
Eileen Silverstein

Follow this and additional works at: https://scholarlycommons.law.hofstra.edu/hlelj

Part of the Labor and Employment Law Commons

Recommended Citation
Available at: https://scholarlycommons.law.hofstra.edu/hlelj/vol11/iss1/3

This document is brought to you for free and open access by Scholarship @ Hofstra Law. It has been accepted for inclusion in Hofstra Labor & Employment Law Journal by an authorized administrator of Scholarship @ Hofstra Law. For more information, please contact lawscholarlycommons@hofstra.edu.
COLLECTIVE ACTION, PROPERTY RIGHTS AND LAW REFORM: THE STORY OF THE LABOR INJUNCTION

Eileen Silverstein

This essay concerns the persistence of ideas about collective action and property rights. It analyzes the one-hundred year history of using injunctions against picketing in labor disputes, and concludes that contemporary decision-makers display the same hostility to the exercise of collective rights and the same solicitude for property rights as did the courts in the period from the 1880’s to the early 1930’s. The finding that attitudes about the rights of capital and labor endure might be unremarkable, except that intervening legislation purported to confer legitimacy on collective action and to weaken traditional deference to property rights. Thus, in addition to exploring entrenched notions about rights, this essay inquires into the use of law to challenge those notions. My hope is that close examination of one attempt at reform through law will identify some of the conditions under which legal intervention can help to make the world otherwise. To that end, this essay is also a modest plea to progressive scholars to once again make the connection of law to everyday life central to our commentary. Without fresh appreciation of the law as an element of social struggle, we risk complicity in the renaissance of ideas about the natural priority of property rights against which our

* B.A., University of Nebraska; J.D., University of Chicago; Professor of Law, University of Connecticut School of Law.

My appreciation to Alan Ritter, Dianne Avery, Jim Atleson, Joe Grodin, George Schatzki, Jack Getman, and Ted Lothstein for pressing the hard questions; to Jennifer Mansfield, Jaye Bailey, Mary McCune and Peter Goselin for able research assistance; and to the 1991 labor law seminar at the University of Connecticut whose startled reaction to the story of the labor injunction prompted me to write this article.

1. The observation that changes in law have little altered the relationship between labor and management may be controversial but it is not new. I have previously demonstrated the tenacity of market regulation as a governing ideology in another area of labor law — the successorship doctrine under the National Labor Relations Act (NLRA). See Eileen Silverstein, The Fate of Workers in Successor Firms: Does Law Tame The Market?, 8 INDUS. REL. L.J. 153 (1986). At the same time Jim Atleson canvassed all of labor law under the NLRA to show the shared values advanced by judges operating under the common law and under the NLRA. See JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW (1983) [hereinafter VALUES AND ASSUMPTIONS]. For the view that law can play a significant role in labor relations, see William E. Forbath, The Shaping of the American Labor Movement, 102 HARV. L. REV. 1111 (1989).
intellectual forebears struggled.2

The regulation of labor picketing through injunctions is an especially good subject for studying the persistent reverence for property rights and the stubborn reluctance to acknowledge a robust legitimacy for collective rights. In the 1930's, when legislators began to use statutes as the primary basis for regulating labor relations in general, the state acted explicitly, in response to popular and scholarly critiques, to change the background substantive rules governing the use of labor injunctions. During the common law period, the prevailing doctrines stressed the sanctity of property rights, including the right to carry on a lawful business, and questioned the legitimacy of collective action including the use of picketing in support of demands for higher wages. The tendency to favor entrepreneurial interests was not surprising, since the common law had been framed without reference to the conflicts between labor and capital. For example, courts applied the tort of unjustified interference with business relations to struggles between trade unions and entrepreneurs, even though the analogy between disputes arising from commercial competition and those arising from disagreements about employment terms was strained,3 and even though the justification asserted by the workers, combination for increased wages as a collective right, was not recognized by a common law developed in and for a commercial context. Reform legislation like the Norris-LaGuardia Act of 1932,4 the Wagner Act of 1935,5 and state anti-injunction laws6 acknowledged the inadequate tailoring of the common law rules to the shape of labor-management conflicts. More important, the new statutory formulations were expressly crafted to trim the inequalities of bargaining power between capital and labor.7 With regard to whether to issue injunctions in

2. Or, as my colleague Jeremy Paul observed, "those of us who believe that no question as basic as the relationship between individual liberty and collective action can ever be 'settled' must continue to confront the opposing arguments." See Jeremy Paul, Searching for the Status Quo, 7 CARDOZO L. REV. 743, 785 (1986).

3. And some would say demonstrates the weakness of reasoning by analogy.


labor disputes and the scope of restrictions on picketing, the break with the past was deliberate and well documented.8

Part I explores the history of equitable relief against picketing and the adoption of anti-injunction legislation in the 1930's. This narrative serves as background and as evidence, establishing a basis for assessing current practices and for demonstrating how the law shapes the meaning of events when it privileges the perspective of one set of participants.9 Part II chronicles the initial judicial response to Norris-LaGuardia, and challenges standard understandings of the Act as successfully establishing the legitimacy of collective action and as curtailing the regime of labor regulation by injunction. Beginning with the premise that Norris-LaGuardia constituted only one element in a changing legal environment, I argue for a revised assessment of the Act and of the effect of anti-injunction legislation on the recognition of rights. My claim is that contemporaneous developments in federal and state laws contributed importantly to the demise of the federal labor injunction but that these contemporaneous developments also allowed pre-statutory attitudes about collective action to flourish. This claim is supported by analysis of present attitudes about the conflict between collective action and property rights, as reflected in federal administrative and state court decisions that now set the standards for regulating labor disputes. The evidence suggests a wavering fidelity to the reforms sought by anti-injunction legislation and to a robust appreciation for collective rights.10 Finally, I draw some conclusions about the role of law in furthering demands that collective rights be taken as seriously as property rights. I do not offer a general theory of the causal relationship between law and social change,11 but I do incline to the view that struggle, not law, initiates


8. Congress was reacting against judicial misreadings of the federal antitrust laws as well as against developments under the common law. See Dianne Avery, Images of Violence in Labor Jurisprudence: The Regulation of Picketing and Boycotts, 1894-1921, 37 BUFF. L. REV. 1, 53-69 (1988-89).


10. Part III also confirms the skepticism of some scholars that judicial influence in mediating labor disputes has diminished. See Klare, supra note 7; VALUES AND ASSUMPTIONS, supra note 1.

and sustains progressive change and that any discussion about a law's role in contributing to change can only be answered by reference to concrete events at carefully defined times. Furthermore, viewpoint matters in evaluating the success of a struggle. The conclusion, therefore, looks at anti-injunction legislation and the struggle to achieve legitimacy for collective rights and to reduce class inequality from the perspective of workers.

I. FROM ENJOINABLE INTIMIDATION TO UNENJOINABLE PERSUASION

The Norris-LaGuardia Act embodies a conscious effort to rewrite the rules regarding the use of injunctions to restrain collective activity in labor disputes. This Part examines the animating ideas that allowed easy access to injunctions before Norris-LaGuardia and the contrasting judgments about collective activity and property rights ratified by Congress in 1932.

A. "[T]he necessary element of intimidation in the presence of groups as pickets"

The conditions giving rise to the use of injunctions in labor disputes are quickly summarized. Organizing labor enjoyed only partial acceptance. To defeat collective activity, employers would replace union supporters with workers willing to accept employment conditioned on the promise not to join a union. When such exploita-

---

Between Critical and Complacent Pragmatism, 63 S. Cal. L. Rev. 1821, 1838 (1990). "In adopting strategies for change, one must remember that no abstract theory of the relation between law and society can provide a blueprint for reform. Rather, we must attend to the actual working of structures of power in society." Id.


14. See Felix Frankfurter & Nathan Greene, The Labor Injunction (1930); Edwin Witte, The Government in Labor Disputes (1932); Avery, supra note 8. Forbath, supra note 1, at 1148-1202, revisits and enriches the institutionally-focused work of Frankfurter, Greene, and Witte; he also highlights the shift from local to national strikes along with the increase in sympathy actions such as boycotts as reasons for the increasing use of injunctions in labor disputes. Forbath, supra note 1, at 1152-53. Bonnet establishes that the use of legal intervention to secure employer goals has a long and consistent history. See Clarence E. Bonnet, The Origin of the Labor Injunction, 5 S. Cal. L. Rev. 105 (1931) (arguing that a combination by employees is a reaction against a combination by employers).
tion of the labor market did not thus defeat the demands of trade unionists, employers turned to the courts. Although settled doctrines in criminal law and torts could be applied to collective action, neither conviction for criminal conspiracy nor damages for tortious interference with business was certain or timely. Jurors identified with workers seeking economic gains and frequently declined to penalize their conduct or to impose large fines; judges would not act unilaterally in the context of a public trial; and labor organizations were often judgment-proof. Even when employers won the legal battle in court, they often lost the economic war at the workplace, having acquiesced to the demands of organized labor in order to maintain, or in the case of a strike resume, production.

What employers needed from the courts was a form of timely intervention that deprived workers of the power to force concessions.\(^{15}\) The equitable remedy of an injunction served this purpose. Under the standards in force from the 1880’s to the early 1930’s, an initial restraining order could be issued on the basis of formulaic allegations of collective action tending toward violence and harm to persons or property, which were, sometimes accompanied by affidavits, often submitted \textit{ex parte} to a judge.\(^{16}\) Those sympathetic to labor’s cause, whether stranger, family or friend, could also be enjoined from interfering with the employer’s business.\(^{17}\) The same judge could punish asserted violations of the restraining order through contempt proceedings. And most important, a judicial command to halt concerted activities, even temporarily, accomplished the twin goals of thwarting the union’s campaign and tarnishing the image of organized labor in advance of any determination that the strike, boycott or picket was actually illegal. As Francis Sayre observed,

\[\text{[In labor cases] the issue of a temporary injunction or restraining order commonly results, not, as in ordinary cases, in maintaining the status quo and thus preventing irreparable injury until a more thor-}\]

\(^{15}\) Bonnett, supra note 14, at 122-23 (suggesting that the first labor injunction arose out of the need to quell violence by agents of capital and labor during an 1877 rail strike).

\(^{16}\) See Witte, supra note 14, at 86-87; Frankfurter & Greene, supra note 14, at 47-81.

\(^{17}\) Indeed, the blanket injunctions often extended to “other persons unknown to the complainant and unknown to the court.” 75 Cong. Rec. 5480 (daily ed. Mar. 8, 1932) (statement of Rep. LaGuardia). They also extended to “all persons combining and conspiring with [the defendants] and all other persons whomsoever.” In re Debs, 158 U.S. 564, 570 (1895). Forbath has aptly described these injunctions as “‘criminal codes’ for entire working class communities.” Forbath, supra note 1, at 1184.
ough examination of the issues can be made, but in virtually award-
ing victory in advance by tying the hands of the defendants during
the critical moments of the struggle.¹⁸

Indeed, the community rarely learned whether the workers had pur-
sued a lawful end through lawful means because the judicially or-
dered cessation of concerted activity made further pursuit of the legal
claim pointless. Dissolution of the order following a trial or an appeal
could not restore the accumulated pressure on an employer’s business,
nor compensate workers for their lost opportunity to change working
conditions or the union for its fruitless expenditures.

At the same time that the restraining order forced workers to
abandon collective action and to accept their employer’s terms (or
seek jobs elsewhere), the judicial intervention sent a signal of official
displeasure with the workers’ tactics calculated to “convince ‘that
large neutral element which is not permanently enlisted on either side
of the labor-capital struggle’ that the unions were in the wrong.”¹⁹
On the basis of partial, untested allegations, labor disputes became
linked with illegality in judicial and popular attitudes; and every
restraining order, whether temporary or permanent, reinforced the
image of organized workers threatening employers, nonunionized
employees and the public with force, violence, or unjustified and
severe economic harm.²⁰

In theory, of course, equity offered relief to unions and employ-
ers alike, and a few labor organizations successfully sought injunc-
tions against combinations of employers intent on breaching collective
bargaining agreements.²¹ The primary beneficiaries of equitable or-
ders were, however, employers for the simple reason that jurists
shared the values of entrepreneurs, looking askance at collective activ-
ity and equating temporal business interests with constitutionally sac-
rosanct property rights. Contemporary commentary by Felix

18. Francis B. Sayre, Labor and the Courts, 39 YALE L.J. 682, 682 (1930). See also
FRANKFURTER & GREENE, supra note 14, at 17 (quoting Eugene V. Debs on the devastating
effect of injunctions issued by federal courts in connection with the Pullman strike).
19. Daniel R. Ernst, The Closed Shop, the Proprietary Capitalist and the Law, 1897-
1915, in MASTERS TO MANAGERS 132, 141 (Sanford M. Jacoby ed., 1991) (citations and
footnote omitted).
20. Forbath, supra note 1, argues that the judicial condemnation also had a significant
influence on the labor movements’ tactics and goals, adding strength to the support for lead-
ers who stressed narrow business unionism over class-based reforms.
21. FRANKFURTER & GREENE, supra note 14, at 108-11; Forbath, supra note 1, at 1195
(concluding that there were no more than 25 pro-labor decrees as compared to his estimate
of 2100 anti-labor decrees in the 1920’s).
Frankfurter and Nathan Greene repeatedly accuses jurists of bias against working people in language stripped of the facade of academic neutrality. Historian William Forbath traces this judicial hostility to labor organizations to the broadening scope of collective activity and to workers' demands that union rules be recognized as the governing force of the workplace.

'There were two dimensions of meaning in judges' recurrent use of words like "tyranny," "dictatorship," and "usurpation" in characterizing broad strikes and boycotts. Such collective actions were unjustified, irresponsible concentrations of power, but they were also bodies of men presuming to act as self-constituted sovereigns, "attempt[ing]," as the Supreme Court declared in In re Debs, to exercise "powers belonging only to government." When unions pointed out that equity traditionally treated only tangible things as property, thus removing interference with business or pecuniary transactions from the reach of an injunction, the tradition yielded a new definition of property as things of exchangeable value. Strikes or boycotts interfering with "the right to do business" could, therefore, be enjoined as interferences with property rights.

Even when substantive legal doctrines appeared to cede no special solicitude to employer interests, the rule of law did not generate equal treatment of unions and employers engaged in similar types of economic activity. For example, workers acted in restraint of trade when they refused, pursuant to union rules, to work on materials produced by nonunion shops, but no injunction would be issued against suppliers that combined to sell materials only to employers maintaining an open shop policy. Similarly, workers who refused in combi-

22. See, e.g., FRANKFURTER & GREENE, supra note 14, at 68-75, 81, 105-08, 165-66, 169.
23. Forbath, supra note 1, at 1154 (citation and footnotes omitted). See also id. at 1130-34, 1168-69, on the class backgrounds of judges. Accord 1 ADAM SMITH, THE WEALTH OF NATIONS, chs. 8 & 10, pt. 2 (Edwin Cannan ed., 1976).
25. See In re Debs, 158 U.S. 564 (1895). See also Witte, supra note 24, at 836. For discussion of a similar transformation of the idea of property in areas not involving labor relations, see Kenneth J. Vandevelde, The New Property of the Nineteenth Century: The Development of the Modern Concept of Property, 29 BUFF. L. REV. 235 (1980).
26. See Sayre, supra note 18, at 689-91; Bonnett, supra note 14, at 113-17. Forbath notes that unionists also remarked on the different treatments. Forbath, supra note 1, at 1206-07.
nation to work except for higher wages engaged in a criminal conspiracy, while employers that combined to depress wages acted lawfully, on the ground that "a combination to resist oppression not merely supposed but real, would be perfectly innocent; for where the act to be done and the means of accomplishing it are lawful, and the object to be attained is meritorious, combination is not conspiracy." 28 Similarity of means or ends did not lead to similarity of legal conclusions.

Within the hierarchy of questionable activities undertaken by unions, attempts to persuade nonstriking workers, suppliers and consumers not to patronize struck employers enjoyed a particularly unsavory reputation. 29 Jurists writing from the 1880's to the early 1930's never questioned that persuasion accomplished by acts of violence, force, or actual physical intimidation merited equitable relief. The only contested issue was whether peaceful patrols in themselves constituted coercion, force or unlawful intimidation. 30 Two distinct themes emerged during this period. The prevailing view, as captured by the majority of the Massachusetts Supreme Court in the celebrated 1896 case of Velgarh v. Gunther, 31 asserted that "[I]ntimidation is not limited to threats of violence or of physical injury to person or property. It has a broader signification, and there also may be a moral intimidation which is illegal." 32 Thus, a patrol of strikers was enjoined from all picketing, including social persuasion. Twenty-five years later in American Steel Foundries v. Tri-City Central Trades Council, 33 the United States Supreme Court echoed this sentiment in

---


29. See Sayre, supra note 18, at 700.

30. Id. at 701 n.72, 702 n.73, for a collection of the cases. On the English experience with picketing, see Jerome R. Hellerstein, Picketing Legislation and the Courts, 10 N.C. L. Rev. 158, 160 n.11 (1932).

31. 44 N.E. 1077 (Mass. 1896).

32. Id. at 1077. See also Gevas v. Greek Restaurant Workers' Club, 134 A. 309, 314 (N.J. 1926) ("A single sentinel, constantly parading in front of a place of employment for any extended length of time, may be just as effective in striking terror to the souls of the employees, bound there by their duty, as was the swinging pendulum in Poe's famous story, 'The Pit and the Pendulum,' to the victims chained in its ultimate path.").

33. 257 U.S. 184 (1921) (Clarke, J. dissented). Justice Brandeis concurred "in substance
reviewing the propriety of an injunction against the importuning of unwilling listeners by patrols of from four to twelve persons.

The numbers of the pickets in the groups constituted intimidation. The name "picket" indicated a militant purpose, inconsistent with peaceable persuasion. The crowds [that the pickets] drew made the passage of the employees to and from the place of work, one of running the gauntlet. Persuasion or communication attempted in such a presence and under such conditions was anything but peaceable and lawful.\textsuperscript{34}

Accordingly, the strikers and their sympathizers were "limited to one representative for each point of ingress and egress in the plant or place of business"\textsuperscript{35} and all others were enjoined "from congregating or loitering at the plant or in the neighboring streets by which access is had to the plant" in order "to prevent the inevitable intimidation of the presence of groups of pickets . . . ."\textsuperscript{36} Indeed, the Court chastised the appeals court below for allowing groups of pickets as long as they did not patrol "in a threatening or intimidating manner." This qualification seems to us to be inadequate . . . . It ignores the necessary element of intimidation in the presence of groups as pickets.\textsuperscript{37}

---

\textsuperscript{34} In the opinion and the judgment of the court." \textit{Id.} at 213.

\textsuperscript{35} \textit{Id.} at 205. The courts appear to use the terms picket and patrol interchangeably. The use of the term picket to describe workers who patrol and seek to persuade others to cease doing business with an employer merits investigation. The term picket was originally applied in the military to describe armed soldiers who stood watch for the enemy. The Oxford English Dictionary applies the term to "men acting in a body or singly who are stationed by a trades-union or the like, to watch men going to work during a strike or in non-union workshops, and to endeavor to dissuade or deter them" and cites a \textit{Times} article of August 1867. 7 \textsc{Oxford English Dictionary} 824-25 (1933). How did a term associated with armed patrollers and battle come to be applied to workers with economic complaints? On the use of the term gauntlet, see \textit{Avery}, \textit{supra} note 8, at 105-06. On the term coercion, see \textit{Edgar A. Jones, Jr., Picketing and Coercion: A Jurisprudence of Epithets}, 39 \textit{Va. L. Rev.} 1023, 1028-31 (1953).

\textsuperscript{36} \textit{American Steel Foundries}, 257 U.S. at 206.

\textsuperscript{37} \textit{Id.} at 206-07. See \textit{Hellerstein}, \textit{supra} note 30, at 182-83 (stating that before \textit{American Steel Foundries}, few cases referred to the actual number of persons on the picket line, but that the "almost universal practice" following the decision was to limit the number of pickets).

\textsuperscript{37} 257 U.S. at 207. ("The purpose should be . . . to allow missionaries."). \textit{American Steel Foundries} involved interpretation of Section 20 of the Clayton Act; but the Court signalled the general applicability of its analysis by observing that Section 20 (forbidding injunctions against peaceful persuasion and peaceable assembly) introduced "no new principle into the equity jurisprudence of . . . courts. It is merely declaratory of what was the best practice always." \textit{Id.} at 203. Subsequently, Chief Justice Taft characterized the holding in \textit{American Steel Foundries} as "[w]e held that . . . picketing was unlawful, and that it might be enjoined as such, and that peaceful picketing was a contradiction in terms . . . ." \textit{Truax v. Corrigan,
The contrasting viewpoint recognized a difference between persuasion and intimidation, but was slow to develop a substantial following. Justice Holmes, on the Massachusetts Supreme Court in 1896, objected that “it cannot be said, I think, that two men, walking together up and down a sidewalk, and speaking to those who enter a certain shop, do necessarily and always thereby convey a threat of force.” A few states adopted laws intended to stop the use of injunctions against peaceful picketing, and some in Congress repeatedly pressed for similar legislation restricting the equity jurisdiction of federal courts. While these efforts, along with exhortations by commentators and labor leaders, served to keep the debate alive, the hostility to picketing persisted. Holmes wrote in dissent; the Supreme Court continued to hold state anti-injunction statutes unconstitutional as denials of property rights and equal protection, and Congress routinely defeated proposals to limit the equity jurisdiction of the federal courts. The rule of one picket per entrance and the rhetoric of picketing as necessarily “intimidating” and “sinister” became standard in federal and state courts in the years before 1932.

257 U.S. 312, 340 (1921). But see id. at 371 (Brandeis, J., dissenting) (“[T]his court has recently held [in American Steel Foundries] that peaceful picketing is not unlawful.”). See also the often-quoted opinion in Atchison, Topeka & Santa Fe Ry. v. Gee, 139 F. 582 (S.D. Iowa 1905) (equating “peaceful picketing” with “chaste vulgarity,” “peaceful mobbing,” and “lawful lynching”).


40. Id. at 154-55.

41. Truax v. Corrigan, 257 U.S. 312 (1921) (Holmes, J., dissenting). The Court recognized that inequalities of fortune deprived workers of meaningful freedom to contract but held that the Constitution forbade legislative redistribution (Justices Brandeis, Clarke and Pitney also dissented). See Coppage v. Kansas, 236 U.S. 1, 17 (1915); Holden v. Hardy, 169 U.S. 366, 397 (1898).

42. FRANKFURTER & GREENE, supra note 14, at 154-58.

43. Id. at 89-122. The author of American Steel Foundries, Chief Justice William Howard Taft, exhibited his contempt for organized labor with pride. See IRVING BERNSTEIN, THE LEAN YEARS 190-91 (1960); Avery, supra note 8, at 21-22 (quoting Taft’s letters about enjoining strikes).
B. "Labor . . . asks . . . no favors from the State.
   It wants to be let alone and to be
   allowed to exercise its rights." 44

A combination of factors led to a critical reassessment of picketing and of the larger issue of regulating labor disputes through injunctions. Repeated, violent confrontations between workers and private security forces exposed the contributions of the latter to disturbances once viewed as the sole responsibility of organized labor; 45 intensified lobbying by unions highlighted the extent to which the injunction against collective activity had become the ordinary, not an extraordinary, remedy in labor disputes; 46 academic criticism of the increasing use and abuses of equitable relief, including restraints against peaceful picketing; 47 crystallized into public unease over the degree of government involvement in labor relations; 48 and, perhaps crucial, the political climate accompanying the Great Depression opened up the debate on how to accommodate the struggle between assertions of collective rights as opposed to property rights. 49 In 1932

44. Samuel Gompers, Judicial Vindication of Labor's Claims, 7 AM. FEDERATIONIST 283, 284 (1901), quoted in Forbath, supra note 1, at 1205.
45. See Great N. Ry. v. Brosseau, 286 F. 414, 416, 418 (D.N.D. 1923) ("[T]he sooner public police officers are substituted for . . . private detectives, the better it will be for all parties concerned in strikes . . . . The impartial history of strikes teaches that there is as much danger to strikers on the picket line from private detectives and sometimes from new employés, as there is of the same kind of wrong on the part of strikers against new employés."); Forbath, supra note 1, at 1185-95, discusses the violence attributable to private security forces. See also Richard Hofstadter, Reflections on Violence in the United States in AMERICAN VIOLENCE: A DOCUMENTARY HISTORY 19-20 (Richard Hofstadter & Michael Wallace eds., 1970) ("With a minimum of ideologically motivated class conflict, the United States has somehow had a maximum of industrial violence. And no doubt the answer to this must be sought more in the ethos of American capitalists than in that of the workers."). Accord id. at 37, 39.
46. Forbath, supra note 1, at 1218-33.
47. FRANKFURTER & GREENE, supra note 14, at 102-03 (stating that labor is discriminated against by the judiciary); WITTE, supra note 14, at 91 (stating that industrial disputes present special problems requiring special treatment).
49. See 75 CONG. REC. 5494 (daily ed. Mar. 8, 1932) and the legislative history, infra notes 65-73 and accompanying text. Anti-injunction proposals were introduced in every Congress between 1894 and 1914. See FRANKFURTER & GREENE, supra note 14, at 163. In the 1930 Congressional elections, Democrats did well and the American Federation of Labor received commitments of support for anti-injunction legislation from candidates many of whom were elected from industrial states. Even before the Depression the Senate responded to the concerns of organized labor, by rejecting the appointment of Judge John Parker to the United States Supreme Court. Parker authored the widely criticized Red Jacket opinion up-
Congress passed, and President Hoover signed,\textsuperscript{50} the Norris-LaGuardia Act, limiting the equity jurisdiction of the federal courts in labor disputes to circumstances where "such action is imperatively demanded."\textsuperscript{51} Many states thereafter adopted little Norris-LaGuardia acts similarly restricting the authority of state courts.\textsuperscript{52}

Structurally, the Norris-LaGuardia Act divides collective activity into two categories, either denying or limiting the power of federal courts to issue any restraining order or temporary or permanent injunction.\textsuperscript{53} Nine activities are insulated from any type of injunction, including refusals to work, membership in a union, peaceful assemblies to promote interests in a labor dispute, and giving information about a labor dispute by any means not involving violence or fraud.\textsuperscript{54} As to conduct still subject to the court's equity jurisdiction, an injunction cannot issue unless evidence establishes that unlawful acts have been threatened and will be committed unless restrained, or have been committed and will continue unless restrained (the unlawful acts requirement); that substantial and irreparable injury will follow unless an injunction is issued (the irreparable injury requirement); that as to each item of relief granted greater injury will be inflicted upon the plaintiff by denial of the relief than upon the defendant by granting the relief (the balance of harms requirement); that there is no adequate remedy at law; and that the public officers charged with the duty to protect the plaintiff's property are unable or unwilling to furnish adequate protection (the public safety requirement).\textsuperscript{55}

holding broad-scale injunctions against striking miners. See Bernstein, supra note 43, at 406-09.

50. Ch. 90, 47 Stat. 70 (1932) (codified at 29 U.S.C. §§ 102-115 (1988)). The vote was 75 to 5 in the Senate and 362 to 14 in the House. 75 CONG. REC. 5019, 5511 (daily ed. Mar. 8, 1932). Some members of the Congress and President Hoover may have assumed the statute would be held unconstitutional. See Bernstein, supra note 43, at 414; Lauf v. E. G. Shinner & Co., 303 U.S. 323 (1938) (holding the Norris-LaGuardia Act constitutional).


52. See Note, Current Legislative and Judicial Restrictions on State Labor Injunction Acts, 53 Yale L.J. 553 (1944). Here I discuss the text and legislative history of the Norris-LaGuardia Act because the state laws are modeled on their federal counterpart and because the public policy animating all anti-injunction laws is fully developed for Norris-LaGuardia. It should be noted, however, that states could have employed a different approach, considered unavailable to Congress in the 1930's, that of a general revision of the substantive law of labor combinations. See Edwin E. Witte, The Federal Anti-Injunction Act, 16 Minn. L. Rev. 638, 649 (1932) [hereinafter Federal Anti-Injunction Act].


55. 29 U.S.C. § 107 (1988). Section 108 also requires the complainant to have met all legal and settlement obligations (the clean hands requirement); this prerequisite is strictly construed. See Brotherhood of R.R. Trainmen v. Toledo, Peoria & W. R.R., 321 U.S. 50
Procedurally, the Act requires notice, a hearing, and testimony subject to cross examination before an injunction issues, with the proviso that a temporary restraining order for no longer than five days may be granted without notice on a showing of substantial and irreparable injury and on testimony under oath of facts adequate to support a temporary injunction.\textsuperscript{56} Charges of contempt are subject to trial by jury and the defendant may seek removal of the judge who issued the underlying restraining order.\textsuperscript{57} The Act reinforces these structural and procedural elements by instructing judges that “every restraining order or injunction . . . growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of . . . and as shall be expressly included in [the] said findings of fact made and filed by the court . . . .”\textsuperscript{58}

Each of these prohibitions, standards and procedures responds to the concerns identified as necessitating anti-injunction legislation and to Congress’ more general assessment of the institutional weaknesses in having federal courts set labor policy.\textsuperscript{59} The Senate Report accompanying the bill is blunt:

It is amazing to realize that in the last forty years there has developed in the American courts the practice of writing a special law to fit the individual case by judges in issuing labor injunctions . . . and then enforcing this new law made by the court . . . . It is difficult to see how any civilized people could indefinitely submit to such tyrannical procedure. It is not difficult to understand how such cruel laws, made not by any legislature but by a judge upon the bench, should bring our Federal courts into disrepute . . . . What free American citizen is willing to submit to the violation of his

\textsuperscript{56} Norris-LaGuardia Act § 7, 29 U.S.C. § 107 (1988). The requirement of irreparable injury in the context of a temporary restraining order means the complainant must establish that the act of giving notice would itself lead to irreparable injury. “The only object in issuing a temporary restraining order without notice is because it is alleged by the complainant that notice of such application would bring about destruction of his property.” S. REP. NO. 163, 72d Cong., 1st Sess. 22 (1932) (emphasis added). Section 7 also requires the complainant to post a bond.


sacred rights of human liberty and freedom?"\(^{60}\)

Accordingly, in Section 2 of Norris-LaGuardia, Congress declared, for the first time, the public policy of the United States in relation to the issuing of injunctions in labor disputes, and emphasized that "[t]he object of setting up such a policy is to assist the courts in the proper interpretation of the proposed legislation . . . ."\(^{61}\) Congress further directed that the proper interpretation is to "protect labor in the lawful and effective exercise of its conceded rights — . . . protect first, the right of free association and, second, the right to advance the lawful object of association."\(^{62}\) To this end, as Representative Celler reminded his colleagues, Norris-LaGuardia did not make conduct lawful; it merely removed the possibility of equitable relief tainted by jurists hostile to or inadequately informed about labor’s interests:

All we do by the passage of this bill is to follow the English practice and relegate the disputants to the criminal side of the law and to actions for damages. Only in rare cases do we allow injunctions in this bill.

If acts of fraud and violence are committed, if criminal statutes are violated, if municipal ordinances are infringed, if the peace authorities cannot cope with the situation, then an injunction may issue, otherwise go to the criminal court and get your redress there.\(^{63}\)

With reference to picketing, Congress severely limited the discretion of the federal courts. Subsection 4(e) provides that courts may not enjoin the act of "[g]iving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence."\(^{64}\) Any question as to whether picketing was considered a

\(^{60}\) S. REP. NO. 163, 72d Cong., 1st Sess. 18 (1932).

\(^{61}\) Id. at 10. See also 75 CONG. REC. 4502 (daily ed. Feb. 23, 1932) (remarks of Sen. Norris).

\(^{62}\) S. REP. NO. 163, 72d Cong., 1st Sess. 10 (1932).

\(^{63}\) 75 CONG. REC. 5490 (daily ed. Mar. 8, 1932) (statement of Rep. Celler) (the practice in twentieth-century England did not allow injunctions in labor disputes until 1971). The single exception to the statement that Norris-LaGuardia did not change the legality of conduct is § 3 of the Act, 29 U.S.C. § 103, which makes unenforceable agreements not to join a labor organization, known as yellow dog contracts.

\(^{64}\) Norris-LaGuardia Act § 4(e), 29 U.S.C. § 104(e) (emphasis added). Picketing is protected only by construction, see infra text accompanying notes 64-73.
method necessarily involving “fraud or violence” is answered by the legislative history. The House considered, and ultimately rejected, an amendment to Section 4(e) that would have prohibited giving information “by any method not involving fraud, violence, threats or intimidation.” Representative Celler advised that it would be foolhardy to amend Section 4(e) to prohibit “threats or intimidation” because courts had in the past interpreted these terms to enjoin many lawful union activities, including peaceful picketing.

An examination of the precedents in this country and in the State and Federal courts will show that the word “intimidation” forms the basis of greatest abuse in labor injunctions. The cases seem to indicate that the word “intimidation” is not capable of exact definition, and hence the courts become laws unto themselves. There is no limit to what the judges embrace within the word “intimidation.” If this amendment were adopted it would cover all sorts of peaceful and lawful actions. You would destroy “peaceful picketing,” recognized universally as proper and lawful. Judges, however, have twisted evidence into strained meanings. They have on occasion prevented peaceful picketing as a result of so-called “intimidation.”

Also speaking in opposition to the amendment, Representative Browning explained that “[i]f anyone comes into court and claims that he has been threatened or intimidated, it is the easiest thing in the world to say that certain conditions prevail. It is a matter you cannot establish, except by the opinion of the one who claims he has been intimidated.”

Finally, the House Report on the bill that became the Norris-LaGuardia Act explained the need for Section 4 by referring to court decisions that restricted the intended protections for collective action in Section 20 of the Clayton Act. Specifically:

In the case of American Steel Foundries Co. v. Tri-City Central

66. Id. at 5506 (echoing the remarks of Rep. LaGuardia, a co-sponsor of the bill, who cited Allis-Chalmers Co. v. Iron Molders' Union, 150 F. 155 (C.C.E.D. Wls. 1906) and Vegelahn v. Gunter, 44 N.E. 1077 (Mass. 1896)).
Trades Council, there was a strike, and of course, a picket line. There was practically no fraud or violence but the persistent giving of publicity to facts involved in the dispute and the persistent advising of other persons without fraud or violence not to work for the employer. It was thought by the labor union that section 20 prohibited an injunction against such acts, but the Supreme Court held that such acts could be enjoined and, therefore, the legislation proposed specifically restricts the courts in this respect unless the acts are accompanied by fraud or violence.69

The debate in the Senate also identified “intimidation” as precisely the kind of amorphous concept that Congress declined to include in the Act as enjoinable, because “[i]f we put that language in, we will not be changing the present law at all, and I think we will find that exactly the same kind of practices will creep in under this law that we found creeping in under the old system.”70 Similarly, the Senate resisted an attempt to describe the public policy of the Act as merely reflective of past equity practice. Section 102, as proposed and enacted, declares the policy of Norris-LaGuardia to be protection of the interests of employees from interference by the judiciary;71 the defeated alternative, drawn from Chief Justice Taft’s opinion in American Steel Foundries v. Tri-City Central Trades Council,72 would have declared the policy to be governmental neutrality consistent with protection of the interests of both employees and employers.73

70. 75 Cong. Rec. 4768 (daily ed. Feb. 26, 1932) (remarks of Sen. Wheeler). The Senator further stated:

Surely no reasonable person, it seems to me, could go as far as the Federal courts have gone with reference to intimidation and coercion, because they have simply said in many cases that if a group of men go upon a strike, that amounts to intimidation, or if they hold a meeting in their hall, that amounts to intimidation.

A committee of the Senate went into Pennsylvania to investigate conditions existing there during the coal strike and found that the courts had issued injunctions. They charged the strikers with intimidation, and prevented them from holding meetings in a church, because of the fact that they claimed that the holding of a meeting was an intimidation of the people of the town, and the other miners in the community.

Id.

72. 257 U.S. 184 (1921).
73. Senator Herbert, the proponent of this change, described it as based on Chief Justice Taft’s opinion in American Steel Foundries. 75 Cong. Rec. 4677 (daily ed. Feb. 25, 1932) (statement of Sen. Herbert). See 257 U.S. at 209 for the language to which Herbert referred. On the political journey of the bill, see Federal Anti-Injunction Act, supra note 52, at 638-43.
The message is remarkably clear. Collective activity, including the use of pickets, is presumed to be nonviolent and lawful. Group communication about issues in labor disputes and concerted efforts to persuade others to cease doing business with a struck employer are presumed to be legitimate, peaceful tactics. Injunctions are presumed to be unnecessary to protect property rights in labor disputes. And in the rare circumstances where a petitioner’s evidence overcomes these presumptions, an injunction is to issue only against conduct involving fraud or violence. All other means for exercising collective rights received the imprimatur of legitimacy from Congress.

There is an additional message to be gleaned from this history. Federal judges had used the injunction procedure to characterize collective action, whether peaceful or not, as coercive and unlawful. This practice arose, in part, because federal courts examined picketing and other types of collective action from the perspective of employers, strikebreakers and an inconvenienced public. In Norris-LaGuardia, Congress repudiated both the policy and the perspective embraced by the federal courts, substituting instead the perspective of organized labor and demanding that federal courts do so as well. Courts were to recognize that self-interest, not coercion, motivated refusals to patronize struck employers. To put it bluntly, the legal discourse began to take class into account and to assess behavior from a viewpoint sympathetic to those asserting collective rights and seeking to reduce inequality of fortune.

II. ANTI-INJUNCTION LAW IN ACTION

Commentators routinely credit Norris-LaGuardia with curbing the worst abuses of government by injunction and with getting the federal judiciary out of the business of setting labor policy. This assess-

74. S. Rep. No. 163, 72d Cong., 1st Sess. 21 (1932) (finding that injunctions are sought "for the moral effect . . . in disheartening and discouraging [striking] employees . . . rather than because of any real necessity to protect property."). See also Thornhill v. Alabama, 310 U.S. 88 (1940) (stating that otherwise peaceful picketing cannot be enjoined under the U.S. Constitution on the presumption it will lead to violence).


76. Of course the courts have always taken class into account by privileging property rights, see supra note 41, but Congress had not previously acknowledged the fact.

77. See, e.g., Benjamin Aaron, The Labor Injunction Reappraised, 10 UCLA L. Rev. 292, 297, 299 (1963) ("T]he Norris-LaGuardia Act has proved to be one of labor's greatest and most enduring legislative victories" and "the objective of the Act's proponents . . .
ment is not wrong so much as it is incomplete. Norris-LaGuardia may have curtailed issuance of labor injunctions by federal courts, but the impact of federal anti-injunction legislation on labor relations cannot be judged without reference to contemporaneous developments which moved the locus of critical decision-making authority from federal judges to the administrators of federal labor policy and to the state courts. Part A examines the federal judiciary's positive response to Norris-LaGuardia. Part B turns the focus to federal administrative regulation of collective activity similar to that addressed in the Norris-LaGuardia Act. Part C examines the application of state anti-injunction legislation by state judges. The section concludes with an attempt to explain why the federal bench sitting in equity acquiesced in the new relationship between collective activity and property rights while state judges and federal administrators did not.

A. "[L]abor disputes as such are not at all reprobated but encouraged, and only violence in connection with them is forbidden"78

The decisions immediately following enactment of the Norris-LaGuardia Act argue powerfully that federal judges accepted the standards and procedures prescribed by Congress for issuing injunctions and acquiesced in the judgment that economic realities or legislative guidelines, not judicial preferences, should determine the outcome of struggles between labor and capital. This concession is instructive, in part because it illustrates the potential for reform through law and in part because it suggests conditions necessary for such reform to retain vitality.

Federal courts quickly endorsed the presumption of legality that attached to collective activity by virtue of Norris-LaGuardia. The opinion in Carter v. Herrin Motor Freight Lines, Inc.,79 describes the change:

The language of the act is too plain and the decisions construing it too clear cut and positive to admit of any doubt that the purpose

79. 131 F.2d 557 (5th Cir. 1942).
and effect of the act, as a whole, was to give expression to, and make effective, the policy which breathes throughout it. *This policy is that labor disputes, as such, with the assembling, the picketing, the persuasion, the stopping of work, the enlisting of sympathy and support, and all the other acts expressly enumerated in Sec. 104, were no longer to be the subject of injunctive action but were, and were expressly recognized to be, legitimate means for advancing the interests of the working man, and, therefore, of the people as a whole .... [T]hat policy ... can be made fully effective only when there is a recognition on the part of employer and employee alike that labor disputes as such are not at all reprobated but encouraged, and only violence in connection with them is forbidden .... 80*

*Wilson & Co. v. Birl*81 and *L. L. Coryell & Son v. Petroleum Workers Union, Local No. 18281*82 illustrate the new tolerance for disruptive but nonviolent conduct. In *Wilson*, the court found picketing by union members to establish a (then lawful) closed shop unenjoinable in the absence of violence.83 The picketing consisted generally of ten to fifteen persons, rose on one occasion to involve ninety-seven persons, and may have constituted mass picketing in violation of state law.84 Nonetheless,

[T]he words "unlawful acts" ... do not ... constitute a general reference to anything that may be considered illegal, but apply specifically to the acts of violence which the authority of the executive is calculated to control.85

Similarly, in *L. L. Coryell* the court dissolved a temporary restraining order and declined to issue an injunction against the union's effort to secure reinstatement for two discharged employees and recognition for the union, despite allegations that:

---

80. *Id.* at 560 (emphasis added).
82. 19 F. Supp. 749 (D. Minn. 1936).
84. *Wilson & Co. v. Birl*, 105 F.2d 948, 951 (3d Cir. 1939). Courts tend to use the term mass picketing to refer both to coordinated picketing that obstructs access temporarily (for example a circular rotation that delays automobile access by a minute) and to mob-like activity that interferes with egress and ingress altogether. In many opinions the term mass picketing is used pejoratively but the actual conduct engaged in cannot be discerned since no facts are given by the court.
[T]he defendants entered into a malicious combination and conspiracy to destroy plaintiffs' business . . . by violence and unlawful conduct on the plaintiffs' premises, and continuously since that date have subjected the plaintiffs and their employees to coercion and intimidation by picketing and by signs and placards bearing false, misleading, and fraudulent matter; that the defendants have threatened, intimidated, and annoyed the customers of the plaintiffs; that the defendants and others under their direction have assembled at various times on and near the plaintiffs' place of business, have interfered with the ingress and egress of patrons, have assaulted and beat the employees of the plaintiffs, have used vile and indecent language in speaking to the plaintiffs' employees, threw stones and missiles striking the plaintiffs' buildings, pumps, and automobiles of customers, and that on one occasion the defendants threw stench bombs on the premises and drove customers therefrom; that since June 29, 1936, the defendants continuously have pursued, threatened, and harassed the employees of the plaintiffs and have tried to induce them to leave the service of the plaintiffs; and that, as a result of the picketing and conduct of the defendants, the plaintiffs have sustained irreparable loss and damages.86

The controversy involved a labor dispute and that settled the matter: Norris-LaGuardia deprived the federal court of jurisdiction.87 Richard H. Oswald Co. v. Leader88 demonstrates the careful attention given to the structural restrictions on the use of labor injunctions imposed by Norris-LaGuardia. On the company's petition to enjoin the continued occupation of its factory, the district court found that the occupation satisfied the requirement of unlawful conduct but, in contrast to the practice before 1932, the court demanded a showing that the prerequisites of irreparable injury and an inadequate remedy at law existed.

There was no evidence of any destruction of property or of anything other than an unlawful detainer, which it seems to me, is compensable in damages, and, therefore, does not indicate an irreparable injury such as would require the extraordinary remedy of an injunc-

86. L. L. Coryell, 19 F. Supp. at 750.
87. The union denied the allegations of violence, but the court's refusal to proceed was based on its observation that sufficient facts were admitted to show that a labor dispute as defined by Norris-LaGuardia was involved and this fact alone "brings this case within the provisions of the [Act] and leaves this court without jurisdiction." Id. at 752.
tion... While there are a number of persons in the plant — there are approximately 48 or 50 — the plaintiff had no difficulty in serving all of them, or substantially all of them, with the bill in this case, and it may well be that an action of ejectment may furnish an adequate remedy. 89

No injunction was issued. 90

Finally, *Newton v. Laclede Steel Co.* 91 shows the developing sensitivity of the federal courts to the nuances of framing restrictions on collective action. The record established “many acts of violence, shooting, bombing, and disturbance” that the court characterized as “terrorism.” 92 In addition, a crowd of two to three hundred “violently assaulted and injured certain employees” for a month before the issuance of a temporary restraining order. 93 Although approving an injunction, the Court of Appeals for the Seventh Circuit affirmed the district court’s modification of the restraining order, striking out restraints on the use of profane or abusive language and restraints against interference by threats of force or intimidation. 94 The only prohibitions supported by the evidence and by the Act were restraints on violence or threats of violence. 95

However impressive the fidelity of the federal courts to the rules laid down by Norris-LaGuardia, it would be a mistake to attribute the reformed judicial behavior solely to enactment of federal anti-injunction legislation. With regard to labor relations, all aspects of the environment were changing, making judicial adherence to the dictates of Norris-LaGuardia palatable. At the federal level, Congress began to formulate a national labor policy, thereby depriving federal judges of the claim of a regulatory void in the absence of court intervention. In

89. *Id.* at 877. It should also be noted that an employer can discharge occupying employees without violating the NLRA. NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240, 254 (1939).

90. *Id.*

91. 80 F.2d 636 (7th Cir. 1935).

92. *Id.* at 638.

93. *Id.*

94. *Id.* at 637.

95. See also Cinderella Theater Co. v. Sign Writers’ Local Union 591, 6 F. Supp. 164, 165 (E.D. Mich. 1934) (dismissing a suit for injunction against patrols of two or three walking in groups and persistently advising others not to patronize employer); Knapp-Monarch Co. v. Anderson, 7 F. Supp. 332, 339 (E.D. Ill. 1934) (refusing to grant an injunction against mass picketing, instructing local police and courts that they could deal with it, although dictum suggests most picketing is enjoinable); Miller Parlor Furniture Co. v. Furniture Workers’ Indus. Union 4899, 8 F. Supp. 209 (D.N.J. 1934) (refusing to decide whether mass picketing is enjoinable as “fraud”).
the (eventually invalidated) National Industrial Recovery Act\(^{96}\) and (its constitutionally more secure successor) the National Labor Relations Act of 1935,\(^{97}\) Congress asserted the robust legitimacy of collective activity and made explicit the value of unionization to the economy.\(^{98}\) Equally important, Congress established the National Labor Relations Board as the arbiter of the new rules for labor-management conflict, effectively substituting the judgments of an administrative agency for those of the federal courts.\(^{99}\) At the same time, some state legislatures expressly adopted the philosophy and details of the Norris-LaGuardia Act in an attempt to confirm their recognition of the lawfulness of collective activity and to take state courts out of the business of government by injunction. Seventeen jurisdictions enacted (and amended) little Norris-LaGuardia acts restricting the equity power of state courts in labor disputes. And finally, workers reinforced the statutory messages by making the newly legitimized collective activity a fact of everyday industrial life. Thus, the question is not whether the federal judiciary stopped issuing injunctions in peaceful labor disputes. It did.\(^{100}\) Rather, the inquiry is whether overall legal regulation of labor relations carried forward the reformed perceptions of appropriate public policy with regard to collective activity and property rights adopted in Norris-LaGuardia.


\(^{98}\) The Supreme Court reinforced the congressional message, holding in Thornhill v. Alabama, 310 U.S. 88 (1940), that otherwise peaceful picketing cannot be enjoined under the U.S. Constitution on the presumption that it will lead to violence. 310 U.S. at 104. By 1957, of course, the *Thornhill* doctrine appeared dead. See Teamsters Local 695 v. Vogt, Inc., 354 U.S. 284 (1957). At any rate, in labor disputes NLRB regulation of picketing eliminated the need for resolution of the constitutional status of picketing.

\(^{99}\) The primacy of NLRB jurisdiction over labor relations led to the preemption doctrine that holds states have no power to regulate conduct protected or prohibited by the NLRA. See San Diego Bldg. Trade Council v. Garmon, 359 U.S. 236 (1959).

\(^{100}\) See supra note 77. But cf. Boys Mkt., Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 247 (stating that an injunction against peaceful strike in violation of contractual no strike clause was not the type of activity that concerned Congress in enacting Norris-LaGuardia Act); National Labor Relations Act of 1935 § 10(l), 29 U.S.C. § 160(l) (1988) (mandating that a regional director must seek and federal court must issue injunctions against certain labor union activity).
B. "[T]he making of abusive threats . . . equate[s] to 'restraint and coercion'"\textsuperscript{101}

Jim Atleson has ably demonstrated the perversive hold of common law values on the minds of those enforcing federal labor law under the NLRA.\textsuperscript{102} He demonstrates, beyond debate, that the NLRB and the appellate courts have interpreted the Wagner Act's affirmation of collective rights in a cradled manner inconsistent with the values embraced by Congress in 1932 and 1935.\textsuperscript{103} For example, the 1938 \textit{Mackay Radio} litigation\textsuperscript{104} established an employer's right to permanently replace economic strikers, despite the admonition in Section 13 of the Wagner Act that "[n]othing in this Act be construed so as either to interfere with or impede or diminish in any way the right to strike."\textsuperscript{105} The \textit{Mackay} Court blandly observed that the NLRA does not deprive employers of "the right to protect and continue business by supplying places left vacant by strikers . . . ."\textsuperscript{106} Atleson comments:

\textit{Mackay}, therefore, reflects a historical continuity of values reflected in judicial opinions. The traditional judicial deference given to productivity, hierarchical control, and continued production has thus remained significant after, as well as before, the NLRA. \textit{Mackay} can be viewed as the almost automatic response of judges raised in an era of acknowledged managerial freedom . . . . Thus, one can construct a sympathetic dialogue between benches separated by forty


\textsuperscript{102} VALUES AND ASSUMPTIONS, supra note 1. My understanding of the reasons for the tenacious persentence of ideas differs somewhat from Atleson's, see infra notes 193-200 and accompanying text, but the similarities dwarf the distinctions.

\textsuperscript{103} See also Aaron, supra note 77, at 322 (decrying "the substitution of administrative or judicial fiat for the established law [under Norris-LaGuardia and the Railway Labor Act].") To Atleson's already lengthy list of cases difficult to reconcile with the language and policy of the National Labor Relations Act, we can add Clear Pine Mouldings, Inc., 268 N.L.R.B. 1044 (1984), aff'd, 765 F.2d 148 (9th Cir. 1985), cert. denied, 474 U.S. 1105 (1986) (holding that mere verbal threats are adequate to deprive picketing strikers of their right to reinstatement as unfair labor practice strikers); Pattern Makers' League v. NLRB, 473 U.S. 95, 114 (1985) (reasoning that unions may not restrict members' right to resign because federal labor policy is based on the concept of voluntary unionism). See VALUES AND ASSUMPTIONS, supra note 1.

\textsuperscript{104} Mackay Radio & Tel. Co., 1 N.L.R.B. 201 (1936), rev'd 92 F.2d 761 (9th Cir. 1937), rev'd 304 U.S. 333 (1938).


\textsuperscript{106} Mackay, 304 U.S. at 345.
years and a supposed social and legal revolution.\textsuperscript{107}

And as Atleson emphasizes, the NLRB did not contest this view of
the employer's right to replace.\textsuperscript{108}

More recently, the NLRB has offered fresh evidence of the ten-
dency to view federal labor policy from the perspective of those
skeptical about the exercise of collective rights.\textsuperscript{109} Under the NLRA,
unfair labor practice strikers and nonreplaced employees have a right
to reinstatement.\textsuperscript{110} Strikers may, however, lose the reinstatement
right if they engage in unacceptable picket line behavior, including
conduct that does not involve violence.\textsuperscript{111} The NLRB standard, as
set out in \textit{Clear Pine Mouldings, Inc.}, characterizes unacceptable
"[conduct] such that, under the circumstances existing, it may reason-
ablely tend to coerce or intimidate employees in the exercise of rights
protected under the Act."\textsuperscript{112} Accordingly, verbal threats not accom-
panied by any further actions and occurring only during a short period
near the beginning of a four-month strike constituted "restraint and

\textsuperscript{107} VALUES AND ASSUMPTIONS, supra note 1, at 29, 34 (citations and footnotes omitted).
\textsuperscript{108} Id. at 23-24. The Board did not reach this issue, but Atleson faults the General
Counsel of the NLRB for conceding the employer's right to replace economic strikers. My
understanding of the litigation strategy undertaken by the General Counsel to convince the
Supreme Court of the constitutionality of the Wagner Act suggests an alternative reading. The
\textit{Mackay} strike occurred in 1935, shortly after passage of the Wagner Act. At that time the
General Counsel of the NLRB was struggling to find the appropriate case to test the con-
stitutionality of the new law and was also unwilling to argue for a reading of the statute not
required by the facts of a particular case. See \textit{Peter Irions, The New Deal Lawyers} 262-
71 (1982). Since the General Counsel could litigate the \textit{Mackay} case on the question of
discrimination in choosing among strikers, the Board did not have to confront the broader
question of whether § 13 restricts an employer's authority to hire replacements. Consistent
with its policy of presenting cases under the new law to the Supreme Court in as factually
appealing and narrow a posture as possible, the General Counsel understandably highlighted
the fact of discrimination and avoided the thorny issue of the extent to which the new statu-
tory rights limited pre-existing employer prerogatives. My knowledge of Supreme Court poli-
tics is inadequate to allow serious speculation on the justices' desire in 1938 to read the
Wagner Act narrowly in order to forestall a political reversal. I can note, however, that suc-
ceding decisions have softened the impact of the \textit{Mackay} replacement rule. See \textit{NLRB v.
Fleetwood Trailer Co.}, 389 U.S. 375 (1967); \textit{Laidlaw Corp.}, 171 N.L.R.B. 1366 (1968), \textit{aff'd},
\textsuperscript{109} Clear Pine Mouldings, Inc., 268 N.L.R.B. 1044 (1984), \textit{aff'd}, 765 F.2d 148 (9th Cir.
\textsuperscript{111} \textit{Clear Pine Mouldings}, 268 N.L.R.B. 1044.
\textsuperscript{112} Id. at 1046. \textit{See also} \textit{Tube Craft, Inc.}, 287 N.L.R.B. 491 (1987) (blocking access to
employer's facility is strike misconduct justifying termination and forfeiture of reinstatement
rights). But see \textit{Sears, Roebuck & Co.}, 305 N.L.R.B. 193 (1991) (holding that the employer
did not violate Act when it told employees that the union "might send someone out to break
their legs in order to collect dues").
coercion" and allowed the employer to refuse to reinstate a three-year employee.\textsuperscript{113} The Board reasoned that "the making of abusive threats against nonstriking employees equates to 'restraint and coercion'" even in the absence of accompanying physical acts because "[a] serious threat may draw its credibility from the surrounding circumstances and not from the physical gestures of the speaker."\textsuperscript{114}

At first instance, the standard adopted in \textit{Clear Pine Mouldings} may appear sensible. No employee, whether on strike or not, is privileged to engage in physical assault. But the Board moves from this unassailable proposition to the assumption that verbal threats "equate to restraint and coercion." It is naive at best to assert that Congress, in authorizing use of collective action, anticipated peaceful patrolling unaccompanied by a "rough incident or a moment of animal exuberance."\textsuperscript{115} As earlier Board decisions expressly acknowledged, "minor acts of misconduct must have been in the contemplation of Congress when it provided for the right to strike . . ."\textsuperscript{116} While the strike environment does not make criminal conduct lawful, Sections 7 and 13 of the NLRA can yield the conclusion that abusive threats "unaccompanied by action" and only occurring at a strike's beginning would leave an employer "woefully without justification in contending that [the employee] engaged in disqualifying conduct."\textsuperscript{117} What the Board in \textit{Clear Pine Mouldings}, is really telling employers is that fifty years after enactment of the Norris-LaGuardia and Wagner Acts, it is once again legitimate to deny jobs to persons who express them-

\begin{itemize}
\item \textsuperscript{113} \textit{Clear Pine Mouldings}, 268 N.L.R.B. at 1046-48, 1054. Another employee lost § 7 protection because of a single incident during the first week of the strike in which he hammered on a truck with a two foot club. Since physical misconduct has traditionally disqualified strikers from reinstatement, see Coronet Casuals, Inc., 207 N.L.R.B. 304 (1973), the Board could have upheld this denial of reinstatement without articulating a new standard.
\item \textsuperscript{114} \textit{Clear Pine Mouldings}, 268 N.L.R.B. at 1046 (quoting Associated Grocers of New England, Inc. v. NLRB, 562 F.2d 1333, 1336 (1st Cir. 1977)). The verbal threats were addressed to nonstriking workers who arguably could evaluate the credibility of the rhetoric in light of their previous and ongoing work relationships with the speakers. Compare Sears, Roebuck & Co., 305 N.L.R.B. 193 (1991) (holding that violation of Act by employer may not be predicated on disparaging remarks alone).
\item \textsuperscript{115} Milk Wagon Drivers, Local 753 v. Meadowmoor Dairies, Inc., 312 U.S. 287, 293 (1941).
\item \textsuperscript{116} Coronet Casuals, Inc., 207 N.L.R.B. 304, 305 (1973), \textit{quoted in Clear Pine Mouldings}, 268 N.L.R.B. at 1045.
\item \textsuperscript{117} \textit{Clear Pine Mouldings}, 268 N.L.R.B. at 1061 (ALJ decision). See also the legislative history discussed supra notes 61-73 and accompanying text. The \textit{Clear Pine Mouldings} Board offered as its sole reason for rejection of the earlier standard: "We disagree with this standard because actions such as the making of abusive threats against nonstriking employees equate to 'restraint and coercion' prohibited elsewhere in the Act and are not privileged by Section 8(c) of the Act." 268 N.L.R.B. at 1046.
\end{itemize}
selves openly, perhaps recklessly, about the importance of their working conditions.\textsuperscript{118} Equally unsettling is the frank invitation to employers to rid themselves of strong unionists whose threats of retaliation are understood by all, employers and co-workers alike, to be hyperbolic.\textsuperscript{119}

To the extent that the NLRB and judges interpreting the NLRA offer no legal protection for traditional forms of labor protest, claims about the success of federal legislation like Norris-LaGuardia must be tempered.\textsuperscript{120} Federal courts may no longer issue injunctions against nonviolent conduct in labor disputes, but the unimpeded exercise of collective rights anticipated by the Norris-LaGuardia Act may nonetheless be an illusion. Unease in this regard is deepened if injunctions against nonviolent picketing are obtainable in state courts. The withdrawal of equity jurisdiction at the federal level would then accomplish only a change of forum, not a change of attitude or outcome.

C. "The picketers intimidated some nonstriking employees who attempted to enter the plant by subjecting them to verbal abuse and to verbal threats"\textsuperscript{121}

Close analysis of judicial interpretation of one jurisdiction's anti-injunction legislation, followed by a survey of injunction activity in states with similar laws, illustrates how \textit{plus ca change \ldots la meme chose} when collective and property rights conflict.

Connecticut enacted its little Norris-LaGuardia Act\textsuperscript{122} in 1939

\textsuperscript{118} \textit{Clear Pine Mouldings} is part of a recent trend in Board and court decisions that reassert the pre-Wagner Act picture of ambiguous conduct by workers as potentially threatening. \textit{See} Eileen Silverstein, \textit{The Meaning of Encounters at the Workplace: Sexual Harassment and Solidarity} (unpublished manuscript, on file with author).

\textsuperscript{119} \textit{See} Precision Window Mfg. v. NLRB, 963 F.2d 1105 (8th Cir. 1992) (denying reinstatement to an employee who, in the course of protesting the legality of a discharge, said he would return to kill the responsible supervisor).

\textsuperscript{120} \textit{See} id. (denying reinstatement to an employee who protested the legality of a discharge and said he would kill the supervisor); Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180, 208, 212 (1978) (Justices Blackmun and Powell, concurring, observing that trespassory picketing may promote violence); and DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 578 (1988) (Justice White, writing for the Court, dicta to the effect that handbills persuade while pickets intimidate).

\textsuperscript{121} Emhart Indus., Inc. v. UAW Local 376, 461 A.2d 422, 426 (Conn. 1983).

and is typical of states with such laws. The text of the statute is closely patterned after the Norris-LaGuardia Act;\(^\text{123}\) the state supreme court has identified the purpose of the law to be similar to that of its federal counterpart, taking "courts out of the labor injunction business except in . . . very limited circumstances . . . "\(^\text{124}\) and state judges are invited to examine federal decisions for guidance in interpreting the provisions of the anti-injunction act.\(^\text{125}\)

The authoritative application of Connecticut's law is found in Emhart Industries, Inc. v. UAW, Local 376, a paradigmatic case decided by a unanimous state supreme court in 1983.\(^\text{126}\) The UAW and Emhart Industries had a long term relationship when their collective bargaining agreement expired on September 12, 1982.\(^\text{127}\) The union struck and began round-the-clock picketing on Monday, September 13.\(^\text{128}\) Within forty-eight hours, Emhart petitioned for a temporary restraining order and temporary injunction.\(^\text{129}\) After holding hearings from Friday, September 17, to Tuesday, October 5, a superior court judge issued the temporary injunction drafted by Emhart's attorneys.\(^\text{130}\) The order, upheld by the state supreme court, instructed the

\(^{123}\) Another View, 54 CONN. B.J. 244 (1980) (advocating negotiations between union, employer and police to set the rules of conduct during a strike).

\(^{124}\) Emhart, 461 A.2d at 433 (internal quotes and citation omitted).

\(^{125}\) Id. Although a footnote in Emhart seems to limit the relevant federal decisions to those of the Supreme Court ("because our statutes are similar to the federal statute, the interpretation of the latter by the United States Supreme Court is deemed 'particularly pertinent' in construing our own statute." Id. at 433 n.12) (citations omitted), the text of the Emhart opinion cites decisions from the United States Courts of Appeals as well as from the Supreme Court.

\(^{126}\) Emhart Indus., Inc. v. UAW Local 376, 461 A.2d 422 (Conn. 1983). The development of the law before and after Emhart is consistent with the opinion in Emhart, both as to result and as to style. Like most jurisdictions, Connecticut has a small number of reported cases, there being little reason to appeal from a temporary injunction. See supra notes 18-20 and accompanying text.

\(^{127}\) Id. at 424.

\(^{128}\) Id.

\(^{129}\) Id.

\(^{130}\) Id. As is customary in cases where a labor injunction is sought, the lawyers for
union, its members, officers, agents, employees and all others acting in concert with them to refrain from:

A. Congregating in mass and engaging in mass picketing, or otherwise in close formation around the entrance . . . to the [company’s] premises . . . in such a way as to block said entrance and prevent, interfere with or impede entrance into or egress from said premises . . .

B. By force, violence or intimidation, or threat of force or violence, or by the use of offensive language or gestures, impeding or interfering with the [company’s] officers or employees, persons doing business with the [company] or members of the public who may wish to enter or leave the [company’s] premises.

C. [M]aintaining more than ten (10) picketers who shall maintain two yards intervals between them at the entrance to the [company’s] premises.

D. Threatening or intimidating employees or officers of the [company] or members of their families, and threatening to damage or injure the property of [anyone] doing business with the [company] in any manner. 131

As characterized by the court, the evidence supporting these restrictions established delays in getting into and out of the plant, and intimidation. 132 As to the delays, the testimony persuaded the court

Emhart submitted a proposed temporary injunction along with the original complaint. The terms of the injunction as issued a month later did not vary from that of the proposed order, except that the plaintiff’s request for no more than five pickets separated by at least three yards was modified to allow no more than ten pickets separated by at least two yards. Record on Appeal.

131. Id. at 424 n.1. The trial court also enjoined the union, etc. from “[i]nterfering in any way with the operation of plaintiff’s business.” Id. at 441. The Connecticut Supreme Court struck this paragraph of the injunction as impermissibly broad. Although the overbroad paragraph was in effect from October 13, 1982 (the date the temporary injunction was issued) to at least June 14, 1983 (the date of the supreme court’s Emhart decision), this paragraph of the injunction is unlikely to have affected the union’s conduct, since the remaining features of the injunction upheld by the supreme court addressed all conduct the union was found to have engaged in or would have been likely to engage in between October 1982 and June 1983.

132. Id. at 435 (stating that “[t]he state interest justifying judicial action is Emhart’s right to the reasonable use and free access to its property. In the present case, the striking employees effectively usurped Emhart’s right to determine when the nonstriking employees

https://scholarlycommons.law.hofstra.edu/hlelj/vol11/iss1/3
that:

- the union set up circular picket lines of ten to thirty persons at the entrance to the company's premises and let cars pass through only after the pickets had engaged in a complete rotation;

- employees lost 1248 hours of work during the first week of the strike and experienced delays of up to two hours particularly during rush hours, all caused by the picketing; and

- the rate at which the vehicles were permitted to pass through the picket line caused the traffic to back up for a number of blocks impeding traffic on streets adjoining the plant.\(^\text{133}\)

As to intimidation, the court found that:

The picketers intimidated some nonstriking employees who attempted to enter the plant by subjecting them to verbal abuse and to verbal threats. In addition, one employee testified that he observed a picketer copying down the license plate numbers of the cars that drove through the picket line. There was also evidence of individual acts of violence and vandalism. At one point, ... about fifty picketers surrounded a nonstriking employee's blue Honda automobile and jumped up and down on it, kicked its sides, pounded on the roof, scratched some paint off and cracked its windshield, and also verbally threatened the driver. This incident led to the arrest of one of the picketers.\(^\text{134}\)

The *Emhart* court undertook a scrupulous examination of the statutory requirements for issuing the injunction, including extensive case citations and application of the facts to each requirement. As to every condition, however, the opinion suggests a turn of mind wholly at odds with the philosophy of the statute.\(^\text{135}\) On the critical question

\[\text{would get into the plant to work."}].\]

\(^{133}\) *Id.* at 426.

\(^{134}\) *Id.* The incident of the blue Honda occurred after the police, who had been escorting employees that morning, left their position at the driveway. A picketer testified that the employee arrived after peak traffic hours and was told by an officer, "Well, you're on your own now." *Id.* at 428 n.7.

\(^{135}\) It is my purpose to demonstrate the persistence of ideas, rather than to chastise the *Emhart* court or second-guess the tactical decisions of counsel to the parties. Accordingly, this section of the article will discuss the primary cases on which the court appears to have relied but will not address every case in the lengthy string citations provided by the court. It should be noted, however, that the *Emhart* court cites the relatively few Connecticut cases
of what constitutes unlawful activity, the opinion follows the curious course of citing cases decided before passage of the anti-injunction laws while ignoring relevant legislative history.\textsuperscript{136} Mass picketing and interference with access to the plant are identified as unlawful acts on the strength of \textit{American Steel Foundries v. Tri-City Central Trades Council}.\textsuperscript{137} \textit{American Steel Foundries} is, of course, the 1921 United States Supreme Court decision limiting the number of pickets to one at each gate because the very name picket is "sinister," and "indicate[s] a militant purpose . . . inconsistent with peaceful persuasion," and because groups of pickets present "a necessary element of intimidation."\textsuperscript{138} The "spoken threats" and "moral intimidation" employed by the Enhart strikers are found to be unlawful on the strength of \textit{Levy & Devaney, Inc. v. International Pocketbook Workers' Union}, a pre-enactment Connecticut case finding intimidation in the absence of force or physical violence because nonstrikers were compelled to pass through strikers giving them "black and threatening looks" which could "overawe and make them afraid."\textsuperscript{139} The assumptions reflected in \textit{American Steel Foundries} and \textit{Levy & Devaney}, and the attitudes that they foster, are what prompted Con-

\textsuperscript{136} American Steel Foundries and Levy & Devaney, discussed infra notes 138-42 and accompanying text. As Mary McCune commented on reading these decisions, "The Connecticut court seems frozen in time." Accord Benjamin Aaron, \textit{Labor Injunctions In the State Courts — Part II: A Critique}, 50 VA. L. REV. 1147, 1152 (1964) [hereinafter \textit{State Courts — Part II}].

\textsuperscript{137} 257 U.S. 184 (1921), cited in Enhart 461 A.2d at 434 (quoting Anaconda Co. v. UAW, 382 A.2d 544 (Conn. 1977)). The Connecticut case in the string citation that follows also relies on the discredited \textit{American Steel Foundries} decision and asserts that "[t]he boundary between lawful and unlawful conduct is that between peaceful persuasion and intimidation." Turner & Seymour Mfg. v. Torrington Foundry Workers Local 1699, 18 Conn. Supp. 73, 76, 78 (1952). But see Cinderella Theater Co. v. Sign Writers' Local 591, 6 F. Supp. 164, 171 (E.D. Mich. 1934) (holding that § 4 of Norris-LaGuardia was intended to overrule \textit{American Steel Foundries}).

\textsuperscript{138} American Steel Foundries, 257 U.S. at 205, 207. See also Hellerstein, supra note 30 (establishing that the decision in \textit{American Steel Foundries} is the basis for condemning mass picketing in this country).

\textsuperscript{139} Levy & Devaney, Inc. v. International Pocketbook Workers' Union, 158 A. 795, 796 (Conn. 1932). The court cited \textit{Vegetaln v. Gunther}, 44 N.E. 1077 (Mass. 1896), discussed supra at notes 31, 32 and 39, for this proposition. Even if a "black look" could have inspired fear in 1932, a black look or moral intimidation on a peacefully conducted picket line in 1983 cannot be said to have "the coercive effect of a hand on a gun butt." See Jones, supra note 34, at 1030.
ggression and the Connecticut Legislature to enact anti-injunction laws. Indeed the legislative history of Norris-LaGuardia speaks directly to the issue: "Mass picketing, intimidations, trailing, besetting, importuning, libeling, and false statements are to be beyond the reach of injunctive relief";\(^{140}\) intimidation or threats are concepts that "would simply give judges a pretense to destroy labor's rights";\(^{141}\) and "[i]njunctions are often applied for and issued for the moral effect that such injunctions will have in disheartening and discouraging employees engaged in a strike, rather than because of any real necessity to protect property."\(^{142}\) A principled application of Connecticut's anti-injunction measure would appear to preclude the analysis offered in *Emhart*.\(^{143}\)

In addition to the curious reliance on outdated jurisprudence to establish unlawful conduct, the *Emhart* opinion takes a decidedly uncritical approach to the structural limitations on the exercise of equitable power. In discussing the often-joined elements of irreparable injury and inadequacy of a remedy at law, *Emhart* explains that "[w]hether damages are to be viewed by a court of equity as 'irreparable' or not depends more upon the nature of the right which is injuriously affected than upon the pecuniary measure of the loss suffered . . . ."\(^{144}\) While this proposition may be sound, it does little to advance our understanding of irreparability and the need for an injunction in the *Emhart* situation or in any other labor dispute. The court's primary citation, to *Hammerburg v. Leinert*,\(^{145}\) is particularly unhelpful in this regard. The statute under consideration in

---

140. 75 CONG. REC. 5471 (daily ed. Mar. 8, 1932) (statement of Rep. Beck) (emphasis added). Although Rep. Beck opposed the legislation, his statement is routinely cited as evidence that mass picketing was to be unenjoinable, even by contemporary critics of Norris-LaGuardia. See, e.g., Haggard, *supra* note 7, at 525 n.88. The Connecticut Supreme Court fails to note this legislative history or to identify the distinctions between the federal and state laws that would permit a different interpretation of the state law. In fairness, most state courts find mass picketing and/or blocking access to be enjoinable, see *infra* note 174 and accompanying text.


142. S. REP. NO. 163, 72d Cong., 1st Sess. 21 (1932). This observation echoes that of Trux v. Corrigan, 257 U.S. 312, 368 (1921) (Brandeis, J., dissenting) (stating that the injunction is not sought "to prevent property from being injured nor to protect the owner in its use, but to endow property with active, militant power which would make it dominant over men.").


Hammerburg explicitly mandated injunctive relief, the Connecticut legislature having determined for itself that a damage remedy could never achieve compliance with a law setting price levels for milk. It is difficult to see how a legislative determination that an injunction is always necessary to enforce regulatory laws can aid in interpreting terms of a contrary legislative judgment, that an injunction should rarely be relied on to redress injuries in labor disputes since monetary and criminal sanctions are adequate.

Moreover, the evidence of irreparable injury and inadequate legal remedies was equivocal at best. The court wrote of the “ongoing” loss of access to Emhart’s property and attributed the delays of up to two hours, the traffic back ups in the neighborhood of the plant, and the 1248 hours of lost work during the first week of the strike to the picketing. But picketing was not the only factor restricting easy access to the plant. Prior to the strike Emhart employees, suppliers, and customers could use any of four entrances to the plant, two on Day Hill Road and two on Addison Road. Emhart closed all but one entrance once the strike began, and that entrance opened on to heavily traveled Day Hill Road. The traffic delays and lost hours attributed to the circular rotations were, therefore, in part created by the company’s own activities.

Another telling oddity appears in the passage on weighing the equities. The court had no difficulty finding in favor of Emhart since only unlawful conduct was being enjoined, and “picketing and/or violence which would interfere with the use of Emhart’s property [is] activity which we have held unlawful.” The problem, of course, is that picketing always interferes with access, and jurisdictions adopting anti-injunction legislation have accepted that reality. Unless the

---

146. Id.
147. Robertson v. Lewie, 59 A. 409 (Conn. 1904) cited by the Hammerburg court, is similarly inapposite. Irreparable injury in that case flowed from the defendant’s obstructing access to an outlet used by the plaintiff for 50 years, where the obstruction rendered plaintiff’s land permanently unusable for certain purposes. Nothing in Emhart suggested this magnitude of harm.
149. Id. Thus, the injunction against “mass picketing” and the restriction to ten picketers separated by at least two yards.
150. Id. at 425.
151. Id.
152. The court considered a theory of contributory responsibility but rejected it in favor of an either/or analysis. Id. at 438 n.17. Note also that the evidence of delay dealt with rush hours, but the injunction is not limited to certain hours or days.
153. Id. at 439.
strike in *Emhart* gave rise to pervasive intimidation and violence, the balancing suggested by the court would justify a broad-based injunction in any situation involving picketing, signalling a return to the traditional deference given to property rights. Indeed the facts in *Emhart* confirm this intuition. The only evidence offered in support of the claims of force, intimidation, coercion or threats thereof consisted of the rotational picketing, “noting” license plate numbers, unspecified verbal abuse and verbal threats to occupants of automobiles, and the incident involving damage to the blue Honda.\(^\text{155}\) As we have seen, however, only the assault on the blue Honda involves unlawful conduct as that phrase is contemplated by the statute.\(^\text{156}\) Realistically then, strikers and their supporters were enjoined from engaging in a considerable amount of lawful, expressive conduct on the basis of a single violent incident in the course of round-the-clock picketing that lasted over three weeks.\(^\text{157}\)

What explains the inferences and assumptions about the harmful consequences of collective activity found in the *Emhart* decision?\(^\text{158}\) The opinion is neither sloppy nor devious. Instead, the decision suggests the unconscious return to “the habits you are trained in, the people with whom you mix, . . . a certain class of ideas of such a nature that, when you have to deal with other ideas, you do not give as sound and accurate a judgment as you would wish.”\(^\text{159}\) The pic-

---

287, 293 (1941) (stating that “the right of free speech cannot be denied by drawing from a trivial rough incident or a moment of animal exuberance the conclusion that otherwise peaceful picketing has the taint of force”); Weyerhaeuser Timber Co. v. Everett Dist. Council of Lumber Workers, 119 P.2d 643 (Wash. 1941) (stating that more than threats of violence inherent in mass picketing are needed for an injunction against all picketing; it requires damage or destruction of property or assault upon persons).

155. *Emhart*, 461 A.2d at 428. The court uses a good deal of ink to link individual union officers to these events and to explain why the police could not contain the union’s conduct in the absence of an injunction. This exercise makes it seem as though a larger number of incidents took place but the court is only using the same evidence to establish the separate statutory requirements.

156. *See id.* (reporting that this incident occurred at a time when police chose not to insure public safety).

157. The Emhart strikers returned to work after six months but it took three-and-a-half additional years to negotiate a contract. *Both Sides Welcome New Emhart Contract, HARTFORD COURANT*, July 10, 1986.

158. The restrictions imposed by the *Emhart* injunction became the boiler plate language sought by employer counsel in Connecticut. Presentation by Burton E. Kainen, counsel to Emhart, to the labor law seminar at the University of Connecticut, Spring 1991.

ture drawn by the company of a situation out-of-control mirrored the image of labor disputes held by the judges. The phrase mass picketing inspires visions of violence in the middle-class imagination so any picketing thus labeled must be unlawful; circular rotations contribute to delays and continuing losses so the harm to capital must be irreparable. Case authority and reasoning that conform to these impressions simply make sense to judges hearing actions for injunctions in labor disputes, even when the case authority and reasoning have been explicitly repudiated by state and federal legislation.

The experience in Connecticut is in no way unique. Studies of the use of labor injunctions in other states find a similar pattern of continued reverence for property rights along with grudging acknowledgment of collective rights. Ben Aaron examined injunctions issued before 1964 in connection with labor disputes in six states, California, Massachusetts, New York, Pennsylvania, Texas and Wisconsin, as well as the injunction practice in Los Angeles County from January 1946 to July 1950. Aaron reported a significant decline in ex parte restraining orders, but otherwise observed that many of the practices associated with government by injunction survived the shift in public policy represented by Norris-LaGuardia. "Injunctions are still, for the most part, drawn up by the successful complainant's attorney, and . . . many of their prohibitions are sweeping in scope and are written in traditional legal mumbo-jumbo or in such vague terms that the average man must find them difficult if not impossible to understand." This conclusion was reflected both in the states governed by little Norris-LaGuardia acts and in jurisdictions like California and Texas where labor disputes were subject to the state's general standards for issuing injunctions.

---

country, the courtroom itself. The world of anguish, of social protest, is a threatening dark form on his window shade.


161. State Courts — Part I, supra note 143. Although Aaron described the selection process as arbitrary, he also notes that the six states represent a fair cross-section of the American economy and share the common experiences of vigorous labor activity and labor-management disputes. Id. at 955.


164. Id. at 1152.

165. In 1975, California adopted a state labor relations law, the Moscone Act, Cal. Civ. Proc. Code § 527.3 (West 1979) (barring injunctions against peaceful picketing). But the
Aaron also observed "a distinct similarity between labor injunctions issued by a court and cease-and-desist orders issued by a state labor relations board or commission [enforcing a state labor relations law]." The Wisconsin Employment Relations Board, for example, operates under a state labor relations law much like the National Labor Relations Act and in the shadow of Wisconsin's little Norris-LaGuardia Act. Against this background the Wisconsin Board issued a cease-and-desist order against "[e]ngaging in, promoting, or inducing picketing at or near" the employees' place of employment or "[c]oercing, intimidating, or attempting to induce, the complainant . . . to recognize the respondent union . . . ." Whatever the forum and despite a state's explicit endorsement of union activity, assumptions about the illegitimacy of collective action and the sanctity of property rights persisted.

Jim Atleson reached a similar conclusion in his study of the legal culture in which attorneys litigate and settle injunction actions involving picketing. Atleson found that:

---

injunction practice does not appear to have changed since Aaron's study. See Kaplan's Fruit & Produce Co. v. Superior Court, 603 P.2d 1341 (Cal. 1979). Accord M Restaurants, Inc. v. San Francisco Local Joint Executive Bd. of Culinary Workers, 177 Cal. Rptr. 690, 702 (Ct. App. 1981) (upholding injunction that specified limit of three picketers per entrance and prohibited "[e]ngaging in loud boisterous shouting, yelling, and/or other noises and activities, to disturb the peace at Plaintiff's place of business.").

166. State Courts — Part II, supra note 135, at 1159.
167. Id. at 1160-61.
168. Id. at 1159-60; the board also enjoined secondary boycott activity. Aaron, unwilling to conclude that prejudice against labor organizations or picketing dictated these substantive decisions, argues that procedural aspects of the process make injunctions unsuitable as remedies for unlawful conduct in labor disputes. Drawing on his considerable experience, Aaron compares the information available to judges with that provided labor arbitrators (an arbitrator may hear too much that is irrelevant but not enough that is relevant, while the rules of evidence will mean that a court may not hear much that is irrelevant but will also exclude much that is relevant). Id. at 1156-57. Thus, Aaron concludes "that many temporary restraining orders and preliminary injunctions are improperly issued, not because the judge is prejudiced, but because he is insufficiently informed . . . 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 that 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." Id. at 1157-58.
169. Reported cases since 1964 are consistent. See supra note 165 (California); Howard Gault Co. v. Texas Rural Legal Aid, 848 F.2d 544 (5th Cir. 1988) (Texas); Alliedmove Constr. Co. v. Building & Constr. Trades Council, 296 A.2d 504 (Pa. 1972). Massachusetts and Wisconsin have few published cases since 1964. New York cases are discussed infra notes 170-72 and accompanying text.
170. James B. Atleson, The Legal Community and the Transformation of Disputes: The
a literal reading [of New York's anti-injunction statute] would make it extremely difficult to obtain any injunctive relief, [but] the decisions have often required merely a pro forma allegation and finding, especially where "violent" union activity has been alleged to exist. In many instances . . . [New York law's] requirements are recited and, without explanation, deemed satisfied.\textsuperscript{171}

Indeed, a frequently quoted judicial passage actually contradicts the statute by equating picketing and coercion: "picketing to be peaceful must be free, not only of violence, but also free of any intimidation, free of any form of physical obstruction or interference."\textsuperscript{172} And, with regard to the required finding of irreparable injury, Atleson found that "courts frequently focus not on the damage the violent or mass picketing was or will be responsible for but on the economic damage the labor dispute has caused as a whole . . . . Such a focus renders the 'substantial and irreparable injury' requirement a minor hurdle if the union's activity is at all effective."\textsuperscript{173}

My own reading of cases from the twenty-four jurisdictions with anti-injunction laws confirms Aaron's and Atleson's findings.\textsuperscript{174} Many decisions resemble that in Emhart, with the courts referring explicitly to the changes wrought by anti-injunction legislation and then proceeding to hold nonviolent activity unlawful on grounds reminiscent of pre-enactment philosophy. A New Jersey appellate court, for example, condemned temporary obstruction of automobile access on a few occasions as "exercising dominion over the gate" and as "continuous trespasses" which historically evoke the protective decree of chancery, despite the absence of any violent activity and despite the company's tactic of creating traffic jams by blocking access with supervisors' automobiles.\textsuperscript{175} An Illinois appellate court affirmed the grant of a temporary injunction against peaceful picketing and against


\textsuperscript{171} Atleson, supra note 170, at 48.

\textsuperscript{172} Id. at 47 (emphasis omitted) (quoting Triangle Finishing Corp. v. Textile Workers Union of Am., 145 N.Y.S.2d 614, 616 (Sup. Ct. 1955)). See also, State Courts — Part I, supra note 143, at 978.

\textsuperscript{173} Atleson, supra note 170, at 47. Accord Aaron and Levin, supra note 162, at 49 ("'Irreparable injury' is given so broad a definition as to render the distinction between it and less serious damage virtually meaningless.").

\textsuperscript{174} I refer to decisions issued since 1960 and reported in the annotated state codes, LEXIS and WESTLAW.

statements to the effect that continued business relations with a company would result in picketing, because the picketing and statements were "a means of economic coercion." The California Supreme Court found that picketing which obstructed consumer access was enjoinable, despite passage in 1975 of the Moscone Act limiting equitable relief against peaceful picketing. Because the record contained no evidence of violence, threats of violence, or inability of local authorities to control the strikers, a concurring justice lamented:

It is disappointing that the Supreme Court of California, after more than half a century and notwithstanding the recent, plausibly incompatible, California legislative history, now appends this decision to the judicial history that Messrs. Frankfurter and Greene in 1930 assailed so graphically and devastatingly in their book The Labor Injunction. 174

With regard to the procedural safeguards at the heart of anti-injunction laws, trial judges still ignore the most basic requirements (if appellate reports provide an accurate record). 179 For example, an Illinois appellate court vacated a temporary restraining order issued without notice to the union whose members were picketing the employer's plant; 180 an Indiana appeals court recently dismissed a

---

176. Twin City Barge & Towing Co. v. Licensed Tugmen's Protective Ass'n, 197 N.E.2d 749, 755 (Ill. App. Ct. 1964) cited with approval in Dinoffria v. International Bhd. of Teamsters, 72 N.E.2d 635 (Ill. App. Ct. 1947), writ dismissed, 77 N.E.2d 661 (1948), cert. denied 335 U.S. 815 (stating that "even where there was no violence in the sense of physical assault or destruction of property, statements and actions of a threatening nature, which amounted to attempts to intimidate, will also be enjoined, and such threats and intimidation have been implied from conduct and demeanor as well as from spoken words.").


179. It is impossible to say whether these instances of procedural defects are routine or rare, because injunction orders are appealed infrequently. See supra notes 18-20 and accompanying text. My point is not that all trial courts fail to follow statutory procedures, but a more modest one, that significant decision-makers continue to hold and act upon pre-statutory attitudes toward collective action.

permanent injunction issued without hearing testimony under oath and without making any statutorily-required findings of fact on the adequacy of police protection and the balance of interests protected by granting or denying relief;¹¹¹ and a Louisiana court set aside a preliminary injunction issued on the strength of the court’s asserted police power “to prevent violence before it occurs” and without any reference to the state’s anti-injunction law.¹¹² Procedural irregularities also continue in jurisdictions where labor disputes are subject to a state’s general injunction laws. In Texas, employer growers hired local criminal district attorneys as civil counsel to secure injunctive relief against a union of striking agricultural workers.¹¹³ The district attorneys had the power under state law to bring criminal actions against the workers for the same conduct that was the object of the civil action seeking a temporary restraining order.¹¹⁴ In a subsequent conspiracy action against the employers and state and local officials, Judge Higginbotham mused that “the two-hatted lawyers who obtained enforcement here have revived an earlier practice of using state court injunctions to bust unions.”¹¹⁵

In many of the jurisdictions with anti-injunction laws appellate courts do not appear to have authoritatively applied their statutes,¹¹⁶ in part because appeals are rarely taken on the issuance of labor

---


¹¹³ Howard Gault Co. v. Texas Rural Legal Aid, Inc., 848 F.2d 544, 549 (5th Cir. 1988).

¹¹⁴ Id.

¹¹⁵ Id. at 567 (Higginbotham, P., concurring). See also Kaplan’s Fruit & Produce Co. v. Superior Court, 603 P.2d 1341 (Cal. 1979), discussed supra note 177.

¹¹⁶ The jurisdictions I include as appearing to have little or no authoritative review are: Arizona, Hawaii, Idaho, Kansas, Maine, Massachusetts, Minnesota, New Mexico, North Dakota, Wisconsin (but see supra note 182 and accompanying text), Utah (also preemption found) and Wyoming (also preemption found). Significant parts of Washington’s statute were declared unconstitutional. See Blanchard v. Golden Age Brewing Co., 63 P.2d 397 (Wash. 1936).
injunctions and in part because state courts find federal preemption by the NLRA. It is therefore difficult to identify with certainty the circumstances under which injunctions do issue, but the limited evidence is not reassuring. An Arizona Superior Court, enjoined, *inter alia*, "[u]sing insulting, obscene or abusive language, remarks and/or gestures or shouting yelling or making loud noises in a manner directly tending to the disturbance of the peace."187 In New York, a court enjoined picketing of a plant that was closing on the ground that there was no labor dispute.188 In Maine and Oregon a strict mootness doctrine appears to preclude most meaningful appellate review.189

The absence of active judicial review may also be attributed to tactical decisions of union lawyers. To avoid formal, perhaps pervasive restrictions imposed by a state judge with all the attendant costs and adverse publicity, Atleson found that in the labor relations community of Buffalo, New York, injunction practice emphasized attorney-negotiated terms of injunction orders.190 Thus, despite the restraining language of New York's legislation and in circumstances where evidence of violence may be "doubtful,"191 lawyers set the boundaries of acceptable conduct about the location and number of pickets, reaffirming the belief that picketing necessarily means violence and challenging the commitment to a robust legitimacy for collective action.

We are left with a paradox. Pervasive legal recognition of the right to engage in collective action seems to have exhausted the enthusiasm of federal courts to issue injunctions in the name of preserving property rights. But administrative agencies and state courts, constrained by the same legal environment that acknowledges the legiti-

---


188. *Anaconda* Co. v. Local 404, IUE, 372 N.Y.S.2d 152 (Sup. Ct. 1975). See also *Logan* v. *Stannard*, 439 P.2d 24 (Wyo. 1968) (remanding to the trial court that issued a temporary injunction for determination of whether an employer-employee relationship is necessary, as a matter of law, in order to maintain a labor dispute under the statute).

189. See *Bancroft & Martin*, Inc. v. *Truckers Local* 340, 412 A.2d 1216 (Me. 1980) (appealing from injunction against blocking access; injunction was moot because strikers had returned to work); *Coin Millwork Co.* v. *Lumber Workers*, 435 P.2d 1015 (Or. 1967) (stating that where picketing has ceased, questions of procedural regularities regarding injunction are moot). But see *Louisiana-Pacific Corp.* v. *Lumber Workers Local* 2949, 679 P.2d 289 (Or. 1984) (vacating injunction against all but one union official because evidence did not establish clear proof of officials' participation, authorization, or ratification of unlawful acts).

190. *Atleson*, supra note 170, at 60-63.

191. Id. at 66.
macy of collective action, revert to the reasoning and rhetoric of law as the guardian of property rights.192

I do not believe that federal judges, as compared to their administrative and state counterparts, have a deeper commitment to enforcement of statutory law. Nor would I suggest that the temperament of federal judges is less easily swayed by class biases. Several considerations may help to explain the differing responses to similar legal mandates.

First, there is federalism. Control of violence and maintenance of public order are traditional concerns of local government. Even the broad preemption doctrine of the NLRA recognizes the continuing power of states to regulate those aspects of labor relations that are a matter of particular local concern, like violence during a labor dispute.193 Federal judges who follow the mandates of anti-injunction legislation may do so secure in the knowledge that theirs are not the courts of last resort. State judges, on the other hand, articulate a special responsibility to foster security and stability in their communities. This obligation may have an unusually strong influence when the task is to locate the line between peaceful persuasion and violent coercion. Indeed, state judges may genuinely believe that anti-injunction legislation at the federal level should be strictly construed precisely because violence is a matter of state concern, and that limitations on state court equity powers cannot be similarly restrictive. This sentiment may be reinforced if state judges view labor disputes as essentially private in nature, a view that harkens back to the early 20th century.194

192. Are these decision-makers correct? Are collective actions in general and picketing in particular inherently intimidating? Or are they so inextricably intertwined with the force and threats of violence as to condemn as foolish any effort to separate out the peaceful and lawful elements? Perhaps the images of violence that recur in the jurisprudence of the labor injunction mirror real life and it is time for fuzzy-minded intellectuals to concede the accuracy of the long-held revulsion against coordinated collective action. The conclusion of commentators and historians is otherwise. As Richard Hofstadter observed in 1970, "... labor often got the blame for violent outbursts that were primarily the work of police or other agents of employers. Hence one speaks of 'labor violence' but not of 'capital violence.'" Hofstadter, supra note 45, at 39.


Timing may be another consideration. Most of the federal cases that deny or severely limit equitable relief on the strength of Norris-LaGuardia occurred during a period of intense organizing activity by industrial workers. Labor aggressively harnessed collective action, not administrative agencies or courts, to compel employers to negotiate and sign collective bargaining agreements. These confrontations reminded federal judges that national labor policy anticipated tolerance of all but clearly violent conduct. By contrast, the state and administrative limits on picketing that Aaron, Atleson and I examined occurred after 1947, during a period in which accommodation rather than confrontation was the dominant theme in labor relations. Without the repeated exposure to aggressive use of collective activity combined with the fresh understanding that “labor disputes, as such, with the assembling, the picketing, the persuasion, the stopping of work, the enlisting of sympathy and support . . . [are] legitimate means for advancing the interests of the working man, and therefore, of the people as a whole,” modern state and administrative judges, like their early 20th century counterparts, hear only the siren song of preserving property rights. This is not surprising. The only recognition of collective rights in United States law is in legislation to regulate collective bargaining. In all other regards, the law privi-

195. See LIZABETH COHEN, MAKING A NEW DEAL: INDUSTRIAL WORKERS IN CHICAGO 1919-1939, at 301-21 (1990); BERNSTEIN, supra note 43.

196. See DAVID BRODY, WORKERS IN INDUSTRIAL AMERICA 182-211 (1980). I do not wish to overstate the proposition. Struggle in the form of labor disputes continued, most notably the strike activity of 1945 through 1946, and continues with Pittston, Ravenswood and Pittsburgh being the most recent examples. See David Moberg, Lock-Out Knock-Out, In THESE TIMES, June 24-July 7, 1992, at 12; Pittsburgh Papers Halt Publication After Two Days, N.Y. TIMES, July 29, 1992, at A-8. The experiences during World War II, when labor leaders took the no strike pledge and the War Labor Board facilitated the negotiation of collective bargaining agreements, provided the ideology and empirical reference for the accommodationist model. See also Howard Kimeldorf, World War II and the Deradicalization of American Labor: The ILWU as a Deviant Case, 33 LAB. HIST. 248, 276 (1992) (stating that the left's commitment to wartime production goals and the entry in World War II of workers who had not experienced the Great Depression “deflected the radical potential of American labor”). The Taft-Hartley amendments, which closely regulate secondary activity, added to the attractiveness of accommodation. However, as Pittston and Ravenswood demonstrate, even with Taft-Hartley (and a far chillier climate for organized labor than in the 1950’s) accommodation is not the only option.


198. See Boys Mkts., Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235 (1970) (holding that federal courts may enjoin peaceful strikes in breach of no strike promises in order to preserve the integrity of collective bargaining agreements).

199. See, e.g., NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) (holding that the First Amendment of the United States Constitution recognizes the right to engage in concert-
leges only individual rights, like the right to own and use property. 200 When a right is an isolated exception, its legitimacy and effective employment require a constant struggle. Moving the exercise of collective rights from the plant floor to the negotiating table or from the streets to the hearing room means that contentious collective action no longer presents itself as an inevitable aspect of everyday workplace life. 201

III. CONCLUSION

Despite the deliberate effort to use law to alter popular and judicial perceptions about the proper balance between collective activity and property rights, the image of workers as violent and capital as requiring constant protection by the state survives. Does this example instruct that reform through law is irrelevant at best, pernicious at worst? 202 I think not. 203 The campaign for tolerance of collective activity by construction).


201. In pointing out the effect of the limited use of self-help by labor organizations, I intend no criticism. Given the current climate of opinion and state of the law, unionists cannot be faulted for holding their jobs to be more important than the commitment to the principle of self-help through strikes and picketing. Indeed, unionists should be applauded for developing alternative strategies with promise of success. On such strategies, see No More Business As Usual: Labor's Corporate Campaigns, 21 LAB. RES. REV. (Fall/Winter 1993).


203. Although I acknowledge that the story of anti-injunction legislation could be used to argue a different conclusion. For example, critical race scholars, like Bell and Delgado, treat harshly the civil rights movement, focusing on the limited gains in racial equality and emphasizing the use of "progressive" law to stabilize race relations at a point of comfort for whites. See Derek Bell, Race, Racism and American Law 2-63 (3d ed. 1992); Richard
activity at the expense of property rights has had a limited success and legal restrictions on the use of injunctions in labor disputes contributed to that success. That the law's contribution was neither necessary nor sufficient to the goals of furthering collective rights and reducing class inequality does not render the contribution trivial.\textsuperscript{204}

At the time of the adoption of anti-injunction legislation, the social and economic arrangements of the United States were unstable. The collective demands of organized labor and the unemployed for jobs and dignity were an element contributing to this instability. These demands were pressed in courts, legislatures, fields, factories, and the streets. Collective activity became a powerful symbol of worker solidarity, control and discipline. For fifty years, injunctions had been used to denigrate collective action, to destroy worker solidarity. Anti-injunction legislation could help, not by insuring the success of the collective demands, but by giving workers the psychological space and institutional opportunity to advance their claims. At the institutional level, the anti-injunction legislation restricted the most egregious forms of governmental repression and put a stop to establishment terror.\textsuperscript{205} At the psychological level, the anti-injunction legislation, in combination with other changes in the way the state regulated labor relations, triggered a preliminary acceptance by mainstream opinion of the workers' right to engage in the struggle for solidarity, control and dignity.

The law did not, of course, wipe out ingrained suspicions about collective activity.\textsuperscript{206} This is not surprising. Legal scholars tend to

\textsuperscript{204} If we describe the ultimate goal as an end to class inequality, anti-injunction legislation clearly has not been sufficient to secure class equality. Nor would anti-injunction legislation be necessary if worker protest of inequality took a revolutionary form.

\textsuperscript{205} See supra note 60 and accompanying text.

\textsuperscript{206} See, e.g. BLACK'S LAW DICTIONARY, distinguishing between picketing and peaceable
describe the law as a solution to a problem, when we should acknowledge the more modest reality that any law will at best ameliorate bad effects and help those concerned to organize a long-term, nonlegal solution to a problem.207 Perhaps our hyperbole is a political maneuver. But having described law as generating change, we then condemn law for not delivering. Although we know that underlying social and economic factors explain the distance between goal and reality, we have been seduced by our own rhetoric.

It seems to me that Norris-LaGuardia could be described as a failure only if it had not opened up to workers the institutional and psychological opportunities to pursue their demands for solidarity, control and dignity. While many attitudes about collective activity and property rights seem unchanged from the 1880’s to the 1980’s, one fact has altered. The concept of collective rights has been accorded a formal legitimacy in both law and opinion. Injunctions may be used to limit but not to deny the right to picket in connection with labor disputes. This gain is not trivial because the opportunity for struggle remains.208

---

207. See generally Sparer, supra note 12 (describing the organizational purpose of securing pre-termination hearings for welfare recipients); Bachmann, supra note 202 (describing a variety of legal tactics employed by ACORN, a non-profit corporation of low-income persons organized into neighborhood groups). See also Austin, supra note 202; James Gray Pope, Labor-Community Coalitions and Boycotts: The Old Labor Law, the New Unionism, and the Living Constitution, 69 Tex. L. Rev. 889 (1991) (discussing community-labor coalitions).

208. As E. P. Thompson wrote, regarding a related struggle:

In all of this I may be wrong. I am told that, just beyond the horizon, new forms of working-class power are about to arise which, being founded upon egalitarian productive relations, will require no inhibition and can dispense with the negative restrictions of bourgeois legalism. A historian is unqualified to pronounce on such utopian projections. All that he knows is that he can bring in support of them no historical evidence whatsoever. His advice might be: watch this new power for a century or two before you cut your hedges down.

THOMPSON, supra note 12, at 266.