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COMMENTS

STATE-COURT INJUNCTIONS AND THE FEDERAL COMMON LAW OF LABOR CONTRACTS: BEYOND NORRIS-LA GUARDIA

Howard Lesnick *

THE question presented is whether federal law restricts state power to enjoin a strike as in violation of a collective bargaining agreement. The relevant sources of federal law are the Norris-LaGuardia Act¹ and section 301(a) of the Labor-Management Relations (Taft-Hartley) Act.²

(1) It seems clear that the Norris-LaGuardia Act does not itself apply to actions in state courts. It is doubtless true that many of the animating principles underlying the 1932 statute are implicated whenever a strike is sought to be subjected to the control of equity, in state or federal court.³ Moreover, the Supreme Court has dramatically sustained the attribution of substantive import to Norris-LaGuardia, despite the act's jurisdictional language, as a legislative response to judicial interpretation of earlier statutory regulation.⁴ Finally, it is at least part of the story to note that the statute was cast as it was because of doubts, soon thereafter dispelled, whether Congress had power to make substantive law to govern labor disputes.⁵ The fact remains that the decision was made to write a statute addressed to the federal courts, that the problem there may have been thought at

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¹ 47 Stat. 70 (1932), as amended, 29 U.S.C. §§ 101-10, 113-15 (1964) (prohibition of federal court injunctions in labor disputes).

² 61 Stat. 156 (1947), 29 U.S.C. § 185(a) (1964): "Suits for violation of contracts between an employer and a labor organization . . . or between . . . labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

³ See COX & BOK, *CASES ON LABOR LAW* 96-102 (6th ed. 1965).

⁴ *United States v. Hutcheson*, 312 U.S. 219, 233-37 (1941).

⁵ See Witte, *The Federal Anti-Injunction Act*, 16 MINN. L. REV. 638, 648-49 (1932).

least to some degree more acute,⁶ and that the issue of legislative policy would have been significantly altered had Congress been asked to exercise its power to regulate commerce.⁷

(2) Section 301, it is clear, does apply to state courts.⁸ I believe, however, that the federal law of section 301 should not be held to "incorporate" the Norris-LaGuardia Act's prohibitions on injunctions against strikes in breach of contract. Of course Norris-LaGuardia is "federal law," and "federal law" controls. But to settle the question so simply comes close to adjudication by pun. As Justice Roberts of the Supreme Court of Pennsylvania put the matter:⁹

Appellant contends that the Norris-LaGuardia Act is an expression of federal labor policy and as such must be incorporated within and made an integral part of the national labor policy expressed in Section 301. Even so, it does not follow that the Norris-LaGuardia Act, if woven into the fabric of Section 301, would express a national labor policy to prohibit the granting of injunctive relief by state courts

Certainly the setting of neither the 1932 nor the 1947 legislative expression of national labor policy warrants "incorporation" of Norris-LaGuardia.¹⁰ As for judicial pronouncements, the Supreme Court's *Sinclair Refining* decision¹¹ says no more than

⁶ Federal question jurisdiction prior to 1932 involved use of the Sherman Act, with results that Congress sought to reverse with Norris-LaGuardia. See *Milk Wagon Drivers' Union v. Lake Valley Farm Prods., Inc.*, 311 U.S. 91 (1940); Witte, *supra* note 5, at 649 n.20. Diversity jurisdiction in the pre-*Erie* period enabled federal judges to fashion more restrictive rules than were being developed in the courts of some states. See, e.g., Justice Brandeis's dissenting opinion in *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 483 (1921). For an illustration of attempts to create diversity jurisdiction in labor disputes, see *Fortney v. Carter*, 203 Fed. 454 (4th Cir. 1913) (bondholders of struck corporation, alleging threat to their security interests, permitted to sue strikers).

⁷ See Witte, *The Federal Anti-Injunction Act*, 16 MINN. L. REV. 638 (1932). Cf. Comment, 113 U. PA. L. REV. 1096, 1101 (1965):

It would seem illegitimate for a court to accept as a basis for common-law development a policy which, although desired by the proponents of the bill, was considered by them too weak to survive the political process and which, even if an accurate reflection of the mood of Congress, never found expression in law.

⁸ Local 174, *Teamsters Union v. Lucas Flour Co.*, 369 U.S. 95 (1962).

⁹ *Shaw Elec. Co. v. IBEW*, 418 Pa. 1, 11, 208 A.2d 769, 775 (1965).

¹⁰ See the discussions in *American Dredging Co. v. Local 25, Int'l Union of Operating Eng'rs*, 338 F.2d 837, 852-53 (3d Cir. 1964), *cert. denied*, 380 U.S. 935 (1965); *McCarroll v. Los Angeles County Dist. Council of Carpenters*, 49 Cal. 2d 45, 63, 315 P.2d 322, 332 (1957), *cert. denied*, 355 U.S. 932 (1958); *Shaw Elec. Co. v. IBEW*, 418 Pa. 1, 10 n.14, 208 A.2d 769, 774 n.14 (1965).

¹¹ *Sinclair Ref. Co. v. Atkinson*, 370 U.S. 195 (1962) (federal court may not enjoin strike in breach of contract).

that the Norris-LaGuardia Act applies to strikes in breach of contract no less than to organizational or bargaining strikes, and that section 301 cannot be taken to repeal that act, or to authorize inroads upon its protection. There was no assumption of judicial responsibility to weigh the need to protect concerted activities against the danger to the security of contractual arrangements. Indeed the Court eschewed any such role.¹² In such a context it would be intolerable to find in the uniformity principle of *Lucas Flour*¹³ a sufficient ground for compelling state conformity to the strictures of Norris-LaGuardia. The channeling of litigation into state courts because of the availability of injunctive relief there may be unfortunate,¹⁴ but something more is needed to justify federal invalidation of state law. Since a uniform rule *permitting* specific enforcement of no-strike clauses was rejected, not as a result of the Court's own fashioning of an appropriate rule of federal labor law, but simply in obedience to the legislative mandate that federal judges not enjoin strikes,¹⁵ that rejection (proper

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[W]e do not see how cases implementing the purpose of § 301 can be said to have freed this Court from its duty to give effect to the plainly expressed congressional purpose with regard to the continued application of the anti-injunction provisions of the Norris-LaGuardia Act. The argument to the contrary seems to rest upon the notion that injunctions against peaceful strikes are necessary to make the arbitration process effective. But whatever might be said about the merits of this argument, Congress has itself rejected it. In doing so, it set the limit to which it was willing to go in permitting courts to effectuate the congressional policy favoring arbitration and it is not this Court's business to review the wisdom of that decision.

Id. at 213. See also *id.* at 210: "When the repeal of a highly significant law is urged upon [Congress] . . . and that repeal is rejected after careful consideration and discussion, the normal expectation is that courts will be faithful to their trust and abide by that decision."

These excerpts suggest the accuracy of reading *Sinclair* as it was read in Comment, 113 U. PA. L. REV. 1096, 1100 (1965): "It did not make the positive determination that a new general anti-injunction policy existed; it made the negative determination that section 301 did not alter the old, limited anti-injunction policy of Norris-LaGuardia."

¹³ Local 174, *Teamsters Union v. Lucas Flour Co.*, 369 U.S. 95, 103 (1962): "[T]he subject matter of § 301(a) 'is peculiarly one that calls for uniform law.' . . . The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements."

¹⁴ See Mr. Justice Brennan's dissenting opinion in *Sinclair Ref. Co. v. Atkinson*, 370 U.S. 195, 226 (1962); Aaron, *Strikes in Breach of Collective Agreements: Some Unanswered Questions*, 63 COLUM. L. REV. 1027, 1034-36 (1963); Summers, *Labor Law Decisions of Supreme Court, 1961 Term*, in ABA SECTION OF LABOR RELATIONS LAW PROCEEDINGS 51, 63 (1962).

¹⁵ Consistent with its view that it was not making law, the Court in *Sinclair* did not even consider the effect of its decision on state power. See Mr. Justice Brennan's dissenting opinion, 370 U.S. at 226.

though it was¹⁶) should not now be parlayed with a revived interest in practical accommodations and judicial creativity to compel the states to obey a mandate never addressed to them.

(3) The matter is not closed, however, by a judgment that the federal law of section 301 does not incorporate Norris-LaGuardia. The anti-injunction statute aside, it seems clear that the conditions governing the availability of injunctive relief should not be regarded as "procedural" for the purpose of deciding the choice of governing law. The question is nothing less "substantive" than the balance to be struck between the need to vindicate contract rights through specific performance and the dangers to protected concerted activities of permitting equity to exercise its fearsome powers too close by. Had Congress never enacted the 1932 statute, we would long since have seen the development of a corpus of federal rulings dealing with injunctions in labor disputes. Some would have been the product of judicial decisions,¹⁷ others embodied in the Federal Rules,¹⁸ other enacted by the legislature.¹⁹ These principles would govern federal court actions, and the Supreme Court would have authority to decide whether effectuation of the purposes of the extensive federal regulatory scheme in the labor-management field called for similar restrictions on state power to enforce no-strike clauses.²⁰

¹⁶ See Wellington & Albert, *Statutory Interpretation and the Political Process*, 72 YALE L.J. 1547, 1559, 1563-66 (1963) ("A proper accommodation — one that best serves the policy of section 301 without undermining the purposes of Norris-LaGuardia — seemingly would allow a district court to enjoin a breach of contract strike over an arbitrable grievance." "[But] resolution of contested issues touching upon sensitive areas of our social and economic life should be made by the electorally based and therefore responsive political institutions.")

¹⁷ See the celebrated opinion of Judge Amidon in *Great No. Ry. v. Brouseau*, 286 Fed. 414 (D.N.D. 1923).

¹⁸ See FED. R. CIV. P. 65 (injunctions).

¹⁹ See National Labor Relations Act § 10(l), 61 Stat. 149 (1947), as amended, 29 U.S.C. § 160(l) (1964) (interlocutory injunction relief in NLRB proceedings); 28 U.S.C. § 1292(a)(1) (1964) (interlocutory orders of district courts regarding injunctive relief appealable to courts of appeals).

²⁰ Cf. Hill, *Substance and Procedure in State FELA Actions — The Converse of the Erie Problem?*, 17 OHIO ST. L. J. 384, 387 (1956):

[W]hen federally-created rights are enforced in the state courts . . . the cardinal consideration is federal paramountcy. . . . Moreover, federal paramountcy extends as much to procedural as to substantive matters; if the federal purpose is clear, and if it is valid, there is no room for local procedural autonomy . . . and this is true whether the federal purpose is evidenced by an express Congressional enactment of a "procedural" character or is reasonably inferable from the substantive federal right in issue.

Even a firm adherent of a "general rule . . . that federal law takes the state courts as it finds them," Hart, *The Relations Between State and Federal Law*, 54

An affirmative answer would often be called for. The federal law whose application *Lincoln Mills* prescribes is one "which the courts must fashion from the policy of our national labor laws."²¹ One can, I believe, sum up the themes of federal concern with reasonable accuracy in a few words, although documentation would require a sensitive recollection of two generations of history. The core of the danger is improvident inhibition of protected strikes — in practice not often undone by subsequent lifting of the restraint — through fallible factfinding or overbroad decrees.²² The development of the preemption doctrine has made clear the central concern, in the Court's perception of national labor policy, that protected concerted activities have "breathing space to survive."²³ There is a strong federal interest in assuring that the remedial scheme by which contract rights are vindicated does not encroach unduly on protected activities.²⁴ Breach-of-contract suits are of course not removed from judicial cognizance, whether state or federal,²⁵ but a state may now vindicate state-

COLUM. L. REV. 489, 508 (1954), would presumably acknowledge a greater concern with the impact of state "procedure" when it is the federal rights of defendants (rather than plaintiffs) that are at stake. Cf. HART & WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 397 (1953) (jurisdiction of state court to hear federal defense). As for the "defense" of removal, see note 36 *infra*.

²¹ *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456 (1957).

²² To elaborate this problem here would by now be superfluous. See, e.g., Aaron, *Labor Injunctions in the State Courts — Part II: A Critique*, 50 VA. L. REV. 1147, 1156-58 (1964).

²³ The phrase is Mr. Justice Brennan's, referring to first amendment rights, in *NAACP v. Button*, 371 U.S. 415, 433 (1963). In the labor context, see *Liner v. Jafco, Inc.*, 375 U.S. 301, 306-08 (1964) (danger that state law of mootness would hinder NLRB determination of legal status of picketing); *Local 438, Construction Union v. Curry*, 371 U.S. 542, 550 (1963) (danger that temporary injunction, if not appealable to Supreme Court, would "effectively dispose" of union's right to picket); *Garner v. Teamsters Union*, 346 U.S. 485, 499 (1953) (danger that state would enjoin picketing that NLRB would permit).

²⁴ Even when state substantive law is permitted to operate, as in the case of "right to work" laws, the Court has proscribed equitable relief against strikes or picketing that is aimed at obtaining a union-security agreement violative of state law, *Local 438, Construction Union v. Curry*, 371 U.S. 542 (1963), while permitting the state to invalidate or hold actionable a union-security arrangement obtained through collective bargaining. *Retail Clerks Int'l Ass'n v. Schermerhorn*, 375 U.S. 96 (1963). A substantial reason for holding that state power "begins only with actual negotiation and execution" of the agreement, see *id.* at 105, is the danger of permitting state court litigation about the object of concerted activities to constrain protected conduct "erroneously" found to have a forbidden object. See *Garner v. Teamsters Union*, 346 U.S. 485, 499 (1953).

²⁵ *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962) (NLRB jurisdiction does not preclude judicial jurisdiction); *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962) (federal court jurisdiction does not preclude that of state courts).

created rights only to the extent that they conform to the evolving federal law of labor contracts.²⁶ Indeed, description of the contract rights in question as "state-created," while doubtless an accurate reflection of the traditions that move a state court to grant or deny a right of action, can probably claim no better legal credentials than those accorded harmless error.²⁷ Federal law should set the outer limits of the availability of injunctive relief in actions governed by section 301.

(4) The question therefore remains: What is the content of the relevant federal law? Some immediately visible problem areas can be readily perceived. The greater difficulty is to strike a proper balance between the demands of federal labor policy and of state procedural autonomy. The case that seems to me easiest to resolve in favor of federal restraint is the use of ex parte restraining orders. Here lies the greatest danger to federally protected rights.²⁸ At the same time, the interference with state procedure is relatively slight. I would argue that the spirit of Rule 65(b)²⁹ and NLRA section 10(l)³⁰ must be observed, and that restraining orders should not be issuable without notice except on a recitation of immediate need and (more important) should be limited to a short time certain, not renewable ex parte.

More difficulty surrounds the procedure governing preliminary injunctions. One can readily state the requisites of full protection: an opportunity for an evidentiary hearing on demand;

²⁶ Local 174, *Teamsters Union v. Lucas Flour Co.*, 369 U.S. 95, 102-04 (1962). A broader reading of the *Dowd Box*, *Lucas Flour*, and *Evening News* cases, as rendering all of the underlying aims of the preemption doctrine wholly inapplicable to § 301 actions, is not warranted by the decisions.

²⁷ State substantive rules of contract law must bow when they would hold actionable what federal law deems lawful, see *id.* at 105 n.14, and when they would treat as permitted what under federal law is sufficient to constitute a breach. *Cf.* *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960). The Court has not, to my knowledge, given any support to the view that state substantive law is permitted to operate as such within a "zone of reasonableness" set by federal law. See *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 457 (1957) ("any state law applied . . . will be absorbed as federal law and will not be an independent source of private rights"); *Local 174, Teamsters Union v. Lucas Flour Co.*, *supra* note 26, at 102; *American Dredging Co. v. Local 25, Int'l Union of Operating Eng'rs*, 338 F.2d 837, 857 (3d Cir. 1964) (Hastie, J., dissenting), *cert. denied*, 380 U.S. 935 (1965).

²⁸ For the still-classic statement of the problem of "temporary" equitable relief, see FRANKFURTER & GREENE, *THE LABOR INJUNCTION* 200-02 (1930); on ex parte applications, see *id.* at 223.

²⁹ FED. R. CIV. P. 65 (b).

³⁰ 61 Stat. 149 (1947), as amended, 29 U.S.C. § 160(l) (1964).

appellate or similar³¹ review within the state system; ³² capacity of respondents under the restraint of a preliminary injunction to bring the proceedings promptly on for final hearing if desired. Here, however, countervailing considerations seem stronger. Is it appropriate for federal common law to prescribe a particular allocation of judicial responsibilities within the state system? ³³ Assuming the availability of Supreme Court review of injunctions issued by lower state courts and not appealable under state law,³⁴ does the relative inadequacy of the certiorari mechanism and its procedures for determining the question of a stay pending review warrant federal insistence on a state's creation or expansion of intramural avenues of redress?

The question of the availability of injunction bonds presents, in my view, a relatively weaker federal need. The aim of bond requirements is twofold: to discourage improper resort to equity through a financial deterrent, and to provide some recompense for respondents wrongly denied self-help at the time they chose to resort to it. When the procedures by which a state litigates equity suits are otherwise adequate to safeguard federally protected rights, I would not think that this requirement is so central to the protection of such rights that a state must provide it.

The thesis of this Comment is the presence of "federal law" apart from the Norris-LaGuardia Act. That law asks whether a particular aspect of a state's equity jurisprudence unduly threatens the policy against erosion of federally protected concerted

³¹ I have in mind here the practice of review by a court en banc of orders issued by a single judge.

³² Cf. 28 U.S.C. § 1292(a)(1) (1964) (district court issuance or denial of preliminary injunction appealable to court of appeals); *Local 438, Construction Union v. Curry*, 371 U.S. 542 (1963) (state court issuance of preliminary injunction appealable to Supreme Court when federal defense litigated).

³³ It should be borne in mind that the prescription would probably be conditional only. A state would be required to meet federal standards or forego the exercise of equity jurisdiction. It would, of course, be a far greater interference to tell a state that it was required to grant specific enforcement of no-strike clauses, but subject to federal restraints on the procedure for doing so. I would not think that the obligation of state courts to enforce federal law, see *Testa v. Katt*, 330 U.S. 386 (1947), embraces any such requirement, although the problem might have been somewhat more difficult had *Sinclair* not been decided as it was.

³⁴ The assumption has two aspects: (a) the application of the rule of the *Curry* case, see note 32 *supra*, to § 301 actions; (b) characterization of the lower state court as the highest "in which a decision could be had" (28 U.S.C. § 1257 (1964)), despite the later availability, on issuance of a permanent injunction, of further state court review.

activities.³⁵ Illustrations are needed to give flesh to the underlying question, and to suggest the process of forming an answer, but it would be premature for me to press the analysis further here.³⁶ The concept of federal law applicable only in state courts seems a strange one. But the Norris-LaGuardia Act is an uncommon piece of legislation. Its applicability to federal court actions prevented the development of more particularized restrictions on state equity jurisdiction, but its inapplicability to state court actions does not render inapplicable all federal concern. Once the demands of the federal common law are perceived, and the governing considerations expressed, the resolution of specific problems remains the task of that fallible, indispensable servant, "litigating elucidation."

³⁵ *Freedman v. Maryland*, 380 U.S. 51 (1965), dealing with state law of obscenity, involves the imposition of analogous requirements — burden of proof on the state, judicial determination of the status of the challenged film, injunctive relief pending judicial review limited to short fixed period — when the federal rights sought to be protected are of constitutional stature. *New York Times Co. v. Sullivan*, 376 U.S. 51 (1964), may portend a similar development in the area of libel. Cf. HART & WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 513 (1953). See also *Case v. Nebraska*, 381 U.S. 336, 340 (1965) (concurring opinion of Brennan, J.) (state postconviction remedies).

³⁶ Putting aside any supposed "incorporation" of Norris-LaGuardia, it seems clear that a court fashioning federal common law should not adopt a rule absolutely prohibiting specific relief against a strike in breach of contract. See, e.g., the discussion in *Wellington & Albert*, *supra* note 16, at 1552-59.

If state courts are to be permitted the exercise of equity jurisdiction denied to federal judges by the Norris-LaGuardia Act, the removal jurisdiction should not be read to permit an end-run around such jurisdiction. See the discussion in Comment, 113 U. PA. L. REV. 1096, 1097-98 (1965).