LEGISLATION

STATUTORY ATTEMPTS TO ELIMINATE THE "YELLOW DOG" CONTRACT—Since the peak year of 1920 the ranks of organized labor have been constantly decreasing from year to year.[1] In part this is due to the recession from abnormal war conditions, in part to technical improvements in the field of labor which have resulted in a growing army of unemployed. Along with these must be placed the introduction of company unions and the use of "yellow dog" contracts by the employer. The former, which were unquestionably fostered for the purpose of bringing about amicable relations between the employer and employee,[2] have made serious inroads upon the trade unions. Tolerant as one may be of the activities of these organizations, there is no doubt that their bargaining power is considerably less than that of the independent organization.[3] Aggrieved as they are at this new form of competition, labor unions have been even more resentful of the "yellow dog" contract.[4] The number of men working under these contracts has been estimated at a million and a quarter.[5] What proportion of the decline in trade unionism can be directly attributed to the anti-union contract cannot be accurately estimated, but it is more likely that they have acted as an impediment rather than as a destructive force. Regardless whether these contracts assisted in the decline or not, the antagonism and ill-feeling which they have inspired make them a pressing matter in the field of American labor problems.[6]

"Yellow dog" contracts are all directed toward one purpose—the abstention of the employee from union activities. In return for employment he may promise not to join a union, or not to join a union while continuing in the employment. Others may take the form of a promise not to agitate for, or join in any strike, or not to do anything to interfere with the employer's conduct of an open shop.[7] The consideration for these promises is the employment, but whether it be for a stated time or at will, the employer invariably reserves the right to discharge for

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[1] See HUNT, AN AUDIT OF AMERICA (1930) 81, 83. In *22* ENCYC. BRIT. (14th ed. 1929) 384, the number is put at 5,110,800 for 1920 compared with 3,903,800 for the year 1927.

[2] WITTE, THE GOVERNMENT IN LABOR DISPUTES (1932) 4, 5. "The solid front of the employers, their more enlightened policy, their welfare work, and their company unions, the surplus in the labor market, all operated to keep down the number of strikes in the last decade. What has happened during the present depression, however, suggests that the pendulum may soon swing the other way."

[3] These organizations are sponsored by the employer and all employees are then required to join them, at the same time promising to join no other organization. On company unions, see Leiserson, *Employee Representation—A Warning to Both Employer and Employee* (1928) 13 ACAD. OF POL. SCI. PROC. 96.

[4] "Company unions are an anathema to organized labor, yellow dog contracts still more so." WITTE, *op. cit. supra* note 2, at 220. See further 75 CONG. REC. 4832-4833, 4836-4837 (1932). It was a decision upholding the yellow dog contract which caused organized labor to combat the vigorous and successful campaign against the appointment of Judge Parker to the Supreme Court bench. 72 CONG. REC. 6569, 7449, 7793, 7808-7822, 7930-7954, 7976, 8021-8048, 8086-8098, 8120, 8181, 8337, 8358, 8423, 8475, 8567 (1930).

[5] WITTE, *"Yellow Dog" Contracts* (1930) 6 WIS. L. REV. 21. "A recent estimate from labor sources gives 1,125,000 as the number now employed under yellow dog contracts. This probably includes employees in many shops operated on a non-union basis without formal contracts, and perhaps also, establishments which at one time had such contracts but have discontinued them."

[6] In England, where the problem of labor law is now almost exclusively embraced in legislation, the problem of yellow dog contracts has not arisen, probably due to the fact that collective bargaining is the accepted method of dealing between employer and employee. THE TRADES DISPUTES AND UNION ACT, 17 & 18 GEO. V, c. 22, 6, has, nevertheless, a provision outlawing them.

[7] Various forms of the contract are set out in Cochrane, *Why Organized Labor Is Fighting "Yellow Dog" Contracts* (1925) 15 AM. LAB. LEG. REV. 227, 230.

any number of stated reasons, leaving the length of the employment to his discretion.[8]

In 1875 these contracts had already appeared in Massachusetts where they were employed to break up a weaver's strike,[9] and at about the same time they were in use in Virginia,[10] but their effect then was incomparable to the importance they have since achieved. It is significant that they follow closely the first established and unified trade movement in America.[11] State statutes which, in attempting to remove impediments to the growth of the trade unions, made it a crime for employers to discriminate against an employee because of union affiliations, were soon before the courts. These statutes were held unconstitutional because of their interference with the employer's right to make and terminate such employment contracts as he deemed best.[12] Nevertheless the number of these statutes continued to grow,[13] and in 1898 the national government passed the *Erdman Act*.[14]

Within a short time the constitutionality of the *Erdman Act* was brought before the court in *Adair v. United States*.[15] This statute, which had within it a clause making it a misdemeanor for an employer to exact a non-union promise as a condition of employment, was tested on that provision which prevented the free discharge of an employee or discrimination against him because of union affiliations. In answer to the argument that this part of the act was a necessary adjunct to the scheme of arbitration and settlement of disputes in other parts of the act, the court said very precisely:

> "Congress could not, consistently with the Fifth Amendment, make it a crime against the United States to discharge the employee because of his being a member of a labor organization." [16]

While the court repeated the formula that freedom of contract is subject to such restraints as are necessary for the public health, welfare, morals or safety, an act which was directed solely to the betterment of the position of the unions was not deemed to be an exercise of the legitimate police power of the government. The determination that the employer could not be forbidden to protect himself against the unions in this manner, left it to the court to decide whether it was beyond the scope of legitimate self defense for an employer to exact a non-union promise from a prospective employee.[17] The court met this situation seven years later when the Kansas statute invalidating the "yellow dog" contract came before the court in *Coppage v. Kansas*.[18] Apparently the situations were considered for all practical purposes indistinguishable, for:

> "Under a Constitutional freedom of contract, whatever either party has the right to treat as sufficient ground for terminating the employment, where there is no stipulation on the subject, he has the right to provide against by

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[8] See for example the contract set out in Interborough Rapid Transit Co. v. Green *et al.*, 131 Misc. 682, 227 N. Y. Supp. 258 (1928).

[9] McNEIL, THE LABOR MOVEMENT—THE PROBLEM OF TODAY (1887) 224-225.

[10] WARE, THE LABOR MOVEMENT IN THE UNITED STATES 1860-1895 (1929) 124.

[11] By 1880, the Knights of Labor, organized in 1869 and pursuing since then a secret existence, had appeared in the open as a union of all workers.

[12] Charles Gillespie v. People of the State of Illinois, 188 Ill. 176, 58 N. E. 1007 (1900); State v. Julow, 129 Mo. 163, 31 S. W. 781 (1895); People of the State of New York v. Harry Marcus, 185 N. Y. 257, 77 N. E. 1073 (1906); State *ex rel.* Zellmer v. Kreutzberg, 114 Wis. 530, 90 N. W. 1098 (1902).

[13] See *infra* note 20.

[14] 30 STAT. 424 (1898).

[15] 208 U. S. 161, 28 Sup. Ct. 277 (1908).

[16] *Id.* at 176, 28 Sup. Ct. at 281.

[17] FREUND, POLICE POWER (1904) § 326.

[18] 236 U. S. 1, 35 Sup. Ct. 240 (1915).

insisting that a stipulation respecting it shall be a *sine qua non* of the inception of the employment, or of its continuance if it be terminable at will. It follows that this case is not distinguishable from *Adair v. United States.*" [19]

Fifteen similar state statutes [20] were in existence at the time of this decision and upon its authority they have since been declared invalid by state tribunals,[21] or remain upon the statute books as dead letters. Thus the first attempts at easing the path of unionization by invalidating the "yellow dog" contract proved themselves objectionable on grounds of constitutionality.

The decision of the Supreme Court in the *Coppage* case established that the legislature could not invalidate the "yellow dog" contract and that the employer was within his rights in demanding that the employee sign such an agreement. Nevertheless, although the prevalence of legislation against them is some indication that they were in widespread use, the effectiveness of the contract was as yet extra-legal. Although it is true that the employer could sue the employee who disregarded its terms, there is no record of any suit of this nature. There remained the power to discharge for breaches and the psychological compulsion upon workmen ignorant of the legal import of such contracts,[22] and it is the latter which must have made their use profitable. The full importance of the anti-union contract became established after the decision in the *Hitchman* case.[23] It was already well established before this case that an action lay for inducing breach of contract and in several instances this action had been permitted in the case of employment contracts terminable at will.[24] In the *Hitchman* case the plaintiff's employees had signed contracts in which they promised not to join unions while continuing in plaintiff's employment, and when the union attempted to organize the workers, an injunction was sought prohibiting the organizers from inducing a breach of contract. Although there has been some dispute as to whether the act of the union organizers actually caused a breach of the employment contract,[25] the court granted the petition and enjoined the unionization of the mine. This injunction, sweeping in its nature, permitted contempt proceedings to be brought under it four years later.[26] The opinion, confusing in the extreme, has been severely criticized,[27] but the value of the decision was not lost upon the employer. Where previously the power of these contracts rested against an

[19] *Id.* at 13, 35 Sup. Ct. at 243.

[20] Such statutes were in force in California, Colorado, Connecticut, Indiana, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, Oklahoma, Oregon, Pennsylvania, Porto Rico and Wisconsin. Bull. of Bur. of Lab. Stat., No. 148, vols. 1 & 2.

[21] Montgomery v. Pacific Electric Co., 293 Fed. 680 (C. C. A. 9th, 1923); People v. Western Union, 70 Colo. 90, 198 Pac. 146 (1921); Gillespie v. Illinois, 188 Ill. 176, 58 N. E. 1007 (1900); Coffeyville Vitrified Brick and Tile Company v. Perry, 69 Kan. 297, 76 Pac. 848 (1904); State *ex rel.* Smith v. Daniels, 118 Minn. 155, 136 N. W. 563 (1912); Jackson v. Berger, 92 Ohio St. 130, 110 N. E. 732 (1913).

[22] See *supra* note 7 at 227.

[23] Hitchman Coal and Coke Co. v. Mitchell, 245 U. S. 229, 38 Sup. Ct. 65 (1917).

[24] On the subject of inducing breach of contract, see Sayre, *Inducing Breach of Contract* (1922) 36 HARV. L. REV. 663; Carpenter, *Interference With Contract Relations* (1927) 41 HARV. L. REV. 728.

[25] Justice Brandeis, dissenting in the Hitchman case, pointed out that there could be no breach of the employment contract until the union both persuaded the men to join and at the same time to stay in the employment since the promise was not to join a union while continuing in the employment. He concludes that there was no evidence of this, and that the action of the union went merely to the extent of getting the men to agree to join the union but not to breach their contract. See Note (1927) 41 HARV. L. REV. 770. The position of Justice Brandeis has been criticized in Cary and Oliphant, *The Present Status of the Hitchman Case* (1929) 29 COL. L. REV. 440, 443-444; *cf.* Sayre, *supra* note 24, at 690-696.

[26] Witte, *supra* note 5, at 27.

[27] Cook, *Privileges of Labor Unions in the Struggle for Life* (1917) 27 YALE L. J. 779; Carey and Oliphant, *supra* note 25; and see the articles cited *supra* note 24.

individual, they now became effective weapons against the union organizers and against the union itself. In 1918 the spread of "yellow dog" contracts caused labor to protest and their use was ordered abandoned by the War Labor Board.[28] However, when the power of that Board ceased, the movement to foreswear the laborer from contact with unions was resumed.

Although the scope of the injunction has been somewhat modified in subsequent cases,[29] the *Hitchman* case has furnished authority for the issuance of injunctions in both state[30] and federal courts.[31] Many decisions have held that such contracts are not contrary to public policy,[32] but, within the last decade, the courts of New York called upon to enforce such contracts decided that they were without consideration.[33] A similar position has been adopted by the Ohio Supreme Court,[34] although both of these courts have left open the question whether or not they would enforce such a contract if the employer had absolutely bound himself to give employment for a specified period. While from a purely legalistic standpoint one might quarrel with these decisions, they suggest at least a position which might be adopted by other courts eager to solve a broad economic problem through the application of common law principles.[35]

In approaching the court's decision upon any labor dispute it is important to bear in mind that the substantial problem which the court must deal with—the core of the dispute which gives rise to so many dissenting opinions—is that of justification[36] If it be a strike which has precipitated the litigation, then the court must decide whether the purpose of the strike justifies the infringement upon the employer's rights.[37] Every demand of labor and the means used to

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[28] NAT. WAR LAB. BD. DOCKET, pp. 19, 154, 1049.

[29] International Organization, United Mine Workers of America *et al.* v. Red Jacket Consol. Coal & Coke Co., 18 F. (2d) 839 (C. C. A. 4th, 1927) (allowing persuasion of employees to join unions after quitting employment); Bittner v. West Virginia Pittsburgh Coal Co., 15 F. (2d) 652 (C. C. A. 4th, 1926) (permitted advertisement of benefits of unions); Kraemer Hosiery Co. v. American Federation of Full Fashioned Workers *et al.*, 305 Pa. 207, 157 Atl. 588 (1931) (persuasion of employees permitted).

[30] Callan v. Exposition Cotton Mills, 149 Ga. 119, 99 S. E. 300 (1919); McMichael v. Atlantic Envelope Co., 151 Ga. 776, 108 S. E. 226 (1921); United Shoe Machinery Corp. v. Fitzgerald, 237 Mass. 537, 130 N. E. (1921); Cyrus Currier & Sons v. International Molders Union, 93 N. J. Eq. 61, 115 Atl. 66 (1921); Skolny v. Hillman, 114 Misc. 571, 187 N. Y. Supp. 21 (1921); Nashville Ry. & Light Co. v. Lawson, 144 Tenn. 78, 229 S. W. 741 (1921).

[31] See, in addition to the cases cited *supra* note 29, Armstrong *et al.* v. United States, 18 F. (2d) 371 (C. C. A. 7th, 1927); Montgomery v. Pacific Elec. Ry. Co., 293 Fed. 680 (C. C. A. 9th, 1923); Gasaway *et al.* v. Borderland Coal Corp., 278 Fed. 56 (C. C. A. 7th, 1921).

[32] Vail Ballou Press v. Casey, 125 Misc. 689, 212 N. Y. Supp. 113 (1925); Nashville Ry. & Light Co. v. Lawson, *supra* note 29; Platt v. Philadelphia & Reading R. R., 65 Fed. 660 (C. C. E. D. Pa., 1894); but see (1922) 22 COL. L. REV. 78.

[33] Interborough Rapid Transit Co. v. Lavin, 247 N. Y. 65, 159 N. E. 563 (1928); Interborough Rapid Transit Co. v. Green *et al.*, 131 Misc. 682, 227 N. Y. Supp. 258 (1928); Exchange Bakery & Restaurant, Inc. v. Louis Rifkin, 245 N. Y. 260, 157 N. E. 130 (1927).

[34] La France Electrical Construction & Supply Co. v. International Brotherhood of Electrical Workers, Local No. 8, *et al.*, 108 Ohio St. 61, 140 N. E. 899 (1923).

[35] See (1932) 80 U. OF PA. L. REV. 305.

[36] Carey & Oliphant, *supra* note 25, at 445. Compare the statement of Justice Harlan in Coppage v. Kansas, *supra* note 18, at 35, 35 Sup. Ct. at 244, that: "No attempt is made, or could reasonably be made, to sustain the purpose to strengthen these voluntary organizations, . . . as a legitimate object for the exercise of the police power" with the opinion of Justice Holmes (dissenting) in Adair v. United States, *supra* note 15, at 191, 28 Sup. Ct. at 287, "But suppose the only effect really were to tend to bring about the complete unionizing of such railroad laborers as a Congress can deal with, I think that object alone would justify the act."

[37] Whether the purpose for which a strike is instituted is or is not a legal justification for it, is a question of law to be decided by the court. . . . A strike is not a strike for a legal purpose because the strikers struck in good faith for a purpose which they thought was a sufficient justification for a strike, . . . the purpose of the strike must be one which the court as matter of law decides is a legal purpose of a strike." DeMinico v. Craig *et al.*, 207 Mass. 593, 598, 94 N. E. 317, 319 (1911).

accomplish this demand necessarily involves some encroachment upon the right of the employer—some curtailment of his freedom.[38] It is the delicate balance of these conflicting rights which determines and orders the court's decision. Strikes (which must naturally infringe the interests of the employer) have justified themselves when undertaken in pursuit of better wages, hours or working conditions.[39] Since these improvements are accomplished only through unions and collective bargaining, the latter must in turn finally justify themselves in the eyes of the court in order that they outweigh or at least equal the employer's right in his anti-union contract. Only when the court has reached this conclusion can we hope to see either legislation on the subject upheld or the "yellow dog" contract refused aid in equity. The failure of the courts to accord to unionization and collective bargaining a higher significance than the employer's unrestricted right to contract has resulted in a situation whereby the employer, already in a superior bargaining position, has been able to forestall the endeavors of his employees to improve their own.

The unions have developed no effective means of combating the anti-union contract. In a few instances, having previously secured workmen to enter into agreements not to work for "yellow dog" employers, they have sought injunctions against the efforts of the proselyting employer, but they met with no success.[40] It is not surprising, therefore, to find that labor has again resorted to legislation for assistance. In 1925 the American Federation of Labor presented a standard anti-"yellow dog" contract bill to the legislatures of Ohio and Indiana, and it is their announced purpose to press it in the legislatures of all states.[41] To date it has been enacted as law in Arizona, Colorado, Nevada, Ohio, Oregon and Wisconsin.[42] The standard bill declares that any promise in an employment contract by which an employee or employer promises not to become or remain a member of an employee's or employer's organization is contrary to the public policy of the state and is thereby declared unenforceable in law or equity.

Thus, the constitutionality of these measures will again be presented within a short time, and the authority of the *Adair* and *Coppage* cases, and the numerous state decisions to the same effect, subject to re-examination in the light of experience and existing conditions.[43] There are two changes in the present act which distinguish it from the previous statutes. In the first place, the present one is not a penal statute, and the distinction between judicial non-enforcement and penal legislation, although it effects no change in the substantial law sought to be achieved, is nevertheless a modification which provokes less prejudice.[44] In the second place, the principle of correlation employed in the present statute is certainly an improvement in draftsmanship.[45] Again, however, the change is not a

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[38] "Nevertheless in numberless instances the law warrants the intentional infliction of temporal damage, because it regards it as justified." Veghelan v. Guenther, 167 Mass. 92, 106, 44 N. E. 1077, 1080 (1896).

[39] OAKES, ORGANIZED LABOR AND INDUSTRIAL CONFLICTS (1927) § 321.

[40] A discussion of contracts by unions to prevent their members from entering into "yellow dog" contracts is found in Stern, *A New Legal Problem in the Relations of Capital and Labor* (1925) 74 U. OF PA. L. REV. 523. Injunctions were unsuccessfully sought in Nolan v. Farmington Shoe Manufacturing Co., 25 F. (2d) 906 (D. Mass., 1928); New England Wood Heel Co. v. Nolan, 268 Mass. 191, 167 N. E. 323 (1929).

[41] See *supra* note 7, at 227.

[42] ARIZ. LAWS (1931) c. 19; COLO. LAWS (1931) c. 112; OHIO LAWS (1931) § 6241; ORE. LAWS (1931) c. 247; NEV. COMP. LAWS (1929) § 10473; WIS. STAT. (1931) § 268.19.

[43] On the constitutionality of the Wisconsin statute see MacDonald, *The Constitutionality of Wisconsin's Statute Invalidating "Yellow Dog" Contracts* (1931) 6 WIS. L. REV. 86.

[44] FREUND, POLICE POWER (1904) § 326; see Frankfurter and Greene, *Congressional Power Over the Labor Injunction* (1931) 31 COL. L. REV. 385. But the importance of this change is minimized by MacDonald, *supra* note 43, at 91.

[45] FREUND, STANDARDS OF AMERICAN LEGISLATION (1917) 240, 243.

substantial one. Turning now to the labor decisions of the Supreme Court we find that there has been no pronouncement on the subject of the anti-union contracts statutes since the *Coppage* case, but this decision and that in the *Adair* case, although often cited, have never been weakened. In fact as late as 1917 the Court expressly reaffirmed the holding of these two cases.[46] If the decision in these cases be taken as laying down the premise that the legislature may in no way interfere with the employment contract, that position would be unfounded. The court has at various times upheld legislation prohibiting the use of child labor, legislation limiting the hours of employment, and has held nugatory the attempts to abolish by contract statutes abrogating the fellow servant rule.[47] It is to be noted that these decisions have dealt with concrete problems whose effect on the physical status or welfare of the workman was not difficult of perception. Demonstrable situations such as these are no indicia that the court will deem within the permissible limits of legislation statutes whose justification, if any, must rest on an abstract theory of social equalization.

There has been one decision the breadth of which might be said to be sufficient to stand as a committal to a thoroughgoing unionizing policy and which seems to grasp at a truer conception at the position of the workman than that of previous cases. In this decision, *American Steel Foundries v. Tri-City Trades Council*,[48] Chief Justice Taft stated:

> "They (labor unions) were organized out of the necessities of the situation. A single employee was helpless in dealing with an employer. . . . Union was essential to give laborers opportunity to deal on equality with their employer. . . . To render this combination at all effective, employees must make their combination extend beyond one shop." [49]

However, the decision merely permitted the use of peaceful persuasion to unionize the workers in a case where there was no interference with a contract. To allow a technical legal right to stand in the way of unionizing activities after such express recognition that the employee is "helpless" and that "union was essential" might seem anomalous indeed, but *dictum* such as this is often considered inapplicable to a different situation, and the economic propensities of one judge are often not shared by his colleagues, even though the legal results may be concurred in by all.[50] More recently the court has recognized that free and independent choice of representatives is essential if collective bargaining is to mean anything at all; consequently the sanction they gave to a statute which imposed a duty not to interfere with the free choice of those who are to adjust the terms between employer and employee [51] would seem to bring them still closer to complete realization that "liberty to contract" may mean a liberty to join voluntary associations of workmen unhindered by the "yellow dog" contract.

[46] New York Central R. R. v. White, 243 U. S. 188, 206, 37 Sup. Ct. 247, 254 (1917).

[47] See Note (1931) 44 HARV. L. REV. 1287. Sturges v. Beauchamp, 231 U. S. 220, 34 Sup. Ct. 60 (1913) (child labor); Muller v. Oregon, 208 U. S. 412, 28 Sup. Ct. 324 (1908) (hours of employment); *cf.* Lochner v. United States, 198 U. S. 45, 25 Sup. Ct. 539 (1905); Chicago B. & B. R. R. v. McGuire, 219 U. S. 549, 31 Sup. Ct. 259 (1911); Shohoney v. Quincy, etc., R. R., 231 Mo. 131, 132 S. W. 1059 (1910) (fellow servant rule).

[48] 257 U. S. 184, 42 Sup. Ct. 72 (1921).

[49] At 209, 42 Sup. Ct. at 78. This statement is in substance incorporated into the recent anti-injunction bill, see *infra* note 56.

[50] "The ground of decision really comes down to a proposition of policy of rather a delicate nature concerning the merit of the particular benefits to themselves intended by the defendants, and suggests a doubt whether judges with different economic sympathies might not decide such a case differently when brought face to face with the issue." Holmes, *Privilege, Malice and Intent* (1898) 8 HARV. L. REV. 1, 8.

[51] Texas & N. O. Ry. v. Railway Clerks, 281 U. S. 548, 50 Sup. Ct. 427 (1930).

Realities must force us to the conclusion that workmen sign these agreements under economic duress. Yet:

> "Why do so many of them [the courts] force upon legislation an academic theory of equality in the face of practical conditions of inequality? . . . Why is the legal conception of the relation of the employer and employee so at variance with the common knowledge of mankind?" [52]

It is with these questions that Dean Pound assailed the statement of Justice Harlan that (speaking of the employment contract) "in all such particulars the employer and employee have equality of right." [53] Although it may be true that the employee is free to decline an employment rather than enter into a non-union contract, the thought that he will, contemplates a workman either of independent means or most unique in his services. Bearing in mind that we, in common with other industrialized countries, are now confronted with the problem of standing unemployment, it can hardly be denied that his right to decline employment is controlled in no small degree by the stern necessities of life. Moreover, the recognition that inequality in wealth is a condition which must exist in view of our economic and political system.[54] and that it is current in all our commercial transactions, connotes a failure to differentiate between the ordinary transaction involving the sale of a commodity and a transaction involving the sale of labor. However much we are devoted to an outmoded policy of *laissez-faire*, it must be borne in mind that it was never intended that the state subserve the system, but rather that the system serve the public.

In the last session of Congress, that body, in an attempt to curb the ever-extending use of the injunction in labor disputes and to give labor greater freedom of action, passed a bill *"To Define and Limit the Jurisdiction of Courts Sitting in Equity"*.[55] This is probably the most comprehensive labor enactment that this country has ever seen and has, within its provisions,[56] a section whereby any undertaking not to become or remain a member of an employee's or employer's organization is declared unenforceable in any court of the United States [57] and denied the aid of law or equity. It must first be observed that as distinguished from other acts of Congress designed to regulate the course of labor, this act was not passed in pursuance of the power of Congress over interstate commerce. The doubt expressed in the *Adair* case may have been sufficient to prove a deter-

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[52] Pound, *Liberty of Contract* (1908) 18 YALE L. J. 454.

[53] Adair v. United States, *supra* note 15, at 175, 28 Sup. Ct. at 280.

[54] See Coppage v. Kansas, *supra* note 18, at 17, 35 Sup. Ct. at 245.

[55] U. S. PUBLIC ACT No. 65 (1932). This bill was drawn up with the assistance of Professor Frankfurter, Professor Oliphant, Mr. Witte, Mr. Richberg and Professor Sayre. For a discussion of the act and its possible effect on the law see Christ, *The Federal Anti-Injunction Bill* (1931) 26 ILL. L. REV. 516; Chamberlain, *The Federal Anti-Injunction Act* (1932) 18 A. B. A. J. 477; for a discussion of the constitutional phases of the act see Frankfurter and Greene, *Congressional Power Over the Labor Injunction* (1931) 31 COL. L. REV. 385.

[56] Section 2 of the bill declares the public policy of the United States. Section 3 covers the anti-union contract. Section 4 limits the scope of injunctive relief, and while this section follows in many respects section 20 of the Clayton Act, 38 Stat. 730 (1914), 15 U. S. C. A. § 12 (1927), it omits the vitiating words "lawfully" and "unlawfully". See American Steel Foundries v. Tri-City Trades Council, *supra* note 49, at 203, 42 Sup. Ct. at 76 where it was decided that this section of the Clayton Act did not change the law. Section 5 declares that labor unions shall not be enjoined on the ground that they are engaged in an unlawful conspiracy. Section 6 provides that no one shall be held responsible or liable in a labor dispute unless upon clear proof of authorization, participation or ratification. The remainder of the bill is mostly concerned with procedural changes.

[57] Section 13 (d) defines "court of the United States" as any court whose jurisdiction has been or may be conferred or defined or limited by act of Congress, including the courts of the District of Columbia.

rent in this respect.[58] Instead resort was had to the Congressional power over the inferior courts of the United States.

As a depository of the judicial power of the United States, the Constitution expressly provides for a Supreme Court, and leaves it to Congress to establish other courts.[59] The power of Congress to establish federal courts is patently a non-enforceable duty, but having established them, it is not generally denied that they may parcel out the jurisdiction in such manner as seems most advisable. It is true that Judge Story early expounded the doctrine that the federal courts, once established, automatically became vested with the entire judicial power.[60] This strong Federalist attitude was not shared by other judges, and the decisions [61] and researches [62] have all inclined to the view that there exists in Congress no small degree of control over the federal courts and the appellate jurisdiction of the Supreme Court.[63] In *Kline v. Burke Construction Company,* Justice Sutherland stated:

> "The Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an act of Congress to confer it. And the jurisdiction having been conferred may, at the will of Congress, be taken away in whole or in part; and if withdrawn without a saving clause, all pending cases though cognizable when commenced must fall." [64]

It is with this in mind that the federal anti-"yellow dog" contract provision was passed. In the opinion of one authority, this section does not render these contracts void but is merely "a restriction of the ambit of the jurisdiction of the inferior courts." [65] As contrasted with the effect of the state statutes which, in their deprivation of the court's assistance to such contracts, deprives them totally of enforcement, the federal statute merely denies access to the federal courts. Only if more courts adopt the position of the New York and Ohio courts or until the state statutes are held constitutional would the "yellow dog" contract be totally eliminated. The objection has been made to the federal statute that it is an indirect attempt to encroach upon the power of the state.[66] Such objection proceeds on the assumption that it is a substantive enactment. Were this so, there would indeed be reason for such a statement, since it is estimated that seventy-five

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[58] Adair v. United States, *supra* note 15, at 179, 28 Sup. Ct. at 282.

[59] U. S. CONST., Art. III, Sec. 1; Art. I, Sec. 8.

[60] Martin v. Hunter's Lessee, 14 U. S. 141 (1816); White v. Fenner, 1 Mason 520 (C. C. 1st, 1818); and this view was apparently shared by Judge Bushrod Washington in *Ex parte* Cabrera, Fed. Cas. No. 2,278 (C. C. Pa. 1805).

[61] Meyers v. United States, 272 U. S. 52, 47 Sup. Ct. 21 (1926); United States v. Union Pacific R. R., 98 U. S. 569 (1878); William F. Cary and Samuel T. Cary v. Edward Curtis, 3 How. 236 (U. S. 1845); Turner v. President, Directors and Company of the Bank of North America, 4 Dall. 8 (U. S. 1799). The control of Congress over the appellate jurisdiction of the Supreme Court is strikingly illustrated in *Ex parte* McCardle, 7 Wall. 506 (U. S. 1868) where, while an appeal was under advisement in the Supreme Court, Congress withdrew this part of their appellate jurisdiction and thereupon the court dismissed the case.

[62] Warren, *New Light on the History of the Federal Judiciary Act of 1789* (1923) 37 HARV. L. REV. 49; Frankfurter and Landis, *Distribution of Judicial Power Between United States and State Courts* (1927) 13 CORN. L. Q. 499; WILLOUGHBY, CONSTITUTION OF THE UNITED STATES (2d ed. 1929) 1263; Frankfurter and Greene, *Labor Injunctions and Federal Legislation* (1928) 42 HARV. L. REV. 766.

[63] See *Ex parte* McCarle, *supra* note 62.

[64] 260 U. S. 226 at 233, 43 Sup. Ct. 79 at 83 (1922).

[65] Frankfurter and Greene, *Congressional Power Over Labor Disputes, supra* note 56, at 401.

[66] Sen. Rep. 163, Part 2, 72d Cong. 1st Sess., No. 176, pp. 6, 7. This is due to the choice of words in the particular section, which in some sense does infer that the contract is declared void.

per cent. of all labor controversies arise out of the diversity clause and involve therefore purely local matters.[67] But the sole case which seems to have involved this problem of indirect attempts is decidedly different from the instant statute,[68] and the objection that this is legislation upon a purely intrastate matter seems therefore without merit.

On the whole, therefore, it would seem that this section may succeed in outlawing the "yellow dog" contract in the federal courts, but the possibility that the Supreme Court will hold the state statutes constitutional seems more remote. Nevertheless the state courts can do much to alleviate this situation by re-examining the premises upon which such inequitable obligations are enforced in equity. It should be recognized that continued enforcement of the anti-union contracts will but encourage their use, and that this in turn has within it the potentiality of destroying unions entirely. Today the union is accepted as part of our social organization, and although there may be a difference of opinion as to its merits, experience alone will disclose whether unionization will perform its function adequately. But:

> "Once we recognize that the right of combination by workers is in itself a corollary to the dogma of free competition, as a means of equalizing the factors that determine bargaining power, it will place in truer perspective the consequences of making the power of union effective."[69]

It follows that the value of legislative efforts to accelerate this development must necessarily be determined empirically. All else is speculation.

N. S.

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[67] Frankfurter, *Distribution of Judicial Power Between United States and State Courts* (1927) 13 CORN. L. Q. 499, 523, n. 123.

[68] United States v. Klein, 80 U. S. 128 (1871). This case involved the appellate jurisdiction of the Supreme Court, and embraced the construction of an act which specified that after a pardon by the President and proof of such in the court of claims, on appeal to the Supreme Court, the pardon should be taken as conclusive evidence that the claimant did give aid to the rebellion (Civil War), and on proof of such pardon, the jurisdiction of the court shall cease. At page 146 the court said, "The court is required to ascertain the existence of certain facts and thereupon to declare that its jurisdiction on appeal has ceased, by dismissing the bill. What is this but to prescribe a rule for the decision of a cause in a particular way?"

[69] Frankfurter and Greene, *supra* note 63, at 772.