CURRENT LEGISLATIVE AND JUDICIAL RESTRICTIONS ON STATE LABOR INJUNCTION ACTS

State anti-injunction legislation 1 accomplishes its purpose of restricting labor injunctions with varying and currently diminishing success. Only eighteen of the twenty-four states with prohibitive statutes have abandoned abortive "little

Clayton” acts and enacted comprehensive provisions similar to those of the Norris-LaGuardia Act. Within those eighteen states, moreover, qualifications imposed by state legislatures and state courts tend to sap the statutes of their vigor. Deliberate legislative omissions, restrictive amendments, and judicial interpretations have played a part in this process. Deliberate legislative omissions, restrictive amendments, and judicial interpretations have played a part in this process.


For typical cases illustrating the impotency of “little Clayton” acts, see Gevas v. Greek Restaurant Workers’ Club, 99 N. J. Eq. 770, 134 Atl. 309 (1926); A. J. Monday Co. v. Automobile Workers, 171 Wis. 532, 177 N. W. 857 (1920). Despite the comparatively favorable attitude towards labor prevailing among the Minnesota judiciary, the statute was held merely declaratory. See Grant Construction Co. v. St. Paul Building Council, 136 Minn. 167, 161 N. W. 520 (1917). For discussion of these cases, see Larson, Labor Warfare and the Anti-Injunction Laws (1941) 29 Ky. L. J. 413.

“Little Clayton” acts suffered their final setback, however, in 1921, when the Supreme Court declared the Arizona statute unconstitutional. Truax v. Corrigan, 257 U. S. 312 (1921). The Court reasoned that since the Act refused the remedy of injunction to employers in a labor dispute, it permitted labor to enjoy privileges denied to the employer and was, therefore, discriminatory; that since peaceful picketing might properly be unlawful and enjoined, the prohibition against injunctions legalized unlawful acts and violated the due process clause of the Fourteenth Amendment. Messrs. Justices Pitney, Clark, Brandeis, and Holmes dissented. Id. at 342. See Clark, The Arizona Decision (1921) 31 Yale L. J. 408; Powell, The Supreme Court’s Control Over the Issuance of Injunctions in Labor Disputes (1928) 13 Proc. Acad. Pol. Soc. 37.

3. See note 1 supra. Wisconsin enacted an anti-injunction statute one year before the federal act was passed. Wis. Stat. (1943) §§ 103.51-103.63. In some respects the Wisconsin statute was more extensive than the federal act: Its provision prohibiting yellow dog contracts made such contracts absolutely void. Id. § 103.52; cf. Norris-LaGuardia Act, § 103. Persons held in contempt were granted the right to bail and notification of the precise accusation against them, and the maximum penalty for contempt was fixed. 2 Tellier, Labor Disputes and Collective Bargaining (1940) § 433. More significantly, the Wisconsin act “legalized” peaceful picketing. Wis. Stat., supra, § 103.53(1). See American Furniture Co. v. Local 200, 222 Wis. 338, 268 N. W. 250 (1936); Crowthers, The Anti-Injunction Acts and Our State Constitutions (1941) 21 Ore. L. Rev. 63, 70. Section 104 of the Norris-LaGuardia Act merely prohibits injunctions against certain activities, which include picketing only by construction. The Act provides that no injunction shall be granted to prohibit any person from “(e) Giving publicity as to the existence of, or facts involved in, any labor dispute whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence.” Norris-LaGuardia Act, § 104. The most recent anti-injunction statute also makes all non-enjoinable activities “legal.” N. J. Stat. Ann. (Supp. 1943) § 2.29-77.1, enacted 1941.

4. But see, e.g., cases where anti-injunction statutes have been permitted to operate as intended: E. M. Loew’s Enterprises v. International Alliance of Theatrical Stage Employees, 127 Conn. 415, 17 A. (2d) 525 (1941); Local Union No. 26 v. City of Ko-
construction to the effect that the statutes as procedural measures cannot alter prior common law principles controlling labor activities, have weakened statutes as protective instruments ab initio. In addition, judicial literal-mindedness in the application of otherwise adequate statutes has resulted in the acceptance of evasive devices as outside the scope of prohibitions. The past two years, in particular, have witnessed such an expansion of judicial doctrines permitting circumvention of the legislative mandates that anti-injunction legislation threatens to become entirely impotent.

Anti-injunction statutes were intended to curb the notorious American judicial practice of controlling labor activities by injunction. Although injunctions were ostensibly issued to protect petitioners' property rights in their businesses, findings were based merely on sworn affidavits without hearings as to whether union activities involved would cause in fact the irreparable damage requisite to relief in equity. Thus the practice furnished managerial groups with an expeditious weapon for breaking labor's organizational efforts.

A statute effective to curtail this abuse by immunizing "labor disputes" from injunctive action must define precisely the scope which the "dispute" com-

komo, 211 Ind. 72, 5 N. E. (2d) 624 (1937); Lichterman v. Laundry and Dry Cleaning Drivers' Union, 204 Minn. 75, 282 N. W. 689 (1938); Alliance Auto Service v. Cohen, 341 Pa. 283, 19 A. (2d) 152 (1941); Wallace Co. v. International Ass'n of Mechanics, 155 Ore. 652, 63 P. (2d) 1090 (1936); Starr v. Laundry & Dry Cleaning Workers' Local Union, 153 Ore. 634, 63 P. (2d) 1104 (1936); American Furniture Co. v. Local 200, 222 Wis. 338, 268 N. W. 250 (1936) (construing the Wisconsin act as predominantly procedural, despite the fact that picketing was made "legal" by one section of the act, see discussion infra, pp. 559-61).


8. Frankfurter & Greene, loc. cit. supra note 5. Whether after prolonged litigation labor is ultimately successful is immaterial. The preliminary ex parte injunction has already destroyed the effectiveness of the strike or picketing. Purdue, Labor Activities and Anti-Monopoly Legislation (1942) 17 Wash. L. Rev. 206, 215.

9. The practice soon provoked the disapproval of the legislatures. As early as 1895 the Montana legislature attempted to limit the issuance of injunctions. The law enacted was conspicuous for its obscurity and was construed as adding nothing to preexisting law. Empire Theatre v. Cloke, 53 Mont. 183, 194, 163 Pac. 107, 112 (1917). The statute provides that no injunction may issue in "labor disputes under any other or different circumstances or conditions than if the controversy were of another or different character, or between parties neither or none of whom were laborers or interested in labor questions." Mont. Rev. Code Ann. (Anderson & McFarland, 1935) §9242(8).

Judicial disapproval of the misuse of injunctions was also expressed. See, e.g., Puget Sound Traction Light & Power Co. v. Whitley, 243 Fed. 945, 947 (W. D. Wash. 1917).
prehends, specifying the nature not only of the parties, but also of the activities to be protected. The ambiguous phrasing of the first federal anti-injunction statute, upon which the first state acts were modeled, permitted the Supreme Court to interpret it as a prohibition against the issuance of injunctions only in situations where the parties involved were in an employer-employee relationship, and thus to exclude from statutory protection practically all activities of an organizational character. The Norris-LaGuardia Act of 1932—the pattern of the majority of present state acts remedied this interpretation by defining a “labor dispute” as “any controversy concerning terms or conditions of employment . . . regardless of whether or not the disputants . . . [stood] in the proximate relation of employer and employee.” It listed, moreover, activities which might not be enjoined when

10. Inclusion of the words “lawfully” and “legitimate” in the characterization of permissible labor conduct protected by section 6 of the Clayton Anti-Trust Act, 38 STAT. 731, 738 (1914), 15 U. S. C. § 17, 29 U. S. C. § 52 (1940), allowed courts a wide discretionary power, usually exercised to the disadvantage of labor. See Duplex Printing Press Co. v. Deering, 254 U. S. 443 (1921); Boudin, Organized Labor and the Clayton Act (1943) 29 VA. L. Rev. 272. Section 6 provides: “Nothing contained in the Anti-Trust Laws shall be construed to forbid the existence and operation of labor . . . organizations, instituted for the purposes of mutual help . . . or to forbid or restrain individual members of such organizations from lawfully carrying out legitimate objects there-of . . .” (italics supplied).


12. Kansas and Arizona enacted statutes similar to the Clayton Act one year before that statute was passed by Congress. As to other states, see notes 1, 2 supra. See also SEGAL, THE NORRIS-LAGUARDIA ACT AND THE COURTS (1941) 5; 2 TELLER, op. cit. supra note 3, §§ 427-28, 434.

13. Section 20 of the Clayton Act, 38 STAT. 735, 738 (1914), 29 U. S. C. § 52 (1940) provides: that no “court of the United States” may issue an injunction “in any case between an employer and employees . . . or between employees . . . or between persons employed and persons seeking employment . . . growing out of a dispute concerning terms or conditions of employment . . .”; that “no restraining order . . . shall prohibit any person . . . from terminating any relation of employment, or from ceasing to perform any work . . . or from recommending, advising or persuading others by peaceful means so to do; . . . or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; . . . nor shall any of the acts specified in this paragraph be considered . . . to be violations of any law of the United States.”


16. Significantly, the Act expressly stated that it was intended to strengthen labor's bargaining position by promoting labor organization. Norris-LaGuardia Act, § 102.

17. Id. § 113c. Section 113(a) (b) (c) provides: “When used in sections 101-115 of this title, and for the purposes of such sections (a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the
ever such a “dispute” existed—striking, assembling peacefully, or giving publicity to facts.\(^{19}\) And while injunctions still might issue in certain situa-

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same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employees; or (3) between one or more employees or associations of employees and one or more employees and associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as defined in this section) of 'persons participating or interested' therein (as defined in this section).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he, or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term ‘labor dispute’ includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.”

This definition, though part of a procedural statute, revolutionized the substantive concept of a “labor dispute,” ultimately appeared as a section of the National Labor Relations Act, 49 Stat. 445 (1935), 29 U. S. C. §§ 151, 152(g) (1940), and occurs frequently also in state labor relation statutes: MNIAS. ANN. LAWs (1942) c. 149, § 20C(c); X. Y. LAOR §701(8) ; 43 PA. STAT. ANN. (Purdon, 1941) tit. 43, §211.3(h).

Cf. Tel-

19. Norris-LaGuardia Act, § 104. Section 104 in its entirety provides:

“No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any state;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;
restrictive amendments. Several state statutes, framed in such inclusive terms, have recently been so restrictively amended as to be ineffective in the hands of even a sympathetic judiciary. The Pennsylvania and Wisconsin amendments exemplify the shift of legislative policy by provisions intended to restrict picketing by stranger unions and to curtail jurisdictional disputes where valid collective bargaining agreements exist. The Pennsylvania amendment expressly excepts from protection of the statute situations where the majority of disputing employees do not belong to a labor organization, or in which a union attempts either to induce a breach of a valid subsisting labor agreement or to coerce

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title."

Some state statutes make exception to this entire section where there is "fraud and violence." See the New York and Indiana statutes, cited supra note 1.


23. As construed prior to amendment, these statutes permitted injunctions only in very extraordinary circumstances. See, e.g., Lichterman v. Laundry and Dry Cleaning Drivers' Union, 204 Minn. 75, 282 N. W. 689 (1938); Wallace Co. v. International Ass'n of Mechanics, 155 Ore. 652, 63 P. (2d) 1090 (1936); Starr v. Laundry and Dry Cleaning Workers' Local Union, 155 Ore. 634, 63 P. (2d) 1104 (1936); Alliance Auto Service, Inc. v. Cohen, 341 Pa. 283, 19 A. (2d) 515 (1941); Atlantic Refining Co. v. Cohen, 34 Pa. D. & C. 582 (1938); Peak v. McElroy, 33 Pa. D. & C. 556 (1938); American Furniture Co. v. Local 200, 222 Wis. 338, 268 N. W. 250 (1936).

24. See notes 41 and 43 supra.


an employer to violate the state or the federal labor relations act. The Wisconsin amendment achieves its objective by a new definition of "labor dispute" confining it to a controversy between an employer and the majority of his employees in a collective bargaining unit. When the Wisconsin amendment is considered in conjunction with the simultaneously enacted Wisconsin "Peace Act," which purports to establish through an Employment Relations Board administrative machinery for peaceful settlement of labor controversies, the extent to which the purpose of the anti-injunction act has been legislatively frustrated becomes apparent. Cease and desist orders issued by the Board against the perpetration of "unfair labor practices," defined in the Peace Act to include picketing for a closed shop when less than three-quarters of the employees in the bargaining unit have voted in its favor, may block labor activities as effectively as if an injunction had issued in the first instance. Similar results are achieved directly by the Minnesota amendment granting district courts power to issue injunctions against "unfair labor practices," as maintaining more than one picket at the entrance of a building not only unfair, but "unlawful," leaves courts with little discretion to refrain from issuing requested injunctions. While some amendments may be based upon the assumption that labor problems can now be adequately handled through the machinery provided by state labor relations acts, the wisdom of resurrecting the injunctive device in view of its still latent possibilities for misuse seems questionable.

**SUBSTANTIVE-PROCEDURAL RATIONALIZATION**

A traditional judicial device for narrowing the scope of unamended prohibitions permits the use of that state substantive law which delimits the area of "legal" labor activities as a criterion of anti-injunction statutes' applicability. Originally intended to prevent interposition of the injunctive sanction as

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27. *Id.* § 205(d)(c).
28. *Wis. Stat.* (1943) §§ 103.535, 103.62(3). However, organizations "affiliated" with either employer or employees may still be considered parties to the dispute under the Wisconsin amendment. See (1942) *Wis. L. Rev.* 115.
30. Resort to the courts is authorized only for review of the Board's action. *Wis. Stat.* (1943) c. 111, § 111.07(7).
32. See Retail Clerks' Union v. Wisconsin Employment Relations Board, 242 *Wis. 21*, 6 N. W. (2d) 698 (1942); Wisconsin Employment Relation Board v. Mill and Ice Cream Drivers & Dairy Employees Union, 238 *Wis. 379*, 299 N. W. 31 (1941).
a forceful determinant in the resolution of extra-legal power conflicts between private parties, those acts prohibited the issuance of injunctions regardless of the "legality" of the activities involved. Criteria of application were to be the presence of a "labor dispute" and the absence of fraud and violence. Courts, however, by interpreting the legislative emphasis on non-use of the injunctive remedy as rendering the statute "procedural" and ineffective to alter "substantive" law, reached the circular result that therefore an activity illegal under state substantive law might still be enjoined. Even recently it has been held that an injunction may issue against a picketing union not in an employee relationship to the picketed party when state law requires such relationship as a condition of lawful picketing. Omission from statutes of an exact definition of the "labor dispute" to be protected from injunction has facilitated this type of construction. Thus a Massachusetts court recently confronted with a statute which failed to specify that the "proximate relation" of employer and employee was not essential to the existence of a "labor dispute,"


37. Shively v. Garage Employees Union, 6 Wash. (2d) 560, 108 P. (2d) 354 (1940); Safeway Stores, Inc. v. Retail Clerk's Union, 184 Wash. 322, 51 P. (2d) 372 (1935).

38. See Keith Theatre v. Vachon, 134 Me. 392, 187 Atl. 692 (1936). Through lack of the definition of a "labor dispute," and omission of a section comparable to section 104 of the Norris-LaGuardia Act, Maine law does not restrict injunctions against strikes for a closed shop. See also Simon v. Schwachman, 301 Mass. 573, 581, 18 N. E. (2d) 1, 6 (1938).


40. MASS. ANN. LAWS (1942) c. 149, §§ 20A-20C.

41. In other states with adequate statutes, courts have found activities like those in the Fashioncraft case to be within the definition of "labor dispute" and refused to allow injunctions. See Peak v. McElroy, 33 Pa. D. & C. 556 (1938) (picketing without a strike); The Atlantic Refining Co. v. Cohen, 34 Pa. D. & C. 582 (1938) (secondary boycott and picketing); Newark Milk & Cream Co. v. Milk Drivers & Dairy Employees, 19 N. J. Misc. 468, 19 A. (2d) 232 (Ch. Ct. 1941) (union picketing retail customers of the petitioner in order to obtain a closed shop at the petitioner's plant); Denver Local Union v. Perry Truck Lines, 106 Colo. 25, 43, 101 P. (2d) 436, 445 (1940) (picketing of third person to induce him not to deal with company with whom picketers in dispute). There is also no provision in the Massachusetts statute comparable to section 104 of the Norris-LaGuardia Act expressly prohibiting the issuance of injunctions against specified activities. See Simon v. Schwachman, 301 Mass. 573, 580-81, 18 N. E. (2d) 1, 6 (1938).
found that Massachusetts common law controlled the operation of the statute. It was then held that a stranger union, picketing for a closed shop with striking employees, was not affected by provisions of the statute and could be enjoined from such picketing, which constituted a tort under Massachusetts substantive law. Since this kind of construction, moreover, renders the statute declaratory of prior equity powers, it has been further buttressed in some states by the contention that a contrary interpretation would render the statute unconstitutional. In the absence of express authorization, it is argued, legislatures may not effect that curtailment of equitable jurisdiction necessitated by scrupulous adherence to the broad definition of "labor dispute" found in most anti-injunction statutes. Possibly in jurisdictions like New York, where the legislature has only a limited power to alter the jurisdiction of the courts, the argument has a slight justification. But in Massachusetts where purported lack of legislative power is responsible for the original defective drafting of the statute, it would seem that the constitutional grant to the legislatures of predominant power over the courts renders the argument nugatory.

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Where the express provisions of anti-injunction statutes remain unimpaired by judicial or legislative narrowing, recognition of extraneous arguments


44. This argument has been conspicuous in states where courts are given little or no power to limit the equity power of courts. See Busch Jewelry Co. v. United Retail Employees' Union, 281 N. Y. 150, 22 N. E. (2d) 320 (1939); Comment (1940) 49 YALE L. J. 537; see also Goldfinger v. Feintuch, 276 N. Y. 281, 11 N. E. (2d) 910 (1937). In Blanchard v. Golden Age Brewing Co., the Washington anti-injunction statute was interpreted as withdrawing equity jurisdiction from the courts and held invalid under the state constitution. 188 Wash. 396, 63 P. (2d) 397 (1936). Subsequent decisions, however, have held the statute valid by construing it narrowly, see the discussion supra, as had already been done in Safeway Stores, Inc. v. Retail Clerks Union, 184 Wash. 322, 51 P. (2d) 372 (1935). Cf. Adams v. Building Service Employees Union, 197 Wash. 242, 247, 84 P. (2d) 1021, 1023 (1938).

45. N. Y. CONST. ART. V, § 3; ART. VI, § 1; Crowthers, supra note 3, at 67.

46. Apparently, the omission was deemed necessary because of the Opinion of the Justices rendered prior to the act's passage, which stated that a statute which limited the power of the judiciary to issue injunctions would be unconstitutional. Opinion of the Justices, 275 Mass. 580, 176 N. E. 649 (1931); cf. Opinion of the Justices, 86 N. H. 597, 166 Atl. 640 (1933); Crowthers, supra note 3, at 69.


48. The majority of cases arising during the past two years have originated in states
ostensibly removing a controversy from the scope of the statutes has also resulted in defeating their purpose.\textsuperscript{49} The contention is conspicuously used in jurisdictional disputes that certification of majority representation by either a state board or the NLRB terminates whatever "labor dispute" might have existed between rival unions.\textsuperscript{50} As an additional argument for adoption of the theory, it is urged that an injunction is essential in the circumstance of certification to prevent the employer from being coerced into "unfair" bargaining\textsuperscript{51} with a minority union.\textsuperscript{52} In both a recent New York\textsuperscript{63} and an Oregon case,\textsuperscript{54} minority unions which had lost certifying elections were enjoined from picketing because after certification no "labor dispute" within the protection of anti-injunction statutes could exist.\textsuperscript{55} In a companion case,\textsuperscript{66} the Supreme Court of Oregon denied injunctive relief against picketing relying largely on the absence of certification as indicative of the continuance of a

with unamended statutes similar to the Norris-LaGuardia Act. The principal cases to be discussed have arisen in New York, Oregon, New Jersey, and Indiana. Since the 1939 amendment of the Oregon statute was held unconstitutional in part, see note 22 supra, the statute remains substantially like the Norris-LaGuardia Act.

\textsuperscript{49} In 1943 seven injunctions were granted out of nine cases; in 1942, six were granted, two denied, and two partial injunctions issued. 2 A. C. C. H. Lab. Serv. §43,601 (1943); id. at 49,001.

\textsuperscript{50} Use of certification as the major factor in determining whether a "labor dispute" exists is not new. The practice was first followed in federal cases: Donnelly Garment Co. v. I. L. G. W. U., 99 F. (2d) 309 (C. C. A. 8th, 1938); Oberman and Co. v. United Garment Workers Union, 21 F. Supp. 20 (W. D. Mo. 1937). See R. H. White Co. v. Murphy, 310 Mass. 510, 38 N. E. (2d) 685 (1942) (injunction granted against a minority which picketed after certification). See also cases cited infra notes 53-54. For discussion of this question, see Comment, Labor Laws: Objectives Test for Determining the Legality of Labor Activities (1943) 41 MICH. L. REV. 1143, 1153; (1943) 91 U. PA. L. REV. 478.


\textsuperscript{52} See SEGAL, op. cit. supra note 12, at 21.


\textsuperscript{54} Markham and Callow, Inc. v. International Woodworkers of America, 170 Ore. 517, 135 P. (2d) 727 (1943).

\textsuperscript{55} The New York Court of Appeals stated: "... it is impossible for the respondents successfully to maintain that any 'labor dispute' between plaintiffs and defendants theretofore existing under section 876-a [anti-injunction statute] of the Civil Practice Act survived the certification by the Labor Relations Board of the collective bargaining agent for plaintiffs' employees and the execution of the collective bargaining contract." Florsheim Shoe Store Co. v. Retail Shoe Salesmen's Union, Local 287, 288 N. Y. 188, 200, 42 N. E. (2d) 480, 485 (1942).

Statutory authorization, however, for application of the certification theory would seem nonexistent. No provisions of the applicable labor relations acts warrant the inference that they are to be enforced by the incorporation of additional exceptions into anti-injunction statutes. These acts specify, moreover, that they shall not be construed so as to impede the right to strike. In addition, judicial adoption of certification as the test of anti-injunction statutes' application may prevent the use of legislatively established criteria. Thus a determination whether a dispute concerning "terms and conditions of employment" exists cannot be made because establishment of the fact of certification has been held to preclude any examination into the nature of the labor dispute previously involved. Adoption of the certification theory, therefore, results in permitting state and national labor relations boards to decide the existence of a "labor dispute" and creates unwarranted legal implications from the function of formal certification, which purports to be merely declaratory of existing conditions of affiliation. As a basis of deci-

57. The court found that the C. I. O. might picket the petitioner for the purpose of obtaining a union shop contract, even though an A. F. of L. union had already obtained such a contract from the petitioner. The court adopted the theory that since the C. I. O. workers had not authorized the A. F. of L. union as their sole bargaining agent, they were picketing to prevent the petitioning employer from engaging in an unfair labor practice under the National Labor Relations Act. The Court said: "Being bound by the Federal Statute and being precluded from the exercise of purely administrative functions, we hold that a labor dispute exists and that in the absence of any authorized state administrative tribunal only the National Labor Relations Board in the first instance can end that dispute by certification." Id. at 769. Injunctions have been denied in other state cases involving picketing by a minority pending certification: Weyerhauser Timber Co. v. Everett District Council, 11 Wash. (2d) 503, 119 P. (2d) 643 (1941); S and W Fine Foods v. Retail Delivery Drivers and Salesmen's Union, 11 Wash. (2d) 262, 118 P. (2d) 962 (1941). Contra: Bloedel Donovan Lumber Mills v. International Woodworkers of America, 4 Wash. (2d) 62, 102 P. (2d) 270 (1940).


60. Norris-LaGuardia Act, § 113c; see note 18 supra.

61. Florsheim Shoe Store Co. v. Retail Shoe Salesmen's Union, 283 N. Y. 188, 42 N. E. (2d) 489 (1942); Markham and Callow, Inc. v. International Woodworkers of America, 170 Ore. 517, 135 P. (2d) 727 (1943).


sion, moreover, the theory tends to obscure underlying problems presented by jurisdictional disputes, preventing much needed analysis of the legal effect of collective bargaining agreements, and postponing determination whether anti-injunction statutes should be interpreted to protect minority picketing to induce a breach of such an agreement.\textsuperscript{65}

By a similarly extraneous test of the anti-injunction statutes' application, "retaliatory" picketing has been held enjoinable when the "spirit" of retaliation is "unrelated to the attainment of a \textit{bona fide labor objective}."\textsuperscript{66} In each of the three recent New York cases\textsuperscript{67} where the doctrine originated, A. F. of L. unions were reciprocally picketing C. I. O. employers because a C. I. O. union had previously picketed an A. F. of L. employer charging company domination.\textsuperscript{68} The New York courts tested the validity of the picketing by the "objectives" of the picketing union and held the activities enjoinable because their \textit{purpose} was retaliation.\textsuperscript{69} No provision in the anti-injunction

\textsuperscript{64} See Padway, \textit{supra} note 59, at 232.

\textsuperscript{65} Picketing under these circumstances has been frequently held non-enjoinable: Stillwell Theatre, Inc. v. Kaplan, 259 N. Y. 405, 182 N. E. 63 (1932); Weyerhaeuser Timber Co. v. Everett District Council, 11 Wash. (2d) 503, 119 P. (2d) 643 (1941); S and W Fine Foods v. Retail Delivery Drivers and Salesmen's Union, 11 Wash. (2d) 262; 118 P. (2d) 962 (1941); cf. Isolantite, Inc. v. United Electrical, Radio and Machine Workers of America, 132 N. J. Eq. 613, 29 A. (2d) 183 (1942). This ruling would seem to accord with the anti-injunction statutes of: New York, § 876a(10) (a); Oregon, § 102.925, and New Jersey, §2:29-77.8(a) (3), see note 1 \textit{supra}, which provide that a labor dispute may arise out of a dispute between "one or more employees or associations of employees and one or more employees or associations of employees." See also Norris-LaGuardia Act, §113a(3). Note that if the anti-injunction statutes were not made applicable to this type of controversy because the court had determined the presence of a valid collective bargaining agreement, the court would have performed a function solely within the jurisdiction of the Labor Board. Fur Workers Union Local v. Fur Workers Union Local, No. 21238, 10 F. (2d) 1 (App. D. C. 1939), \textit{aff'd per curiam}, 308 U. S. 522 (1939).


\textsuperscript{68} Florsheim Shoe Store Co. v. Retail Shoe Salesmen's Union, 288 N. Y. 188, 42 N. E. (2d) 480 (1942).

\textsuperscript{69} The Supreme Court of New York in Coward Shoe, Inc. v. Retail Shoe Salesmen's Union Local 1115-F, 117 Misc. 708, 31 N. Y. S. (2d) 781 (Sup. Ct. 1942), briefly dismissed the problem posed by finding that the defendant union did not seek an enlargement of its membership. \textit{Id.} at 709-10, 31 N. Y. S. (2d) at 783. The Court of Appeals in Dinny and Robbins, Inc. v. Davis, 290 N. Y. 101, 48 N. E. (2d) 280 (1943), found nothing in section 876a of the Civil Practice Act (anti-injunction statute) to cover "...a retaliatory jurisdictional dispute between two rival unions where no strike existed against an employer and there was no complaint concerning terms and conditions of employment..." \textit{Id.} at 105, 48 N. E. at 282.
statute, however, authorizes the use of an “objectives” test, especially since one policy influential in the minds of the draftsmen was the elimination of confusion caused by such a vague standard. Nor can it be claimed in view of the broad common law test of authorized picketing—"the presence of a community of interest"—prevailing at the time of the New York statute’s enactment, that it was intended to incorporate by reference any “objectives” test from state substantive law. It would seem preferable, therefore, for the court to have considered whether this retaliatory picketing, which lacked the elements either of fraud or violence, exemplified a controversy between two associations within the same “trade, craft, or industry” within the statutory definition of “labor dispute.” While in one of the cases the statutory definition was considered, its application was thought to depend upon the question whether the picketing union was in direct dispute with the employer being picketed. Ordinary jurisdictional disputes, however, involve no direct controversy with employers and are generally held to be “labor disputes.” Thus it would seem that since retaliatory picketing is the result of inter-union conflict, it might also be included within the definition by analogy.

Even the protection of organizational picketing has been circumvented by use of a perverted construction of “public policy” sections of anti-injunction

70. The only possible limitation on objectives in the statute is that found in the general definition of a “labor dispute” requiring that it be “a controversy concerning . . . the association or representation of persons negotiating . . . or seeking to arrange terms and conditions of employment . . . .” N. Y. CIV. PRAC. ACT § 876-a(10).c.

71. Mr. Justice Holmes has said: “The ground of decision really comes down to a proposition of policy of rather a delicate nature concerning the merit of the particular benefit 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, PRIVILEGES, MALICE, AND INTENT IN COLLECTED LEGAL PAPERS (1920) 128.


73. This test was used as the basis of section 113a of the Norris-LaGuardia Act. See note 72 supra.

74. The unlawfulness of the labor “objective” has, nevertheless, been a frequent rationale in the New York courts since 1940. The leading case is Opera on Tour, Inc. v. Weber, 285 N. Y. 348, 34 N. E. (2d) 349 (1941); Boudin, The Opera Tour Case (1941) 1 LAW GUILD REV. 7; see also American Guild of Musical Artists v. Petillo, 286 N. Y. 226, 36 N. E. (2d) 123 (1941). For discussion of this practice, see Galenson, The New York Labor-Injunction Statute and the Courts (1942) 42 COL. L. REV. 51; Comment, The New York Anti-Injunction Act (1940) 49 YALE L. J. 537.

75. N. Y. CIV. PRAC. ACT § 876a(10).


77. Even as between union and immediate employer the case seems to have involved terms and conditions of employment. Although the defendant union did not claim that the picketing was for organizational purposes, a bargaining agreement had been tendered to the petitioner and was refused. See Desmond, J., dissenting id. at 107, 48 N. E. at 282.
In a case involving that clause of the public policy section which provides that employees shall have full freedom to organize and designate representatives of their own choosing, the Supreme Court of Indiana held that picketing for the purpose of coercing an employer to induce employees to join a particular union, might be enjoined because it tended to compel employer-interference with employees' choice of representatives. Such a construction of public policy provisions hardly accords with their primary objective, the encouragement of unhampered organizational activities. And even if construction of an anti-injunction statute to authorize as a sanction for enforcement of its “policy” the remedy it was primarily designed to prevent were justifiable, an injunction would still not be essential in these circumstances to protect rights conferred upon employees, or to protect employers from abridging those rights. For the employer-action which the picketing sought would seem well within the area of permissible conduct adumbrated by the statute. The employer who has a legitimate interest in the establishment of working conditions is certainly privileged to encourage employees to make use of a bargaining agent of which he does not maintain control; and such hortatory action could hardly interfere unjustifiably with a merely debatable “freedom” not to organize.

A similar contention that organizational

78. Roth v. Local No. 1460 of the Retail Clerks Union, 216 Ind. 363, 24 N. E. (2d) 280 (1939). Although the case was later reversed because of the introduction of additional facts on new trial, 218 Ind. 275, 31 N. E. (2d) 986 (1941), the arguments used in the original case were never disallowed by the court. See 39 N. E. (2d) 775 (1942) (affirming decision on second new trial), cert. denied, 11 U. S. L. WEEK 3102 (1943).

79. IND. STAT. ANN. (Burns, 1940) § 40-502.

80. Roth v. Local No. 1460 of the Retail Clerks Union, 216 Ind. 363, 24 N. E. (2d) 280 (1939).

81. “Whereas, under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership associations, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment. . . .” IND. STAT. ANN. (Burns, 1940) § 40-502.

82. See American Furniture Co. v. Local 200, 222 Wis. 338, 268 N. W. 250 (1936); Employees had neglected or declined to organize. The court said that: “. . . the plaintiff could exercise the right that it always had . . . to establish whatever conditions for continued employment its judgment might dictate with one exception, that it could not insist upon the type of organization which preserved to it a position of dominance.” Id. at 371, 268 N. W. at 265. For a leading federal case involving the effect of the public policy section of the Norris-LaGuardia Act, see Lauf v. E. G. Shinner & Co., 82 F. (2d) 68 (C. C. A. 7th, 1936), 303 U. S. 323 (1938).

83. See American Furniture Co. v. Local No. 200, 222 Wis. 338, 370, 268 N. W. 250, 265 (1936): “The law plainly protects not the unorganized individuals constituting the employees, but the right of employees to act in groups or associations. It deals with the collective efforts of employees to better their conditions, and it is only their activities in this direction that are brought within the protection of the statute. The rights of employees not to organize and not to name bargaining agents is neither fostered nor protected.” (italics supplied).
picketing threatened to coerce the employer to violate the provisions of the “Yellow dog” contract section 84 was discredited in a Colorado case. While the ruling was based in part on the fact that the section prohibited individual contracts and had no relevance to collective bargaining agreements which may properly make union membership a condition of employment, 85 the court added that the anti-injunction act could not reasonably be construed as prohibiting employers from encouraging organizational efforts.

Judicial exclusion of certain classes of labor disputes where the legal relationship of the parties is such that technically no “employment” relation exists has also circumvented anti-injunction prohibitions. Thus some courts have permitted injunctions to issue in cases involving intra-union disputes because no controversy concerning “terms and conditions of employment” existed. This theory was recently used by a New Jersey court to justify its injunction of union officers 86 from the use of oppressive tactics and from favoritism in apportioning work to union members. Support for the ruling was found in a Supreme Court decision holding that union fishermen who owned their own vessels could not be involved in a “labor dispute” within the Norris-LaGuardia Act, despite the existence of a controversy with the petitioning Fishpackers’ Association over violation of an agreement of exclusive purchase. 87 The two cases would seem distinguishable, however, since the controversy in the New Jersey case concerned the manner in which “employment” was to be allotted. Moreover, there is case support for construing the term “employment” broadly. Thus union independent vendors 88 having no contract with any employer have been held parties to a labor dispute. The New Jersey definition of labor dispute as a controversy “between employees and associations of employees” 89 engaged in the same craft or industry, could, therefore, have included this situation where both parties to the suit were members of a labor union. 90 While the circumstance that union members

85. Ibid.
87. Columbia River Packers’ Ass’n v. Hinton, 315 U. S. 143 (1942). Since no “labor dispute” was found, the plaintiff was granted an injunction against a general boycott by the Pacific Coast Fisherman’s Union.
90. Compare Scafidi v. Debnar, 22 N. Y. S. (2d) 390 (Sup. Ct. 1940) (union denied injunction against employer where both were parties to a “labor dispute”).
required relief from the conduct of union officers does introduce conflict between the two usually harmonious purposes of anti-injunction statutes—maximum protection of union rights and maximum curtailment of the use of the injunction in labor controversies, resolution of the conflict might have been made by better means than a strict interpretation of the word "employment."

Similarly, the "employment" rationalization has permitted the exemption of formal partnerships. Thus an injunction was issued in a recent New York case at the request of an employer who formed a partnership with non-union employees, admittedly to evade the anti-injunction statute after his restaurant had been picketed for organizational purposes. The court held that the partnership worked a bona fide transformation into a "one-man business," the members of which could not be "employees" in a "labor dispute." Since New York courts have not always refused to look beyond legal technicalities to the nature of underlying controversies, it would appear desirable for the court to have recognized the existence of a "labor dispute" and

91. See Bulkin v. Sacks, 31 Pa. D. & C. 501, 504 (1938): "A reading of these statutes [Pennsylvania Labor Relations Act and Labor Anti-Injunction Act] indicates that the public policy is not merely to protect labor against the issuance of injunctions and to compel or protect collective bargaining, but also to relieve the courts from the necessity of passing upon or even considering these cases until all other methods of settling them have failed. There is a very definite policy of keeping labor disputes out of the courts." See also May's Furs and Ready-to-Wear, Inc. v. Bauer, 282 N. Y. 331, 343, 26 N. E. (2d) 279, 285 (1940): "It is not the function of the court to supervise labor controversies."


93. Id. at 504, 46 N. E. (2d) at 906.


determined whether conditions, such as fraud or violence, necessitated the issuance of an injunction.

**War Developments**

While such fine-spun judicial theories have tended to dissipate the protection afforded by anti-injunction statutes, no court found provocation prior to the War for complete abrogation of their provisions. Recently, however, the Supreme Court of New York, despite the presence of a "labor dispute,"

97. Although the inscription on the banner which the union picket carried was held to be false and instrumental in misrepresenting the facts to the public, there is no authority in support of the view that the sometimes exaggerated statements on pickets' signs amount to fraud under the section of the New York statute comparable to section 104 of the Norris-LaGuardia Act. See Denver Local No. 13, International Brotherhood of Teamsters, Chauffeurs, Stablemen, and Helpers of America v. Perry, 106 Colo. 25, 101 P. (2d) 436, 446 (1940): "This firm unfair to teamsters. . . ." held neither false nor fraudulent under Colorado anti-injunction statute. As in *Angelos v. Mesevich*, the union was picketing an employer of non-union labor in an effort to obtain a closed shop. But see Mutual Biscuit Co. v. Kudisch, 34 N. Y. S. (2d) 949 (Sup. Ct. 1942). A temporary injunction was issued not against picketing, but to restrain the union from approaching the plaintiff's customers with false and untrue statements.

Since the statute was deemed inapplicable in the *Mesevich* case because of the absence of a "labor dispute," the Court enjoined the picketing upon ordinary equity principles. It found that the banner tended to create falsely the impression that the petitioner, who had no contract with any union, was unfair to organized labor and that, therefore, the picketing constituted unlawful coercive conduct. *Angelos v. Mesevich*, 289 N. Y. 498, 502, 46 N. E. (2d) 903, 905 (1943).


99. The *Mesevich* case ultimately went to the Supreme Court, where the New York decision was reversed and the injunction denied under the doctrine that peaceful picketing as a prerogative of free speech is within the protection of the Fourteenth Amendment. Cafeteria Employees Union v. Angelos, 320 U. S. 293 (1934).

100. Failure to insist on strict compliance with procedural requirements may also impair the application of anti-injunction statutes. The New Jersey anti-injunction act, for example, permits no "temporary or permanent injunction" to issue in any case "involving or growing out of a labor dispute," except after "hearing of the testimony of witnesses in open court" and an opportunity for cross-examination. N. J. STAT. ANN. (1940) §§ 2:29-77.2—2:29-77.3. Yet a New Jersey court recently restrained certain union activities concomitant with picketing, including loitering, violence, and the use of obscene language, even though only two-thirds of the proof was made in accordance with statutory requirements and the remaining one-third was based upon affidavit. Isolanite, Inc. v. United Electrical, Radio and Machine Workers of America, 132 N. J. Eq. 613, 29 A. (2d) 183 (1942); cf. Yale Knitting Mills v. Union, 334 Pa. 23, 5 A. (2d) 333 (1939). While the usual equity court may have such a discretionary margin, it would seem that in the case of anti-injunction statutes, careful compliance with legislatively directed procedure should ensue.
granted an injunction to facilitate delivery of bakery products to the army and navy, urging the inexpediency of allowing "technicalities" to "interfere with the prosecution of the National War Effort." In several other cases, where injunctions have been granted, war influences are unmistakable. In one, it was noted that eighty per cent of petitioner's orders were Government orders; in another, appeal was made for unity and harmony in a time of national crisis; in a third, officers of a union were enjoined from disciplining members who refused to comply with a strike order because such a strike would violate contracts with the United States Navy. Moreover, the number of recent cases appealed to the Supreme Court to secure the constitutional protection of picketing as an incident of rights of free speech indicates that state legal sanctions are not operating effectively. While some argument may be made for suspension of a scrupulous adherence to anti-injunction statutes

102. Id. at 826, 35 N. Y. S. (2d) at 22.
106. See Bakers & Pastry Drivers v. Wohl, 315 U. S. 769 (1942), and the recent cases, Cafeteria Employees Union v. Angelos, 320 U. S. 293 (1943), and Cafeteria Employees Union v. Tsakiries, 320 U. S. 293 (1943). The free speech doctrine has been used frequently in states to supplement weakened anti-injunction statutes. But the war has affected this doctrine also and somewhat curtailed its effectiveness in such capacity. In Markham & Callow, Inc. v. International Woodworkers of America, 170 Ore. 517, 135 P. (2d) 727 (1943), it was ineffectual to prevent the injunction of minority-union picketing: "If, in time of war, the pure right of free speech... may be somewhat limited in the interests of national safety, it follows of necessity that interests lying in the vague periphery of constitutional right wherein speech and action are blended, may likewise be subject to such modest restraint as is involved here." See also Weyerhaeuser Timber Co. v. Everett District Council, 11 Wash. (2d) 503, 537, 119 P. (2d) 643, 657 (1941).

For successful use of the doctrine to supplement anti-injunction statutes, see Denver Local Union v. Buckingham Transportation Co. of Colorado, 107 Colo. 419, 118 P. (2d) 1088 (1941); Glover v. Minneapolis Building Trades Council, 215 Minn. 533, 10 N. W. (2d) 481 (1943); cf. Heine's, Inc. v. Truck Drivers' Union, 129 N. J. Eq. 308, 19 A. (2d) 204 (1941). For use of the doctrine to prevent the issuance of injunctions without reference to applicable anti-injunction statutes, see Cafeteria Employees Union v. Angelos, 320 U. S. 293 (1943); S and W Fine Foods, Inc. v. Retail Delivery Drivers and Salesmen's Union, 11 Wash. (2d) 262, 118 P. (2d) 962 (1941); Friedman v. Blumberg, 342 Pa. 387, 23 A. (2d) 412 (1941). The following cases have held that a state may regulate peaceful picketing, notwithstanding the free speech doctrine: Angelos v. Melevich, 289 N. Y. 498, 46 N. E. (2d) 903 (1943); Isolantite, Inc. v. United Electrical, Radio, and Machine Workers of America, 132 N. J. Eq. 613, 29 A. (2d) 183 (1942); Fashioncraft, Inc. v. Halperin, 313 Mass. 385, 48 N. E. (2d) 1 (1943); Shiveley v. Garage Employees Local Union, 6 Wash. (2d) 560, 108 P. (2d) 354 (1940).
in time of war, such suspension—particularly in view of an already existing inclination to abandon strict interpretations—should be regulated according to definite standards. Otherwise, prior curtailment of application, implemented by war-motivated legislative restrictions on labor activity, may nullify statutes altogether and revive the abusive issuance of injunctions.

107. See note 37 supra. See also pages 561-69 supra.

108. Colorado Labor Peace Act, Colo. Laws 1943, s. 183, approved April 1, 1943, A. F. of L. v. Reilly, 7 C. C. H. Lab. Cases ¶ 16,761 (Sup. Ct. Colo. 1943) (sections 20, 21 requiring incorporation of labor unions as a prerequisite to engaging in labor activities, held unconstitutional). The Act embodies most of the Wisconsin Peace Act, but the power of Colorado Industrial Commission to settle disputes extends beyond that of the Wisconsin Employment Relations Board. The Colorado Commissioner may limit the number of pickets, prescribe the distance from a plant where such picketing may be allowed, etc. Sit-down strikes and demands for use of stand-ins are "unfair labor practices." Unfair labor practices are punishable both as civil wrongs and misdemeanors. Thus even breach of contract might constitute criminal conduct. (1943) 56 MONTHLY LAB. REV. 941, 943.

Kan. Laws 1943, c. 364: Unfair labor practice regulations do not prohibit discrimination against union and non-union employees in the matter of their hiring and discharge. Where a union consists of more than twenty-five members, it must file with the Secretary of State an annual report showing the names and dates of elections of officers, compensation for their services, membership dues, and a sworn financial statement. A closed shop agreement must be approved by a majority of employees. Mass. Ann. Laws (1942) c. 385: The exaction of union fees for work permits prohibited.

Minn. Laws 1943, c.c. 624-625: The hindering by threats or intimidation of transportation, production, processing and marketing of farm products is prohibited. The Governor is empowered to appoint a referee to settle disputes involving picketing, boycotting, or striking. These activities are unlawful pending the referee's decision. Conspiring by secondary boycotts to injure the processor is prohibited. Interference with free and uninterrupted use of the streets is unlawful. Wis. Stat. (1943) § 111.05(2) (c), 111.05(3), amended, Wis. Laws 1943, c. 465: see page 559 supra.