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A STUDY IN THE CONFLICT OF FEDERAL PRE-EMPTION AND STATE SOVEREIGNTY: DISPARATE LABOR AND JURISDICTION POLICIES

Introduction

The purpose of this article is to discuss two inherently incompatible attitudes which have been manifested by the federal judiciary and Congress toward state courts and administrative agencies. Since 1793 there has existed, in one form or another, a provision in the Judicial Code disabling federal courts from enjoining state proceedings. Although attempts have been made to avoid it, evade it, and in one or two instances, ignore it, the broad prohibition has remained entrenched in the law without significant legislative qualification.

On the other hand, when a sufficient federal interest has been shown, such as that shown in the field of labor relations, Congress has gone to the opposite extreme and completely divested the states of any and all jurisdiction in the matter, thereby pre-empting the field. Thus, while the states can be said to enjoy a sacrosanct status with regard to one phase of their relationship with their federal counterpart, in the other instance they enjoy no status at all. In addition to the incongruity just mentioned, myriad problems have arisen within the separate areas themselves making proper judicial determination that much more difficult.

Solutions to these problems have been attempted and have at best enjoyed only partial success. Section 2283 of the Judicial Code, enacted in 1948 to clarify the position of Congress in an ideological battle which had been waged in the Supreme Court some seven years earlier, fell far short of its purpose; the Labor-

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2 See note 30 infra.

3 See notes 20-24 infra.

4 See Bowles v. Willingham, 321 U.S. 503 (1944).

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Management Reporting and Disclosure Act of 1959\(^6\) apparently solves at least one problem (jurisdictionally speaking) but makes no attempt to settle some of the more basic issues.

The Early Prohibition and Necessary Exceptions

The first version of the prohibition was deceptively simple: "... nor shall a writ of injunction be granted [by any court of the United States] to stay proceedings in any court of a state ... .\(^7\)"

The statute is believed to be the product of the efforts of two men, Edmund Randolph and John Jay. In 1790, Attorney General Randolph requested Congress to pass a bill which would debar federal district courts from "interfering with the judgments at law in the state courts,"\(^8\) and two years later, Chief Justice Jay requested a similar provision for the benefit of his colleagues who were tiring of the rigors incident to eighteenth century circuit riding.\(^9\) Passed in what has been aptly labelled a “states’ rights setting,”\(^10\) there is no evidence of any difficulties encountered by the bill in passage. In fact, the bill may well have been welcomed by Federalists and states’ rights advocates alike; by the latter for obvious reasons, and by the former as a concession to a debtor class unenthusiastic in ratifying a Federalist-sponsored Constitution.\(^11\) In addition, the provision, which is a limitation on the equity powers of the federal courts rather than a limitation on their jurisdiction,\(^12\) is consistent with a general prejudice against equity practice which was prevalent at the time.\(^13\) This could be mere coincidence, but there is some evidence that some of those responsible for the successful passage of the bill were also among those who were disdainful of chancery practice.\(^14\)


\(^7\) Act of March 2, 1793, ch. 22, § 5, 1 Stat. 335.

\(^8\) See Warren, Federal and State Court Interference, 43 Harv. L. Rev. 345, 347 (1930).


\(^12\) Smith v. Apple, 264 U.S. 274 (1924): "[The prohibition] ... merely limits their general equity powers in respect to the granting of a particular form of equitable relief. ... [The court's decision] ... is plainly not a decision upon a jurisdictional issue but upon the question whether there is or is not equity in the particular bill. ... ." Id. at 279-80. But see Ex parte Schwab, 98 U.S. 240, 242 (1878) (dictum).

\(^13\) See Taylor and Willis, supra note 9, at 1171. See also Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 Harv. L. Rev. 49, 95-101 (1923) (prejudice against equity seen in the debates connected with the passage of § 16 of the Judiciary Act of 1789).

\(^14\) Senator (later Chief Justice) Ellsworth was an important member of the Senate committee that reported out the bill which became the Act of 1793
Unquestionably, the prohibition serves to avoid "needless friction"\(^\text{15}\) and "inevitable conflicts"\(^\text{16}\) of jurisdiction between state and federal courts, but it may also be borne in mind that the provision has served some pragmatic and worldly causes as well as it has vindicated any lofty notions of federal-state relations, and that courts in deciding cases involving the prohibition have not necessarily been unmindful of that fact.\(^\text{17}\)

Although the provision was used sparingly for over half a century,\(^\text{18}\) it became evident upon subsequent repeated usage that qualifications to the broad mandate of the statute would have to be made. These qualifications, or exceptions as they are called, fell into three categories: those specifically enumerated in the statute itself,\(^\text{19}\) those implied from the content of other statutes passed subsequent to the prohibition,\(^\text{20}\) and the judicial exceptions.\(^\text{21}\) The jus-

and he is believed to have had a pronounced aversion to chancery practice. See Taylor and Willis, *The Power of Federal Courts to Enjoin Proceedings in State Courts*, 42 YALE L.J. 1169, 1171 (1933).


\(^{17}\) See Taylor and Willis, *supra* note 14, at 1194. As a vindication of an abstract concept of federalism, in Gunter v. Atlantic Coast Line R.R., 200 U.S. 273 (1906), the Court called § 265 a "partial accomplishment of the more comprehensive result effectuated by the prohibitions of the Eleventh Amendment." *Id.* at 292.


\(^{19}\) The only exception written into the statute prior to 1948 was the exception for bankruptcy proceedings. The section was amended to read: "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any Court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." 36 Stat. 1162 (1911).


\(^{21}\) It should be mentioned that the judicial exceptions, the largest group and by far the most confusing, are not susceptible to easy classification. Compare the treatment given the judicial exceptions in the following commentaries: Taylor and Willis, *The Power of Federal Courts to Enjoin Proceedings in State Courts*, 42 YALE L.J. 1169 (1933); Durfee and Sloss, *Federal Injunction Against Proceedings in State Courts: The Life History of a Statute*, 30 MICH. L. REV. 1145 (1932); Warren, *supra* note 18; Com-
tification for these exceptions (except those specifically authorized) lies in a familiar rule of comity that when a court properly takes jurisdiction of a cause it should be allowed to reach a determination without interference from another tribunal. So that if an action were removed to a federal court, the federal court could enjoin the parties from seeking redress in a state court on the ground that the federal court could aid its jurisdiction. Even without statutory authorization, i.e., a removal statute, the courts felt constrained to grant an exception where a federal court had obtained prior in rem jurisdiction of a cause, placing reliance on the same theory. The doctrine, however, was extended to include cases in which the res had passed out of the hands of the federal court, and cases in which only constructive possession had been obtained. Moreover, the exception was granted in instances where the res itself was not readily identifiable. Of course, if a state court had first assumed jurisdiction, the injunction would be denied.

Exceptions were also granted in cases where a party sought to enforce a void or inequitable judgment, cases in which a party attempted, Federal Injunctions Against Proceedings in State Courts, 35 Calif. L. Rev. 545 (1947).


24 A federal court can enjoin state action if its purpose is to protect or make effective its prior jurisdiction; in this sense the injunction is said to be "ancillary." If, however, the injunction is the business, or a part thereof, of the first resort to the federal court, it will be denied. Compare Diggs & Keith v. Wolcott, 8 U.S. (4 Cranch) 179 (1807), with French v. Hay, note 23 supra.

25 The exception will not be granted for actions in personam. See Kline v. Burke Constr. Co., 260 U.S. 226 (1922): "... [W]here the action first brought is in personam and seeks only a personal judgment, another action for the same cause in another jurisdiction is not precluded." Id. at 230. The Court in this case felt that only a possible interference with a court's physical control over a res would warrant the exception: "But a controversy is not a thing, and a controversy over a mere question of personal liability does not involve the possession or control of a thing, and an action brought to enforce such a liability does not tend to impair or defeat the jurisdiction of the court in which a prior action for the same cause is pending." Ibid.


30 See, e.g., Atchison, Topeka & Santa Fe Ry. v. Wells, 265 U.S. 101 (1924); Essanay Film Mfg. Co. v. Kane, 258 U.S. 338 (1922); Wells Fargo & Co.
tempted to enforce a statute repugnant to the Constitution.\textsuperscript{31} and cases where the United States itself was a party in interest.\textsuperscript{32} Doubtless it was this judicial munificence in granting exceptions which has led more than one author to comment, in a derogatory manner, on the usefulness and significance of the statute.\textsuperscript{33} In no other area of the law were the words of Chief Justice Hughes ("... the Constitution is what the judges say it is...") more meaningful or appropriate, for whether or not an exception would be granted in an individual case became contingent upon the exigencies of that particular case, and perhaps upon the political climate and predisposition of the Court rendering the decision, more than on anything Congress had said or failed to say on the matter.\textsuperscript{34}

The problems inherent in "judicial legislation" were illustrated in \textit{Toucey v. New York Life Ins. Co.}\textsuperscript{35} The respondent executed a deed of trust conveying all of its property to secure a bond issue and the trustees filed a bill of foreclosure in the federal District Court for the Northern District of Iowa. One of the respondent's stockholders intervened as a party defendant, alleging that the bonds and

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  \item v. Taylor, 254 U.S. 175 (1920); Simon v. Southern Ry., 236 U.S. 115 (1915); Marshall v. Holmes, 141 U.S. 589 (1891). \textit{But see Hill v. Martin, 296 U.S. 393, 403 (1935); Durfee & Sloss, Federal Injunction Against Proceedings in State Courts: The Life History of a Statute, 30 Mich. L. Rev. 1145, 1157 (1932).} This exception is predicated on the proposition that the enforcement of a judgment (void or otherwise) is not a "proceeding" within the meaning of the statute; the proceeding is considered to have ended when judgment is reached. Therefore, properly speaking, this class of cases forms no exception to the statute at all because they are considered never to have come within the purview of the prohibition at all. They "avoid" it rather than "evade" it. \textit{Cf. Western Union Tel. v. Tompa, 51 F.2d 1032 (2d Cir. 1931).}
  \item Leiter Minerals, Inc. v. United States, 352 U.S. 220 (1957); United States v. Inab, 291 Fed. 416 (E.D. Wash. 1923). This exception is permitted on the theory that since sovereigns have immunity, by not disallowing the prohibition of § 265, the effect would be to force the sovereign, indirectly, to appear in a state court to defend its rights, and, hence, make the immunity meaningless. See Taylor and Willis, \textit{The Power of Federal Courts to Enjoin Proceedings in State Courts, 42 Yale L.J.} 1169, 1192 (1933).
  \item See Taylor and Willis, \textit{supra} note 32, at 1194. "To say that the statute merely enacts a doctrine of comity which already existed, and that the limitations on that doctrine may therefore be enforced though not in terms included in the enactment, is little more than a circumlocution announcing that the statute will be departed from whenever, in the judgment of the court, necessity or convenience invites the departure...[T]he limitations which the courts have placed upon the statute are now so crystallized that discussion of their intrinsic merit is purely academic." \textit{Ibid.} See also Durfee & Sloss, \textit{supra} note 30, at 1169. "...[I]f Congress should repeal the statute and so furnish us a laboratory for comparative study of the practice with and without that legislation, we would find that...the statute has long been dead." \textit{Ibid.}
  \item 314 U.S. 118 (1941).
\end{itemize}
mortgage were fraudulent and without consideration, and the petitioner, holder of ninety per cent of the bonds and joined as party plaintiff, denied all allegations of fraud. The court denied foreclosure on the grounds that the issue was fraudulent and without consideration. The petitioner thereafter began five separate suits in the Delaware state courts seeking recovery on various notes and contracts which purportedly represented consideration for the bonds. The respondent thereupon filed a "supplemental bill" in a federal district court to enjoin the plaintiff from readjudicating the issues settled by the federal decree. The issue was whether "relitigation cases" were among the exceptions to section 265, or whether the defendant would be forced to plead res judicata in the second action.

The Court failed to agree on the precedents and the judicial history of the section. The majority, through Mr. Justice Frankfurter, insisted on the literal interpretation of the statute and by summarily dismissing a "sporadic, ill-considered decision," arrived at the conclusion that the res exception was the only permissible judicial exception because of its "uninterrupted and firmly established acceptance." Noting that section 265 had never been subject to any comprehensive legislative re-examination, the majority refused to construe congressional silence as a tacit request for another exception.

It is indulging in the merest fiction to suggest that the doctrine which for the first time we are asked to pronounce with our eyes open and in the light of full consideration, was so obviously and firmly part of the texture of our law that Congress in effect enacted it through its silence . . . . The explicit and comprehensive policy of the Act of 1793 has been left intact. To find significance in Congressional nonaction under these circumstances is to find significance where there is none.

The minority disagreed in every respect with the majority. In addition to relying on the precedent which had been impeached by Justice Frankfurter, this opinion interpreted the silence of Congress

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38 The facts as they appear are the facts of the companion case, Phoenix Finance Corp. v. Iowa-Wisconsin Bridge Co., which perhaps better illustrates the relitigation principle than the facts of Toucey.
37 The Judicial Code had been amended in 1911. Section 5 of the Act of 1793 became § 265 of the 1911 revision.
40 Id. at 140-41.
41 The minority vindicated the Ben-Hur decision as precedent for the relitigation exception by attempting to salvage the Looney opinion. Where the majority dismissed Looney because there had been no decree as such, the
in enacting the Judicial Code of 1911 as an approval or implied acceptance of earlier legislation with its judicial gloss. The minority also pointed up the impracticality and inconvenience involved in forcing a party to litigate a suit when the outcome of the suit is perfectly clear.

These differences in opinion led Congress in 1948 to undertake a revision of the Judicial Code. Section 265 was significantly amended; the bankruptcy provision was omitted and the general exception was inserted to cover all exceptions.

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

Although it is well known that the purpose of this re-codification was to restore the law to its pre-Toucey status, it became apparent that Congress had not gone far enough; the revision still lacked appropriate definition. For in spite of the fact that everyone knew that Toucey had been repudiated, it was not clear whether Congress had meant to reverse only the bare holding, or whether it had intended to manifest an attitude toward exceptions to the prohibition in general. So, as had been necessary before, the Supreme Court was called upon to settle what was basically the same problem—a problem which seemingly transcended the factual situation of any given case presented for decision.

The Development of Pre-emption in Labor Relations

While the federal government has observed a "hands-off" policy with regard to state proceedings as a means of "achieving harmony in our . . . complicated federalism," a contrary approach has been employed in the field of labor relations; Congress has obviated conflict by pre-empting the field. However, the complexity of national legislation in this area and the equally complex case law demand a preliminary examination of terms and concepts. Five threshold inquiries will be helpful.

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minority felt that "a temporary injunction may well be likened to a decree and entitled to the same protection against relitigation." Toucey v. New York Life Ins. Co., 314 U.S. 118, 151 (1914) (dissenting opinion).


43 Ibid.

44 See Reviser's Note, 28 U.S.C. § 2283 (1958). The revision was also made to conform with the all writs section, 28 U.S.C. § 1651 (1958).


46 See Reviser's Note, note 44 supra.

First, how far should federal regulation of labor extend? If basic industries are to be subject to federal control, should those that are un-basic be likewise subject to federal control?

Second, assuming that the federal government has chosen to regulate some aspect of "labor-management relations," are the states to be foreclosed from regulating other aspects of that relationship? For example, if the federal government outlaws secondary boycotts, can the state outlaw peaceful picketing?

Third, if federal regulation of "labor-management relations" is to be exclusive, how shall we define the subject matter of this regulation? Certainly, an act of sabotage could, in a given instance, constitute an "unfair labor practice" within the scope of federal regulation, but it would almost certainly be a tort and a crime, subject to state regulation as well. Therefore, does the existence of a ground for federal intervention exclude all local authority in the matter?

Fourth, should state courts and agencies be permitted to administer federal substantive law?

Fifth, which of the powers of government, legislative or judicial, is to make law in this area? 48

Although it was aware of pre-emption principles 49 when passing the Wagner Act 50 and the Taft-Hartley Act, 51 Congress has declined to establish a labor policy definitive of the rights of the federal and state governments, but has left the solution of the problem in the hands of the Supreme Court. The Court, as case-by-case adjudication over a ten-year period has shown, has likewise refused to make any categorical declaration of labor policy, but has slowly evolved a policy that has run the gamut from allowing state action as long as it does not conflict with federal action, 52 to ousting the states from "areas of potential conflict." 53

One of the first areas foreclosed to state action concerned the right of a state to interfere with an act specifically authorized by Congress. 54 Thus, certain "concerted activities" protected by Sec-

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tion 7 of the Wagner Act were excluded from state control. Likewise, the states were foreclosed in certification cases, both where the NLRB had refused certification, and where it would have if called upon. It was in one of these certification cases, Bethlehem Steel Co. v. New York Lab. Rel. Bd., that the first stirrings of an exclusion-without-conflict policy were heard:

When Congress has outlined its policy in rather general and inclusive terms and delegated determination of their specific application to an administrative tribunal, the mere fact of delegation of power to deal with the general matter, without agency action, might preclude any state action if it is clear that Congress has intended no regulation except its own.

These first vibrations were given considerable amplification four years later in Garner v. Teamsters Union. In that case an employer, engaged in interstate commerce, sought a state court injunction to prevent the union from engaging in conduct which was in violation of state and federal law. In disallowing the state remedy, the Court construed the intent of Congress in passing Taft-Hartley as an attempt to vest jurisdiction in the NLRB to the exclusion of state and federal courts, and maintained that since the purpose of vesting exclusive jurisdiction in the Board was to achieve uniformity in labor policy, concurrent, albeit non-conflicting, remedies could not be permitted. Pre-emption was by no means complete. The Court said that Taft-Hartley left "much to the states,

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55 "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities. . . ." National Labor Relations Act (Wagner Act) §7, 49 Stat. 452 (1935). The Supreme Court held some forms of conduct to be outside the scope of §7. See, e.g., Southern S.S. Co. v. NLRB, 316 U.S. 31 (1942) (mutiny); NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240 (1939) (violence); NLRB v. Sands Mfg. Co., 306 U.S. 332 (1939) (strikes in breach of contract).
60 Supra note 57, at 773.
62 PA. STAT. ANN. tit. 43, § 211.6(2) (1952).
63 According to §8(b)(2) of Taft-Hartley (the section allegedly violated), it is an unfair labor practice for a union to cause an employer to discriminate in his hiring practices to encourage or discourage membership in a labor union. 61 Stat. 141 (1947), 29 U.S.C. §158(b)(2) (1958).
64 Garner v. Teamsters Union, 346 U.S. 485 (1953): "The conflict lies in remedies, not rights. . . . [W]hen two separate remedies are brought to bear on the same activity, a conflict is imminent." Id. at 498-99.
though Congress has refrained from telling us how much." The trend, however, was clear; the "how much" was to diminish rapidly.

The policy was given further definition in *Weber v. Anheuser-Busch*, Inc. Here, the respondent filed a charge with the Board alleging a violation of section 8(b) (4) (D). This charge was dismissed. The respondent sought and received a state court injunction on the ground that the union's conduct fell within the state's restraint of trade statute. In dismissing the injunction, the Supreme Court said that federal power cannot be curtailed "even though the ground of intervention be different than that on which federal supremacy has been exercised." The Court reiterated the Garner principle that Taft-Hartley does not exhaust the full sweep of legislative power permitted by the commerce clause, but, in addition, cautioned the states that they must decline jurisdiction "... where the facts reasonably bring the controversy within [federal law] ... , and where the conduct, if not prohibited by the federal act, may be reasonably deemed to come within ... that Act."

The Conflict of Section 2283 and Pre-emption—The Amalgamated Case

A week after the *Weber* case had been decided, the conflicting attitudes inherent in section 2283 and principles of pre-emption met head-on in *Amalgamated Clothing Workers v. Richman Bros.* The petitioner had engaged in peaceful picketing of respondent's stores, presumably to compel the latter's employees to join the union. The respondent, charging the petitioner with common-law conspiracy and restraint of trade, sought a state court injunction. The union attempted to have the case removed to the federal district court, but jurisdiction was refused on the ground that were the allegations

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65 Id. at 488.
67 "It shall be an unfair labor practice for a labor organization or its agents: ...

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: ... (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class ... ." Labor-Management Relations Act (Taft-Hartley Act) § 8(b), 61 Stat. 141 (1947), 29 U.S.C. § 158(b) (1958).
69 Id. at 481.
true, only the NLRB could lawfully exercise jurisdiction in the matter. The union then attempted to enjoin the state court action, but the district court refused, citing section 2283. The Supreme Court affirmed, holding that section 2283 applies, even where the state court is "wholly without jurisdiction over the subject matter, having invaded a field pre-empted by Congress." 71

The controversy centered around the construction to be given the 1948 revision of the no-injunction provision. The majority, through Mr. Justice Frankfurter, adhered to the "literal" view it had employed in the similar Toucey case. This opinion relied on the fact that there was no express authorization for an exception to be made where Congress has chosen to occupy a field exclusively, and, concluded that section 2283 was not a "statute conveying a broad general policy for ad hoc application." 72 The Court further stated: "... Congress made clear beyond cavil that the prohibition is not to be whittled away by judicial improvisation .... Legislative policy is here expressed in a clear-cut prohibition qualified only by specifically defined exceptions." 73

The minority, relying on the fact that the 1948 revision was a legislative refutation of the Toucey decision, felt that the common sense of the exception required an exception. 74 The language of Wells Fargo & Co. v. Taylor 75 well illustrates the attitude of the minority:

[The provision] . . . tends to prevent unseemly interference with the orderly disposal of litigation in the state courts and is salutary; but to carry it beyond that field would materially hamper the federal courts in the discharge of duties otherwise plainly cast upon them by the Constitution and the laws of Congress, which of course is not contemplated. As with many other statutory provisions, this one is designed to be in accord with, and not antagonistic to, our dual system of courts. 76

A literal reading of the section offers no justification for an exception. The clause, "expressly authorized by . . . Congress," is

72 Amalgamated Clothing Workers v. Richman Bros., supra note 71, at 516.
73 Id. at 514-16. But see Leiter Minerals, Inc. v. United States, 352 U.S. 220 (1957): "The frustration of superior federal interests that would ensue from precluding the Federal Government from obtaining a stay of state court proceedings except under the severe restrictions of 28 U.S.C. § 2283 would be so great that we cannot reasonably impute such a purpose to Congress from the language of 28 U.S.C. § 2283 alone. It is always difficult to feel confident about construing an ambiguous statute when the aids to construction are so meager, but the interpretation excluding the United States from the coverage of the statute seems to us preferable in the context of healthy federal-state relations." Id. at 226.
74 Amalgamated Clothing Workers v. Richman Bros., supra note 71, at 516 (dissenting opinion per Douglas, J.).
75 Wells Fargo & Co. v. Taylor, 254 U.S. 175 (1920).
76 Id. at 183.
merely a codification of the statutory exceptions and represents no significant change in the law. Likewise, the "protect or effectuate its judgments" clause, although sufficient to reverse the Toucey decision, is inapplicable as there is no judgment to protect or effectuate. Justice Frankfurter similarly dismissed the third ground for exception, "in aid of its jurisdiction," by noting that there was no jurisdiction to aid. Certainly, if "jurisdiction" is used as a reference to jurisdiction in the exercised-control-over-a-physical-res sense of the word, no serious argument can be made, for in Amalgamated the Board was not called upon to act. However, even if it can be established that the Bethlehem Steel-Garner-Weber line of cases establishes a broader concept of jurisdiction, one which would exclude the states even in the absence of federal activity, the wording of 2283 still frustrates any attempt to justify an exception because the jurisdiction which can be aided under the statute is the jurisdiction of the district court. The district courts, excluded from the labor relations area along with the state courts and agencies can enjoin state court actions by specific authorization of Taft-Hartley, but only upon application by the Board. Clearly, an exception granted in the Amalgamated case would have, itself, constituted an exception to the then-existing long line of exceptions.

The appeal of Mr. Justice Douglas' "common sense" is compelling. Not only did the Amalgamated decision delimit the power of the federal judiciary to give efficacy to Congress' plan of pre-emption, but it provided a neat avenue of escape for employers who wished to circumvent the federal forum and take their chances with a state court judge. Of course, the latter could refuse jurisdiction, obeying the Garner rule, but this very fact of choice involves an element of discretion which was no doubt unintended by Congress.

The difficulties encountered in this area have been generated, at least in part, by the Court's persistence in attempting to interpret

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77 See Moore, Commentary on the Judicial Code ¶ 0.03(49), at 410 (1949).
78 Id. at 411.
82 For instances where state courts have circumvented the Garner rule, see Cox, Federalism in the Law of Labor Relations, 67 Harv. L. Rev. 1297, 1317 n.85 (1954). On the same subject see Glushien, Federal Preemption in Labor Relations, 15 Fed. B.J. 4, 11 n.16 (1955), but also see the same article at n.15 where the rule has been followed.
the often-mythical "intent" of Congress. In both areas of pre-emption and federal injunctions of state proceedings, Congress has refused to act and the Court has had to "draw the lines," but the Court has drawn them by asking itself, paradoxically, where Congress drew them. The result, as already shown, has been somewhat less than satisfactory.

Total Foreclosure and the Landrum-Griffin Act

More problems were raised as the result of the Court's decision in Guss v. Utah Lab. Rel. Bd. That case raised the question whether the states were excluded where the Board had declined to exercise its jurisdiction but had not ceded jurisdiction pursuant to Section 10(a) of the Taft-Hartley Act. Section 10(a) provides, inter alia, "the Board is empowered by agreement with any agency of any state . . . to cede to such agency jurisdiction over any cases . . . unless the provision of the [applicable] State . . . statute . . . is inconsistent with the corresponding provisions of this Act or has received a construction inconsistent therewith." The Court held section 10(a) to be the "exclusive means" by which the states could act concerning matters entrusted to the Board by Congress. Since section 10(a) is simply a means of applying federal law in a state forum, the message was clear: federal substantive law was to exclusively control labor relations. The effect of the decision was to create a "no man's land": those employers who fell below the Board's jurisdictional requirements were literally without a remedy, absent a cession agreement. This effect was by no means accidental; the Court in Guss was well aware of this undesirable side-effect of its decision, as was Congress when the Taft-Hartley amendments were proposed. The Court, however, felt constrained to honor the judgment of Congress in spite of whatever policy objection could be made to the creation of the "no man's land."

83 See Glushien, supra note 82, at 4.
84 See Cox and Seidman, Federalism and Labor Relations, 64 Harv. L. Rev. 211, 212 (1950).
85 353 U.S. 1 (1957).
86 This section also permits the Board to regulate unfair labor practices, Labor Management Relations Act (Taft-Hartley Act) § 10(a), 61 Stat. 146 (1947), 29 U.S.C. § 160(a) (1958).
88 The statutory authorization or the source of the Board's power to prevent unfair labor practices is only permissive; for administrative and budgetary reasons, the power is not exercised exhaustively. The Board attempts, however, to exercise jurisdiction over those employers who have the greatest impact on commerce.
91 See note 89, supra.
Although the controversial Guss opinion played a leading role in the movement for legislative reform that became effective in 1959, the groundwork for the movement had been laid several years before. Centralization was taking its effect. Although desirable in many ways, the disadvantages of exclusive national control of labor problems became manifest. Centralization always breeds a certain amount of rigidity. In the name of efficiency, generalizations are made and identities are lost. The very nature of labor problems, however, demands a familiarity with the parties and local conditions that cannot properly be obtained by a centralized agency constrained by necessity to adjudicate its cases in a quasi- *stare decisis* fashion without making a substantial inquiry as to the exigencies of a particular case. At the time Congress considered a modification of the Guss rule, there existed, therefore, a "home rule" movement favoring local control of labor disputes.

Three solutions to the "no man's land" problem were proposed: the so-called Administration bill embodied one approach, the Kennedy-Ervin measure another, and the third solution, adopted as part of the Senate bill, was basically a compromise between the other two. The Administration approach, which was favored by most employer groups, was to allow the Board to decline jurisdiction over cases having an insubstantial effect on interstate commerce and to allow state courts and agencies to assume jurisdiction over such discarded cases. The Kennedy-Ervin bill, on the other hand, required the Board to assert jurisdiction over all cases within its statutory jurisdiction, except in instances where a section 10(a) cession agreement had been made. The third approach, or Prouty compromise, as it is called, allowed State agencies to exercise jurisdiction over cases declined by the Board, but the agencies had to apply federal substantive law and their decisions were made subject to review by federal courts.

The solution finally adopted the Administration approach which had been incorporated in the Landrum-Griffin bill that had won approval in the House, but one important qualification to the Board's power to decline jurisdiction was made. The bill provided:

The Board, in its discretion, may, by rule of decision or by published rules . . . decline to assert jurisdiction over any labor dispute involving any class . . .
or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: *Provided,* That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959. (2) Nothing in this Act shall be deemed to prevent or bar any agency or the courts of any state . . . from assuming and asserting jurisdiction over labor disputes over which the Board declines . . . to assert jurisdiction.98

First of all, in addition to freezing the Board’s maximum jurisdictional requirements,99 the Act is an effective repeal of the proviso to section 10(a), and as such, seemingly solves the “no man’s land” problem and the problem raised in the *Amalgamated* case as well. It does, however, raise a problem of its own, for although employers hovering around the jurisdictional requirements might have heretofore shown concern about the availability of a remedy, the Act brings them no closer to certainty; the appropriate question is now, “which remedy?” Moreover, the permissive language affords no guarantee of remedy. In the absence of state action or a lowering of the Board’s standards, the employer is no better off than he was before. The “no man’s land” is still a fact to be reckoned with.

Probably the only solution to the problem involves a comprehensive change in the Board’s standards. Presently, the Board attempts to treat almost all industries that “affect commerce” and delimits itself by establishing arbitrary figures which represent the minimum dollar-by-dollar impact on interstate commerce over which the Board will exercise jurisdiction. Under such a system, two things are certain: (1) the smaller you are, the better chance you have of being excluded, and (2) anyone around the arbitrary figure, regardless of whether it is high, low, or otherwise, can legitimately express grave doubts as to the substantive law applicable to him, as well as to the courts open to him. This problem might be obviated if the Board were to abandon its present policy of treating a few employers in many industries and substitute a policy of treating many employers

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99 The effect of sub-section (2) is to allow the Board to increase its jurisdiction, but not reduce it. The current dollar-by-dollar standards, in their respective industries, are: (1) Non-Retail: $50,000 outflow or inflow, direct or indirect; (2) Office Buildings: Gross revenue of $100,000 of which $25,000 or more is derived from organizations which meet any of the new standards; (3) Retail Concerns: $500,000 gross volume of business; (4) Instrumentalities, links, and channels of Interstate Commerce: $50,000 from interstate (or linkage) part of enterprise or from services performed for employers in commerce; (5) Public Utilities: $250,000 gross volume, or meet standard 1 (non-retail); (6) Transit Systems: $250,000 gross volume; (7) Newspapers and Communication Systems: Radio, television, telegraph and telephone: $100,000 gross volume—Newspapers: $200,000 gross volume; (8) National Defense: Substantial impact on national defense; (9) Business in the Territories and District of Columbia: D.C., Plenary; Territories, Standards apply; (10) Associations: Regarded as single employer. See BNA, at 400.
in a few industries. Under this *vertical*, rather than *horizontal* approach the Board would select the industries which have the greatest impact on commerce and treat them exhaustively, leaving the others to the states. Dollar-by-dollar standards would be unnecessary, and, hence, much of the now-existing confusion and uncertainty would disappear.

The second, and perhaps most significant, effect of the Act is that, as the first expression of the congressional will on the subject in over a decade, it modifies the rule of exclusiveness which has pervaded and controlled the subject during that time. As *Garner* and subsequent cases had shown, uniformity was to prevail; conflict to be avoided at all cost. The Act serves to qualify what the Court had thought to be Congress' intent in passing Taft-Hartley, but how much of a qualification it is will no doubt be determined only through litigation. There are several possibilities: (1) the Act represents a significant retreat from the *Garner* position and, as such, seriously undermines the policy of pre-emption which has been followed since the earliest comprehensive labor legislation, (2) the Act was passed to meet the needs of a particular situation and will not be given effect beyond the scope of that situation, (3) Congress doesn't care about uniformity below the jurisdictional requirement level, or (4) Congress simply isn't as fastidious about exclusiveness as the Supreme Court.

Other problems exist. On the authority of *San Diego Bldg. Trades Council v. Garmyn*, the states must decline jurisdiction when conduct is "arguably" or "potentially" subject to Taft-Hartley regulation. The new act only permits state intervention if there has been a "clear determination" by the Board that no ground for federal intervention exists. Whether this determination will be made by the Board by "rule of decision" or by "published rules" remains to be seen. However, if the state must remain idle pending a jurisdictional determination by the Board, isn't one of the primary advantages in local authority, namely, fast service, being wasted away, particularly if the Board chooses the "rule of decision" method? There is also a possible conflict on the question of what substantive law will apply where the states can act. Unquestionably, if conduct is within the Board's standards, and the Board fails to act (upon a finding that no unfair labor practice exists, for example) the states are nevertheless excluded; the act so provides. If, however, the jurisdictional standards are not met, but the conduct falls within the purview of Taft-Hartley, the Act is silent as to whether federal or state law will govern. The rejection of the Prouty amendment may be indicative of a congressional preference, but is certainly not conclusive on the matter.

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100 359 U.S. 236 (1959).
Conclusion

The attempts to avoid conflict between federal and state judiciaries have been responsible for a disproportionate amount of litigation. It may well be one of the prices that must be paid for our rather unique form of government; on the other hand, it may be nothing more than the price that must be paid when a desirable end is sought to be attained through diverse and incongruous means. Congressional abnegation is undoubtedly responsible in at least a small way. This is not to say that the courts should abdicate their functions, but if the judges are going to base their decisions on the “intent” of Congress, that intent should be manifested as explicitly and, when necessary, as often as possible.

Congress has seemingly risen to the occasion with the Landrum-Griffin Act. It is only urged that, if clarification of this legislation is necessary, and it seems upon analysis that clarification will be necessary, Congress again rise to the occasion and express such clarification.

SCOPE OF ARBITRATION CLAUSES IN COMMERCIAL CONTRACTS

Introduction

One of the most perplexing problems presented by a commercial arbitration clause is the scope of its applicability. The scope of the agreement will be discussed with respect to the type of agreement used and to the conflict of laws’ difficulties presented by the choice of forum. This latter point will be limited to a consideration of the Federal Arbitration Act of 1925 and the New York Arbitration Act of 1920. An attempt will be made to discover the boundaries of such agreements within the confines of the law and within the agreement itself. This article will consider that problem as it appears in a “future disputes” agreement, which is generally incorporated into the primary contract, rather than in a submission which is a post-

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2 N.Y. CIV. PRAC. ACT §§ 1448-69. The New York Act was amended in 1937 to provide that “future disputes” agreements were valid, enforceable and irrevocable. N.Y. Sess. Laws 1937, ch. 341, at 882.
3 AMERICAN ARBITRATION ASSOCIATION, COMMERCIAL ARBITRATION RULES 2 (1954). A standard “future disputes” arbitration agreement supplied by the American Arbitration Association is as follows: