THE LABOR INJUNCTION: AN HISTORICAL PERSPECTIVE

FIFTY YEARS AFTER NORRIS-LAGUARDIA

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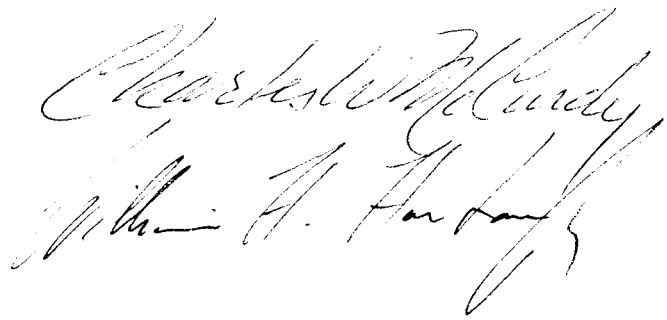

INTRODUCTION

Samuel Gompers hailed the Clayton Act as organized labor's Magna Charta. At last, thought Gompers and other labor leaders, arbitrary judicial intervention in labor disputes would end. 1/ Labor's high hopes were soon dashed. The United States Supreme Court adopted a narrow construction of the Clayton Act's labor provisions, effectively terminating any relief from the injunction problem. Eighteen years passed before the Norris-LaGuardia Act was enacted, and the injunction issue was finally settled. The legislation and litigation surrounding the Clayton and Norris-LaGuardia Acts reflect fundamental transformation in both governmental policy and constitutional doctrines applicable to labor.

This essay is divided into three chapters. The first chapter provides background for analysis of the labor injunction issue. Labor history and relevant legal history are outlined to give the reader the basic knowledge with which to understand the topic. Also, two major pieces of legislation are discussed in the first chapter. The years surrounding the Clayton Antitrust Act 2/ and the Norris-LaGuardia Act 3/ (roughly 1912 to 1937) provide the focus for this study. During these years, the Congress exercised

its superior institutional capabilities to deal with the injunction problem and the courts developed constitutional doctrines to preserve this congressional action.

The second chapter analyzes equity practice. The fundamental criticism of labor injunctions was that judges were abusing their discretionary powers to help management crush labor's self-help efforts. On this premise, Congress enacted the two acts relevant to this issue. This traditional view has recently been attacked as unfounded, 4/ which implicitly requires one to conclude that the legislative solutions, based on this supposed judicial abuse, were invalid. However, the evidence suggests that the historical concept of equity and traditional limits on equity discretion requires acceptance of the time-honored view.

The third chapter focuses on the constitutional doctrines employed in judicial scrutiny of labor injunction legislation. This era saw the fall of substantive due process which played such an important role in invalidating early New Deal legislation. The interventionist activity of the Court was eventually replaced by judicial deference to legislative solutions; this shift allowed the Norris-LaGuardia Act and other important legislation to withstand constitutional attacks. A particularly relevant issue and

the primary emphasis of the third chapter is the congressional method used in the Norris-LaGuardia Act of withdrawing federal court jurisdiction to issue injunctions. This same problem of the relative powers of the legislative and judicial branches has surfaced today with legislative attempts to withdraw federal court jurisdiction over abortion and school prayer issues. 5/ The 1930's Supreme Court upheld Congress' power to determine federal jurisdiction. On the issues of abortion and school prayer, the Supreme Court faces a similar decision on whether this congressional action infringes on the federal courts' inherent powers.

This paper will explore why the courts were not capable of solving the conflicting economic realities of the management-labor confrontation. Congress was institutionally capable, because of what I call a "superior fact-finding ability," of developing a coherent national injunction policy. Congress' first solution, the Clayton Act, was doctrinally ill conceived. The Norris-LaGuardia Act, Congress' second attempt, was based on a different constitutional provision and only sought to equalize the type of activity allowed to both capital and labor. Congress' premise for taking both legislative actions was that courts were abusing their equity powers. This premise appears valid. The initial, Clayton Act solution was merely an

extension of traditional equity limitations, while the second attempt, embodied in the Norris-LaGuardia Act, attacked equity jurisdiction and proved successful in ending the injunction issue. Finally, the 1930's Supreme Court deferred to the legislative withdrawal of federal court injunction power, since the Congress had already embarked on a comprehensive labor policy and the inherent powers of the Courts were not threatened.

Chapter One

HISTORICAL AND LEGAL BACKGROUND: DETERMINING THE ALLOWABLE ECONOMIC CONFLICT

I. Introduction

United States Attorney General Harry M. Daugherty ordered a local United States Attorney to file a bill of complaint on August 30, 1922 in a Chicago Federal District Court. This bill prayed for injunctive relief against certain activities in which the Federated Craft Shopworkers were allegedly engaged. 1/ Two days later, Federal District Court Judge James H. Wilkerson granted the injunction which restrained activities of 400,000 workers. 2/ This sweeping injunction prohibited the union leaders from issuing any instructions or public statements that might induce union members to leave or refrain from entering into employment with the railroads. It also prohibited the use of union funds to further any act forbidden in the injunction. Finally, picketing by "letters, printed or other circulars, telegrams, telephones, word of mouth, oral persuasion or suggestion, or from interviews to be published in the newspapers, or otherwise in any manner whatsoever," to encourage

union members not to work for the railroads was prohibited. 3/

Today it is difficult to believe that the government would procure an order that so violated essential First Amendment rights of free speech and association. Yet, this was the state of the law known as "Government by Injunction." This order seemed unfair to many Americans. In fact, Attorney General Daugherty was confronted with an impeachment resolution for his activities. 4/

To understand how the law seemed to depart from a common sense of fairness, one must look to the history of labor and its interaction with the law. Originally, common law courts branded labor unions as unlawful criminal conspiracies. Gradually, there was an acceptance of labor's right to exist and use certain means to achieve lawful ends. The parameters of these means and ends were shaped under tort doctrines. The equitable remedy of enjoining unlawful activity was not used against labor unions until the 1880's, but thereafter, the injunction became a popular judicial solution. The Clayton Act was the first enacted congressional attempt to solve the injunction problem, but it was eviscerated by the United States Supreme Court. Not until eighteen years after the Clayton Act was passed, did the

Norris-LaGuardia Act decisively end the rule of government by injunction.

II. Labor Associations and The Common Law

The rise of organized labor and its conflict with common law courts is an oft-told story. Yet, it is important to isolate the aspects of the story which relate to labor injunctions. Equity practice became fused with labor law only in the 1880's. After that date, the injunction and labor law were inextricably intertwined in an ever growing number of cases. This section will provide the common law and equity court practice as they related to labor when Congress addressed the injunction issue in the events leading up to the Clayton Act.

Traditionally, common law courts regarded labor unions as unlawful conspiracies in restraint of trade. Unions so classified were punishable by criminal or civil sanctions. 5/ Early in the nineteenth century, a Philadelphia Mayor's Court in Philadelphia Cordwainers explained the labor conspiracy in two parts. First, the union was attempting to increase wages. Second, the union was preventing other workers from working at non-union wages and they were compelling others to join the union. Had only one employee engaged in these activities, then that would be legal. But the confederacy rendered the action criminal. 6/

The major case questioning the practice of declaring labor unions illegal was Commonwealth v. Hunt. 7/ Here, Jeremiah Horne accepted pay below the Boston Journeymen Bootmakers Society pay scale. Horne claimed the Society conspired to exclude him from his trade when Horne's employer had to fire him or risk a Bootmakers Society strike. Massachusetts Supreme Court Chief Justice Lemuel Shaw did not repudiate the criminal conspiracy doctrine, but he did accept general considerations supporting the legality of familiar objectives of labor unions. For Shaw, the issue was not if there was a criminal offense, but if there was adequate justification for the means unions used to achieve lawful ends. 8/ This new means/ends test became the accepted legal inquiry after Hunt.

Courts now had to determine first if the union objectives were acceptable and second if the means employed were appropriate. The doctrinal controls on union activity fell under common law tort theories. 9/ The vague and often ambiguous tort notions of "unfair competition," "civil conspiracy" and "illegal purpose," lent themselves well to judicial regulation of ends and means. Higher wages, shorter hours and improve working conditions were allowable ends. Courts reasoned that these objectives gave direct benefits to workers and the right to combine for these

activities was universally recognized. 10/ But when unions went "one degree more remote" and strove to strengthen the union for future economic fights, the courts often struck down the activity as illegal. 11/ The determination of when the activity became "one degree more remote" allowed a great deal of discretion to the judge.

Similarly, means determinations were also not confined within clear-cut boundaries. The right to strike or cease work for a lawful end was generally upheld. Picketing and boycotts received a more varied reception. 12/ Courts essentially gaged what union devices used to inflict economic pressure on employers were "fair." Those that were not were improper means. Determinations based on vague notions of "malice" and "unfair competition" produced great confusion on what was permitted. 13/ In short, the analyses courts used to evaluate union activities often depended on the judge's impression on what amount of harm one side could inflict on the other. This amorphous region of permitted activity has been termed the "allowable area of economic conflict." 14/

Tort doctrines provided an effective cause of action, but tort remedies often proved inadequate. The typical tort remedy is money damages. To recover, management had to sue after the harm was inflicted and if they prevailed in the

suit, they could receive monetary compensation. This remedy was not effective because labor unions would or could not pay judgments. Labor unions were not incorporated and therefore not capable of being sued as an entity. Labor leaders were the usual defendants and all too often they had no money to pay judgments. Even if the lenders could pay, this might not discourage the rank and file union members from further unlawful activity. Finally, money damages or even criminal convictions were small condolences to employers for harm already inflicted. 15/ Some other sanction was needed to meet these problems.

The equity court injunction provided judges with an effective remedy where tort sanctions failed. Equity courts acted on the person; they could order someone to act or refrain from acting in a certain way. Labor unions now could be ordered to stop their conduct before the alleged harm occurred. Also, equity courts sat without a jury. One did not even need an adversarial proceeding if certain conditions were met. Violations of an injunction would result in a contempt charge, something very similar to a criminal charge. The penalty for a contempt charge, like a criminal one, might be jail or fines and this penalty was determined by the judge who issued the injunction. It seemed to many that the equity judge was a prosecutor, judge

and jury all in one. How injunctions and equity procedure came to be used in labor cases is a unique American adaptation of an old English practice.

The early English common law courts functioned through a very rigid writ system. To recover for a wrong, a litigant had to frame his case within a limited number of writs and then follow a strict pleading procedure. This formalistic practice resulted in great unfairness when parties could not fit their case within a writ or if the party failed to follow the proper procedure. To mitigate this unfairness, the king empowered his chancellor to satisfy the royal conscience by doing justice in all cases. The chancellor would only act where there was no remedy at common law. The chancellor by use of an injunction could order a person to do or undo some act or refrain from taking a certain course of action. An injunction might be temporary or permanent depending on the need. A parallel system of equity courts emerged that operated as the collective "conscience of the king" to achieve fairness where the common law courts failed. Equity courts did not use juries and they had the power to jail or fine for contempt those who violated their orders. 16/

No one knows for sure when the first injunction was issued against a labor union. An injunction was known to

have been issued by a circuit judge in Iowa in 1884, and perhaps some were issued the year before at Baltimore, Maryland and Kent, Ohio against the Knights of Labor. 17/ Edwin Witte reports a substantial increase in injunctions after these dates. He lists only 28 injunctions in the 1880's and 921 from January 1, 1920 to May 1, 1930. 18/ Felix Frankfurter and Nathan Greene report the number of injunction cases after the 1880's "grew in volume like a rolling snowball." 19/

The magnitude of the labor injunction problem is impossible to determine. Witte reports that 1872 injunctions were granted between 1880 and May 1, 1931. During this time, in only 221 cases were injunctions applied for, but not granted. Witte also estimate that unreported cases outnumbered reported ones, 5 to 1. 20/ This 5 to 1 figure might even be low. In the Federated Craft Shopworkers strike, 300 injunctions were issued and only 12 were reported. Also, the Massachusetts Bureau of Statistics discloses that between 1898 and 1916 there were 260 injunctions cases and only 18 were reported. 21/ By unreported cases or even reported ones, the labor injunction was a frequently used remedy. 22/

Two major cases brought public awareness to the labor injunction problem and also upheld many of the practices

used in federal courts. The first case came in the 1894 United States Supreme Court decision In Re Debs. 23/ The case arose from a strike of Pullman Company employees over a twenty percent reduction in wages. Eugene Debs ordered his American Railway Union, the union representing the Pullman workers, to not operate trains that included Pullman cars. This action paralyzed Chicago and threatened to close down the national railroad network. President Grover Cleveland ordered his attorney general to apply for an injunction restraining Debs and other union leaders from interfering in the railroad's business. 24/ The Supreme Court upheld this intervention which broke the strike. Justice David Brewer, speaking for the court, said, "[t]he jurisdiction of courts to interfere in such matters by injunction is one recognized from ancient times and by indubitable authority...." 25/ Thus, the Supreme Court sanctioned injunctions in labor cases that had begun in American no more than a decade earlier. 26/ The Court did not find it important that injunctions traditionally had not been issued in labor cases.

The other major case bringing public attention to labor injunctions was Gompers v. Bucks Stove & Range Co. 27/ Here, the American Federation of Labor (A.F. of L.) placed the Bucks Stove & Range Co. on its "Unfair" or "We Don't

Patronize" list published in its magazine The American Federationist. The Buck Stove Company applied for and obtained an injunction against this publicized boycott. Samuel Gompers and other A.F. of L. leaders ignored the injunction, claiming it infringed their right of free speech. The district court convicted Gompers and other leaders of contempt for violating the injunction and sentenced them to jail. 28/ The Supreme Court upheld the conviction and said "publication and use of letters, circulars and printed matter may constitute a means whereby a boycott is unlawfully continued, and their use for such purpose may amount to a violation of the order of injunction." 28/ The "We Don't Patronize" list damaged Buck Stove's business and thus infringed their property rights. The constitutional right of free speech did not immunize these defendants from guilt for directing a boycott in violation of the Sherman Act. 30/

After Debs and Gompers, labor injunctions became a political issue of national importance. The Democratic Party, in direct response to the Debs decision, included in its 1896 platform: "we especially object to government by injunction as a new and highly dangerous form of oppression by which Federal judges...become at once legislators, judges and executioners...." 31/ The Democrats continued to

include such a provision in their presidential platforms, and in 1908, the Republicans included their own call to alter injunction practice. 32/

In sum, there was a gradual public recognition that labor injunctions and equity practice were unfair to labor's interests. But exactly why were injunctions a problem? In other words, what were the specific misuses against which labor was complaining? Obviously, a vague notion of unfairness towards labor's interests would not be a sufficient basis for legislative action. 33/ Fortunately, from labor's perspective, powerful legal arguments were being made against the use of labor injunctions.

Representative John W. Davis of West Virginia gave the best speech on the abuses associated with injunctions. In a 1912 address on the floor of the House of Representatives, Davis identified the abuses as:

> The issuance of injunctions without notice.
> The issuance of injunctions without bond.
> The issuance of injunctions without detail.
> The issuance of injunctions without parties.
> And in trade disputes particularly, the issuance of injunctions against certain well established and indisputable rights. 34/

These abuses formed the rationale for legislation that eventually led to the Clayton Act, and therefore highlight the areas of greatest concern when addressing the injunction issue.

The first abuse identified by Davis was injunctions issued without notice. Injunctions were issued in three types of proceedings. A temporary injunction might issue after notifying the defendant of the charges brought against him and giving the defendant a chance to respond to those charges. A permanent injunction could be ordered after there was a full hearing on the merits of the case. In both of these proceedings, the defendant union could prepare a response to the plaintiff's charges and perhaps win. The great outcry arose not from these proceedings but from the temporary restraining order (TRO) which might issue without warning to the union. A TRO is designed merely to maintain the status quo and prevent irreparable injury that is too imminent to risk delay. However, management often submitted "boilerplate" or form affidavits drafted by lawyers tracking the necessary language alleging irreparable harm. Within hours, a TRO would be issued that halted the strike in its initial states. The fact that the TRO lasted only a few days was irrelevant; the strike was broken without the union having a chance to respond to the employer's sometimes frivolous complaint. 35/

The second of Davis' enumerated injunction abuses was the need for bond to insure that a party would not apply for a sham injunction. As with the notice abuse, management

often knew a TRO would break union activity before an adversarial proceeding could be held. A complaint requesting a TRO might be totally without merit, but by meeting certain form requirements one might nevertheless be obtained. Requiring the filing party to post bond created a fund from which damages were deducted if it later turned out that the complaint was a sham. The bond requirement deterred bringing frivolous actions. 36/

The third and fourth abuses can be considered together. Injunctions often were vaguely worded and did not adequately describe the activities or parties enjoined. Common language in injunctions restrained workers from "doing any further act whatsoever," "from issuing any further strike orders," or "from issuing any instructions, written or oral." 37/ Similarly, parties not even involved in the suit were enjoined. In the Debs case, the judge enjoined the defendants "and all persons combining and conspiring with them and all other persons whomsoever." 38/ With the stiff penalties for contempt, union leaders were genuinely concerned about knowing exactly who and what was enjoined. Representative Davis commented that these ambiguous injunctions were issued with no more right than if the "Czar of Russia promulgate[d] a ukase on American soil." 39/

Finally, injunctions were issued in labor cases against certain fundamental rights. Speech was enjoined such as prohibiting picketing by "letters, printed or other circulars, telegrams, telephones, word of mouth [or] oral persuasion...." 40/ Even specific words like "scab," traitor" and "unfair" were enjoined. 41/ A sympathetic barber who displayed a sign reading "No Scabs Wanted in Here" was held in contempt for violating an injunction prohibiting anyone associated with the union from "annoying or insulting" anyone who wished to enter into employment with the company. 42/ Other injunctions infringed the right to assemble such as an order which prohibited parading or marching "near to or in the sight of" the company's mines. 43/ The key to this abuse was the willingness of courts, upheld by the Supreme Court in Gompers v. Buck Stove, to sanctify an employer's property right in business over the union's civil liberties. 44/ Justice Louis Brandeis in dissent asserted that now an injunction was not sought "to prevent property from being injured nor to protect the owner in its use, but to endow property with active, militant power which would make it dominant over men. 45/

In short, the history of labor and its interaction with the law reveals a gradual evolution of legal policy. Unions were first held to be criminal conspiracies, but this

doctrine fell from favor in the middle of the nineteenth century. Tort theories provided an adaptable theoretical base, but tort remedies were inadequate. The injunction provided American courts with an effective remedy and was quickly adopted. But tort law required too many fine definitions which left labor law vague and the allowable area of economic conflict indefinite. The situation called for a better policy making body than the courts; the logical branch of government to create a coherent labor injunction policy was the legislature. To these legislative attempts at a solution, we now turn.

III. The Clayton Act

The courts defined the allowable area of economic conflict by varying ends and means standards. Unlawful ends often were classified as restraints of trade under the Sherman Antitrust Act. 46/ Unlawful means typically were determined by the extent the union activity infringed on the employer's property rights. The Clayton Act was Congress' first enacted attempt at defining the proper union activity under the means/ends test. This attempt did not, however, withstand constitutional scrutiny in the United States Supreme Court.

Attempts at legislative relief for the injunction problem were made in every Congress but one between 1894 and

1914. 47/ The first bill to gain substantial support was the Pearre Bill of 1906. 48/ The bill restricted the issuance of injunctions only to cases where there was irreparable injury to property. The bill also limited the meaning of "conspiracy" to cases where the act would be unlawful if done by a single individual. 49/ The bill was not reported out of committee, but in 1910, after the Democrats gained control of the House, essentially the same bill was reintroduced by Representative William B. Wilson of Pennsylvania. 50/ The Wilson Bill also did not make it out of committee. 51/

Eleven bills dealing with the injunction issue were introduced in the Sixty-Second Congress. Hearings were held by the House Judiciary Committee in January and February of 1912 on these bills. 52/ A.F. of L. President Samuel Gompers testified at these hearings and presented labor's complaints with the status of the law. He complained of three things. First, Gompers contended that the Sherman Act was "never intended to apply to the normal personal activities of any persons not organized or combined for profit." 53/ Second, the A.F. of L. President asserted that the proper use of the injunction was "for the protection of property and property rights... [and not] to regulate

personal activities." 54/ Finally, Gompers voiced views on the need to alter contempt practice and procedure. 55/

Since the Wilson bill did not fully address the anti-trust or contempt problems, the bill was recast in committee. The reworked version was reported out of committee as the Clayton Bill. 56/ The bill passed the House only to die in the Senate Judiciary Committee. 57/ Two years later, a similar bill was introduced again by Representative Henry Clayton of Alabama and it also was reported out of committee. 58/

The proponents of the bill expressed the purpose of the measure as first withdrawing labor from the substantive application of the antitrust laws and second to meet the abuses delineated by Representative Davis. 59/ The first purpose was met in what became section six in the final act. This provision provided a definition that "the labor of a human being is not a commodity or article of commerce." 60/ It further required that nothing in the antitrust laws was to be construed to forbid the existence and operation of labor unions as long as they were "lawfully carrying out the legitimate objects thereof" (emphasis added). 61/ Finally, labor unions were not to be construed as illegal combinations or conspiracies in restraint of trade. 62/ In short, section six provided a substantive definition of labor and

their weapons which excluded them from the reach of antitrust laws. The issue of what was lawfully carrying out legitimate objects was to have great significance in the courts.

The friends of labor in Congress asserted that the Sherman Act was never intended to apply to labor. Representative Robert Henry of Texas explained how the legislative history of the Sherman Act had been misconstrued by The Supreme Court. During the debates on the Sherman Act, Senator James George of Mississippi proposed an amendment that clearly exempted labor unions from the provisions of the act. When the bill was reported back from committee, the George Amendment was deleted "because all agreed that the act as written without the language in it meant exactly what was contained in the George Amendment." 63/

Representative Henry's comments were in direct response to the United States Supreme Court opinion in the Danbury Hatter's Case, 64/ where the Court adopted the reverse reasoning. The Court rationalized in Danbury that several attempts were made to exempt labor unions from the Sherman Act, but since none were included in the final act, Congress must have intended not to exempt labor unions. 65/ This appears to be a clear misreading of the legislative history of the Sherman Act which Congressman Henry supporting the Clayton Act hoped to correct in section six. 66/

The second express purpose of the Clayton Bill was to correct the injunction abuses listed by Representative Davis in 1912. These abuses were: failure to give notice, failure to provide bond, insufficient detail as to prohibited acts and parties, and orders which infringed certain well established rights. 67/ The Clayton Bill directly confronted these abuses in sections that became seventeen through twenty in the final act.

Section seventeen provided that "no preliminary injunction shall be issued without notice to the opposite party." This section also required that no temporary restraining order should issue without notice unless certain conditions on evidence and duration of the order were met. Section eighteen required security, the amount to be determined by the judge, before any injunction could issue. Section nineteen required detailed descriptions of the acts enjoined and the reasons for the issuance of the order and that the order be binding only on parties to the suit. 68/

Section twenty is a more involved provision. Here, no injunction could be issued unless it was necessary to "prevent irreparable injury to property, or to a property right...." 69/ The section also provided that no injunction could infringe the various personal rights of assembly, speech, ceasing work and other activities as long as it was

done "in a lawful manner, and for lawful purposes...." (emphasis added). 70/ As with the "lawful" disclaimer in section six, the language here was to cause considerable trouble in the courts.

The proponents of the procedural legislation especially and the labor provisions as whole did not believe the injunction issue was a systematic problem. Rather, they felt a few judges were abusing their discretion and arbitrarily injuring labor's interests. The authors of the procedural provisions intended "to write the better practice of the Federal courts into the statute as a rule to govern all the courts, and not leave it to their discretion to issue injunctions on whatever state of fact may suit the fancy of the judge." 71/ A Senate supporter of the labor exemption from the Sherman Act likewise commented that he did not "believe there is a lawyer in this body or outside of this body who will seriously contend that section [six] modifies existing law...." 72/ In short, much, if not all of the Clayton Act's labor provisions did no more than restate the law as Congress felt the best courts were construing it.

To many Congressmen, merely restating existing law seemed a useless exercise. 73/ But there was a feeling among members of Congress that public opinion required action. Senator Moses Clapp of Minnesota recognized that

some thought it unnecessary to restate existing law, but he indicated that "the pouring in of telegrams and letters would indicate that there is an impression that this is not the law." 74/ The intent of the drafters was to "make [the law] so plain and certain that there can be no longer any doubt about it." 75/ Senator Thomas Walsh of Montana reiterated this view. He stated that "there is a feeling among laborers and the people generally that their government is not near enough to them," and that "the federal injunction is looked upon with a good deal of disfavor." 76/ The proponents of this legislation thus built the statute on the supposed best practice of federal courts to meet the demands of public opinion.

There was a wide range of objections to the Clayton Act. One opposition position was that this legislation was class biased in favor of labor. In the House Judiciary Committee report, Representative John Moon of Tennessee claimed that by exempting only labor and related organizations from the antitrust laws, Congress was favoring one class. 77/ Along these same lines, Representative John Sterling of Illinois criticized the Clayton Bill's alteration of contempt procedure. He felt the bill would "greatly impair and might in some instances, we fear, totally destroy the power of the court to enforce its orders and decrees and

maintain the peace of society." 78/ These views did not persuade many members of Congress, and did not greatly influence voting on the bill. 79/

More important are the views of those Congressmen who accepted the need for legislation, but felt the form in which it was embodied would not withstand judicial attack. Representative John Nelson of Wisconsin said that the labor exemption from the Sherman act was a "laudable objective." However, Nelson criticized the vagueness of the labor exemptions wording. He believed the Clayton Act would "merely prevent suits for the dissolution of labor organizations, but [would] permit...injunctions against labor organizations to restrain them from carrying out their purposes." 80/

This construction may be understood by analyzing certain ambiguous phrases in the bill. Representative Martin Madden of Illinois found a fatal defect in the bill because courts still had to construe what were "legitimate objects of labor organization." 81/ Senator Wesley Jones of Washington also stated that if a labor organization "should commit some unlawful act, the court would stop those unlawful acts" by injunction. 82/ Thus, under the definitions in sections six and twenty, courts still could grant injunctions to restrain means and ends according to their definitions of

"lawful" acts and "legitimate" objectives. This essentially left labor in the same situation it was in before the Clayton Act.

One other key objection was made to the Clayton Act. Since the Clayton Act predominately concerned antitrust violations, the act was based on Congress' commerce clause power. 83/ Representative Madden asserted that the correct exercise of legislative power should instead employ Congress' power under article III of the Constitution to create federal courts and regulate their jurisdiction. 84/ He claimed that the addition of a private cause of action under section sixteen and the provisions of section twenty created a new jurisdiction under the wrong section of the Constitution (i.e., the commerce clause). 85/ Madden stated "no bill containing [a provision limiting federal jurisdiction] is before us, and the issue is not raised by this bill." 86/ In asserting this reasoning, Madden foreshadowed the constitutional theory reasoning that was adopted in the Norris-LaGuardia Act after the Clayton Act proved ineffective.

The Clayton Bill passed easily in both Houses of Congress. The bill passed the House 277 to 54 87/ and the Senate 46 to 16. 88/ The Senate and House made a few changes in the bill but the conference reports were easily

agreed to in both houses. 89/ The bill was signed into law by President Woodrow Wilson in October of 1914. 90/

The Clayton Act was, of course, federal legislation. As federal legislation, it would not be binding in all state court cases. The Clayton Act did encompass all cases arising from interstate commerce and thus comprised a great number of cases. Also, state antitrust laws seldom were used against labor and even without direct applicability of the Clayton Act's labor exemptions, state antitrust laws were not a great problem. 91/ Some state acts did alter equity procedure. Oklahoma and Massachusetts required jury trials for contempt cases even before the Clayton Act was enacted. 92/ Arizona and Kansas enacted laws very similar to sections seventeen and twenty of the Clayton Act. Montana and Massachusetts protected peaceful economic coercion. After the Clayton Act was enacted, North Dakota, Oregon, Utah, Washington, Wisconsin and in part Iowa and Minnesota passed laws similar to the Clayton Act's section twenty. 93/ State legislation was substantial, although federal enactments provided the basis for most reforms.

The effectiveness of the Clayton Act's labor provisions and its state legislative offspring was generally invalidated during the 1921 Supreme Court calendar. In Duplex Printing Press Co. v. Deering, 94/ the Court narrowly

construed sections six and twenty of the Clayton Act. In this case a labor union attempted to force wage and working condition demands on a printing press manufacturer by using economic weapons against the company's retail outlets. This is known as a secondary boycott, which pressures one employer in order to get that person to convince the union's target to meet certain demands. The Court quickly disposed of the argument that section six immunized unions from the antitrust laws. The Court said the Clayton Act exemption existed only when the union was "lawfully carrying out their legitimate objects...." (emphasis in the original). 95/ Since secondary boycotts were not a lawful method of applying pressure, section six could not protect the union from antitrust violations. 96/

Duplex Printing also narrowed the usefulness of section twenty of the Clayton Act. The Court read this section as applying only to persons within an employer-employee relationship. Since, on the facts of Duplex Printing, the defendant union leaders were not employed by the printing company, they could not claim section twenty protection. 97/ Also, in American Steel Foundaries Co. v. Tri-City Trades Council, 98/ the Court adopted the Duplex Printing section six construction of "lawful" for the same terminology in section twenty. The Court found certain coercive picketing

was "unlawful" means and therefore not protected by section twenty. 99/ In both these cases, the Court made clear that the Clayton Act only declared the law as it stood before. 100/ The Court cannot be faulted for construing the act to restate the law, since that is what the drafters intended.

The Supreme Court, in the same term, decimated most state statutes which regulated injunction procedure. In Truax v. Corrigan, 101/ the Court held unconstitutional an Arizona Supreme Court decision upholding an Arizona statute similar to the Clayton Act's section twenty. The state court permitted defamatory picketing of a restaurant which resulted in a significant loss of business to the restaurant's owner. The United States Supreme Court reasoned that this interference was an unlawful violation of the restaurant owner's property right to conduct business and invalidated the state court decision upholding the picketing. 102/ As with decisions before the Clayton Act, the property right to engage in business was held to predominate over picketing defined by the court as unlawful.

Justice Brandeis dissented in both Duplex Printing and Truax. His Duplex Printing dissent, joined by Justice Oliver Wendell Homes, Jr., read the Clayton Act as an attempt by Congress to enlarge the allowable area of economic conflict by making it coextensive with the pursuit of

union interests. 103/ Brandeis said also that this conflict should not be restrained to the employer-employee relationship because the balance of power between labor and capital "involves vitally the interests of every person whose cooperation is sought." 104/ For Brandeis, the Clayton Act and the common law required full competition in the industrial struggle. Judges were not to set limits on the permissible contest, rather, this was the function of the legislature. 105/

Brandeis' dissent in Truax attempted to balance property rights in business with the union's use of economic weapons. Brandeis attributed the determination of the allowable constitutional right to property vis-a-vis the union's use of economic weapons as partly a judicial and partly a legislative function. 106/ Holmes also dissented in Truax and went further in degrading constitutional property rights in business. Holmes stated that there is nothing more he disapproved of than

> the use of the Fourteenth Amendment [the provision used to define the constitutional right to property] beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires.... 107/

The Holmes-Brandeis view of not interfering in the parties' struggle to determine their relative strengths was not to

become the majority view until there was a significant change in the membership of the Court.

In sum, after a long struggle to attain what most felt was a solution to the labor injunction issue, the United States Supreme Court invalidated the solution in one term. One writer summarized the total ineffectiveness of the Clayton Act by surveying cases subsequent to 1921 term. Ten injunctions were issued that could not have been issued without the statute, thirty-five other injunctions were ordered in spite of the statute and not a single one out of the remaining twenty-six reported cases was an injunction denied because of the statute. 108/ Obviously, the tactic of merely stating what the best practice of the courts was, would not withstand prevailing constitutional doctrines. It would take another legislative enactment and a change in Supreme Court membership before the labor injunction problem would be solved.

IV. The Norris-LaGuardia Act

After the 1921 emasculation of the Clayton Act by the Supreme Court, a new approach was necessary. Courts were not able to develop a unified approach to the injunction issue because they were always constrained within the facts of the case before them. Congress was the competent institutional body to deal with the injunction issue and had

to try again. The Clayton Act failed because it did nothing more than state the existing law. Some congressmen in 1914 recognized that real change had to come under Congress' article III power to limit federal court jurisdiction. Eventually this theory gained the support of a majority of congressmen and was embodied in the Norris-LaGuardia Act. This enactment proved to be a solution to the injunction issue and became a vital step in the development of a coherent national labor policy.

A series of weak legislative attempts were introduced to remedy the injunction issue after the Clayton Act failed. 109/ By the late 1920's, one of these bills aroused interest and extensive hearings were conducted on its provisions. 110/ This bill, called the "Shipstead Bill" after its Senate sponsor, proposed that nothing should be deemed "property" by a federal court unless it was "tangible and transferrable." 111/ This definition was not unlike section six of the Clayton Act which provided in part that "the labor of a human being is not a commodity...." 112/ Both provisions attempted to define terms used by the Supreme Court so as to narrow the use to which the Court could use the terms and thus withdraw the concepts from the Court's anti-labor arsenal. In this respect, the Shipstead Bill did not make any doctrinal advances.

The hearings on the Shipstead Bill encompass over seven hundred pages of testimony from management and labor. Labor was adamant about the need for anti-injunction legislation, but only Seaman's Union President Andrew Furuseth came out strongly for the bill. 113/ All the lawyers, union and management (except one) felt the measure was overbroad because it affected the definition of property rights in many fields besides labor injunctions. 114/ As one writer termed it, the Shipstead Bill threw "out the baby with the bath." 115/ The Shipstead Bill received only minimal consideration in the Senate. 116/

The subcommittee which conducted the Shipstead Bill hearings concluded that some other action was necessary since the Shipstead Bill did not garner sufficient support. Senators George Norris of Nebraska, John Blaine of Wisconsin and Thomas Walsh of Montana invited legal scholars Felix Frankfurter, Herman Oliphant, Francis B. Sayre, Edwin E. Witte and Donald Richberg to draft a substitute Shipstead bill. 117/ The substitute this group developed, drastically altered the basis for attack on the labor injunction. The introductory clause of the substitute bill demonstrates this new approach:

> no court of the United States...shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or

> growing out of a labor dispute, except in strict conformity with the provisions of this act...nor shall any such...injunction be issued contrary to the public policy decared in this Act. 118/

This bill relied on article III, the first section of which provides inter alia: "[t]he judicial power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish...." 119/ The second section of article III continues: "[t]he judicial Power shall extend to all Cases in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties...." 120/ The drafters of the substitute bill reasoned that if the Constitution gave Congress the right to establish the jurisdiction of the federal courts, it gave the right to take away or limit the jurisdiction Congress previously conferred. 121/ Since the jurisdiction of the federal courts extended to cases in equity, and the injunction was an equitable remedy, it naturally followed that Congress could limit this judicial power.

The Senate Committee on the Judiciary reported the bill adversely on its first attempt. 122/ The Committee vote was originally tied seven to seven (with three members abstaining) on whether to report the bill favorably. The Committee then voted to refer the bill to the attorney

general to get his opinion on the constitutionality of the proposed measure. 123/ Attorney General William Mitchell declined to express views on the constitutionality of the bill citing a lack of authorization to give his official opinion to anyone other than the President or the head of an executive department. 124/ By a majority vote, the Judiciary Committee than adversely reported the bill. 125/

The majority report makes various criticisms of the bill. The crux of the majority's argument was that the legislation was not needed. The majority polled eighty-eight district court clerks and of the eighty-one who responded, only one reported that an injunction application was pending. The majority felt labor's real grievance was with continuing permanent injunctions and not new injunctions that would be issued in the future. Also, the majority cited a trend toward industrial peace which meant there was a less compelling reason for legislative enactments. The majority therefore felt the bill would give rise to more problems than it solved and adversely reported it. 126/

The minority views of Senator Norris did not explicitly counter these criticisms. The report instead attempted to base the need for legislation on the recognized right to combine and the emerging political sentiment behind col-

lective bargaining. The right of labor to combine was well recognized by the courts. 127/ Also, both political parties in their 1928 conventions directly supported collective bargaining. 128/ The minority report asserted the need for collective bargaining to equalize power between management and labor for a more equitable distribution of the fruits of industry. Such a policy had already been implemented in the railroad industry under the Railway Labor Act. 129/ Finally, the minority called it "hypocracy" for the government to recognize the right to strike and collectively bargain and yet by allowing injunctions "to prohibit any effective exercise of these rights by labor." 130/

In short, the Substitute Shipstead Bill adopted a new approach to the injunction problem that was premised on the constitutional authority of Congress to determine federal court jurisdiction. The initial introduction of the bill failed to make it out of committee because of a belief of the majority of the committee that the measure was not yet necessary. The minority, however, rested the need for the measure on sound notions of public policy towards a developing governmental support of collective bargaining. The need for a national labor policy, heavily lobbied for by labor, gradually overcame the notion that labor injunction legislation was not necessary.

In the Seventy-Second Congress, the substitute Shipstead Bill was again introduced in the Senate by Senator Norris and in the House by Representative Fiorello LaGuardia of New York. 131/ These two congressmen reported what became known as the Norris-LaGuardia Bill favorably out of their respective Judiciary Committees. 132/ Senator Norris' report was essentially the same as his minority report given two years earlier. Representative LaGuardia's Committee report was not substantially different from Norris' report except that it made on important argument against the inherent power of courts to punish contempt. The inherent power argument asserted that there are certain powers of courts that Congress could not take away. These powers were said to inhere in the Court when the court was created. LaGuardia countered this argument by citing Michaelson v. United States 133/ where the Supreme Court said: "[t]he courts of the United States when called into existence and vested with jurisdiction over any subject, at once become possessed of the power [to punish contempts]. So far as the inferior Federal courts are concerned however, [this power] is not beyond the authority of Congress." 134/ Thus, jurisdiction granted by Congress carries the inherent power to punish contempt, but Congress by limiting jurisdiction, limited this power.

Representative LaGuardia's House Judiciary Committee report was accompanied by no minority views. The Senate Judiciary Committee report did, however, have a dissenting opinion. 135/ This dissent did not disparage the need for anti-injunction legislation. Instead, it was "in accord with the majority of the Committee [that relief was necessary from] certain abuses growing out of the issuance of injunctions in labor disputes." 136/ The minority was concerned that even this bill would not withstand constitutional attack and though the provisions as written might only be a "mere gesture." 137/ The minority wished only to assure congressional intent was not misconstrued again in the courts. Luckily for labor interests this problem did not arise.

The Norris-LaGuardia Bill sailed through both houses of Congress. There was little debate on the bill in the Senate. The Senator supporters basically reiterated the position of the Judiciary Committee majority. 138/ Some reservations were voiced that the bill would not be upheld in the Supreme Court, just as the committee minority argued. 139/ Also, the American Bar Association continued its opposition to legislation that "radically limit[s] the jurisdiction of the Federal courts, or decreases the power thereof." 140/ Evidently these concerns did not sway many

Senators; the bill passed the Senate seventy-five to five. 141/

The debates in the House of Representatives showed a little more doctrinal fervor. LaGuardia placed the blame for the need for legislation directly on the shoulders of federal judges. He commented:

> Gentlemen, there is one reason why this legislation is before Congress, and that reason is disobedience of the law on the part of whom? One the part of organized labor? No. Disobedience on the part of a few Federal judges.... If the courts had not emasculated and purposely misconstrued the Clayton Act, we would not today be discussing an anti-injunction bill. 142/

The House opposition to the bill was more enthusiastic (if less reasonable) than the Senate opposition. Representative James Beck of Pennsylvania was concerned that Congress had "enthroned the possible rule of the prolitariate in free America." 143/ Beck further asserted:

> some of the proponents of this law, having visited Moscow and become somewhat enamored with its political philosophy, have endeavored to write a rule of public policy into this law which I would understand if Moscow had provided it, but I can not understand it in a government such as ours, of laws and not of men. 144/

Representative Beck's views also did not sway many Representatives, the bill passed the House three hundred sixty-two to fourteen. 145/ The Senate and House conferees had little difficulty ironing out the differences between

the two versions of the bill. 146/ The Norris-LaGuardia Bill was signed into law by President Herbert Hoover in March of 1932. 147/

One has to notice the turn around from the bill not being reported favorably by the Judiciary Committee in 1930 to its overwhelming passage in 1932. Why exactly was this a bill whose time had come? The declining economic situation may have prompted congressional action, but this reason for enacting the bill does not show up in the legislative history. There may even have been a majority of congressmen in 1930 who supported the bill, although the committee majority was against it. There is no way to know this; what we can determine is that other factors persuaded congressional minds.

One important factor was the literary outpouring in favor of the Norris-LaGuardia Bill. Felix Frankfurter co-authored an enormously influential book on the subject entitled, The Labor Injunction (1930). Frankfurter was one of the legal scholars who helped draft the Substitute Shipstead Bill. In the book, he and his co-author Nathan Greene developed in great detail the constitutional and public policy reasons which formed the foundation of the bill. Edwin Witte and Francis Sayre, both members of the group of legal scholars who helped draft the bill, also

published works calling for a legislative solution such as that which became the Norris-LaGuardia Act. 148/ Other authors independently asserted the need for a legislative solution to the injunction problem, such as Duane McCracken's Strike Injunctions in The New South (1930) and John Frey's The Labor Injunction (1923). These articles and books gave legitimacy to labor's call for change.

Probably the most important factor in the passage of the Norris-LaGuardia Act was the development of labor as a coordinated political lobbying force. The fiasco of the Clayton Act's labor provisions, as well as the spread of anti-union employment contracts, spurred labor and its friends in Congress to draft an anti-injunction act that allowed unions to carry on purely economic self-help activitives. 149/ In the debates on the bill, Senator Blaine referred to labor's lobbying pressure for anti-injunction legislation when he stated that the "American Federation of Labor has declared relief from the misuse of injunctions in labor disputes to be its foremost legislative demand." 150/ This recognition by labor of the failure of the Clayton Act and their wholehearted support of some effective relief played an important part in the passage of the more focused Norris-LaGuardia Act.

The Norris-LaGuardia Act was much narrower than the Clayton Act. The Norris-LaGuardia Act allowed freedom of concerted activity only by those with an interest at stake and not by those exerting purely sympathetic pressures as the Clayton Act permitted. 151/ The act set up a laissez-faire framework in which unions were free from injunctive relief when they undertook the same type of economic free enterprise which the courts at common law accorded business enterprises. 152/ In other words, the Norris-LaGuardia Act expanded the union's area of economic activity to the same region as management had. The parties now were able to determine their relative strengths without judicial intervention favorable to one side.

Sections four and thirteen of the Norris-LaGuardia Act implemented this scheme. Section four listed various self-help techniques which where protected from judicial injunction intervention. Section thirteen broadly defined the parties to a labor dispute who may employ section four activities. This definition included employees in the same trade, employees of the same employer or of the same of affiliated organizations of employers. Section thirteen also allowed "persons participating or interested" in a broadly defined "labor dispute" to include disputants regardless of whether they stood in the proximate relation

of employer and employee. Thus, labor unions fell into the protections defined by these terms. 153/

As with the Clayton Act, the Norris-LaGuardia Act was copied by many state legislatures. Wisconsin passed a "little Norris-LaGuardia Act" which actually anticipated the federal enactment (due no doubt to the influence of Edwin E. Witte of Wisconsin who was an original draftsman of the federal act). Immediately after the federal act passed, about a dozen legislatures enacted their own version. 154/ By 1955, half the states had adopted similar statutes limiting labor injunctions. 155/

These state statutes were significant because state judges might still exercise injunctive powers under state law. 156/ However, state judges, while not stopped from issuing injunctions, were influenced by the Norris-LaGuardia Act's statement of public policy. The Act in section two stated the public policy of the United States as supporting the worker so that:

> He [has] full freedom of association, self-organizing, and designation of representatives of his employment, and that he shall be free from the interference, restraint, or coercion of employers...: for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions and limitations upon the jurisdiction and authority of the courts of the United States are enacted. [These limitations are then listed in next sections.] 157/

Few state courts would issue an injunction against this stated national public policy, even though technically this public policy was binding only on the federal courts.

The Norris-LaGuardia Act fared significantly better than the Clayton Act in the courts. Some lower federal courts read section thirteen to include only disputes between an employer and his employees in the immediate relationship of employment, thus excluding unions from section thirteen protection. This demonstrated a clear inability on the part of these judges to read the statute and understand the structure of the Act which had discarded old means/ends judicial intervention. 158/ Luckily, the United States Supreme Court did not accept these lower court misconstructions.

The first Supreme Court review tested the validity of Wisconsin's "little Norris-LaGuardia Act." In Senn v. Tile Layers Union, 159/ a non-union tile layer sought an injunction against a union who picketed him every time he worked on a job. Justice Brandeis writing for the Court upheld the state court's denial of the injunction based on the Wisconsin statute. Brandeis found that a "hope-for job is not property guaranteed by the Constitution." 160/ The majority of the Court now held the belief that the Constitution did not protect the right to engage in business.

From now on, legislative determinations of proper union economic activity would not be interfered with on the basis of this substantive due process. 151/ Four dissenting judges--Butler, Van Devanter, McReynolds and Sutherland--continued to believe the Fourteenth Amendment protected the right to engage in business. 162/ Senn in effect, upheld the principle that the allowable area of economic conflict was a legislative determination. The Wisconsin legislature determined that the infliction of harm through economic activity of unions was permitted if it was justified by the pursuit of self-interest and gain. Labor unions were now able to use their economic weapons in the same way business associations could at common law. 163/

Since the Wisconsin statute and the Norris-LaGuardia Act were so similar, most took it for granted that the federal act would be upheld. This in fact is what happened in New Negro Alliance v. Sanitary Grocery Co. 164/ This case involved a black association "organized for the mutual improvement of its members and the promotion of civic, educational, benevolent, and charitable enterprises," which picketed a store that refused to hire blacks in management and sales positions. 165/ The store owner sued for an injunction against this activity, but the Supreme Court said this was a "labor dispute" under section thirteen and thus

this association was protected. Even though there was no direct employment relationship between the store owner and the association, the alliance included "persons interested in the dispute" and therefore was covered by the Act. 166/ Only two of the four Senn dissenters were still left on the court. Justice McReynolds wrote a short stinging dissent which asserted the old property rights theory, 167/ but clearly now, the membership of the court no longer adhered to substantive due process doctrine.

In sum, Congress adopted a new approach to deal with the injunction problem after the Supreme Court negated the Clayton Act. This approach was based on the article III power of Congress to determine jurisdiction of the lower federal courts. The Norris-LaGuardia Bill broadly defined the parties in a labor dispute and delineated the allowable economic activities of unions. The effect of the bill was to equalize the common law attitudes toward labor and business. The bill passed Congress easily after lobbying efforts by both legal scholars and organized labor. A fall of the substantive due process constitutional right of property because of a change in Supreme Court membership, enabled the Norris-LaGuardia Act to pass judicial review. The injunction problem, at least from labor's point of view, was solved.

V. Conclusion

This first chapter has conveyed the story of organized labor and its attempts to secure equality before the law. The law gradually accepted first, the right of labor to organize and second, the right of labor to make full use of its economic weapons. The struggle was a long one, and one that seemed continually to be made more difficult by decisions of American courts.

Labor unions were originally considered criminal conspiracies in restraint of trade. With the Massachusetts Supreme Court decision in Commonwealth v. Hunt, organized labor was no longer a per se criminal violation. Instead the emphasis swung to a means/ends determination based on common law tort principles. The question now was what the allowable area of economic conflict would be. Detailed tort theories imposed vague limits on many union activities, but tort remedies proved to inadequate to meet employer's needs to stop damage before it happened.

The first labor injunction was issued sometime in the 1880's. The injunction, an order by a court sitting in equity to cease certain activity or planned activity, was an extremely effective weapon against strikes, picketing, boycotts and other labor economic weapons. Federal and state courts gradually increased the use of injunctions;

soon it seemed labor injunctions became the normal, not exceptional remedy.

Labor injunction practice developed its own case law precedent. Organized labor complained of the increased use of injunctions which often were issued without notice, without security, in orders that were unclear as to who and what was restrained and most importantly, in violation of certain well established personal rights. Well publicized cases involving famous labor leaders Eugene Debs and Samuel Gompers came before the United States Supreme Court and made the labor injunction a national political issue.

Congress in 1912, initiated hearings that eventually led to a major legislative attempt to solve the injunction problem. The result was the Clayton Act's labor provisions which were thought to institute the better practice of the federal courts and to reign in maverick judges who issued most of the injunctions. In fact, the Clayton Act merely restated existing law and The Supreme Court in 1921 effectively negated any solution some thought the Clayton Act provided for the injunction issue.

Congress did not seriously attempt another legislative solution until the late 1920's. The main impetus behind the renewed effort was the development of organized labor as a coordinated political pressure organization. Eminent labor

scholars added their efforts to push for a legislative solution to labor injunctive practice. The Norris-LaGuardia Act succeeded where the Clayton Act failed because it merely placed labor on an equal common law plane with business organizations. The allowable area of union economic activity included any infliction of harm if justified by the pursuit of self-interest and gain. The Norris-LaGuardia Act was based on the article III power of Congress to determine the jurisdiction of federal courts rather than the commerce clause on which the Clayton Act was structured. This solution proved successful in the Supreme Court and and the labor injunction issue for all intents and purposes was solved.

There are two main issues raised by the material presented thus far. The first is whether the courts actually were abusing their equity powers in granting injunctions. This issue is important because the alleged abuse of equity power is the premise on which both the Clayton and Norris-LaGuardia Acts were based. A recent article asserts that the courts were not abusing their equity powers in granting labor injunctions. 168/ There is a strong argument against this view based on historical principles of equity. This argument requires one to analyze the actual practice of

lower federal courts and state courts. This will be the focus of Chapter Two.

The second major issue presented by the material so far, deals with the change in constitutional doctrines between the judicial review of the Clayton Act and the construction given the Norris-LaGuardia Act. The era saw a fall of the dogma of substantive due process and a rise in deference to legislative enactments. Coexistent with this change, was a major turnover in the membership of the Supreme Court. The injunction problem raises a particularly interesting separation of powers issue; an issue that has reappeared in today's Congress. Chapter Three of this essay will be concerned with this issue.

Chapter Two

EQUITY PRACTICE: HISTORICAL LIMITATIONS AND MODERN POLICY

I. Introduction

As described in the first chapter, equity practice was introduced into labor law through the issuance of injunctions in labor disputes. When an employer, living in the late nineteenth century, was faced with labor unrest, he could go to a federal or state court and petition for relief to stop the union's strike, picketing, boycott or other economic activity. The basis for the bill in equity was vague tort concepts such as "unfair competition," "civil conspiracy," or "illegal purpose," or the Sherman Antitrust Act. 1/ These theories provided the right to relief which the employer sought, but the traditional tort damage remedy proved inadequate.

The equity court injunction was the perfect remedy to furnish the relief management sought. An injunction could stop the expected unlawful union conduct before damage could occur. A company lawyer needed only to file an equity court bill alleging unlawful activity, attach boilerplate affidavits from those who witnessed the union activity and the

equity judge would issue a temporary restraining order (a type of injunction) with no appearance by union counsel. Even if the injunction was found invalid after an adversary hearing, the ten day length of the temporary restraining order was usually sufficient to break employee concerted activity. Injunctions also were valuable because they proscribed activities, and anyone who violated the order was subject to a fine or jail term. Enforcement of injunction orders was by contempt actions, which were much like criminal charges, except that the judge issued the sentence without a jury. In short, relief by equity court injunction was effective in proscribing conduct by any person, not just employees. When the usefulness of the injunction became recognized (by the last two decades of the nineteenth century), it became the standard method by which employers could break union self-help activities.

Naturally, organized labor wanted to stop these injunctions. Labor leaders lobbied Congress for an end to "Government by Injunction" as they called the practice of courts issuing labor injunctions. These lobbying activities paid off when Congress passed the Clayton Act in 1914, 2/ which included several labor provisions. This Act's framers attempted to "write the better practice of the Federal courts into the statute as a rule to govern all courts." 3/

The theory of labor leaders and Congress was that a few judges were abusing their discretion and by codifying the best practice of the federal courts the problem of injunctions being issued in labor disputes would end. The view proved inadequate as the Supreme Court negated any solution the Clayton Act may have offered for the injunction problem. 4/

Two decades passed before another anti-injunction measure passed Congress. The Norris-LaGuardia Act of 1932 5/ did not aim to place limitations on how federal courts issued injunctions, as the Clayton Act had, instead, the Norris-LaGuardia Act withdrew federal court power to issue injunctions in labor disputes. This legislative attempt, which employed Congress' article III powers under the Constitution to determine lower federal court jurisdiction, survived judicial scrutiny in the Supreme Court. 6/

This chapter will focus on the historical background of equity and whether equity practice, as used in labor disputes, was a proper use of equity power. The traditional view is that judges abused their equity jurisdiction when they issued labor injunctions. The two anti-injunction acts were enacted pursuant to this theory. This chapter will further explore whether the traditional view is valid and why the Clayton Act failed to accomplish its purpose, while

the Norris-LaGuardia Act succeeded. To answer these inquiries, an investigation must be made into the theory of equity, the historical limitations on that power and how equity came to be used against labor union activities. 7/

II. The Origins of Equity

Equity has a long history in Anglo-American jurisprudence. Equitable concepts can be traced to Greek and Roman thought. Centuries later, the English legal system borrowed some of these Greek and Roman equitable principles and employed them to soften the harsh application of law. Gradually, as English common law became rigid, a separate system of justice developed to administer equity. The chancellor, as the king's conscience, was the head of this system. The evolution of this parallel system of courts and the limits which grew up to confine equity judges' discretion had lasting influence; including a great impact on American labor jurisprudence.

A theme which is a predecessor of our equity can be traced to the ancient Greeks. Aristotle used the term "epieikeia" to represent clemency, leniency and generally a means by which harsh rules of strict statutory (or positive) law could be blunted. 8/ This idea was incorporated into the unwritten law and a Greek judge could draw on it to fill gaps that were left by the statutory law. Intentionally or

unintentionally, legislators did not create legislative schemes which provided judgments in every factual situation; epieikeia served to provide justice where the positive law did not reach. This Greek forerunner of equity was therefore viewed as a higher justice than mere statutory justice could achieve. 9/

Aristotle also realized that there were dangers involved with this power to provide higher justice than available under the strict law. The discretion necessary to implement epieikeia was also subject to human weaknesses. He recognized that "love, hate, or personal interest is often involved so that they [judges] are no longer capable of discerning the truth adequately, their judgment being obscured by their own pleasures or pain." 10/ This discretion could be controlled by requiring that the positive law remain the primary means to approximate justice, and invoking epieikeia only in exceptional cases. Aristotle's system was not an institutionalized body of law, rather, it was an idea of fairness and humanity which complemented the law. This notion of higher justice used to soften strict law, coupled with restrictions on discretion has been a lasting legacy of Aristotle's thought. 11/

As in many other fields, the Romans borrowed heavily from Greek law. The Romans divided law into two parts:

natural law as expressed by the terms ius naturale or ius gentium; and statutory law as expressed by the term ius civile. 13/ Ius naturale was law as it ought to be, while ius gentium was law which is in fact observed by all mankind. However, these terms gradually came to be associated with the same, natural law idea. Ius civile was the statutory law as applied to Roman citizens. Unfortunately, the ius civile developed into a rigid legal system, with absolute accuracy required in following procedure or the cause of action would be lost. Roman legal commentators or "jurists" criticized this excessive subtleness or subtilitas in the strict law and argued that when subtilitas in construing the ius civile would do a moral wrong, the result should be changed to adhere closer to ius naturale. A body of moral principles developed which could change the ius civile, which came to be known as aequitas or equity. 13/

The great Roman contribution to equity history was not this theory of equity (that was borrowed from the Greeks), but the institutional framework which administered aequitas. Each year, the chief Roman magistrate called the "Praetor" issued an "Edict" which listed all circumstances and methods for which remedies would be granted. The Edict included relief available under the ius civile as well as the extraordinary aequitas relief. The Praetor did not alter the ius

civile itself, as that was a legislative function, but he could make innovations in remedies to better effectuate ius naturale in the Roman legal system. Thus, the Praetor now controlled the situations under which Roman judges could invoke aequitas. 14/

The main advantage of Praetorian control over aequitas was that it restrained the discretion of Roman judges. The judges could only grant relief where the Edict allowed. The Praetor could alter the Edict, but he also was confined in his discretion. The main body of the Edict carried over from year to year and when a change was necessary, the Praetor was bound by Roman custom to consult an informal counsel of advisors before making such a major public decision. Also, the Praetors were not legal scholars themselves; they relied on jurists to formulate the Edict and the changes that were necessary. The building of the Edict apparently was completed by the end of the Republic (27 B.C.). The jurist Julian then consolidated the Edict (around 130 A.D.), which by order of Emperor Hadrian could no longer be changed. Only juristic interpretation of the final Edict or actions by the Emperor could result in new remedies. 15/ Finally, Emperor Justinian compiled the Corpus Iuris Civilis (534 A.D.) which was a consolidation of classical juristic literature and statements of the law in

force in his own time. Much of what we know of Roman law comes from this source. 16/ In short, like the Greeks, the Romans allowed strict law to be made more just by the application of equity. But unlike the Greeks, the Romans institutionalized a system of checks on the judicial discretion required to administer equity.

The English adopted a system of equity very similar to the Roman arrangement. The actual influence of Roman law on the English is a matter of some debate and this debate is not of particular significance for this paper. However, the English developed a concept of equity and its limitations that owes very much to prior Greek and Roman theory, and these earlier principles are important in understanding how the English equity practice developed.

The earliest known English legal treatises adopt a concept of equity which is very much like the Roman and Greek examples. Ranulph de Granville's De Legibus et Consuetudinibus Regni Angeliae (1188) introduced its readers to the study of English law with a clear imitation of a passage from Justinian's Corpus Iuris Civilis. Similarly, Henrici de Bracton, writing only fifty years later in his De Legibus et Consuetudinibus Angliae (1235), imitated the same quote of Justinian. 17/ These writers relied on Justinian for the idea that equity should flow from discretion and not

from blind adherence to the strict law. 18/ Bracton further distinguished justice, a virtue, from jurisprudence, a science, and noted that jurisprudence may attempt to achieve justice although it does not always succeed. And as the Roman Praetor invoked aequitas to make the ius civile closer to ius naturale, Bracton concluded that equity softens the rigor of the law by appealing to natural right in contra-distinction to positive right. 19/

Christopher St. Germain further articulated the principle that equity mollifies the strictness of law. In his Dialogues between a Doctor of Divinity and a Student in the Laws of England (1518), St. Germain defined equity as "that, which is commonly called equal, just, and good; and is a mitigation or moderation of the common law, in some circumstances...and often it dispenseth with the law itself." 20/ Thus, there is a linear progress of equity thought from Aristotle and the Greeks to the Romans and then to the English.

English law also developed a system to administer equity that very much resembled the Roman Praetor model. The Romans developed the flexible Edict system after the ius civile became too rigid and outmoded to provide comprehensive justice. 21/ The Praetor could fashion new remedies for the traditional causes of action, thus expanding relief

and making the law more flexible and complete. The Praetor's law, the ius naturale supplemented or qualified the ius civile to make the law closer to ius naturale. Similarly, the English equity developed after the common law became rigid; equity allowed remedies the common law writs could not provide. Individuals who believed themselves without remedy at common law could appeal to the King's conscience for special dispensation. The monarch referred these cases to the Chancellor who would grant a remedy to a deserving petitioner despite the fact that there was no remedy at common law. By the end of the seventeenth century, a completely separate court system existed to administer this discretionary remedy. 23/ This court system existed to provide a higher justice than could the common law courts. The exact influence of Roman law and the Praetor on the English equity courts and the Chancellor are unknown, but the similarities are striking.

Like the Romans, the English realized that unlimited discretion to circumvent the common law was a great power to place in the hands of judges. Equity courts were criticized, usually by common law judges, for the amount of discretion an equity judge might wield. 24/ The only satisfying answer to this charge was for equity courts to become a regular court of judicature. 25/ Precedential

rules and organized pleading and procedure served to limit the discretion of equity judges. 26/ By Blackstone's time, equity was a regular science which could not be understood without study any more than could the science of law. Equity limitations had advanced significantly toward containing arbitrary judicial opinion. 27/

One particular equitable remedy is the focus of this essay. The injunction, like other aspects of equity, has its roots in Roman Law. The Roman Praetor could command that, instead of a damage remedy, the defendant would have to pursue some course of action directed by the court. A judge could order the defendant to refrain or desist from some act, produce something in his possession or restore something to its original position. These commands were called "interdicts" and were usually granted where some danger was expected or injury to property was imminent. 28/ The English adopted themes very close to these Roman concepts. Granville in his De Legibus and Bracton in his De Legibus picked up the idea that equity should be invoked when injury to property was expected. The Chancellor developed the writ of injunction to require a party to do or refrain from doing a particular thing when imminent danger to property was threatened. 29/ This link between equity

and property would come to have major ramifications in later American labor law.

In sum, the concept of equity providing fairness in individual situations when strict application of law would create unjust results can be traced to Aristotle and the ancient Greeks. Aristotle realized that the positive law could not cover every possible fact situation, and thus, judicial discretion was necessary to bend the law to obtain just adjudication. The Greeks also realized that unbridled discretion could be a dangerous problem. The Romans borrowed Greek theory and built on it an efficient superstructure to administer the system. The Roman Praetor could alter remedies to achieve equity, but the Romans also confined the Praetor discretion within certain boundaries. The English borrowed heavily from the Romans and placed equity power with the Praetor-like Chancellor. The English gradually developed a separate court organization to administer equity. This equity court system developed complex precedent and procedure which served to reign in the discretion of those judges administering equitable remedies. In fact, the equity courts were as complicated as the common law courts by the late seventeenth century. These historical concerns of properly administering natural law justice and still confining judicial discretion carried over

to the colonies. To the American equity history we must now turn.

III. American Equity Develops

English law naturally had great impact on the legal systems of the American colonies. However, initially American law was not uniform; most communities adopted the local law from the areas from which they emigrated, thus creating a variety of legal standards. Gradually, the legal systems became standardized along the English model. After the revolution, the new republic continued the common law tradition. Equity practice was officially incorporated into the American judicial system in article III of the Constitution, and American courts freely followed English precedent. American law borrowed heavily from English precedent and procedure to control judicial discretion, while adding their own limitations, including the developing science of equity and the codification process.

The colonial judicial tradition was originally a patchwork of English common law, statutes and American innovation necessary to maintain legal order in the new country. Colonial charters authorized the colony's leaders to set up governmental functions and to pass laws to run the colonies. These laws promulgated by the ruling elders could not be "contrarie or repugnant to the Lawes and statutes of this

our Realme of England." 30/ The infant American court structures moved from the simple to the complex as the colonies matured, with English organization, English terms and English customs as powerful influences. Social and cultural ties also strengthened and the English asserted greater political influence in the colonies. Appeals to the home country were set up to review colonial legislative enactments as England attempted to take tighter control of the colonies. 31/

American colonies instituted equity courts, although again, it was in a haphazard way at first. Some colonies lacked separate equity courts and when equity matters materialized, the common law judges simply sat in equity. Other colonies had separate equity courts much like the English model. Yet, these chancery courts were not well liked by the colonists due primarily to the way some colonial governors used the equity courts as tools of imperial policy. The colonists saw equity courts as unlimited discretion, controlled by the executive without proper checks on their powers. Despite the pre-revolution uproars and complaints, the equity courts were not abolished after the American revolution -- chancery merely passed to new masters. 32/

This equity power also had to be fitted into the federal framework. One question confronting the delegates to the Philadelphia Constitutional Convention was whether to extend equity power to the new federal courts. The answer to this question was not controversial. With only one dissenting vote, the delegates decided, "[t]he judicial power shall extend to all cases in Law and Equity." 33/ The lack of debate on the subject leaves us with little background on the framer's logic in extending equity power to the federal courts. Alexander Hamilton's defense of this action in The Federalist Papers is perhaps the best source to understand the framer's logic. 34/

Hamilton sketched out the contours of American equity jurisprudence in six of The Federalist Papers. 35/ He believed that the duties of judges under the new Constitution would be to "declare the sense of the law" by expressing their judgment and not their will. 36/ Arbitrary judicial discretion would be "bound down by strict rules and precedents which serve to define and point out their duty in every particular case...." 37/ Equity jurisdiction would "relieve against what are called hard bargains." In any case "ingredients of fraud, accident, trust or hardship" must exist to create the need for equity powers. 38/ These powers were only to be used "to give relief in extraordinary

cases, which are exceptions to general rules." 39/ Finally, Congress had the power to establish the lower federal courts which Hamilton asserted was a power to prescribe the mode of operation of those courts, including their jurisdiction. 40/ Congress was then left with the task of ironing out the details of federal equity powers.

The Judiciary Act of 1789 41/ established the jurisdiction of lower federal courts and the appellate jurisdiction of the Supreme Court. The Act struck a balance between those who wanted separate law and equity courts and those who wanted equity to be available in every proceeding. Equity jurisdiction was established for all lower federal courts, while maintaining a firm rule that equity jurisdiction would exist only where no remedy at law was available. The Judiciary Act also gave the Supreme Court appellate jurisdiction over equity decrees from state courts when brought by petitioners in error. This provided federal control over equity cases in the states. 42/ Three years later, the Supreme Court was given the power to promulgate equity rules for the lower federal courts. 43/ That same year, Chief Justice John Jay announced that the Court would "consider the practice of the courts of King's Bench and Chancery in England as affording outlines for the practice" of the Court and the Court would make corrections as cir-

cumstances required. 44/ In other words, the Americans adopted English theories of equity based on natural law principles and the precedential and procedural limitations necessary to maintain proper judicial discretion.

Now that the judicial power was established in the federal system, a dispute developed over the place of common law tradition under the American Constitution. The debate concerned, among other factors, the extent of discretion the new American system should allow judges vis-a-vis English examples. New philosophic theories influenced a movement for greater certainty in the law, which in turn led to codification. However, other scholars thought those advocating codification went too far and they argued for a place for classical natural law ideas within a "scientific" framework. These two theories were not opposites, although the proponents did not see them as idealogically close as they were. The merger of law and equity and the institution of the Federal Rules of Civil Procedure completed the American transformation of equity.

The philosophic content of natural law was undergoing major change, due in great part to the work of Thomas Hobbes. Hobbes built on a realist tradition, established by Nicolo Machiavelli, which saw justice not as a classical metaphysical good but as an observance of how men in fact

live their lives. For Hobbes, natural law should be concerned with the passions of men rather than reason. The primary object of natural law was human existence in a competitive world, rather than human virtue. Upon this conception of natural law, Hobbes constructed his state-of-nature theory of society. He saw man entering civil society not to fulfill his nature in the classical sense, but for convenience of man in an all too harsh world. The legitimacy of society rested on man's consent, not on nature. Law was reduced from an obligatory set of moral rules discovered in nature to a starkly positivistic set of rules fashioned on human consent. 45/ These theories displaced the traditional natural law foundations of the common law. To fill this void, a new conception of the role of natural law in the common law was developed.

James Wilson helped provided a theoretical framework for this new natural law in the American legal structure. Wilson was a signer of the Declaration of Independence, a leading delegate to the Constitutional Convention and later an associate justice on the United States Supreme Court. Wilson's political philosophy was derived essentially from the Scottish enlightenment, but it also drew heavily on Hobbes. He believed that men were bound by a moral common sense which allows one to know right from wrong. The common

law was a science founded on experiment, composed of a multitude of efforts made by men to understand and commit to general rules the complex relationships of human life. The authority of the common law rested on custom which for Wilson was the only true evidence of consent. This common sense, implemented through trial and error into a system of law, became an instrument of will and was properly responsible for rules to govern society and promote socially desirable conduct. These ideas, exemplified by the thought of Wilson, allowed the common law to take on many of the qualities of legislation as rules for society. 46/ Unfortunately for the natural law advocates, this expansive legal conception drew angry reaction from another powerful group in the new republic.

The Republicans, led by Thomas Jefferson, James Madison and Edmund Randolph were particularly concerned with a judiciary, such as one based on Wilson's theories, which was granted too much flexibility. The most visible issue that highlighted these concerns was the Alien and Sedition Acts of 1798-99. 47/ These acts invested in judges great power to punish as libel actions which violated vague and undefined standards. Judges construing these acts relied heavily on English precedent which the Republicans felt had not been adopted under the Constitution. They felt that the

preservation of liberty required strict adherence to the letter of the Constitution. To proclaim that the common law hovered over the republic as an omnipotent spirit, readily invoked by Congress or the courts, was against the concept of limited national government. The Republicans could not stomach a system of law dependent on fluctuating and uncertain opinions of judges. 48/

The Republicans' concerns with this subjective and the political nature of the common law led them and others to move to codify the common law. By setting down rules, they believed judges would have less discretion. There were several factors influencing this movement; probably the most important was the thought of Jeremy Bentham. 49/ Bentham's utilitarian theories aimed at providing the greatest good for the greatest number of people. Codification could depoliticize the law, and thus remove privilege. Codificationists also desired simplicity so that the law could be understood by laymen. 50/ In short, codification would reign in and depoliticize the judiciary by decreasing discretion. Yet, others saw the need for natural law to play a role in the codification scheme.

Many American lawyers and scholars believed a coherent legal system had to include natural law. A new and defensive emphasis exalting a "scientific" analysis of the law

arose as a reaction to the claims of the radical codifiers. Legal scholars wrote treaties which organized the common law and promoted logical, symmetrical and generally an inexorable system of law at the expense of policy based attitudes. 51/ By organizing the law in such a way, these scientific lawyers hoped to maintain flexibility in the law that the codifiers could not provide. They also realized that a code could not reach every factual situation; a certain flexibility was required so that justice could be done in individual cases. 52/ For the scientists, natural law discretion had to exist in any rational legal order.

James Kent was the first great advocate of the science of law, but Joseph Story was the most prolific writer and definitely the most important equity commentator. 53/ Story believed that equity must exist even in a codified legal system. In his Commentaries on Equity Jurisprudence (1836), he adopts the Aristolian view "that the very nature of Equity [is] the correction of the law." 54/ Story further commented, as had Aristotle, that it was impossible for "any code, however minute and particular, [to] embrace or provide for the infinite variety of human affairs." 55/ Equity served to provide justice where the positive law did not and Story intended to give order to this fluid field by creating a science of equity. 56/

Story believed that equity was no longer carefully studied and had never been cultivated as a science. Because of these problems, equity was inappropriately labeled as unbound judicial discretion. Story saw equity bound by the same limitations as was the common law: precedent and procedure. 57/ His Commentaries on Equity Jurisprudence and Commentaries on Equity Pleading (1838) developed a science of equity which restrained discretion with set rules of precedent and procedure. However, despite Story's efforts, the Benthamite codifiers won a major victory in 1848, only three years after Story's death.

David Field engineered one of the most important events in the American codification movement. In 1848, Field was able to push through the New York legislature what became known as the "Field Code." The focus of this reform was abolishing the "distinctions between actions at law and suits in equity." 58/ Field replaced the parallel procedural systems at law and equity with "but one form of action, for the enforcement or protection of private rights and the redress or prevention of private wrongs which shall be denominated a civil action." 59/ Field believed the union of law and equity would subordinate form to substance and create a less technical, more just system. Story on the other hand, argued that the rigid separation of the two

procedures was necessary to achieve substantive justice. 60/ Other states quickly adopted the unification of law and equity. The federal system finally merged their systems under the new Federal Rules of Civil Procedure in 1938. 61/ The codifiers proved successful in constraining the use of natural law to an increasingly smaller sphere, but they did not succeed in completely wiping out natural law.

Probably, the differences between the scientists and the codifiers was not as great as some have suggested. 62/ Both groups wanted to create more certainty in the law and to give it more refined contours. The scientists did not believe that codification was the complete answer, but they did agree that positive law as expressed by the legislature was a necessary element of any legal system. Their belief was that discretion had to always be available to do justice, and within the area where discretion was appropriate, they hoped to define and limit it by objective standards. The codifiers probably realized that a completely comprehensive code was impossible, but they hoped to get as close to one as they could. Both groups were looking to restrain the legislative or policy making powers of judges by imposing limits on their discretion.

In sum, we see the progress of American law from frontier necessity to a refined judicial order. At the

founding of the American colonies, most communities set up judicial systems that combined law and equity functions, thus giving judges a great amount of discretion. The taming of the frontier and unpleasant experiences with arbitrary imperial power led to gradual restraints on the equity powers of judges. These limitations were formalized through the codification movement and the growth of legal science. The injunction issue is greatly influenced by the growing efforts to mechanize the law under set rules, both statutory and common law. There were two congressional attempts at solving the injunction issue; their histories may best be analyzed by referring to the concepts of equity as have been previously discussed.

IV. Equity Reform and Labor Injunctions

To a layman living in the late nineteenth or early twentieth century, the labor injunction was the best known use of equity power. From the 1880's until 1932, it was a simple practice for an employer to go to a federal or state judge sitting in equity and obtain an injunction to stop labor union economic activity such as strikes, picketing or boycotts. Congress first attempted to resolve the injunction issue in 1914 with the labor provisions of the Clayton Act, 63/ but the courts construed these provisions as merely restating the law as the better federal courts already

did. 64/ In 1932, Congress made another attempt, the Norris-LaGuardia Act, 65/ which adopted a different constitutional policy approach and successfully limited federal court jurisdiction to issue injunctions. The Supreme Court allowed this act to pass judicial review. 66/ The first attempt failed and the second succeeded in solving "Government by Injunction" because the second attempt appealed to equity jurisdiction, while the first applied only to the historical limitations.

Most of the background on labor injunctions has already been covered in Chapter One. A few relevant facts may be helpful here. The use of injunctions in labor disputes developed out of the inadequacy of common law tort remedies to provide management redress against labor union activity. Money judgments are the normal tort remedy. These remedies were not effective against unions because unions could not be sued as entities (being unincorporated associations) and suits against union leaders often led to no damage recovery because the leaders could not pay and even if they could pay, this usually did not stop union rank and file form continuing their actions. Money judgments were also of little use when damage had already been done. In contrast to damage remedies, the equitable injunction served the dual purpose of restraining anyone who might violate its mandates

and stopping injury before it happened. 67/ The injunction became so successful in accomplishing its anti-labor purposes, that it became the common relief in labor cases.

Equity would not provide a remedy anytime there was an adequate remedy at law. Instead, American equity courts, borrowing from the English, required that a remedy at law be inadequate and that irreparable injury to a property right must occur before an injunction would issue. 68/ Story listed the property rights for which an injunction would issue, and all of these interests were property to which a title adhered or in the case of personal property, where title or possession maintained the ownership right. 69/ Labor injunctions, on the other hand, were founded on the proposition that unions, in using their economic weapons, damaged the employer's property right to engage in business without unlawful interference. The property right violation infringed the employer's Fifth and Fourteenth Amendment due process rights. 70/ Thus, there develops an interesting alteration of the concept of property from only titled, tangible property, to an intangible right to business, and besides this fact, the right to business was now a constitutional right.

It is unclear how this definition of property lost its historical meaning. Since the middle 1880's, federal and

state courts were trying to determine the exact amount of harm a labor union could inflict on an employer before there was unlawful conduct. 71/ Also about this time, the injunction came to be seen as a means to protect interest other than land from irreparable injury. The right to engage in business became one of these rights. The Supreme Court did not draw the traditional distinction between the titled property and the right to do business when the use of an injunction was first used to protect business against labor infringement in 1894. The Court said that its jurisdiction to issue injunctions in labor disputes for a violation of a business property right was, "one recognized from ancient times and by indubitable authority...." 72/ Felix Frankfurter once remarked that "legal tradition fosters the illusion that law always was what it has come to be." 73/ Now that business was a property right, the authority for using an injunction to protect it went clear back to Aristotle--or so the Supreme Court assumed.

It is clear that the right to pursue business is as valuable as a strip of Blackacre, but as Frankfurter said, "there is property and property." 74/ Business as property certainly is not the same as land. Justice Oliver Wendell Holmes Jr. remarked that "[b]y calling a business 'property' you make it seem like land.... But you cannot give it

definitions of contour by calling it a thing." 75/ Justice Louis Brandeis believed that union interests were as much a property right as management's interest in its business. For Brandeis, the proper approach would be for business and union interests to be balanced so that each side could use its economic power to determine the collectively bargained rights of each party. 76/ But most importantly, the new property right was protected by the Constitution and powerful judicial blocs were intent on maintaining the constitutional right to engage in business free of labor interference.

The right to pursue one's business was protected by the due process clauses of the Fifth and Fourteenth Amendments to the Constitution. 77/ This constitutional doctrine is known as substantive due process and an example of its use may be seen in the Supreme Court's Truax v. Arizona 78/ opinion. There the Court declared unconstitutional an Arizona Supreme Court decision which upheld a state statute allowing peaceful picketing. The Arizona Court decided that defamatory but peaceful picketing of a restaurant was protected by the statute. The United States Supreme Court held that the verbal disparagement deprived the plaintiff of his property right to do business free of unjust interference in violation of due process of law. 79/ The Court, in this

case and in its other decisions in this area, attempted to scientifically articulate the proper means and ends that a union might pursue. In attempting to create guidelines, the Court was, in fact, legislating on weak constitutional authorization (i.e., that business was property protected by the Constitution), the proper sphere of economic conflict. Many felt, on whatever theory, that this practice as inappropriate.

It follows from the above analysis, that any anti-injunction reform would have to confine the equity power to grant injunctions and somehow escape the reach of substantive due process review. Two acts comprise Congress' attempts at solving the labor injunction issue: the Clayton Act of 1914 and the Norris-LaGuardia Act of 1932. To understand why the Norris-LaGuardia Act survived judicial scrutiny and the Clayton Act did not, it is best to apply the already discussed historical conception of equity.

Most of equity jurisprudence as discussed in this chapter was an attempt to place discretion of equity judges within some definable limits. The Greeks, Romans and English recognized this as the chief problem with a judicial system based on natural law. The problem carried over to the new republic in America. Judicial discretion became more and more regulated within procedural rules under the

scientists and codifiers. The Clayton Act was a continuation of the attempt to place rules on judges.

The Clayton Act labor provisions were an attempt "to write the better practice of the Federal courts into the statute as a rule to govern all courts, and not leave it to their [judges] discretion to issue injunctions on whatever state of fact may suit the fancy of the judge." 80/ It was the belief of members of Congress that a few judges were abusing their discretion and acting to the detriment of the legal system. The Clayton Act implemented this approach by defining labor as "not a commodity or article of commerce" in an attempt to escape the reach of the antitrust laws, 81/ by procedural restrictions on the form of injunction orders, 82/ and by confining injunctions solely to those situations where irreparable injury would occur to property or a property right in the hope that this would escape substantive due process review. 83/ The Act also was written under Congress' Article I power to regulate commerce. As would be expected from the express congressional purpose as stated above, the Supreme Court declared that the Act only declared the law as it stood before. 84/ The Clayton Act thus, offered no solution to the injunction problem.

The Norris-LaGuardia Act took a different approach to the problem of labor injunctions. Here, legislation proceeded under Congress' article III powers to limit federal court jurisdiction. The Constitution extends the "judicial power to all cases in Law and Equity," 85/ and gives Congress the power "from time to time [to] ordain and establish" inferior federal courts. 86/ Since Congress could establish the federal courts, the Norris-LaGuardia Act drafters reasoned that they could take away any jurisdiction they conferred. These same arguments applied to Congress' power to define the Supreme Court's appellate jurisdiction. 87/ This Act and similar state counterparts were upheld in the Supreme Court against due process attacks. 88/

There are two main reasons why this second congressional attempt was successful in ending "Government by Injunction" and the first was not. First, the earlier Clayton Act was merely an extension of the codification and scientific traditions. The Act defined and limited the discretion of the lower federal courts by restricting procedures and creating precedent. Since the Act was based on Congress' power to regulate commerce, it did not seek to change equity jurisdiction, rather, it only sought to define the substantive tort and antitrust law in a different way and to organize procedure. The Norris-LaGuardia Act did

alter the jurisdiction of equity courts and in doing so affected the natural law foundations of equity. This congressional action proceeded under the article III of the Constitution which was where Congress bestowed upon the federal courts their natural law jurisdiction. By altering jurisdiction under the Constitution (itself a statement of natural law), Congress changes natural law as those powers apply to the federal courts. Congress simply withdrew federal court power to issue injunctions. This withdrew the tool federal courts used to "legislate" in the labor area and ended management's advantage in the labor area. Both sides now could pit their economic weapons against one another to determine collective bargaining rights. This result sounds very much like the Hobbesian natural law idea that life is a struggle and the actors should fight it out among themselves unless the parties consent to government intervention. Thus, the Norris-LaGuardia Act altered the fundamental natural law equity jurisdiction and in doing so succeeded before the Supreme Court where the Clayton Act failed.

The second reason why the Norris-LaGuardia Act succeeded was because of a change in constitutional doctrine and Supreme Court membership. The next chapter of this essay will be concerned with constitutional doctrines. How-

ever, it is important to note that the Supreme Court got out of the business of overturning congressional reforms by the use of the due process clauses after the court construed the Clayton Act, but before the Norris-LaGuardia Act came before the bench. 89/ The famous "switch in time that saved the nine" by Justice Owen Roberts which ended the wholesale use of substantive due process and saved the Court from President Franklin Roosevelt's "Court-Packing Plan" happened before the 1937-38 decisions construing the Norris-LaGuardia Act anti-injunction provisions. 90/ This reason has none of the intriguing historical conceptualism that the equity jurisdiction argument has, yet it realistically is probably the most important reason the Act survived judicial review.

A recent study refutes the contention that American equity courts were abusing historic equity powers in issuing labor injunctions. 91/ The purpose of this article presumably is to show that the Norris-LaGuardia Act was based on an erroneous assumption for the need for legislative change. The article asserts that equity judges were not abusing their equity power and the assertion is proved by a comprehensive study that shows state and federal judges properly followed equity precedent and procedure. 92/ This argument appears merely to be saying that the Story "science" of equity was properly administered by the courts. After

reading scores of these injunction cases, one does get the feeling that equity rules were mechanically and faithfully applied by judges to labor disputes. However, this does not mean that statutory reform was unnecessary. Equity practice certainly had broken loose from its historical use as an exceptional method to curb the injustices of the strict applications of law. Americans were developing a new concept of justice, one that did not favor one side of a labor dispute. By altering the natural law foundations of equity jurisdiction, the legislature had every right to effectuate this public policy. Fortunately, the Supreme Court was ending its practice of frustrating the legislative function by resort to substantive due process.

In sum, the practice of American courts between 1880 and 1932 of issuing injunctions in labor disputes was a problem of policy based on natural law equity principles -- not a limitation issue. Originally, Congress believed that the injunction controversy could be solved by resort to reigning in a few maverick judges. This attempt failed to solve the problem. The second congressional attempt went to the heart of the injunction problem: fundamental equity jurisdiction. By withdrawing federal court power to issue injunctions in labor disputes, Congress stopped judicial legislation in the labor field. This attack on the in-

junctions was also saved by a movement in the Supreme Court's conception of constitutional law away from substantive due process and towards a "hands off" approach. Government by injunction was now history.

V. Conclusion

This second chapter has analyzed the equity foundations that American courts used when issuing labor injunctions. Equity traditionally implemented a less strict application of law by allowing a judge to use his discretion to provide justice in exceptional cases. This power to disregard the law in certain circumstances was confined by requiring judges to follow rules of procedure and maxims of precedent. But mechanistic application of these traditional limitations did not assure substantive justice. The decision of public policy was one for the legislature and not the courts acting as legislatures.

Greek and Roman law had great influence on the development of equity theory. Artistotle applied epieikeia or leniency to soften harsh rules of strict law. He also realized that the discretion necessary to use epieikeia created a possibility of arbitrary judicial action. The Romans adopted an equity concept similar to the Greek epieikeia. They used aequitas to alter the ius civile when administration of the civil law was too formalistic. The

great contribution of the Romans was the development of the Edict system which institutionalized the use of aequitas into a coherent body of moral principles.

The English adopted a theory of equity much like that applied by the Greeks and Romans. Equity was necessary to attain a higher justice than strict application of law could obtain. English equity was a means to provide a remedy where the common law writs could not give relief. A system developed where a person without a common law remedy could appeal to the conscience of the king in the person of the royal chancellor. Eventually this process became a separate judicial organization -- a legal system parallel to the common law courts. Limits on discretion under the equity courts became institutionalized into rules of precedent and procedure as formal as the common law courts.

American law in the colonial period was initially a patchwork system which just hoped to provide further justice. Gradually, English examples provided a model for the development of a more comprehensive legal system. The new American republic adopted English practice as a necessary element to provide justice in individual cases and to complement the law. However, Americans distrusted discretion as left to equity judges. The codifiers and the scientists attempted to decrease the discretion allowed

equity judges. The scientists argued that natural law still deserved a place in a rational legal order, while the codifiers tried to get rid of all discretion. The government by injunction issue was greatly influenced by these theories and limitations on equity.

The first chapter of this thesis deals with the judicial and legislative background to the labor injunction problem. The history of equity is especially relevant to the two attempts Congress made to solve the injunction issue. The first attempt, the Clayton Act of 1914, merely continued the codifiers' and scientists' efforts at defining clear contours for equity. The second legislative approach, the Norris-LaGuardia Act of 1932, adopted a different method of relief. This act redefined the policy underpinnings on which the right to injunctions were based. The natural law foundations for equity jurisprudence were altered by resort to article III powers. Fortunately, this attempt came at a time when substantive due process, commonly used to strike down economic legislation, was being repudiated. The Norris-LaGuardia Act thus survived judicial scrutiny and ended government by injunction.

There is one major issue left to consider in this essay. Chapter Three will explore the change in constitutional doctrines that allowed the Norris-LaGuardia Act to

survive and the impact it had for future constitutional issues. The first major change was the fall of substantive due process. This subject has been explored in detail in other historical works and is not of major importance for this essay. The second major issue and the focus of Chapter Three is the separation of powers problem. This chapter will explore if Congress' withdrawal of jurisdiction to issue labor injunctions infringed on the inherent judicial power of the federal courts. The first constitutional issue is mainly of historical importance, the second problem is of major importance today.

Chapter Three

THE LABOR INJUNCTION AND SEPARATION OF POWERS

We are trying to outlaw the "yellow dog" contract by taking away the jurisdiction of the courts to enforce it. 1/

Senator George Norris,
Sponsor of the Norris-
LaGuardia Bill in the Senate

I. Introduction

Great constitutional changes occurred between the time that President Herbert Hoover signed the Norris-LaGuardia Act 2/ into law in 1932 and when the United States Supreme Court upheld the act in a series of cases in 1937 and 1938. 3/ The greatest constitutional event was, of course, the fall of the substantive due process doctrine. 4/ This change in judicial attitude curtailed judicial intervention in economic regulations and enabled many New Deal measures to escape constitutional invalidation which may not have survived before the shift. This issue has received considerable treatment by commentators 5/ and is not the primary focus of this chapter. Instead, this chapter will analyze the separation of powers doctrine and how the Norris-LaGuardia Act was, and may be viewed, under that principle.

Because the Norris-LaGuardia Act was a successful example of Congress' power to limit federal court jurisdiction, the subject has relevance to various contemporary court-curbing measures regarding busing, school prayer and abortion. 6/

The Norris-LaGuardia Act was directed at ending "Government by Injunction". This was the term used by organized labor to label the practice of federal court judges issuing injunctions to stop strikes, picketing, boycotts and other economic weapons of labor unions. From the 1880's to the 1930's, it was a simple procedure for an employer to apply ex parte to a federal court sitting in equity for an injunction supported only by boilerplate affidavits alleging irreparable injury. An equity judge could then issue a temporary restraining order for a short time until a hearing on the merits could be held, and often, the temporary restraining order was sufficient to break the strike as workers became discouraged during the tenure of the preliminary injunction. Any person who violated the injunction was subject to contempt sanctions administered by the same judge who issued the restraining order and who sat without a jury. 7/ Congress, in 1914, passed provisions included in the Clayton Act 8/ in an attempt to prevent the regular use of injunctions in labor disputes. But the Supreme Court narrowly construed the provisions of the Clayton Act and

state counterparts, thus denying effective relief from the injunction problem. 9/

Congress adopted a different approach in the Norris-LaGuardia Act than it used in the Clayton Act to regulate the use of federal court injunctions. The Norris-LaGuardia Act proceeded under Congress' article III power to regulate lower court jurisdiction while the Clayton Act had attempted to define the activities of labor unions under the commerce power so as not to infringe on the substantive due process doctrine. 10/ The Norris-LaGuardia Act did three things that are important in this chapter: (1) it outlawed "yellow dog" contracts or contracts where an employee promised not to join a union; 11/ (2) it withdrew jurisdiction to issue labor injunctions in all cases except certain enumerated instances; 12/ and (3) it provided for jury trials in all contempt cases and allowed the parties to demand the retirement of the contempt judge if the issue in the case was the conduct of that judge in issuing labor injunctions. 13/ These provisions survived scrutiny before the Supreme Court. 14/ The reasons why the withdrawal of jurisdiction as used in the Norris-LaGuardia Act succeeded constitute the subject of this chapter.

Three inquiries are emphasized in the material that follows. First, the law of separation of powers as it

relates to Congress' article III powers to limit federal court jurisdiction is explored. Second, the extent that the Seventy-Second Congress and the contemporary constitutional law scholars recognized restraints on Congress' approach in the Norris-LaGuardia Act is examined. Finally, those principles which can be derived from our experience with the Norris-LaGuardia Act are listed and their application to current jurisdiction limitations is summarized.

II. The Separation of Powers Doctrine

The language in article III of the Constitution facially gives Congress complete control over all lower federal court jurisdiction and most Supreme Court appellate jurisdiction. Congress has seldom used this power to limit jurisdiction, and when it has, the United States Supreme Court has upheld the action with only one exception. The limits on Congress' power to limit jurisdiction are far from settled. Perhaps a proposal currently before Congress may be enacted and brought before the Court so that a definite rule will be announced. Considering the history of the separation of powers doctrine, such an event is unlikely.

Congress' power to limit federal court jurisdiction is derived from article III of the Constitution. Section one of article III provides inter alia: "[t]he judicial power of the United States, shall be vested in one Supreme Court,

and in such inferior courts as the Congress may from time to time ordain and establish." Section two of the same article provides in part: "[i]n all the other cases before mentioned [other than original jurisdiction], the Supreme Court shall have appellate jurisdiction both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

Since Congress has discretionary control over the establishment of lower federal courts under section one of article III, it is generally assumed that Congress has broad power to take away the jurisdiction which it grants. 15/ The appellate jurisdiction of the Supreme Court is viewed somewhat differently. The Constitution gives a direct, self-executing grant of jurisdiction, both appellate and original to the Supreme Court. 16/ The Court has, however, deferred to Congress and will not assume appellate jurisdiction where Congress has not specifically granted some part of that which the Constitution will allow. This failure by Congress to grant all possible jurisdiction available under the Constitution is viewed by the Court as an "exception" to the Court's appellate power. 17/

The nature of this jurisdiction is important where one looks at how a court would invalidate an unconstitutional limitation on its jurisdiction. The Supreme Court, since

its jurisdiction is self-executing, may strike down the offending limitation and proceed under its general constitutional grant of jurisdiction. The jurisdiction of the lower federal courts is not self-executing and thus they may not automatically proceed under the Constitution as would the Supreme Court. But every court inherently enjoys jurisdiction to determine whether it has jurisdiction. As long as the district court exists as a court, Marbury v. Madison 18/ requires that every statute is subject to the Constitution. Jurisdictional statutes must be reviewed vis-a-vis the Constitution no less than substantive ones. 19/

The records of the Constitutional Convention lend credence to the view that Congress has extensive power over lower federal court jurisdiction. In Philadelphia, there was considerable dispute over whether federal trial courts should be established. One faction, led by Edmund Randolph of Virginia, advocated mandatory establishment of lower federal courts. Another group, including John Rutledge of South Carolina, believed state tribunals should be the courts of first instance with the Supreme Court being sufficient to secure national rights and uniformity of judgments. The result was a compromise; Congress was left the option to create or not to create inferior federal courts. Implicit in this compromise is the position that

lower federal courts need not exist because state courts could provide adequate remedies and dispense adequate justice. 20/ Since Congress may decide whether or not to create federal courts, the logical corollary is that Congress may abolish those courts or may withhold some of the jurisdiction it could grant under the Constitution. This view that Congress need not grant federal courts the full extent of their constitutional jurisdiction was accepted when the Judiciary Act of 1789 21/ was passed by the first Congress which did not give the fullest possible judicial power to the federal courts. 22/ The Supreme Court generally permits Congress to adjust the jurisdiction of the federal courts in virtually any manner. 23/

However, there are those who believe the federal courts are mandated. Justice Joseph Story seized on the words "shall be vested" in article III to argue that lower federal courts are required by the Constitution. In Martin v. Hunter's Lessee, 24/ Story wrote that if some part of the judicial power established by the Constitution was not vested in a court of the first instance (either state or federal) then the appellate jurisdiction of the Supreme Court would not reach those cases and the constitutional requirement that judicial power "shall be vested" would be disobeyed. It then followed, for Story, that Congress was

"bound to create some inferior courts, in which to vest all that jurisdiction which, under the constitution, is exclusively vested in the United States, and of which the Supreme Court cannot take original cognizance." 25/ Story also employed this position in his Commentaries on the Constitution 26/ where he said:

> If congress possess any discretion on this subject, it is obvious, that the judiciary, as a co-ordinate department of the government, may, at the will of congress, be annihilated, or stripped of all its important jurisdiction; for, if the discretion exists, no one can say in what manner, or at what time, or under what circumstances it may or ought to be exercised . . . . "The language of the third article . . . is manifestly designed to be mandatory upon the legislature. Its obligatory force is so imperative, that congress could not, without a violation of its duty, have refused to carry it into operation." [Quoting from Martin v. Hunter's Lessee.] 27/

Certainly, Story's view conflicts with the history behind the drafting of article III at the Constitutional Convention. Since the nature of the Convention compromise discussed above was because there was significant opinion against the mandatory existence of the federal courts, it seems unlikely that Story's view has persuasive historical value. Also, Story believed that federal courts must hear these claims because state courts could not hear federal claims. This position is incorrect. State courts may hear federal claims and therefor as long as the Supreme Court has

appellate jurisdiction over state courts, lower federal courts are not required on this basis. 28/

Another argument is advanced which would require lower federal courts under the present constitutional scheme. Theodore Eisenberg, in a recent article, 29/ asserts that while Congress at the time of the Constitutional Convention was granted discretion to establish lower federal courts, the current constitutional situation requires the lower federal courts to administer these rights. Eisenberg agrees that the framers saw the Supreme Court as the body necessary to protect federal rights through its role as an appellate reviewer of state court decisions. 30/ However, he feels that the federal question caseload has increased to a point where the Supreme Court cannot be an effective protector of federal rights. If the lower federal courts are abolished, few litigants with federal claims could be heard in federal court, even on appeal. For Eisenberg, this would frustrate the framer's twin intents of protecting federal interests from state biases and providing uniformity of decisions on questions of national concern. 31/

Serious problems exist with Eisenberg's analysis. First, the framers' intent seems clear that federal courts are not necessary to hear every article III case. This fact is further supported by noticing that lower federal courts

lacked federal question jurisdiction until 1875. 32/ Thus, the state courts, as intended by the framers, were the primary protectors of federal rights and they still may be so because they are required to follow federal law under the supremacy clause. Second, Eisenberg would allow restrictions on his mandatory federal courts if Congress took "prudent steps which help avoid case overloads." 33/ But nothing in the Constitution establishes efficiency and manageable dockets as the standard for congressional power. 34/ Article III simply does not place such a requirement on the power to limit jurisdiction.

Congress' power to regulate jurisdiction falls between the apparent language of the Constitution and Supreme Court cases which give Congress plenary power over lower federal court jurisdiction and the view that lower federal courts are constitutionally required. Congress is allowed great discretion under article III to limit jurisdiction, while certain limitations exist on that broad grant of power. It is important to remember that federal courts enjoy the jurisdiction to determine jurisdiction and may invalidate an unconstitutional limitation. 35/ The nature of these constitutional limitations on the power to define lower federal court jurisdiction is an interesting study in Constitution law and history.

There are three constitutional limitations on Congress' power to define federal court jurisdiction. The first was introduced by Professor Harry Hart and prohibits congressional infringement on the "essential role" of the federal courts under the Constitution. 36/ The second is derived from a Supreme Court case, United States v. Klein. 37/ This doctrine requires that Congress may not use federal jurisdiction to achieve unconstitutional substantive ends. Finally, the third requires the Congress leave intact some judicial forum capable of providing constitutionally adequate remedies for constitutional wrongs. 38/ Questions involved in studying labor injunctions arise under all three of these limitations, and each has important ramifications today.

The first restriction on Congress' power to define federal court jurisdiction was initially recognized by Professor Hart. 39/ In a famous dialogue he framed the limitation as: "the exceptions must not be such as will destroy the essential role of the Supreme Court in the constitutional plan." 40/ This "essential role" for the Supreme Court consists of its duty to resolve conflicting interpretations of federal law by state and federal courts and to provide a tribunal for maintaining the supremacy of federal law when it conflicts with state law or is challenged by state authority. 41/ The framers at the Constitutional

Convention recognized the need for an ultimate decision-making body to serve these two purposes. 42/ Whether this theory is valid or not is not of great concern here, because the Norris-LaGuardia Act did not purport to alter Supreme Court jurisdiction. It is only where the essential role has generalized application to the lower federal courts do we need to explore the matter further.

One way that this essential function analysis could impact on lower federal courts is on review of federal conduct. Before 1875, 43/ lower federal courts could not entertain federal question cases. However, the Supreme Court was authorized to review final judgments from the highest state courts where "is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity." 44/ A hole existed in the federal review power because during most of the nineteenth century, the Supreme Court could not review federal criminal cases. 45/ The essential role might be expanded to require lower federal courts to review these cases in line with the intent of the framers to provide uniformity or uphold federal interests. This restraint on Congress' power is rather narrow and is not of great general importance.

A more consequential limitation on Congress' jurisdictional power is a limitation on Congress' farming-out article III cases to non-article III courts. Congress has the power under article I to "constitute Tribunals inferior to the Supreme Court." 46/ The Court allows Congress to confer article III jurisdiction on article I courts such as territorial courts, courts martial, the District of Columbia courts and administrative agencies. 47/ But article III requires the judges of the superior and inferior courts hold their "offices during good behavior" and that their compensation "shall not be diminished during their continuance in Office." 48/ Congress may not give article III cases to article I judges who are not protected by the tenure and compensation provisions. 49/ The importance of this issue here is that Hart contends Congress, by withholding federal court jurisdiction, directs business to the state courts. There is no right to have one's case heard in a federal court if a state court is available to hear the case. But if state judges do not enjoy tenure and compensation protections this is no less a constitutional violation than if an article I court whose judges serve without tenure and salary protections is given article III cases. Also, withdrawing certain attributes which permit a court to function as a court (having inadequate procedural safeguards for example)

may violate this principle. 50/ The key factor appears to be if some competent court, state or federal, hears the case or if there is ultimate article III review of this non-article III court then the Constitutional requirements are satisfied. 51/ Otherwise, federal interest and uniformity of decision may be jeopardized.

These essential role theories thus require review by some competent court of federal claims to effectuate policies established in the Constitution. The next limitation on Congress' power to define and prescribe federal court jurisdiction developed out of constitutional common law.

The second constitutional limitation on Congress' power to define federal court jurisdiction arises when Congress manipulates jurisdiction to achieve an unconstitutional substantive end. For example, if Congress withdraws jurisdiction from federal courts to enjoin refusal by states to allow abortions in the first trimester of pregnancy, then this would be in effect overruling Roe v. Wade 52/ by a jurisdictional limitation. Congress may not evade a perhaps unpopular constitutional decision by withdrawing jurisdiction, simply because it may not achieve a de facto reversal of that decision through the majoritarian jurisdictional limitation process, when to change the substantive rule itself would require a constitutional amendment. 53/ There

is only one case in which a federal court has enforced a jurisdictional limitation on Congress and that case is the essence of this doctrine against regulating decisions. 54/

In United States v. Klein, 55/ the plaintiff was the administrator of a deceased owner's estate from which cotton bales were seized and sold by agents of the United States government during the Civil War. Legislation allowed those Southerners who were "loyal" to the government to recover the proceeds from cotton that was seized and sold by the government. 56/ The decedent (Wilson), owner of the cotton bales, was pardoned by President Andrew Johnson, although the Court of Claims found the decedent loyal in fact. The loyalty issue concerned whether Wilson's serving as surety to confederate officers constituted giving aid or comfort to the enemy. The Court of Claims found that it was not and permitted recovery of the proceeds from the sale of the seized cotton. 57/

While the case was pending before the Supreme Court, two events occurred. First, the Supreme Court decided in United States v. Paddleford, 58/ that serving as surety upon a rebel officer's official bond (as Wilson had done) was giving comfort within the meaning of the Abandoned Property Collection Act, 59/ and thus, was proof of disloyalty. The Court also concluded that a presidential pardon constituted

"loyalty" just as if the party had been truly loyal. 60/ Second, in response to the Paddleford decision, Congress passed an act which provided that no pardon could be admitted as proof of loyalty and that accepting a pardon without written protest or disclaimer that the party took no part in the rebellion was conclusive evidence of disloyalty. 61/ These subsequent events changed the circumstances when the Court of Claims decision came before the Supreme Court.

In United States v. Klein, the Supreme Court ruled that the statute passed by Congress in response to Paddleford "passed the limit which separates the legislative and the judicial power." 62/ The act of Congress impaired, "the executive authority [to grant pardons] and directs the court to be instrumental to that end." 63/ The Court then refused to recognize the statute as binding and affirmed the judgment of the Court of Claims. 64/ Congress was not allowed, through its power to define Supreme Court jurisdiction, to impose a decision on the Court.

This constraint on Congress' power expressed in Klein, prohibits Congress from using its jurisdiction powers to manipulate federal court decisions to reach a substantive result forbidden by the Constitution. 65/ Although the act in Klein applied only to Supreme Court appellate jurisdiction, the language of the case makes the holding of more

general applicability. Chief Justice Salmon Chase held that the act passed the point which "separates the legislative from the judicial power." 66/ This statement is founded on a violation of article III judicial power, rather than specific textural rules which govern the Supreme Court. 67/ Lower federal courts exercise "judicial power", and thus, the case rule should apply to congressional attempts to regulate lower federal courts' decisions. 68/

Another example may be informative to further reveal the Klein constraint on Congress' power to limit federal court jurisdiction. The Fair Labor Standards Act 69/ requires that, in industries covered by the act, time and a half per hour of normal wages must be paid for hours worked over the normal forty hour work week. In a series of cases, 70/ the Supreme Court held that "work week" as defined in the act included incidental activities of employment (such as underground travel in ore mines) which normally were not compensable before the act. The threat of large, retroactive claims by employees for these previously uncompensated time caused Congress to enact the Portal-to-Portal Act 71/ which withdrew jurisdiction from any federal, state or legislative court to enforce liability for the employer's failure to pay wages in conformity with the Fair Labor Standards Act before the date of the Portal-to-Portal Act

(1947). The statute also effectively negated the Supreme Court decisions extending the "work week" for the period covered by the Portal-to-Portal Act.

A claim was made before the Second Circuit in Battaglia v. General Motors Corp. 72/ that the Portal-to-Portal Act, because of its retroactive operation, destroyed vested rights to property in violation of the Fifth Amendment. 73/ Circuit Judge Harris Chase reasoned that Congress did have extensive power to regulate jurisdiction, but if that limitation deprived "any person of life, liberty or property without due process of law or [took] property without just compensation," it was invalid. 74/ The Court then found no taking within the Fifth Amendment and upheld the act. 75/ The effect of this decision is to render the jurisdictional limitation void if the substantive end is unconstitutional. 76/ As with the Klein case, Congress may not manipulate jurisdiction to achieve improper results.

In short, the separation of powers doctrine is violated if Congress' jurisdictional restriction violates a substantive constitutional right. This would include not only infringing the constitutional power of another branch of government (executive power to pardon) as in Klein, or property and due process rights as mentioned in Battaglia, but presumably all other constitutional rights as well. The

right to due process of law has had different meanings over the course of our constitutional history and very well might be the broadest limitation. A special due process problem exists in this area of Congress' control over federal court jurisdiction and constitutes the third limitation on that congressional power.

The final check on Congress' power to limit federal court jurisdiction is the requirement that there be adequate remedies for constitutional wrongs. An example of a problem that might arise was given in a recent article by Professor Martin Redish and Curtis Woods. 77/ They cite Tarble's Case 78/ which denied state courts authority to issue writs of habeas corpus against federal officers. The Supreme Court extends this restraint on state courts to writs of mandamus against federal officials 79/ and the lower federal courts also apply the rule to state court injunctive power against those federal agents. 80/ If Congress withdrew jurisdiction, in an instance where Tarble's Case would apply, there would be no forum to hear the case because the state courts would be without remedy to effectuate the constitutional rights. This circumstance would violate the Fifth Amendment due process clause which requires some independent judicial determination of constitutional rights. 81/

This dilemma offered by Tarble's Case has significant general application. If a constitutional right is infringed, some court must be available to grant reasonably effective relief. Denying an effective remedy is not that much different than denying the substantive right at issue. Equitable relief is essential for many of our constitutional rights. Damages will certainly not alleviate the wrong done to a pregnant woman who is banned from having an abortion or a child who is forced to attend a segregated school. Even if damages offer some redress, they are not always available because of sovereign immunity, the Eleventh Amendment or other official immunities. 82/

Yet, in most cases, state courts will have adequate jurisdiction. Certain circumstances besides the Tarble's Case problem might negate the state court's ability to adequately provide relief. Defendants in state courts may remove a case to federal court if they have a federal claim. 83/ Where the federal court has had its effective remedies withdrawn by Congress, the litigant is then left without a constitutional redress. 84/ Also, if the case remained in state court, but Congress excepted Supreme Court and lower federal court jurisdiction to provide an effective remedy and if state court rulings were inconsistent or biased, then the Supreme Court's essential role under the Constitution

would be violated. 85/ Finally, the United States v. Klein principle might be violated if the withdrawal of a particular remedy mandated a certain decision. One example might be if federal courts hear school prayer controversies, but dismissal is required in cases of "voluntary" school prayer. 86/ The courts would be forced to accept voluntary school prayer, an unconstitutional result. In other words adequate remedies, as the most likely judicial power to be withdrawn, may be required to avoid due process limitations, the essential role limitation or the Klein doctrine. The theories expressed above require nothing less.

In sum, the language of the Constitution and certain Supreme Court cases make Congress' power over lower court jurisdiction appear plenary. Some scholars assert the exact opposite and contend lower federal courts are mandated. The actual power of Congress lies somewhere between these views. The Constitutional Convention debates and Supreme Court precedent leave wide discretion to Congress to define lower federal court jurisdiction. However, limitations on this power exist. Congress may not destroy the essential role of the Supreme Court under the Constitution nor the essential role of another federal court if the Supreme Court is not the final tribunal. Congress may not withdraw federal jurisdiction to mandate a certain decision. Finally,

Congress may not deny federal courts an effective remedy if state courts cannot hear the case. This would violate procedural due process or the other limitations mentioned above.

This discussion above has baffled more than a few students of constitutional law. These complicated legal theorums may be applied to the Norris-LaGuardia Act, one of the few times Congress has withdrawn a portion of the lower federal courts' jurisdiction. This exercise should enable us to better understand both the doctrine of separation of powers and the Norris-LaGuardia Act.

III. Separation of Powers and Norris-LaGuardia

The understanding of the doctrine of separation of powers and the constitutional limitations on Congress' power to define and limit lower federal court jurisdiction has advanced significantly since 1932 when the Norris-LaGuardia Act was enacted. However, this is not to say that many of the concepts described in Section II above were not known to legal scholars in 1932. The fact is that important separation of powers arguments were expressed by both those in favor and those opposed to the Norris-LaGuardia Act. Only the modern articulation is more refined. The following material will explore how friends and foes viewed the Norris-LaGuardia Act around the time of its passage. The

particular constitutional limitations which were expressed and countered will be especially reviewed. Some of the modern theories which may not have been anticipated will also be applied to the Norris-LaGuardia Act, although there is not a significant amount that was not expressed at least in some form in the 1930's. But before this discussion begins, a note on the substantive constitutional law is in order.

The years between the passage of the Norris-LaGuardia Act 1932 and the Supreme Court review of the Act in 1937 and 1938 saw the fall of substantive due process. This doctrine was used extensively in the first four decades of the twentieth century to invalidate federal and state economic regulations. 87/ Under this doctrine, economic regulations were balanced against "liberty" and "property" interests protected by the Fifth and Fourteenth Amendments. The Supreme Court justices scrutinized the ends and means employed in the statute at issue. Legislative means had to bear a "real and substantial" relationship to their objectives, and those objectives had to promote "the general welfare" and not be "purely for the promotion of private interests." 88/ Those that did not meet these means-ends standards violated constitutional due process. Such a balancing approach is not unusual in constitutional law-

making; what was unique was the extent to which review depended on the justice's individual perception on how far he would go to invalidate laws based on these liberty and property rights. 89/

Labor regulations were especially susceptible to due process invalidation. In Coppage v. Kansas 90/ and Adair v. United States, 91/ the Supreme Court invalidated state and federal laws directed against "yellow-dog" contracts. These challenged laws made it illegal for employers to contract with employees not to join unions. Justice Mahlon Pitney in Coppage held that this invasion on the substantive due process right of liberty to contract was "so serious... and so disturbing of equality of right, [that it] must be deemed to be arbitrary...." 92/ Similarly, in Adair, the first Justice John Harlan stated that "the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with liberty of contract." 93/ Minimum wage was another labor area which was peculiarly susceptible to substantive due process invalidation. 94/

The Clayton Act, the Norris-LaGuardia Act's predecessor in the attempt to limit federal use of labor injunctions, received a narrow construction under the substantive due process doctrine. This act and its state counterparts were

not invalidated under this review, but their provisions were confined so as to render any possible relief from labor injunctions inadequate. 95/ Such was the state of the law in 1932 when Congress set about enacting another statute to deal with labor injunctions. It was not until the Supreme Court cases of Nebbia v. New York 96/ in 1934 and West Coast Hotel Co. v. Parrish 97/ in 1937 that the Court discarded substantive due process and adopted an approach which required only a "minimum rationality" of legislative means to ends. 98/

The proponents of the Norris-LaGuardia Act adopted an expansive interpretation of Congress' power to control lower federal court jurisdiction under article III. The Senate majority report submitted by George Norris of Nebraska stated:

> No one will seriously doubt the right of Congress, under the Constitution to limit the jurisdiction of federal courts. The jurisdiction, for instance, of the district courts of the United States is given by act of Congress. All the courts of the United States except the Supreme Court could be entirely abolished by act of Congress, and while Congress could not give to these inferior courts jurisdiction greater than is provided by the constitution, it could, on the other hand, within the limits of the Constitution, give to the inferior courts such jurisdiction as Congress in its wisdom deems just. 99/

The House majority report reached a similar conclusion: "[t]he Congress having the power to establish and confer

jurisdiction upon the courts in question, it cannot be questioned that it has the power to restrict or curtail the exercise of their powers as proposed in this bill." 100/

The debates in Congress highlighted the proponents' position that Congress had broad discretionary power to define lower federal court jurisdiction, within certain constitutional limits. Senator Norris, the Senate sponsor of the bill did not even mention the jurisdiction issue in his introductory remarks on the bill. 101/ Another Senate sponsor, Senator John Blaine of Wisconsin said that the bill was "drawn upon the theory that Congress has the authority to define and limit the jurisdiction of the federal courts...it is possible within the power of Congress to prescribe their jurisdiction." 102/ Representative John O'Connor of New York based the House version of the bill on "the power of Congress to create or abolish those courts." 103/ Under this theory, the bill passed overwhelmingly in both houses of Congress. 104/

The Norris-LaGuardia Act sailed through the courts. The most important case construing the act before the Supreme Court reviewed the case was the Second Circuit opinion in Levering & Garrigues v. Morrin. 105/ There, an employer sought an injunction against a union which attempted to organize ironworkers on New York construction sites. The

lower court, utilizing a master, held that since the union was not in a direct employer-employee relationship, the act did not exempt the union activity and enjoined the union conduct. The Second Circuit reversed, holding that this activity was covered by the act and that "Congress has the power as now exercised, of withdrawing this jurisdiction from the District Court." 106/

The Supreme Court summarily dismissed any idea that Congress acted beyond its power when it withdrew jurisdiction to issue labor injunctions under the Norris-LaGuardia Act. In Lauf v. E. G. Shinner & Co., 107/ a district court enjoined union members who were picketing in an attempt to coerce the defendant's employees to join the union. The Court found this activity covered by Wisconsin's "Little Norris-LaGuardia Act" as well as the Norris-LaGuardia Act. The Court used only one sentence to uphold the jurisdiction limitation in this case. It said: "[t]here can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States." (footnote omitted). 108/ In short, the Court found Congress clearly within its article III power to limit jurisdiction when it enacted the Norris-LaGuardia Act.

This cursory treatment by the Supreme Court does not mean that there were not serious questions raised over the

constitutionality of the act. As we have seen, the sponsors of the act realized their power to restrict federal court jurisdiction "could not be greater than is provided by the Constitution" and had to be "within the limits of the Constitution." 109/ While the proponents of the act did not expand greatly on what these constitutional limits were, the opponents of the legislation did voice their opinions. These arguments might best be examined by comparing the contemporary state of the law and opinions that were expressed to some of the theories explained in Section II of this chapter.

It is clear that the nature of the compromise which resulted in article III of the Constitution was known in the 1920's. Charles Warren, in a 1923 article, 110/ revealed the discovery of original drafts of the Judiciary Act of 1789 111/ and various amendments which were not previously known to exist. Using this evidence from the first Congress, Warren asserted that those who wished Congress to have no power over the federal courts and those who wished state courts to be the courts of the first instance were forced to compromise. This compromise was that the disposal of lower federal court judicial power was given to Congress and the first judiciary act effected that compromise. 112/

Since the Constitutional Convention compromise was known, Justice Story's view that lower federal courts were constitutionally mandated was not accepted. The framers were known to have granted Congress discretionary power over whether to create the lower federal courts and thus the phrase "shall be vested" was not intended to require federal courts as Story contended. Also, Story's view that judicial power had to be vested in federal courts because state courts lacked the authority to hear federal claims was clearly discredited by 1923. Warren even felt that Congress should restrict the broad federal question jurisdiction given the lower federal courts in 1875. 113/ For Warren, state courts should hear federal cases because "[f]ederal rights [were] amply safeguarded by right of appeal to the United States Supreme Court." 114/

Theodore Eisenberg's position that lower federal courts are mandated because they are needed to administer constitutional doctrines, certainly does not apply to the situation in 1932. Eisenberg is concerned that "the Supreme Court is clearly no longer capable of providing a federal forum to hear the merits of every case involving a federal question." 115/ The instances he cites for the proposition that the lower federal courts are required to effectuate modern constitutional rights are criminal procedure cases like

Miranda v. Arizona 116/ and Gideon v. Wainwright 117/ and civil reapportionment and desegregation decisions. 118/ These cases were decided at least twenty years after the period in question here. It seems that lower federal courts would not be required in 1932 based on this theory. In other words, neither Story's nor Eisenberg's positions that lower federal courts are mandated had much if any relevance at the time the Norris-LaGuardia bill was under consideration.

Elements of Professor Hart's essential role theory and Redish and Woods' adequate remedy theory also were recognized at the time Congress confronted the labor injunction problem. As you will remember, Professor Hart argues that Congress may limit federal court jurisdiction because the state courts can adequately hear federal cases. Redish and Woods also feel that if a situation arises when an adequate constitutional remedy is foreclosed, the separation of powers doctrine is violated. 119/ Some difficulty developed during the consideration of the Norris-LaGuardia bill which may best be understood in this context.

It was recognized by the time of the Seventy-Second Congress that there was no constitutional right to proceed in federal court. In Kline v. Burke Construction Co., 120/ decided in 1921, the Court remarked that the "right of a

litigant to maintain an action in federal court...is not one derived from the Constitution of the United States...." 121/ The jurisdiction limitation in the Norris-LaGuardia Act sent litigants who sought injunctions to state courts as Hart's theory provides. 122/ However, defendants could defeat state court jurisdiction by removing the case back to federal court. A commentator in the journal, Law and Labor, the mouthpiece for the manufacturer's cooperative, the League for Industrial rights, stated the problem:

> it [is] within the power of the defendants at any time to prevent the state courts from enforcing their law as to the legality of such [yellow-dog] contracts, through removal of the case by the defendant to the federal courts. Thereupon the federal courts are required to assume jurisdiction of the case; but despite such courts having jurisdiction of the case, [the Norris-LaGuardia bill] nevertheless makes the contracts unenforceable as such courts and deprives the plaintiff of all remedies at law or in equity in such courts. 123/

This reasoning was a valid criticism in 1932, but certain events changed its importance. Removal is dependent on the court to which the case is removed having jurisdiction to hear the controversy and grant relief. 124/ Under the Norris-LaGuardia Act, federal courts would still grant injunctions in certain situations 125/ and still had power to grant other remedies. The issue was whether the remedies provided in the act were adequate. This question was

answered after the fall of the substantive due process doctrine. Since liberty and property interests were no longer broadly used to strike down labor regulations, the act's provisions allowing injunctions to issue in instances of fraud and violence were sufficient protection. 126/ In short, removal to federal court would not deny a party any adequate constitutional redress. 127/

Another problem with the Norris-LaGuardia Act requiring state court review was that many state legislatures passed statutes modeled on the federal act. 128/ Employing Professor Hart's analysis and Redish and Woods' adequate remedy requirement, if federal jurisdiction is withdrawn and then the state legislature similarly withdraws jurisdiction from its state courts to issue labor injunctions, the Fifth Amendment may require the state courts to vindicate federal rights and assume jurisdiction so that some court can provide an adequate remedy. 129/ If this is true then state courts could conceivably have been required to declare their state statutes modeled on the Norris-LaGuardia Act unconstitutional vis-a-vis the Constitution, or the United States Supreme Court may have invoked its jurisdiction and invalidated the state laws. This proved unnecessary. With the fall of substantive due process, the state and federal acts did not infringe on any substantive constitutional right and

therefor procedural due process was satisfied. 130/ This problem was recognized when the act was passed, but that problem evaporated by the time the act was reviewed by the Supreme Court.

This dilemma highlights a weakness with Professor Hart's theory. To determine whether the jurisdiction limitation is valid, a decision on the substantive constitutional merits must be made. In effect, this renders the restriction always invalid, since the purpose of the limitations is to prevent inquiry into the exact substantive merits which need to be resolved under Hart's theory. If the state courts are ineffective protectors of federal rights because of removal or state legislation, then Hart's theory that there is no constitutional right to a federal forum is incorrect. 131/ Either the state court must invalidate its own state statute or deny removal, or the federal courts must step in and do it for them.

Probably the most important issue raised by those arguing against the constitutionality of the Norris-LaGuardia Act was whether the jurisdictional limitation used deprived anyone of substantive constitutional rights. 132/ This is nothing else than the issue raised in United States v. Klein. 133/ The question eventually decided by the Supreme Court was whether the statute passed by majority

vote was a legitimate exercise of article III power to limit jurisdiction or an attempt to overrule substantive due process which would require a constitutional amendment. As in Klein, if Congress actually overruled the substantive due process cases, then the jurisdictional limitation would be invalid. The debate generated by the Norris-LaGuardia issue is enlightening.

The act's proponents approached the constitutionality of the bill by stating Congress' extensive power to limit jurisdiction and then asserting a public policy of the country in favor of collective bargaining. Evidently their hope was to have the Court adopt their public policy in such a way that it would not conflict with substantive due process.

Statements on Congress' broad power to limit federal court jurisdiction have already been cited. 134/ The public policy section, in favor of collective bargaining was hoped to "remove doubt to the purpose and intention of the Congress and thereby (be) of assistance to the courts in determining questions of interpretation." 135/ The Senate judiciary report more forcefully argued it to be "the duty of the courts to follow such policy and to decide litigated questions related thereto in accordance with the public policy thus declared." 136/

Collective bargaining essentially tries to equalize capital and labor by allowing employees to combine into labor unions to assert their rights against employers who usually hold more economic power. The public policy statement in the act asserts: "the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment...." 137/ Substantive due process doctrine conceptualized the relationship between the employer and individual employee in terms of liberty of contract and regarded any union interference as an infringement of that liberty. The substantive constitutional question, then, was whether real liberty of contract existed between labor and capital or between the individual employer and employee.

The collective bargaining principle was upheld under the Railway Labor Act 138/ in 1930 in Texas & New Orleans Railroad Co. v. Brotherhood of Railway & Steamship Clerks. 139/ The Norris-LaGuardia Act's proponents no doubt hoped the same principle would be upheld in the labor injunction situation. However, it would require a constitutional amendment to impose this public policy on the court's review of the limitation on remedies to protect constitutional rights. It was much easier to proceed under the majority

vote, jurisdiction provisions and hope the collective bargaining policy would be adopted as not infringing substantive due process.

The act's sponsors then, were, attempting to change the substantive law through the jurisdiction mechanism. Senator Norris said: "We are trying to outlaw the 'yellow-dog' contract by taking away the jurisdiction of the courts to enforce it." 140/ Senator Walsh echoed Norris' comments:

> [if] the court should find that they [yellow-dog contracts] still are protected by the Constitution, we are not without remedy, because so far as the federal courts are concerned, their jurisdiction is controlled entirely by acts of Congress. We may limit as we see fit the jurisdiction of the inferior courts of the United States. 141/

These statements lead one to believe that the real intent of the congressional sponsors was to infuse a new meaning into liberty of contract. If true, this violated United States v. Klein.

The opponents of the legislation made just this change. In hearings before the House Judiciary Committee, James Emery, counsel for the National Association of Manufacturers asked if:

> Any lawyer dares to assert that the power to control or regulate the jurisdiction of the Congress [sic courts] of the United States can be used for the purpose of depriving the court itself of its own constitutional powers or depriving the Supreme Court of the United States of its constitutional rights, or that it can be used for the

> purpose of destroying the authority of the executive department? [citing United States v. Klein]. 142/

Walter Gordon Merritt, General Counsel for the League of Industrial Rights similarly argued:

> If you cannot make that [yellow-dog contracts] illegal because they are constitutional rights and rights of property, then certainly you cannot accomplish the same end by declaring it against public policy and forbidding the courts to do anything to enforce it. 143/

The minority views of the Senate Judiciary Committee submitted by Senator Felix Hebert of Rhode Island reiterated these same comments, 144/ as did comments on the floor of Congress. 145/ Thus, the opponents of the bill saw Klein as a limitation on Congress' power and argued that this congressional enactment was susceptible to invalidation on that basis.

The problem received some review in the lower courts before the Supreme Court reviewed the act. In Cinderella Theater Co. v. Sign Writer's Local Union, 146/ the plaintiff cited Klein to argue that this act was not a valid exercise of Congress' article III power to limit jurisdiction. The court summarily dismissed the argument, finding that Klein applied only when the appellate jurisdiction of the Supreme Court was affected and since the Norris-LaGuardia Act applied only to the lower federal courts, "the decision in that case is therefore clearly inapplicable here." 147/

The Cinderella Theater court was correct when it said that the facts of Klein applied to the appellate jurisdiction of the Supreme Court. But the language in Klein as discussed above in Section II leads one to believe that the holding has broader application. The Supreme Court in Klein said that in making the exception there, "Congress has inadvertently passed the limit which separates the legislative from the judicial power." 148/ This language suggests that the rule announced was not strictly applicable to Supreme Court jurisdiction, but is binding on all federal courts which exercise "judicial power." The Klein court made no distinction between Supreme Court and lower court judicial power and there is no reason to think they should have. Thus, the Cinderella Theater decision was incorrect in distinguishing Klein on this basis.

Again, this constitutional limitation was, at the time, rendered moot because substantive due process was no longer a constraint. The litigants before the Supreme Court in Lauf v. E. G. Shinner's Co. did not mention Klein in their briefs. 149/ Despite this suprising omission, Klein clearly emphasises the effect that withdrawing jurisdiction has on changing substantive constitutional decisions. The Norris-LaGuardia Act was certainly intended to reverse federal court practice of issuing labor injunctions based on substan-

tive due process principles. This could very well be seen as an attempt to overrule judicial decisions in violation of Klein.

One other major argument was made against the Norris-LaGuardia Act. Many critics argued that this congressional action invaded inherent judicial powers to punish contempts of court. These criticisms were based on strong dicta in a Supreme Court case, Michaelson v. United States, 150/ decided just eight years before the Norris-LaGuardia Act was enacted. There the Court said:

> The courts of the United States when called into existence and vested with jurisdiction over any subject, at once became possessed of the power [to punish contempts]. So far as the inferior federal courts are concerned, however, it is not beyond the authority of Congress [cases cited]; but the attributes which inhere in that power and are inseparable from it can neither be abrogated nor rendered practically inoperative. That it may be regulated within limits not precisely defined may not be doubted. 151/

Since the provisions of the Norris-LaGuardia Act imposed greater restrictions than did the Clayton Act, the act construed in Michaelson, many felt these undefined limits might be breached.

This inherent power argument is applicable to two aspects of the Norris-LaGuardia Act. First, the act provides in sections 11 and 12 that civil and criminal contempts for violating injunctions will be tried before a jury. 152/ The

Michaelson decision upheld provisions of the Clayton Act 153/ which required jury trial in contempts that would "constitute also a criminal offense," as not invading "the powers of the courts as intended by the Constitution or violate that instrument in any way." 154/ Some opponents expressed doubt over Congress' power to extend the jury trial requirement to civil cases, 155/ but this argument proved of little consequence in the courts. 156/ This result seems reasonable because contempts would still be punished under the Norris-LaGuardia Act, only the trier of fact differed. If our system respects juries at all, justice will still be served when juries decide facts rather than a judge.

A second and more important issue based on the inherent powers concept is whether withdrawing the power to grant labor injunctions destroys effective equity power. As discussed above, the proponents of the legislation proceeded under the assumption that Congress had great power to define the jurisdiction of the inferior federal courts. Felix Frankfurter, in an appendix to the House Judiciary Committee Report, 157/ listed other instances where Congress successfully withdrew equitable remedies from federal courts. These included: prohibiting injunctions to stay state court proceedings, forbidding suits to restrain the assessment or

collection of taxes and provisions of the Clayton Act regarding contempt procedures. 158/ He further commented that no act of Congress has ever been declared unconstitutional on the ground that it interfered with federal equity powers. 159/

The Act's opposition made various arguments against these provisions, including some extra-constitutional arguments. Senator Hebert responded to a question on whether the limitations on Congress' article III power existed only in the Constitution by stating: "[n]o, there are certain inherent powers in the courts of the United States which cannot be taken away by legislative act." 160/ Similarly, Representative James M. Beck said that there are certain functions which, when bestowed by Congress, could not be taken away. These functions included the power "to punish by contempt and the power to preserve the status quo pending hearings on the merits." 161/

These arguments are very close to our modern conception that by depriving a court of its essential attributes, one destroys its fundamental nature as a court. This is the same type of constraint which prohibits article III cases to be sent to article I courts whose judges do not enjoy article III tenure and salary protection. 162/ By taking

away these essential protections, Congress may pass its constitutional limits and invade judicial independence.

This reasoning fails for the situation surrounding the Norris-LaGuardia Act. The injunction was not completely denied to employers under the Norris-LaGuardia Act. The injunction was still available in cases of fraud or violence. 163/ Injunction remedies have also been withdrawn from federal court arsenals and the courts have upheld this practice. 164/ Furthermore, the Second Circuit found that the labor injunction was not within the class of inherent judicial attributes. 165/ Under the act, other remedies are still available to litigants. Finally, this theory that adequate remedies did not exist after Norris-LaGuardia, fails for an important reason. A substitute remedy system was being constructed by Congress that was to occupy the labor field. Starting with the Railway Labor Act in 1926 166/ and culminating in the National Labor Relations Act of 1935, 167/ Congress established a system of administrative tribunals which essentially replaces state jurisdiction on labor issues. Since, an alternative remedy structure was contemplated and under development to replace the federal and state courts (at least in the trial court level), the denial of the labor injunction did not create a significant remedy vacuum. The three year limbo between when Norris-LaGuardia Act was passed in 1932 and when the National Labor

Relations Act was enacted in 1935 is best explained by the fact that Congress logistically cannot implement programs as quickly as may be necessary.

In sum, Congress proceeded under a broad reading of its own power to regulate federal court jurisdiction. Most of the theories and limitations were expressed by opponents of the measure, at least in a rudimentary form. Those constitutional limitations which require a substantive determination of the merits failed because the substantive due process, historically used to invalidate labor legislations, was discarded before the Norris-LaGuardia Act was reviewed by the Supreme Court. Otherwise, the Klein doctrine which depends on a substantive constitutional determination might have been violated. Had the Norris-LaGuardia test case come before the court prior to the fall of substantive due process, the second great constitutional decision on Congress' power to regulate federal jurisdiction would have been decided. Instead Klein remains the sole Spreme Court decision in this area.

IV. Conclusion

The history of the labor injunction teaches us that Congress does have great discretion to withdraw jurisdiction from the lower federal courts. The limitation on the federal courts from the Norris-LaGuardia Act is a broad one -- and one which was upheld by the Supreme Court. Yet,

our understanding of the separation of powers doctrine has developed significantly since the 1930's and what was clearly constitutional back then might be more closely scrutinized today.

The most important limitation on Congress' power over federal courts is the Klein prohibitions against using the jurisdiction-defining power to revise substantive constitutional law. It appears that this principle was violated by the Norris-LaGuardia Act, but by the time constitutional review was undertaken, the substantive law permitted the action taken by Congress. Some modern court-curbing bills may not be as lucky as the Norris-LaGuardia Act. Many of the present proposals are directed at unpopular Supreme Court decisions, 168/ and if these bills are enacted serious constitutional questions must be answered. The anti-abortion bills and those bills restricting federal court jurisdiction over "voluntary" school prayer, if enacted, would be especially suspect under Klein.

The other two limitations mentioned in this chapter have not actually been argued before a federal court. There are scholarly theories at the moment. However, both Professor Hart's essential role theory and the due process requirement of an effective constitutional remedy are based on sound principles. The reason these theories have never been before the courts is probably because they are more

obvious than the Klein problem. The language in the Constitution seems to give Congress plenary control over lower federal court jurisdiction. Klein is an old decision and somewhat hard to understand. But most people recognize that Congress cannot deny a person their day in court (whether it be state or federal) and that the Supreme Court is needed to maintain unity of decision and protect federal interests. Few Congressmen would politically dare to go against such important rights.

Finally, perhaps Story and Eisenberg do have a good argument that federal courts are required. From an historical viewpoint there is little basis for their positions, but times have changed. The federal government has imposed on our personal lives more than any of the framers could have imagined. The strongest force against that sometimes unwanted intervention are our constitutional liberties. The federal courts are the best champions of those liberties. We must be careful that they are not limited too much.

CONCLUSION

Samuel Johnson once remarked that events of history are "oftener employed for show than use and rather diversify conversation than regulate life." 1/ The congressional solution to the injunction issue was a significant accomplishment in the 1930's. However, today, a common theme regarding that solution, as voiced by one commentator, is: "the Norris-LaGuardia Act, having achieved its historical purpose, is now something of an anachronism." 2/ This essay attempts to show that the labor injunction, and the legislative solutions to the problem, are interesting historical studies, and are important in modern congressional activities.

The first chapter explores the background of the labor injunction. This subject is an intriguing case study on how Congress reacts to developing public opinion. Federal court labor injunctions were originally perceived as effective solutions to restless labor. But as the unions grew in political power, more congressmen saw the need to accommodate organized labor's desires and the labor injunction became a "problem." The Clayton Act, as Congress' first legislative "solution" was little more than a congressional effort to pacify the unions, and it offered little chance for effective relief in the federal courts. The Depression and great

public support for labor ushered in the second legislative enactment. The Norris-LaGuardia Act passed Congress easily amid extensive lobbying by labor organizations and intellectuals like Felix Frankfurter. A successful solution to the labor injunction was necessary and this act proved to be the answer that the public demanded.

This essay's second chapter focuses on how the legislative approach to a problem may affect the eventual outcome of an act before the courts. The Clayton Act merely defined the contours of federal equity power. This regulation of court procedure had little impact on the problem because the courts could finesse the ambiguous language employed to implement this procedural regulation. The Norris-LaGuardia Act went further than the Clayton Act. It denied federal courts the ability to issue injunctions, and in doing so, the Norris La-Guardia Act did not permit the courts any way to circumvent Congress' purpose of ending labor injunctions. Historically, the Clayton Act adopted an approach meant only to reign in a few maverick judges by procedural limitations. The Norris-LaGuardia Act deprived the federal courts of fundamental equity jurisdiction. The approach was determinative on whether the act accomplished its stated purpose.

The third chapter addresses the most relevant issue to today's legislation. Congress successfully exercised its

constitutional power to limit federal court jurisdiction when it passed the Norris-LaGuardia Act. However, it appears clear that the act's sponsors used the jurisdiction power in an attempt to alter the substantive law. The only reason the act did not fall as a violation of the separation of powers doctrine was because the substantive constitutional law changed in the years between the act's passage and Supreme Court review. Many current legislative proposals must be tailored to avoid the problem the Norris-LaGuardia Act could have had in the courts. The Norris-LaGuardia Act is one of the few examples one can look to to understand the complex separation of powers doctrine.

Thus, the labor injunction offers a chance for historical perspective as well as a guide for modern legislation. The fact that the substantive provisions of the act may be rendered inoperative by subsequent events does not diminish its significance in these areas. The Norris-LaGuardia Act is a good case study for modern congressional legislation.

ENDNOTES

Introduction

1/ Gompers, The Charter of Industrial Freedom--Labor Provisions of the Clayton Anti-Trust Law, 21 American Federationist 957 (1921).

2/ Ch. 323, 38 Stat. 730 (1914)(current version at 15 U.S.C. §§12-27 (1976)).

3/ Ch. 90, 47 Stat. 70 (1932)(current version at 29 U.S.C. §§101-115 (1976)).

4/ Petro, Injunctions and Labor Disputes: 1880-1932, Part I: What The Courts Actually Did and Why, 14 Wake Forest L. Rev. 341 (1978) [hereinafter cited as "Petro"].

5/ Busing: H.R. 158, 798, 98th Cong., 1st Sess. (1983); H.R. 761, 1079, 1180, 2047, 5200, 97th Cong., 1st Sess. (1981); S. 528, 1743, 97th Cong., 1st Sess. (1981). School prayer: H.R. 183, 253, 520, 525, 98th Cong., 1st Sess. (1983); H.R. 72, 326, 408, 865, 989, 1335, 4756, 97th Cong., 1st Sess. (1981). Abortion: H.R. 73, 97th Cong., 1st Sess. (1981); S. 583, 97th Cong., 1st Sess. (1981).

Chapter One

1/ Bill of Complaint, United States v. Railway Employees Department of The American Federation of Labor, reprinted in 62 Cong. Rec. 12192 (1922) (submitted by Sen. Watson). The "Federated Shop Crafts" included various unions whose workers were employed by railroads. The shopmen listed as defendants in this case were: Railway Employees' Department of the American Federation of Labor; International Brotherhood of Blacksmiths, Drop Forgers, and Helpers; International Alliance of Amalgamated Sheet Metal Workers; International Brotherhood of Boiler Makers, Iron Ship Builders and Helpers of America; Brotherhood of Railway Car Men of America; International Association of Machinists; International Brotherhood of Electrical Workers and numerous system federations.

2/ 62 Cong. Rec. 12192 (1927) (Remarks of Sen. Robinson).

3/ Id.; Sternau, The Railroad Strike Injunction, 12 Am. Labor Leg. Rev. 157 (1922).

4/ H.R. Res. 425, 67th Cong., 2d Sess., 62 Cong. Rec. 12346 (1922). The resolution never made it out of the House Judiciary Committee.

5/ R. Gorman, Labor Law 621 (1976).

6/ Philadelphia Cordwainers (Commonwealth v. Pullis), Philadelphia Mayor's Court (1806), reprinted in B. Meltzer, Labor Law 16 (1977)[hereinafter cited as "Meltzer"].

7/ 45 Mass. (4 Met.) 111 (1842).

8/ Id.; Meltzer at 20-21. Edwin Witte in Early American Labor Cases, 35 Yale L.J. 825 (1926) disputes the idea that Hunt was a turning point away from the criminal conspiracy doctrine. He asserts American courts never really accepted the doctrine at all. In any event after Hunt it is clear the means/ends test predominates. Thus I cite it here for a clear point of reference for that test.

9/ F. Frankfurter and N. Greene, The Labor Injunction 26-27 (1930) [hereinafter cited as "Frankfurter and Greene"]; C. Greggory and H. A. Katz, Labor and The Law 88-104 (3d ed. 1979) [hereinafter cited as "Greggory and Katz"]; Holmes, Privilege, Malice, and Intent, 8 Harv. L. Rev. 1 (1894). Criminal actions could be brought for physical violence and property damage and often were, but we are more concerned here with subtle categories of tort law that applied to economic activity of unions.

10/ American Steel Foundaries v. Tri-City Central Trades Council, 257 U.S. 184 (1921); Frankfurter and Greene at 26-27.

11/ Greggory and Katz at 93; Frankfurter and Greene at 27.

12/ Frankfurter and Greene at 30-31.

13/ Greggory and Katz at 92; Holmes, 8 Harv. L. Rev. at 9-10.

14/ Frankfurter and Greene at 1.

15/ Greggory and Katz at 94-95.

16/ Id. at 96. The equity and common law courts were combined in the United States.

17/ Witte, Early American Labor Cases, 35 Yale L.J. 825, 832 (1926). The Iowa injunction was by circuit judge D. D. Miracle in Keystone Coal Co. v. Davis (Report of The Iowa Bureau of Labor Statistics, 155 (1885)). The injunctions against the Knights of Labor are reported by T. V. Powderly in his book Thirty Years of Labor 442-43 (1890).

18/ E. Witte, The Government in Labor Disputes 84 (1932) [hereinafter cited as "Witte"]. His figures show at total of 1,845 injunctions between 1880 and 1930. 28 in the 1880's, 122 in the 1890's, 328 in the 1900's, 446 in the 1910's and 921 between January 1, 1920 and May 1, 1930.

19/ Frankfurter and Greene at 21.

20/ Witte at 84. Witte's figure of 1872 includes the reported cases and also a number of unreported ones. A reported case is one that is printed in an official or unofficial case reporter published by the state in which the court sits or a private company like West Publishing Company. These reporters normally select only a certain number of cases to print in all areas of the law, not just labor injunctions.

21/ S. Doc. No. 1060, 71st Cong., 2d Sess. at 7 (1930).

22/ Petro lists 524 federal and state cases between 1880-1932. Petro at 547, Appendix II. By Witte's estimate of 5 to 1 unreported to reported cases that would make a total of 2620. From the figures noted in the text accompanying footnote 26, this 5 to 1 estimate may be conservative.

23/ 158 U.S. 564 (1894).

24/ Frankfurter and Greene at 19 citing In Re Debs record in Appeal and Appendix.

25/ In Re Debs, 158 U.S. at 599.

26/ England, the birthplace of equity, never fully accepted the labor injunction. Witte reports infrequent use

of labor injunctions starting in 1868 in England. Witte at 83. The Trade Disputes Act of 1906, 6 Edw. VII, Ch. 47, outrightly excepted trade union activity from any remedy based on tortious acts. Injunctions in labor disputes were a distinctly American contribution to the law of industrial strife. Frankfurter and Greene at 156.

27/ 221 U.S. 418 (1911).

28/ 221 U.S. at 419-26.

29/ Id. at 437.

30/ Id.; A. Taylor, Labor and The Supreme Court 34-35 (1961) [hereinafter cited as "Taylor"].

31/ Proceedings of The Democratic National Convention 194-95 (1896), reprinted in Frankfurter and Greene at 19 n.79.

32/ Frankfurter and Greene at 156.

33/ There are two notions related to the "unfairness" view that might have merited some attention. One was the fact that an injunction was supposed to be extraordinary remedy--one that was to be used only when a remedy at law was inadequate. In fact, what happened was that the labor injunction came to be the ordinary, even the sole remedy. Frankfurter and Greene at 53. A second fairness notion was the overwhelming success of employees in obtaining injunctions. Witte reported 1872 injunctions granted and only 223 denied. Witte at 84. These problems no doubt engendered hard feelings on the part of labor, but neither one were such that they would require legislative solutions. These were the results of a faulty system. The arguments had to change the legal bases which resulted in these problems.

34/ 48 Cong. Rec. 6436 (1912). See generally, W. Harbaugh, Lawyer's Lawyer 69-73 (1973).

35/ Id.; Frankfurter and Greene at 54-55.

36/ 48 Cong. Rec. at 6438-40.

37/ Limiting Scope of Injunctions in Labor Disputes: Hearings on S. 1482 Before a Subcommittee of The Senate Committee on The Judiciary, 70th Cong., 1st. Sess., at 233

(1928); Frankfurter and Greene at 100 n.86. See also page 4 supra, The Federated Shop Crafts injunction prohibited inter alia picketing "in any manner whatsoever."

38/ In Re Debs, 158 U.S. at 570; Frankfurter and Greene at 88-90.

39/ 48 Cong. Rec. at 6437.

40/ Railroad Shopmen's Strike, see page 4 supra.

41/ Frankfurter and Greene at 98.

42/ United States v. Taliaferro, 290 F. 214 (W.D. Va. 1922).

43/ Wheelwright v. Haggerty, (D.C. W.Va. 1902) cited in Frankfurter and Greene at 98 n.80.

44/ See Gompers v. Buck Stove & Range Co., 221 U.S. 418.

45/ Truax v. Corrigan, 257 U.S. 312, 368 (1921) (Brandeis, J, dissenting).

46/ Ch. 647, 26 Stat. 209 (1890) (current version at 15 U.S.C. §§1-7 (1976)). See cases decided under The Sherman Act: The Danbury Hatters Case (Loewe v. Lawlor), 208 U.S. 274 (1908); Gompers v. Buck Stove & Range Co., 221 U.S. 418 (1911); Duplex Printing Co. v. Deering, 254 U.S. 443 (1921).

47/ Injunctions: Hearings on H.R. 55 Before The House Committee on the Judiciary, 62d Cong., 2d Sess. (1912) [hereinafter cited as "Hearing on H.R. 55"].

48/ H.R. 94, 60th Cong., 1st Sess., 42 Cong. Rec. 13 (1907).

49/ Id.; 51 Cong. Rec. Appendix 939, 940 (1914). (Extension of remarks of Rep. Madden).

50/ H.R. 25188, 61st Cong., 2d Sess., 45 Cong. Rec. 5597 (1910).

51/ 51 Cong. Rec. Appendix at 940-941.

52/ Hearings on H.R. 55.

53/ Id. at 9-10. There is substantial evidence that this assertion is correct. See page 17 infra.

54/ Id.

55/ Id.

56/ H.R. 23635, 62d Cong., 2d Sess., 48 Cong. Rec. 5514 (1912). Reported out of Committee, H.R. Rep. No. 612, 62d Cong., 2d Sess., 48 Cong. Rec. 5514 (1912).

57/ Passed House, 48 Cong. Rec. 6470-71 (1912). Referred to Senate Judiciary Committee, 48 Cong. Rec. 6477. See generally Frankfurter and Greene at 160.

58/ H.R. 15656, 63d Cong., 2d Sess., 51 Cong. Rec. 6714 (1914). Reported out of committee, H.R. Rep. No. 627, 63d Cong., 2d Sess., 51 Cong. Rec. 8201 (1914). A minor change was made from the 1912 Bill by adding in certain language to make it clear that "fraternal labor, consumers, agriculture or horticulture organizations...organized for mutual help, not having capital stock or conducted for profit [do not] come within the scope and purview of the Sherman Antitrust Law...."

59/ H.R. Rep. No. 612, 62d Cong., 2d Sess., incorporated in H.R. Rep. No. 627, 63d Cong., 2d Sess. The Clayton Act also made changes in contempt procedure, most importantly requiring a jury trial in contempt cases. Clayton Antitrust Act, ch. 323, §§21-25, 38 Stat. 738 (1914) (current version at 28 U.S.C. §§386-390 (1976)). The United States Supreme Court upheld these provisions in United States v. Michaelson, 266 U.S. 42 (1924). As far as the record of injunctions before and after the enactment of these sections, there is not very much difference. These sections did not figure importantly in the issues that eventually required the enactment of the Norris-LaGuardia Act. They were generally accepted provisions.

60/ Clayton Antitrust Act §6. See Appendix A for the text of this section. See generally Frankfurter and Greene at 134-98.

61/ Id.

62/ Id.

63/ 51 Cong. Rec. 9540 (remarks of Rep. Henry). The George Amendment read:

> This act shall not be construed to apply to any arrangements, agreements, or combinations between laborers made with a view of lessening the number of hours of labor or the increase of wages.... 51 Cong. Rec. 16338.

64/ Loewe v. Lawler, 208 U.S. 274 (1908).

65/ Id. at 301; A. Taylor, Labor and The Supreme Court 91 (1961).

66/ Accord, E. Berman, Labor and the Sherman Act (1930). Contra, A. T. Mason, Organized Labor and the Law (1925). Reading the Sherman Act legislative history, it appears the Berman view is correct. Certainly the Clayton Act legislative history make it clear that in 1914 Congress wished to adopt an exemption for labor.

67/ See pages 12-14 supra.

68/ Clayton Act, §§17-19. See Appendix I. See generally Frankfurter and Greene 134-198.

69/ Id. at §20.

70/ Id.

71/ 51 Cong. Rec. 9611 (1914) (remarks of Rep. Floyd). See also 48 Cong. Rec. 6434 (1912) (remarks of Rep. Davis); 51 Cong. Rec. 9068-9091 (1914) (remarks of Rep. Webb).

72/ 51 Cong. Rec. 14019 (1914) (remarks of Sen. Clapp). See also 51 Cong. Rec. 9544, 14021 (remarks of Rep. Thomas); 51 Cong. Rec. 13918 (remarks of Sen. Borah); 51 Cong. Rec. 14016 (remarks of Sen. Jones); 51 Cong. Rec. 16279 (remarks of Rep. Webb).

73/ See statements in 48 Cong. Rec. 6418 (1912) (Rep. Moon); 48 Cong. Rec. 6465 (Rep. Sterling); 51 Cong. Rec. 9083, 9496 (1914) (Rep. Madden); 51 Cong. Rec. 9429 (Re/ MacDonald); 51 Cong. Rec. 16283 (Sen. Volstead).

74/ 51 Cong. Rec. at 14019.

75/ Id.

76/ Id. at 14333.

77/ H.R. Rep. No. 612, part 2, 62d Cong., 2d Sess. (1912) incorporated in H.R. Rep. No. 627, part 2, Appendix A, 63d Cong., 2d Sess. (1914) (minority views of Rep. Graham).

78/ Id. No. 612, part 3; No. 627, part 2, Appendix B.

79/ These views were not persuasive because both views were successfully countered by proponents of the Clayton Bill. Senator Jones did not deny that this legislation might be class legislation but he said everything is to some degree. Also he argued that the bill was merely trying to end class distinctions that favored the commercial class. 51 Cong. Rec. 14017.

As to the Sterling argument that the powers of the court would be destroyed, an exchange among Senators Culberson, Jones and West made it clear that the courts still had injunctive power to stop unlawful acts. 51 Cong. Rec. 14017-18.

80/ H.R. Rep. No. 627, part 3, at 9-10.

81/ 51 Cong. Rec. at 9082; 51 Cong. Rec. Appendix 939, 940. As will be shown below, the Supreme Court had to construe "lawful means" as well as "legitimate objects" of labor organizations. Madden's criticism of what was a legitimate object is equally applicable to unlawful means.

82/ 51 Cong. Rec. 14018.

83/ 51 Cong. Rec. 9496 (remarks of Rep. Madden). The commerce clause of the Constitution rends that Congress shall have the power:

> To regulate Commerce with Foreign Nations, and among the several states, and with the Indian Tribes. U.S. Const. art. I, §8, cl. 3.

84/ 51 Cong. Rec. 9496. See U.S. Const. art. III, §1 which reads in part:

> The judicial Power of the United States, shall be vested in one supreme court, and in such inferior Courts as the Congress may from time to time ordain and establish.

85/ 51 Cong. Rec. 9496. Section sixteen of the Clayton Act allowed injunctive relief by private parties if the union did violate the antitrust laws. This included the treble damages provisions in section three. Clayton Anti-trust Act, §16.

86/ 51 Cong. Rec. 9083.

87/ 51 Cong. Rec. 9911.

88/ 51 Cong. Rec. 14609-10.

89/ H.R. Rep. No. 1168, 63d Cong., 2d Sess. (1914), agreed to in the House by a vote of 245-52, 51 Cong. Rec. 10344. S. Doc. 583, 63d Cong., 2d Sess. (1914), agreed to in the Senate by a 35-24 vote. 51 Cong. Rec. 16170.

90/ 51 Cong. Rec. 16756.

91/ Witte at 80. In fact, ten states before 1932 expressly exempted labor unions from anti-trust laws. These states were: California, Iowa, Louisiana, Michigan, Nebraska, New Hampshire, New Mexico, Oklahoma, Virginia and Wisconsin. Witte at 80 n.3.

92/ Oklahoma by constitutional amendment, Massachusetts by statute (that was later declared unconstitutional). Witte at 271.

93/ Witte at 271-73.

94/ 254 U.S. 443 (1921).

95/ 254 U.S. at 469.

96/ Two other cases were important in determining the proper economic weapons labor could use without violating antitrust laws. The Bedford Cut Stone Co. v. Journeyman Stone Cutter's Ass'n, 274 U.S. 37 (1927) and Coronado Coal Co. v. United Mine Workers, 268 U.S. 295 (1925) decisions were more important in determining antitrust theory than

they were with injunction practice. Thus, they will not be discussed at length here.

97/ 254 U.S. at 469.

98/ 257 U.S. 184 (1921).

99/ 257 U.S. at 203.

100/ Duplex Printing, 254 U.S. at 470; Tri-City, 257 U.S. at 203.

101/ 257 U.S. 312 (1921).

102/ 257 U.S. at 330.

103/ Duplex Printing, 254 U.S. at 479 (Brandeis, J., dissenting); Greggory and Katz at 168.

104/ 254 U.S. at 481.

105/ Id. at 488; Greggory and Katz at 169.

106/ 257 U.S. at 354 (Brandeis, J., dissenting). This may appear inconsistent with Brandeis' statement in footnote 105 and text above, but it is not. In Duplex Printing, Brandeis was concerned with the limits courts put on the parties in the industrial struggle. In Truax, Brandeis was balancing weapons with constitutional theory. Construing the Constitution is a judicial function; the legislature could pass statutes defining economic conflict as long as it did not infringe on the Constitutional right.

107/ 257 U.S. at 342-44 (Holmes, J., dissenting).

108/ J.F. Christ, The Federal Courts and Organized Labor, [1932] J. of Business 104 cited in A. Taylor, Labor and the Supreme Court at 110.

109/ H.R. 12622, 67th Cong., 2d Sess., 62 Cong. Rec. 12533 (1921-22); H.R. 3208, 8663, 68th Cong., 1st Sess., 65 Cong. Rec. 283, 6352 (1924); H.R. 3920, S. 972 69th Cong., 1st Sess., 67 Cong. Rec. 451, 608 (1925-26), H.R. 10082, S. 1482, 70th Cong., 1st Sess., 69 Cong. Rec. 21104, 475 (1927-27).

110/ Limiting Scope of Injunctions in Labor Disputes: Hearings on S. 1482 Before a Subcommittee of the Senate Committee on the Judiciary, 70th Cong. 1st. Sess. (1928) [hereinafter cited as "hearings on S. 1482"].

111/ S. 1482, 70th Cong., 1st Sess., 69 Cong. Rec. 10050 (1928); Frankfurter and Greene at 207 n.13 and text.

112/ Clayton Act, §6.

113/ See Hearings on S. 1482, statements by Andrew Furuseth at 18; William Green at 36; John T. Frey at 118; Frank Morrison at 149; and Morris Earnst at 157.

114/ Frankfurter and Greene at 207 n.15. Thirty-two categories of property rights were enumerated at the hearings that the bill would affect.

115/ Frankfurter and Greene at 207. An excellent statement of Senator Henrick Shipstead's views on the subject may be found in a speech he gave to the Forty-First Annual convention of the Illinois Federation of Labor, September 10, 1923 reprinted in 65 Cong. Rec. 6685 (1924).

116/ See 69 Cong. Rec. 3449, 3909.

117/ S. Rep. No. 163, 72d Cong., 1st Sess. (1932); Witte at 274 n.4.

118/ S. 2497, 71st Cong., 2d Sess., 69 Cong. Rec. 10050 (1930).

119/ U.S. Const. art. III, §1.

120/ Id. §2.

121/ S. Rep. No. 163 at 10-11.

122/ 72 Cong. Rec. 10250.

123/ S. Rep. No. 163 at 4.

124/ Letter of Attorney general William D. Mitchell to Senator George M. Norris (June 30, 1930) reprinted in S. Doc. No. 1060, 71st Cong., 2d Sess., Appendix (1930).

125/ S. Rep. No. 163 at 4. The report was: S. Doc. No. 1060, 71st Cong., 2d Sess., (1930).

126/ S. Doc. No. 1060. Reasons why the majority felt the bill would cause problems included: The bill invaded state perogatives in controlling corporate entities; it invaded the freedom to contract; it would not permit injunctions against illegal strikes and it too drastically limited injunctions to just cases of actual threat, fraud or violence.

127/ The Supreme Court in an opinion written by Chief Justice Taft said "[t]he right to combine for such a lawful purpose has in many years not been denied by any court." American Foundaries Co. v. Tri-City Trades Council, 257 U.S. 184, 209 (1921).

128/ The Republicans adopted a plank which stated inter alia: "The party favors freedom in wage contracts, the right of collective bargaining by free and responsible agents of their own choosing...." The Democrats voiced a similar statement: "We favor the principle of collective bargaining and the Democratic principle that organized labor should choose its own representatives without concern or interference." S. Doc. No. 1060, part 2 at 6.

129/ Ch. 347, 44 Stat. 577 (1926) (current version at 45 U.S.C. §§151-188 (1976)).

130/ S. Doc. No. 1060, part 2 at 6-8.

131/ S. 935, 72d Cong., 1st Sess., 75 Cong. Rec. 202; H.R. 5315, 72d Cong., 1st Sess., 75 Cong. Rec. 369 (1932).

132/ S. Rep. No. 163, 75 Cong. Rec. 3370; H.R. Rep. No. 669, 72d Cong., 1st Sess., 75 Cong. Rec. 5143 (1932).

133/ 266 U.S. 42 (1924).

134/ 266 U.S. at 66; H.R. Rep. No. 669 at 5.

135/ S. Rep. No. 163, part 2.

136/ Id. at 14.

137/ Id. It is interesting to note the complete turnaround the committee displayed in two years. From a

majority report in 1930 which asserted the bill was not necessary, to an overwhelming acceptance of the need for legislation in 1932, the Committee did a complete about face. The minority views in 1932 wanted (unnecessarily as it turned out) to be even more clear. Compare S. Doc. No. 1060 with S. Rep. No. 163.

138/ See 75 Cong. Rec. 4502 (Remarks of Sen. Norris; 75 Cong. Rec. 4618 (Remarks of Sen. Blaine); and 75 Cong. Rec. 5006 (Remarks of Sen. Shipstead).

139/ 75 Cong. Rec. 4676 (Remarks of Sen. Herbert).

140/ 75 Cong. Rec. 5000 (Remarks of Sen. Bingham).

141/ 75 Cong. Rec. 5019.

142/ Id. at 5478.

143/ Id. at 5474.

144/ Id. There is no known evidence that the drafters of the bill took a trip to Moscow when considering public policy for the Norris-LaGuardia Act. It appears the policy for collective bargaining is instead a western practice.

145/ 75 cong. Rec. 5511.

146/ S. Doc. No. 71, 72d Cong. 1st Sess., 75 Cong. Rec. 6455; H.R. Rep. 821, 72d Cong., 1st Sess., 75 Cong. Rec. 6336 (1932).

147/ 75 Cong. Rec. 7122.

148/ Such works include articles by Edwin E. Witte Early American Labor Cases, 35 Yale L.J. 825 (1926); Labor's Resort to Injunctions, 39 Yale L.J. 374 (1929); The Federal Anti-Injunction Act, 16 Minn. L. Rev. 638 (1932) and his book The Government in Labor Disputes (1932). Francis B. Sayre also published Labor and the Courts, 39 Yale L.J. 682 (1930).

149/ Greggory and Katz at 184-85. Anti-union or "yellow dog" contracts were major thorn in the side of labor. These were contracts which employers forced employees to sign that promised the employee would not join a union. If a labor attempted to organize a shop whose

employees were under such a yellow dog contract, the union often was held liable for inducing a breach of contract. An employer would get an injunction to stop this tort from occurring.

150/ 75 Cong. Rec. 4618.

151/ Greggory and Katz at 185.

152/ Id. at 185-86.

153/ Norris-LaGuardia Act, §§4, 13. See Appendix B for full text of these sections. See generally Greggory and Katz at 184-99.

154/ Greggory and Katz at 185.

155/ A. Taylor, Labor and The Supreme Court at 111.

156/ See 75 Cong. Rec. 5500-01 (remarks of Rep. Sumners).

157/ Norris-LaGuardia Act §2.

158/ Greggory and Katz at 198.

159/ 301 U.S. 468 (1937).

160/ 301 U.S. at 482.

161/ Id. at 481. See Truax v. Corrigan, 257 U.S. 312 (1921) for view that engaging in business is a property right.

162/ 301 U.S. at 483 (Butler, J. dissenting).

163/ Greggory and Katz at 198.

164/ 303 U.S. 552 (1938).

165/ 303 U.S. at 555.

166/ Id. at 560.

167/ Id. at 563 (McReynolds, J., dissenting and joined by Butler, J.).

168/ Petro, 14 Wake Forest L. Rev. 341.

Chapter Two

1/ Sherman Antitrust Act, Ch. 647, 26 Stat. 209 (1890) (current version at 15 U.S.C. §§1-7 (1976)). See generally Chapter One of this paper.

2/ Clayton Act, Ch. 323, 38 Stat. 730 (1914) (current version at 15 U.S.C. §§12-27 (1976)).

3/ 51 Cong. Rec. 9611 (1914) (remarks of Rep. Floyd).

4/ See Truax v. Corrigan, 257 U.S. 312 (1912); Bedford Cut Stone Co. v. Journeymen Stone Cutter's Ass'n, 274 U.S. 37 (1927); Coronado Coal Co. v. UMW, 268 U.S. 295 (1925); Duplex Printing Co. v. Deering, 254 U.S. 443 (1921); American Steel Foundaries v. Tri-City Central Trades Council, 257 U.S. 184 (1921).

5/ Norris-LaGuardia Act, Ch. 90, 47 Stat. 70 (1932) (current version at 29 U.S.C. §§101-115 (1976)).

6/ New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552 (1938).

7/ This introduction was derived essentially from Chapter One of this essay. The two most helpful sources on general background of labor injunctions are: F. Frankfurter and N. Greene, The Labor injunction (1930) [hereinafter cited as "Frankfurter and Greene"] and Petro, Injunctions and Labor Disputes: 1880-1932, Part I: What the Courts Actually Did and Why, 14 Wake Forest L. Rev. 341 (1978) [hereinafter cited as "Petro"].

8/ G. McDowell, Equity and the Constitution 15 (1982) [hereinafter cited as "McDowell"]. See also F. Pollock, Essays in the Law 180-81 (1922) [hereinafter cited as "Pollock"].

9/ McDowell at 16-18.

10/ Aristotle, The Art of Rhetoric, 1354 a-b, quoted in McDowell at 18.

11/ McDowell at 18.

12/ B. Nicholas, An Introduction to Roman law 54-55 (1962) (hereinafter cited as "Nicholas"]; 1 J. Pomeroy, Equity Jurisprudence §8 (4th ed. 1918) [hereinafter cited as "Pomeroy"]; McDowell at 19.

13/ 1 Pomeroy at §§4-8; McDowell at 19.

14/ Nicholas at 19-23; McDowell at 20-21.

15/ Nicholas at 19-23. There were essentially two methods by which the jurists made the subtilitas of the ius civile more equitable. Benignitas (benevolence) was used to uphold the validity of legal transactions against a too subtle legal reading. Humanitas (humanity) was used by the emperor to render the law more humane -- especially if by bestowing imperial grace it would make him more popular and work to his political advantage. Hausmaninger, "Benevolent" and "Humane" Opinions of Classical Roman Jurists, 61 B.U.L. Rev. 1139 (1981); McDowell at 21.

16/ Nicholas at 38-45. The Corpus Iuris was actually comprised of several elements. The Digest was the part which presented the classical literature and set out the law of the times.

17/ Compare Justinian in the Institutes:

> The Imperial dignity should not only be supported by arms, but guarded by laws, that the people may be properly governed in time of peace as well as war; for a Roman emperor ought not only to be victorious in the hostile field, but should expel the iniquities of men regardless of law; and become equally renowned for a religious observance of justice, as for warlike triumphs.

With Glanville in his De Legibus:

> Not only must royal power be furnished with arms against rebels and nations which rise up against the king and the realm, but it is also fitting that it should be adorned with laws for the governance of subject and peaceful peoples; so that in time of both peace and war, our glorious king may so successfully perform his office, that crushing the pride of the unbridled and ungovernable with the right hand of strength and tempering

> justice for the humble and the meek with the rod of equity, he may both be always victorious in wars with his enemies, and also show himself continually impartial in dealing with his subjects.

and Bracton in his De Legibus:

> These two things are necessary for a king who rule rightly, arms forsooth and laws, by which either time of war or of peace may be rightly governed, for each of them requires the aid of the other, in order that on the one hand the armed power may be in security, and on the other the laws themselves may be maintained by the use and protection of arms. For if arms should fail against enemies who are rebellious and unsubdued, the realm will so be without defence, but if laws should fail, justice will be thereupon exterminated, nor will there be anyone to render a rightful judgment.

The similarities of these three introductions are striking and reveal that these English writers knew of Justinian's work an drew upon it. McDowell at 21-22.

18/ McDowell at 22.

19/ Id. at 23.

20/ Quoted in 1 J. Story, Commentaries on Equity Jurisprudence §8 (3d ed. 1842) [hereinafter cited as "Story, Equity Jurisprudence"].

21/ Nicholas at 19. The Twelve Tables was the original code of Rome. It was compiled by ten men who had been sent to Greece for the purpose of studying legislation. The Twelve Tables was the ius civile of ancient Rome, although it was not a comprehensive code; just the more salient rules were expressed. See Nicholas at 15.

22/ Nicholas at 19.

23/ McDowell at 24-25; 1 Story, Equity Jurisprudence at §§38-55; Pollock at 190-95; F.W. Maitland, The Constitutional History of England 223-26 (1920) [hereinafter cited as "Maitland"]. There also was a major battle between the common courts over which was the supreme judicial body.

Essentially, the power struggle developed over whether equity courts could review judgments of common law courts. Sir Edward Coke, the champion of the common law and Sir Francis Bacon, the defender of equity squared off in one of the greatest intellectual battles in English history. Both sides appealed to natural law concepts (as discussed herein) for justification. The specifics of the debate are not directly relevant here other than the fact that the debate threw open both systems to criticism and reform.

24/ See note 23 supra. The Coke-Bacon debate was the focus of this dispute between equity and the common law. See Pollack, especially the chapter entitled "The Transformation of Equity" for background on how the Coke-Bacon debate affected equity.

25/ Pollock at 191-93.

26/ Maitland at 225-26; McDowell at 31-32.

27/ McDowell at 31-32. Blackstone remarked that "the system of our courts of equity is a laboured connected system, governed by established rules, and bound down by precedents, from which they do not depart...." 3 W. Blackstone, Commentaries on the Laws of England 432 (1768).

28/ Pomeroy at §1337 n. 1. The ideas are from the Roman jurist Gaius which are compiled in Justinian's Institutes.

29/ McDowell at 23; 2 Story, Equity Jurisprudence at §§861-72.

30/ From the charter of the Massachusetts Bay Colony, quoted in L. Friedman, A History of American Law 33 (1973) [hereinafter cited as "Friedman"].

31/ Friedman at 40-90.

32/ Id. at 47-48.

33/ U.S. Const. art III, §2, cl. 1.

34/ McDowell at 36.

35/ These are the federalist papers numbers 78-83. A. Hamilton, J. Madison, J. Jay, The Federalist Papers (Mentor Book ed. 1961) [hereinafter cited as "Federalist"].

36/ Federalist at 469; McDowell at 40-41.

37/ Federalist at 471.

38/ Id. at 479-80, italics in original.

39/ Id. at 505, italics in original.

40/ McDowell at 41.

41/ The Judiciary Act, ch. 20, 1 Stat. 73 (1789) (current version at 28 U.S.C. (1976)).

42/ McDowell at 45-46.

43/ Process Act, ch. 36, 1 Stat. 275 (1792)(current version at 28 U.S.C. §2071 (1976)); McDowell at 46-47.

44/ Hayburn's Case, 2 U.S. (2 Dall.) 409, 413-14 (1792).

45/ McDowell at 51-52.

46/ Id. at 50-53.

47/ Alien and Sedition Acts, ch. 58, 1 Stat. 570; ch. 66, 1 Stat. 577; ch. 74, 1 Stat. 596 (1798) (current version at 50 U.S.C. §§21-24 (1976)).

48/ McDowell at 55-62.

49/ Charles Warren suggests five factors as important in the formation of the codifiers motives: (1) continuing hostility to all things English; (2) a distrust and jealousy of lawyers who came to power because of the abtruse quality of the law; (3) the massive accumulation of law reports; (4) the influence of the Napoleonic code; and (5) the theoretical support offered by the writings of Jeremy Bentham. C. Warren, A History of the American Bar 508 (1911); McDowell at 61.

50/ McDowell at 61.

51/ L. Horowitz, The Transformation of the Common Law 257-58 (1977).

52/ This attitude is essentially the same as Aristotle's mentioned in section II supra. Aristotle and the scientists believed that no code could be completely comprehensive. Equity was needed to file on the gaps that the positive law could not reach.

53/ Kent's great work was his Commentaries on American Law (1826). Story's treatises included: Commentaries on Bailments (1832); Commentaries on the Constitution of the United States (3 vols., 1833); Commentaries on Conflicts of Laws (1834); Commentaries on Equity Jurisprudence (2 vols. 1836); Commentaries on Equity Pleading (1838); Commentaries on Agency (1839); Commentaries on Partnership (1841); Commentaries on Bills of Exchange 1843); and Commentaries on Promissory Notes (1845). McDowell at 69.

54/ 1 Story, Equity Jurisprudence at §3.

55/ Id. at §7; McDowell at 69. See note 52 supra.

56/ McDowell at 69.

57/ 1 Story, Equity Jurisprudence, at §§18-28; McDowell at 74-75.

58/ An Act to simplify and abridge the Practice, Pleadings and Proceedings of the Courts of this State, ch. 379, 1848 N.Y. Laws 497.

59/ Id.

60/ McDowell at 87.

61/ Id. at 86-93.

62/ Professor Gary McDowell asserts that in combining procedures in law with those in equity, the courts, in effect, can now ignore the dangers of equity. Judges may easily switch roles from equity to law and visa-versa. This allows them to disregard the traditional limits on judicial discretion -- procedure and precedent. McDowell believes that this enhanced subjectivity and uncertainty, from tearing equity from its historial limitations, creates a new "sociological" equity; an equity which allows assumed

judicial power to formulate public policies as the particular judge sees fit. This really did not materialize until 1938 when the federal courts combined law and equity. In the time period concerned with this essay, this new equity influenced, but did not determine, the two legislative actions. McDowell at 93.

63/ Clayton Act §§6, 17-20. See Appendix A.

64/ See Chapter One, §III.

65/ Norris-LaGuardia Act §§1, 2, 4 and 13. See Appendix B.

66/ See Chapter One, §IV.

67/ Id. at 8-9.

68/ J. High, Injunctions §1415(b)(4th ed. 1905); 6 Pomeroy at §590.

69/ 2 Story, Equity Jurisprudence at §§905-07, 953-58.

70/ See e.g. Gompers v. Buck Stove & Range Co., 221 U.S. 418 (1911).

71/ See Chapter One, §II.

72/ In re Debs, 158 U.S. 564 (1894).

73/ Frankfurter and Greene at 47.

74/ Id.

75/ Truax v. Corrigan, 257 U.S. at 342 (Holmes J. dissenting); Frankfurter and Greene at 48.

76/ Truax, 257 U.S. at 354 (Brandeis, J. dissenting). See also Duplex Printing Co. v. Deering, 257 U.S. at 479 (Brandeis J., dissenting).

77/ The Fifth Amendment due process clause applies against and the federal government, the Fourteenth Amendment applies to the states.

78/ 257 U.S. 312.

79/ Id. at 328.

80/ 51 Cong Rec. 9611 (1914) (remarks of Rep. Floyd). See Chapter One at 19.

81/ §6. See Appendix.

82/ §§17, 18 19. These sections required notice, security, and detail as to the parties enjoined. See Appendix A.

83/ §20.

84/ Duplex Printing, 254 U.S. at 470; American Steel Foundaries v. Tri-City Central Trades Council, 257 U.S. 184.

85/ U.S. Const. art III, §2 cl. 1.

86/ Id. at §1.

87/ S. Rep. No. 163, 72d Cong., 1st Sess 4 (1932).

88/ See Senn v. Tile Layers, 301 U.S. 468 (1937); New Negro Alliance, 303 U.S. 552 (1938).

89/ See e.g. G. Gunther, Cases and Materials on Constitutional Law 502-669 (10th ed. 1980); J. Nowak, R. Rotunda & J. Young, Handbook on Constitutional Law 385-450 (1978) and cases and articles cites therein.

90/ Gunther, Cases and Materials on Constitutional Law at 533-34. The decisions construing the Norris-LaGuardia Act and similar state legislation are mentioned in note 88 supra.

91/ Petro, 14 Wake Forest L. Rev. 341.

92/ Id.

Chapter Three

1/ 75 Cong. Rec. 4680 (1932).

2/ Ch. 90, 47 Stat. 70 (1932) (current version at 29 U.S.C. §§101-115 (1976)).

3/ Senn v. Tile Layers Union, 301 U.S. 468 (1937); New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552 (1938); Lauf v. E. G. Shinner & Co., 303 U.S. 323 (1938).

4/ The substantive due process doctrine is best exemplified by the case Lochner v. New York, 198 U.S. 45 (1905), where the Court struck down a New York law which prohibited the employment of bakery employees for more than 10 hours a day or 60 hours a week. The Court held that this regulation of hours of labor was not justified by any police power regulation by the state and therefore trampled the Fourteenth Amendment constitutional right of "liberty of contract". 198 U.S. at 64. This doctrine did not result from an expansive reading of "liberty" or "property" as used in the Constitution, but rather a willingness on the part of the justices to invalidate economic regulation using their personal conceptions of what was proper regulation. The Court moved away from the Lochner interventionist approach and adopted a "minimum rationality" standard which allowed more statutes to survive constitutional review. This shift to Supreme Court deference to legislative judgments came in the 1934 decision Nebbia v. New York, 291 U.S. 502 and the 1937 decision West Coast Hotel Co. v. Parrish, 300 U.S. 379. West Coast Hotel was decided just prior to the Supreme Court's decisions on the Norris-LaGuardia Act. See generally, G. Gunther, Cases and Materials on Constitutional Law 502-34 (10th ed. 1980) [hereinafter cited as "Gunther"]. See also pages 113-15, infra.

5/ See e. g. L. Tribe, American Constitutional Law 427-55 (1978); Gunther at 502-34; B. Wright, The Growth of American Constitutional law (1942); J. Nowak, R. Rotunda and J. Young, Handbook on Constitutional Law 385-450 (1978); W. Lockhart, Y. Kamisar, J. Choper, Cases and Materials on Constitutional Rights and Liberties 110-38 (4th ed. 1975).

6/ Busing: H.R. 158, 798, 98th Cong., 1st Sess. (1983); H.R. 761, 1079, 1180, 2047, 5200, 97th Cong., 1st Sess. (1981); S. 528, 1743, 97th Cong., 1st Sess. (1981). School prayer: H.R. 183, 253, 520, 525, 98th Cong., 1st Sess. (1983); H.R. 72, 326, 408, 865, 989, 1335, 4756, 97th Cong., 1st Sess. (1981). Abortion: H.R. 73, 97th Cong., 1st Sess. (1981); S. 583, 97th Cong., 1st Sess. (1981).

7/ See Chapter One of this essay; F. Frankfurter and N. Greene, The Labor Injunction (1930); E. Witte, Government by Injunction (1932).

8/ Ch. 323, 38 Stat. 730 (1914) (current version at 15 U.S.C. §§12-27 (1976)).

9/ Cases narrowly construing the Clayton Act and state counterparts were: Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921); American Steel Foundaries Co. v. Tri-City Trades Council, 257 U.S. 184 (1921); Truax v. Corrigan, 257 U.S. 312 (1921). See Chapter One of this essay for further details on the background of the labor injunction.

10/ The use of article III power to limit federal court jurisdiction will be explained in detail below. The Clayton Act attempted to withdraw labor from the substantive application of the antitrust laws including the Sherman Act, ch. 647, 26 Stat. 209 (1890) which were often used as the basis for issuing injunctions against labor activities deemed to be in restraint of trade, and the Act further attempted to reform procedural abuses used in granting injunctions. The act used the definition "the labor of a human being is not a commodity or article of commerce" to define labor organizations out of the substantive reach of the antitrust laws. It also required that nothing in the antitrust laws was to be construed to forbid the existence and operation of labor unions as long as they were "lawfully carrying out the legitimate objects thereof." See Appendix A, §§6 and 20 of the Clayton Act. The Supreme Court in Duplex Printing Press Co., 254 U.S. 443 and American Steel Foundaries Co., 257 U.S. 312, said these provisions merely declared the law as it stood before, and thus, offered no relief for the injunction problem. See Chapter One, page 22, 30 supra.

11/ §3, see Appendix B.

12/ §4, see Appendix B.

13/ §§11, 12, see Appendix B.

14/ See cases cited in n. 3 supra.

15/ Sager, Forward: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts, 95 Harv. L. Rev. 17, 25-26 (1981) [hereinafter cited as "Sager"]; Redish and Woods, Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis, 124 U. Pa. L. Rev.

45, 46 (1975) [hereinafter cited as "Redish and Woods"]; Eisenberg, Congressional Authority to Restrict Lower Federal Court Jurisdiction, 83 Yale L. J. 498, 500 (1974) [hereinafter cited as "Eisenberg"]; Ratner, Congressional Power over the Appellate Jurisdiction of the Supreme Court, 109 U. Pa. L. Rev. 157, 158 (1960); Lockerty v. Phillips, 319 U.S. 182 (1943); United States v. Klein, 80 U.S. (13 Wall.) 128 (1872); Sheldon v Sill, 49 U.S. (8 How.) 441 (1850).

16/ Sager at 24; Kline v. Burke Constr. Co., 260 U.S. 226, 234 (1922).

17/ Durousseau v. United States, 10 U.S. (6 Cranch) 307, 314 (1810); United States v. More, 7 U.S. (3 Cranch) 159, 172-73 (1805); Sager at 25 n.21.

18/ 5 U.S. (1 Cranch) 137 (1803).

19/ United States v. Shipp, 203 U.S. 563, 573 (1906); Sager at 22-30.

20/ Redish and Woods at 52-56; Sager at 33-36 n.47, 51.

21/ Ch. 20, 1 stat. 73 (1792).

22/ Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 Harv. L. Rev. 49 (1923); P. Bator, P. Mishkin, P. Shapiro, H. Wechsler, Hart and Wechsler; The Federal Courts and the Federal System 33-34 (2d ed. 1973) [hereinafter cited as "Hart and Wechsler"].

23/ See Palmore v. United States, 411 U.S. 389 (1973); Glidden Co. v. Zdanok, 370 U.S. 530 (1962); Yakus v. United States, 321 U.S. 414 (1944); Lockerty v. Phillips, 319 U.S. 182 (1943); Bors v. Preston, 111 U.S. 252 (1884); United States v. Union Pac. R. R., 98 U.S. 569 (1878); Sewing Machine Co. Case, 85 U.S. 553 (1873); United States v. Klein, 80 U.S. (13 Wall.) 128 (1872); Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850); United States v. Hudson, 11 U.S. (7 Cranch) 32 (1812); Redish and Woods at 46 n.4; Ratner at 158.

24/ 14 U.S. (1 Wheat.) 304 (1816).

25/ Id. (Italics in original).

26/ J. Story, Commentaries on the Constitution (3 vols. 1833).

27/ J. Story, 3 Commentaries on the Constitution 449. See Redish and Woods at 56-59; Hart and Wechsler at 313-14.

28/ Redish and Woods at 58-59; Sager at 34-35; Gunther at 57-60. Another author, like Story, bases an argument that lower federal courts are constitutionally required on the language of the Constitution. Professor Julius Goebel asserts that when the language of an early draft of section 1 of article III which allowed lower federal courts to be "constituted" was changed to the final "ordain and establish" language, the Convention wished lower federal courts to be created. He feels that the words "ordain and establish" are more forceful than "constitute" and thus were used to assure lower federal courts would be created. J. Goebel, History of the Supreme Court of the United States: Antecedents and Beginnings to 1801 at 246 (1971). This is merely noted here because the same arguments used against Story's theory are applicable here and the use of language seems less forceful than Story. See Redish and Woods at 59-61.

29/ Eisenberg, 83 Yale L.J. 498 (1974).

30/ Id. at 509-10.

31/ Id. at 510. See Redish and Woods at 67-69; Sager at 35-36.

32/ Ch. 137, §1, 18 stat. 470 (1875) (current version at 28 U.S.C. §1331 (1976)).

33/ Eisenberg at 516.

34/ Redish and Woods at 75.

35/ See pages 96-97 supra.

36/ Hart's theory was first printed as an article in the Harvard Law Review, Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1361 (1953). This article is reprinted in Hart and Wechsler at 330, and it is to the Hart and Wechsler text that citations will be made.

37/ 80 U.S. (13 Wall.) 128 (1872).

38/ Sager at 42; Redish and Woods at 93; Hart and Wechsler at 330-32.

39/ See note 36 supra.

40/ Hart and Wechsler at 331; Sager at 43.

41/ Ratner at 161; Sager at 43.

42/ Sager at 45-57.

43/ See note 32 supra.

44/ §25 of the Judiciary Act of 1789, ch. 20, 1 stat. 73 at pp. 85-86.

45/ The Court was granted general power to review major federal criminal cases in 1891. Act of March 3, 1891, ch. 517, §5, 26 stat. 826, 827; review of capital cases was available two years earlier, Act of Feb. 6, 1889, §6, 25 Stat. 655, 656. Habeas corpus was available to review most of these cases before this time. Ratner at 196; Sager at 53 n.105.

46/ U.S. Const. art. I, §8.

47/ Sager at 62 n.137 and cases cited therein.

48/ U.S. Const. art III § 1.

49/ Professor Sager lists four criteria which loosely govern the constitutionality of directing article III cases to article I courts: (1) the importance of the pertinent article III business and its relationship to the article's tenure and salary requirements; (2) the particular circumstances that induced Congress to depart from those requirements; (3) the availability of article III review; and (4) the extent that the article I court enjoys the procedural attributes of a well functioning "court". (footnotes omitted). Sager at 63.

50/ O'Callahan v. Parker, 395 U.S. 258, 263-65 (1969); United States ex rel Toth v. Quarles, 350 U.S. 11, 15-17 (1955). See Hart and Wechsler at 317-22.

51/ Sager at 66.

52/ 410 U.S. 113 (1973).

53/ Young, Congressional Regulation of Federal Courts' Jurisdiction and Processes: United States v. Klein Revisited, 1981 Wisc. L. Rev. 1189, 1219-24 [hereinafter cited as "Young"]; Sager at 68; Hart and Wechsler at 316.

54/ Young at 1192.

55/ 80 U.S. (13 Wall.) 128 (1872).

56/ The Abandoned Property Collection Act, ch. 120, §3, 12 stat. 820 (1863); Young at 1197-98 n.43. The act required one who had "never given any aid or comfort to the rebellion" could recover proceeds from abandoned property within two years after the suppression of the rebellion.

57/ Wilson v. United States, 4 Ct. Cl. 559, 567 (1868), modified, 7 Ct. Cl. vii (1871), aff'd sub non., United States v. Klein, 80 U.S. (13 Wall.) 128 (1872); Young at 1199.

58/ 76 U.S. (9 Wall.) 531 (1870).

59/ Id. at 539.

60/ Id. at 538-39; Young at 1202-03.

61/ Act of July 12, 1870, ch. 251, 18 stat. 230 (1870).

62/ 80 U.S. (13 Wall.) at 147.

63/ Id. at 148.

64/ Id. See Young at 1210-12; Hart and Wechsler at 315-16.

65/ Young at 1260; Sager at 71; Hart and Wechsler at 316.

66/ 80 U.S. (13 Wall) at 147; Young at 1224.

67/ Young at 1224.

68/ Professor Sager would extend this protection of decisions of lower federal courts further. He argues that selective withdrawal of jurisdiction from lower federal courts enables state courts to repudiate Supreme Court doctrine because the Supreme Court cannot adequately supervise state court decisions due to case overloads. Sager at 74. This argument does not significantly differ from Mr. Eisenberg's theory that lower federal courts are required to administer the new constitutional decisions. See pages 99-101 supra. The same criticisms that the framers clearly intended to have state courts decide just these issues applies to Sager's theory. Manageability of dockets is not an important limitation on congressional power to limit jurisdiction.

69/ Act of June 25, 1938, c. 676, 52 Stat. 1060 (current version at 29 U.S.C. §§201-19 (1976)).

70/ Tennessee Coal Co. v. Muscoda Local, 321 U.S. 590 (1944); Jewell Ridge Corp. v. Local No. 6167, 325 U.S. 161 (1945); Anderson v. Mt. Clemons Pottery Co., 328 U.S. 680 (1946); Hart and Wechsler at 322-23.

71/ Act of May 14, 1947, ch. 52, 61 stat. 84 (current version at 29 U.S.C. 251-62 (1976)).

72/ 169 F. 2d 254 (2d. Cir. 1948).

73/ Id. at 257; Hart and Wechsler at 323.

74/ Id.

75/ 169 F. 2d at 261.

76/ Sager at 71-72.

77/ See note 15 supra.

78/ 80 U.S. (13 Wall.) 397 (1871).

79/ McClung v. Silliman, 19 U.S. (6 Wheat.) 598 (1821); Redish and Woods at 82-84; Sager at 80.

80/ Alabama ex rel Gullon v. Rodgers, 187 F. Supp. 848 (M.D. Ala. 1960), aff'd per curiam, 285 F.2d 430 (5th Cir. 1961), Pennsylvania Turnpike Commission v. McGinnes, 179 F. Supp. 579 (E.D. Pa. 1959) aff'd per curiam, 278 F.2d 330 (3d

Cir.), cert denied, 364 U.S. 820 (1960); Redish and Woods at 88-92; Sager at 80 n.197. A counter line of cases exist, see Missouri ex rel Burnes National Bank v. Duncan, 265 U.S. 17 (1924); Perez v. Rhiddlehoover, 247 F. Supp. 65 (E.D. La 1965); Redish and Woods at 88 n.202.

81/ Redish and Woods at 93; Sager at 82. See Hart and Wechsler at 300.

82/ Sager at 85-86.

83/ See the Federal Removal Act, 28 U.S.C. §1441 (1976) which allows removal by defendants in state courts to federal court if the district court would have had original jurisdiction.

84/ The Norris-LaGuardia Act is the best example of a situation where this happened. See pages 112-33 infra; Sager at 86 n.216; Hart and Wechsler at 317 n.6.

85/ See pages 102-04 supra; Sager at 87.

86/ Sager at 87-88. This seems to be the attempt made by Representative Philip Crane of Illinois in H.R. 525, 98th Cong., 1st Sess. (1983).

87/ Professor Gunther says 200 statutes were struck down between 1905 and the 1930's under the substantive due process doctrine. Gunther at 517. See generally, note 4 supra.

88/ L. Tribe, American Constitutional Law §§8-3,-4 (1978) [hereinafter cited as "Tribe"] citing T. Cooley, A Treatise on the Constitutional Limitations which Rest upon the Legislative Power of the States of the American Union (8th ed. 1927). See Lochner v. New York, 198 U.S. 45 (1905); Gunther at 517-23.

89/ J. Nowak, R. Rotunda and J. Young, Handbook on Constitutional Law at 397; Gunther at 517.

90/ 236 U.S. 1 (1915).

91/ 208 U.S. 161 (1908).

92/ 236 U.S. at 14; Gunther at 524.

93/ 208 U.S. at 175; Gunther at 525.

94/ Adkins v. Children's Hospital, 261 U.S. 525 (1923); Gunther at 525.

95/ See, pp. 29-33 of Chapter One supra. The cases which narrowly construed the Clayton Act and its state counterpats were: Duplex Printing Co. v. Deering, 254 U.S. 443 (1921) which narrowly construed sections six and twenty of the Clayton Act; American Steel Foundaries Co. v. Tri-City Trades Counsel, 257 U.S. 184 (1921) construing the same sections; and Truax v. Corrigan, 257 U.S. 312 (1921) which narrowly construed an Arizona statute very similar to section twenty of the Clayton Act. See also Appendix A for language of these Clayton Act sections.

96/ 291 U.S. 502 (1934).

97/ 300 U.S. 379 (1937).

98/ Gunther at 528-34; J. Nowak, R. Rotunda, J. Young, Handbook of Constitutional Law at 404-10.

99/ S. Doc. 163, 72d Cong. 2d Sess (1932) reprinted in R. Koretz, Statutory History of the United States: Labor Organization 169, 174-75 (1970) [hereinafter cited as "Koretz"].

100/ H. Rep. 669, 72d Cong. 2d Sess (1932); Koretz at 194.

101/ 75 Cong. Rec. 4502-10 (1932); Koretz at 107-33.

102/ 75 Cong. Rec. 4626.

103/ Koretz at 234. See statements of Representative Sweeny: "[I]t cannot be questioned that it [Congress] has the power to restrict or curtail the exercise of their [courts] powers as proposed in this bill." 75 Cong. Rec. 5502.

104/ The bill passed 75-5 in the Senate, 75 Cong. Rec. 5019 and it passed the House 362-14, 75 Cong. Rec. 5512. All those voting against the bill were Republicans from northeastern states, except one Democrat from Texas in the House. Id.

105/ 71 F.2d 284, cert. denied, 293 U.S. 595 (1934).

106/ Id at 287. See also Cindarella Theater Co. v. Sign Writers' Local Union, 6 F. Supp. 164 (E.D. Mich. 1934); United Electric Coal Companies v. Rice, 80 F. 2d 1 (7th Cir. 1935).

107/ 303 U.S. 323 (1937).

108/ Id. at 330.

109/ S. Doc. 163 at 5.

110/ Warren, A New Light in the History of the Federal Judiciary Act of 1789, 37 Harv. L. Rev. 49 (1923).

111/ See note 44 supra.

112/ Warren, 37 Harv. L. Rev at 67-69; F. Frankfurter and N. Greene, The Labor Injunction 209 n.17 (1930).

113/ See note 32 supra.

114/ Warren, 37 Harv. L. Rev. at 69-70.

115/ Eisenberg at 506-510.

116/ 384 U.S. 436 (1966).

117/ 372 U.S. 335 (1963).

118/ Eisenberg at 511.

119/ Hart and Wechsler at 300-358; Redish and Woods at 62-66. It must be remembered also that the Norris-LaGuardia Act did not regulate Supreme Court appellate jurisdiction, thus those elements of the essential role theory that apply to that Court are not relevant here. See also pages 102-04 supra.

120/ 260 U.S. 221 (1921).

121/ Id. at 233.

122/ Riddlesbarger, The Federal Anti-Injunction Act, 14 Ore. L. Rev. 242 (1935).

123/ Editorial, Anti-Injunction Bill Reported Unfavorably in United States Senate, 12 Law and Labor 151, 152 (1930).

124/ Walker Furniture Co. v. Furniture Salesmen's Union, 126 N.J. Eq. 145; 8 A.2d 275 (1939).

125/ The Norris-LaGuardia Act allows injunctions to be issued in instances of fraud or violence, 29 U.S.C. §104(i).

126/ The New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552, 561-63 (1938).

127/ An issue did develop in the 1960's where a problem did result because of the federal courts' lack of power to issue injunctions. Union defendants were sued in state courts when they violated no-strike clauses in their contracts. The defendants would remove to federal court where injunctions were prohibited. Avco Corp. v. Aero Lodge No. 735, 390 U.S. 557 (1968). The Supreme Court held this an outster of state court jurisdiction and denied removal. Boys Markets v. Retail Clerks Union Local 770, 398 U.S. 235 (1970). No-strike clauses were not raised in 1932, and thus this problem did not arise then. See Sager at 86 n.217.

128/ Eighteen states had anti-injunction statutes by June of 1935. See Riddlesbarger, State Anti-Injunction Legislation, 14 Ore. L. Rev. 501, n.3 (1935); New York Times, Feb. 15, 1931, §II, at 16. The American Civil Liberties Union organized a National Committee on labor injunctions to push state bills, modeled on the federal act, through state legislatures. New York Times, Feb. 14, 1935, §1 at 20.

129/ Hart and Wechsler at 330. Although Professor Hart does not mention which constitutional right is involved, he must mean the Fifth Amendment right to due process. Some court must be available to hear federal claims. State courts may not be free to decline to enforce federal claims in these situations. Testa v. Katt, 330 U.S. 386 (1947); Redish and Woods at 62-63; Tarble's Case, 80 U.S. (13 Wall.) 397 (1871).

130/ See Lauf, 303 U.S. 323.

131/ Redish and Woods at 63-65.

132/ Riddlesbarger, 14 Ore. L. Rev at 254.

133/ 80 U.S. (13 Wall.) 128. See pages 104-09 supra.

134/ See pages 115-17 supra.

135/ H. Rep. 669 at 5; Koretz at 197.

136/ S. Rep. 163 at 5; Kortez at 177.

137/ 29 U.S.C. §102; Appendix B infra.

138/ Act of May 20, 1926, ch. 347, 44 stat. 557 (current version at 45 U.S.C. §§151-164 (1976)).

139/ 281 U.S. 548 (1930).

140/ 75 Cong. Rec. 4680.

141/ 75 Cong. Rec. 4692. See also 75 Cong. Rec. 4917, 5017 (statement of Sen. Wagner); 75 Cong. Rec 4680 (statement of Sen. Borah).

142/ Defining and Limiting the Jurisdiction of Courts Sitting in Equity: Hearings before the Committee on the Judiciary, House of Representatives, 72d Cong., 1st Sess. at 23 (Feb. 25, 1932).

143/ Id. at 30. See also Id. at 23, 39 for further comments on this issue.

144/ S. Rep. 163, pt. 2.

145/ See 75 Cong. Rec. 4680-82 (statement by Sen. Hebert); 5475-77 (statement of Rep. Beck).

146/ 6 F. Supp 164 (E.D. Mich. 1934).

147/ Id. at 169.

148/ 80 U.S. (13 Wall.) at 147.

149/ Appellant's Brief, Brief of the Respondent, Lauf v. E. G. Shinner & Co., 303 U.S. 323 (1938).

150/ 266 U.S. 42 (1924).

151/ Id. at 65-66.

152/ 29 U.S.C. §§111, 112; Appendix B infra.

153/ 15 U.S.C. §21, 22.

154/ 266 U.S. at 67.

155/ S. Rep. 163, pt 2 at 13-14.

156/ Russell v. United States, 86 F.2d 389, 393 (8th Cir. 1936); United States v. United Mine Workers of America, 330 U.S. 258, 298 n.69 (1947)(dicta). Norris-LaGuardia Act §11 was reenacted under Title 18 of the United States Code. Act of June 25, 1948, ch. 645, 62 stat. 844 (codified as 18 U.S.C. §3092 (1976)). See Mitchell v. Barbee Lumber Co., 35 FRD 544 (S.D. Miss. 1964). Section 12 of Norris-La Guardia was similarly reenacted. Act of June 25, 1948, ch. 645, 62 stat. 844 (codified as 18 U.S.C. §3693 (1976)). However, now this section is incorporated in the Federal Rules of Criminal Procedure, Rule 42. See 18 U.S.C.A. §3693 (West 1969)(directing one to Federal Rule of Criminal Procedure 42).

157/ H. Rep. 669, Appendix.

158/ Id. at 15-16.

159/ Id.

160/ 75 Cong Rec 4679.

161/ Id. at 5475.

162/ See pages 103-04 supra.

163/ 29 U.S.C. §104(i).

164/ See note 157 and accompanying text supra.

165/ Levering & Garrigues, 71 F.2d at 287.

166/ Railway Labor Act, ch. 347, 44 Stat. 175, 577 (1926)(current version at 45 U.S.C. §§151-188 (1976)).

167/ Labor Management Relations Act, ch. 120, 61 stat. 136 (1947)(current version at 29 U.S.C. 141-188 (1976)).

168/ See note 6 supra.

Conclusion

1. The Idler, No. 84. quoted in B. Evans ed., Dictionary of Quotations 316 (1968).

2. Aaron, The Labor Injunction Reappraised, 10 U.C.L.A. L. Rev. 292, 344 (1963). See similar statements in Wimberly, The Labor Injunction - Past, Present, and Future, 22 S.C. L. Rev. 689, 737 (1970); Winter, Labor Injunctions and Judge Made Labor Law: The Contemporary Role of Norris-LaGuardia, 70 Yale L. J. 70 (1960).

BIBLIOGRAPHIC ESSAY

This essay traces some of the sources available to study the injunction question between the years leading up to the Clayton Act and the passage of the Norris-LaGuardia Act. the emphasis is on judicial activity. However, no judge's decision can be viewed without reference to legislative and popular influences. There has been a surprising lack of recent analysis of this issue that was so volatile in the 1920's and 30's. No work, of any period, has successfully treated the subject devoid of significant labor or management bias. Whether or not this treatment is possible, remains to be seen.

The Cases

The number of injunctions issued between the passage of the Clayton Act (1914) and the passage of the Norris-La Guardia Act (1932) is impossible to determine. The great majority of decisions were not reported. This is true for any type of case and injunction cases are no different. There are sources from which a rough guess can be made on the number of unreported injunctions. We must then decide whether our lack of full capacity to know the scope of the injunction problem dooms the researcher to failure.

Dr. Edwin Witte, the Chief of the Wisconsin Legislative Reference Library, spent a major proportion of his life collecting labor injunction decisions. Witte collected unreported cases through newspaper accounts, contact with litigants and by direct correspondence with judges. He reports 1872 injunctions granted between 1880 and May 1, 1931, of which unreported cases outnumber reported ones five to one. 1/ Witte's collection of the unreported cases is located in the State Historical Society of Wisconsin at Madison. This collection contains 500 unreported cases covering the years 1894-1932, but unfortunately 350 are in such rough and fragmentary form that they are useless as legal material. 2/ Seventy-five of these remaining cases fall between the years at issue in this essay. 3/ By any standard, this can only be a fraction of the total unreported cases. 4/

However, the fact that we are not able to review all the injunctions issued during this period is not fatal to a valid conclusion. Most injunctions were issued by inferior (lower) courts whose decisions are not noted in any series of reports. 5/ This occurs for all types of cases not just injunction decisions. Comparison of Witte's unreported injunction cases to reported ones does not reveal any unique procedures or reasoning. 6/ Also, legal precedents derive

from reported decisions and judges rely on the same reported cases to make their decisions whether their cases are themselves reported or not. We would not expect unreported decisions to be any different. In sum, the fact that we do not know exactly the number of injunctions issued, or the specific reasoning in each case, does not mean we can not know what happened. The reported cases tell us all we really need to know.

The number of reported decisions between the enactments of the Clayton and the Norris-LaGuardia Acts is fairly easy to ascertain. There are 106 reported Federal cases and 239 reported State cases. All major state and federal cases are included; there is about a 10-20% probability that all state cases are not included. 7/

State and federal cases are distinguished because they often are decided under different laws. States passed their own labor acts during these years, often modeled after federal acts, often not. In general, state court opinions and frequency of injunctive relief against labor unions are based on the same judicial principles and will not vary perceptively from federal court decisions.

The significance of these cases is a matter of some dispute. The traditional view of judicial decision making in injunction cases is that judges were generally abusing

their equity powers in granting most injunctions. Recently this view has come under some criticism. This essay focuses on a time period where various legislative attempts were made to withdraw judicial power to grant injunctions. This time period requires an analysis of the traditional and revisionist views on judicial abuse of equity power in the context of changing legislative and public policy.

The Legislation

Legislative History reveals a critical anti-injunction policy evolution between the Clayton and Norris-LaGuardia Acts. In the federal sphere, the transformation involved three major pieces of legislation. The Clayton Act initially attempted to confine judicial injunction power by placing unions outside the definition of the substantive anti-trust law and by altering basic equity jurisdiction and procedure. The Supreme Court adopted a narrow construction of the Clayton Act's labor provisions and return labor to the reaches of the anti-trust laws. Not until 1928, was another attempt made to deal with the injunction problem. This attempt, the Shipstead Bill, did not adopt an approach significantly different from the Clayton Act and was not passed by Congress. Finally, in 1932, the Norris-LaGuardia Act withdrew basis injunction-granting power from federal

judges. State legislation tended to follow the federal pattern, although certain states anticipated federal enactments.

The source material relating to federal legislative history can best be understood by a chronological analysis of the various reports available. State legislative histories are more difficult to compile. Fortunately we have sources to help determine which states passed anti-injunction legislation during the period from 1910 to the middle 1930's.

Senate and House of Representative Reports and Documents, the Congressional Record and committee hearings provide source materials for federal legislative histories. A great proportion of the Clayton Act material relates to anti-trust law. The Clayton Act, Ch. 323, 38 Stat. 730 (1994) (current version at 15 U.S.C. §§12-27 (1976)), has two major sections devoted to labor, §§6, 20, and others that related to equity and contempt procedure, §§16-19, 21-24. The legislative history described below will attempt to deal only with these sections.

The anti-injunction legislation directly leading to the Clayton Act was introduced early in President Taft's administration. However, none of those attempts ever made it out of committee. In 1912, extensive hearings were held before

the House Judiciary Committee on eleven anti-injunction bills. Injunctions: Hearings on H.R. 55 Before The House Comm. on The Judiciary, 62d Cong., 1st Sess. (1912). Labor leaders, including Samuel Gompers and Seamen's Union President Andrew Furuseth gave testimony urging some anti-injunction action.

One of the eleven bills, authored by Representative Wilson showed some promise for future consideration. H.R. 11032, 62d Cong., 1st Sess. (1912). Samuel Gompers strong endorsement of Wilson's anti-injunction bill is reprinted in S. Gompers, Wilson Anti-Injunction Bill, Labor's Reasons for Enactment, S. Doc. No. 440, 62d Cong., 2d Sess. (1912). However, this bill was extensively altered and reintroduced by Representative Clayton. 8/

The Clayton Bill, H.R. 23635, 62d Cong., 2d Sess. (1912), was the result of extensive hearings mentioned above. Clayton reported the bill out of committee and to the full House. H.R. Rep. No. 612, 62d Cong., 2d Sess. (1912). Extensive debates were held on the bill which are conveniently compiled in Injunctions: Proceedings in the House of Representatives in Connection with the Injunction Bill, 62d Cong., 2d Sess. (1912). The Clayton Bill passed the Democratic House only to be defeated in the Republican Senate. See also, 51 Cong. Rec. 9272 (1914) (remarks of

Rep. Carlin). The debates cited above provide an excellent and extensive source for reviewing the intent behind Clayton's bill, they also reveal that many congressmen had apprehensions about the viability of this legislation to affect lasting anti-injunction solutions.

Two years later Representative Clayton again reported his anti-trust bill out of committee. H.R. Rep. No. 627, 63d Cong., 2d Sess. (1914). This report gives an extensive discussion of the bill's provisions including the labor sections. The bill's stated purpose was to withdraw labor from the reach of anti-trust laws and to restrict federal courts' equity and contempt power. Clayton cites many sources for the bill's power to do this and gives substantial reasons for such action.

Not everyone agreed that the Clayton Act would accomplish its purpose in regard to its labor provisions. Minority views accompany Clayton's report. Representative Graham in his minority report basically disagrees with the need for anti-injunction legislation, H.R. Rep. No. 627, Part 2, 63d Cong., 2d Sess. (1914). This report challenges Clayton's attempt to take this action because of lack of precedent and in this respect Graham's view offers little legal value. The other minority report is of much greater value. Representative Nelson's view, H.R. Rep. No. 627,

Page 3, 63d Cong., 2d Sess. (1914), warns that the status of labor under the Clayton Act's wording was not clearly defined and that various interpretations of the language would be made. Such an interpretation, different than that intended by the bill's authors, is exactly what happened when the Supreme Court interpreted the Clayton Act's labor provisions. Nelson's minority view is thus prophetic and valuable.

The debates on the Clayton Act reflect the views expressed by the committee report and minority views. The debates are quite extensive on both sides of Congress. The most important statements are the ones that attack the legislation as necessary, but futile. A few congressmen took views like Representative Nelson in his minority report and these offer great insight into the problems that eventually destroyed the Act's anti-injunction provisions. Examples of statements along these lines include: 51 Cong. Rec. 9249 (MacDonald); 9083, 9496 (Madden); 16283 (Volstead); 9544, 14021 (Thomas); 13918 (Borah); and 14013 (Jones). 9/

After the Supreme Court effectively negated the Clayton Act's labor provisions in Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921), no further anti-injunction action was taken until 1928. Senator Henrik Shipstead of Minnesota in that year introduced a bill which provided a

new definition of property as an attempt to furnish effective anti-injunction legislation. S. 1482, 70th Cong., 1st Sess. (1928). Extensive hearings were again held on the bill in which both labor and management leaders testified. The text of these hearings, Limiting the Scope of Injunctions in Labor Disputes: Hearings on S. 1482 Before a Subcommittee of the Senate Committee on the Judiciary, 70th Cong., 1st Sess. (1928), contains excellent material on why the anti-injunction provisions of the Clayton Act failed and what then had to be done. Every lawyer except one that testified rejected the Shipstead Bill as unsound and ineffective against expected judicial construction. Minimal discussion took place on the floor of the Senate, 69 Cong. Rec. 3449, 3909 (1928), before the bill went back to committee for more hearings. These second hearings, Limiting the Scope of Injunctions in Labor Disputes: Hearings on S. 1482 Before a Sub-Committee of the Senate Committee on the Judiciary, 70th Cong., 2d Sess. (December 18, 1928) again gave the bill a negative rating.

The failure of the Shipstead Bill led Senators Norris, Blaine and Walsh of the sub-committee which held the Shipstead hearing to invite several legal scholars to help them come up with a more effective anti-injunction measure. The group, headed by Felix Frankfurter and Edwin Witte,

drafted a substitute anti-injunction bill. Hearings were again held with members from management and labor testifying. Defining and Limiting the Jurisdiction of Courts Sitting in Equity: Hearings on S. 2497 Before a Subcommittee of the Senate Committee on the Judiciary, 71st Cong., 2d Sess. (1930). These hearings revealed again that labor was not confident of the provisions of the act and thought they still might not be effective. Winter S. Martin, an attorney close to the American Federation of Labor (A.F. of L.), after the hearing submitted a paper that sheds further light on labor's reservations on the Bill. S. Doc. No. 327, 71st Cong., 3d Sess. (1931). The Norris Bill received an unfavorable recommendation by the majority of the Senate Judiciary Committee, S. Doc. No. 1060, 71st Cong., 2d Sess. (1930), and was not debated on the Senate floor. Norris' minority views in the report, S. Doc. No. 1060, Part 2, 71st Cong. 2d Sess. (1930), explain in great detail the reasoning behind the substitute Shipstead measure.

What eventually became the Norris-LaGuardia Act, ch. 90, 47 Stat. 70 (1932) (current version at 28 U.S.C. §§101-115 (1976)) was again introduced in 1932. The legislative history for this activity is conveniently compiled in Statutory History of the United States, Labor Organization, (R. Koritz ed. 1970). Included in this compilation is

Senator Norris' report of the Senate Judiciary Committee, Representative LaGuardia's report from the House Judiciary Committee, the House Committee in Conference report and the House and Senate debates. This is a time saving work which allows one to look at the legislative history in a neat package, but is must be supplemented by a few items.

The minority reports accompanying committee reports are often the best reasoned opposition to a bill. Representative LaGuardia's committee report contains no minority views. H. R. Rep. No. 669, 72d Cong., 1st Sess. (1932). The Senate Committee report has a published minority view. S. Rep. No. 163, Part 2, 62d Cong., 1st Sess. (1932). The main concern of the minority view is that the bill would be decared unconstitutional. This committee's dissenters wished to go further than the majority and in this respect all parties display more liberal attitudes than those expressed in the 1930 committee report.

There was relatively little debate in the House and Senate on the bill. Representative Beck from Pennsylvania expressed concern that the country was moving "in the direction of Moscow," and that this bill would "entron[e] the possible rule of the proletariat in free America." 10/ Evidently the rule of the proletariat did not frighten most congressmen because the bill passed easily in both houses.

State anti-injunction legislation offers a wide variety of approaches and dates of enactment. As a gross generalization, state laws tended to follow the pattern set by federal legislation. State legislatures enacted Norris-LaGuardia type legislation in great numbers after the federal act was held constitutional by the Supreme Court.

Represenative LaGuardia's committee report, H. R. Rep. 669, 72d Cong., 1st Sess. 11 (1932), lists the states that had passed anti-injunction laws up to that date. His report states that five states had enacted laws resembling Section 20 of the Clayton Act and three others had statutes different in wording but generally similar. In addition, four states had already enacted Norris-LaGuardia type legislation. Also, six states had had anti-injunction laws declared unconstitutional by state or federal courts. It is reasonable to believe that a congressman would be accurate in presenting these types of figures. Even if we do not make this assumption, this evidence may be all we have on state injunction laws. States often do not keep legislative histories of their acts and many of these laws are probably repealed or out of date. It is only necessary for us to know the general extent of anti-injunction laws, because as we have seen earlier, state courts tended to decide injunction cases with the same types of reasoning. 11/ By 1955,

over half the state legislatures had passed Norris-LaGuardia type acts although some liberalization of injunction laws have occurred because of court decisions since then 12/

Manuscripts and Biographies 13/

A great many people were associated with the anti-injunction movement during the years surrounding the passage of the Clayton and Norris-LaGuardia Acts. For purposes of this paper, the private views of many are of little relevance. However, much can be learned from studying the personal lives of those that directly influenced and motivated the anti-injunction activity. The personal papers and biographies of Supreme Court justices, labor leaders and scholarly proponents of anti-injunction legislation need to be reviewed.

Perhaps at no time since the days of natural law had the personal opinions of judges been so vital. Theoretically, judges are confined by precedent and should derive similar conclusions. But on this subject, doctrines heavily depended on judicial discretion were very important. Thus the personal opinions of the judiciary can be of great value.

The source material on all but the United States Supreme Court justices is very limited. The fact that we do

not have personal information on most lower court judges is not fatal. Judicial policy comes from the top. Thus lower courts tend to follow the United States Supreme Court's reasonings. Much of the personal information we need about a lower judge often can be gleaned from their opinions. Personal information in this respect is beneficial but not critical to our analysis.

The Supreme Court tends to be a body composed of individuals with closely held convictions. We are fortunate to have a work that covers all the justices. Any research on the Supreme Court's personality must necessarily start with, The Justices of the United States Supreme Court 1789-1969 (L. Friedman & F. Israel, eds. 1969). This work includes a short personal biography, some representative opinions and a bibliography of each judge. The biographies are written by the foremost legal and historial scholars and the editing is generally very well done.

The Chief Justice who sat during all the important Clayton Act decisions was William Howard Taft (1921-1930). Taft's voluminous papers at the Library of Congress cover his years on the court as well as his years in many other public offices. These papers and an address on anti-injunction legislation he gave before the American Bar Association, reprinted in S. Doc. No. 614, 63d Cong., 2d

Sess. (1914), reveal his attitude toward this issue. A worse Chief Justice probably could not have been found from labor's point of view. Taft was not necessarily anti-labor, but he was a worshiper of private property rights and thus warm to the arguments management mustered against the Clayton Act labor provisions. Stanley Kutler in Labor, The Clayton Act and The Supreme Court, 3 Labor History 19 (1962), sees Taft as one who attempts to formulate the law and never realized its evolutionary nature. Mr. Kutler's work is generally very perceptive of the man known in his earlier judicial life as "the injunction judge".

Biographical sources on the "Big Chief" are helpful and generally well-done. Henry Pringle's, The Life and Times of William Howard Taft (2 vol. 1939) is a comprehensive work that tends more to the narrative than to the critical on Taft's judicial career. A better piece of legal criticism is A. T. Mason's, William Howard Taft (1965) which portrays Taft as a judicial architect unable to anticipate the tides of progress. See also Mason, The Labor Decisions of Chief Justice Taft, 78 U.Pa.L. Rev. 585 (1930) for a more specific exposition on this theme.

Charles Evans Hughes (Associate Justice, 1910-1916; Chief Justice, 1930-1948) succeeded Taft to the Chief Justice position and passed on the constitutionality of the

Norris-LaGuardia Act. Hughes' papers supplemented by his biographical notes are collected at the Library of Congress. Of the biographies, Merlo Pusey in the semi-authorized Charles Evans Hughes (2 vol. 1956) styles Hughes as an extraordinarily open-minded, balanced and objective individual. Samuel Hendel in Charles Evans Hughes and the Supreme Court (1951) is more objective than Pusey. Hendel sees Hughes as a tragic figure, torn between the old and the new who, as a conservative, first attempts to stem progress and then is caught up and moves with the flow.

Almost as critical, from labor's viewpoint, as Chief Justice Taft was a decidedly conservative, four justice bloc. All four members of this bloc served for many years and came to be known as the "four old men" during President Franklin Roosevelt's Court Packing Plan. The first of this group, Pierce Butler (1922-1939), left no personal papers and very little has been written about him. David Burner, who wrote the biography of each of the four old men for The Justices of the United States Supreme Court 1789-1969 labels Butler as a staunch proponent of laissez-faire who regularly rejected New Deal legislation. A fascinating study on the circumstances leading to Butler's Supreme Court appointment is A Supreme Court Justice is Appointed (1964) by David Danielski.

James C. McReynolds (1914-1941), the second of the conservative bloc, left a small and incomplete collection of papers at the University of Virginia Library. David Burner in The Justices writes that McReynolds was foremost among those defending property and consequently was unable to view the Constitution with any flexibility. McReynolds voted against New Deal legislation more than any other justice. Stephen T. Early attempts to personalize this outwardly arid character in his James Clark McReynolds and the Judicial Process (1952) (unpublished Ph. D. thesis at the University of Virginia Library).

The third old man, George Sutherland (1922-1938) was a prolific correspondent and left a large collection of papers, now housed at the Library of Congress. David Burner in The Justices is more sympathetic toward Sutherland then he is toward the other three conservative justices. Burner says Sutherland was the intellectual spokesman for the four justices and was a man of considerable legal talent. Joel Paschal's Mr. Justice Sutherland (1951) views Sutherland as a landmark for transformation from the old to the new guard in the court. Paschal's sympathetic view is an interesting contrast to Burner's generally negative position towards all these judges.

Willis Van Devanter (1911-1937), the last old man, left a very small collection of papers, mostly letters, to the Western Reserve University Library. David Burner's treatment of Van Devanter in The Justices is harsh on the Justice's philosophy, but sympathetic to him as a man. Generally, the four old men have not been researched much and as a consequence suffer from prejudices remaining from New Deal days.

Two voices were most often heard in dissent during this era. Not unsurprisingly, they are the two most highly respected justices of this period. Oliver Wendell Holmes Jr.'s (1902-1932) papers are collected at the Library of Congress and reveal much about the depth of this great mind. A lesser collection of Holmes' papers are at the Harvard Law School Library. There are extensive works by and about Holmes and only a few can be mentioned here. No bibliography on Justice Holmes would be complete without reference to his The Common Law (1881) which is one of the best expositions of law and public policy ever written. Catherine D. Bowen's, Yankee from Olympus (1944) studies Holmes' personality and family background without much analysis of his legal life. Francis Biddle's, Justice Holmes, Natural Law and the Supreme Court (1960) defends Holmes' practically oriented style of law against the attacks made on the justice after his death. Finally, two works explore the

intellectual man as he developed his own special juristic form: Felix Frankfurter in Mr. Justice Holmes and the Supreme Court (1938) reveals Holmes' sense of history and Samuel Konefsky compares Holmes and Louis Brandeis within this theme in The Legacy of Homes and Brandeis (1961).

Like Justice Holmes, Louis D. Brandeis (1916-1939) often dissented from the Taft court opinions. His extensive and well organized personal and public papers are deposited at the University of Louisville Library and his court papers are at the Harvard Law School Library. One published selection of Brandeis' views devotes a chapter to the Justice's dissents in labor cases. The Social and Economic Views of Mr. Justice Brandeis (A. Lief, ed., 1930). The authorized biography is A. T. Mason's, Brandeis: A Free Man's Life (1946) which is a balanced view of the man that reveals the subject's intellect and personality. Alfred Lief takes a sympathetic view in his Brandeis: A Personal History of an American Ideal (1936). A collection of essays on the Brandeis judicial approach is contained in Mr. Justice Brandeis (F. Frankfurter, ed., 1932).

The last justice of major importance who sat on the court during these years was Harlan Fiske Stone (Associate Justice 1925-1941; Chief Justice 1941-1946). Stone's papers are also at the Library of Congress. The authorized bio-

graphy is again by A. T. Mason and is entitled Harlan Fiske Stone: Pillar of Law (1956). This work portrays a man unable to create a unified court during his Chief Justiceship who may have failed because of his own closely held ideals. A series of law review articles deal with more specific aspects of Stone's legal thought and are helpful sources. Some of the more important include: J. P. Frank, Harlan Fisk Stone: An Estimate, 9 Stan. L. Rev. 621 (1957); H. Wechsler, Stone and the Constitution, 46 Colum. L. Rev. 793 (1946); N. T. Dowling, The Methods of Mr. Justice Stone in Constitutional Cases, 41 Colum. L. Rev. 1160 (1941). Many other sources are available on Stone, but most have to do more with his years as Chief Justice than his earlier work. 14/

It is helpful to explore the lives of other public figures who were involved in the anti-injunction movement. Labor leaders were constantly agitating for anti-injunction legislation. Samuel Gompers was president of the American Federation of Labor (A. F. of L.) until 1924. His papers at the A. F. of L. Archives provide helpful material on his attempts to deal with labor injunctions. Another helpful sources for understanding the approach Gompers took to combat this problem can be found in the text of a speech he gave to the thirty-first annual A. F. of L. convention which

is reprinted in S. Doc. No. 440, 62d Cong., 2d Sess. (1912). Bernard Mandel's biography, Samuel Gompers (1963) devotes several informative passages to Gomper's disgust over the difficulty of getting anti-injunction legislation passed, then having it narrowly construed by the Supreme Court.

William Green succeeded Gompers to the presidency of the A. F. of L. in 1924. Green, like Gompers devoted significant time to agitation for anti-injunction legislation. The best source of Green's views on this subject are his statements before the Norris committee which can be found in Defining and Limiting the Jurisdiction of Courts Sitting in Equity: Hearings before a Subcommittee of the Senate Committee on the Judiciary, 71st Cong., 2d Sess. (1930). Green's papers are at the Cornell University Library and provide good source material for his whole career as president of the A. F. of L. A later work by Green, Labor and Democracy (1939) mentions nothing about injunctions, leading one to believe the problem was considered solved by that date.

Two other labor leaders were key figures in the eventual passage of the Norris-LaGuardia Act. Andrew Furuseth was the President of the International Seamen's Union and testified no less than four times before congressional committees on the injunction problem. 15/ John Frey, the

secretary-treasurer of the Metal Trades Division of the A. F. of L. was also an avid proponent of anti-injunction legislation and testified during the Shipstead Bill hearings. 16/ The testimony given during these congressional hearings by both men was generally well reasoned and persuasive. Frey also wrote a book, The Labor Injunction (1923) to help labor's cause. However, this book tends to be rather naive in its legal analysis of the injunction problem and not of any value other than demonstrating labor's somewhat passionate outlook on the subject. A collection of Frey's papers can be found at the Library of Congress.

One legislator is prominent in the crusade for effective anti-injunction legislation. Senator George Norris of Nebraska guided the Norris-LaGuardia Act through Congress and was instrumental in providing effective action needed to end the injunction problem. Norris' papers are at the Library of Congress with a smaller collection at the Nebraska State Historial Society, Norris' autobiography, Fighting Liberal, (1945) cite the passage of the Norris-LaGuardia Act as one of his greatest achievements. As with many autobiographies, the author appears somewhat godlike in his pursuit of justice and equality. Alfred Lief's biography, Democracy's Norris: The Biography of a Lonely Crusade

(1939) is also very favorable and of little value in terms of legal analysis.

The Secretary of Labor under Presidents Harding, Coolidge and Hoover is an interesting story in executive-labor relations, John B. Dudley writes that Secretary James S. David was relegated to the role of public relations agent and used by the three presidents to placade labor. James S. Davis: Secretary of Labor under Three Presidents 1921-1930 (1972) (unpublished Ph.D. dissertation at Ball State University Library), by John Dudley is a valuable essay about a man who seems to have been caught in a bad situation. Davis' papers at the Library of Congress shed more light on his activities directly surrounding the anti-injunction legislation attempts.

Finally, two figures drove very hard for anti-injunction action and lent a scholarly backing that may have meant success for the Norris-LaGuardia Act. Edwin Witte, the Chief of the Wisconsin Legislative Reference Library compiled the most extensive collection of materials related to courts and injunctions available anywhere. His papers encompass 302 boxes at the Wisconsin Historical Society and are invaluable to the researcher. Witte's The Government in Labor Disputes (1932) is the result of most of this research and is persuasive propaganda for anti-injunction legislation.

Felix Frankfurter is rumored to have written the Norris-LaGuardia Act. Even if this is not true, he was instrumental in obtaining the passage of the act through his influence and writing. Frankfurter's personal papers are extensive, with the greatest proportion housed at the Library of Congress. Columbia University also has an oral history collection on Frankfurter. His own works are too voluminous to be listed here, except his work. The Labor Injunction (1930) which is the seminal work in this area. The biographies of Frankfurter are many and varied. As a starting point Liva Baker's one volume, Felix Frankfurter (1969) is a solid work that is favorable and not very comprehensive on his labor theories. Two books edited by Wallace Mendelson consist of essays that are generally favorable to Frankfurter. These sources are: Felix Frankfurter: A Tribute (1964) and Felix Frankfurter: The Judge (1964). The letter source is valuable to help understand the justice's legal philosophy. A recent work has studied the psychological makeup of the man and H. N. Hirsch in The Enigma of Felix Frankfurter (1981) concludes he was neurotic.

Besides manuscript collections on leading figures in this area, the researcher may wish to investigate the labor holdings of some major libraries. The journal Labor History

runs an article about twice a year which summarizes an important library's labor holdings. For example, Edwin Witte's manuscript collection is abstracted in F. G. Haun, Labor Manuscripts in the State Historical Society of Wisconsin, 7 Labor History 313 (1966). This article also reveals the A. F. of L. records located there as well as many collections of local interest. The United Auto Workers' records are housed at Wayne State University and the collection is summarized in P. Mason, Labor History Archives at Wayne State University, 5 Labor History 67 (1964). Many of the articles in this series do not tell the researcher the value of each particular collection; many just list holdings. Other articles give summaries of less detail on the collections contained at the Harvard University Library, the National Archives, Library of Congress, the New York City Library, the University of Illinois Library and others. O. L. Harvey's Invertory of Department of Labor Archives, 4 Labor History 196 (1963) gives a somewhat better review of this source's departmental collection.

Newspapers and Periodicals

Newspapers and periodicals were prime propaganda weapons for both sides during these years. Business interests were represented by Law and Labor (New York 1919-

1932), the official organ of the League for Industrial Rights. This tabloid type periodical regularly contained articles on labor legislations and judicial decisions. It is clearly a propaganda sheet with little objective value. Interestingly, it went out of business the same year the Norris-LaGuardia Act was enacted. It is difficult to determine if there is any connection between these two events.

Two major periodicals represent labor's point of view: The American Federationist (Washington, 1894-) and The American Federation of Labor Weekly Newsletter (Washington 1911-) voice organized labor's perspective with little more objectivity than their management counterpart. These two periodicals tend to cover a broader spectrum of complaints than Law and Labor and therefore it is somewhat more difficult to find relevant articles on the injunction issue.

The labor injunction issue was a politically hot item around the late 1910's and then again in the late 1920's. The New York Times provides the most comprehensive treatment of the period, although the New York World was a significant competitor. Wall Street and Republican interests were represented by the New York Sun and The Evening Sun as well as by the Los Angeles Times. The Hearst newspapers, the New York American and the Chicago American tended to be Demo-

cratic, but were heavily dependent on Hearst's personal views and thus often varied depending on the political issue. The radical press was presented by the New York Call, the Girard, Kansas Appeal to Reason and New York's Pearson's Magazine.

Periodicals of general interest which where not primarily critical journals include Reviews of Reviews (New York, 1890-1937), Collier's (New York, 1888-1957), Saturday Evening Post (Philadelphia 1821-) and World's Work (New York 1900-1932). The New Republic (New York, 1914-) was easily the most significant of the political journals and expressed advanced progressive thought. The Nation (New York, 1865-) generally expressed nineteenth century liberal opinions, while Harper's Weekly (New York, 1857-1916) was a Democratic mouthpiece. The leading conservative journal was George Harvey's North American Review (Boston and New York, 1915-1940). 17/

Unpublished Secondary Sources

The unpublished source material is valuable although somewhat diverse. Various biographical works have already been mentioned in this essay. Two other works provide insight into the political tenor of the times, Robert Zeigler in The Republicans and Labor: Politics and Policies,

1919-1929 (1965) (unpublished Ph.D. dissertation at the University of Maryland) argues that Republic leaders failed to appreciate the economic and social value of unions because of employers laissez-faire assumptions. He blames part of the 1929 crash on the Republican's political approach of placating unions and denying labor its fair share in the wealth. Vaughan Bornet's Labor and Politics in 1928 (1951) (unpublished Ph.D. dissertation at Stanford University) closely analyzes the events surrounding the Shipstead Bill.

Milton Farber argues a fundamental shift in labor policy between 1929 and 1933 in his, Changing Attitudes of the American Federation Toward Business and Government, 1929-1933 (1959) (unpublished Ph.D. dissertation at The Ohio State University). Farber's thesis that as the depression worsened, labor shifted from a union-management cooperation policy to one of emphasis on Government responsibility to protect collective bargaining, may help explain the ease with which the Norris-LaGuardia Act passed Congress. Horton Emerson analyzes the same type of subject over a broader time period in his, Attitudes of the American Labor Movement towards the Role of Government in Industrial Relations: 1900-1948 (1957) (unpublished Ph.D. dissertation at Yale University).

Several doctorial dissertations provide valuable information in the injunction problem in various states. As we might expect from earlier comments in this essay, the state injunction issue normally did not involve unique situations. These studies include: Joseph Tripp, Progressive Labor Laws in Washington State: 1900-1925 (1973) (unpublished Ph.D. dissertation at the University of Washington); Patricia Rose, Design and Expectency: The Ohio State Federation of Labor as a Legislative Lobby, 1883-1935 (1975) (unpublished Ph.D. dissertation at The Ohio State University); James Maroney, Organized Labor in Texas, 1900-1929 (1975) (unpublished Ph.D. dissertation at the University of Houston); and Gary M. Fink, The Evolution of Social and Political Attitudes in the Missouri Labor Movement, 1900-1940 (1968) (unpublished Ph.D. dissertation at the University of Missouri-Columbia).

Finally, Edward Gibbons in, The Attitude of American Economists Toward the Labor Movement 1919-1930 (1964) (unpublished Ph.D. dissertation at the University of Notre Dame) argues that economics played a key role in the Norris-LaGuardia Act. He explains that during this period, there was a fading vision of industrial democracy. Yet, economists did not accept welfare capitalism and many still placed the blame for economic troubles on the unions. This reasoning

has great possibilities because economics would seem to have played a key role in the Norris-LaGuardia Act's eventual passage.

Published Second Sources

The published secondary material on labor injunctions suffers from a serious lack of recent historical review. A great amount of literature was written during the period itself, but few critical appraisals of the era have challenged the assumptions these earlier works make. The remainder of this essay will survey the books and articles written about this subject. The approach is general to specific with a critical comment on what remains to be done.

Bibliographies

Secondary works on labor law and labor history fill whole libraries. Several published bibliographies can point a researcher to a specific starting place. The best general bibliography is Maurice Neufield's, A Representative Bibliography of American Labor History (1964) which categorizes sources by subject matter and period. James McBrearty, American Labor History and Comparative Labor Movements: A Selected Bibliography (1973) and Gene Stroud, Labor History in the United States: A General Bibliography (1961) are helpful works, but not nearly as well organized

and complete as Neufield's work. The leading journal in this field, Labor History publishes a yearly bibliography of labor writings that includes published articles and unpublished dissertations. A helpful guide to pamphlets held in the AFL-CIO Library is Mark Woodbridge, American Federation of Labor and Congress of Industrial Organizations Pamphlets, 1889-1955; A Bibliographic and Subject Index (1977).

General Labor Works

LABOR HISTORY

There are a great many histories of American Labor. Probably the most comprehensive study of the nineteenth and early twentieth centuries is John R. Commons and Associates, History of Labor in the United States (4 vol. 1918 and 1935). These works are meticulously researched and rely heavily on facts and figures to support their conclusions. This type of economic history has become known as the "Commons Tradition". The second two volumes of the four volume work cover the first four decades of the twentieth century. Volume III deals with working conditions and legislature on those conditions and is thus of great value. Volume IV by Selig Perlman and Philip Taft traces the development of organized labor in America and is very useful.

The Commons works are mainly concerned with the growth of trade unions and have been criticized for failure to anticipate the rise of mass unionism. 18/ Irving Bernstein's, The Lean Years (1960) is a history of the American worker from 1920 to 1933 that breaks from the emphasis on trade unionism. Bernstein focuses on the individual worker and how he reacted to organization. Two chapters of The Lean Years are devoted to labor injunctions and both give a good picture of this remedy on the common worker.

Philip Taft's The A.F. of L. in the Time of Gompers (1957) and The A.F. of L. from the Death of Gompers to the Merger (1970) are Commons Tradition studies of the A. F. of L. Some effort is devoted to the trade union approach to the injunction problem, but these books are a better background source for the tenor of the times. In contrast, a somewhat reactionary stance is taken in Destination Unknown, Fifty Years of Labor Relations (1951) by Walter G. Merritt. In chapter twenty-one of this book, Merritt argues that federal courts can be trusted to use injunctions and that injunctions are necessary in a great number of cases.

Merritt was writing during a pendulum swing when many felt that the Wagner Act had given labor too much power. Merritt is correct when he comments that up to his time, there was blind acceptance of the assumption that the

injunction was an improper remedy. He claims this blind acceptance suspended the critical analysis of twentieth century authors. 19/ While perhaps overstated, Merritt is correct that too few scholars challenged the Frankfurter thesis (voiced in his, The Labor Injunction). Even today few writers have developed a comprehensive critique of the assumptions underlying the Norris-LaGuardia Act.

GENERAL LEGAL TREATISES

While there is a great deal of literature on labor law, little of it is devoted to labor law history. Lawyers are interested in precedents, not history and thus the field tends to be neglected. 20/ Two major texts on labor law: Robert Gorman, Labor Law (1976) and Charles Morris, The Developing Labor Law (1971 & Supp.) devote practically nothing to the injunction issue or any other issue of history for that matter. What these two works do devote to legal history is uncritical. A third text, Charles Greggory and Harold Katz, Labor and the Law (3d ed. 1978) is a more valuable source. This book devotes substantial discussion to the tort and property bases for judicial injunction decisions. The work also surveys decisions and policies surrounding the Clayton and Norris-LaGuardia Acts. The language of the book is simple, easy to understand and not loaded with legal jargon. 21/ In short, Labor and the Law

is a highly important source for studying the labor injunction.

Two multi-volume labor treatises provide a greater amount of resource material, if not more relevant information, Joseph Jenkins' Labor Law (4 vol. 1971 & Supp.) devotes a whole chapter to the labor injunction. This chapter is a good general survey of the legal issues involved with numerous citations to cases, but it is not a valuable critical analysis. The work is not concerned with why they passed the Norris-LaGuardia Act but rather with what the Norris-LaGuardia Act means today. A much larger work. T. Kneel's Labor Law (10 Vol. 1972 & Supp.) was much the same emphasis as Jenkins' work. Kheel does give excellent legislative histories, but again gives little critical analysis.

Labor Injunction History

There are several works that study the problem of labor injunctions. These materials were for the most part written during the 1920's and 30's in an attempt to change the existing law. Later sources typically adhere to the reasoning advanced by the earlier writings. However, one recent work challenges this traditional view and analyzes judicial activity from a forty-year vantage point. This is the type of critique that will help determine what really

did happen during those years between the Clayton Act and the Norris-LaGuardia Acts.

The reasoning of one book permeates this topic. Felix Frankfurter and Nathan Greene's The Labor Injunction (1930) traces the approach federal and state courts took toward labor disputes. Labor unions were historically seen as infringements on employers and employees' rights to contract. Union strike and picketing activities were classified as illegal restraints of trade and not within the allowable area of economic conflict. The authors argue that in reacting to this misconception of the allowable area of economic conflict, judges abused their discretionary equity powers when granting injunctions. Added to these blunders, injunction procedures and burdens of proof were abused to the disadvantage of unions. Furthermore, temporary restraining orders, which were easily obtained, tended to discourage union protest activity and thus were more powerful than their procedure warranted. Finally, the authors discuss prior attempts to legislate solutions and explain why their proposed bill withstands the constitutional failings of the other bills.

The Labor Injunction is an excellent piece of legal propaganda. It is written with a scholarly style that drives home a persuasive theme. The authors' arguments are

backed up with pages of charts and graphs to "prove" their points. There is no doubt that these renowned authors with their well reasoned work exerted great influence towards the passage of anti-injunction legislation.

This propaganda campaign did not consist solely of The Labor Injunction. A relative deluge of articles and books were published to affectuate the policies voiced in The Labor Injunction. The authors of this material where members of the consulting group asked by Senator Norris to advise his subcommittee on anti-injunction legislation. These works followed by general theme of The Labor Injunction that judges were abusing their traditional equity powers.

Edwin Witte the most prolific propagandist, published two works that preceded Frankfurter's direct involvement in the anti-injunction activities. In Labor's Resort to Injunctions, 39 Yale L.J. 374 (1929), Witte reviews the cases where labor used injunctions against employers. These cases are numerically insignificant to the number of injunctions granted against labor unions. Witte advises the increased use of injunctions by unions, but reveals that judges are unlikely to allow unions the frequent use that they allow employers. Witte in Early American Labor Cases, 35 Yale L.J. 825 (1926) compares English and American labor

decisions and finds a greater bias by judges against American labor.

Two of Witte's other works followed The Labor Injunction. His The Government in Labor Disputes (1932) is a sequel to The Labor Injunction with a considerable amount of the information he compiled over many years of collecting unreported injunction cases. In other respects, The Government in Labor Disputes mimics the arguments of The Labor Injunction. Witte adds a few economic arguments to further bolster Frankfurter and Greene's analysis in The Federal Anti-Injunction Act, 16 Minn. L. Rev. 638 (1932) but these don't really add much to the general picture. This article was written after the passage of the Norris-LaGuardia Act and is a call for states to adopt similar measures. A third member of the consulting group, Francis B. Sayre published his call for anti-injunction legislation in Labor and the Courts, 29 Yale L.J. 682 (1930). This article offers little that Frankfurter and Witte have not already told us.

There are a few other early works written by authors that were in no way connected with the Frankfurter group. For example, Clarence E. Bonnet's, The Origin of the Labor Injunction, 5 So. Cal. L. Rev. 105 (1931) suggests that a judicial distinction be made between a labor conspiracy and a combination of workmen in the hope that this would allow

union organizing. There is little reason to believe this suggestion did or would have persuaded the Supreme Court to change its policy toward labor. However, this reasoning is an interesting contrast to the Frankfurter arguments.

Various legal sources written thirty to forty years after The Labor Injunction add very little to Frankfurter and Greene's analysis. These later works critique the contemporary use of labor injunctions to the policy considerations that were involve in the passage of the Norris-LaGuardia Act. The basic question for these authors is if the prohibition against injunctions is still necessary. The best of these recent works is Ralph Winter's, Labor Injunctions and Judge-Made Labor Law: The Contemporary Role of Norris-LaGuardia, 70 Yale L.J. 70 (1960) which skillfully determines the extent that Norris-LaGuardia is rendered inoperative by subsequent legislation. James Wimberly in The Labor Injunction-Past, Present and Future, 22 S. Carolina L. Rev. 689 (1970) argues that unions have gained collective bargaining rights and that across the board denial of injunctions in labor disputes no longer is necessary. A similar result is reached in Benjamin Aaron, The Labor Injunction Reappraised, 10 U.C.L.A. L. Rev. 292 (1963).

These articles ask the interesting question that if the historic purpose of the Norris-LaGuardia has been achieved (i.e. equal bargaining power), is the maintenance of the law necessary? These articles argue persuasively that Norris-LaGuardia is anachronistic. This appears to be a question the historian must confront when writing in this area.

A recent study has challenged the basis conclusions reached by Frankfurter and Greene. Sylvester Petro in Injunctions and Labor Disputes: 1880-1932, Part I: What the Courts Actually Did and Why, 14 Wake Forest L. Rev. 341-577 (1978), 22/ asserts that American courts of equity between 1880 and 1932 faithfully adhered to the traditions as well as the principles of equity. The statistics for Petro show that the courts correctly followed equity procedure and practice. He maintains that judges did not show class bias against workers and that the only time injunctions were issued was when union members were enmeshed in violence or destruction of property. Like The Labor Injunction this work is packed with charts, graphs and long footnotes.

Mr. Petro makes some good points in his article, especially when he attacks some of Frankfurter and Green's dubious research methods. However, Petro's view of the overall picture is tainted by some fundamentally erroneous assumptions of his own. A little of Petro's social phil-

osophy is revealed by reference to another work of his, The Labor Policy of a Free Society (1957). In this book, Petro calls for the abolition of the National Labor Relations Board and outright return to full equity jurisdiction for all federal courts. He speaks of property rights like he was one of the "four old men" of the 1930's Supreme Court. These biases on the part of Mr. Petro cause him to forget that the purpose of Norris-LaGuardia and subsequent legislation was to equalize bargaining power of labor and management. What he is proposing would reverse that effort for equality about which Frankfurter and Greene were concerned and return us to the unthinkable past.

A number of books and articles study labor injunctions in specialized situations. A very valuable work is Duane McCracken's, Strike Injunctions in the New South (1930). Dr. McCracken investigates the general injunction problem much along the lines of Frankfurter and Greene's The Labor Injunction, and in this respect offers little to the dogma that grew up around that book. However, McCracken takes a unique turn that is seldom seen in legal writings. He follows the parties after the court proceedings have ended and surveys the effects injunctions had on the parties. This technique lends great creditability to his assertion

that strike injunctions in the new south retarded peaceful settlements of labor disputes.

Various articles and books have researched the problems in particular states. These works are valuable as informative on state practice but offer us little in the way of innovative analysis. These works include: Kurtz, The Labor Injunction in Pennsylvania, 1891-1931, 29 Pa. Hist. 306 (1962); Hanson, Labor Injunction In Pennsylvania, Its Background and Present Status, 45 Dick. L. Rev. 313 (1941); P. Brissenden, The Labor Injunction in Hawaii (1956); Brewer, State Anti-Labor Legislation: Texas a Case Study, 11 Labor History 58 (1970); Mathews, Survey of Ohio Practice in Issuing Labor Injunctions, 5 Ohio State L.J. 289 (1939). See also, unpublished dissertations cites supra for works in other states.

Equity Sources

The fundamental legal conflict is whether or not the courts of this era actually abused the equity power in granting these injunctions. Frankfurter and Greene say unequivocally "yes", Petro forcefully says "no". An injunction is an uniquely equitable remedy that depends heavily on a judge's discretion as to whether it is invoked or not. Treatises specifically on equity were more important in the early part of this century than they are now,

because most jurisdictions have combined law and equity into one system. It is necessary to review even ancient works on equity because these are the foundations on which judicial equity powers rest.

The seminal work on equity and a great deal of all American law is W. Blackstone, Commentaries on the Laws of England (1756). This was the first and perhaps only law book for many early American lawyers and its influence remains with us today. The corresponding American authored classics are J. Story's, Commentaries on Equity Jurisprudence (2 vols. 3d ed. 1842) and Commentaries on Equity pleading (1838). F. W. Maitland's Equity (1st ed. 1909, 2d ed. 1936) and G. Clark's Equity (1919) were popular works during the years in question and no doubt formed the basis for most judges views on their own equity powers. H. Hanbury, Modern Equity (1st ed. 1935 and current editions) and F. Chafee, Some Problems of Equity (1950) are more modern sources that allow us to review the earlier author's assumptions in comparison to today's view. Unfortunately, sources say practically nothing on equity procedure in labor injunctions. They are valuable as generally source books but do not provide specific information.

Two equity treatises do go into detail on labor injunctions. James High's Law of Injunctions (2 vol., 4th ed.

1905), devotes a whole chapter to labor injunctions. He writes that generally in issuing labor injunctions, "courts are merely meeting new and unusual conditions as they arise with the application of principles which are themselves at the foundation of equity." 23/ Another author does not adhere to these traditional views. John Pomeroy in his Equity Jurisprudence (6 vol., 5th ed. 1919) adopts an enlightened view of equity that attempts to balance labor's right to contract individually and in combination with management's right to run its business. From this premise, it would seem logical that injunctions would not be granted unless this balance was not maintained. Perhaps then labor would have benefited from injunctions against employers.

Reference must also be made to sources dealing with equity history. The best single work is Equity and the Constitution (1982) by Gary McDowell which traces the concept of Equity from the ancient Greeks clear down to the present. The main focus of this book is a critique of Brown v. Board of Education and subsequent American Civil rights decisions, but the background on equity is superb. The best single work on Roman Law for one not familiar with that system is B. Nicholas' An Introduction to Roman Law (1962). This book gives a concise exposition on Roman Law which includes much that is relevant to the development of equity.

Herbert Hausmaninger's, Benevolent and Humane Opinion's of Classic Roman Jurists, 61 B.U. L.Rev. 1139 (1981) adds further information on equity history derived from Roman Law. The development of Equity in England can be examined in The Constitutional History of England (1920) by F. W. Maitland and in Essays in the Law (1922) by F. Pollock. A History of American Law (1973) by Lawrence Friedmand and The Transformation of the Common Law (1977) by Lawrence Horowirtz provide information on the American evolution of equity. American Constitutional Sources.

An important issue surrounding the Congressional approach taken in the Norris-LaGuardia Act is whether Congress properly used its power under article III of the Constitution to withdraw jurisdiction from the federal courts. To study this separation of powers question Gerald Gunther's Casebook, Cases and Materials on Constitutional Law (10th ed. 1980) and the treatises American Constitutional Law by Lawrence Tribe and Handbook on Constitutional Law (1978) by Nowak, Rotunda and Young are good starting points. More specific on the jurisdiction aspect of constitutional law are Charles Wright's Law of Federal Courts (3d ed. 1976) and Bator, Mishkin, Shipiro and Wechsler's Hart and Wechsler's The Federal Courts and the Federal System (2d ed. 1973). A good general study of the Klein case appears in G.

Young, Congressional Regulation of Federal Courts' Jurisdiction and Processes; United States v. Klein Revisited, 1981 Wisc L.Rev. 1189.

The more interesting approaches to the article III power of Congress are those works where limits are imposed on the apparent plenary constitutional power of Congress to withdraw jurisdiction. Story very early expressed the view that federal courts are mandated in his Commentaries on the Constitution (1833). His theory may have been an overstatement to advance his Federalist position. More recently, Theodore Eisenberg in Congressional Authority to Restrict Lower Federal Court Jurisdiction, 83 Yale L.J. 498 (1974) asserts federal courts are mandated because they are necessary to effectuate modern constitutional rights.

Other authors address the problem by advancing theories which require federal courts only under certain situations. The most important work in this whole area is Henry Hart's, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L.Rev. 1361 (1953), also reprinted in Hart and Wechsler's The Federal Courts and the Federal System mentioned above. This article agrees that if Congress withdraws jurisdiction which would destroy the "essential role" of the Supreme Court in the constitutional scheme, then this act would violate the

separation of powers doctrine. Similarly, Redish and Woods in Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis, 124 U.Pa. L.Rev. 45 (1975) believe that if all adequate constitutional remedies are foreclosed by an act of Congress, then the separation of powers is violated. A good general overview of the various theories may be found in L. Sager, Forward: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts, 95 Harv. L.Rev. 17 (1981). R. Ratner, Congressional Power over the Appellate Jurisdiction of the Supreme Court, 109 U.Pa. L.Rev. 1357 (1960) is helpful although more concerned with Supreme Court jurisdiction which is not an issue directly relevant in the acts researched in this paper. This jurisdiction question has seen significant modern treatment because of the many recent attempts by some Congressmen to use the article III power to change Supreme Court doctrine.

Labor, Public Policy and Other Legislation

A group of works attempt to theorize a standard labor policy and attempt to fit anti-injunction legislation into their theme. Dean Harry Wellington of the Yale Law School in Labor and the Legal Process (1968) examines the role of law in moving collective bargaining to its present position at the center of national labor policy. For Wellington, the

Norris-LaGuardia Act was one of the first examples of government intervention in the development of this coherent national policy. Labor and the Legal Process is a significant source in viewing the larger picture in which the injunction problem fits. Similarly Harold Metz and Meyer Jacobstein in A National Labor Policy (1947) argue that the Norris-LaGuardia Act was the first declaration of the developing congressional collective bargaining policy.

Labor's problems with the Sherman and Clayton Acts' anti-trust provisions are explored in A. T. Mason, Organized Labor and the Law (1925) and E. Berman, Labor and the Sherman Act (1930). A "Commons Tradition" book dealing with wage, hours and conditions of employment labor legislation is J. Commons and J. Andrews, Principles of Labor Legislation (1936). Finally Edward Berman in Labor Disputes and The Presidents of the United States (Columbia University studies on History, Economics and the Public Law, No. 249, 1924) advises Presidents to avoid ending strikes by seeking injunctions. Berman believes this action creates an impression of arbitrariness in the eyes of the workers. Berman does not offer any advice on how else to end strikes. Evidently the Republican Presidents to which he directed this work did not listen to him anyway.

Labor's Legal Attack

Labor was generally frustrated during a long effort to get anti-injunction legislation. Labor leaders lobbied long and hard to get some sort of congressional action. 24/ The legal positions labor lawyers often took against management injunction petitions were often quite interesting. One approach was "damn the precedents and go ahead" revealed in Don't Tread on Me, a Study of Aggressive Legal Tactics for Labor (1928) by Clement Wood and McAlister Coleman. These authors argue that lawyers must keep asserting constitutional issues, attempt to use injunction remedies themselves and attempt to persuade non-union men to line up with them. 25/ A more sophisticated approach is the brief of Herman Oliphant from Interborough Rapid Transit Co. v. Green which was published in 1928 by the A. F. of L. Oliphant advised the use of affidavits and facts contained in the brief in other injunction cases to help labor lawyers influence courts with "Brandeis Briefs".

Lastly a work needs to be mentioned about the radical faction as it relates to the injunctions problem. The Communist dominated Labor Research Association published a yearly Labor Fact Book (1931-) which expressed left wing sentiments. The remedy, they argue, to the labor injunction is mass violations of court decrees. This they

felt, would be the only way to compel courts to limit the use of injunctions. Luckily, organized labor generally was not driven to this course of action.

Conclusions

There are many puzzles associated with studying the labor injunction. It seems hard to believe that an issue which at the time occupied so much space in labor oriented periodicals, had several full length books and numerous articles written about it and engaged significant congressional and judicial efforts, has had so little historical criticism done on it. Curious also is the general acceptance of one theory about labor injunctions which formed the underlying policy basis for federal and state legislation. Some general conclusions and questions about more specific issues can be derived from the material on this subject.

The case law and legislative history of anti-injunction legislation after the turn of the century is centered around two congressional acts. The Clayton Act passed in 1914 and the Norris-LaGuardia Act of 1932. It was clear by the early 1920's that the Clayton Act's labor provisions would not withstand judicial scrutiny. Yet there was a long wait for a second attempt at anti-injunction legislation. No one has researched the reasons for this pregnant pause. There also

seems to be some evidence that legislators suspected that the approach taken by the Clayton Act would not work at all. 26/ Whether or not the circumstances surrounding the passage of the Clayton Act's labor provisions were really favorable to labor interests also needs to be considered.

Again in 1928 and through the next four years, agitation for anti-injunction legislation was strong. Obviously there were great economic and political upheavals during these years that would explain some of this activity. Again no one has attempted to research the question. The explanations that have been given focus on the legal doctrines and the need for their change, but surely other factors were just as important.

After the Norris-LaGuardia Act passed, the injunction issue dropped completely out of sight. The act passed so easily and was so readily accepted that some very powerful forces must have been at work. Was the Government's acceptance of labor's cause enough to make this great turnaround? Again, we need research to answer this question.

These years from the middle 1910's to the early 1930's witnessed some interesting activity by the United States Supreme Court. A story can be told on the conflict within the Supreme Court on the labor injunction issue. There were some great minds and some closely held opinions in this

court that could be brought to life in studying the injunction problem.

Lower courts reflect this conflict and a corresponding conflict of public opinion. Were these lower courts abusing their equity powers? Frankfurter and his contemporaries say that they were. Petro says that they were not and brings forth charts, graphs and other evidence to prove his point. However, Mr. Petro misconceives Frankfurter's work. Frankfurter was asserting the need for legislative action by claiming judges were abusing their equity powers. The labor situation, of which the injunction issue was just one part, had gone past the point of policy determinations by courts. What was needed was a national labor policy and Congress was the one to do it. 27/ Thus, Petro's attack on Frankfurter's legal reasoning misses entirely the fundamental issue that Frankfurter was asserting. In this light, Frankfurter's legal doctrines and the almost dogmatic adherence of most writers to his point of view makes some sense and offers interesting paths for new research.

Finally, what about the contemporary role of the anti-injunction legislation. If the legislation is no longer necessary within the scheme of our national labor policy, is it proper to keep these laws on the books? Chances are that we never would return to "Government by

Injunction." What then would be the effect of repeal of this legislation on the current balance of labor-management relations? It might make a currently bad situation worse or it might help. There also might be some impact on the life an average worker, but I doubt it. These problems are difficult ones to find answers to, yet the resources are available and the questions need to be answered. The labor injunction issue needs balanced research. While it is probably impossible to be devoid of all passion on the subject, the balanced approach must be taken to determine what the courts and Congress really did and why.

Endnotes

1/ E. Witte, The Government in Labor Disputes, 84 (1932).

2/ Petro, Injunctions and Labor Disputes: 1880-1932, Part I: What the Courts Actually Did and Why, 14 Wake Forest L. Rev. 341 (1978). The standard for a sufficient case requires the court, the judge's name, the date of the opinion, the parties involved and a holding .

3/ Id., Appendix III, 570-76.

4/ Compare to 345 reported cases during this period. If we accept Witte's conclusion that five times as many cases go unreported as reported, this would mean we have only 4.3% of the unreported cases.

5/ Witte at 84.

6/ Petro at 360.

7/ Id. at 485-546. We are not 100% certain because legal finding aids or judges just do not tell us all we need to know about a case.

8/ F. Frankfurter and N. Greene, The Labor Injunction 158 (1930).

9/ Id. at 144-146.

10/ Statutory History of the United States, Labor Organizations, 247 (R. Koritz ed. 1970).

11/ See page 176, supra.

12/ A. Taylor, Labor and the Supreme Court, 111 (1961).

13/ I have combined a primary and secondary source here to save space and avoid repetition.

14/ Other Justices served on the court during this period. The fact that they served shorter lengths of time or were less influential allows me to leave them out of the main text. See generally, The Justice of the United States Supreme Court Vol. III for bibliographies and legal opinions of these men.

15/ Hearings on H. R. 11032, 62d Cong., 2d Sess. (1912); S. 1482, 70th Cong., 1st and 2nd Sess. (1928) and S. 2497, 71st Cong., 2d Sess. (1930).

16/ S. 1482, 70th Cong., 1st Sess. (1728).

17/ See A. Link, Woodrow Wilson and the Progressive Era 289 (1954) for more detail.

18/ See, Labor, Management and Social Policy, Essays on the John Commons Tradition (1963) for criticism of the Commons Tradition.

19/ W. Merritt, Destination Unknown, Fifty Years of Labor Relations.

20/ L. Friedman, A History of American Law 9 (1973).

21/ Greggory's work also contains few footnotes.

22/ Apparently Part II has not yet been published.

23/ J. High, Law of Injunctions, 1410 (2 vol., 4th ed. (1905).

24/ See Discusion of opinions of labor leaders pages 186 and 187 supra.

25/ C. Wood and M. Coleman, Don't Tread on Me, a Study of Aggressive Legal Tactics for Labor, 12 (1928).

26/ See page 179 supra.

27/ Actually as it turned out, President Roosevelt had as much to do with formulating the modern national labor policy.

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Appendix A

Clayton Antitrust Act
Ch 323, 38 Stat. 730 (current version at 15 U.S.C. §§12-27 (1976)).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That "antitrust laws," as used herein, includes the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety [The Sherman Act]....

§ 6. That the labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

§ 17. That no preliminary injunction shall be issued without notice to the opposite party.

No temporary restraining order shall be granted without notice to the opposite party unless it shall clearly appear from specific facts shown by affidavit or by the verified bill that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon. Every such temporary restraining order shall be endorsed with the date and hour of issuance, shall be forthwith filed in the clerk's office and entered of record, shall define the injury and state why it is irreparable and why the order was granted without notice, and shall by its terms expire within such time after entry, not to exceed ten days, as the court or judge may fix, unless within the time so fixed the order is extended for a like period for good cause shown, and the reasons for such extension shall be entered of record....

§ 18. That, except as otherwise provided in section 16 of this Act, no restraining order or interlocutory order of

injunction shall issue, except upon the giving of security by the applicant in such sum as the court or judge may deem proper, conditioned upon the payment of such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained thereby.

§ 19. That every order of injunction or restraining order shall set forth the reasons for the issuance of the same, shall be specific in terms, and shall describe in reasonable detail, and not by reference to the bill of complaint or other document, the act or acts sought to be restrained, and shall be binding only upon the parties to the suit, their officers, agents, servants, employees, and attorneys, or those in active concert or participating with them, and who shall, by personal service or otherwise, have received actual notice of the same.

§ 20. That no restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is not adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful

purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

Appendix B

Norris-LaGuardia Act
Ch. 90, 47 Stat. 70 (1932)(current version at 29 U.S.C. §§ 101-115 (1976)).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That no court of the United States, as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this Act; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy decared in this Act.

§2. In the interpretion of this Act and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are herein defined and limited, the public policy of the United States is hereby declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted.

§ 3. Any undertaking or promise, such as is decribed in this section, or any other undertaking or promise in conflict with the public policy declared in section 2 of this Act, is hereby declared to be contrary to the public policy

of the United States, shall not be enforceable in any court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such court, including specifically the following:

Every undertaking or promise hereafter made, whether written or oral, express or implied, constituting or contained in any contract or agreement of hiring or employment between any individual, firm, company, association, or corporation, and any employee or prospective employee of the same, whereby

(a) Either party to such contract or agreement undertakes or promises not to join, become, or remain a member of any labor organization or of any employer organization; or

(b) Either party to such contract or agreement undertakes or promises that he will withdraw from an employment relation in the event that he joins, becomes, or remains a member of any labor organization or of any employer organization.

§ 4. No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concern, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 3 of this Act.

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 3 of this Act.

§11. In all cases arising under this Act in which a person shall be charged with contempt in a court of the United States (as herein defined), the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the contempt shall have been committed: Provided, That this right shall not apply to contempts committed in the presence of the court or so near thereto as to interfere directly with the administration of justice or to apply to the misbehavior, misconduct, or disobedience of any officer of the court in respect to the writs, orders, or process of the court.

§12. The defendant in any proceeding for contempt of court may file with the court a demand for the retirement of the judge sitting in the proceeding, if the contempt arises from an attack upon the character or conduct of such judge and if the attack occurred elsewhere than in the presence of the court or so near thereto as to interfere directly with the administration of justice. Upon the filing of any such demand the judge shall thereupon proceed no further, but another judge shall be designated in the same manner as is provided by law. The demand shall be filed prior to the hearing in the contempt proceeding.

§ 13. When used in this Act, and for the purposes of this Act--

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees, whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations or employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as hereinafter defined) of "persons participating or interested" therein (as hereinafter defined).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, 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.

(d) The term "court of the United States" means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia.