The New Federal Law of Labor Injunctions

Since Textile Workers' Union v. Lincoln Mills,1 the Supreme Court has sought to elaborate on the proposition that federal courts must apply federal labor law in suits brought under § 301 of the Labor Management Relations Act.2 This difficult task has often forced the Court to strike a delicate balance between competing interests. Two areas in particular have proved troublesome: (1) resolution of the apparent conflict between the federal labor policy favoring arbitration provisions in collective bargaining agreements and the policy disfavoring injunctive relief against labor unions; (2) resolution of the tension between a policy demanding uniformity in federal labor law and one giving state courts a role in shaping and administering that law. Since Sinclair Refining Co. v. Atkinson3 these two problems, complicated in their own right, have been intertwined.4

In its latest attempt to explicate § 301, Boys Market v. Retail Clerks Union,5 the Court overruled Sinclair and held that in conformity with certain guidelines a federal court may enjoin a strike over a grievance the parties had contractually agreed to arbitrate, thus making such injunctions available in the federal courts for the first time in nearly forty years. After placing the decision in the context of § 301 doctrine, this Note will both examine the adequacy of the Boys Market guidelines as a check on potential judicial abuse of the newly delineated injunction power and explore the impact of Boys Market on state courts.

I. The Development of § 301

A. The Federal Law of Injunctions and Arbitration

In 1932, Congress, through the Norris-LaGuardia Act, promulgated a clear policy against the use of injunctive relief in labor-management disputes.6 Prior to the enactment of Norris-LaGuardia, federal courts

1. 353 U.S. 448 (1957).
2. 29 U.S.C. § 185 (1964). § 185 reads in pertinent part:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such 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.
4. See pp. 1594-95 infra.
too frequently abused their equity powers by issuing ex parte restraining orders against union activities at the request of management. These injunctions were summarily issued at preliminary hearings; the courts granted relief on the basis of the employer's unsupported affidavits and denied the union opportunity to cross-examine or to present its own evidence. The orders were usually written in vague, sweeping language and were designed to enjoin large numbers of people from participating in a broad range of activities. While judicial abuse of the injunctive remedy might theoretically be corrected at the permanent injunction hearing or on appeal, in practice the temporary restraining order usually defeated the union's cause.

To correct these abuses and procedural inadequacies, Congress prohibited federal courts from issuing temporary or permanent injunctions in most labor disputes. For the remaining cases, the Act provided strict procedural safeguards.

In subsequent labor legislation, Congress gave no further attention to the problem of strike injunctions; instead, in the Labor Management Relations Act, Congress focused on the collective bargaining agreement. Despite unclear Congressional intent, the Court interpreted § 301, which by its terms merely gave federal district courts jurisdiction to hear suits for violation of collective bargaining agreements, as a mandate for the creation of substantive federal law. Subsequently, as the Court became ever more enthusiastic about arbitration as a means of resolving disputes under such agreements, it concluded in Teamster's Local 174 v. Lucas Flour Co. that for some purposes arbitration and strikes must be treated as mutually exclusive mechanisms for dispute resolution. But, because Congress failed to specify the relationship of § 301 to the Norris-LaGuardia Act, the question

7. F. FRANKFURTER & N. GREENE, THE LABOR INJUNCTION 200-02, 63-64 (1930) [hereinafter cited as FRANKFURTER & GREENE].
8. Id. at 66-81.
9. Id. at 86-89.
10. See sources at note 66 infra.
13. See note 2 supra.
14. 353 U.S. at 451. Lincoln Mills began to fashion substantive law by making agreements to arbitrate specifically enforceable. 353 U.S. at 449-56. This was necessary because most state courts would not compel specific performance of an agreement to arbitrate.
17. Id. at 104-05.
18. The House version of the Labor Management Relations Act explicitly authorized federal courts to enjoin violations of collective bargaining agreements, H.R. 2020, 80th Cong., 1st Sess. § 302(e) (1947), but this provision was eliminated by the conference com-
remained open whether, as a means of promoting arbitration, the federal courts could enjoin a strike in violation of an express or implied no-strike clause. *Sinclair Refining Co. v. Atkinson*\(^{10}\) seemed to settle the issue: "§ 301 was not intended to have any such partially repealing effect upon such a long-standing, carefully thought out and highly significant part of this country's labor legislation as the Norris-LaGuardia Act."\(^{20}\)

Federal courts, then, were forbidden to issue injunctions for violations of no-strike clauses. While state courts retained jurisdiction over § 301 suits under *Charles Dowd Box Co. v. Courtney*,\(^{21}\) they were required by *Lincoln Mills*\(^{22}\) and *Lucas Flour*\(^{23}\) to apply federal substantive law. But none of these cases decided whether the availability of injunctive relief was a matter of substantive law and thus whether the state courts must apply the federal rule forbidding injunctions in order not to undermine *Sinclair*. As a practical matter, however, unions could remove § 301 suits to federal court under the federal question removal procedures made applicable to § 301 by *Avco Corp. v. Aero Lodge 735*,\(^{24}\) even though the question was specifically left open whether federal courts were required to dissolve state court temporary injunctive relief after removal. Even if the state court's order were temporarily left standing, however, the federal court's final decision would presumably end all injunctive relief. After *Avco*, then, the Court faced a

20. 370 U.S. at 203.
21. Speaking for the Court, Justice Stewart noted:
   The clear implication of the entire record of the congressional debates in both 1946 and 1947 is that the purpose of conferring jurisdiction upon the federal district courts was not to displace, but to supplement the thoroughly considered jurisdiction of the courts of the various States over contracts made by labor organizations. 368 U.S. 502, 511 (1962).
22. We conclude that the substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor laws. . . . The range of judicial inventiveness will be determined by the nature of the problem . . . . Federal interpretation of federal law will govern, not state law. . . . But state law, if compatible with the purpose of § 301, may be resorted to in order to find the rule that will best effectuate the federal policy. . . . Any state law applied, however, will be absorbed as federal law and will not be an independent source of private rights. 353 U.S. 448, 456-57 (1957).
23. "[I]n enacting § 301, Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules." 369 U.S. 95, 104 (1962).
   Actions removable generally.
   (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

1595
The dilemma of its own creation: while state courts theoretically retained jurisdiction under Dowd Box, they were effectively deprived of it.

B. Boys Market v. Retail Clerks Union

In Boys Market, the Court reasoned that it could resolve these troublesome federal-state problems either by overruling Sinclair or by extending its holding to the states.25 The case involved a collective bargaining agreement which contained both a broad arbitration clause making any dispute over the terms of the agreement subject to arbitration and a no-strike clause co-extensive with the arbitration clause.26 The union struck over the employer's refusal to have union members undertake work already completed by non-union employees. After an unsuccessful attempt to invoke the contractual arbitration procedure, the employer obtained a temporary restraining order from the California Superior Court. The union removed the case to a federal district court, which ordered the parties to arbitrate the underlying dispute and simultaneously enjoined the strike. When the Court of Appeals reversed, it was in turn reversed by the Supreme Court, which explicitly overruled Sinclair.

But, by holding that federal courts could now grant injunctions against union strikes over arbitrable issues, the Court only skirted the federal-state questions which it had intended to resolve. Under

25. "It is undoubtedly true that each of the foregoing objections to Sinclair—Arco could be remedied either by overruling Sinclair or by extending that decision to the states." 398 U.S. 235, 247 (1970).

26. "ARTICLE XIV

"ADJUSTMENT AND ARBITRATION

"A. CONTROVERSY, DISPUTE OR DISAGREEMENT.

"Any and all matters of controversy, dispute or disagreement of any kind or character existing between the parties and arising out of or in any way involving the interpretation or application of the terms of this Agreement . . . [with certain exceptions not relevant to the instant case] shall be settled and resolved by the procedures and in the manner hereinafter set forth.

"B. ADJUSTMENT PROCEDURE.

"C. ARBITRATION.

"1. Any matter not satisfactorily settled or resolved in Paragraph B herein-above shall be submitted to arbitration for final determination upon written demand of either party. . . .

"4. The arbitrator or board of arbitration shall be empowered to hear and determine the matter in question and the determination shall be final and binding upon the parties, subject only to their rights under law . . . ."

"D. POWERS, LIMITATIONS AND RESERVATIONS.

"2. Work Stoppages. Matters subject to the procedures of this Article shall be settled and resolved in the manner provided herein. During the term of this Agreement, there shall be no cessation or stoppage of work, lock-out, picketing or boycotts, except that this limitation shall not be binding upon either party hereof if the other party refuses to perform any obligation under this Article or refuses or fails to abide by, accept or perform a decision or award of an arbitrator or board."

398 U.S. at 238-39 n.3.
New Federal Law of Labor Injunctions

Sinclair, those states which permitted injunctions were out of step with federal policy; after Boys Market, those which do not are out of step. Nor does Boys Market confront the problem of how a federal court is to treat a state court injunction in conflict with federal policy when the action is removed from the state forum.

Boys Market also dramatically resuscitated the federal injunctive power for use in the enforcement of arbitration clauses, without fully exploring the possibilities of abuse.

The very purpose of arbitration procedures is to provide a mechanism for the expeditious settlement of industrial disputes without resort to strikes, lock-outs, or other self-help measures. This basic purpose is obviously undercut if there is no immediate, effective remedy for those very tactics which arbitration is designed to obviate.27

The Court argued that Norris-LaGuardia’s policy of “nonintervention by the federal courts [should] yield to the overriding interest in the successful implementation of the arbitration process.” Thus, it said, “[t]he core purpose of the Norris-LaGuardia Act is not sacrificed by the limited use of equitable remedies to further this important policy.”28

In an attempt to insure that the abuses which the Norris-LaGuardia Act was designed to correct would not reappear, the Court established guidelines for the district courts to follow when granting injunctive relief:29 (1) the collective bargaining agreement must contain a mandatory adjustment or arbitration procedure; (2) the court must first determine that the strike is over a grievance which both parties are contractually bound to arbitrate; (3) the court must order the employer to arbitrate as a condition of his obtaining an injunction against the strike. Beyond these specific guidelines, the court, according to Boys Market, must consider whether issuance of an injunction would be warranted under ordinary principles of equity.30

II. The Guidelines for Granting Injunctive Relief

By establishing these guidelines, the Court implicitly acknowledged its general responsibility to implement the policies behind the Norris-

27. 398 U.S. at 249.
29. These guidelines were first suggested by Justice Brennan in his Sinclair dissent, 370 U.S. at 228-29.
30. 398 U.S. at 254.
LaGuardia Act, even if the Act itself was "responsive to a situation totally different from that which exists today."\(^{21}\) The Court reasoned that while judicial intervention on behalf of employers was unacceptable in 1932 when the unions were weak, intervention is today necessary under some circumstances, because unions have become strong and mature. "Congressional emphasis shifted from protection of the nascent labor movement to the encouragement of collective bargaining and to administrative techniques for the peaceful resolution of industrial disputes."\(^{22}\) Relying on its perception of this shift in emphasis, the Court justified the use of injunctions to halt strikes by arguing that industrial peace is best preserved through the enforcement of collective bargaining agreements, including agreements to arbitrate. Attempts to enforce agreements to arbitrate are, in turn, undermined by strikes violating no-strike clauses.\(^ {33}\)

The Court's argument for creating an exception to the anti-injunction provisions of the Norris-LaGuardia Act is hardly compelled by either history, statutory interpretation or the Court's role, relative to that of other institutions, in making national labor law. The eight years between the promulgation of the *Sinclair* decision and its overruling did not contain any changes which made the issue any less close or which gave the Court new guidance through the tangled web of conflicting policies. That unions are strong today may be testimony more to the effectiveness of the Norris-LaGuardia Act than to its obsolescence. Nor was § 301—the statutory basis for the *Boys Market* decision—a clear mandate for partial repeal of the Norris-LaGuardia Act.\(^ {34}\) As Justice Frankfurter contended in his dissent in *Lincoln Mills*, Congress may have intended § 301 to be merely jurisdictional.\(^ {35}\) Even if § 301 is substantive and reflects the policies embodied in the Labor Management Relations Act generally, there is no clear guidance from the Congress about which of two conflicting national labor policies should prevail.\(^ {36}\) The conclusion that labor relations are today so al-

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31. 398 U.S. at 250.
32. 398 U.S. at 250.
33. The Court's second argument that injunctive relief is necessary to encourage employers to enter into arbitration agreements is rather specious in light of the fact that over 94% of all collective bargaining agreements already have grievance arbitration procedures. See 2 BNA COLL. BARG.: NEG. & CONT. 51:6 (1970).
36. 353 U.S. 448, 452 ("The legislative history of § 301 is somewhat cloudy and con-
tered as to justify a change in national labor law seems a judgment best left, if possible, to the Congress, with its unique capacity for fact-finding.

Given its decision in *Lincoln Mills* that § 301 was substantive, the Court was left to fashion the law from the competing policies of ensuring industrial peace, enforcing collective bargaining agreements and withholding injunctions. *Sinclair* resolved that conflict by withholding injunctions even where a strike was in violation of a no-strike clause, thus undermining effective enforcement of the collective bargaining agreement. In reaching the opposite conclusion by rebalancing the conflicting policies, *Boys Market* arguably reaches a better result, given the fact that after *Lincoln Mills* the Court had to make some choice in the area. In the era before Norris-LaGuardia, injunctions were used to quash union organizational efforts. In the *Boys Market* setting, the injunction is being used as a tool to enforce the bargain which the parties have made. The enforcement of the no-strike clause certainly is consistent with respecting freedom of contract and insuring industrial peace, the goals sought when enforcing the collective bargaining agreement. The centrality of the collective bargaining agreement in the national regulatory scheme as the means by which private parties order industrial relations further justifies this emphasis on contract enforcement.

A. Identifying Proper Situations

Before examination of the proper procedures for determining when the facts of a case constitute a union action which falls within the “injunction situation,” it is necessary to define in clear though general terms the situations in which a court can properly enjoin strikes. The *Boys Market* decision seems to require only that the strike be over an arbitrable grievance, without regard to the presence, language, and/or intent of a no-strike clause. But absent congressional modification of Norris-LaGuardia, the conflicting policies in the area would suggest that the power of the courts to issue injunctions be narrowly construed; that is, the power should be limited to those situations where the policies of ensuring industrial peace through arbitration and of promoting freedom of contract by enforcing collective bargaining agreements both clearly support the granting of an injunction. In


37. H. WELLINGTON, supra note 14, at 91-125.
practical terms, an injunction should issue only when the dispute is one which the parties have agreed to arbitrate and over which the union has in fact agreed not to strike.

It follows, then, that a court should enforce the collective bargaining agreement by injunction if necessary when the parties have agreed to an express no-strike clause as well as an arbitration clause. Although the Boys Market agreement contained an express no-strike clause, the Court suggested that in the absence of such a clause, it would imply a no-strike clause co-extensive with the arbitration clause under the principle of contract interpretation first enunciated in Teamsters Local 174 v. Lucas Flour Co. Yet, as Justice Black noted in dissent in Lucas Flour, employers regularly bargain for the inclusion of no-strike clauses, and the absence of a no-strike clause usually indicates that the parties considered and rejected such a clause. The industrial peace through arbitration rationale is not demonstrably of greater importance than freedom of contract in suits under § 301. In injunction proceedings, implying a no-strike clause would subordinate to industrial peace not only freedom of contract but also the Norris-LaGuardia Act. To issue an injunction, a court would first have to add a term to the contract that the parties did not bargain for and then enforce the term through injunctive relief in the face of a general legislative policy against injunctions. In addition to avoiding such judicial manipulation, requiring an express no-strike clause, as suggested here, would have the practical effect of placing the burden of bargaining for a no-strike clause on the employer, where it has traditionally been.

In the converse situation, where there is a no-strike clause but no arbitration clause or where the coverage of the arbitration clause is narrower than that of the no-strike clause, the same requirement should apply; that is, an injunction should not be issued unless the dispute

39. In Lucas Flour the Court implied a no-strike clause coextensive with the arbitration clause. 369 U.S. 95, 104-05 (1962). Commentators are divided over the propriety of this decision. See, e.g., H. WELLINGTON, supra note 14, at 122 (opposing the Court's position); but see Summers, Collective Agreements and the Law of Contracts, 78 YALE L. J. 823, 558-61 (1969).
41. It should be acknowledged that prohibiting a court from implying a no-strike clause in an injunction action may be inconsistent with the Lucas Flour holding that a no-strike clause may be implied in a damage action. If contract interpretation is not to depend upon the nature of the relief requested, it will be necessary for the Court to overrule Lucas Flour completely, thereby denying damages in strikes over arbitrable grievances where the parties have not also agreed to an express no-strike clause.

42. H. WELLINGTON, supra note 14, at 116-17.
New Federal Law of Labor Injunctions

falls within both clauses. If a dispute is not arbitrable, the Court's own justification for issuing an injunction despite Norris-LaGuardia—that strikes over arbitrable issues undermine the arbitration process—is absent. The policies of Norris-LaGuardia should prevail. The practical effect of this position is that the parties are likely to include broader arbitration clauses in future contracts, a result favored by the Boys Market decision.

B. Administering the Injunction Power

Employers value injunctions because they are fast and decisive, but these very qualities make the unions fear that the injunction power will be used improperly. That most strikes during the term of collective bargaining agreements are quite short—more than half last no longer than three days—increases the stakes. The employer is interested primarily in speed, the union in procedural safeguards, particularly notice and hearing. In a suit for an injunction under Boys Market, the court must decide whether a grievance falls within the arbitration and no-strike clauses of the collective bargaining agreement and whether the employer is entitled to an injunction under general equitable principles. If only broad procedural safeguards circumscribe these decisions, some permissible strikes will be temporarily enjoined, depriving the union by judicial intervention of an important economic weapon. If strict procedural safeguards are established, impermissible strikes may temporarily continue while the union is being given notice and a hearing, thus closing down or restricting the employer's operations in the short term. Consonant with the suggested narrow reading

43. Indeed, the very purpose of arbitration procedures is to provide a mechanism for the expeditious settlement of industrial disputes without resort to strikes, lockouts, or other self-help measures. 398 U.S. at 249.

44. Any incentive for employers to enter into such an agreement is necessarily dissipated if the principal and most expeditious method by which the no-strike obligation can be enforced is eliminated. 398 U.S. at 248.

45. In 1967, of the 1,561 strikes that occurred during the term of the collective bargaining agreement, 789 lasted less than three days. ANALYSIS OF WORK STOPPAGES—1967, BULL. No. 1611, U.S. DEPT. OF LABOR, BUREAU OF LABOR STATISTICS, Table 15, (1969). Sinclair Refining Co. v. Atkinson, 370 U.S. 195 (1962), provides a good example of the kind of strike that takes place in the typical "breach of the no-strike clause" context. The plaintiff complained of nine separate union strikes: (1) 8 hours/6 employees, (2) 24 hours/the Mason Dept., 12 hours/the Mechanical Dept., 9 hours/the Barrel House employees—all of these strikes occurring on the same day, (3) 1 hour/73 employees, (4) 1 3/4 hours/24 employees, (5) 2 hours/24 employees, (6) 8 hours/43 employees, (7) 3 3/4 hours/71 employees, (8) 8 hours/800 employees, (9) 48 hours/999 employees—this time over a grievance in behalf of three riggers who were docked an aggregate of $219 in pay for having reported late.

46. If the conclusion of this Note is not correct, that no-strike clauses ought not be implied, then the court or arbitrator need only decide whether a grievance is arbitrable.
of *Boys Market*, the Court should, as a general matter, resolve procedural questions in favor of the union to ensure that permanent injunctions—or temporary restraining orders—are issued only in instances where the union’s activities are clearly in violation of a no-strike clause.

The major procedural issues involved in administering the injunction are: what presumptions should the court employ regarding factual issues; who shall decide those factual issues; and how such issues shall be decided—through an ex parte or an adversary proceeding. For reasons to be discussed below, it is undesirable to impose rigid factual presumptions. Nor does the proper choice of court or arbitrator to decide the factual questions necessarily guarantee fairness to the unions. Only by requiring notice and hearing before the issuance of any order can unions be relatively well protected against the possibility that legal strikes will be enjoined.

The factual issues in a suit for an injunction are of two types, contractual and equitable. The contractual issues are whether the strike is over a grievance which is within the arbitration clause of the collective bargaining agreement and, as suggested in this Note, whether the strike is in violation of an express no-strike clause. If, to protect the unions, the Court wished to establish a presumption that the issue over which the union was striking was not arbitrable, it would have to overrule *Steelworkers v. Warrior & Gulf Navigation Co.*, which created a presumption that a dispute is arbitrable. Although reversing the *Warrior* presumption would afford some protection to a union in the *Boys Market* setting, it would undercut a basic part of the court-developed arbitration doctrine. The resolution of doubts in favor of arbitrability serves both industrial peace and freedom of contract goals. Because of his familiarity with the industrial context, the arbitrator is usually the best judge of whether a particular action falls within a general arbitration clause. To reverse the presumption in favor of arbitration would severely diminish the present usefulness of the arbitration device in industrial relations and impose on the courts a burden of evaluating practices in particular industrial contexts for which they are ill-equipped. To reverse the presumption only in the injunction situation is to take the inconsistent step of varying the principle of con-

47. *See* pp. 1599-1600 *supra*.
tract interpretation with the remedy. Thus, the presumption should stand.

Shifting the burden of proof with respect to no-strike clauses would only lead to confusion. Since under the suggested interpretation of *Boys Market* the clause must be express, the only factual question is whether the strike falls within the no-strike clause. When a no-strike clause is expressly coextensive with the arbitration clause, a presumption that a strike does not fall within the no-strike clause may lead to the incongruous result that a dispute falls within the arbitration clause but not within the no-strike clause. Of course, in those cases where the no-strike clause is not expressly co-extensive, it might be possible to shift the burden to the employer to prove that the strike violates the no-strike clause, but by itself this would not provide meaningful protection for the unions.

In addition to resolving contractual issues, the court must determine whether the employer is entitled to an injunction under general equitable principles. This requirement was intended to give the courts the discretion which is necessary for effective use of the injunction power. Of the three equitable principles mentioned specifically in *Boys Market*, the first merely requires a finding that there is a strike or that one is threatened. Another requires that the court consider "whether the employer will suffer more from the denial of an injunction than will the union from its issuance." Because *Lucas Flour* and *Boys Market* proscribed strikes in violation of no-strike clauses, however, unions suffer no legally cognizable injury from issuance of an injunction. Therefore, since employers will always "suffer more," the balance of equities principle offers no protection to unions.

50. See note 41 *supra*. But should the Court require notice and hearing even before granting temporary injunctive relief, as suggested by this Note, p. 1603 *infra*, the presumption of arbitrability need not be maintained. In a hearing for permanent relief where the union has full opportunity to develop and argue its case the presumption of arbitrability does not unduly harm the union. At a temporary relief hearing, however, where the union lacks adequate time to fully prepare its case and where the necessity of expeditious judicial determination prevents a detailed presentation of the issues, a presumption of arbitrability would be extremely difficult for the union to meet. Therefore, such a presumption would have the effect of undermining the minimal protections offered to the union by the requirement of notice and hearing.

51. The *Warrior* presumption, though not an affirmative protection in favor of the union, at least does no violence to freedom of contract; the parties must have provided for arbitration before the presumption can arise. But in *Lucas Flour* the presumption that parties intended the court to imply a no-strike clause co-extensive with the arbitration clause promotes industrial peace at the expense of freedom of contract. It is the failure to take proper account of freedom of contract that warrants reversing the *Lucas Flour* presumption. See pp. 1600-01 *supra*.

52. The *Boys Market* no-strike clause is a good example of a no-strike clause expressly co-extensive with the arbitration clause; see note 26 *supra*.

53. 398 U.S. at 254.

1603
The third principle, that the court must find irreparable injury to the employer, might have proven a useful device for protecting unions. In general, injury is irreparable if the extent of the injury cannot be rationally ascertained or if monetary compensation is inadequate. Since courts are accustomed to calculating business losses both in the labor law and the ordinary contract situation, such losses ought to be considered rationally ascertainable. Monetary compensation may, however, be inadequate if the employer must, as a practical matter, forgive damages at the next bargaining session. If, on the other hand, the damages will be a subject of serious bargaining, the employer will receive his due. Whatever the merits of this argument, Boys Market asserts that “an award of damages after a dispute has been settled is no substitute for an immediate halt to an illegal strike,” indicating a perfunctory interpretation for the phrase “irreparable injury.” Of course, it might be possible to establish presumptions against the employer on each of these three issues. But to do so would destroy the purpose of using the injunction in the first place—to provide flexible and effective relief—by making the injunction power rigid and unresponsive.

If shifting the presumptions about what must be proven to allow injunctive relief does not offer much promise for assuring that unions are enjoined only in instances that clearly fall within the definition of an “injunctive situation,” shifting the decision-making power from court to arbitrator may be a partial solution, at least in some cases. The court’s discretion is sufficiently broad to allow it to remit important factual questions to the arbitrator where that is warranted in order to make full use of the arbitrator’s special familiarity with the industrial setting. In a damage action, where time is not a factor, the Court has wisely let the arbitrator determine not only the underlying merits of a dispute but also the threshold questions of the scope of the arbitra-

54. While it is of course true, as respondent contends, that other avenues of redress, such as an action for damages, would remain open to an aggrieved employer, an award of damages after a dispute has been settled is no substitute for an immediate halt to an illegal strike. Furthermore, an action for damages prosecuted during or after a labor dispute would only tend to aggravate industrial strife and delay an early resolution of the difficulties between employer and union.

398 U.S. at 238.


56. In Steelworkers v. American Manufacturing Co., 363 U.S. 564 (1960), the Court held at 567-68:

The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by contract . . . the parties should not be deprived of the arbitrator’s judgment, when it was his judgment and all that it connotes that was bargained for.
tion clause and the applicability of the no-strike clause. Until Boys Market there was no opportunity to decide whether the role of the arbitrator in deciding these threshold questions would be the same in injunction cases, where time is critical.

The Boys Market Court decided that, where the collective bargaining agreement compels arbitration and proscribes strikes for all disputes arising out of the contract but does not expressly provide who shall decide the threshold questions of arbitrability and violation of the no-strike clause, the courts shall decide those questions. When an employer is entitled to an injunction, a court can ordinarily hold a hearing, rule on the violation of the no-strike clause, and issue an injunction more quickly than can an arbitrator; indeed, strikes in violation of no-strike clauses are characteristically so short that most would be over before the arbitration process were completed.

But Boys Market should not be read to preclude the parties from providing expressly that the arbitrator shall decide the threshold questions as well as the underlying dispute. By so providing, the parties intentionally waived the right to the faster ruling they might have received from the court. Nor, for that matter, need the parties always

57. In Drake Bakeries v. Bakery Workers, 370 U.S. 254 (1962), the Court held that when the collective bargaining agreement provided that the employer could grieve, and when the arbitration clause was extremely broad—not stopping with disputes involving questions of interpretation or application of any clause or matter covered by the contract—then the threshold questions of arbitrability and applicability of the no-strike clause should be deferred to the arbitrator.

58. Several commentators believe that the question of whether the no-strike clause was breached is best left up to an arbitrator's judgment, even where the plaintiff seeks an injunction. Professor Jones states the position clearly:

State judges (and for that matter, federal judges whose removal or remanding powers are exercised so as to preserve jurisdiction in state judges to enjoin) should be required to refer no-strike contractual disputes immediately to arbitration. These matters are of paramount sensitivity in collective bargaining, and the judge who is not technically competent to dispose the arbitrator's judgment in other less sensitive areas of collective bargaining certainly ought not to be deemed to be so here.


59. The following is an example of an express grant: "If a question arises as to whether or not a defined grievance or stated issue is arbitrable under the provisions of this Article, the question may be submitted to an arbitrator hereunder; if need be, at the request of either party." (Consolidated Edison Co. of N.Y. Inc. and Brothers of Consolidated Edison Employees Ind., cited at ¶ 64,057, P-H, IND. REL. LAB. & EM. 8% of all collective bargaining contracts have such specific provisions, see, 2 BNA COLL. BASED. NEG. & CONT. 72:2. 

1605
sacrifice speed for the arbitrator's special competence. By including an expedited grievance-arbitration procedure for alleged violations of the no-strike clause in the collective bargaining agreement, the employer can be assured of obtaining fast relief and the union can be protected by receiving a fair hearing before the arbitrator. For example, pursuant to such an agreement between Ford Motor Company and United Auto Workers Local 588, the process of holding a hearing, making an award, and obtaining court enforcement of the award took less than twenty-four hours. Under these circumstances, arbitration affords effective relief without doing violence to the intentions of the parties, and the court should defer to the agreement of the parties rather than enforce the collective bargaining agreement through the judicial system.

The most important “procedural aspect” of the injunction power in the § 301 situation is whether the power is to be administered through ex parte proceedings or through the adversary process. When the arbitrator is the proper decision-maker, the procedures agreed upon by the parties will protect the union's concomitant right to due process. When the court is the proper forum, however, the court's own rules must safeguard the union. In formulating rules to guarantee due process, the courts should keep in mind that the historic abuse of the injunction power derived in large part from denial of notice and hearing to the union and from the unlimited scope and duration of restraining orders.

In determining what rules should be adopted as to the crucial questions of notice and hearing—or the permitted duration of the temporary restraining order if notice and hearing are not required—the Court might turn for guidance to the safeguards which Norris-LaGuardia provided for those cases in which injunctions are permissible, to the provisions of Federal Rule of Civil Procedure 65, or to relevant state rules.

Although the thrust of Boys Market is that suits to enjoin strikes in violation of no-strike clauses are not governed by § 4 of the Norris-LaGuardia Act, the anti-injunction section, this does not mean that the entire Norris-LaGuardia Act is inapposite. In particular, §§ 7-12 pro-

60. 63-2 A.R.B. ¶ 9491 (May 20, 1963). For additional examples see United Parcel Service, Inc., 41 LAB. ARB. 560 (1963) (hearing held and arbitrator's award rendered in 72 hours); Matter of Ruppert (Engelheifer), 3 N.Y.2d 576, 148 N.E.2d 129 (1958) (court noted that the arbitrator had been able to hear the grievance and render his award in 48 hours).

61. The Norris-LaGuardia Act procedural safeguards for injunctive relief have been followed by courts issuing injunctions against “minor” disputes under the Railway Labor Act. As noted by Justice Brennan, 598 U.S. at 251-52, the Court in Brotherhood of
vide safeguards applicable to a suit for injunctive relief in all labor
disputes not covered by § 4. If the Norris-LaGuardia safeguards are
applied, they offer some protection against improper restraining orders,
but do not afford adequate protection. The complaining party must
allege under oath that immediate and irreparable injury will occur if
an order is not issued and must be prepared to post security for the
damages suffered by the defendant should he later be found to have
been wrongfully enjoined. The court must limit its order to the
specific persons and issues involved, and ex parte orders may run for
no longer than five days.

But the Norris-LaGuardia safeguards do not sufficiently protect the
union from improper judicial intervention on the side of the employer
if the policy guiding determinations about proper procedural rules is
the desire to prevent strikes not in breach of the agreement from being
enjoined—even if temporarily. Since injunctions may still be granted
without notice or hearing, there exists the very real possibility that a
certain number of permissible strikes will be enjoined, often breaking
the morale of the strikers and defeating the union’s cause. Before a

R.R. Trainmen v. Chicago River & Ind. R. Co., 353 U.S. 30 (1957), had “accommodated”
Norris-LaGuardia to allow federal courts to enforce the Railway Labor Act by enjoining
strikes over “minor” disputes. In that case, as in Boys Market, the Court failed to specify
what source of law the federal courts should turn to in order to determine what proce-
dural safeguards to apply before issuing injunctions. In subsequent cases, however, the
courts have followed the Norris-LaGuardia procedural safeguards provided that the dis-
pute is a “labor dispute” within the meaning of § 13 of the Norris-LaGuardia Act and
provided that the Norris-LaGuardia procedural safeguards have not been superseded by
more specific safeguards in the Railway Labor Act itself, in which case the latter are fol-
lowed. See Rutland Ry. Corp. v. Brotherhood of Locomotive Eng., 307 F.2d 21 (2d Cir. 1962),
cert. denied, 372 U.S. 945 (1963); Long Island R.R. Co. v. Brotherhood of Locomotive
Eng., 290 F. 2d 100 (E.D.N.Y. 1960). Comment, Enjoining Strikes and Maintaining the
Status Quo in Railway Labor Disputes, 60 COLUM. L. REV. 381, 386 (1960).
holding that a strike in violation of a no-strike clause is not a “labor dispute” within
the meaning of the New York “Little” Norris-LaGuardia Act.
64. 29 U.S.C. § 109 (1964) thus prevents vague, sweeping injunctions designed to enjoin
large numbers of people from participating in a broad range of activities.
65. 29 U.S.C. § 7 (1964). Should the Court decide that strikes in violation of no-strike
clauses are entirely outside of the Norris-LaGuardia Act, Federal Rule 65 would be app-
licable. However, Rule 65 has essentially the same provisions as §§ 7-12 of the Norris-
LaGuardia Act, except that temporary restraining orders may run up to ten days.
66. See pp. 1601-02 supra; Professor Aaron states:
In a great many, if not the majority, of cases ... the restraining order or preliminary
injunction spells defeat for the defendant's cause. Every objective study of injunctions
in action since the publication of the pioneer work by Frankfurter and Greene has
noted this result. Such a result is wrong, not because we can be sure the defendant's
cause is just and its objectives lawful—they frequently are not—but because the
judicial power has been used prematurely and unfairly to aid one party to a private
dispute.

Labor Injunctions in the State Courts—Part II, 50 VA. L. REV. 1147, 1157-58 (1964); accord,
Witte, The Federal Anti-Injunction Act, 16 MINN. L. REV. 628 (1932); FRANKFURTER &
GREENE 200-01.
67. Frankfurter and Greene believed the only adequate solution to this source of

1607
judge grants an injunction, the union ought to have the chance to be heard either on the specific factual issues defining the "injunctive situation" or, given the generality of the equity powers, on other matters relating to the fairness of the remedy in the particular instance.

Therefore, rather than follow the Norris-LaGuardia safeguards on the use of the ex parte temporary restraining order, the Court might wisely adopt the Minnesota rule, which eliminates the ex parte restraining order altogether. Minnesota requires that before any form of injunction may be issued, the defendant must be given adequate notice and a full hearing at which to cross-examine the plaintiff's witnesses and put forward testimony of his own. Absent Supreme Court adoption of such a rule, district courts may exercise their discretion to withhold temporary relief in favor of a full hearing on the merits, or at least to issue a show cause order, thereby permitting the union to respond.

III. Boys Market in the State Courts

A. The Procedure-Substance Test

The impact of Boys Market will be determined in part by the extent to which it is binding upon state courts. Had § 301, or the Supreme Court, given the state courts express directions as to what portions of federal labor law to follow, the state courts would have been bound by the supremacy clause of the Constitution to follow the federal law, even though the state courts may have regarded the federal law as merely "procedural" or in conflict with important state policy. Instead, the Court has consistently required only that state courts apply "substantive" federal law in § 301 cases, leaving state courts free to

potential abuse was complete abolition of the ex parte restraining order. Their belief was "based upon a realization that the ex parte order possesses potentialities of great evil and is too rarely of sufficient immediate necessity to outweigh the dangers of its abuse," FRANKFURTER & GREENE 224.


70. Bindczyk v. Finucane, 342 U.S. 76 (1951); In § 338 of the Nationality Act of 1940, 8 U.S.C. § 738 (1964), Congress provided explicit and exclusive procedural rules that must be followed when revoking naturalization; based on evidence outside the record; the Court held those rules are equally applicable to state courts hearing naturalization cases, state procedural rules to the contrary notwithstanding.


Whatever springs the state may set for those who are endeavoring to assert rights that the state confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.

apply their own "procedural" rules. But of course the distinction between substance and procedure is elusive, varying with the purpose for which the distinction is drawn.\textsuperscript{73} A test for state courts to use in deciding which law to apply must therefore balance the particular federal and state interests involved in §301 suits.

On numerous occasions, the Court has insisted that national labor policy demands uniform application of federal labor law.\textsuperscript{74} The problem of labor disputes is national in scope and importance; labor-management relations are appropriately regulated by federal law. Further, without uniformity there would be forum-shopping to take advantage of varying state rules of law, and this would seriously undermine the collective bargaining process by making the parties uncertain of the legal effect of a proposed or existing agreement. More particularly, the federal policy favoring the peaceful settlement of industrial disputes through arbitration and the enforcement of collective bargaining agreements should be implemented consistently in both federal and state courts to satisfy the federal interest in uniformity.

State interests in §301 suits are much less strong, at least as §301 is presently interpreted. While Dowd Box held that state courts retain jurisdiction to hear cases under §301,\textsuperscript{76} Lucas Flour deprived the states of the right to develop independent law governing collective bargaining agreements (although the opinion suggested that superseded state rules might provide a fruitful source for federal common law under §301).\textsuperscript{77} However, it should be remembered that prior to Lincoln Mills the states had a strong substantive interest in the laws they fashioned to deal with labor disputes. The intrusion of federal remedies in an area of strong state interest was one aspect of Lincoln Mills that drew sharp criticism.\textsuperscript{78} It was only the Court’s interpretation of §301 which destroyed that state substantive interest. What remains is, thus, a


\textsuperscript{75} 369 U.S. 502, 511 (1962).

\textsuperscript{76} 369 U.S. 95, 104 (1962).

\textsuperscript{77} The problem therefore calls for a balancing of the gravity of the constitutional issue raised by referring to state law against the damage to the fabric of federalism that would be caused by a holding that federal law applies. Since the prevailing and in our view sound opinion is that section 301 is constitutional, adoption of state law is, we think, in order. . . . Instead of achieving uniformity by imposing its own law, may not Congress, hoping for harmony and orchestration though expecting and desiring some continuing diversity, hand the conductor’s baton to the federal courts rather than giving them a set of cymbals with which to drown out all other sounds? Bickel & Wellington, \textit{supra} note 36, at 19-20.
weaker, solely procedural interest. When a state court exercises jurisdiction over a § 301 suit, the enforcement proceedings take place in the state forum, thus calling into play the state's legitimate interest in the smooth and economical functioning of its judicial machinery. While it is clear, then, that states retain an interest in § 301 litigation, that interest is a limited one.

As in other circumstances where state courts exercising jurisdiction over federally-created rights have had to apply substantive federal law, state courts should employ an "outcome-determinative" test to determine what law is substantive under § 301: if, in choosing a forum for his suit, a party would make his choice on the basis of a reasonable belief that a particular rule in one forum would produce a significantly different outcome in the litigation, then that rule is substantive and must be applied by state courts. In applying this test, a court should look not at whether the plaintiff in the case before it chose the state forum because he thought that he could obtain a better outcome under a particular state rule. Rather, a court should consider whether a reasonable party in a substantial number of cases would so choose on the basis of the rule in question. Use of the test, then, would yield rules

78. In disputes involving choice between state laws these procedural interests have often been held to outweigh the substantive interests of the "foreign" state. See H. Goodrich & E. Scopes, Conflict of Laws §§ 80, 91 (1964); Strumberg, Conflict of Laws 128 (1937); Restatement, Conflict of Laws, ch. 12, Introductory Note (1934); Cook, supra note 73; Lorenzen, The Statute of Frauds and the Conflict of Laws, 43 Yale L.J. 311 (1923); Choice of Law Governing Proof, 58 Harv. L. Rev. 155, 195 (1944); Sedler, The Erie Outcome Test as a Guide to Substance and Procedure in the Conflict of Laws, 37 N.Y.U. L. Rev. 813 (1962).


80. When federal courts enforce state-created rights, Erie R.R. v. Tompkins, 301 U.S. 64 (1938), and progeny, the Supreme Court applies an outcome-determinative test to decide whether a state rule is substantive and therefore must be applied by the federal district courts in diversity actions. In Hanna v. Plumer, 380 U.S. 460, 468 (1965), the Court made clear that a rule is outcome-determinative only if it would affect a litigant's choice of forum. The Court reasoned:

Not only are non-substantial, or trivial, variations not likely to raise the sort of equal protection problems which troubled the Court in Erie; they are also unlikely to influence the choice of forum. The "outcome-determinative" test therefore cannot be read without reference to the twin aims of the Erie rule: discouragement of forum shopping and avoidance of inequitable administration of the laws.

In Brown v. Western R. of Alabama, 338 U.S. 294, 302 (1949), the Court recognized the analogy between federal courts applying state law and state courts applying federal law. Attempting to define the "substantive" federal law that the state court was required to enforce, Mr. Justice Black said, "The terms substance and procedure are not meaningless even though they do not have fixed, undeviating meanings. They derive content from the functions they serve here in precisely the same way in which we have applied them in the reverse situation—when confronted with the problem whether the Federal courts respected the substance of State-created rights, as required by the rule in Erie."

81. This test meets Hart's objection that an outcome-determinative test lacks logical boundaries and can thus be used to deprive forum states from using any of their own procedural rules. See Hart, The Relations Between State and Federal Law, 54 Colum. L. Rev. 489 (1954).
applicable to future cases rather than produce ad hoc determinations about the state of mind of one of the parties. In an analogous “reverse Erie” situation, such an outcome-determinative test has been used to balance federal and state interests in litigation brought under the Federal Employers Liability Act, and has required state courts to apply federal rules regarding burden of proof, presumptions and res ipsa loquitur, jury trial, and pleading.

In a Boys Market setting, if the state rules of appellate procedure provide that an appeal from final judgment must be taken within 20 days, but the federal rule allows 30 days, the federal rule providing the added time might well determine the outcome of a lawsuit in the sense that if the party waited twenty-five days before filing his appeal he would be barred from going forward in the state court system, but free to proceed with his appeal in the federal courts. But the federal rule would not be “outcome-determinative” because the rule would probably not affect a litigant’s choice of forum or would do so in only an insubstantial number of cases. On the other hand, federal rules of discovery in a state with strict code pleading requirements might in a substantial number of cases cause an employer rationally to believe that he is more likely to obtain an injunction in a state court because the union will be hampered by narrow state rules of discovery. Consequently, the rules of discovery would be outcome-determinative under the § 301 test and thus substantive.

The outcome-determinative test will be a strong force toward uniform application of federal law at the expense of state law. But if one accepts the primacy of uniform federal labor law and the consequent need for state substantive law to yield before analogous federal law, the relative strength of federal and state interests fully justifies this result.

90. See pp. 1609-10 supra.
B. State court injunctions

In the wake of Boys Market, it is necessary to determine whether the availability of injunctive relief is substantive. Twenty-five states presently have statutes which parallel the Norris-LaGuardia Act. However, ten of these states have made exceptions allowing injunctive relief to issue against strikes in breach of no-strike clauses; only the remaining fifteen prohibit their courts from enjoining such strikes. The question arises whether or not these fifteen states may continue to withhold injunctive relief for strikes in breach of no-strike clauses.

Commentators and courts have long recognized that remedies are often integral parts of substantive rights. In suits arising under the Emergency Price Control Act state courts were required to apply federal rules relating to remedy. Moreover, the availability of a particular remedy is precisely the kind of fact likely to influence a litigant's choice of forum, especially in the labor law context. According to Professor Aaron,

"an order to halt a strike is such a completely different remedy


93. See, e.g., Von Hoffman v. City of Quincy, 71 U.S. (4 Wall.) 535 (1866). Judge Swain commented: "Nothing can be more material to the obligation than the means of enforcement. Without the remedy the contract may, indeed, in the sense of law, be said not to exist, and its obligation to fall within the class of those moral and social duties which depend for their fulfillment wholly upon the will of the individual. The ideas of validity and remedy are inseparable, and both are parts of the obligation, which is guaranteed by the Constitution against invasion." 71 U.S. at 552; Angel v. Bullington, 330 U.S. 183 (1947); Bernhardt v. Polygraphic Co., 350 U.S. 198 (1956); H. Hart & H. Wechsler, supra note 73 at 474-77; J. Moore, Federal Practice ¶ 209, ¶ 65.18; Hill, supra note 82, at 418; Comment, The Equitable Remedial Rights Doctrine, 55 Yale L.J. 401 (1946); Note, Parallel State and Federal Remedies, 71 Harv. L. Rev. 513 (1958). But see Isaacson, The Grand Equation: Labor Arbitration and the No-Strike Clause, 48 A.B.A.J. 914 (1962); Wellington, Labor and the Federal System, 26 Chi. L. Rev. 592 (1959).


New Federal Law of Labor Injunctions

from an order to arbitrate the dispute or a judgment of damages for breach of contract that it must be considered a separate right rather than an alternative form of relief. 98

The issue of the anti-injunction provision in state law might arise in the following manner. A union in a little Norris-LaGuardia state strikes over a grievance that the employer has allegedly refused to arbitrate. The employer preferring to arbitrate the grievance rather than undergo a strike would want to bring suit in federal court under § 301. However, in anticipation of this, the union hurries to state court in an attempt both to force the employer to arbitrate and to avoid the federal injunction law. What law, therefore, should the state court judge apply? Here, a rational union has considered the availability (or lack of availability) of an injunction when choosing its forum. Indeed, in this case, avoiding an injunction may be the union's only reason for going to court. Since in a substantial number of cases the rational union might well consider the availability of an injunction when choosing its forum, the rule governing injunctive relief is thus substantive under the § 301 outcome-determinative test 97—state courts must make injunctive relief available. 98 This result reduces forum-shopping while facilitating uniform enforcement of the laws. Because the availability of an injunction no longer turns on the choice of forum, labor and management can take proper account in their bargaining of the certainty that an injunction will be available for strikes in violation of an express no-strike clause. Admittedly, this reasoning eliminates a substantial state remedy; but, as noted, such an occurrence is the necessary result of the Court's interpretation of § 301 starting with Lincoln Mills. The Court's modification of important state law—without explicit authority or guidance from Congress—underscores the need for congressional evaluation of the law being promulgated under § 301. 99

The right to injunctive relief which emerged from Boys Market, however, is a right qualified by strict guidelines and safeguards. These qualifications, in present form or altered and augmented as suggested in this Note, must, if substantive, be applied by all the states.

On facts similar to those in Boys Market, use of state court rules con-

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97. For a discussion of the possibility that uniformity might be accomplished by federal removal, see pp. 1615-16 infra.
98. State courts must enforce federally created rights and remedies such as those arising under § 301, if they enforce analogous state-created rights. See D. Currie, supra note 73, at 365-69; H. Hart & H. Wechsler, supra note 73, at 295-99; Note, State Enforcement of Federally Created Rights, 73 HARV. L. REV. 1551, 1551-54 (1960).
trolling the granting of injunctions would yield a variety of results. There are marked differences in the nature of proof required from the plaintiffs, necessity of notice to the defendant, the length of time a temporary injunction may run, and the size of security bond required. Nor do states uniformly require that the employer must agree to arbitration as a condition for issuance of an injunction or that the no-strike clause be express.

Since the safeguards surrounding injunctive relief often go to the heart of the substantive right being enforced, the manner in which injunctive relief may be obtained and the extent of the relief obtainable are factors which are likely to influence a litigant's choice of forum. For example, an employer who desires an injunction against a strike


102 Alabama, California and New York rules allow temporary injunctive relief without notice to the defendant when the court is satisfied that the plaintiff has met his burden of proof. Code of Ala. Tit. 7, §§ 1054, 1058 (1960); CAL. CODE CIV. P. § 527 (West 1967); N.Y.C.P.L.R. § 6315(a). Minnesota has eliminated ex parte injunctive relief by requiring that the defendant be given notice and an opportunity to be heard. MINN. STAT. ANN. § 179.14 (1966).

103 The duration of a temporary restraining order is limited to fifteen days in the California rule. CAL. CODE CIV. P. § 527 (1967). Minnesota limits the duration to 7 days with no opportunity for extension. MINN. STAT. ANN. § 179.14 (1966). New York places no limit on the length of time a temporary restraining order may run, but does require that a full hearing on the merits be scheduled as soon as possible. N.Y.C.P.L.R. § 6316(a). Alabama requires no time limit. Code of Ala. Tit. 7, §§ 1054, 1058.

104 California and New York rules require a plaintiff to post a security bond in order to protect the defendant from any damages he may suffer as a result of a temporary restraining order later found to be improvidently granted. CAL. CODE CIV. P. § 529 (West 1967); N.Y.C.P.L.R. § 6312(b). Although the Alabama Code technically requires the plaintiff to post a security bond, the Alabama Supreme Court has ruled that failure to post a security bond does not render an ex parte injunction null and void. Francis v. Scott, 229 Ala. 590, 72 So. 2d 59 (1955). Minnesota requires no security bond because it requires a full hearing in the first instance. See p. 1608 supra.
over an arbitrable issue but who is unwilling to arbitrate would bring his suit in a state court if the state rule did not require him to arbitrate. Similarly, an employer wishing to stop a union's strike over an issue excepted from the arbitration and no-strike clauses might seek a temporary injunction in a state court which lacks the federal safeguards permitting only sworn proof of allegations and requiring security bond from the plaintiff. The employer would risk little by pursuing an unjustified claim for injunctive relief in such a state court, whereas in federal court he would risk being charged with perjury or losing his security bond.

In both cases, a plaintiff-employer would very likely seek a state forum with less stringent safeguards, thus undermining strong federal labor policy favoring the strict protection of the labor injunction from judicial abuse. Since a litigant in a substantial number of cases may rationally believe that the availability or non-availability of such safeguards will affect the outcome of his § 301 suit, the rules governing these safeguards are substantive under the § 301 outcome-determinative test.\textsuperscript{105} Again, the effect of \textit{Boys Market} is to develop uniform federal law at the expense of state law.

C. \textit{Removal} 

If a state court issues a temporary restraining order which violates federal safeguards, the union may seek to remove the case to federal court. Because the outcome-determinative test requires that state courts grant injunctions in the same manner as federal courts, need for removal in § 301 suits ought to be greatly diminished after \textit{Boys Market}. Nevertheless, the right to remove still exists\textsuperscript{106} and may be of limited value in protecting unions from state court abuse of the power to issue temporary restraining orders; however slow the removal procedure, it remains more expeditious than taking an appeal through the state court system to the United States Supreme Court.\textsuperscript{107} If the union re-

\textsuperscript{105} Interests in uniform federal labor law, as reflected in the "outcome-determinative" test, also require those few states with more restrictive injunctive relief safeguards (such as Minnesota, see p. 1608 \textit{supra}) to follow the federal balance that the \textit{Boys Market} case has struck between anti-injunction policy and arbitration policy. It is therefore necessary for such states to follow the federal injunctive relief guidelines.

\textsuperscript{106} See p. 1595 \textit{supra}.

\textsuperscript{107} The federal removal statute, 28 U.S.C. § 1446 (1964), provides that a defendant must file petition for removal within thirty days after receiving notice of the plaintiff's claim and before final adjudication—in \textit{Boys Market} situations, before issuance of a full injunction. If the use of temporary restraining orders is not circumscribed, the union's first note of the employer's claim is likely to be receipt of an ex parte order. At that stage, however, the union can remove to federal district court if it believes that the state court judge did not correctly apply the federal safeguards.
moves, the state court order remains in effect until dissolved. But because the district court sits not as an appellate court reviewing a final order but as a trial court reconsidering its own temporary order, the federal judge has full discretion to apply the Boys Market standards himself and then modify or dissolve the order, as appropriate.\textsuperscript{108}

IV. Conclusion

In the series of cases that began with Lincoln Mills, the Supreme Court promoted arbitration by expanding § 301, only arguably substantive at the time of its enactment, into areas of substantive law formerly the province of the states. Boys Market is particularly problematic in that it not only compromises Norris-LaGuardia's anti-injunction power but also eliminates state anti-injunction statutes, since the state must apply substantive federal labor law uniformly if the national policies are not to be frustrated and if rampant forum-shopping is not to result.\textsuperscript{109} This Note has argued that the courts must subsequently limit the decision to those situations where the union has expressly agreed not to strike and that they must develop and then apply strictly procedures which guard against abuse of the injunction power. To honor the goal of freedom of contract, the Court can legitimately employ the industrial peace rationale to justify the granting of injunctions only when it is clearly enforcing the agreement of the parties.

The attempt to reconcile the contradictory policies with consistent rules, however, should not obscure the fact that the thorny statutory and policy conflicts between § 301 and Norris-LaGuardia, and between § 301 and state law, are symptomatic of the general difficulties engendered by Lincoln Mills. The legislative purpose and history of § 301 does not provide sufficiently precise direction to inform the Court's "accommodation" of other well-established federal labor law doctrines and to guide its intrusion into areas of traditional state concern. Moreover, Boys Market was predicated on an historical shift in the nature of labor relations. But the role of describing that factual shift and of drawing inferences from it rightly belongs to Congress.\textsuperscript{110} Without

\textsuperscript{108} 28 U.S.C. § 1450 (1964); see, e.g., Sharp v. Whiteside, 191 F. 156 (C.C. Tenn. 1883).

\textsuperscript{109} In Boys Market, the Court did not have before it a state court injunction and thus did not have to overrule so important an aspect of state remedial law as an anti-injunction statute. Nor, under Sinclair, had the Court addressed the problem of state law permitting injunctions when federal law did not.

\textsuperscript{110} Possibly, of course, Congress would explicitly approve the law which the Court has developed under § 301. Because Congress has the institutional capability to investigate the factual assumptions which underlie both the Court's decisions and this Note, Con-
New Federal Law of Labor Injunctions

guidance, the Court has embarked on the formulation of a complex body of doctrine which inevitably affects the balance of power between labor and management and between the federal government and the states. The attempt to make this Court-created law internally consistent further increases the conflicts with other federal and state law. Frequent judicial changes in § 301 law upset the expectations of the parties to collective bargaining agreements and reallocate in an unsystematic way the burden of bargaining on important issues. The failure of Boys Market and its predecessors to resolve satisfactorily the conflict between the policy favoring arbitration and that disfavoring injunctions or the tension between the desire for uniformity and the desire to give state courts a role under § 301 makes urgent congressional evaluation and rationalization of the doctrines which have developed under § 301.

gress could at least base its legislation on answers to the recurring questions: How strong are unions? Do parties bargain over no-strike clauses? Do courts still abuse the injunction power?

111. H. WELLINGTON, supra note 14, at 100.