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NOTES

CONSTITUTIONALITY OF THE NATIONAL LABOR RELATIONS ACT*

The first fourteen of the Federalist Papers contain an elaborate argument for the adoption of the Constitution based on the necessity for maintaining order in the state. Says Madison, "A landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, with many lesser interests, grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments and views. The regulation of these various and interfering interests forms the principal task of modern legislation. . . . ."[1] He goes on to warn against allowing any one faction to become a judge in its own cause through its ability to influence the agencies of government.

Subsequent experience has shown that the conflicts between employers and labor represent one of the more serious forms of factional disturbance in the state. In these conflicts labor has been seriously handicapped by restrictions imposed by law and by employers upon its right to organize. Like some previ-

* For a discussion of the activities of the National Labor Relations Board, see Despres and Myer, The National Labor Relations Board—Decisions of its First Year, *ante* p. 97.

[1] Madison, The Federalist, No. x, p. 43 (Everyman ed. 1934).

ous pieces of legislation covering labor organization problems, the National Labor Relations Act[2] has been hailed by labor organizers in some quarters as a solvent of their political and legal difficulties.[3] The constitutionality of the act, however, has been subjected to attack on a number of grounds. A consideration of these seems to show that the Supreme Court can, with almost equal facility: (1) hold the act unconstitutional *in toto* on the ground that it combines inseparably both constitutional and unconstitutional types of regulation; (2) hold it constitutional under the commerce clause, but limit the scope of its application to the immediate instrumentalities of interstate transportation and communication; or (3) hold it constitutional and applicable also to the labor relations of all producers whose product is important in interstate commerce. The purpose of this note is to examine the three choices apparently open to the Supreme Court.

I. In determining whether the act is unconstitutional *in toto*, it seems that since the act is limited in terms to apply only to questions affecting commerce, the court should not invalidate the whole act unless it finds (1) that the kind of regulation imposed by the act is in itself unconstitutional, or (2) that if the regulation is imposed upon parties to whom the act does not legitimately apply, the damage attendant upon being declared guilty of an unfair labor practice, which is prerequisite to judicial review, is so great that parties will submit to regulation rather than seek judicial protection.[4] In *Bendix Products Corp. v.*

[2] 49 Stat. 449 (1935); 29 U.S.C.A. §§ 151–166 (1935). The purpose of the National Labor Relations Act is to eliminate by the promotion of collective bargaining some of the chief causes of labor disputes in large enterprises where labor troubles affect the public generally as well as the disputants. To accomplish this the act provides (1) in § 9 machinery for selection of representatives of employees to bargain with the employer, and (2) in § 10 machinery for prevention of practices tending to obstruct or nullify the benefits of collective action. It is the duty of the Board created by the act, when a dispute "affecting commerce" is found to exist concerning representation for purposes of bargaining, to determine the appropriate bargaining unit, and to investigate and certify to the interested parties the names of the persons selected by a majority of the employees in that unit to represent them. Thereafter these persons are the exclusive representatives of the unit for purposes of collective bargaining in regard to matters covered by the act (§ 9). It is also the duty of the Board to hear complaints of unfair practices —interference, domination, discrimination, refusal to bargain—and to issue "cease and desist" orders enforceable in proper cases by the circuit court of appeals (§ 10).

[3] For a discussion of the present act and its antecedents, and the relation of these to the political attitude of American labor, see Mason, Federal Control of the Employer-Employee Relation, 84 U. of Pa. L. Rev. 277 (1936).

[4] In *Ex parte* Young, 209 U.S. 123 (1908), it was held that an act fixing railway fares and providing penalties of up to $5000 and five years imprisonment for each violation in effect denied equal protection of the laws. The Court concluded that even though a party has no constitutional right to break a law in order to test its constitutionality, if an attempted regulation provides such severe penalties for non-compliance that parties in doubt will submit rather than risk an adverse finding in the courts the act deprives such parties of essential constitutional protection. This somewhat anomalous doctrine has been distinguished from the usual doctrine applied to criminal statutes, in that it is said to apply to types of regulation not clearly and absolutely within the legislative power. However, the scope of the doctrine is extremely ill-defined.

Beman,[5] a representative case which will be used as a basis for discussion, the court found an unconstitutional type of regulation—"compulsory unilateral arbitration"[6] and "majority rule"—which is also so imposed that all parties who seek judicial review are damaged as the price of review, regardless of whether or not the act is applicable to them. The regulation and the difficulties attendant upon judicial review were held to constitute a deprivation of property without due process of law.

The argument by which the district court established that the act provides for "compulsory unilateral arbitration," is worth noting. It is as follows: Suppose one of the rival unions is selected as the exclusive representative of the employees. It is an unfair practice for an employer to refuse to bargain collectively concerning terms of employment;[7] and the act expressly permits an employer to make a closed shop agreement,[8] which may be termed a "condition of employment." Suppose the representatives propose such an agreement. The employer *must bargain*, but—says the district court—he must obviously bargain either with or without a good faith intention of actually entering into a closed shop agreement. But it is clear that one of these alternatives is prohibited to the employer by the act. For a person could not be said to "bargain" for the purchase of a house if he had a fixed determination not to buy under any circumstances; *i.e.* if he bargains without a good faith intention to reach an agreement he does not bargain at all. Therefore an employer, once approached on the subject, *must* enter into a closed shop agreement of some sort—that is, he is subjected to "compulsory unilateral arbitration." However, the "alternatives" relied upon in this argument are of course not exhaustive since a person need not have an actual intention either to do or not to do a given act. He may be in a state of suspended judgment in which he entertains the *possibility* of intending either one without *actually* intending the one or the other. In fact, in common understanding, people are said to "bargain" only so long as they are open to different decisions; and indeed the term "bargain" excludes the notion of a single, fixed determination.[9] Consequently this objection, which

[5] 14 F.Supp. 58 (Ill. 1936).

[6] This phrase was apparently coined by Dean William H. Spencer. It appears in Spencer, The National Labor Relations Act (1935). For an analysis of Dean Spencer's exposition of this objection, see *infra*, p. 112. *Cf.* the argument of Barnes, J. in the *Bendix* case, stated *infra*, p. 114.

[7] Sec. 8(5), 49 Stat. 452 (1935); 29 U.S.C.A. § 158 (5) (1935).

[8] Sec. 8(3): ". . . . nothing in this Act . . . . shall preclude an employer from making an agreement with a labor organization . . . . to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made."

[9] Bargaining has been defined as: (1) The act of discussing the terms of a proposed agreement. 1 Century Dictionary 451 (1911). (2) To treat with anyone as to the terms which one party is to give, and the other to accept, in a transaction between them; to try to secure the best possible terms; to haggle over terms. 1 Oxford Dictionary 670 (1888).

is based on a classical error in logic, fails to bring the act under the established rule against "compulsory arbitration" laws.[10]

There is a variant of the "compulsory arbitration" argument.[11] Under the interpretation of the "duty to bargain" which was made under §7(a) of the National Industrial Recovery Act[12] by the old National Labor Relations Board[13] an employer must not merely listen, but must meet proposals with reasonable objections or counter-proposals. If there exist no available reasonable objections, it is clear that the employer must either make a concession of some sort or be adjudged by the Board guilty of a refusal to bargain. A circuit court of appeals could then order him to bargain. This would necessitate some concession. In the absence of reasonable objections to a proposal, then, the employer would inevitably be forced into some sort of agreement with the labor representatives; that is, he would, by judicial process, be forced into a contract on terms not actually acceptable to him merely because he had no reasonable objections to terms of the contract as proposed and did not want to make other proposals. This argument leads to the conclusion that the employer would under this act be deprived of the right to an unreasonable refusal to contract, which is nevertheless a property right. We can see that, assuming that the interpretation of "bargaining" given above is adopted by the courts, there is the possibility that an employer could be forced by judicial process to be reasonable, in violation of his hitherto unquestioned right or privilege to be unreasonable. It should be noted, however, that this objection may be almost wholly academic; since few executives in the past have been unable to show or create good "business reasons" for doing or not doing a given thing. There is, then a real difference, and in practice there would probably be a vast difference between this and a "compulsory arbitration" act, such as that considered in the *Wolff* case;[14] for under that act, the Industrial Court's determination would merely have to be fair to both sides and not clearly unreasonable, while here the ultimate agreement would have to be fair to the employer beyond reasonable doubt.[15] But still the argument cannot lightly be dismissed. There is not, strict-

[10] Wolff Packing Co. v. Industrial Court of Kansas, 262 U.S. 522 (1923). The statute in question set up a court of arbitration, which in case of dispute could step in and make an arbitration agreement binding upon the parties. There is, of course, a clear distinction between compelling a party to arbitrate a difficulty and compelling him to entertain, and perhaps even meet with reasonable counter-proposals, the proposals of another party looking toward a possible arbitration agreement. "To bargain" does not mean "to reach an agreement." For a discussion of compulsory arbitration laws, see Simpson, Constitutional Limitations on Compulsory Industrial Arbitration, 38 Harv. L. Rev. 753 (1925).

[11] The discussion that follows is based largely upon Spencer, The National Labor Relations Act 21–29 (1935).

[12] 48 Stat. 198 (1933); 15 U.S.C.A. § 707(a) (supp. 1934).

[13] Matter of Houde Engineering Corp., N.L.R.B. Decisions, (July–Dec., 1935) at 35.

[14] See note 10 *supra*.

[15] Some commentators ignore the fact that a proposal may be reasonable, and that at the same time there may be reasonable objections to it. This arises from the fact that in practical

ly, compulsory arbitration; but there may be some interference with "freedom of contract" in the provisions of the present act. The effect of finding such interference can be discussed in connection with the next major objection—"majority rule."

The "majority rule" is set up in the provisions for selecting representatives.[16] The proviso in section 9(a), that individuals shall have the right to present grievances, when read in connection with the provisions that the selected representatives are exclusive representatives of the unit for collective bargaining as well as the provisions that discriminatory contracts of employment may not be made,[17] may be construed to imply that individuals and minority groups retain only the right to present grievances and that no individual or minority group can make a separate agreement of any kind with the employer.[18] If this inference is correct,[19] there is undoubtedly a restraint upon an absolute "freedom of contract." It is well settled, however, that freedom of contract[20] is a

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matters equally reasonable men may properly reach different conclusions, each supported by rational argument. Thus a court of arbitration might reach a fair solution of a dispute, even though both disputants could still present reasonable arguments against it; while under the present "duty to bargain," an employer could not be forced into an agreement so long as a single reasonable objection remained open to him, even assuming the above definition of bargaining.

[16] Sec. 9(a), "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or group of employees shall have the right at any time to present grievances to their employer."

[17] Sec. 8(3), "It shall be an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . . . "

[18] The exception in favor of presentation of grievances alone may be held to imply that the individual retains no other rights; since the exceptions from a power mark its bounds. Gibbons v. Ogden, 9 Wheat. (U.S.) 1 (1824).

[19] The correctness of this inference is not indisputable. The act nowhere states expressly that an employer and an employee cannot make separate agreements, provided the nature of the agreement is not such as to tend to encourage or discourage the employee in the matter of his choice of representatives. This proviso, it is true, limits individual agreements very materially; but neither the act nor common sense seems to require that minor individual adjustments, sometimes made to accommodate either employer or employee in the course of business, be prohibited. The act in terms merely provides that if an employee is to be *represented*, and the terms of his employment fixed for him by third parties, the representatives must be selected by certain rules. This might well be interpreted as aimed primarily at the rubber-stamp company-union representative. Unless it is urged that all arrangements between employer and employee necessarily tend to coerce the employee in his selection of representatives, it would seem that the only area within which arrangements are actually made in practice is not affected by the terms of the act.

[20] The denial of a right to contract in this instance does not seem to differ materially from the denial of a right not to contract which would be involved in the preceding instance.

qualified, not an absolute right; that freedom implies absence of arbitrary restraint, but not immunity from reasonable regulations and prohibitions imposed in the interests of the community.[21] The prevention of discriminatory contracts with individuals and minority groups seems clearly and reasonably necessary to insure to employees a right to bargain collectively; and it is by no means clear that the act is intended to do more than prevent discrimination.[22] Thus, assuming that with respect to parties in commerce the Supreme Court finds a sufficient relation between collective bargaining and the public interest in unhampered commerce,[23] the objection to majority rule is not insurmountable.

In addition to the foregoing, a principal objection advanced in the *Bendix* case was that the act imposes damage as the price of review of the Board's determinations.[24] The damage consists of profits lost by reason of the Board's proceedings: either (1) the expense and inconvenience of supplying witnesses and records at hearings, or the demoralization and loss of employees' good-will attending an election campaign in the plant; or (2) the loss of public good-will and trade from the pendency of proceedings charging unfair labor practices, or from the issuance of a "cease and desist" order by the Board. This damage is made possible by the fact that the act provides for review only after a hearing on a complaint of unfair labor practice resulting in the issuance of or refusal to issue a "cease and desist" order, whereupon the party aggrieved may apply to the circuit court of appeals for review.[25] Only then do the questions of the Board's jurisdiction,[26] its determination of the proper bargaining unit,[27] and its

[21] Chicago, B. & Q.R.R. Co. v McGuire, 219 U.S. 549, 567 (1911).

[22] If the act is intended to ban all individual and minority agreements, whether discriminatory or not, it may be open to objections such as those advanced in the Adair and Coppage cases, note 39 *infra*. It may be that most individual agreements tend to be discriminatory, and that as a practical matter a blanket prohibition of all contracts but those with the majority would have the same effect as a prohibition of discriminatory contracts alone. However, the technical difference is quite definite and should be adhered to.

[23] Since Congress has found that one of the chief causes of labor troubles is the interference by employers with the organization of labor for purposes of collective bargaining, the Court may apply the usual presumption that the legislature has acted advisedly and with full knowledge of the situation. See Ches. & Potomac Tel. Co. v. Manning, 186 U.S. 238 (1902).

[24] 14 F.Supp. 58, 67–68 (Ill. 1936).

[25] Sec. 10, 49 Stat. 455 (1935); 29 U.S.C.A. § 160 (1935).

[26] In Jones & Laughlin Steel Co. v. National Labor Relations Board, 83 F. (2d) 998 (C.C.A. 5th June 15, 1936), the court refused to enforce a "cease and desist" order of the Board on the ground that the Board lacked jurisdiction of a dispute in a manufacturing plant.

[27] In El Paso Electric Co. v. Elliott, 15 F.Supp. 81, 89 (Tex. June 10, 1936) the court incidentally brought into question the propriety of the Board's designation of five smaller departments as an appropriate bargaining unit, although the point was not expressly decided there. While the act does not expressly provide for review of the propriety of a designation of the bargaining unit, this provision is probably to be implied from the general power of the reviewing court to examine the entire record and enforce or modify the Board's order at its discretion,

certification of representatives come before a court. However, to balance the charge that the holding of an election or a hearing will cause an appreciable deprivation of property, there is the fact that the Board, before assuming jurisdiction, must find as a matter of fact that labor trouble and disruption of business is sufficiently probable to warrant interference.[28] If the Board is about to prevent strife by its action, no loss of profits can reasonably be attributed to its action; but if it is about to cause strife which would otherwise not exist, there is certainly a deprivation of property.

In appraising the force of the objection to the "majority rule" provision and to the provisions for judicial review, analogies to existing acts may be helpful. Upon both these points there is a very close analogy between the Labor Relations Act and the Railway Labor Act[29] and the Federal Trade Commission Act[30] respectively. The Railway Labor Act[31] makes provision for collective bargaining and self-organization, by which the majority of any class or craft has the right to determine who shall represent the whole group for the purposes of the act, and provides that the Mediation Board, upon request of either party, is to certify the names of the chosen representatives, resorting if necessary to an election. While there is no express prohibition of individual bargaining, the Railway Labor Act prevents interference, domination or discrimination;[32] and it has been indicated that under proper circumstances the representatives elected by the majority have recourse to mandatory injunction to compel the carrier to bargain collectively with them.[33] It is noteworthy that the right of the Mediation Board to conduct an election has not been successfully challenged, as yet, even upon the ground of loss of profits and deprivation of property without due process. Yet it would be difficult to show that the loss of profits and employees' good-will resulting to a carrier from an election under

§ 10(e), (f). It should be noted, however, that Barnes, J., in the *Bendix* case, at 66, concluded that neither the Board's assumption of jurisdiction nor its designation of an appropriate bargaining unit is subject to review under the act.

[28] Sec. 2(7) defines "affecting commerce" as " . . . . having led or tending to lead to a labor dispute burdening . . . . commerce." § 9(c) and § 10(a) require the Board to find that a "question affecting commerce" has arisen. For the presumption aiding a board in such matters, see note 37 *infra*.

[29] 48 Stat. 1186 (1934); 45 U.S.C.A. §§ 151–158 (1935).

[30] 38 Stat. 717 (1914); 15 U.S.C.A. §§ 41–51 (1927).

[31] Sec. 2, 48 Stat. 1186 (1934); 45 U.S.C.A. § 152 (1935).

[32] We may interpret the act, without straining the construction, to disapprove of discriminatory individual contracts insofar as they would directly tend to nullify the rights of self-organization and collective action. That is, if the carrier could make special contracts with all individuals who would promise not to do or to do certain things, the intended freedom of choice might easily become "a mockery."

[33] In Virginian Ry. Co. v. System Federation No. 40, 84 F.(2d) 641 (C.C.A. 4th June 18, 1936), a mandatory injunction requiring the carrier to treat with the representative elected by the majority was held proper. *Cert.* granted, C.C.H. Labor Law Serv. ¶16000 (1936).

the Railway Labor Act is significantly less than the corresponding loss to an employer under the Labor Relations Act.

With respect to judicial review, the Federal Trade Commission Act[34] provides that the Commission, upon finding as a fact that it will be to the public interest to investigate trade practices of a party found by the Commission to be engaging in interstate trade, may give notice of hearing, subpoena records and witnesses, and if it thinks proper enter a "cease and desist" order.[35] Upon the issuance of such an order, the party aggrieved may obtain review by the circuit court of appeals of the jurisdiction of the Commission and of its findings; but until an order issues, the party has no recourse to the courts.[36] It has been repeatedly held that even though there is no review until after a final order, with its attendant odium, the judicial review provided is adequate, there being a presumption that administrative tribunals will not act unreasonably nor impose expense unnecessarily.[37] It seems questionable, therefore, whether the odium and loss of profits attaching to proceedings under the National Labor Relations Act is so much greater than the expense and inconvenience and odium attending proceedings before the Trade Commission that the presumption of reasonableness normally attending such proceedings should be abandoned[38] and the act held fatally lacking in constitutional protection to parties brought by the Board within its jurisdiction.

In addition to the objections urged in the *Bendix* case, it is possible that a vulnerable portion of the act is the prohibition in section 8(3) of discrimination

[34] 38 Stat. 717 (1914); 15 U.S.C.A. §§ 41–51 (1927).

[35] Secs. 5–6, 38 Stat. 719–21 (1914); 15 U.S.C.A. §§ 45–46 (1927).

[36] Sec. 5, 38 Stat. 719 (1914); 15 U.S.C.A. § 45 (1927). It has been said that while it might be desirable from some viewpoints that the law should provide for a preliminary review of questions of jurisdiction, the courts should not assume that power without such a provision; that to halt an investigation prematurely would be an invasion of the legislative and executive branches of the government. Chamber of Commerce of Minneapolis v. Federal Trade Commission, 280 Fed. 45, 48–49 (C.C.A. 8th 1922). Perhaps the most cogent argument against preliminary review on all points is that the purpose of creating an administrative board to handle these cases is partly to relieve the courts of the burden of passing on all the details in the administration of a complex act.

[37] On the ground that there is a presumption of reasonableness accompanying the acts of an administrative board, the courts have refused to interfere until the party has exhausted all remedies afforded by argument and evidence before the commission up to the time the commission issues a final order. Chamber of Commerce of Minneapolis v. Federal Trade Commission, 280 Fed. 45, 48 (C.C.A. 8th 1922); E. Griffiths Hughes, Inc. v. Fed. Trade Commission, 63 F. (2d) 362 (App. D.C. 1933). This right of review satisfies due process. Arkansas Wholesale Grocers' Ass'n v. Federal Trade Commission, 18 F. (2d) 866 (C.C.A. 8th 1927), *cert.* denied, 275 U.S. 533 (1927).

[38] That is, if the Board's intervention is reasonable, there must already exist a likelihood of disturbance; and the Board cannot then be said to be *causing* strife by its intervention. Consequently if the presumption of reasonableness is followed, no court will have proper ground for granting extraordinary, injunctive relief to an employer; for there will not be the requisite "great and irreparable injury."

in regard to hire or tenure of employment, operating for or against a labor organization. This in effect makes illegal a contract not to join a union while in the employer's service; whereas acts making "yellow dog" contracts illegal have previously been held unconstitutional.[39] These cases, however, were distinguished by the Supreme Court in the *Railway Clerks* case[40] in a manner which implies that this prohibition would be held valid. While the only point expressly decided was that section 2(3) of the Railway Labor Act[41] was valid, the Court held that a carrier had no constitutional right to interfere with the free selection of representatives. The section in question prohibited "interference, coercion, or influence" by either party with the selection of representatives by the other. The Court defined "influence" as the use of authority or power of either party to induce action by the other in derogation of what the statute called "self-organization." Since the act in question did not interfere with the normal right of the employer to select and discharge his employees, no constitutional objection was found available. The legality of collective action could not be disputed (Congress could make appropriate arrangements to facilitate settlement of disputes); consequently the arrangement made to promote collective bargaining was proper. And such collective action, it was said, would be a mockery if representation were made futile by interferences with freedom of choice. It is no far step from this to the holding that the imposition of an obligation not to associate with a union, as a pre-condition to employment, would do as much to interfere with the free representation of employees as would the imposition of that obligation after employment has commenced. And just as the right to discharge was limited, so might the right to fix certain terms of the hiring contract be limited in order to protect the right to organize. Consequently if the present act is construed to prohibit "yellow dog" contracts *only insofar as they tend to influence the selection of representatives*, it may be held constitutional even though incidentally, for practical purposes, this might ban all "yellow dog" contracts. To make a "yellow dog" contract illegal *per se* may be to interfere with an employer's constitutional rights; but it can fairly be said that to make a "yellow dog" contract illegal when used as a means of influencing the free choice of representatives is merely to protect a corresponding constitutional right of the employees. That is what the Supreme Court held with respect to general "interference, coercion, or influence." To hold the same with respect to a specific mode of influence would scarcely be an extension of the rule laid down in the *Railway Clerks* case and would be in accord with the shift in the attitude of the Supreme Court concerning the need to protect the right to organize.

II. While it could not be said that the Supreme Court would be unreasonable in holding the act unconstitutional *in toto*, since it has not yet expressly ap-

[39] Adair v. United States, 208 U.S. 161 (1908); Coppage v. Kansas, 236 U.S.1 (1915).

[40] Texas & N.O.R.R. Co. v. Railway Clerks, 281 U.S. 548, 570–1 (1930).

[41] 48 Stat. 1186 (1934); 45 U.S.C.A. § 152(3) (1935).

proved all the provisions of the Railway Labor Act[42] which are analogous to those of the Labor Relations Act, nevertheless the decisions of lower courts amplifying what they consider the import of the *Railway Clerks* case lend some weight to the notion that the present act is constitutional in form, but applicable only to the instrumentalities of interstate transportation and communication and not to producers.[43] This is the view taken by the circuit court of appeals in most circuits,[44] especially since the Supreme Court's decision in the *Carter* case.[45] But even before the decision in the *Carter* case, the district court in the *Bendix* case held that, the plaintiff's business being primarily production and the shipment of its product being separate from the manufacturing operations, the business was not subject to regulation under the commerce clause. There is good constitutional authority for the proposition that a manufacturing *business* is not subject to regulation under the commerce clause.[46] However,

[42] The decision in the Railway Clerks case passed expressly upon § 2(3) of the Railway Labor Act, which merely prohibits interference by one party with the free designation of representatives by the other.

[43] Ass'n of Rock Island Mech. & Power Plt. Employees v. Lowden, 15 F.Supp. 176 (Kan 1936); Virginian Railway Co. v. System Federation No. 40, 84 F.(2d) 641 (C.C.A. 4th June 18, 1936), *cert.* granted, C.C.H. Labor Law Serv. ¶16,000 (1936). In the Virginian Ry. case, it should be noted that the employees involved were "back shop" employees whose connection with the actual running of the road was quite remote, and who were much more like production than railway employees.

[44] National Labor Relations Board v. Washington, Va. & Md. Coach Co., 4 U.S. L.W. 134 (C.C.A. 4th 1936) (cease and desist order enforced against interstate coach line); National Labor Relations Board v. Associated Press, 85 F. (2d) 56 (C.C.A. 2d July 13, 1936), *cert.* granted Oct. 36, 1936, (cease and desist order enforced against newsgathering agency for discriminatory discharge of "re-write" man); National Labor Relations Board v. Jones & Laughlin Steel Co., 83 F. (2d) 998 (C.C.A. 5th June 15, 1936); Fruehauf Trailer Co. v. National Labor Relations Board, 85 F. (2d) 391 (C.C.A. 6th June 30, 1936.) Injunction to restrain hearing has been held proper on review where the appellate court decided the Act was inapplicable to plaintiff. Pratt v. Stout, 85 F. (2d) 172 (C.C.A. 8th Aug. 5, 1936). Other courts, however, have declined to decide the question of applicability and denied injunctive relief. Bradley Lumber Co. v. National Labor Relations Board, 84 F. (2d) 97 (C.C.A. 5th June 5, 1936), *cert.* denied Oct. 12, 1936; E. I. DuPont de Nemours & Co. v. Boland, 85 F. (2d) 12 (C.C.A. 2d July 13, 1936); Precision Castings Co. v. Boland, 85 F. (2d) 15 (C.C.A. 2d July 13, 1936); Alexander Smith Carpet Co. v. Herrick, 85 F. (2d) 16 (C.C.A. 2d July 13, 1936).

[45] Carter v. Carter Coal Co., 298 U.S. 238 (1936), decided May 18, 1936. The labor provisions of the Bituminous Coal Conservation Act, 49 Stat. 1001 (1934); 15 U.S.C.A. § 808 (1935), *held* unconstitutional as not proper regulation under the commerce clause. The act in §§ 1, 2 declares a policy of regulation under the "general welfare" and the commerce clause, respectively. (§§ 801, 802). With respect to commerce, it is declared that practices prevailing in the coal industry directly affect commerce, and that labor disputes directly obstruct commerce. The Court finds this effect indirect under the rule announced in Schechter v. United States, 295 U.S. 495 (1935).

[46] Manufacturing is not commerce. Hammer v. Dagenhart, 247 U.S. 251, 272 (1918); Oliver Iron Mining Co. v. Lord, 262 U.S. 172, 178 (1923). The business of a manufacturer is not in the "stream of commerce" and does not "affect" commerce. Swift & Co. v. United States, 196 U.S. 375 (1905); Stafford v. Wallace, 258 U.S. 495 (1922); Schechter v. United States, 295 U.S. 495 (1935); Carter v. Carter Coal Co. 298 U.S. 238 (1936).

this act does not seek to regulate any *business* as such; it seeks to regulate and control the causes of labor troubles[47] occurring in what is *incidentally* a manufacturing or mining or other enterprise. What distinguishes this act from previous acts[48] held unconstitutional is that it is limited in terms to apply only to labor disputes which are specifically found in each case to involve actual or probable interference with interstate commerce. This also distinguishes the act from acts regulating wages and hours and handling other labor "problems" whose effect upon commerce has been held to be remote.[49] It is this distinguishing feature of the act which opens the third possibility—a holding that the act may be applied to the labor relations of producers whose product is important in interstate commerce.

III. There is well-established authority permitting federal intervention in labor disputes in manufacturing and mining enterprises in particular cases in which such disputes involve actual or probable interference with interstate commerce. The cases on this point[50] have already had much discussion; yet the very fact that the cases are commonplace has led some commentators to overlook the actual holdings and accept without criticism the interpretations of

[47] This and similar acts have been directed toward one point: promoting collective bargaining between representatives of parties involved in labor disputes, by providing for free selection of representatives without coercion or influence. This does not essentially involve control of a "business"; for, as the Supreme Court noted in Adair v. United States, 208 U.S. 161, 178–9 (1908), membership or non-membership in a labor organization has no bearing upon the fitness of a laborer. Of course, it must be noted that the point was there being used to hold that Congress had no warrant to suppose that any relation to a labor organization could have in itself any bearing upon the commerce with which the employee is connected by his services, so as to make it a proper commerce regulation to declare criminal an attempt to prevent employees from joining labor unions. However, the point should also apply to the present discussion, in that a regulation which guarantees merely the right to belong to an organization cannot be an interference in the business of an employer insofar forth.

[48] Thus in the Bituminous Coal Conservation Act, the labor board thereby created had jurisdiction of disputes over selection of representatives for collective bargaining, without finding as a fact in each case that commerce was being or was about to be affected. 49 Stat. 1001 (1935), 15 U.S.C.A. § 808(e) (1935). But while labor troubles generally may not affect commerce, the courts have already spelled out the types of circumstances under which labor troubles can be held to affect commerce directly and unreasonably; and so long as the board under the National Labor Relations Act finds facts bringing individual cases under these decisions (see note 50 *infra.*), the rule of the Schechter and Carter cases would seem inapposite.

[49] Lochner v. New York, 198 U.S. 45 (1905); Adair v. United States, 208 U.S. 161 (1908); Adkins v. Children's Hospital, 261 U.S. 525 (1923); Morehead v. People *ex rel.* Tipaldo, 56 Sup.Ct. 918 (1936). *Cf.* Wilson v. New, 243 U.S. 332 (1917); Texas & N.O.R.R. Co. v. Railway Clerks, 281 U.S. 548, 570 (1930).

[50] United States v. Workingmen's Amalgamated Council of New Orleans, 54 Fed. 994 (C.C.La. 1893); Loewe v. Lawlor, 208 U.S. 274 (1908); Lawlor v. Loewe, 235 U.S. 522 (1914); Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921); Bedford Cut Stone Co. v. Journeymen Stonecutters' Ass'n, 274 U.S. 37 (1926); United Mine Workers v. Coronado Coal Co., 259 U.S. 344 (1922); Coronado Coal Co. v. United Mine Workers, 268 U.S. 295 (1925). The literally hundreds of other cases depending upon these are partially collected in Frankfurter and Greene, The Labor Injunction (1930), and bibliography there compiled.

other commentators. Consequently, in view of the fact that the strict limitation of the act as noted above would materially reduce its importance, and in view of the fact that the Supreme Court's interpretation of the labor injunction cases in the *Carter* opinion[51] may bear reconsideration, a few comments on these cases might not be out of place. In the *Carter* case, the court distinguishes the labor injunction cases on the ground that in them interstate commerce was the direct object of attack, citing the second *Coronado* case: "The mere reduction in the supply of an article to be shipped in commerce by the illegal or tortious prevention of its manufacture is ordinarily an indirect and remote obstruction to that commerce. But when the intent of those unlawfully preventing the manufacture or production is shown to be to restrain or control the supply entering and moving in interstate commerce, or the price of it in interstate markets, their action is a direct violation of the Anti-Trust Act."[52] The Court next states that in the *Bedford* case[53] interstate commerce was the direct object of attack; and the restraint of such commerce was the necessary consequence of the acts and the *immediate end in view.* This alleged "intent" to restrain commerce is directly contrary to the findings of fact in the *Bedford* case.[54] This was recognized by Mr. Justice Stone in his opinion in that case,[55] in which he stated that clear authority[56] seemed to hold a labor union's peaceably refusing to work on non-union materials, even though commerce was affected, would not allow federal intervention; but that the Supreme Court in the *Duplex* case[57] had rejected these views. In the *Bedford* case, the "intent" to meddle with commerce itself was constructed out of the curtailment of supply resulting from the peaceable attack on a producer. The resulting doctrine of the labor injunction cases, then,[58] is that the mere reduction of the supply of an

[51] See 298 U.S. 238, 304–5 (1936).

[52] Coronado Coal Co. v. United Mine Workers, 268 U.S. 295, 310 (1925).

[53] Bedford Cut Stone Co. v. Journeymen Stonecutters' Ass'n, 274 U.S. 37 (1926).

[54] In Bedford Cut Stone Co. v. Stonecutters, 9 F.(2d) 40, 41 (C.C.A. 7th (1925)), the Circuit Court of Appeals said: "It is contended for appellants that the holding of the Supreme Court in the second Coronado case, 268 U.S. 295, . . . , requires the conclusion here that this asserted conspiracy is in restraint of interstate commerce. In that case the court found there was new evidence appearing on the second trial tending to show that one of the very purposes of the extensive destruction of mines and other property, and of killing and injuring persons, was to prevent the large capacity of the mines destroyed, and other mines there, from entering into competition with the product of the union operated mines in the neighboring states. No evidence of any such purpose or conduct here appears nor of any purpose to restrain commerce." The Supreme Court did not disturb the findings of fact of the lower courts.

[55] 274 U.S. 37, 55 (1926).

[56] The Clayton Act (presumably § 6, 38 Stat. 731 (1914); 15 U.S.C.A. § 17 (1927), purporting to eliminate combinations of labor from the operation of the Anti-Trust Act); Standard Oil Co. v. United States, 221 U.S. 1 (1911); United States v. American Tobacco Co., 221 U.S. 106, 178–80 (1911).

[57] Duplex Printing Co. v. Deering, 254 U.S. 443, 478 (1921).

[58] The Duplex and Bedford cases have been widely followed. See Frankfurter and Greene, The Labor Injunction 173–75 (1930).

article to be shipped in interstate commerce by the illegal or tortious prevention of its manufacture is not a "direct" obstruction to commerce unless the supply is reduced with the actual intent of controlling the supply entering commerce or the price of it in interstate markets; but that such *actual intent* to restrain commerce *is implied by the fact that the actual result of the attack on the producer is* (1) *to reduce the amount of his interstate trade and* (2) *to affect the supply or the price of the product in interstate markets.* This amounts to holding that the fact *plus intent* is required to bring the acts done within the federal power over commerce; but that *the required intent may be inferred from the fact.* Couple this with the rule that the Anti-Trust Act directs itself against the dangerous probability of interference with interstate commerce as well as the completed result,[59] and the conclusion seems inescapable that actual or probable labor disputes in plants whose output appreciably[60] affects the interstate market for such products—whether because the output is large or because the product is unique, so that the given producer is responsible for a significant part of the market supply which exists—that such disputes under the doctrine of the later injunction cases are within the scope of the federal power over commerce.[61] But what force will now be given to the doctrine of the labor cases after the *Carter* case is highly problematical.

We have observed that without doing violence to established legal doctrine the Court may choose any one of three different interpretations of the constitutional status and scope of application of the National Labor Relations Act. It should be noted, however, that even though the act should be held constitutional and widely applicable such a holding would not necessarily give labor organizers the *carte blanche* which has been anticipated by some observers. The passage of the Clayton Act, sections 6 and 20–22, was similarly hailed by labor as a Magna Charta and viewed by others with alarm. In this case again it may well turn out that the policies developed under the interpretations of the act

[59] Swift & Co. v. United States, 196 U.S. 375 (1902); Vicksburg Waterworks Co. v. Vicksburg, 185 U.S. 65, 82 (1902).

[60] It may be objected that it is hard to draw the line, but the injunction cases have already pretty well carried out the process of defining what is an appreciable effect on commerce.

[61] In the Carter case, 298 U.S. 238, 308, the Court says, "If the production by one man of a single ton of coal intended for interstate sale and shipment, and actually sold and shipped, affects interstate commerce indirectly, the effect does not become direct by multiplying the tonnage. . . . . " However, the regulation of labor disputes has not depended directly upon whether or not the material shipped affects commerce; it depends upon whether or not a court, following the doctrine developed in the Duplex and Bedford cases, can take the actual situation and out of it construct an "intent" to restrain commerce. An attack by a union against the interstate shipment of a ton of coal would scarcely be allowed to evidence an "intent" to restrain commerce; but a boycott directed at a producer, the effect of which was to reduce very greatly the large amounts of stone the producer was ordinarily able to ship and market successfully in interstate markets, was in fact enough to satisfy the Court that the "intent" was to hurt interstate commerce itself. Increase the tonnage, and the ease with which a fictitious "intent" is constructed is also increased.

will not be so disturbing to the status quo as a reading of the preamble may lead one to believe. The same ground upon which this act may be held applicable in the broad sense might well support later legislation—given an appropriate change in the policy of the government—tending to control still further the burden of strikes and boycotts on interstate commerce by materially limiting the right to strike. (It is true that the prohibition of "compulsory arbitration" legislation might still prove a partial obstacle to complete supervision of labor relations and control of strikes.) It is not suggested that this act contains a hidden menace to organized labor; it is merely suggested that such an act as this need not inspire undue dread in the general public or in employers, nor undue hope in the leaders of labor.

PROPOSED STATUTORY CHANGES IN MARRIAGE LAW

The difficulties surrounding an attempt to alter statute law are notorious. Once a revision is accepted it may be impossible to procure further revision for years. Consequently a new statute should be drafted with extreme care. In failing to suggest any substantial departures from the existing law the draftsmen of the proposed Illinois Marital Relations Bill[1] have failed to recognize that extreme care requires not merely rejection of changes whose value has not been demonstrated but also insistence upon changes where the existing law has proved itself inadequate.

The purpose of this note is to demonstrate that a more extensive study of the problems in the law of Marital Relations should be made before the Bill is considered by the Legislature. It will be sufficient to examine only the more striking inadequacies in the sections on Marriage.[2] This is, of course, not intended to imply that the other sections are error-free. The whole Bill must be explored for desirable changes in policy and form alike. But no criticism of public policy is here attempted; suggestions are made only where results generally considered desirable are missed or the language is so ambiguous that the law remains uncertain.

Like all American marriage statutes,[3] the Bill sets up an intermediate age class in which parental consent is required for a marriage.[4] Although the lan-

[1] Illinois House of Representatives Bill No. 919. In the Marriage and Divorce articles there are no material changes from Smith-Hurd Ill. Rev. Stats. 1935, cc. 89 and 40, respectively.

[2] Other parts are: Divorce; Uniform Marriage Evasion Law; Rights of Husband and Wife; Relinquishment of Dower and Homestead of Insane Spouse; Power over Property upon Absence or Imprisonment of Spouse; Relief to Destitute Wife or Children; Separate Maintenance.

[3] 1 Vernier, American Family Laws 188 (1931).

[4] "Sec. 3. Age. Male persons of the age of 21 years and older and female persons of the age of 18 years and older may be joined in marriage. A male person who is a minor not less than 18 years old or a female person who is a minor not less than 16 years old may contract a legal marriage if the parent or guardian of the minor appears before the county clerk in the county where the minor resides, consents to the marriage, makes an affidavit stating that he is the