle and colored by it, are likely to lack the precision of principles derived from commercial contract law.[168] The Supreme Court has recently held that the common law of labor agreements cannot always be based upon traditional notions of contract.[169] Even direct application of commercial precedents to the loosely-drawn, frequently ambiguous collective agreements will present problems not amenable to hasty decision. For example, under an agreement lacking a broad no-strike clause, a union's right to engage in work stoppages may be governed by an "implied promise" not to strike over arbitrable issues.[170] The scope of the arbitration provision—a much-debated question in the federal courts—cannot be resolved by reference to rules of thumb but may be decided only after careful consideration of the complex factors involved in construing collective agreements.[171]

Nor does *Lincoln Mills*, by allowing specific enforcement of arbitration clauses against management, create an imbalance requiring the same remedy to be made available for violations of no-strike provisions; for the apparent inequality of remedies is, in fact, a proper adjustment to the difference in the tactical positions of management and labor when either refuses to arbitrate. Injunctive relief against management's refusal is necessary because a damage action for breach of the promise to submit to arbitration would furnish the union only nominal relief.[172] But when the union strikes in refusing to arbi-

168. The *Lincoln Mills* decision made it quite clear that commercial contract law would be no more than a guide and that the corpus of federal law governing § 301 actions was to be fashioned through "judicial inventiveness" from "the policy of our national labor laws." 353 U.S. 448, 456-57 (1957).

169. Lewis v. Benedict Coal Corp., 361 U.S. 459 (1960); see United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

170. See, *e.g.*, Local 25, Teamsters Union v. W. L. Mead, Inc., 230 F.2d 576 (1st Cir. 1956), *cert. denied*, 352 U.S. 802 (1956); United Constr. Workers v. Haislip Baking Co., 223 F.2d 872, 877 (4th Cir.), *cert. denied*, 350 U.S. 847 (1955) (dictum).

171. See authorities cited note 81 *supra*.

172. Arbitration agreements were denied specific enforcement at common law, and only nominal damages were recoverable for their breach. RESTATEMENT, CONTRACTS § 550 (1932); 6 WILLISTON, CONTRACTS § 1919 (rev. ed. 1938).

trate, the factor of strike losses makes the damage award a substantial deterrent.[173] Moreover, this disparity apparently accords with the policy of Norris-LaGuardia; section 8 encourages arbitration, while a strike is specifically immunized from the injunction by section 4.[174]

State Courts, Section 301, and Norris-LaGuardia

If federal courts may not issue injunctions in section 301 actions, then state courts exercising concurrent jurisdiction over suits for breach of collective agreements may be bound by an identical rule. While the Supreme Court has not yet ruled on the role of state courts under section 301, state courts have held that their jurisdiction over labor contract actions is not preempted by Taft-Hartley's provision for federal jurisdiction. In *McCarroll v. Los Angeles County Dist. Council of Carpenters*, however, the California Supreme Court concluded that state law must be subordinated to the federal law of labor contracts, in order to avoid uncertainty and disparity of litigants' rights.[175] As a result state courts would be bound to follow, and to participate in formulating, the federal common law of labor contracts. According to *Lincoln Mills*, formulation of the federal common law must be governed by federal labor policy.[176] Since Norris-LaGuardia represents a part of the federal labor policy, arguably state courts should be limited by Norris-LaGuardia when applying federal law. The California court in *McCarroll*, however, rejected this thesis, reasoning that neither Norris-LaGuardia nor section 301 were intended to deprive state courts of their injunctive powers, and that state injunctive relief would not affect the uniformity of litigants' rights.[177] *McCarroll*'s evaluation of the legislative intent underlying both Norris-LaGuardia and section 301 seems correct. Norris-LaGuardia was directed only to federal courts.[178] In Taft-Hartley, Congress recognized the existence of state remedies when drafting the act,[179] and yet evinced no intention of affecting the enforcement powers

173. See note 165 *supra*.

174. Norris-LaGuardia Act § 8, 47 Stat. 72 (1932), 29 U.S.C. § 108 (1958) reads in part: "No restraining order or injunctive relief shall be granted to any complainant who has failed . . . to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration." But § 4(a), 47 Stat. 70 (1932), 29 U.S.C. § 104(a) (1958), prohibits absolutely any decree enjoining persons involved in a labor dispute from "ceasing or refusing to perform any work or to remain in any relation of employment."

175. 49 Cal. 2d 45, 315 P.2d 322 (1957), *cert. denied*, 355 U.S. 932 (1958); Karcz v. Luther Mfg. Co., 338 Mass. 313, 155 N.E.2d 441 (1959); see Wellington, *Labor and the Federal System*, 26 U. CHI. L. REV. 542, 557-58 (1959).

176. 353 U.S. 448, 456 (1957).

177. 49 Cal. 2d at 45, 315 P.2d at 330-33.

178. "[N]o court of the United States shall have jurisdiction . . . ." Norris-LaGuardia Act § 1, 47 Stat. 70, 29 U.S.C. § 101 (1958). Prior to Taft-Hartley, Norris-LaGuardia had no impact on state tribunals. *E.g.*, Nevins, Inc. v. Kasmach, 279 N.Y. 323, 18 N.E.2d 294 (1938).

179. See, *e.g.*, S. REP. No. 105, 80th Cong., 1st Sess. 16-17 (1947).

of state courts. Indeed, the enaction of section 301 reflects congressional desire for greater, not lesser sanctions against breaches of contract.[180]

Thus the decision in *McCarroll* may be challenged only by demonstrating that the court erred in its assumption that injunctive relief would not affect the uniformity of federal rights under section 301, and that this lack of uniformity must be eradicated. No doubt the presence or absence of strike injunctions will affect the content and meaning of a "no strike" clause; the union's power to win disputes by striking in violation of the contract will be severely curtailed if such strikes can be immediately enjoined. Thus there exists a significant disparity between federal and state relief, which may affect a substantive federal right. Once disparity is shown, however, it remains to be proven that such disparity should be eradicated. Since Congress was aware of the potentially greater severity of state remedies and did not attempt to cure it, it cannot be argued that disparity offends a "policy" of uniformity under Taft-Hartley. Perhaps correction would be warranted if, despite this congressional inaction, it could be shown that the lack of uniform remedies prevents achievement of Taft-Hartley's policy to encourage stable collective agreements. But it does not. While the possibility of different interpretations of the same substantive term might create uncertainty in the negotiation and drafting of collective agreements, the possibility of injunctive relief can be calculated by the parties in advance, particularly since the union knows that management will seek such relief if it is available.[181] The final argument suggested for rectifying disparity appeals to uniformity of result for its own sake, based upon a reverse *Erie R.R. Co. v. Tompkins* theory which would impose upon state courts enforcing federal rights the same duty to reach uniform "outcomes" as is imposed upon federal courts enforcing state rights under diversity jurisdiction.[182] The analogy is misconceived, however. The uniform

180. *Ibid.*; see H.R. REP. No. 245, 80th Cong., 1st Sess. 45-46 (1947).

> The principal purpose of section 301 was to facilitate the enforcement of collective bargaining agreements by making unions suable as entities in the federal courts, and thereby to remedy the one-sided character of existing labor legislation. . . . We would give altogether too ironic a twist to this purpose if we held that the actual effect of the legislation was to abolish in state courts equitable remedies that had been available, and leave an employer in a worse position in respect to the effective enforcement of his contract than he was before enactment of section 301.

McCarroll v. Los Angeles County Dist. Council of Carpenters, 49 Cal. 2d 45, 63-64, 315 P.2d 322, 332 (1957), *cert. denied*, 355 U.S. 932 (1958) (Traynor, J.).

181. McCarroll v. Los Angeles County Dist. Council of Carpenters, 49 Cal. 2d 45, 315 P.2d 322 (1957), *cert. denied*, 355 U.S. 932 (1958); Wellington, *supra* note 175, at 559. See also Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 491 (1954).

182. Under Erie Ry. v. Tompkins, 304 U.S. 64 (1938), federal courts in diversity cases must follow state law on all matters which will affect the outcome of litigation. See, *e.g.*, Guaranty Trust Co. v. York, 326 U.S. 99 (1945). Since the "outcome-determinative" test measures encroachment by the federal forum on state created rights, it should similarly detect state interference with federally-created rights. And, since a federal court in diversity

result demanded of federal courts rests upon the notion that the federal court sitting in diversity cases promotes no independent federal interest,[183] but is merely another court of the state. State courts hearing labor contract actions, on the other hand, may have an independent interest in labor relations, as evidenced by the long history of state jurisdiction over labor contract matters, and although the logical extension of *Lincoln Mills* would apparently require uniformity, this state interest should not be lightly dismissed in the absence of either specific congressional intent to the contrary, or outright conflict with Taft-Hartley policy. Thus, even accepting the argument that state injunctive relief sanctions disparate results, the disparity would not seem to require rejection of the *McCarroll* conclusion that state courts preserve their injunctive power in section 301 suits.

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must bow to state rules on all matters affecting the outcome of litigation, so state courts enforcing contract rights under § 301 must yield to federal law on any matter that is "outcome-determinative." See Meltzer, *The Supreme Court, Congress, and State Jurisdiction over Labor Relations: II*, 59 COLUM. L. REV. 269, 280 (1959); Loeb, *Accommodation of the Norris-LaGuardia Act to Other Federal Statutes*, 11 LAB. L.J. 473, 491 (1960).

183. See Bernardt v. Polygraphic Co., 350 U.S. 198 (1956) (dictum).

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