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The truth of any general proposition remains in doubt until it has been tested in many different situations. One must not lightly assume that sauce for the goose will always suit the gander. I live in sight of a deep lake which, tradition tells, will never freeze in any winter. The local motorist who filled his radiator with lake water instead of anti-freeze on the assumption that what was true under one set of conditions would hold true under another, did not stand alone in his error of logic. Lawyers, like other philosophers when filled with zeal and intent on some great purpose, have to be vigilant to avoid the same confusion. This is a difficult discipline. It requires talent for imagining all manner of circumstances not present, probably unwelcome and reluctantly sought out. And so varied are the combinations of human affairs that no imagination ever turns out to be as effective as the passage of time. The years apply the only reliable test, as slowly and patiently they try the wearing quality of what has passed for truth.¹

Whoever turns his hand to drafting legislation, for example, is apt to have a dismaying time of it. Zealous for the righting of some evil, he makes a few facile strokes of the pen and produces a simple law intended to succor the wronged and punish the wicked. Then some critic points out that the proposed statute applies to a situation its enthusiastic author never thought of, and there it will produce the most surprising and unwelcome results. It will reward the unworthy and penalize the virtuous. The abashed draftsman retires to compose some of those necessary provisos and exceptions which so exasperate the casual reader.²

¹“... time has upset many fighting faiths ...” Mr. Justice Holmes, dissenting in Abrams v. United States, 250 U. S. 616, 630, 40 Sup. Ct. 17, 22 (1919).
²See for an example, Record of the New York Constitutional Convention of 1938, Proposed Amendment Print No. 628, Int. No. 600; pp. 1221, 1227.
Judges writing opinions, and political philosophers composing learned articles, have to be similarly cautious, lest today's satisfying epigram, turned off in confident exuberance, may have to be retracted tomorrow with embarrassing explanations. Only Chief Justice Marshall's tremendous prestige,—and the widespread human dislike for paying money to the government,—kept "The power to tax is the power to destroy" in circulation until Mr. Justice Holmes killed it in 1927. To be sure Holmes' words "The power to tax is not the power to destroy while this court sits" were written to contradict an opinion of a judge dead ninety-three years. There is more embarrassment when a court, examining one of its pronouncements only a few years old, finds that it will produce an unwanted result if applied today. Under these circumstances if the undesirable precedent cannot decently be followed it must be overruled or distinguished. Overruling is hardest, of course, where the irksome decision is founded on a long line of cases—where it is not a sport, but a member of a recognized species that cannot lightly be disestablished. In such cases considerable judicial ingenuity is required to distinguish the case at bar, that is, to find a more or less good reason for not following what appears at first glance to be a compelling mass of precedent.

Those who write editorials or papers for law reviews have a less responsible mission. No judge has to follow a magazine article if he doesn't like it; and last year's editorials find few readers today. Its very evanescence gives non-judicial writing on law and government a certain free élan. But still, if enough written matter of this sort accumulates it is hard to disregard completely; and when a judge contemplates writing an opinion which will contradict all the ephemeral commentators at once, a decent respect for the opinions of mankind requires caution, or at least a word of explanation.

For a generation preceding 1937, liberal opinion in the United States, expressed in the writings of great judges and of noted contributors to periodicals, agreed that no court should set itself up as a super-legislature, and that every presumption should be applied in favor of constitutional validity. Decisions of the Supreme Court, holding state or federal social legislation invalid under the Fifth or Fourteenth Amendments, or some other Consti-
tutional provision, were criticized in dissenting opinions and other publica-
tions which pointed out that though a legislature might choose to pass a law
with which judges individually disagreed, the presumption of constitutionality
still obtained.

Mr. Justice Holmes in 1905 set a pattern for thirty years of comment
when he said:

"United States and state statutes and decisions cutting down the liberty
to contract by way of combination are familiar to this court . . . Some
of these laws embody convictions or prejudices which judges are likely
to share. Some may not. But a constitution is not intended to embody
a particular economic theory, whether of paternalism and the organic
relation of the citizen to the State or of laissez faire. It is made for
people of fundamentally differing views, and the accident of our finding
certain opinions natural and familiar or novel and even shocking ought
to not to conclude our judgment upon the question whether statutes em-
bodying them conflict with the Constitution of the United States."\(^5\)

Mr. Francis B. Sayre, then a Professor at the Harvard Law School, wrote
in the May, 1923, *Survey*:

"If the Fifth and the Fourteenth Amendments are to be so interpreted
that henceforth legislation is to be declared unconstitutional whenever it
is out of accord with the economic and social theories of five members
of the Supreme Court, a blow is struck at one of the most fundamental
principles of our government. The legislature then becomes not an in-
dependent and supreme body framing policies into law; it becomes sub-
ordinate to the Supreme Court which becomes virtually a House of Lords,
exercising an actual veto power over such laws as fail to accord with
the social theories of five of its members."\(^6\)

When the Supreme Court on January 6, 1936 in one of the last decisions
under the old dispensation declared the Agricultural Adjustment Act unconsti-
tutional, Mr. Justice Stone in his dissent stated the accepted liberal doc-
trine with admirable clarity.

"The power of courts to declare a statute unconstitutional is subject
to two guiding principles of decision which ought never to be absent
from judicial consciousness. One is that courts are concerned only with
the power to enact statutes, not with their wisdom. The other is that
while unconstitutional exercise of power by the executive and legislative

\(^5\)Lochner v. New York, 198 U. S. 45, 74, 25 Sup. Ct. 539, 546 (1905); see for a
similar comment his dissent in Adkins v. Children's Hospital, 261 U. S. 525, 567, 43
Sup. Ct. 394, 404 (1923).

\(^6\)Survey, May, 1923. The article from which the quotation is taken appeared shortly
after the decision of the Adkins case, mentioned in note 5. Mr. Sayre's subsequent dis-
tinguished career in the service of his country does not need notation here.
branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint. For the removal of unwise laws from the statute books appeal lies not to the courts but to the ballot and to the processes of democratic government."

The Nation for the next week published an editorial which is a fair sample of much similar comment. It said of the Butler decision:

"Now the court proves definitely that it is the last bulwark of the vested interests. They have been displaced from the Legislative and have been outwitted by the Executive; they find their last refuge in the Judiciary. It is inconceivable that the good sense of a democracy will tolerate very much longer such a use of the judicial power. If Mr. Roosevelt has courage he will make the limitation of this power in declaring acts of Congress unconstitutional a major part of his campaign. If he has a long view of statesmanship he will make it part of a long range effort to restore the basic decisions of a democracy to the legislative will of the people."

The abrupt change in the Court's attitude, which became evident in the spring of 1937, has now become a commonplace of the classroom. The disseners of 1936 were now writing the prevailing opinions of the Supreme Court. The views expressed in Stone's recent minority opinions and in Holmes' classic dissents now became the law of the land. The liberals had won out at long last, and the Supreme Court was no longer to be a stumbling block in the path of social legislation. Under the grant of power to regulate commerce, Congress now controlled in great detail the most local of transactions which in any measure affect commerce between the states and the constitutional requirement that states and nation alike must grant due process of law no longer prevented price, wage or other economic control by state or federal government. From the farm, mine and factory, through the intervening transportation, to the consumer who buys a bottle of milk, the great extent of the power granted to Congress by the Commerce Clause


The literature on this subject is abundant. A few references are: Corwin, Constitutional Revolution, Ltd. (1941); Jackson, The Struggle for Judicial Supremacy (1941); McCune, The Nine Young Men (1947); Curtis, Lions Under the Throne (1947).


Sunshine Anthracite Coal Co. v. Adkins, 310 U. S. 381, 60 Sup. Ct. 907 (1940).


REASONS IN RETROSPECT

has been declared in a formidable series of Supreme Court decisions; and a new self-restraint of the court in applying the restrictions of the Fifth and Fourteenth Amendments is apparent from the same line of cases.\(^7\)

All this has naturally pleased the judges and writers who had so anxiously awaited the change in attitude that the Court showed in 1937. There was a tone of decorous triumph where the dominant note used to be one of somewhat impatient criticism. The days had passed when due process of law and the status quo were synonyms. From now on the people, speaking through their elected representatives, could make their economic and social arrangements without constitutional worries. The Supreme Court had renounced its broad supervisory powers over state and congressional legislation. Laissez-faire had a new meaning.

"No generalization is true," runs the French saying, "not even this one." To the noteworthy canon of judicial self-limitation laid down by the Supreme Court in 1937, there is of course an equally notable exception. Where civil liberties are concerned, the Court, more than ever since the "constitutional revolution," has freely used the Fourteenth Amendment to kill state legislation and administrative action. Statutes which threatened the right to speak or right of free assembly have been struck down with confidence. Procedure in civil and criminal courts has been held to a standard of scrupulous fairness. Where a statute appears to threaten civil liberty, some opinions seem almost to set up a presumption of invalidity in place of the traditional view that a statute should stand unless clearly unconstitutional.\(^8\) The definite position of the majority of the court is made conspicuous by the protests of dissenting justices, who feel that the court is wrong in abandoning its newly declared deference to legislation, even for the sake of greater civil freedom.\(^9\) Mr. Justice Frankfurter expressed this view with conviction when he said:

"Such an attitude is a great enemy of liberalism. Particularly in legislation affecting freedom of thought and freedom of speech much which should offend a free-spirited society is constitutional. Reliance for the most precious interests of civilization, therefore, must be found outside of their vindication in courts of law. Only a persistent positive translation of the faith of a free society into the convictions and habits and

\(^7\)Different in theory but quite similar in practical effect is the resolute determination of the court not to pass on constitutional issues unless the decision is inevitable. See Rescue Army v. Municipal Court, — U. S. —, 67 Sup. Ct. 1409 (1947) and United States v. Petrillo, — U. S. —, 67 Sup. Ct. 1538 (1947).


actions of a community is the ultimate reliance against unabated tempta-
tions to fetter the human spirit.”

Whatever the merits of these opposing views of the Supreme Court’s func-
tion, the majority shows no signs of abandoning its zealous protection of
civil liberties. On May 19, 1947 the Court upheld the right of a newspaper
to criticize a judge for his conduct of a pending case; and again declared
that it would examine the facts for itself to find out whether a state was
disobeying the Fourteenth Amendment. On February 3, 1947, in a per curiam
opinion without dissent, it reversed the Supreme Court of Michigan and
granted habeas corpus to a man who in 1932, as a seventeen year old boy,
had in one day been charged with murder, arraigned, tried, convicted, and
sentenced to life imprisonment, all without counsel. In effect the Supreme
Court has said, “When business is in question we shall not set our own ideas
of social policy over those of a legislature. Business must be regulated; let
the legislators go to it. But individual freedom is different. Individual liberty
is so important that we are going to repel every threat to it, even at the risk
of being called a super-legislature.” In the field of civil liberties, then, the
relationship between the Court and the legislatures is much the same as it
was in economics in 1900. It is no different in manner of operation from
that criticized in economic matters by Holmes in 1905, by the Survey in 1923,
by the Nation and by the dissenting Justices in 1936. Only the subject mat-
ter of the laws struck down is different. The protests of Justices Frank-
furter and Jackson at what they think an excessive exercise of jurisdiction
are obviously sincere, and are profoundly moving. These are men who deep-
ly believe in the capacity of our people to govern themselves through their
elected lawmakers. For years they had cried out against courts which sub-
stituted their own ideas of what was wise for the differing ideas of state
and federal legislators. And no sooner had their concept of legislative su-
premacy been accepted than ancient error reappeared in court, dressed in

20Dissent in Board of Education v. Barnette, 319 U. S. 624, 670, 63 Sup. Ct. 1178,
1200 (1943).
23To observe a phenomenon is not necessarily to deplore it; and I am not at all com-
plaining about the civil liberties cases. The power and readiness of the Court to strike
down statutes produces entirely different consequences in a case like Thomas v. Collins,
323 U. S. 516, 65 Sup. Ct. 315 (1945) where a Texas law required a permit for a
union organizer, and Coppage v. Kansas, 236 U. S. 1, 35 Sup. Ct. 240 (1915) where a
Kansas law forbade the “yellow dog” contract. The Court exercises the same sort of
power in each, but one does not necessarily have to approve or condemn both results
together.
24See notes 19 and 20 supra.
the seductive draperies of freedom! Here is one of those unhappy choices of doctrine men must make,—a choice between freedom to legislate and freedom from oppressive laws. The majority of the court can justify itself by pointing out the essential nature of free expression, freedom from undue policing, free politics. It is all very well to rely on a representative legislature to express the popular will, but the popular will is not expressed unless men are free to express it. Consistency for consistency's sake is not a virtue; and a doctrine of "hands off the legislature" does not necessarily mean passivity where the very means of selecting a truly representative legislature are in question. The Constitution, the majority of the justices can say, embodies the will of the people as much as any statute, and the Court should not be squeamish about giving effect to the Bill of Rights and the Fourteenth Amendment when really important matters are forward.

During the generation ending with 1936, those given to facile characterization used to say that Congress was liberal but the Supreme Court was conservative. Congress was willing to pass child labor statutes, a minimum wage law for the District, the National Industrial Recovery Act, a Farm Mortgage Moratorium Act, the first Municipal Bankruptcy Act, the Agricultural Adjustment Act, the Railway Retirement Act—and all these the Court of the old dispensation called unconstitutional. Since 1937 the Court has completely reversed its position; and among the numerous bright commentators who write for the papers about the characters of the justices, the basic question seems only to be which is the least advanced liberal in a bench that is liberal from end to end. Writers who were thus able for a brief span to use the same adjectives for Court and Congress, are now obliged to remember some of the hard words they applied to the Court of 1936, to use in characterizing the Congress which repassed over the President's veto the Labor-Management Relations Act of 1947. They have come to describe in terms of reaction the legislatures, and sometimes the voters, of a number of states which since 1943 have been adopting various "curb labor" laws.

Whoever examines the labor legislation of the states and the federal government, passed during the last generation, must be struck by its stratification.

26Adkins v. Children's Hospital, 261 U. S. 525, 43 Sup. Ct. 394 (1923).
Successive waves of popular sentiment have left quite uniform and widespread deposits of statutes, from which a history of opinion can be read as one reads geological history from layers of rock in a gorge. One such wave of opinion occurred just after the war of 1917-18 when there was a widespread fear of Russian radicalism with which, in the minds of many people, certain labor groups were associated. Its most curious remains are the “red-flag laws” passed in 1919. Their phraseology varies, but they commonly forbid the display of red flags to symbolize such matters as “opposition to organized government”, “belief in anarchy”, “the overthrow of government by force or by the general cessation of industry” and the like.\textsuperscript{32} In 1931 the Supreme Court in Stromberg v. California, 238 U. S. 359, 51 Sup. Ct. 532 (1931) held that the California statute, insofar as it purports to penalize the display of a flag “as a sign, symbol or emblem of opposition to organized government” violated the 14th Amendment, for the opposition might be peaceful and by customary political procedure. These statutes generally remain on the books, undismissed, unviolated, unrepealed, reminders of a simpler, enviable day when we still believed we could suppress sedition by proscribing its banners.

The LaGuardia-Wagner Era began about 1932 and ended about 1941. Between those years, the federal government and the legislatures of many states were passing statutes which rigorously limited the use of injunctions in labor cases, and which set up administrative boards charged with suppressing employers’ “unfair labor practices”, defined in general as opposition to the formation of free unions and to the conduct of collective bargaining.\textsuperscript{32}\textsuperscript{a}

Beginning about 1939 a widespread legislative movement to restrict certain activities of organized labor became noticeable. Its beginnings, as one would expect, occurred before the definite end of the LaGuardia-Wagner period; by 1943 the new movement had gathered a great deal of momentum, which was continuing unabated in the spring of 1947. In this phase of law-making, “curb labor” laws (including some constitutional amendments) have been adopted in thirty-four states and a constitutional amendment is pending in another (New Mexico). Of course the expression “curb labor law” is one which would be defined differently by persons of differing interests. I


here use the term to describe a law which I should oppose, if I were a labor leader, on the ground that it would conceivably interfere with my ability to do my union job in the way I saw fit. The laws vary from simple prohibitions of the closed and union shop, to elaborate state enactments which parallel the Taft-Hartley Act just as the Wagner Act had its state counterparts. Some idea of the scope of this recent legislation can be gained from the necessarily brief summary which follows:

**ALABAMA:** The Bradford Act, Ala. Code tit. 26, § 388 (Supp. 1943) requires a majority vote of employees before a strike, makes unauthorized (wildcat) strikes a misdemeanor, forbids secondary boycotts, requires reports from unions to be filed with the State Labor Department, forbids political contributions by unions. Many of the provisions of the Bradford Act resemble the provisions of the Taft-Hartley Act. The Supreme Court of Alabama in Alabama State Federation of Labor v. McAdory; et al., 246 Ala. 1, 18 So. 2d, 810 (1944), declared unconstitutional under the Fourteenth Amendment so much of the statute as forbids an individual to refuse to handle non-union materials (Section 12), and so much as forbids a strike by a minority of workers when a majority has voted against a strike. The provision (Section 17) forbidding contributions by labor unions or organizations of employers to political parties or candidates was struck down under Section 45 of the Alabama Constitution on the ground that it applies to employers and employees alike, and that portion applying to employers has no relation to "the subject of the Act." The balance of the Act was upheld. The Supreme Court of the United States granted certiorari, 323 U.S. 703, 65 Sup. Ct. 191 (1944) but later dismissed the writ 325 U. S. 450, 66 Sup. Ct. 64 (1945). The Alabama Supreme Court opinion contains an exhaustive review of authorities and is useful in considering the constitutionality of the Taft-Hartley Bill.

**ARIZONA:** An amendment to the State Constitution adopted at a general election November 5, 1946, effective that date, provides as follows:

"No person shall be denied the opportunity to obtain or retain employment because of non-membership in a labor organization, nor shall the state or any subdivision thereof, or any corporation, individual or association of any kind enter into any agreement, written or oral, which excludes any person from employment or continuation of employment because of non-membership in a labor organization."

A statute implementing this amendment became effective June 18, 1947. Laws of 1947, c. 81.


**CALIFORNIA:** Adopted a statute making permanent wartime temporary restrictions on jurisdictional strikes, hot cargo and secondary boycott; Cal. Labor Code (Deering, 1941), § 1131, amended by Chap. 278, Laws of 1947, to become effective Sept. 19, 1947.


**CONNECTICUT:** Forbade picketing of the residence of any individual unless it is also the place of employment concerning which a labor dispute is in progress. Public Act No. 123, Act of 1947, approved May 20, 1947, effective October 1, 1947.

**DELAWARE:** Adopted a comprehensive statute regulating labor unions, etc., containing many provisions like that of the Taft-Hartley Act. H.B. 212, Laws of 1947, effective April 5, 1947.

**FLORIDA:** Adopted an anti-closed shop amendment to the State Constitution at the general election of November 7, 1944. This provision added to Section 12 of the Declaration of Rights of the State Constitution.
“The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization; provided, that this clause shall not be construed to deny or abridge the right of employees by and through a labor organization or labor union to bargain collectively with their employer.”

The constitutionality of this law under the Fourteenth Amendment has been before the Supreme Court which declined to pass on the merits on the ground that the case was not yet ripe for adjudication. A. F. of L. v. Watson, 327 U. S. 582, 66 Sup. Ct. 761 (1946). The District Court had held it constitutional 60 F. Supp. 1010, (S. D. Fla. 1945).


GEORGIA: By laws of 1947, Act No. 140, effective March 27, 1947, Georgia forbade the closed and union shop, and the check off except by individual revocable order. By Act No. 141 approved the same day, mass picketing, and assemblies of two or more persons for coercing interference with work at a place where a labor dispute is going on were also forbidden. In general terms this statute also makes it unlawful to attempt unionization by any threatening or actual interference with a person, his family, or his property or his employment.

IDAHO: By c. 265, Laws of 1947, approved March 19, effective May 6, 1947, secondary boycotting and picketing or refusing to handle goods in connection therewith is made a misdemeanor. A statute of 1943 (Idaho Laws 1943, c. 76) requiring union financial reports, etc. was held unconstitutional on the ground that it embraced more than one subject, not expressed in the title. A. F. of L. v. Langley, 66 Idaho 763, 168 P. 2d 831 (1946).

ILLINOIS: No “curb labor” legislation since 1940.

INDIANA: Sections 1-18 of c. 341, Laws of 1947, effective March 14, 1947, sets up a conciliation procedure in public utility labor disputes and forbids strikes until the settlement procedure has been exhausted. An order made by a board of arbitration under the Act is binding for a year.

IOWA: By S. B. 109, the Laws of 1947 approved April 28 and effective May 2, 1947, the closed and union shops were forbidden and the check off was permitted only by consent in writing agreed to by the spouse. By S. B. 111, Laws of 1947, effective April 29, 1947, secondary boycotts were forbidden.

KANSAS: By S. B. 264, Laws of 1943, approved March 23, effective May 1, 1943, Kansas adopted a comprehensive labor relations act requiring registration of unions’ annual reports, a majority vote of the employees to be governed by a strike before a strike commences, forbidding the execution of an “all union agreement” unless a majority of the workers to be governed have authorized it by secret ballot and forbidding secondary boycotts and jurisdictional strikes.

KENTUCKY: No “curb labor” legislation since 1939.

LOUISIANA: An agreement to join or not to join a labor organization as a condition of employment is unlawful as against the public policy, LA. Gen. Stat. (Dart, 1939) § 4381.2. Act 180, Laws of 1946, approved July 16, effective July 31, 1946, makes unions liable under contracts, but subjects only union property to execution; forbids wildcard strikes but permits individuals to stop work; forbids sit-down strikes and authorizes injunctive relief.

MAINE: The closed shop but not the union shop is forbidden by c. 395 of the Laws of 1947, approved May 13, effective August 13, 1947.
MARYLAND: By Md. Ann. Code Gen. Laws (Flack, 1939) art. 100 § 65, the union and closed shop agreements are invalidated.

MASSACHUSETTS: By c. 657 of the Laws of 1947, approved June 28, 1947, effective Sept. 26, 1947, discharges of employees for loss of union standing are regulated, sit-down strikes and boycotts to bring about "unfair labor practices" are forbidden. The State Labor Relations Commission is given jurisdiction of disputes between unions and employees concerning disputes over admissions to membership. By c. 590 of the Laws of 1947, provision is made for handling labor disputes "endangering public health and safety." These include the disposition of food, fuel, water, electric light and power, gas and hospital and medical services. The Governor is empowered to seize plants during emergencies which he declares, and during such emergencies concerted cessations of work are made unlawful. Unions are required to make annual reports to the Commissioner of Labor and Industries pursuant to an initiative petition adopted by the voters at a general election on November 5, 1946, effective the succeeding Dec. 4.

MICHIGAN: By Public Act No. 318 of the Acts of 1947, approved July 1, 1947, and effective the following Oct. 11, strikes are forbidden until prescribed proceedings have been conducted before the Labor Mediation Board. Strikes must not be called until approved by a majority of the employees in the bargaining unit concerned, voting at an election called for the purpose. The employer's most recent offer is to be placed on the ballot. Compulsory arbitration is provided for in labor disputes in public utilities, municipally owned utilities and in hospitals.

MINNESOTA: In 1943, 1945 and 1947 Minnesota passed statutes which cover in general the same ground as the Taft-Hartley Act. C. 624 and 658, Laws of 1943; c. 415 Laws of 1945; c. 486, 593 and 527 Laws of 1947. Secondary boycotts are made unfair practices. Unions are made suable, injunctions are provided for, etc.

MISSISSIPPI: No "curb labor" legislation since 1939.

MISSOURI: By H.B. 180, Laws of 1947, approved May 19, effective Sept. 10, 1947, Missouri adopted an elaborate system of regulation of labor relations in public utilities. A sixty day cooling off period without strikes is prescribed. Seizure by the Governor in public operations is authorized, and strikes against the State in that case are prohibited. A strike or lockout under these circumstances is penalized by a forfeiture of $10,000 a day by the offending employer or employee. The utility may lose its certificate of convenience and necessity if it fails to bargain in good faith. Injunctions are authorized to enforce the statute.

MONTANA: No "curb labor" legislation since 1939.

NEBRASKA: By initiative petition a constitutional amendment was proposed, which was adopted by the voters at a general election Nov. 5, 1946, and which became effective Dec. 11, 1946. This forbade the closed and union shop. A statute L.B. 344, Laws of 1947, approved June 10, 1947, effective Sept. 7, 1947, makes entry into any closed or union shop contract a misdemeanor. By L.B. 537, Laws of 1947, there was created a Court of Industrial Relations charged with the compulsory arbitration of labor disputes in public utilities. Other disputants may voluntarily arbitrate before the Court of Industrial Relations. Labor Unions are made suable by L.B. 276, Laws of 1947, approved June 10, effective Sept. 7, 1947.

NEVADA: No "curb labor" legislation since 1939.

NEW HAMPSHIRE: By c. 194 of the Laws of 1947, effective June 14, 1947, New Hampshire invalidated closed or union shop agreements unless the employer has five or more employees and unless two-thirds of the employees voting by secret ballot, constituting at least a majority of the employees covered, shall vote affirmatively in favor of the contract. A new election may be had every two years. Labor organizations may not negotiate or renew a contract if its dues are unduly burdensome; its initiation or other entrance fees may not exceed $25.00 per person. Non-discriminatory regulations are imposed on unions. Annual statements of finances and officers are required and union by-laws must be filed.

NEW JERSEY: By c. 38, Laws of 1946, amended by c. 47 and 75, Laws of 1947, New Jersey provided for regulation of labor disputes in public utilities. Sixty days notice of changes in contracts is required. The "State Board of Mediation" supervises a public hearing panel which makes recommendations for the settlement of any dispute. If these
are not accepted the Governor may seize the utility and operate it publicly. Once seized, the utility is operated as a governmental function of the State of New Jersey. Concerted work stoppages are forbidden after such a seizure. A temporary injunction against the enforcement of this statute (with a minor exception) was granted by a three judge court in Traffic-Telephone Workers v. Driscoll, 71 F. Supp. 681 (D. N.J. 1947). The grounds were possible unconstitutionality and possible conflict with the National Labor Relations Act. The merits were not decided.

New Mexico: At the 1947 session of the legislature a constitutional amendment was proposed for circulation to the people of the State at the next election. H.J. Res. 15, Laws of 1947, adopted Feb. 24, 1947. This amendment outlawed closed and union shops.

New York: C. 391, Laws of 1947, effective March 27, 1947 prohibits strikes by public employees. A striking employee can be rehired only under restrictions as to pay-raises etc.

North Carolina: By H.B. 229 Laws of 1947, effective March 18, 1947, the closed and union shop contract is made void and is declared a conspiracy in restraint of trade. The check-off is forbidden.

North Dakota: By H.B. 151, Laws of 1947, approved March 13, 1947, all contracts by which the right of persons to work shall be denied or abridged on account of membership or non-membership in any labor union are declared void. A petition for referendum requiring approval by the electors of the state has been filed with the Secretary of State, and the law is inoperative until so submitted. By H.B. 160, Laws of 1947, approved March 13, 1947, secondary boycotts and sympathy strikes are declared unlawful. A union statement has to be filed and renewed annually showing officers, dues, assessments, etc. Contracts may be enforced in court. No strike may be called until thirty days after an election has been held. No bargaining agent can be appointed and no strike can take effect unless 51% of the employees voting shall approve. Picketing is disallowed for an unapproved strike. Boycotts and sympathy strikes are forbidden. A successor organization is bound by the contract of its predecessors. The regulations of H.B. 160 have all been suspended until submitted to and approved by the electors pursuant to a petition filed with the Secretary of State.

Ohio: No "curb labor" legislation since 1939.

Oklahoma: No "curb labor" legislation since 1939.

Oregon: S.B. 314, Laws 1947, approved April 4, 1947, effective 90 days after adjournment of the regular session, provides for ending a labor dispute by a vote of a majority of the employees, by secret ballot supervised by the Commissioner of Labor. Such a termination is binding for a year. By S.B. 323, Laws of 1947, approved April 4 and effective 90 days after the legislature adjourns, "hot cargo" and secondary boycotts are made illegal and injunctive relief is authorized.

Pennsylvania: The Pennsylvania State Labor Relations Act forbids the check-off without a majority vote at secret ballot of all the employees in the appropriate collective bargaining unit. "Unfair labor practices" for labor organizations or their officers are defined as including intimidation, restraint or coercion to compel an employee to join a union, picketing of a place of employment by a person not there employed, secondary boycotting, and jurisdictional strikes or boycotts. See P.L. 484, Act of June 30, 1947, effective Sept. 1, 1947; see also Act July 7, 1947, P.L. 558; effective that day. By Act 485 of the Acts of 1947, approved June 30, effective Sept. 1 of that year, labor disputes and public utilities were regulated in some detail. Public mediation in such cases is provided for, and strikes are forbidden until that procedure is exhausted, unless the Governor shall determine that a failure to settle the dispute will not cause substantial hardship. If a settlement is not arranged in 30 days after a mediator appointed by the Governor has intervened, a secret ballot shall be taken among the employees of the bargaining unit to determine whether the employer's best offer shall be accepted. If the offer is accepted it is binding for a year from the appointment of the mediator. If rejected it constitutes a vote in favor of binding arbitration before a board appointed by the Governor. The Board's findings become binding for a year. Strike slow-downs, etc. and violations are forbidden and injunctions are authorized.

Rhode Island: No "curb labor" legislation since 1939.

South Carolina: No "curb labor" legislation since 1939.

South Dakota: By S.D. Const. Art. VI, § 2, adopted at general election November
5, 1946, effective Dec. 14, 1946, it was provided that the right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or a labor organization. The closed shop, and apparently the union shop as well had been outlawed in 1945 by c. 80 of the Laws of that year. By S.B. 224, Laws of 1947, approved March 11 and effective July 1, 1947, the constitutional amendment of 1946 was implemented. By S.B. 226, Laws of 1947, approved March 11 and effective July 1 of that year picketing was limited, particularly where no labor dispute exists between the employer picketed and his employees. By S.B. 225 of the same date collective bargaining contracts were made enforceable by injunctive relief or other processes, and labor unions are made suable, execution limited to union assets. By c. 86, of the Laws of 1943, unions were required to file annual financial statements.

TENNESSEE: By S.B. 367, Laws of 1947, approved and effective Feb. 21, 1947, the closed and union shop is forbidden, but rights under existing contracts and their renewals and extensions are preserved.

TEXAS: By H.B. 23, Laws of April 8, 1947, effective Sept. 5, 1947, the closed and union shop, and contracts providing for them, are prohibited. The statute contains this recital: "Due to the fact that there have been widespread labor difficulties resulting from the unreasonable demands of labor unions, all of which has delayed the reconversion plan, and there being an urgent need for constructive legislation to protect the public welfare, which need is so found, there exists an emergency and an imperative public necessity that the Constitution Rule requiring bills to be read on three several days in each House shall be suspended and the same here now is suspended, and this Act shall become effective from and after its passage, and it is so enacted.” However, two-thirds of the votes of the legislature as required by the state constitution were not obtained for this provision, and hence the statute did not take effect at once. By H.B. 41, approved May 1, 1947, mass and abusive picketing were forbidden. By S.B. 167, Laws of 1947, approved June 13, secondary strikes, picketing and boycotting were forbidden. By S.B. 178, Laws of 1947, approved April 14, 1947, picketing of public utilities was limited. By H.B. 73, Laws of 1947, approved April 28 of that year, unions were made liable for damages for picketing or strikes in violation of contract. All of the foregoing statutes contain emergency clauses, none of which took effect because of failure to get the necessary two-thirds majority. Hence all these statutes will become effective Sept. 5, 1947. Statutes providing for annual reports of labor unions giving their officers and their financial transactions, requiring annual elections, forbidding financial contributions, etc. became effective August 10, 1943, TEX. ANN. REV. CIV. STAT. (Vernon, Supp. 1946) Art. 5154a. By H.B. 22, Laws of 1947, approved May 23, 1947 and effective ninety days after the adjournment of the regular 1947 session of the legislature, the written consent of each employee affected was made necessary for the check-off. An emergency clause failed a two-thirds vote.

UTAH: By H.B. 36, Laws of 1947, effective May 13, 1947, Utah forbade secondary boycotts, picketing, boycotting or any other “overt concomitant of a strike” unless a majority in a collective bargaining unit shall have voted by a secret ballot to call a strike. Annual registration of unions with a statement of their officers and affiliations is required by UTAH CODE ANN. (1943) § 49-13-1 and 4.

VERMONT: No “curb labor” legislation since 1939.

VIRGINIA: By c. 2 of the Laws of 1947, approved Jan. 1 and in effect April 30 of that year, the closed and union shop is forbidden. Existing contracts, but not the renewals, are excepted. Picketing by non-employees is forbidden, by VA. CODE (Michie, et al., Supp. 1946) § 4711a, approved March 25, effective June 18 of that year. Strikes of public employees result in termination of employment and ineligibility of re-employment for twelve months by VA. CODE (Michie, et al., Supp. 1946) § 2695h, approved March 27, effective June 18. By H.B. 6-2, Laws of 1947, effective Jan. 29, 1947, the Governor is authorized to take over public utilities in the case of emergencies and operate them by the Commonwealth. Where the utilities are being operated by the Governor, picketing or interference with his efforts to secure personnel are forbidden.

WASHINGTON: No “curb labor” legislation since 1939.

WEST VIRGINIA: No “curb labor” legislation since 1939.

WISCONSIN: By its Employment Peace Acts, c. 57, Laws of 1939, WIS. STAT. (Bro-
cidedly the doctrine of judicial tolerance for legislative experiment, established
after a long struggle by the Supreme Court in 1937, will now be put to the
test. When these new laws come before the Supreme Court, will it still keep
its hands-off attitude? Or will some of this legislation seem to threaten civil
liberties, and will the justices who have so stoutly upheld the Witnesses, the
editors accused of contempt, the union organizer who sought to speak
without a license, and the accused not given a reasonable chance to defend
himself, again speak up to invalidate the "curb-labor" legislation? This, it
seems to me, is the most important of current constitutional issues.

II

Two questions seem pretty well settled. The wide extent of federal power
over interstate commerce has not only been the subject of so many decisions
that it is not likely to be attacked successfully, but furthermore, the very
groups who are interested in upsetting the Taft-Hartley Act are strongly in

sard, 1945) § 111.01 et seq., Wisconsin enacted a comprehensive labor relations regu-
lation which was sustained as construed by the Wisconsin courts not to forbid peaceful
picketing, etc. in Hotel Employees' Local v. Board, 315 U. S. 437, 62 Sup. Ct. 706
(1942). This statute was amended by c. 465 of the Laws of 1943 and by Laws of 1945,
c. 424, 504; 43.08 (2). As so amended, the statute makes "unfair" the violation of a col-
clective bargaining agreement, picketing if not an exercise of constitutionally guaranteed
free speech, boycotting or any other "overt concomitant of a strike" unless a majority
of the employees of the bargaining unit of the employer have voted by secret ballot for a
strike. The Wisconsin Employment Relations Board may order an unfair practice
stopped. This order may be enforced by court proceedings. See International Brother-

WYOMING: No "curb labor" legislation since 1939.

FEDERAL: This article discusses at some length the Lea Act, Act April 16, 1946, 60
Stat. 89, 47 U.S.C.A. § 506 (1946), and the Taft-Hartley Act, or Labor-Management
"curb labor" laws would be complete without mention of the Portal-to-Portal Pay Act,
May 14, 1947, c. 52; 29 U.S.C.A. § 251-262 (1947). This statute was passed to counter-
act the effects of Anderson v. Mt. Clemens Pottery Co., 328 U. S. 680, 66 Sup. Ct. 1187
(1946) which had been followed by suits for several billions of dollars against employers
for pay for time spent at the place of work but before directly productive work began
or after it ended. The new statute presents an interesting problem about the constitution-
ality of those provisions rendering certain existing claims non-assignable, and with-
drawing jurisdiction of suits on them from both state and federal courts. This question
is not one on which the Supreme Court took a position in 1937; and so is a little aside
from the main current of this paper. Perhaps I should also mention the "Anti Racketeer-
ing Act," 60 Stat. 420, 18 U.S.C.A. § 420 (Supp. 1946), making it a federal crime to ob-
struct interstate commerce by robbery or extortion. No one would object to this on its
face; but it originated in resentment at what were considered by some to be labor tactics.

34See notes 19 and 20 supra.

35Pennkamp v. Florida, 328 U. S. 331, 66 Sup. Ct. 1029 (1946); Bridges v. California,
(1947).


The cases are very numerous. The most recent is cited in note 22 supra.
favor of the old National Labor Relations Act, the Fair Labor Standards Act and similar legislation dependent on the same commerce power. There will be no effort made by them, I think, to cut off the limb they sit on. For the same reason the cry of "class legislation" is not apt to be raised about laws dealing only with the relations of labor and management. Even if it were conceivable that this point had merit, it would, if asserted, reflect adversely on much legislation of great value to organized labor. But the "right to strike," the right of any man to express himself about a labor issue by proper picketing or otherwise, the right of any man to work or quit as he sees fit, alone or with his friends,—all these are apt to be argued by those who uphold the cause of labor; and on the other hand the iniquity of interference by the federal courts with duly enacted legislation is apt to be a cry raised by partisans of management, who prior to 1937 found judicial supremacy all to the good. To almost all of us, reasons are less important than results.

It was a new thing to read, on December 3, 1946, of a nationally prominent labor leader saying, "Thank God for the Federal Court." The gentleman who is said to have made this observation on the occasion of his winning the first round in an important lawsuit, was Mr. James C. Petrillo, President of both the American Federation of Musicians and of its Chicago local union. The United States District Court had just declared unconstitutional a statute of which he disapproved. Mr. Petrillo had been much in the newspapers for a long time. The New York Times index has a heading "Music"; one who consults the 1946 volumes under this topical heading sees occasional references to new symphonies or rising composers; but month after month "Labor" is far and away the biggest item, and Mr. Petrillo is the main topic in it. He was aggressively insisting that musicians have more jobs; and in general was decrying a tendency to substitute canned music for live players over the radio. The efficiency of his control over his unions had aroused some adverse sentiment, and in April Congress passed and the President signed the Lea Bill, sometimes called the "Anti-Petrillo Act." This statute

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40See note 39 supra. The text of the statute, so far as is here important, is printed in the report of the case. The matter aroused strong feelings in Congress. Representative Lea, from the Committee on Interstate and Foreign Commerce in the house, submitted a report (H.R. Doc. No. 1508, 79th Cong., 2d Sess. (1946) to accompany H.R. 5117) condemning Mr. Petrillo by name, describing some of his activities, and saying, among other things, "The perpetration of the offenses penalized by this bill involves moral turpitude akin to that of larceny, embezzlement, the acquisition of another's property by false pretenses, racketeering and extortion." Representative Marcantonio of the same Committee printed his minority views in Part 2 of Report 1508. He criticized the lan-
makes it a crime to constrain a licensee of the Federation of Musicians to employ or agree to employ in the broadcasting business any person or persons "in excess of the number of employees needed by such licensee to perform actual services."

The question whether a live musician or an inanimate disc makes music over the radio is probably not of profound importance to the state of the whole nation. But the Lea Act was the first piece of federal "curb labor" legislation to be passed by the Congress since the days of the New Deal. Its fate might give a clue to other, and broader legislation.

A challenge to its constitutionality followed very shortly after the law was passed. In June, 1946, Mr. Petrillo was charged by information in the United States District Court for the Northern District of Illinois with violating the Lea Act. The information stated that although station WAAF in Chicago had, on May 28, 1946, all the employees it needed for the operation of its broadcasting facilities, the defendant Petrillo:

"... wilfully, by the use of force, intimidation, duress and by the use of other means, did attempt to coerce, compel and constrain said licensee to employ and agree to employ in connection with the conduct of its radio broadcasting business, three additional persons not needed by said licensee to perform actual services, in the following manner, to wit:

"By directing and causing three musicians, members of the Chicago Federation of Musicians, theretofore employed by the said licensee in connection with the conduct of its broadcasting business, to discontinue their employment with said licensee;

"By directing and causing said three employees and other persons, members of the Chicago Federation of Musicians, not to accept employment by said licensee; and

"By placing and causing to be placed a person as a picket in front of the place of business of said licensee."

The form of this information is interesting in the light of the judicial opinions later written about it. Petrillo is charged with three sorts of wrongdoing—directing and causing three musicians employed by WAAF to quit, directing and causing those three, and other persons, not to accept employment by WAAF, and placing and causing to be placed a picket in front of WAAF's place of business,—all in order to attempt to coerce, compel and constrain WAAF to employ three additional persons not needed in the broadcasting business.

guage of the majority report, spoke of the legislation as penalizing the legitimate methods and objectives of labor, and said it clearly impaired the constitutional freedom of speech, press and action.
The defendant promptly moved to dismiss the information on constitutional grounds. He contended that the First, Fifth, Tenth, and Thirteenth Amendments to the Federal Constitution were severally sufficient to entitle him to the relief he sought. On December 2, 1946, Judge La Buy ordered the indictment dismissed and the defendant discharged.

The District Court opinion describes several infirmities in the statute. A prohibition of employment of pressure to compel hiring help “in excess of the number of employees needed” is too vague a standard, said the Court,\(^{41}\) to survive under the federal due process clause: A man of common intelligence could only guess at its meaning. He could not tell definitely what was forbidden. The Supreme Court in 1939 had held that a statute attempting to make it criminal to be a member of “a gang” laid down too vague a standard to enforce,\(^{42}\) and the same defect in the Lea Act was fatal to it.

The District Court also found other constitutional flaws. The employer could admittedly hire as many people as he chose, and the opinion finds that any law purporting to forbid the defendant to urge, by peaceful picketing, the employment of more help, was invalid as a curtailment of the guarantee of free expression in the First Amendment. Furthermore the Thirteenth Amendment protects the right of any man to quit work whenever he pleases; and the statute as here applied, purported to curtail the exercise of this right “through a group organization.” Then too the statute offended as class legislation. It applied only to employees of broadcasting stations, not to other sorts of workers. It denied to radio employees the equal protection of the laws impliedly guaranteed by the due process clause of the Fifth Amendment. The Tenth Amendment objection was not upheld. Indeed it is difficult to understand why it was ever raised, as success in this contention would seriously threaten labor’s gains under other and more sweeping legislation. Judge La Buy clearly saw the point. He wrote, “This court does not hold that Congress is powerless to act or that the declared objectives of this law are beyond the reach of Federal legislative control. The only question before the court is the constitutional aspect of this statute as it was written by Congress. On this question the court is of the opinion that the statute is unconstitutional for the reasons above stated.”

The District Court in the Petriello case then, found that a problem in the civil liberties field was presented. Its attitude was governed by the “freedom” exception to the new judicial self-limitation of 1937. The primary consti-

\(^{41}\)See note 135 infra for a prototype of this statute in 1778.

tutional question, it found, was one of freedom, not economics. This same choice between doctrines in any given case may well turn out to be the principal constitutional task of the Supreme Court in the years just ahead.

The choice has not yet been clearly made in the *Petrillo* case. On June 23, 1947, the Supreme Court reversed the District Court and remanded the case for further proceedings. Its opinion however deals principally with one of those puzzling questions of procedure which arise from the Court's guiding principle of not passing on a constitutional issue until the state of the record makes it necessary. Said Justice Black, who wrote the prevailing opinion:

"We have consistently refrained from passing on the constitutionality of a statute until a case involving it has reached a stage where the decision of a precise constitutional issue is a necessity. The reasons underlying this principle, and illustrations of the strictness with which it has been applied, appear in the opinion of the Court in *The Rescue Army v. Municipal Court*, 331 U. S. —, 67 S. Ct. 130, and cases there collected. And in reviewing a direct appeal from a District Court under the Criminal Appeals Act, supra, our review is limited to the validity of construction of the contested statute. For ‘The Government's appeal does not open the whole case.’ *United States v. Borden Co.*, 308 U. S. 188, 193, 60 Sup. Ct. 182, 186, 84 L. Ed. 181."

The Court found that the record necessarily presented for decision the question of the vagueness of the expression "numbers of employees needed by such licensee," because if the statute was invalid for this reason it would make the section in question "void in toto, barring all further actions under it, in this, and every other case." And on this issue the Supreme Court reversed the District Court.

"It would strain the requirement for certainty in criminal law standards too near the breaking point to say that it was impossible judicially to determine whether a person knew when he was wilfully attempting to compel another to hire unneeded employees. . . . The Constitution has erected procedural safeguards to protect against conviction for crime except for violation of laws which have clearly defined conduct thereafter to be punished; but the Constitution does not require impossible standards. The language here challenged conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. The Constitution requires no more."43

43*United States v. Petrillo*, — U. S. —, 67 Sup. Ct. 1538 (1947). When this decision was announced, Mr. Petrillo said, "The Supreme Court has spoken. This is my country and the Supreme Court makes the final ruling on its laws. No one will ever say that Jim Petrillo fought his country or the Supreme Court. I thought that I had the law on my side, and I made the best fight I knew how. The Supreme Court has spoken and I bow to its dictates." The words are quoted in an editorial at page 801, Vol. 33, American Bar Association Journal, for August 1947, commending the speaker.

44Id. at 1542.
Likewise the Court found that the "equal protection" point was properly before it, for this was a contention sustained by the District Court "as a ground for holding the statute unconstitutional as written." The Supreme Court found that the prohibition of the statute against coerced hiring of broadcasting employees alone was not a sufficient ground for holding the statute bad.

"... it is not within our province to say that because Congress has prohibited some practices within its power to prohibit, it must prohibit all within its power. Consequently, if Congress believes that there are employee practices in the radio industry which injuriously affect interstate commerce, and directs its prohibitions against those practices, we could not set aside its legislation even if we were persuaded that employer practices also required regulation. See National Labor Relations Board v. Jones & Laughlin Steel Corporation, 301 U. S. 1, 46. Nor could we strike down such legislation, even if we believed that as a matter of policy it would have been wiser not to enact the legislation or to extend the prohibitions over a wider or narrower area."4

The reliance on the Jones & Laughlin case is interesting. What was sauce for the goose in 1937, says the Court, is sauce for the gander ten years later. The Petrillo opinion clearly shows that the Court finds that Congress has power to regulate employment practices which affect interstate commerce, alike when distasteful to labor as when welcomed by it. But does the Lea Act infringe the freedoms guaranteed by the First Amendment or the Thirteenth? Disappointingly enough we don't know yet! For the Supreme Court here decides only the questions raised by "the statute as written," and declines for the present to pass on the "statute as it was proposed to be applied by the information as it then read."46 The District Court had decided something not before it. "The question as it was decided by the District Court was not the question raised by the motion to dismiss—whether the statute is invalid on its face—but whether it is invalid as it is proposed to be applied." The information might be amended before trial. The statute might never be applied to convict a defendant because he peacefully posted a picket or caused three employees to quit or refuse to accept a job. "Thus this case had not reached a state," said Mr. Justice Black, "where the decision of a precise constitutional issue was a necessity." At any rate, thus far the parties do not know whether the constitutional guarantees of free speech or freedom from compulsory labor have been infringed by the Lea Act.

4Ibid.
46See for a discussion of constitutional challenges of the "statute as written" as compared to the "statute as applied," Mr. Justice Frankfurter's dissent in Fleming v. Rhodes, U. S. —, 67 Sup. Ct. 1140, 1144 (1947).
On the long view, it is probably correct to make decisions on constitutional questions only when they are inevitable, although the delay produces disappointment. The Supreme Court is not a debating club. This rule makes the determination of the constitutionality of statutes a little slower in many cases and on balances that may turn out to be a good thing. At any rate the Petrillo case furnished this procedural guide: if Congress uses in a statute words which are themselves claimed to violate constitutional immunities, the Supreme Court is ready on a direct appeal from a dismissal of an information to say whether the words of Congress offend or not. But if before trial it appears that the words of the statute may or may not violate constitutional immunities depending on how they are finally applied in the specific case, no constitutional question is yet presented which under the Criminal Appeals Act is appealable by the United States directly to the Supreme Court.

"Further pleadings and proof might well draw the issues into sharper focus making it unnecessary for us to decide questions not relevant to determination of the constitutionality of the statute as actually applied. Thus this case has not reached a stage where the decision of a precise constitutional issue was a necessity. Consequently, we refrain from considering any constitutional questions except those concerning the Act as written. We do not decide whether the allegations of the information, whatever shape they might eventually take, would constitute an application of the statute in such manner as to contravene the First Amendment. We only pass on the statute on its face; it is not in conflict with the First Amendment."

The man in the street, whose summary of a case is often more pithy than that of a lawyer, would say that Petrillo has to stand trial, and the Supreme Court has not yet decided whether under the Constitution a man can be put in jail for picketing his boss to compel "featherbedding." Under the Supreme Court's self-limitation, however urgently a test case is desired, if the statute is so worded that it may or may not be applied in a constitutional manner,

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47 In Rescue Army v. Municipal Court, — U. S. —, 67 Sup. Ct. 1409, 1421 (1947). Mr. Justice Rutledge, treating of the policy of not deciding constitutional questions until necessity compels it, wrote: "Its execution has involved a continuous choice between the obvious advantages it produces for the functioning of government in all its coordinate parts and the very real disadvantages, for the assurance of rights, which deferring decision often entails. On the other hand, it is not altogether speculative that a contrary policy, of accelerated decision, might do equal or greater harm for the security of private rights, without attaining any of the benefits of tolerance and harmony for the functioning of the various authorities in our scheme. For premature and relatively abstract decision, which such a policy would be most likely to promote, have their part too in rendering rights uncertain and insecure."


the defendant has to stand trial before he can find out the validity of the statute as applied in his own case.

III

The President of the United States, in his message on the veto of the "Labor-Management Relations Act, 1947," spoke of it as "the most serious economic and social legislation of the past decade." War legislation aside, this appraisal is just. The statute deals with controversies in which calm reasonableness has never been common, and it has produced bitterly resentful outcry from labor ranks and from the dissenters in Congress. The language of the Minority Report of the House Committee on Education and Labor concerning Representative Hartley's Bill shows the intensity of the emotions aroused by the bill. Says the minority:

"It does not ... require mature reflection to realize that these proposals are deliberately designed to wreck the living standards of the American people.... This bill does not merely wipe out labor's gains under the beneficent administration of President Roosevelt; it turns the clock of history back at least a century and a half and eliminates safeguards and protections which both Republican and Democratic Congresses have sponsored for generations.... It only proposes to swell the coffers of gigantic industrial combinations by rendering labor impotent."

Mr. A. F. Whitney, President of the Brotherhood of Railroad Trainmen, spoke of the passage of the Taft-Hartley Act as putting the country on the threshold of fascism. Mr. David Dubinsky, President of the International Ladies Garment Workers Union called it "a snake-bite into the heart of our American liberties."

Discussion of the constitutionality of the new Act is difficult under these emotional circumstances. When people are angry and suspicious, they often do not clearly distinguish between criticism of the wisdom of congressional policy and judgment whether it exceeds the power of Congress. A man who believes that the Taft-Hartley Act is a "slave-labor law" will not easily understand how it can be constitutional. Unwise and intemperate the new legislation may be, or calm and statesmanlike in its fairness to all; loud enough voices will present both arguments. What I here discuss is a much narrower question. Since 1937 we have had laid down by the Supreme Court new

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50Doc. No. 334, 80th Congress, 1st Session.
definitions of the extent of and limitations on federal power. These were stated in cases upholding the constitutionality of a broad new program of legislation, sought by labor and agreeable to it, and enacted by a Congress anxious to satisfy labor’s wants. Will these new definitions of constitutionality hold good for legislation, passed over labor’s violent objections by a Congress anxious to “curb labor”? And will the latitudinarian view of state legislation, exemplified in the *Nebbia* case, permitting states to experiment in the social and economic field, prevail even when the state laws are “anti-labor”?

Test cases will undoubtedly arise, indeed several cases involving state statutes have already arisen in state and federal courts. On June 26, 1947, Mr. A. A. Berle, Jr., New York State Chairman of the Liberal Party announced that his party would “join in contesting in the Courts the unconstitutional provisions” of the Taft-Hartley Act. Labor leaders are reported to plan tests, particularly by publishing articles in union newspapers, of Section 304 of that statute which forbids a labor organization to make an “expenditure in connection with any election” at which presidential electors or Senators or Congressmen are to be voted for. In the *Petrillo* case, the defendant in the District Court relied on the First, Fifth, Tenth and Thirteenth Amendments, and presumably the same constitutional objections are possibilities in a case involving the Taft-Hartley Act.

Summarizing a statute is difficult and dangerous; but as the Labor-Management Relations Act, 1947, though universally discussed, is widely unread some outline of its contents seems advisable before hazarding a guess as to its constitutionality in part or in whole. The Act applies only to labor matters affecting interstate and foreign commerce, but this covers most of the im-

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55 See A. F. L. v. Reilly, 7 Lab. Cas. 61,761 (Colo., 1943); Alabama State Federation of Labor v. McAdory, 246 Ala. 1, 18 S. 2d 810 (1944), *cert. denied* with opinion 325 U. S. 450, 65 Sup. Ct. 1384 (1945); Hotel Alliance Local No. 122 v. Wisconsin Employment Relation Board, 236 Wis. 329, 294 N.W. 632 (1940), *aff'd*, 315 U. S. 437, 62 Sup. Ct. 706 (1942); A. F. L. v. Watson, 327 U. S. 582, 66 Sup. Ct. 761 (1946), *reversing* 60 F. Supp. 1010 (D.C. Fla. 1945), and declining at the time to pass on the constitutionality of a Florida constitutional amendment limiting the closed shop. The Supreme Court has not passed on the merits of the constitutionality of any of the “curb-labor” legislation passed since 1939, except in the *Petrillo* case. See notes 40 and 43 *supra*.


58 The statute is Pub. L. No. 101, 80th Cong., 1st Session (June 23, 1947). Citation of sections of the statute are puzzling as it contains amended matter from other existing statutes which have their own numeration. In the summary of the Labor-Management Relations Act of 1947 in the text, references are to U. S. Code sections.
Important business in the United States. It begins with a declaration of policy stressing the protection of the public interest. The "findings" set out by Congress in Section I of the National Labor Relations Act are amended to recite that some of the blame for stoppages of the free flow of commerce rests on labor as well as industry. The National Labor Relations Board is increased in membership from three to five, and is given a General Counsel who is to have "final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board." There is added to old Section 7 of the Wagner Act, which guarantees the right of employees to organize, a new right to refrain from organizing if they so desire. Section 8 of the old Act which defined only unfair labor practices by employers, is amended by adding a list of unfair practices by labor organizations or their agent. "Coercion" of employees in the exercise of their rights to organize or refrain from organization; causing an employer to discriminate against a man dropped from a union (except for failure to pay dues or initiation fees); refusing to bargain collectively; striking or refusing to handle goods where an object is to oblige an employer or self-employed person to join a union or to oblige any person not to do business with someone else, forcing an employer to deal with a union not certified by the Board as the bargaining representative of his employees, or to deal with one union where another has been certified, or forcing an employer (other than one who is disobeying a Board order) to assign work to one union, craft or class rather than another; requiring excessive initiation fees; requiring payment for services not performed or to be performed, all are declared "unfair labor practices by employees."

The expression of views, argument, or opinion in any form is declared not to be an unfair labor practice, as long as there is no threat of reprisal or force or promise of benefit.

There is a definition of collective bargaining as meaning a meeting and conferring in good faith; and, when agreement is reached, its reduction to a writing; but there is stated to be no obligation to agree.
Restrictions are imposed on strikes intended to bring about the revision of an existing contract. Restrictions are imposed on the power of the Board to unite professional employees, or craft units, with other bargaining units. Plant-guard unions may not be included in or affiliated with unions admitting other types of employees.67

Employers are given standing to apply for an election by their employees, to choose a union to represent them. Formerly only employees could apply except in rare instances.68

Unions must file with the Secretary of Labor and refile annually rather elaborate reports concerning their membership, officers and finances, in order to have any standing before the Board; and the Board is not to help any union "unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods."69

The Board is empowered to hear complaints of unfair labor practices, take evidence "in accordance with the rules of evidence applicable in the District Courts of the United States" and to order redress, including back pay to be paid by unions as well as employers. The Board's power to petition the appropriate Circuit Court of Appeals to enforce its orders is continued. District Courts, as well as the Circuit Court of Appeals, on appropriate application, may grant temporary injunctions, pending action of the Board. There is a statement disclaiming any intention to supersede state enactments by implication. To carry out its functions, the Board is to have wide investigatory powers.70

Supervisory personnel (foremen for example) are excluded from the employee class for purposes of local or national laws relating to collective bargaining.71

68 Id. at § 159 (c) (1) (B).
69 Id. at § 159 (f), (g) and (h).
70 Id. at §§ 160-162.
71 Id. at § 164. This section overrules Packard Motor Car Co. v. N.L.R.B., — U.S. —, 67 Sup. Ct. 789 (1947).
The Conciliation Service of the Department of Labor is severed from that Department and set up as an independent agency called the "Federal Mediation and Conciliation Service." Where a threatened or actual strike, in the President's opinion, imperils the national health or safety, he may appoint a Board of Inquiry, and on receiving its report may direct the Attorney General to petition a District Court for an injunction. In that case the Norris-LaGuardia Act shall not apply. The injunction, if granted, shall stay in effect for eighty days, during which the employees have an opportunity to vote on whether they will accept the employer's last offer. When the results of the ballot are certified, or the strike is settled, whichever happens sooner, the injunction is dissolved and the President tells the whole story to Congress. But the "national emergency" provisions and the Conciliation Service arrangements are not applicable to matters covered by the Railway Labor Act.

Labor unions are authorized to sue, and made subject to suit in the federal courts, regardless of any jurisdictional sum. Only union assets, not assets of individual members, are subjected to execution. At this point occur these interesting and somewhat obscure words:

"For the purposes of this section, in determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

The check-off must be authorized in writing by each employee affected. Deductions for welfare trust funds are regulated and the administration of the funds is to be made by representatives of the employer, the employee, and neutral persons selected by the two.

Certain secondary boycotts and jurisdictional strikes are made actionable wrongs, for which the wrongdoer is liable for damages in the federal courts.

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72Id. at §§ 171-174.
75Id. at § 185.
76Id. at § 185 (e). The obscurity largely disappears when this section is read with United Brotherhood v. United States, — U. S. —, 67 Sup. Ct. 775 (1947) and § 6 of the Norris-LaGuardia Act, 47 Stat. 70 (1932), 29 U.S.C. § 106 (1947). The new section modifies the rule there previously declared which required proof of actual participation in unlawful acts by a union member or officer or actual authorization of his acts, or ratification after actual knowledge, for unions or their members to be held liable for the acts of other members or officers.
77Id. at § 186.
78Id. at § 187.
Unions (like corporations) are forbidden "to make a contribution or expenditure in connection with any election," primary or otherwise, for a federal office.\textsuperscript{79}

Strikes by government employees are made unlawful, will cost the strikers their jobs, their civil service status, and three years of eligibility for federal employment.\textsuperscript{80}

A joint Senate-House Committee on Labor Management Relations is set up to investigate and report to Congress on how labor laws are working out.\textsuperscript{81}

The individual right to quit work is carefully restated, and stoppages because of abnormally dangerous conditions are carefully excluded from the term "strike."\textsuperscript{82} The conventional separability clause undertakes to salvage the constitutional portion of the Act if some part is invalidated by the Supreme Court.\textsuperscript{83}

This then is the new labor law, so praised and damned by its advocates and its opponents. Can it stand up in court?

The most vulnerable points are those affecting civil liberties; and of these the amendments to the Federal Corrupt Practices Act seem most conspicuous. This statute, as amended, provides:

"It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization to make a contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person to accept or receive any contribution prohibited by this section. Every corporation or labor organization which makes any contribution or expenditure in violation of this section shall be fined not more than $5000; and every officer or director of any corporation, or officer of any labor organization, who consents to any contribution or expenditure by the corporation or labor organization, as the case may be, in violation of this section shall be fined not more than $1,000 or imprisoned for not more than one year, or both. For the purposes of this

\textsuperscript{81}Id. at §§ 191-197.
\textsuperscript{82}Id. at § 143.
\textsuperscript{83}Id. at § 144.
section 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.\textsuperscript{84}

The amendment to this section which forbids "any expenditure" where formerly only "contributions" were forbidden has particularly irritated union leaders. Many labor people genuinely feel that the ordinary press gives an unsympathetic account of labor problems, and they welcome publications financed by union funds. The opportunity to influence elections is certainly diminished if such publications can only be carried on by individuals, disassociated from unions in that activity.

On February 10, 1947, the Supreme Court decided \textit{United Public Workers of America (C.I.O.) v. Mitchell}.\textsuperscript{85} The case arose under the Hatch Political Activity Act.\textsuperscript{86} The plaintiff union sought, and failed, to enjoin the Federal Civil Service Commission from enforcing the provisions of that statute which seriously restrict the political activity of federal employees. One would suppose that the power of the government to make rules for the political behavior of its employees would be fairly clear, yet of seven justices who participated in the decision, three (Justices Black, Rutledge and Douglas) dissented. The question of contribution or "expenditures" of union funds was not involved; the significance of the dissents lies in the tone of the opinions. They disclose a real anxiety lest large groups of citizens be deprived of a normal means of influencing public policy.

No corporation has contested the validity of U.S.C. Tit. 2 § 251 in the Supreme Court, so far as the decisions show. The only opinion referred to under this section in the United States Code Annotated is \textit{United States v. Brewers Ass’n},\textsuperscript{87} in which a District Court found no trouble in upholding the constitutionality of the section, which then forbade only "contributions."

One can perhaps assume that by an appropriate Act of Congress federal corporations may constitutionally be prohibited from playing any politics, and any corporation may be prohibited from playing federal politics. Are

\textsuperscript{84}61 \textit{Stat.} — (1947), 2 U.S.C. § 251 (Supp. 1947). The amendment made to this section by the Taft-Hartley Act consisted in forbidding "expenditures" in addition to "contributions" (which were already barred whether made by corporations or by unions), and in a reference to primary elections and political conventions.\textsuperscript{85— U. S.} — 67 Sup. Ct. 556 (1947).

\textsuperscript{86}60 \textit{Stat.} — (1946), 18 U.S.C. § 61 (h) (Supp. 1946). The statute forbids any officer or employee of the executive branch of the government (except certain policymaking officers) to "take any active part in political management or in political campaigns."

\textsuperscript{87}239 Fed. 163 (D.C. Pa. 1916).
the same considerations really applicable to labor unions? In some ways, yes. A corporation is a group of human beings organized for joint effort; so is a union. A corporation is in many respects treated, by a legal fiction, as if it were a single being. So, under this very act is a union. But around a labor union is grouped a whole complex of emotions, memories, allegiances, and loyalties that do not so readily attach to a business corporation. To the best of my information "Germinal" and "Waiting for Lefty" have as yet no literary or dramatic counterparts whose theme is the worker's loyalty to a fine old Power and Light Company, or a kindly National Bank.

In 1943 Mr. R. J. Thomas, President of the United Automobile Workers, went down to Texas and made a speech to recruit some members for a local union. Texas had a statute requiring one who solicited membership in a union to get a license, and Mr. Thomas intentionally omitted to get one. Ultimately the Supreme Court decided that he was not obliged to get a license because the Texas statute was in conflict with the Fourteenth Amendment, which in turn guaranteed against state interference the same privileges of free expression protected against federal invasion by the First Amendment.

Of course, any case can be distinguished from any other case, and Mr. Thomas making a speech to advise people to join a local, and being paid by his union to do it, is not the same thing as Mr. Thomas publishing an article in a newspaper (supported by a union) to advise people not to vote for a congressman. But is it so very different? If Texas cannot stop the one, can Congress stop the other? There is an arguable question about Section 304 of the Taft-Hartley Bill; and a careful lawyer cannot without a little squeamishness brisly say that the Supreme Court will brush off any objection raised under the First Amendment.

Alabama, in 1923, passed a statute purporting to make picketing a misdemeanor. In 1940 the Supreme Court found that this law, as applied to punish a man named Thornhill, for acting as a peaceful picket in a labor dispute, was invalid under the Fourteenth Amendment. Said Mr. Justice Murphy,

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89A novel by Emile Zola, describing the labor movement in Northern France.
90A play by Clifford Odets, about the labor movement in the United States.
91An apparent exception to this sweeping, and therefore presumably inaccurate generalization is the recent moving picture called "It's a Wonderful Life," in which a group of employees rallied 'round a benign though financially embarrassed Building and Loan Society. However the villain of the piece was the town's leading banker who, though abundantly solvent, was a moral leper; he secretly filched the B and L's money and got away scot-free, thus depriving the audience of a wholesome lesson.
writing for the Court, "In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution." Mr. Justice McReynolds alone dissented. The long series of Jehovah's Witnesses cases makes essentially the same point. In effect, newspaper contempt cases are founded on the same policy.

The Taft-Hartley Act, in the list of unfair employee practices and in the prohibition of boycotts and other unlawful combinations, forbids unions to "induce or encourage" certain activities hitherto customary in the labor field, activities which any man is surely free to engage in as an individual if he wishes. The statute expressly disclaims any intention to require any individual to work against his will; and no statute is needed to assure a man that in peacetime he cannot be compelled to handle any article he chooses not to handle provided he is willing to risk a discharge. Yet Section 8 of the Wagner Act as now amended and Section 303 of the Taft-Hartley Act prohibit the employee to induce or encourage such acts by groups. This prohibition would seem to clash directly with the guarantee of free expression embodied in Thornhill v. Alabama, if it were not for Section 8C of the newly amended Wagner Act, which provides, "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit."

There is no similar saving clause in Section 303A of the Taft-Hartley Bill, however, making one who "induces or encourages the employees of any employer" to engage in boycotting or jurisdictional strikes liable to a damage action in the federal courts. And as the Supreme Court left undecided the question of the prosecution of Petrillo for picketing Station WAAF, one cannot be completely sure that some parts of the new Taft-Hartley Bill may not fall for the same reason as the Alabama anti-picketing statute in Thornhill's case. But only a rash prophet would say so with

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95 See notes 19 and 20 supra.
96 See note 35 supra.
98 Id. at § 188.
99 See note 94 supra.
101 Id. at § 187 (a).
102 For an Alabama Supreme Court opinion holding part of her Bradford Act, Ala. Code (Supp. 1943) tit. 26, §§ 376 et seq. unconstitutional under the 14th Amendment, on
confidence, and on the whole, it seems unlikely. The Supreme Court upheld
the application of the Wagner Act to find unfair labor practices in statements
made by employers which were, at least on their faces quite uncoercive. What
the government could thus forbid when the second Virginia Electric Power case was decided in 1943, the government probably can forbid today, even
though today the labor and not the management side in the controversy is
now asking protection for its right of free expression.

Another provision of the new statute which may well be attacked is the
requirement of the amended Section 9(h) of the Labor Relations Act that
if a union is to qualify for relief under that statute, each of its officers must
keep on file an affidavit "that he is not a member of the Communist Party
or affiliated with such party, and that he does not believe in, and is not a
member of or supports any organization that believes in or teaches, the over-
throw of the United States Government by force or by any illegal or un-
constitutional methods." Statutes making membership in the Communist
Party a disqualification of some sort are not uncommon now. The Supreme
Court has not yet taken a position on the constitutionality of imposing dis-
qualification because of membership without more.

In Schneiderman v. United States, decided in 1943, the Court reversed a
judgment cancelling the naturalization of an admitted member of the Com-
munist Party. The Court held that the prosecution had failed to prove that
the Communist Party of the United States advocated violent overthrow of
the government. Mr. Justice Murphy, writing for the Court, said:

"For some time the question whether advocacy of governmental over-
throw by force and violence is a principle of the Communist Party of the
United States has perplexed courts, administrators, legislators, and stu-
dents. On varying records in deportation proceedings some courts have
held that administrative findings that the Party did so advocate were not
so wanting in evidential support as to amount to a denial of due process,
others have held to the contrary on different records, and some seem to
have taken the position that they will judicially notice that force and
violence is a Party principle. This Court has never passed upon the ques-
tion whether the Party does so advocate, and it is unnecessary for us
to do so now.\textsuperscript{105}

In Bridges v. Wixon,\textsuperscript{106} decided in 1945, the Supreme Court granted to

\textsuperscript{103}Virginia Electric and Power Co. v. N.L.R.B., 319 U. S. 533, 63 Sup. Ct. 1214 (1943).
\textsuperscript{105}320 U. S. 118, 148, 63 Sup. Ct. 1333, 1347 (1943).

the ground that it impaired the workers' right to strike and boycott, see Alabama State Federation v. McAdory, 246 Ala. 1, 18 So. 2d 810 (1944), cert. denied 325 U. S. 450, 65 Sup. Ct. 191 (1945).
Harry Bridges, the Australian labor leader, a writ of habeas corpus, on the ground that there was no sufficient evidence to support a finding that he was a member of or "affiliated with" the Communist Party of America, and hence liable to deportation under a statute deeming "(c) Aliens . . . who are members of or affiliated with any organization, association, society, or group, that believes in, advises, advocates, or teaches: (1) the overthrow by force or violence of the Government of the United States. . . ." 107

The Court found in substance that the case against Bridges was not proved. He cooperated with the Communist Party but was not shown to be "affiliated with" it. They did not find the statute unconstitutional; the opinion disclaims passing on constitutional questions.

In 1944 the United States Civil Service Commission found Mr. Morton Friedman ineligible to retain a position in the War Manpower Commission on the ground that there was "a reasonable doubt as to his loyalty to the United States." The Commission's action was based mainly (so it notified Mr. Friedman) on his activities in connection with a group called American Peace Mobilization. "... It is generally recognized (the Commission wrote Mr. Friedman) that those who were prominently and actively affiliated with that organization were people who had shown sympathy with the Communist cause." The Commission also pointed out that Mr. Friedman's ideas about the propriety of the United States fighting Germany had changed when Germany attacked Russia in 1941. The District Court for the District of Columbia, to which he applied for redress, held that neither the First nor Fifth Amendments entitled him to get his job back. 108 The District Court of Appeals affirmed. 109 The Supreme Court of the United States denied certiorari. 110

The Court, then, without reversing itself can still hold if it will, under the First and Fifth Amendments, that membership in the "Communist Party," or affiliation with it, (whatever those terms may mean) by a union official is not sufficient ground to justify discrimination against the union under the Taft-Hartley Act. 111

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111This paper discusses constitutional limitations, not the strategy of union public relations. But one can't help a little curiosity as to whether labor organizations will attack the anti-communist section of the Taft-Hartley Act. The attempt would certainly start a new lot of talk about "communist-dominated unions." (Since this footnote was
There are thus parts of the new federal labor statute which might be vulnerable on the ground that they interfere with civil liberties. But the far greater part of the new legislation seems beyond constitutional attack.

Section 305 of the new Act making strikes against the United States unlawful and providing for loss of certain rights by violation echoes the *Lewis* case, in which the Supreme Court upheld an injunction against a strike in government operated coal mines. The constitutionality of Section 305 seems assured unless the *Lewis* case is wrong. Sections 206-208 however carry this idea a step beyond government employment. The United States by those sections is itself to enjoin strikes of non-governmental employees if of wide effect and if they imperil the national health or safety. The power is essentially the same as that used by the Government in *In re Debs*, when the Supreme Court sustained a contempt conviction for violation of an injunction against certain officers of the American Railway Union, and all other persons combining or conspiring with them, restraining them from stopping the business of certain interstate railroads, and enjoining them from inducing their employees to quit work in connection with interstate commerce, or the carriage of the mails. The *Debs* case has come by many to be considered a symbol of objectionable "government by injunction." But here again it is one thing to say that Congress should not pass such a law as the Taft-Hartley Act, and quite another to argue that the Constitution forbids its passage. One might think of a number of reasons why the policy of the anti-trust laws should not apply to combinations of workmen. But to argue that Sections 206-208 of the Taft-Hartley Act are unconstitutional is an argument against the constitutionality of the Sherman Act also.

At this late date there seems little prospect of successfully attacking the first written, the newspaper reports indicate considerable union feeling against the application of this section to bar from the benefits of the Wagner Act any local whose national or international officers fail to file the required affidavit.

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113140, 158 U. S. 564, 15 Sup. Ct. 900 (1895). In the *Lewis* case, — U. S. —, 67 Sup. Ct. 677, 707 (1947), Mr. Justice Frankfurter, dissenting, uses the *Debs* case as exemplum horrible.
114For a discussion of the authorities see United Brotherhood v. United States, — U. S. —, 67 Sup. Ct. 775 (1947) and Mr. Justice Frankfurter's dissent (with which the Chief Justice and Mr. Justice Burton concurred) at page 785.
general regulatory scheme of the Taft-Hartley legislation on the vague ground of "denial of due process of law,"—interference with "liberty of contract," with established ways of doing business. One would suppose that the reasons for the reduction of the former effect of the due process clause in making business regulation impossible, put forward in 1937 and earlier, were still cogent today. The new act necessarily interferes with many activities legitimate in the absence of a statute, and with many agreements otherwise valid—with an agreement for the check off, say, or for unionization of plant guards, or the closed shop itself. But one scarcely expects to hear the attorneys for a labor union argue that when the Supreme Court in 1915 decided Coppage v. Kansas, it was right; and that no legislature can, within the limits of due process, interfere with the "right" of a union and an employer to make any contract the stronger can dictate. The fight to kill the "yellow dog" contract is too recent to be forgotten. Labor gained too much in the "constitutional revolution" of 1937 to risk a loss of ground now by trying to overrule National Labor Relations Board v. Jones and Laughlin Steel Corp., which established the constitutionality of the National Labor Relations Act.

Overruling it will be necessary, if any great part of the new labor law is to be declared unconstitutional. The same objections once made to the Wagner Act by management, labor now applies to the Taft-Hartley Act. It shows partiality, we are told; it is directed against one and unduly favors the other side in the struggle between the two industrial adversaries. It interferes with the management by labor of its own affairs. "It would inject the Government deeply into the process by which employers and workers reach agreement. It would superimpose bureaucratic procedures on the free decisions of local employers and employees." Chief Justice Hughes in the Jones and Laughlin case gave the constitutional answer to the arguments of the employer then, of the employee now.

"The Act has been criticized as one-sided in its application; that it subjects the employer to supervision and restraint and leaves untouched the abuses for which employees may be responsible; that it fails to pro-

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119 The quoted words are those of the President in his message of June 20, 1947, vetoing the Taft-Hartley Bill. When the National Labor Relations Act was before the Supreme Court in 1937, counsel for Jones & Laughlin vainly argued "... a constant threat to the respondent's right to manage its own affairs... an unqualified bureau will sit as a higher court over the respondent's employment office." N.L.R.B. v. Jones & Laughlin, 301 U. S. 1, 20, 57 Sup. Ct. 615, 620 (1937).
vide a more comprehensive plan, with better assurances of fairness to both sides and with increased chances of success in bringing about, if not compelling, equitable solutions of industrial disputes affecting interstate commerce. But we are dealing with the power of Congress, not with a particular policy or with the extent to which policy should go. We have frequently said that the legislative authority, exerted within its proper field, need not embrace all the evils within its reach. The Constitution does not forbid "cautious advance, step by step," in dealing with the "evils which are exhibited in activities within the range of legislative power."  

At first glance the likeness between a public utility holding company and a labor union is not particularly striking. But when the Supreme Court, on November 25, 1946, upheld the "death sentence" section of the Public Utility Holding Company Act of 1935, it again demonstrated that the due process clause of the Fifth Amendment did not stand in the way of a decidedly vigorous and intimate control by Congress of the organization and conduct of an interstate business. The Court had foreshadowed that decision the preceding April in the North American case; and a most striking feature of the opinions of the Court, written by Mr. Justice Murphy in each case, is the reliance on precedents in labor cases. The considerations affecting the one apply to the other. Said Justice Murphy:

"It is sufficient to reiterate the well-settled principle that Congress may impose relevant conditions and requirements on those who use the channels of interstate commerce in order that those channels will not become the means of promoting or spreading evil, whether of a physical, moral or economic nature. Brooks v. United States, 267 U. S. 432, 436-437. This power permits Congress to attack an evil directly at its source, provided that the evil bears a substantial relationship to interstate commerce. Congress thus has power to make direct assault upon such economic evils as those relating to labor relations, Labor Board v. Jones & Laughlin Corp., 301 U. S. 1; Polish Alliance v. Labor Board, 322 U. S. 643; to wages and hours, United States v. Darby, supra." . . . The constitutionality of § 11 (b) (1) is also questioned from the standpoint of the due process clause of the Fifth Amendment. . . Congress has concluded from the extensive studies made prior to the passage of the Act that the economic advantages of a holding company at the top of an unintegrated, sprawling system are not commensurate with the resulting economic disadvantages. The reasonableness of that conclusion is one for Congress to determine. The fact that valuable interests may be affected does not, by

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120301 U. S. 1, 46, 57 Sup. Ct. 615, 628 (1937).
itself, render invalid under the due process clause the determination made by Congress.”

If these words can be applied to the Taft-Hartley Act much of it will stand.

To discuss the details of the state "curb labor" laws in the thirty-four states which have enacted some during the current legislative phase is beyond the bounds of this paper. Some of them may, of course, fall by reason of conflict with provisions of state constitutions which have no federal counterpart, and state judges may, without danger of contradiction by the Supreme Court of the United States, construe their state due process clauses to forbid legislation which the Fourteenth Amendment would permit. Mr. Justice Frankfurter has lately reminded us that "'The devil himself knoweth not the mind of man' and a modern reviewing court is not much better equipped to lay bare unexposed mental processes." By the same token, only a rash soul would undertake to predict what thirty-four modern reviewing courts will do. Due process for a grain elevator, to be sure, is not inevitably due process for a labor organization; one of the first lessons in constitutional law is its lack of absolutes. The advocate who seeks to uphold one of the new state labor acts in the Supreme Court can not simply point to the Mulhm v. Illinois and the Nebbia case, and relax. But aside from the possible questions of civil liberty which arise alike in state laws and in the Taft-Hartley Act, not much of the state legislation seems apt to fall as denying due process. The present Supreme Court in most matters has given the states a very loose rein.\textsuperscript{126}

\textsuperscript{123}Id. at 705, 66 Sup. Ct. at 796. If some of the Taft-Hartley Act is declared unconstitutional, can the rest stand under the separability clause? 61 Stat. — (1947), 29 U.S.C. § 144 (1947). I should not doubt it but for the strange case of Carter v. Carter Coal Co., 298 U. S. 388, 56 Sup. Ct. 855 (1936), in which Congress was held not to mean what it said in such a clause.

\textsuperscript{124}See note 33 supra.


\textsuperscript{127}129 U. S. 113 (1876). The opinion upheld state rate regulation of a grain elevator.


\textsuperscript{129}In A. F. L. v. Watson, 327 U. S. 582, 66 Sup. Ct. 761 (1946), the Supreme Court had before it the propriety of a district court order dismissing a bill to enjoin, as unconstitutional, the Florida anti-closed-shop constitutional amendment. It reversed and remanded to the District Court to hold the bill until the state courts shall have construed the Florida constitutional amendment. Here again Holmes' words are apt. "There is nothing I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several states, even though the experiments may seem futile or even noxious to me and to those whose judgment I most respect." Dissent in Truax v. Corrigan, 257 U. S. 312, 42 Sup. Ct. 124 (1921).
One provision of the Taft-Hartley Bill to which no just objection can be made, constitutional or other, is Title IV, creating a joint committee of the Senate and the House, to “conduct a thorough study and investigation of the entire field of labor-management relations.” The committee is directed to include in its study:

“(1) the means by which permanent friendly cooperation between employers and employees and stability of labor relations may be secured throughout the United States;
(2) the means by which the individual employee may achieve a greater productivity and higher wages, including plans for guaranteed annual wages, incentive profit-sharing and bonus system;
(3) the internal organization and administration of labor unions, with special attention to the impact on individuals of collective agreements requiring membership in unions as a condition of employment;
(4) the labor relations policies and practices of employers and associations of employers;
(5) the desirability of welfare funds for the benefit of employees and their relation to the social-security system;
(6) the methods and procedures for best carrying out the collective-bargaining processes, with special attention to the effects of industry-wide or regional bargaining upon the national economy;
(7) the administration and operation of existing Federal laws relating to labor relations; and
(8) such other problems and subjects in the field of labor-management relations as the committee deems appropriate.”

Legislation is always somewhat tentative. Mankind organizes itself in so many and such complex relationships that no one can foresee how a law will work out—particularly a law as involved, and applying to as many vastly different situations, as the Taft-Hartley Act. The provision for a joint committee shows that Congress recognized the experimental character of the statute. Only time will really show its merits or faults. The new committee is a more convenient forum for complaint and for the correction of legislative errors as they appear than the Supreme Court. The committee can inform itself more easily and contemporaneously, and can directly recommend relief where needed. The procedural impediments found by the Supreme Court in the Petrillo case need not slow up Congress. “Judicial control of national commerce—unlike legislative regulations—must from inherent limitations of

131"It is an experiment, as all life is an experiment. Every year if not every day, we have to wager our salvation upon some prophecy based upon imperfect knowledge.” Mr. Justice Holmes, dissenting in Abrams v. United States, 250 U. S. 616, 630, 40 Sup. Ct. 17, 22 (1919).
the judicial process treat the subject by the hit and miss method of deciding single local controversies upon evidence and information limited by the narrow rules of litigation. Spasmodic and unrelated instances of litigation cannot afford an adequate basis for the creation of integrated national rules which alone can afford that full protection for interstate commerce intended by the Constitution.\textsuperscript{132}

A quotation about the federal control of commerce is not out of place in a discussion of labor law. Where the original Wagner Labor Relations Act tells of the obstruction of commerce by industrial strife, it makes no mere specious and insincere effort to force local social legislation into the area of federal competence. It speaks a truth of critical importance to the nation's life. A tugboat strike today in New York harbor will send the city cold and hungry to bed, exactly like a boatmen's embargo in the days before the Constitution was written.\textsuperscript{133} When the Founding Fathers were giving Congress power "to regulate commerce with foreign nations and among the several states," they may, in part, have been seeking to ease the worries of gentlemen in counting-houses; but they had seen from recent experience that passage of necessities of life from place to place in this country was required for the mere survival of everyday people. The New York legislature during the Revolution had rather desperately tried to keep its people fed, forbidding flour and grain to leave the state;\textsuperscript{134} forbidding importers to charge more than a set markup plus the cost of transportation, trying to agree with New England and Pennsylvania on price-fixing for food, shoes, drink and like essentials, and trying to prevent hoarding by any person of "any greater quantity... than shall be sufficient for the necessary use and consumption of himself or themselves or his or their family or families respectively."\textsuperscript{135} The progress of the war called out more and more frantic legislation in an effort to keep the populace supplied. By 1780 New York was trying to keep prices at not over twenty times what they had been six


\textsuperscript{133}See Sutherland and Vinciguerra, \textit{The Octroi and the Airplane}, 32 CORNELL L. Q. 161 (1946) and the discussion in Mr. Justice Jackson's dissent in Independent Warehouses v. Scheele, --- U. S. ---, 67 Sup. Ct. 1062, 1075 (1947).

\textsuperscript{134}N. Y. Laws 1778, 1st Sess., c. 10.

\textsuperscript{135}N. Y. Laws 1778, 1st Sess., c. 34. The shades of these long dead revolutionary legislators were doubtless gratified when the Supreme Court, 139 years later, approved "more than necessary" as a standard in a statute. United States v. Petrillo, --- U. S. ---, 67 Sup. Ct. 1538 (1947). Labor problems were not unknown in 1778: the same statute undertook (without success) to stop the inflation in wages of "farmers, mechanics and others." See the N. Y. Laws 1778, 1st Sess., c. 42; apparently it was a tough job.
years before. To make carriage possible it limited the hire per day of a four horse wagon to fifty dollars. People had to have goods or die.

Whoever has seen Europe in the years since 1939 has learned a great deal about the flow of commerce. People still sleep cold in Vienna flats because glass for broken windows is scarce; and glass can only be made with coal; and coal doesn’t come. Children in a crowded sub-continent need clothes because cotton is not brought from where it grows. They need food, and there is no food. There are too many people in the world for us to return to a simpler time when nearly everyone grew or caught what he ate. Our ministers abroad plead for the shipment of produce to hungry nations in the hope that desperation may not bring more war. The flow of commerce among the several states and commerce with foreign nations now has implications far transcending commercial security.

Where the new labor legislation—state or national—may be thought by anyone to hamper his essential liberties, a prompt test in the Supreme Court is desirable. One hopes that procedural obstacles may not too long delay it. Along with our food we should export an example of scrupulous care for individual freedom, a useful article today. But is it too much to ask that, for a time, both sides to the labor-management controversy turn their principal attention not to litigiousness but to an effort to make the Labor Management Relations Act operate well and fairly? Both sides might well use the committee Congress has set up, to speed amendment where it is needed, without either side talking, any more than is humanly uncontainable, in terms of “the stranglehold of the labor bosses,” a tyranny more despotic than one could think possible in a free country,” or (on the labor side) “treachery” that has “stabbed the heart of democracy,” “a snake-bite into the heart of our American liberties” or “a step toward fascism.”

The Supreme Court, after years of travail by all concerned, has it settled that the judges’ ideas about the wisdom or unwisdom of social and economic experimentation by legislatures are not adequate reasons for sustaining or

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N. Y. Laws 1780, 3rd Sess., c. 43.


40Mr. A. F. Whitney, President of the Brotherhood of Railroad Trainmen, commenting on the final passage of the Taft-Hartley Act. N. Y. Times, June 24, 1947, p. 4, col. 3.

41Mr. David Dubinsky, President of the International Ladies Garment Workers’ Union. N. Y. Times, June 24, 1947, p. 4, col. 3.

upsetting legislation. That decision is right. Today the language of the old “freedom of contract” opinions seems to have been written in another age. Coppage v. Kansas\textsuperscript{142} sounds unreal; it is hard to believe that lawyers still not old were practicing when it was decided. No thoughtful man wants it back. The best reason is, or ought to be, that Coppage v. Kansas and most of what it stood for is unnecessary. We can get along better without it.

Ten years ago a distinguished lawyer, writing just after the Supreme Court had upheld the National Labor Relations Act, made a moving plea for an end of warfare between capital and labor. “The old ways will not work,” he wrote, “could not work, really. It is time for an act of faith.”\textsuperscript{143} That appeal is timely ten years later; the need for it is more urgent now than it was in 1937. It is not a suitable time for bitterness in our own house when there is too much of bitterness and sorrow in the whole world. Are we a people who can govern ourselves by our elected deliberative assembly, or are we not? That is probably the most important question asked by living men. The means are available; have we the self-restraint to use them? Never did we so urgently need to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare and secure the blessings of liberty to ourselves and our posterity. We can do it if we want to.*

\textsuperscript{142}236 U. S. 1, 35 Sup. Ct. 240 (1915).

\textsuperscript{143}Calvert Magruder, (now Senior Circuit Judge, 1st Circuit) A Half Century of Legal Influence upon the Development of Collective Bargaining, 50 Harv. L. Rev. 1071, 1117 (1930).

\*My learned and kindly colleague Professor B. W. Willcox, by reading over the proof of this paper, has saved me from several errors of form: I absolve him, however, from any blame for doctrinal sins into which I may have fallen.