CHAPTER VII

CURRENT DEVELOPMENTS IN LABOR LAW AND LEGISLATION *

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One of today's most pressing questions in the regulation of industrial relations arises out of the necessity of fitting our rapidly growing labor laws into a federal system in which the sum of governmental power is shared between the States and Nation. No other problem gives rise to more litigation in the appellate courts nor to as much contrariety of judicial opinion. Congress is also concerned with the problem: witness the Smith bill limiting NLRB jurisdiction, the Goldwater bill ceding the States full power to regulate strikes and picketing even in industries affecting interstate commerce, and the various proposals to repeal NLRA Section 14(b), which permits a State to apply an anti-closed shop law to any industry.

The importance of the subject is exceeded by its difficulty. The fundamental issues go to the heart of our political philosophy yet their resolution requires detailed knowledge of the intricacies of both State and federal labor laws. In the past the allocation of responsibility for labor policy between State and federal governments has been made chiefly by the Supreme Court and the complexities of the task have been left to lawyers. The growing interest of legislators and pressure groups, coupled with doubt concerning the wisdom of leaving the task to the Court without guidance, makes it likely that the allocation will ultimately be made through political proc-

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cases, if only to the extent of Congressional acquiescence in what the Court decides. This—and the importance of the subject—are the reasons for trespassing on so much of your time to discuss a topic apparently far removed from the day-to-day practicalities of helping management and labor resolve their differences.

1. The Basic Issues

In the beginning it is well to recall a few elementary premises underlying the federal system. The national Congress has power "to regulate Commerce * * * among the several states" and to enact any laws "necessary or proper" to the execution of such power. The entire residue of regulatory power so far as it may affect labor relations was left to the States. Under the philosophy of constitutional interpretation prevailing prior to 1937, this meant for all practical purposes that industrial relations were governable only by the States, but in the *Jones & Laughlin* case, the Supreme Court awarded the national government power to regulate labor relations in production industries. Thereafter a series of decisions expanded federal power over labor relations so wide that many scholars have concluded that there is no business in which employment relations are not potentially subject to federal control. Within the last month the Court has upheld the application of the NLRA to small local retailers of automobiles.

The constitutional decisions allocating to Congress power to enact labor legislation mean (1) that the national government may regulate labor relations, including strikes, boycotts and picketing, and (2) that it may forbid the application of State laws, whether statutory or judge-made. Both propositions are true beyond dispute, but note that they are only permissive. The national government may choose not to exercise its power over labor relations or to use only part. The allocation of constitutional power to Congress did not automatically exclude the operation of State labor law; on the contrary, States continue to govern even businesses in interstate com-

merce until Congress takes some action which expressly or impliedly excludes State action. In terms of federalism the chief effect of the enormous expansion of national power, which began in 1937, was to transfer from the Supreme Court to Congress the initial responsibility for determining the respective roles of the States and national governments in the regulation of labor relations.

Until recently historical accident obscured the distinction between the extent of national power and the scope of actual regulation. Since the extent of national power was supposed to be narrow—indeed, far too narrow—in 1935, the National Labor Relations Act purported to exercise all the power Congress possessed; and thereafter each decision broadening the scope of national power also widened the incidence of actual regulation. Government attorneys, actuated partly by the process of logical extension so dear to all lawyers and partly by zealousness for spreading the gospel of the statutes they administered, pressed the boundaries so far out as to raise serious questions in the labor field as to whether we were not in danger of overwhelming the federal agencies with small cases and destroying local responsibility by ousting local control. Today we are in the process of re-examining the question. If the re-examination is to be careful, it must be broken into three lines of inquiry, with sharp distinctions.

One question is, how far out along the range of infinitely small gradations from the interstate railroads and basic steel producers to the corner drug stores and delicatessens should actual federal regulation of labor relations be extended.

The second question is, what aspects of the whole field of labor-management relations should be regulated by the national government in those industries brought under *national* control. The original Wagner Act dealt with employer unfair labor practices and questions of representation, leaving other subjects, such as the enforcement of collective bargaining agreements and the regulation of strikes and picketing, to the States. The Taft-Hartley amendments brought new aspects under federal

law but on some points there is great uncertainty; for example, no lawyer can tell you with assurance whether State or federal law determines the validity of a collective bargaining contract.

The third question is this: If the Congress decides that a given business should be subject to the national labor law and regulates some aspects of the triangular relationship between management, union and individual employees, should it permit concurrent State regulation of these or other aspects of the same relationship or should the national law apply to the total exclusion of a State? If the national law forbids jurisdictional strikes and secondary boycotts, should a State be permitted to add prohibitions against minority strikes or organizational picketing.

The first and third questions are interrelated in the sense that the answer given to any one of them affects the answer to be given the others. The conclusion I press upon you is that we can best achieve a workable body of labor law and still preserve the federal system by making national law the exclusive regulation of labor-management relations in those businesses any aspect of whose labor relations is brought under national control, while at the same time greatly curtailing the reach of national law into predominantly local activities. There should be clear fields of State and national regulation. The two governments should never exercise concurrent jurisdiction over labor relations. Within its sphere, each body of law should be exclusive and supreme.

For the moment, however, it is convenient to analyze separately (1) the reach of national regulation and (2) the problem of concurrent vs. exclusive jurisdiction.

2. The Reach of National Legislation

Under the Roosevelt and Truman administrations debate concerning the extent to which the national government should reach out to regulate labor relations was usually a tussle between those who believed in strong unions and collective bargaining and an opposition which wished to preserve the old regime.

The other considerations entering into the allocation of regulatory power within a federal system were so largely forgotten, at least by those of us interested in labor-management relations, that I venture to recall them.

The justifications for a national labor law may be grouped under four headings.

(a) Some businesses have so great importance to the economy or national defense that their labor relations must be matters of national concern. The basic steel companies and the atomic energy installations are obvious examples; automobile assembly plants furnish another illustration. Where the line should be drawn is a matter of degree, but it seems fair to say that the argument for national regulation would taper off pretty quickly in time of peace if it had to rest exclusively on proof of the national economic significance of each separate business unit.

(b) National labor legislation is also warranted in many instances by the need to prevent competition based upon differences in State law. Only a few years ago the competitive position of many businesses was affected by the enforcement of wage and hour and child labor laws in some States while other States tolerated much lower labor standards. An individual State could not increase the minimum wage or raise the age for the employment of children without fear of injuring its businessmen or even driving industries to migrate beyond its borders. The Fair Labor Standards Act largely corrected the evil. Today the competitive advantages and disadvantages result from differences among the States in their attitude toward labor unions and collective bargaining. Enterprises located in States where unionization is fought by the whole business community and where there are repressive laws against strikes and picketing frequently enjoy advantages which influence the location of new industries and even the migration of established concerns. Where in 1789 it was the function of the national government to eliminate interstate competition in the form of tariff and navigation laws, today national control is

required to eliminate discriminations in social and economic legislation.

(c) Often the balance of convenience from the viewpoint of the people affected also lies on the side of national control. The best illustration is a bargaining unit composed of several plants in different States. Collective bargaining is complicated and confused if the duties resting on the employer and union are different on each side of the State line; if some provisions of the contract are valid and enforceable in one State and illegal or ineffective in the other; or if one State permits half the employees in the unit to strike while the other persists in taking a prior strike vote or in outlawing familiar labor objectives. Even where the actual bargaining units are confined to a single State, any company operating several plants will find convenience in uniform regulation. Similarly, where authority within the union is centralized in the International, it benefits from having to deal with only one set of laws.

(d) Finally, national control may be warranted by the desirability of spreading the benefits of a sound labor policy. The country has repudiated the view that the commerce clause is to be used only to deal with subjects beyond the control of an individual State. We are committed to use of the commerce power to improve social and economic conditions. We should not forget the advantages of spreading collective bargaining as a national labor policy, although our enthusiasm for that policy should not blind us to competing considerations unrelated to labor policy that are also matters of public concern.

The justifications for a measure of State control may also be brought under four headings.

(a) Often the balance of convenience lies on the side of State regulation. Trips to Washington involve time and expense burdensome to a small business. Despite the great improvements achieved by the present General Counsel, State agencies have usually been able to handle labor relations cases with infinitely greater dispatch than the national Board.

(b) Often State governments are better equipped to reach wise decisions, especially in particular cases. A national board in Washington is remote from the facts in two senses. It lacks knowledge of local conditions. It is also forced to consider cases on a printed record separated from human beings by repeated straining through sieves of review. The result is a tendency to substitute "agency policy" for flexibility and discretion in appraising a human situation.

(c) Leaving an area for State regulation encourages local experimentation. Professor Witte's presence reminds us that once the great body of liberal thought stressed the value of having forty-eight States each of which might serve as a laboratory for testing progressive measures, once Wisconsin was far the laboratory par excellence. Is it not likely that for all our discussion of national emergency disputes, we stand to learn more by permitting Massachusetts to have its Slichter law, Wisconsin its compulsory arbitration statute, and Virginia its State seizures, while some States devise new remedies and others, perhaps most wisely, do nothing?

(d) Finally, local authority means local responsibility and local responsibility is closer to our ideal of self-determination. The American tradition of federalism is strong. It retains and will retain its vitality because it has values which, however hard to articulate, are not destroyed by rapid transportation and the growth of national markets.

Drawing a line between the businesses whose labor relations should be subject to national regulation and the businesses which should be left to the States obviously involves a judgment upon matters of degree for which I have no formula. There are, however, three comments that seem appropriate.

First, I suggest that federal regulation has been extended too far while too little has been left to State control. Granting that a good many employees would lose the benefit of rights guaranteed by NLRA Section 8, I am unable to understand why employment relations of a retail store, a local transit line or an auto sales agency are matters of national concern.

Nor does it seem to me to make much difference if the auto agency is a dealer in Ford or General Motors products or if the distributor sells soft drinks under the Coca-Cola trademark with the benefit of national advertising. At the same time I am deeply convinced that the labor relations of any given enterprise are—in the current phrase—"one ball of wax" and should not be subject to two sets of laws. If I am right in this, some contraction is required in the reach of national legislation, either through Congressional legislation or NLRB decision.

Second, it seems obvious that the line cannot be drawn according to the dollar size of a business or its effect on interstate commerce in terms of the volume of goods brought from, or sent to, other States. The considerations I have listed affect different industries in different ways without much regard to the size of the business units. I would deem it unwise, therefore, to write rigid standards into the National Labor Relations Act in the manner proposed by Senator Smith last spring either in their present form or with adaptations. What seems to be required is a careful study of various segments of our economy made by the NLRB in the light of a new statutory mandate but with reference to the considerations I have listed.

Third, the dividing line between State and federal regulation should be drawn with such clarity that both governments and the people affected know in advance whether State or federal law is controlling. In this area certainty in predicting what law applies is more important than reaching an otherwise perfect answer. The proper solution might be for the NLRB to abandon the case-by-case process of defining its jurisdiction and issue the kind of regulations for which it has ample authority. The statute should be changed, moreover, to make it plain that the NLRB's declination of jurisdiction does not leave a no-man's land subject to neither State nor national control, and that the determination applies to all phases of labor relations.

3. Exclusive National Regulation v. Concurrent Control

Labor law grew up initially as a body of judge-made rules regulating the concerted activities of employees by limiting the objectives for which they might strike or picket and the means to which they might resort. These rules were State law—private law in the sense that they were invoked in actions for damages or suits for injunctions in which no government agency was involved, public regulation of strikes and picketing in the sense that they embodied the judges' notions of public policy in dealing with strikes and picketing. Since the Wagner Act was apparently confined to employer unfair labor practices and questions of representation, its enactment in 1935 brought about no collision between the existing body of State law and the new national legislation. The baby Wagner Acts adopted by Massachusetts, New York and Wisconsin dealt with these aspects of labor relations, but for almost ten years the NLRB was so occupied with cases in truly interstate enterprises that ample scope was left for local agencies and where overlapping occurred, it was minimized by interagency agreements. By 1945, however, duplication and collision had become so common that some further determination concerning the application of State law to businesses subject to NLRB jurisdiction was required. Although the Supreme Court decisions extending federal power to regulate labor relations transferred to Congress the authority to make this determination, Congress remained silent, thus transferring the issue back to the Court. There, according to the conventional legal theory, the Justices would answer the question by divining "the intent of Congress."

Representation Proceedings. The initial decisions made it clear that the NLRB has exclusive jurisdiction over representation cases within the federal domain. A State may not undertake to decide a question of representation in any business affecting commerce over which the NLRB would normally exercise jurisdiction. The Court appears to have been influenced largely by fear that concurrent regulation would cause conflict and confusion. Representation cases turn on administrative

policy concerning the time for elections, the composition of the bargaining unit and the eligibility of voters. A decision by a State agency might well have the practical effect of establishing a pattern of representation inconsistent with the federal policy even though the national board had not acted in the particular case. Two points of uncertainty remain. In many borderline cases it is impossible to forecast whether the NLRB would exercise its jurisdiction. Also, we have no indication from the Court whether the States may handle representation cases affecting interstate commerce in which the NLRB would decline to act.

Employer Unfair Labor Practices. It also appears to be settled law that a State may not undertake to remedy employer unfair labor practices in a business over which the NLRB ordinarily would exercise jurisdiction. Wisconsin found a packing house guilty of discriminatory discharges and made an order of reinstatement and back pay. The Supreme Court set the order aside without opinion. There is no apparent reason for distinguishing between this and other unfair labor practices.

Strikes and Picketing. In the field of strikes and picketing the situation is much more complex. Until 1949 almost everyone supposed that the large body of State law regulating the concerted activities of employees was applicable to all businesses whether they were engaged in interstate or intrastate activities. The clarity was disturbed by two developments. Section 7 of the National Labor Relations Act was interpreted to guarantee the right to engage in "concerted activities" not only against employer interference but also against curtailment by the States. The Taft-Hartley amendments superimposed federal regulation upon the existing State law of strikes and picketing.

To understand the consequences of these developments it is necessary to distinguish between three categories of employee activities. One group is made up of the strikes, picketing and similar activities in which NLRA Section 7 guarantees employees the right to engage. Obvious examples are peaceful strikes for higher wages. A second group is made up of concerted

activities forbidden by federal law. Strikes for the closed shop, secondary boycotts and jurisdictional strikes are obvious illustrations. The third group is made up of those activities which the federal law neither protects nor forbids. The slow-down, quickie, and strike in breach of contract are clear-cut illustrations. A strike for recognition or bargaining rights called during an NLRB representation proceeding may fall in this class.

Activities protected by NLRB Section 7 may not be forbidden by the States. In *United Automobile Workers CIO* v. *O'Brien* the Court held that a provision in the Michigan strike control law making it unlawful to strike without a prior majority vote of all the employees was held constitutionally inapplicable to a peaceful strike for higher wages in a business subject to NLRB jurisdiction under "the principle that if 'Congress has protected the union conduct which the State has forbidden * * * the State legislation must yield' that that principle is controlling here." The same reasoning was applied to prevent the application of the Wisconsin compulsory arbitration law to a local transit line subject to NLRB jurisdiction.

With respect to strikes and other concerted activities forbidden by the Taft-Hartley Act, there was great diversity of judicial opinion until a few weeks ago when the Supreme Court decided that the Pennsylvania courts lacked power to restrain the Teamsters, a minority group, from primary picketing in support of its demand for recognition and a closed shop contract, because the picketing was an unfair labor practice under NLRA Section 8(b)(2). Under this decision the States may not apply local laws against strikes or picketing which duplicate the federal statute, in situations where a national remedy is available; nor may they undertake to provide State remedies for violation of the national law even pending NLRB action. It is immaterial whether the State restriction be statutory or common law or whether it purports to constitute adjudication of private rights or to enforce public regulation.

With respect to the intermediate group of concerted activities—those neither protected by Section 7 nor forbidden by Section 8(b)—the decisions leave grave uncertainty. Slowdown and quickie strikes are certainly subject to State restriction, but there are other instances in which State regulation of employees' activities would intrude so close to the aspects of labor relations dealt with by federal law as to threaten the kind of interference with the administration of national policies that led to the Supreme Court decision in the *Garner* case.

Collective Bargaining Agreements. Before turning from this summary of the present state of the law to analysis of the issues of policy, it is worth noting one other problem as to which the precedents give no reliable guidance. Apart from NLRA Section 14(b), which authorizes the States to restrict the negotiation of closed shop or union security contracts, few questions have arisen concerning State power to regulate the terms of collective bargaining agreements. LMRA Section 301 authorizes the federal courts to entertain "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce," but there is no provision indicating whether the courts are to apply state or federal law in determining the merits of the plaintiff's claim or the remedy to be granted. To give a single example in which arbitrators should be interested, it is quite uncertain whether the State decisions holding agreements to arbitrate unenforceable govern actions under Section 301, or whether a federal court may disregard State precedents and decree specific performance. Congressional action would avoid the endless litigation needed to clarify such an issue.

There has been sharp criticism of the Court decisions excluding concurrent State regulation, not only by those who stand to gain through the enforcement of State laws and decisions restricting labor union activities but also by men long sympathetic to the labor movement. The latter critics make two points: They fear that the breadth of jurisdiction asserted by

the NLRB plus the exclusion of State law from the same area would destroy our federalism in the government of labor relations. They also argue that the Supreme Court has distorted the intent of Congress. The justice of the latter criticism depends on what is meant by "the intent of Congress." If we mean that the Court should give the answer that would have been given by an imaginary, composite Congressman in 1947, we should all have to agree that there was no intent to forbid the States to apply common law decisions or statutes curtailing strikes and picketing. On the other hand, if the function of the Court, in the absence of other evidence, is to study the problems with which the statute deals and to give the answer that would have been given by one who understood and sympathized with all its philosophy and implications, then the Court has been faithful to the legislative intent. I say this for the same reasons that lead me to the conclusion that Congress ought to remove the doubt by an explicit declaration excluding State regulation of the labor relations of any business governed by the NLRA.

One reason is that the superimposition of State obligations would seriously affect the operation of the national policy. The problems which arise during employee organization, the selection of a bargaining representative, the negotiation of a series of collective bargaining agreements and their day-to-day administration are all phases of a continuous human relationship. Government intervention at one point inevitably affects the whole course of events. Most of us believe that collective bargaining agreements should be administered through a grievance procedure ending in final and binding arbitration, but nothing in the national law requires the parties to adopt this procedure. For a State to require it might conceivably be wise, but can anyone doubt that it would be a departure from the basic policy of free negotiation underlying the NLRA which Congress would not tolerate? Section 14(b) seems equally inconsistent.

A second illustration is furnished by the much debated question whether NLRA Section 8(a)(5) requires employers

to bargain during the term of a collective agreement about some major problem not mentioned therein, such as a pension plan or social insurance. The answer turns upon a nice judgment as to whether the institutions of collective bargaining would function better under one rule or the other. The NLRB has held that there is such a duty, chiefly because it believes that this is the wiser labor policy. A State could not relieve of the obligation employers subject to NLRB jurisdiction because the application of the State statute would be inconsistent with the federal policy. If the federal policy were changed so as to impose no such obligation during the term of an existing agreement, it would be no less of an interference with national policy if Wisconsin or Massachusetts were to impose the duty.

There is equal interference with the operation of the kind of collective bargaining envisaged by national law if the States are permitted to impose additional obligations upon employees and labor unions. It is elementary that freedom to strike, picket and engage in other concerted activities affects the progress of union organization and the balance of power in collective bargaining. The progress of organization and the balance of power affect the way collective bargaining works. When the Congress determined to forbid the use of secondary boycotts and strikes against NLRB certification as organizing techniques, it debated the problem of primary strikes for recognition and struck a balance in which these weapons of self-help were left available. When the NLRB interprets the complicated secondary boycott provisions of Section 8(b)(4)(A), it must follow the words of the statute, but where they are ambiguous, the Board inevitably makes a policy decision concerning the effect of expanding or contracting their meaning. To add State restrictions would change the effect of these decisions.

My second reason for concluding that the federal law should preempt the entire field it touches is the desirability of avoiding too fine lines of distinction. In some cases the concurrent application of State laws might not affect the operation of

federal policies, but in many cases my first point must be conceded. If the applicability of each State law is to be decided ad hoc by inquiring whether it will interfere with national policy, today's endless litigation would have to continue until each little point were decided by the Supreme Court; meanwhile the litigants and all persons similarly situated would be left to build a highly delicate relationship upon shifting sands.

Third, to permit the concurrent operation of State labor laws in industries already subject to the federal statutes would destroy the uniformity and convenience which are part of the justification for federal legislation. It would also open the way to interstate competition in deciding cases and writing statutes most attractive to the migration of industry.

Fourth, this is not a situation in which State tribunals may share in the enforcement of national legislation. Labor law lacks the degree of precision which is necessary before anyone can say whether the State and national policies are in fact the same. Too much administrative discretion is required. If all forty-eight States were to adopt statutes phrased exactly like the secondary boycott provisions of the National Labor Relations Act, it would not surprise me to find at least thirty different interpretations. After all, we often get as many as three different interpretations from four or five members of the National Labor Relations Board.

In presenting these arguments I do not mean to overlook my earlier reasons for permitting a large measure of local autonomy. Those considerations seem to require some contraction of the scope of the national labor relations law, but they do not argue for concurrent State regulation with equal force. Indeed, it seems to me that those who advocate concurrent regulation in the name of local autonomy either have failed to think the problems through or else are much less interested in preserving the federal system than in permitting States to apply restrictive statutes and court decisions. In Massachusetts we believe that the Taft-Hartley amendments were the wrong approach to the problems created by closed shop and other union security contracts. Our legislature enacted statutes which

permit unions to strike for such agreements and employers and unions to negotiate them. The legislation also provides direct safeguards against the closed union and other abuses of individual freedom. Is there any less reason, from the standpoint of encouraging local autonomy, to permit Massachusetts to apply this law to businesses in interstate commerce than there is to permit Florida and Virginia to outlaw all union security agreements? Again, some jurisdictions allow employees greater freedom to engage in strikes and picketing than the present federal statute. Local autonomy should cut both ways. One who proposed to support the Goldwater bill authorizing the States to restrict strikes and picketing regardless of the federal statute ought also be willing to permit other States to tolerate such activities, unless his purpose is simply to aid employers.

One answer to this line of argument is to say that Congress should not attempt to enact a comprehensive code of labor legislation, that the federal law deals only with extreme cases of outrageous strikes and picketing but leaves the debatable cases to the States. I can understand the verbal logic but in my opinion it misconceives the nature of the legislative process in dealing with labor relations. Labor relations laws necessarily involve striking a nice balance between opposing interests. Congress must decide not only how far employer and union conduct should be regulated but also how far it should be free. Both decisions determine how collective bargaining works. When Congress revised the employer unfair labor practices provisions of the Wagner Act, it necessarily decided not only what coercive tactics should be forbidden but also what methods of argument and persuasion should be permitted employers seeking to induce employees not to join a labor union. Conversely, the Taft-Hartley restrictions on strikes and secondary boycotts required drawing a line between the practices to be outlawed and the freedom to be allowed. All these issues are far too delicately balanced to describe the situation fairly as one in which Congress deals only with obviously undesirable wrongs.

I submit to you, therefore, that Congress should limit the businesses brought under the National Labor Relations Act, but that it should also provide that wherever a business is subject to the national statute, the States should be prohibited from attempting to regulate the conduct of employers, employees and labor unions with respect to union organization or collective bargaining, including resort to strikes, lockouts, boycotts and other concerted activities. The law governing the validity of collective bargaining agreements and the remedies for their enforcement is so intimately related to the processes of negotiation that it, too, should not be left to the States. The States should be free to regulate the terms of collective bargaining agreements by applying laws of general applicability, such as anti-trust laws, insurance regulations and sundry criminal statutes, but not by singling out collective bargaining agreements for special legislation.

To this general rule I would make two significant exceptions. One would permit the State governments through the police or court decrees to maintain public order and protect persons and tangible property against physical injury. The processes of the National Labor Relations Board are inadequate for this purpose. There is no general police force. Second, the President's recent message to Congress wisely proposed to give back to the States power to deal with public emergencies threatened by the breakdown of collective bargaining in public utilities and similar industries concerned with the distribution of food. Public opinion will not tolerate leaving all government powerless, and since the emergencies usually affect particular localities, it is wiser to leave the problem to the States.

Three Examples

I have discussed the problem of fitting labor relations law into the background of a federal system at such length partly because of its own importance and partly because it is typical of the stage in the development of labor law into which we

have entered. The seeds of the creative ideas of labor laws were sown and germinated in the last two decades. We are now facing the problems of fitting the new ideas into a surrounding jurisprudence which must also recognize other competing interests. In this stage the issues become increasingly technical and the judgments increasingly delicate yet one must take care withal that the new ideas are not sapped of vitality or destroyed by reactionaries under cover of the process of assimilation and adjustment.

Let me take three more short examples of the nature of the process and its dangers.

The first is furnished by debate over employers' anti-union speeches. In many communities any speech that an employer delivers in opposition to a labor union instills fears of reprisal in the minds of employees. Complete protection of the right of self-organization would lead to the prohibition of all such speeches, certainly to outlawing the appeals to racism and the "predictions" that the coming of the union may force a closing of the plant. But our society is also devoted to the ideal of freedom of communication. At first perhaps the conflict was not fully perceived and the NLRB allowed its devotion to the ideal of collective bargaining to run rough shod over the ideal of freedom of communication. Today we realize that we must find some way to solve the problem of accommodating the rights of self-organization with competing interests.

The problem of employer free speech has a second aspect typical of current problems in labor relations law. There is danger that the work of fitting the new ideas born in the 1930's into the surrounding legal structure will be confused by efforts to destroy the new ideas through excessive pruning. It is one thing to recognize the necessity for tolerating even demogogic employer speeches in order to preserve freedom of communication, but it is quite another to justify them on the ground that employers should compete with unions for the loyalty of employees. The latter approach is inconsistent with the new ideas born in the Wagner Act because it leads not merely to the toleration of expressions of opinion but also to allowing em-

ployers to interfere with union organization in other ways which lack the same philosophical justification. I have in mind particularly the current NLRB tendency to permit employers to question employees about their union affiliations. The second objection is that to encourage employers to compete for the loyalty of employees is so contrary to the basic ideas of collective bargaining and majority rule as to revive the emotional issue of union status. A union is the majority of the employees acting as a group. The decision of the union is the decision of the majority of the employees acting through the internal procedures of their organization.

This brings me to my second illustration. Many of the most difficult problems in labor relations law today are those of accommodating the power vested in the group with the protection of certain basic interests of individuals and minorities. While collective bargaining implies a large measure of majority rule, a democratic society recognizes that there are certain basic rights the minority may not be asked to surrender. The adjustment of these conflicting interests has given rise to many statutory changes and judicial decisions and even to such interesting private but quasi-legal arrangements as the outside appeal board set up by the Upholsterers' Union to review all instances of union discipline. The adjustments are difficult to make at best. The danger lies in solutions which, either inadvertently or by design, fail to recognize the fundamental ideas of collective bargaining or set the employer against the union as the supposed watchdog for minority interests. The President's proposal for a government conducted strike vote has a superficial appeal because it seems to assert the very plausible proposition that a strike which is called against the wishes of a majority should be discouraged. There is need for such a vote only if one assumes that unions do not truly reflect the wishes of employees—an assumption contrary to all experience —and the taking of a vote necessarily denies the authority of the group to speak for the employees in the bargaining unit.

Enactment of the recommendation would complicate labor-management relations by forcing both company and union to

campaign actively for the employees' support, thus increasing antagonism and bitterness, at the very time when calmer negotiations might result in a settlement. The emotional ardor and aggressiveness which union leaders will work to a high pitch and which individual employees will display in order to strengthen their bargaining position will later make it difficult for the union leaders to induce the employees to accept a reasonable settlement. Yet these objections are small, I think, in comparison with the harm that would be done through the enactment of still another measure challenging the status of the union in collective bargaining and encouraging the belief that unions are outsiders.

The current problems of labor law also include cases where conflicts between two of the basic ideas born in the 1930's must be adjusted. The Norris-LaGuardia Act was based on the philosophy that the law has only a minimum role to play in the settlement of labor disputes. It left problems of employee organization, recognition and collective bargaining to the free interplay of competitive forces including combinations and concerted activities such as strikes and picketing. The Wagner Act is based in part on the notion that the law does have a role to play, at least with respect to employees' organization and the establishment of collective bargaining relations.

Here is a basic inconsistency which threatens revival of the labor injunction. Under the NLRA an employer is required to bargain with a union certified by the NLRB as the exclusive representative of his employees, yet the Norris-LaGuardia Act made it impossible for him to obtain protection against a minority union destroying his business by picketing for exclusive recognition. The Taft-Hartley amendments quite reasonably provided that the employer who performed his statutory duty should be protected against reprisals by the minority union. Many State courts reached the same conclusion without the aid of new legislation on the theory that the union should be enjoined from attempting to compel the employer to do something unlawful.

Suppose now that there is no certified representative and that a union having few members in the bargaining unit nevertheless pickets an establishment demanding immediate recognition. Shall we say that here again the union is seeking to compel the employer to do something unlawful and that the policy of the national labor relations law should prevail over the inconsistent policy of the anti-injunction statute? The reasoning is certainly a logical one and many courts have followed it. But suppose the union is advised by clever counsel and pickets only to "educate" the employees and the public or else confines itself to a demand that the employees join the union and that the employer grant recognition after a majority have become members. The union has avoided the charge that it is attempting to coerce the employer to do something unlawful, but many courts have issued injunctions on the ground that the distinction is verbal. I take it we should all agree that the distinction is silly, but lumping the several cases into a single category does not compel the conclusion that all strikes for recognition or union organization should be unlawful. Perhaps they should all be lawful.

The real question is whether the restraints imposed on employer unfair labor practices and the legal machinery for conducting elections and compelling employers to bargain with any union chosen by a majority justify taking away the cruder weapons of self-help. Here I think we are in danger of forgetting one of the lessons we thought had been learned as long ago as 1932. In a democracy sanctions can be invoked only against the occasional wrongdoer. The effectiveness of law depends upon its acceptance by the governed either because they approve the policy which it expresses or because it is the law. To enforce an edict against large numbers of recalcitrant employees is out of the question. There was, and is, no such consensus of opinion about the propriety of labor's various objectives or the weapons with which they are pursued. Also, in each instance the decision, whether statutory or judge-made, too obviously involves debatable policy judgments and feelings run too high for it to command acquiescence merely because

it is the law. The Norris-LaGuardia Act is the highwater mark of this philosophy, for in the federal courts it immunized all peaceful labor activities. Although the Taft-Hartley Act marks a withdrawal from the extreme position that the law serves no function in labor disputes, it is generally consistent with recognition of the limited usefulness of law in dealing with strikes, boycotts and picketing.

The points at which the Taft-Hartley Act revives legal intervention into everyday labor disputes are trivial in comparison with those it leaves untouched. Also, the law intrudes only in areas where the overwhelming consensus of opinion condemns the unlawful conduct. This is clearly true of violence and strikes to compel the commission of unfair labor practices. While the jurisdictional dispute provisions are faulty, there is almost unanimous agreement upon the wisdom of outlawing jurisdictional strikes. There is even general agreement that many secondary boycotts should be forbidden by law; the dispute is over where to draw the line. But there is no such agreement upon the undesirability of organizational strikes and picketing prior to a labor board election and the attempt to forbid them by statute or court decisions is reviving the labor injunction to an alarming degree. It is part of the problem of recognizing the limits on the usefulness of law, which is one of the most difficult and least understood of legal problems.