Unions and the Southern Courts: Part II--Violence and Injunctions in Southern Labor Disputes

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UNIONS AND THE SOUTHERN COURTS:
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SYLVESTER PETRO†

In this Article, the second installment of a series that began earlier in this volume, Professor Petro continues his examination of the southern labor cases in an attempt to evaluate the common charge that unions have suffered in the South because of institutional anti-unionism, including judicial bias. The focus of this installment is on procedures and remedies, with emphasis on the southern response to union violence. After examining the various forms of oppressive union activity, Professor Petro explores the development of the equity principle and the use of the labor injunction in the southern courts. Professor Petro finally concludes that there is no evidence that the southern courts displayed an anti-union animus; in fact, he claims, the southern courts often displayed pro-union tendencies in many areas.

We continue here the effort begun in the first installment of this Article to evaluate the belief that unions have not done as well in the South as they should have done and that the reason for this supposedly poor performance has lain in institutional anti-unionism, particularly in the southern courts. In the first part we compared the principles applied by southern judges to compulsory unionism agreements,2 picketing,3 and other varieties of “secondary boycotts”4 with those prevailing in the northern courts. We concluded that in these substantive areas there was no evidence in the cases that southern judges were more anti-union than their northern colleagues. On the contrary, the cases revealed the southern judges sharing the views of the most “liberal” (pro-union) northern courts. Whenever there was a “liberal”-“conservative” split, the southern courts were far more likely to reflect the views of the “liberal” New York Court of Appeals than those of the “conservative” Massachusetts Supreme Judicial Court.5

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2. Id. at 107-12.
3. Id. at 112-21.
4. Id. at 121-42.
5. For an examination of the paradoxes and contradictions of this “liberal”-“conservative” terminology, see id. at 107, 109-10, 127, 142. However, the habit of identifying “liberalism” with the syndicalist pro-unionism of the New York Court of Appeals in the period 1900-1950 and “conservatism” with the passion for personal freedom and against monopoly evident in almost all members of the Massachusetts Supreme Judicial Courts, except Justice Holmes, in the first third
In contrast to the concentration on substantive law in the first installment, this one focuses mainly on procedures and remedies; but it is nonetheless of at least equal significance. Violence is unlawful everywhere in this country, in the South as well as in the North. However, judicial opinion differs widely on what constitutes violence, and it differs still more widely, within given jurisdictions as well as between different jurisdictions, as to when or whether equitable relief is proper. It may reasonably be argued that no labor-law issues are more important than those concerning the availability of injunctive relief in violent labor disputes. Pro-union or anti-union bias is more likely to show up, I believe, in judicial tendencies to grant or withhold prompt injunctive relief in labor disputes than anywhere else. In a sense, then, Section II of this installment is the climactic feature of the series. However, I do not present it, or the series, as complete and definitive studies in themselves. They are part of a larger project, one designed to examine exhaustively the legal history and background of current national labor policy.

Since it is not easy to summarize the conclusions to which my reading of the southern labor cases has led me, I leave them to the end of this Article. However, a decision on the charge that southern judges have been motivated by anti-union animus is easy: the evidence does not sustain the charge.

I. VIOLENCE IN THE SOUTHERN LABOR CASES

A relatively undeveloped region prior to 1930, the South had few large-scale employment units and, therefore, few large-scale labor disputes (before 1930) of the kind in which violence is likely to develop. As a result, in order to collect a sufficient number of cases with which to evaluate the approaches of the southern courts to union violence, it has been necessary to expand research into the more recent cases. We have come up to date in North Carolina and Texas in order to see how one of the least organized and one of the more heavily organized of the southern states have dealt with labor violence.

Picketing by unions has caused all American courts considerable trouble, mainly because of its ambiguous character: it does double duty, both as a mixed form of intimidation and as a communication, alerting friendly mem-

of this century, is now so ingrained among most teachers of labor law that communication would be impaired rather than promoted by using more precise and less contradictory terminology. For one of the sources of the current confusion, see C. GREGORY, LABOR AND THE LAW 52-82 (1st ed. 1946).

6. See section II. C. infra.
8. South Carolina appears to be the least organized of the states, with 8.9% of its nonagricultural labor force belonging to trade unions or other employee associations. But there have been so few labor cases in South Carolina that we have chosen North Carolina for illustrative purposes. North Carolina has 10.7% of its nonagricultural labor force organized. See U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, BULL. NO. 2079, DIRECTORY OF NATIONAL UNIONS AND EMPLOYEE ASSOCIATIONS, 1979, at 72, Table 19 (1980).
9. The most heavily organized of the southern states, Alabama, with 24.6% of its nonagricultural labor force organized, had relatively little labor litigation, at least compared with Texas, with 13.3% of its nonagricultural labor force organized. See id.
bers of other unions to their "duty" to boycott offending employers. We start our review of the southern labor violence cases with those involving picketing, and go on from there to the libel, slander, name-calling, intimidation, and finally the outright violence cases. Evaluation of the common belief that the southern courts have been harder on unions than the northern courts has been postponed until after the cases have been presented.

A. Picketing in the Southern Courts

In the first part of this Article, we considered picketing in its "signal" aspect—as a form of boycott inducement—and found that on the whole the southern courts considered it privileged if it was peaceable. Here we review the ways in which southern judges evaluated and dealt with picketing from the point of view of the social interest in preserving the peace and in protecting persons from intimidation.

Alabama. No purely common-law decision on the legal status of picketing has been found in Alabama. In the earliest case found, the Alabama Supreme Court ordered the courts below to enjoin all picketing, but the decision rested upon the Alabama anti-picketing statute later held unconstitutional in the Thornhill case. After the Thornhill decision, the Alabama courts consistently held peaceful picketing to be constitutionally privileged speech, even if the pickets were strangers, that is, not employees of the picketed establishment. However, mass picketing by 300 persons, especially when obstructive, was held enjoinable, and an injunction against all picketing was held proper as late as 1964 when the picketing was in itself violent and enmeshed in other violent conduct.
Arkansas. In the leading Arkansas case on picketing, decided in 1918, the court observed that at first American judges had readily accepted picketing as a privileged method of appealing for public support during strikes. Later, however,

it became more and more apparent that picketing was practiced and resorted to, not alone for purposes of publicity and persuasion, but for coercion and intimidation as well; so that, while the tendency of the earlier cases was to uphold picketing as an exercise of the right of free speech, the tendency of later cases is to restrict that right as an act of coercion in its tendencies, and one which in its practical application tends generally to breaches of the peace and other disorders.

The court affirmed an injunction against all picketing in front of the plaintiff's restaurant where, despite the union's instructions against intimidatory conduct, the pickets had threatened and otherwise annoyed customers. The public, said the court, is entitled to "bestow its favor and support upon one side or the other free from any coercive molestation."

Eight years later in 1926, in a case involving extreme violence, the injunction failed to mention picketing specifically, though it did prohibit interference with the employer's operation. Since then, the Arkansas Supreme Court has approved injunctions against all picketing only when it was enmeshed in serious violence.

Florida. Prior to the Thornhill identification of picketing as a constitutionally privileged form of speech, the Florida Supreme Court vacated an injunction against all picketing when it found insufficient evidence of violence. After Thornhill, it affirmed injunctions against picketing in a pair of cases in which it appeared that the picketing was enmeshed in serious violence.
Georgia. In 1908, in its earliest picketing decision, the Georgia Supreme Court held long before *Thornhill* that picketing, as such, was a privileged form of conduct, but that all picketing might be enjoined when the pickets were guilty of coercive and intimidatory conduct.28 Ten years later, however, the court ruled that only intimidatory acts could be enjoined, not picketing as such.29 This position was reaffirmed three years later.30 Since then injunctions have been sustained in Georgia only against violent picketing or obstructive mass picketing.31

Louisiana. Picketing decisions were few in Louisiana, but they were extraordinarily interesting. In *Gilly v. Hirsh*32 rival jewelers were involved; there was no labor dispute. The plaintiff, a jewelry auctioneer, sued a neighboring retail jeweler for allegedly interfering with customers and for posting a sign denigrating the plaintiff. The defendant counterclaimed, alleging that plaintiff blocked his entrance and asking the court to enjoin the auction itself on the ground that it was illegal. The court approved an injunction against blocking defendant’s entrance and interfering with his customers, but refused to enjoin the auction.33

In another interesting Louisiana case, the New Orleans port commissioners refused to permit striking longshoremen to picket the area of the port where loading operations were carried on. On suit by the union, the trial court enjoined the commissioners, but the Louisiana Supreme Court reversed, holding that the commissioners had not abused their authority to maintain orderly and peaceable conditions at the dock.34

These two decisions antedated federal labor legislation, but the *Godchaux Sugars* case35 arose in 1955, while the United States Supreme Court was creating the preemption doctrine. There the Louisiana Supreme Court upheld an injunction against picketing in an interunion dispute, saying that the picketing was enjourable, even if peaceable, because it was inducing a strike in violation of a no-strike agreement at a crucial time, during the brief harvesting period of the Louisiana sugar cane crop.36 The United States Supreme Court vacated

79 (Fla. Cir. Ct. 1951). In Moore v. City Dry Cleaners & Laundry, Inc., 41 So. 2d 865 (1949), the court cut back on an overbroad order but accepted an injunction against all picketing when it was ensnared in violence.

32. 122 La. 966, 48 So. 422 (1909).
33. Id. at 972, 48 So. at 424.
34. Keegan v. Board of Comm’rs, 154 La. 639, 98 So. 50 (1923).
36. Id. at 170-71, 78 So. 2d at 681.
the injunction and remanded the case because it had become moot.\textsuperscript{37}

Perhaps the most interesting of the Louisiana cases was one in which a union sought and secured in the trial court an injunction against nonstrikers who persisted in crossing its picket line. According to the union, the defendants were guilty of provoking violence in crossing the picket line. A Louisiana appellate court disagreed, considering it "novel" that "those likely to cause violence in order to prevent the exercise of legal rights by others are protected by an injunction which itself prevents the others from exercising those legal rights in a proper manner."\textsuperscript{38}

\textit{Mississippi}. In the only picketing case found in the state, the Mississippi Supreme Court held that while violent mass picketing was wrongful and enjoindable, the right of free speech as interpreted by the United States Supreme Court precluded an injunction against all picketing unless it was inextricably enmeshed in extreme violence.\textsuperscript{39}

\textit{North Carolina}. While North Carolina has had its share of outrageously violent strikes and picket lines,\textsuperscript{40} in no reported decision has there been an injunction against all picketing; the North Carolina Supreme Court has never permitted an injunction that has gone further than limiting the number of pickets. In one case the injunction limited the picketing to "a reasonable number" of persons at a time.\textsuperscript{41} In two cases the picketing was "limited" to twenty-five persons,\textsuperscript{42} in another to ten,\textsuperscript{43} in still another, to four.\textsuperscript{44}

\textit{Tennessee}. Peaceable picketing, as such, seems always to have possessed a privileged status in Tennessee, as it has in most of the other confederate states. Indeed, even when enmeshed in serious violence, picketing as such has not been enjoined in Tennessee. In the cases on picketing that have been found, all decided after 1930, the farthest the Tennessee court has gone has been to hold picketing properly limited in numbers when it has been enmeshed in violence.\textsuperscript{45}

\begin{itemize}
  \item \textsuperscript{37} Chaisson v. Southcoast Corp., 350 U.S. 899 (1955).
  \item \textsuperscript{38} Independent Oil & Chem. Workers' Union v. Shell Oil Co., 150 So. 2d 102, 106 (La. App. 1963).
  \item \textsuperscript{40} \textit{See} notes 92-100 and accompanying text \textit{infra}.
  \item \textsuperscript{41} Citizens Co. v. Asheville Typographical Union, 187 N.C. 42, 121 S.E. 31 (1924). For a detailed review of some early North Carolina equity decisions in labor disputes, see D. McCracken, \textit{Strike Injunctions in the New South} (1931). The title is, of course, misleading: there were no injunctions against strikes in either the "new" or the "old" South.
  \item \textsuperscript{42} Erwin Mills, Inc. v. Textile Workers Union, 234 N.C. 321, 36 S.E.2d 372 (1951); Hart Cotton Mills, Inc. v. Abrams, 231 N.C. 431, 57 S.E.2d 803 (1950).
  \item \textsuperscript{43} Royal Cotton Mill Co. v. Textile Workers Union, 234 N.C. 545, 67 S.E.2d 755 (1951).
  \item \textsuperscript{44} Carolina Wood Turning Co. v. Wiggins, 247 N.C. 115, 100 S.E.2d 218 (1957) (but all picketing was prohibited within 10 feet of entrance to the plant). Number and place limitations were put on picketing also in Safie Mfg. Co. v. Arnold, 228 N.C. 375, 45 S.E.2d 577 (1947).
  \item \textsuperscript{45} Gunn v. Southern Bell Tel. & Tel. Co., 201 Tenn. 38, 296 S.W.2d 843 (1956) (only mass
Texas. A strict early attitude toward picketing has given way over the years in Texas to an approach much the same as that prevailing in the other states of the South and of the North. In the first picketing case\(^46\) to reach a Texas appellate court, peaceful stranger picketing for recognition and the closed shop was held unlawful and enjoimbale as "provocative of violence and bloodshed,"\(^47\) as well as for inflicting unjustified harm. Three years later, in 1921, a Texas appellate court repeated its condemnation of all picketing, even picketing accompanying a lawful economic strike; however, the court did not enjoin picketing as such, but rather prohibited "going into and near [plaintiff's] . . . place of business for the purpose of interfering with the business and intimidating its employés or assaulting or threatening them."\(^48\)

Since these early cases, the normal practice has been to limit the number of pickets, not to enjoin picketing entirely, even when there has been outrageous violence.\(^49\) However, in one case the Texas Supreme Court held that an intermediate appellate court erred in modifying a trial court's temporary injunction against all picketing when it had been enmeshed in violence.\(^50\) In another appellate court decision, picketing with "unfair" signs was held enjoimbale when the signs were found libelous.\(^51\) More recently, the Texas courts have been limiting picketing to two persons under a statute defining "mass picketing" as picketing by more than two persons at a time.\(^52\)

**Conclusions.** The foregoing review of the southern picketing cases produces the same conclusions as did our earlier review of the southern boycott cases:\(^53\) there is no ground for the belief that the southern courts were harder

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\(^46\) Webb v. Cooks Local 748, 205 S.W. 465, 467 (Tex. Civ. App. 1918) (noting that this was the first picketing case to reach an appellate court in Texas, id. at 466).

\(^47\) Id. at 467.


\(^51\) Carter v. Bradshaw, 138 S.W.2d 187 (Tex. Civ. App. 1940). Compare ILGWU Local 123 v. Dorothy Frocks Co., 95 S.W.2d 1346 (Tex. Civ. App. 1936), in which the court affirmed a denial of an injunction against all picketing while also affirming an injunction against the placards and banners being carried by the pickets. See clause (b) of the order, 95 S.W.2d at 1347.


\(^53\) See text accompanying note 11 supra.
on unions and picketing than were the northern courts. Indeed, the southern courts on the whole were more permissive with picketing than were the conservative northern courts typified by Massachusetts. Although Alabama had a statute outlawing all picketing, once the United States Supreme Court held that statute unconstitutional, the Alabama courts went along with the other southern courts to hold that picketing was enjoinable only when enmeshed in extreme violence. This position was precisely the same as that taken by the Illinois Supreme Court and affirmed by the United States Supreme Court in the Meadowmoor case. Moreover, it was the same as the position articulated by the New York Court of Appeals during its "liberal" heyday in Nann v. Raimist. Southern judges in the picketing cases seemed aligned with or influenced more by the "liberal" rather than the "conservative" northern courts.

B. "Unfair" Signs and Name-Calling in the Southern Courts

Except in Texas, there were few southern cases involving the legality of "unfair" signs and name-calling in labor disputes. What cases do exist are as follows:

Alabama. In a decision in 1904, the Alabama Supreme Court made it clear that "unfair" listings by unions would rarely be found actionable. A building contractor sued for libel when a union publication put him on its "unfair" list and said he would remain there until he "set himself square" with organized labor. According to plaintiff, the "unfair" listing implied that he was dishonest, faithless, and unreliable. The Alabama Supreme Court reversed a judgment in plaintiff's favor, holding that "unfair" listings did not ordinarily carry with them the imputations alleged by plaintiff.

Georgia. The Georgia Supreme Court held contemporaneously with the neighboring Alabama Supreme Court that "unfair" listings were not libelous. The defendant union had published in a local newspaper a statement that the plaintiff, a partnership, was "unfair" in being the only merchant not closing its doors by six p.m. in the hot summer months. According to the Georgia court, the use of the word "unfair," when read in the context of the whole article, imputed no moral turpitude to plaintiff and in no sense challenged its credit.
solvency, or business reliability.\textsuperscript{60}

\textit{North Carolina}. There was no relevant case in North Carolina until 1967, when \textit{R.H. Bouligny, Inc. v. United Steelworkers} was decided.\textsuperscript{61} During an organizing drive, a union published material stating that the plaintiff employer was so evil that there was no level to which it would not sink to keep its employees from other employment. After the union was unsuccessful in having the case removed to the federal courts,\textsuperscript{62} the North Carolina Supreme Court held that the complaint stated a good cause of action in alleging that the union spoke with knowledge of the falsity of its statements or reckless disregard of whether those statements were true or false.\textsuperscript{63}

\textit{Texas}. In the first case in which it ruled upon the legality of the use of "opprobrious epithets" in the course of a labor dispute, the Texas Supreme Court took a strong stand in favor of what it considered freedom of speech. In a habeas corpus proceeding it held that an injunction against such epithets was unconstitutional and void:

Let it once be admitted that courts may arrogate the authority of deciding what the individual may say and may not say, what he may write and may not write, and by an injunction writ require him to adapt the expression of his sentiments to only what some judge may deem fitting and proper, and there may be readily brought about the very condition against which the constitutional guaranty was intended as a permanent protection. Liberty of speech will end where such control of it begins.

\ldots

\ldots There is no power in courts to make one person speak only well of another.\textsuperscript{64}

The court's rhetoric should not be allowed to obscure the fact that the injunction made no attempt to tell the defendant what to say. It merely prohibited unionists from calling female telephone operators dirty names. In contrast, fifty-two years later, a Texas appellate court held that it had constitutional power to restrain unionists from parading with maliciously false signs and from the use of insulting and obscene language.\textsuperscript{65} And six years after that, another Texas appellate court held in a case involving rival unions that it had the authority to determine the legality of the allegedly libelous

\textsuperscript{60} J.B. Watters & Son v. Retail Clerks Local 479, 120 Ga. 424, 47 S.E. 911 (1904). The court cited mainly northern authorities for its decision.

\textsuperscript{61} 270 N.C. 160, 154 S.E.2d 344 (1967).

\textsuperscript{62} Judge Craven, then a trial court judge, accepted the removal, but the Fourth Circuit reversed, 336 F.2d 160 (1964), and the U.S. Supreme Court affirmed the Fourth Circuit's remand to the state courts, 382 U.S. 145 (1965).

\textsuperscript{63} 270 N.C. at 177, 154 S.E.2d at 358.

\textsuperscript{64} \textit{Ex parte} Tucker, 110 Tex. 335, 220 S.W. 75, 76 (1920).

name-calling of one of the unions involved.66

In Cafeteria Employees Local 302 v. Angelos,67 a 1943 decision, the United States Supreme Court held that "unfair" signs are not to be construed as falsifying facts and that they are constitutionally protected speech.68 Three years earlier, the Texas Court of Civil Appeals had held in Carter v. Brads-haw69 that "unfair" signs could constitutionally be enjoined when addressed to an automobile dealer only because he had had some building done by a contractor who employed nonunion labor against the desires of the picketing union.70 It is fairly clear that the preemption doctrine of the United States Supreme Court does not oust state-court jurisdiction in such cases.71 However, it is not quite so clear that the point of view expressed in the Cafeteria Employees case has been abandoned,72 so that the earlier Texas case may no longer be law.

Virginia. No relevant decision has been found in Virginia prior to 1951, when McWhorter v. Commonwealth was decided.73 There, during a minority strike by six women members of the International Ladies’ Garment Workers Union in a plant employing a hundred persons, the six sang such verses as "when the roll is called up yonder will you whores be there?" One of the female nonstrikers was so shocked by the pickets that she fainted. Applying a statute prohibiting interference with the right to work by the use of insulting language, the Virginia Supreme Court upheld the conviction of the pickets. The court considered Cafeteria Employees but concluded that it was distinguishable.74

Conclusion. We have now reviewed all the decisions of the courts in the states of the old confederacy on the legality of "unfair" listings, "opprobrious epithets," and other allegedly libelous and slanderous materials. It would be difficult for anyone to conclude, on the basis of the actual cases, that the southern courts were especially hard on the use or misuse of language by trade unions. In a rational and decent civil order, there would be no special privilege for language that caused pain or economic harm. It would be as actionable as other conduct. On the whole, the southern courts, like the courts in

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67. 320 U.S. 293 (1943).
68. Id. at 295.
70. Id. at 190.
72. In Youngdahl v. Rainfair, Inc., 355 U.S. 131, 139 (1957), the U.S. Supreme Court held that the states retained jurisdiction over violence in labor disputes but that a state-court injunction against all picketing would not be permitted under the picketing-free speech doctrine unless it met the Meadowmoor test of enmeshment in outrageous violence. See Milk Wagon Drivers Local 753 v. Meadowmoor Dairies, Inc., 312 U.S. 287 (1941). On the same reasoning it might be thought that while the states retain jurisdiction over common-law libel complaints, they must meet the free speech standards set in Angelos.
74. Id. at 861-66, 63 S.E.2d at 22-24.
most of the rest of the country, rejected this value judgment, holding that words are somehow entitled to a greater area of privilege than other acts. The Virginia court in *McWhorter* drew the line at calling women "whores" merely because they refused to join in a strike called by a small minority of union activists. But this seems to have been more a decision in favor of a minimum of civility than one against unions. It scarcely supports the contention that the courts of the old South were unusually hard on unions.

### C. Outright Violence in the Southern Courts

We review here all the southern cases involving outright violence in labor disputes—arson, assault, bombing, physical obstruction, vandalism, and so on. Despite the frequent references one sees in the literature to employer violence or provocation, both are largely absent from the cases. The aggressors in most of the cases are unionists, and the victims are nonunion workers or unionists who prefer to work when their leaders tell them to strike.

There are few southern cases of labor violence before 1930. I believe this is because there was little large-scale business in the South before 1930, not because unions in the South, or southerners, were less violent than their northern counterparts. In any event, a significant proportion of the cases covered here are post-1930. Even with these, there still was not a great number of cases, although these few were violent enough, especially in North Carolina and Texas. On whether or not the southern courts dealt more harshly with unions in violence cases than did the northern courts, we shall have something to say after reviewing the cases state by state.

*Alabama.* The defendant in *Welch v. State* was a textile union organizer who set up an armed picket line in an effort to keep employees from entering a mill he sought to "organize." When the chief deputy sheriff and other deputies tried to arrest defendant, gun shots were exchanged, and the chief deputy was killed. Convicted of manslaughter, defendant appealed. The conviction was affirmed, however, on the ground that although the deputies were without warrants, the arrest attempt was lawful. Even had the arrest not been lawful, said the court, the killing of the deputy would still not have been justified. The use of deadly force was not appropriate when defendant was threatened only with arrest.

Cases such as *Welch* illustrate the virtues of the labor injunction and one of the main reasons for its wide use in the period before the anti-injunction acts were passed. Had there been no picketing at all, or had the picketing been limited to one or two persons by a well-policed decree, the killing probably would not have occurred, and the union organizer would not have had to be incarcerated.

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75. See the conclusion to Part I of this Article, 59 N.C.L. Rev. 99, 142-46 (1980).
77. *Id.* at —, 183 So. 2d at 885.
UNIONS AND THE SOUTHERN COURTS

The other Alabama cases of outright union violence contain no unusual facts. One involved violent and obstructive mass picketing by 300 persons and the affirmance of a temporary injunction against it.  

Another involved the all too common contumaciousness of the Teamsters Union in the face of an injunction against outrageously violent picketing.  

The last Alabama case worth noting achieved a certain degree of fame. *UAW v. Russell* was one of the cases in which the United States Supreme Court agreed to permit the state courts to continue to exercise jurisdiction over union violence, notwithstanding that such violence also violates the National Labor Relations Act.

Arkansas. Besides the five cases of picketing violence cited previously, there were two other Arkansas cases worth noting. In one, a federal district court enjoined Arkansas authorities from seeking orders in the Arkansas courts prohibiting the employer in a labor dispute from transporting striker replacements into Arkansas.  

Apparently, instead of attempting to prevent or punish strike violence, the Arkansas authorities thought it better to deny the strike-bound firm the right to try to keep its business operating.

In the other Arkansas case, two members of a painters' union were convicted under a statute making it a crime "by the use of force or violence, or threat [thereof] to prevent or attempt to prevent any person from engaging in a lawful vocation." The two were sentenced to one year in prison for brutally beating a painting contractor who operated nonunion with four negro painters and used a spray gun contrary to union rules.

Florida. Union violence figured directly in three Florida decisions. Two we have already cited in the section on picketing, the third was Florida's first labor case. There, while holding that a union was privileged to strike against the employment of nonunion labor, the court affirmed an injunction against threats and assaults.

A fourth Florida decision indicates how inadequate appellate court reports may be as a basis for judging the extent to which violence prevails in labor disputes. The issue in this case was whether or not a work stoppage by bus drivers amounted to a strike within the meaning of a Florida statute, but the report indicates that the stoppage traced to the imprisoning of a bus driver for assault and battery and that in the course of their refusal to work the bus

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81. See notes 19-24 and accompanying text, supra.
84. Id. at 106, 179 S.W.2d at 186.
85. See note 27 and accompanying text supra.
86. Jetton-Dekle Lumber Co. v. Mather, 53 Fla. 969, 43 So. 590 (1907).
drivers blockaded a Miami street.  

**Georgia.** Seven Georgia cases involving union violence and obstruction are cited in the section on picketing. The only additional case worth noting did not involve a union or a normal labor dispute, but it is extremely interesting and attests the bona fides of the Georgia courts in their attempts to control violence. An 1887 decision, *Spencer v. State*, 92 was a criminal prosecution against former slaves for shooting an overseer. It appears that the overseer had threatened the defendants, shot at them, and frightened their families. One of the defendants shot back and urged the other to do the same, but he refused. On appeal from a conspiracy conviction, the Georgia Supreme Court held that there was no unlawful conspiracy. The only combined action was the urging to shoot, and that was privileged self defense. The court said:  

The superintendent of a plantation has no more right to terrify the laborers under him, and their families, than they have to terrify him and his family. And this is so, regardless of the color of the respective parties. All races, and all classes, are alike bound to keep the peace, and observe the laws.  

**Louisiana.** No cases were found other than those cited in the picketing section. 

**North Carolina.** Only a small proportion of the North Carolina labor force belongs to unions, but there has been a relatively large number of reported cases on union violence in the state. In the section on picketing, six North Carolina cases of picketing enmeshed in serious violence are cited. Twelve others are significant enough for citation. Of these, some were outrageous indeed, involving union confrontations with police and troops, bombings, arson, and mass assaults. One of the most interesting and 

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87. State ex rel. Frazier v. Coleman, 156 Fla. 413, 23 So. 2d 477 (1945).
88. See notes 28-31 and accompanying text supra.
89. 77 Ga. 155, 3 S.E. 661 (1887).
90. Id. at 156, 3 S.E. at 661-62.
91. See notes 32-38 and accompanying text supra.
92. See notes 41-44 and accompanying text supra.
Instructive of the North Carolina cases is *State v. Hoffman*, which features a confrontation between a state-trooper captain and a union bully. Perhaps the most noxious incident is found in an unreported case in which violent unionists were alleged to have organized small boys into slingshot gangs and encouraged them to attack nonstriking employees in a strike-torn village.

**South Carolina.** No South Carolina case directly involving union violence has been found. However, in a 1922 case a lawyer unsuccessfully sued a union for a fee under an alleged contract to assist the union in prosecuting the alleged murderer of a union member. And in 1957, a union unsuccessfully sought an *ex parte* restraining order in federal court against an employer for allegedly interfering with the union’s organizers by intimidation, violence, threats, and the use of insulting language. The restraining order was denied for failure of diversity of citizenship.

**Tennessee.** Extreme violence appeared in five Tennessee cases, some of them relatively recent, but the Tennessee courts seem to have been generally tolerant of union defendants. For example, in a 1930 decision a Tennessee appellate court reversed a contempt conviction on the dubious ground that a settlement agreement between the employer and the union had discharged the injunction and made it inoperative as of the time the unionists persisted in the wholesale violence that had been enjoined. In a later case, seventy-five to one hundred unionists defied an injunction against mass picketing by marching on a struck telephone building and shooting off firecrackers. A dynamite explosion occurred on the roof of the telephone company’s power plant during these activities, but the Tennessee court limited its contempt holding to the violation of the order against mass picketing.

In *Strunk v. Lewis Coal Co.*, a Tennessee appeals court again vacated a criminal contempt conviction, despite admittedly overwhelming evidence of contumacious violence, because the trial court had failed to make clear that the jury should apply the “reasonable doubt” standard to the unionists. Fi-
nally, as noted in the section above on picketing, the Tennessee courts consistently refused to enjoin all picketing, even when enmeshed in extreme violence, despite the United States Supreme Court's position that an injunction against all picketing is proper in such cases.

Texas. Charges of employer violence are fairly common in the literature of labor relations, but documentation is sparse and union prosecutions against employers have been even rarer—except in Texas. Two Texas cases contain charges of employer violence. One charged an employer with responsibility for the murder of a unionist by a Texas ranger paid by the employer to guard its property. The Texas Supreme Court reversed a judgment against the employer on the ground, among others, that while the employer was paying for the ranger's services (besides paying regular taxes), officials of the Texas rangers retained complete control over his conduct.

In the second case charging employer violence, a unionist sued the manager of a theatre who threw eggs at pickets and struck one of them. Judgment against the employer was reversed on the grounds that the trial court had erroneously excluded evidence of provocation and that plaintiffs had not established that the theatre manager was acting within the scope of his authority.

The numerous Texas cases involving union violence, sometimes of a particularly outrageous character, occasionally produced some instructive judicial comments. For example, in a case in which Judge Bobbit dissented from an affirmance of contempt convictions on the ground, among others, that there are always two sides to what he called "labor-management" disputes, Judge Smith, concurring, took pains to point out that the case really involved the rights of nonstrikers "to continue at work... without being stalked, waylaid, beaten, their faces and bodies slashed with broken glass, their clothes publicly stripped from their bodies."

The unique significance of violence in labor disputes was brought out by

107. See note 45 and accompanying text supra.
Judge Krueger in another Texas decision. This case involved a challenge to the constitutionality of a Texas statute making it a felony to prevent or to attempt to prevent, by "force or violence," any person from engaging in any lawful employment. Among other arguments, the defendant unionist contended that the statute denied equal protection of the laws because ordinary assaults, not involving employment, are misdemeanors, not felonies. Judge Krueger rejected the contention on the ground that the type of assault prohibited by the statute is "not only directed against the person but against his vocation... [and] in a measure affects the entire economic fabric of the country." Rarely has a court so succinctly defined the particular gravity of labor violence, and the deficiencies of the commonly held position that courts need to be especially indulgent toward violence in labor disputes.

Virginia. No union violence case was found in Virginia prior to United Construction Workers v. Laburnum Construction Corp., a 1954 case notable because it produced one of the most significant exceptions to the preemption doctrine, which excludes state court jurisdiction over most types of conduct subject to federal labor relations legislation. In Laburnum the plaintiff employer was awarded damages against the United Mine Workers for the harm done by U.M.W. violence. Justice Douglas dissented from the United States Supreme Court's decision to allow the Virginia courts to retain jurisdiction over such conduct, saying that the union's "conduct is the stuff out of which labor-management strife has been made, ever since trade unionism began its growth." Apparently Justice Douglas believed that for unions prescriptive rights accrue to the use of violence.

In another still more recent case, the United Mine Workers again attempted to secure a special privilege to engage in outrageous violence by seeking removal to a federal court. Citing the Laburnum case among others, the federal district court remanded the case to the state court in which the suit had been brought.

114. Ex parte Frye, 143 Tex. Crim. 9, 156 S.W.2d 531 (1941).
115. Id. at 15, 156 S.W.2d at 534.
116. Justice Frankfurter typified this supercilious but obtuse judicial attitude when he cautioned state judges against enjoining all picketing merely because unionists had grown temporarily violent in "a moment of animal exuberance." Milk Wagon Drivers Local 753 v. Meadowmoor Dairies, Inc., 312 U.S. 287, 293 (1941). Like Justice Douglas in the Laburnum case see notes 117-19 and accompanying text infra, Justice Frankfurter had an inadequate grasp of the extent to which violence in labor disputes was damaging society, morally and economically. These justices may have had a great deal more to learn from jurists such as Judge Krueger than they apparently knew.
118. Under this exception state courts retain jurisdiction over common-law tort actions for damages where the genesis of the tort action is conduct that also constitutes an unfair labor practice under the Labor Management Relations Act. Id. at 657.
119. Id. at 670 (Douglas, J., dissenting). See the comment on Justice Douglas' attitude in note 116 supra.
Conclusions. It is hard to see how any person disinterestedly examining all the cases gathered here could justly conclude that the southern courts were biased against unions. Perhaps the most revealing judicial comments were those of Judges Smith and Bobbit in the Garment Workers case, 121 of Judge Krueger in Frye, 122 of Justice Douglas in Laburnum, 123 and of Justice Frankfurter in Meadowmoor. 124 Bobbit, Douglas, and Frankfurter apparently believed that violence in labor disputes should be dealt with tolerantly because in the class struggle between “management” and “labor,” “labor” is so disadvantaged that it needs leeway. Judge Smith would have none of this because he saw violence in labor disputes as normally involving one set of workers, abusing another, 125 and he did not believe that a decent legal system could tolerate such aggression. Indeed, Judge Krueger added, society had more than a common interest in maintaining the peace in labor disputes. Ordinary, “casual,” violence is bad enough and must be prevented or punished if civil order is to prevail. But systematic, continual violence of the kind that occurs in labor disputes is much worse, he thought, because of its profound effect on the entire social and economic fabric. 126

Judge Krueger might have gone on to say that mankind’s sustained effort to replace violent aggression and theft with peaceful and efficient production as a means of improving the human condition is one of the more significant aspects of human history. Wars among nations and crimes within nations represent the unfinished business of mankind in this respect, but so too does violence in labor disputes. Labor violence is no more socially acceptable than the wasteful violence of war or the nonproductive and violent wealth transfers of thugs and muggers. Violence in labor disputes is fundamentally a monopolistic device. It is designed deliberately to eliminate competition, usually the competition of unorganized workers or of members of rival unions, and, by eliminating this competition, to cause employers (and ultimately consumers) to pay more than they need to pay for labor services.

As a means of eliminating competition, union violence is thus no different in physical or social terms from the kind of violence that has occurred occasionally between rival businesses, the prototype of anti-social, predatory, unfair competition—“competition” that raises costs and prices rather than reducing them. The courts have always ruled sternly against violent forms of business competition. 127 Perhaps this is why rival businesses almost never re-

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121. See note 113 and accompanying text supra.
122. See notes 114-15 and accompanying text supra.
123. See note 119 and accompanying text supra.
124. See note 116 supra.
125. See text accompanying note 113 supra. In the usual labor dispute that reached the courts prior to the new deal legislation, the disputants were rival workers, usually organized workers against unorganized workers. For extensive documentation, see Petro, supra note 7, at 411-28.
126. See text accompanying note 115 supra.
127. The third installment of this series, to be published in volume 60 of this Review, examines at length the growth of the tort category now known as “unfair competition,” going back as far as Garret v. Taylor, Cro. Jac. 567, 79 Eng. Rep. 485 (1621) and the Schoolmasters’ Case, Y.B. 11 H. 4, fol. 45, pl. 21 (1410). For a more recent example of business tactics analogous to the
sort to violence anymore. It is recognized in business as the archetypal form of unfair competition.

Expanded, Judge Krueger's point is that when a unionist assaults a person who prefers to work during a strike and is willing to accept a lower wage rate than the unionist insists upon, the moral and economic effects of such an assault are even graver than those resulting from the violence that occurs occasionally among rival businesses. Labor costs are far and away the principal costs of production. Direct and indirect labor costs together amount in the average firm to more than seventy percent of all costs. If this vastly preponderant element in costs is taken out of competition, the value of competition to society is drastically reduced, while the most precious of all spiritual values, personal freedom, is brutally diminished.

The union slogan that wages must be taken out of competition is a prescription for moral, economic, and social ruin. It is absurd for a society to expend large resources in an effort to promote business competition, as we do, while encouraging the removal of competition among workers, as our current statutory labor policies do.

Neither now nor earlier, however, have our courts—either in the North or in the South—formally regarded violence among workers as a legitimate form of competition. However tolerant the most liberal of the northern courts might have been of the economically coercive boycotts that unions perfected, they drew the line against violence. The decisions of the New York Court of Appeals were not different in this respect from the decisions of other northern courts. And there is no perceptible difference between the way in which the southern courts and the New York courts handled labor violence cases. This fact should put to rest forever the accusation that the southern courts were more unfriendly to unions than the northern courts were, and that unions have done relatively badly in the south because of institutional mistreatment.

II. THE LABOR INJUNCTION IN THE SOUTHERN COURTS

Equity is not a purely discretionary system of legal administration; in the best courts and among the best judges, as we shall see, there is as rigid a framework of principle underlying the discretionary features of equitable remedies as there is anywhere else in the law. However, in the nature of the mis-


128. A lower wage rate does not necessarily mean lower earnings. In fact pushing wage rates up too high is often an extremely effective way of reducing earnings to the vanishing point, as stonemasons and bricklayers on Manhattan Island have learned, as they watch steel and glass buildings take the place of stone and brick.

129. The implications of this are dealt with brilliantly in Professor William H. Hutt's forthcoming book, LABOR'S DISADVANTAGE.


sion of equity to prevent irreparable injury, a considerable amount of
discretion must be vested in the trial judge (the chancellor, properly speaking)
to decide whether or not immediate relief should be granted before any real
proof of illegality can be made. With discretion, unfortunately, comes the po-
tential for bias in favor of or against one party or the other. Therefore, if there
is any truth in the contention that unions have done badly in the South and
that institutional anti-unionism is to blame, evidence of it should appear in the
southern labor-injunction cases.

In an effort to uncover such evidence of bias among trial judges as may
exist, we begin with a general survey of the results of applications for injunc-
tive relief in labor disputes in the South both at the trial-court and at the ap-
pellate-court levels. We proceed then to examine the cases in more detail,
comparing the doctrines and principles applied in the southern cases with
those of the contemporaneous northern cases, seeking in this way to establish
the basis for a comparative judgment, since no other seems feasible. We end
Part II with a brief review of southern contempt proceedings.

Definitive demonstrations of the presence or absence of undue bias
among judges are very hard tasks even in individual cases. When it comes to
dealing with all southern judges over a hundred year period, the thought of a
definitive demonstration would be absurd. However, there is no way to evalu-
ate the charge that southern judges were biased other than to examine what
they did. In any event, a documented examination such as this is bound to be
better than the mere assertion of southern bias that has thus far dominated
discussion of the issue.

A. General Summary of the Southern Labor Injunction Cases

We have collected 186 southern labor-injunction cases, 72 decided before
1942 and 114 after 1941. The pre-1942 cases are all we found and include
some that were not officially reported. However, we have not attempted to
exhaust the post-1941 cases in all the states, since the state courts have been so
heavily influenced in this period by national labor legislation and by the fed-
eral preemption doctrine. Instead we have tried to exhaust the cases only in
North Carolina, one of the least organized, and in Texas, one of the more
heavily organized of the southern states, while taking fairly large samples of
the post-1941 cases in the other states of the old confederacy. This procedure
establishes a fair basis for evaluating the southern labor decisions both when

132. We have used the period 1940-1942 as the dividing point for fairly obvious reasons:
before then the southern courts were relatively unfettered by national labor legislation or by the
constitutional doctrines of the United States Supreme Court. If there was anything like a particu-
larly "southern" view, comparing the pre-1942 cases with the post-1941 cases should help to ex-
pose it.

133. The most recent data show North Carolina with 242,000 union and employee-association
members, or 10.7% of its labor force; and Texas with 698,000 for 13.3% of its labor force. U.S.
BUREAU OF LABOR STATISTICS, DEPT OF LABOR, BULL No. 2079 DIRECTORY OF NATIONAL
UNIONS AND EMPLOYEE ASSOCIATIONS, 1979, at 72, Table 19 (1980).
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the courts were independent and when they were virtually incorporated into the federal judicial system.

A general summary of all 186 southern labor-injunction cases is found in Table I. As the table shows, trial courts granted injunctive relief in forty-eight and denied it in twenty-four of the seventy-two pre-1942 cases. In the 114 post-1941 cases, the trial courts granted injunctive relief in ninety-four and denied it in twenty. The proportion of grants to applications was thus sixty-seven percent in the pre-1942 cases and eighty-two percent in the post-1941 cases. Since no attempt was made to exhaust the post-1941 cases, this comparison may not be significant. A more meaningful comparison, however, may be made in North Carolina and Texas, where we have attempted to exhaust the reported cases, both pre-1942 and post-1941.

In North Carolina we found only four labor-injunction cases prior to 1942.134 The trial courts issued injunctive relief in all four. We found sixteen post-1941 injunction cases. The trial courts granted relief in fifteen and denied it in one. The proportions were thus much the same in both periods.

The proportions were different in Texas, the only southern state with a substantial amount of labor litigation. Of thirty-one pre-1942 applications, trial courts granted injunctive relief in eighteen cases (fifty-eight percent), and denied it in thirteen (forty-two percent). The proportion of grants to denials increased in the post-1941 period. We found thirty-two reported applications for injunctive relief after 1941. Trial courts granted relief in twenty-four (seventy-five percent) and denied it in eight (twenty-five percent) of these cases.

A closer look at the Texas cases seems in order, since it is the most industrialized state of the South and one of the most heavily organized. Viewed in the light of the state's reputation, the Texas labor-injunction cases contain some surprises.

Of the thirty-one pre-1942 applications, fourteen were by employers.135 Of the remaining seventeen, one was a suit by a union against an employer for

134. Asheville Times Co. v. Asheville Typographical Union, No. 263, 187 N.C. 157, 121 S.E. 37 (1924); Citizens Co. v. Asheville Typographical Union, No. 263, 187 N.C. 42, 121 S.E. 31 (1924); McGinnis v. Raleigh Typographical Union, No. 54, 182 N.C. 770, 108 S.E. 728 (1921); Marion Mfg. Co. v. United Textile Workers (N.C. Super. Ct., McDowell County, July 24, 1929) (see D. McCracken, supra note 41, at 79). These early North Carolina cases are extensively reviewed in D. McCracken, supra note 41, at 49-93. Although McCracken seems to have been impressed by the Frankfurter and Greene belief that "government by injunction" prevailed in labor disputes generally (see generally F. Frankfurter & N. Greene, The Labor Injunction (1930)), he said that "[g]overnment by injunction . . . was not found in any of the North Carolina and Virginia Cases." D. McCracken, supra note 41, at 136.

specific enforcement of a closed-shop agreement;\textsuperscript{136} five were suits by unions against employees or other unions;\textsuperscript{137} four were suits by unions against municipal officials\textsuperscript{138} and police;\textsuperscript{139} and the remaining seven were suits by individual employees against their unions or against unions and employers as codefendants.\textsuperscript{140}

The trial courts granted relief in eight of the employer suits\textsuperscript{141} and denied it in six.\textsuperscript{142} On appeal the grants were affirmed in seven cases\textsuperscript{143} and vacated in one.\textsuperscript{144} The appellate courts affirmed the denials of relief to employers in all six cases.\textsuperscript{145}

In the single application by a union against an employer, the relief sought was granted and affirmed.\textsuperscript{146} Unions were largely successful in their other applications for injunctive relief as well. In the four applications against other unions, although the trial courts granted the relief sought in two\textsuperscript{147} and denied

\begin{itemize}
\item \textsuperscript{136} Harper v. Local 520, IBEW, 48 S.W.2d 1033 (Tex. Civ. App. 1932).
\item \textsuperscript{139} Gurtov v. Williams, 105 S.W.2d 328 (Tex. Civ. App. 1937); Thomas v. International Seamen’s Union, 101 S.W.2d 328 (Tex. Civ. App. 1937).
\item \textsuperscript{144} \textit{Ex parte} Tucker, 110 Tex. 335, 220 S.W. 75 (1920).
\item \textsuperscript{145} \textit{See cases cited supra} note 142.
\item \textsuperscript{146} Harper v. Local 520, IBEW, 48 S.W.2d 1033 (Tex. Civ. App. 1932).
\item \textsuperscript{147} Motion Picture & Vitaphone Operators No. 56,880 v. Motion Picture Operators Local 305, 132 S.W.2d 299 (Tex. Civ. App. 1939); Machinists Local 1488 v. Federated Ass’n of Accessory Workers, 109 S.W.2d 301 (Tex. Civ. App. 1937), \textit{dismissed as moot}, 133 Tex. 624, 130 S.W.2d 282 (1939).
\end{itemize}
it in two,\textsuperscript{148} on appeal the grants were affirmed in both cases and one denial was reversed.\textsuperscript{149} Thus, unions eventually secured relief in three of the four cases against other unions. In the one case in which a union sought injunctive relief against employees (wildcat strikers), the relief was granted and affirmed as modified.\textsuperscript{150} Summarized, unions sought injunctive relief against employers, other unions, or employees in six cases and secured it in five. Employers sought relief in fourteen cases and ultimately secured it in seven. Unions thus won eighty-three percent of their cases while employers won fifty percent.

Unions were less successful in suits against municipal authorities but more successful in suits for injunctive relief against police harassment. In two suits challenging the authority of cities to discharge unionists, relief was denied in both cases, and the denials were affirmed.\textsuperscript{151} However, both suits against police harassment were successful on appeal as well as in the trial courts.\textsuperscript{152}

Employee suits, mainly against unions, were the least successful of all in Texas. Employees brought five suits for injunctive relief against their unions. While they were successful in the trial courts, the injunctions were vacated by appellate courts in all five cases.\textsuperscript{153} They brought two suits against employers and unions jointly. Both were unsuccessful in the trial courts as well as on appeal.\textsuperscript{154}

It is difficult to perceive any sign of anti-union bias in the foregoing data. On the contrary, the tendency of the Texas courts to grant injunctive relief in suits by unions and to deny it in suits by employees against their unions suggests institutional acceptance of unions by the courts. The relatively poor record of employers in injunction suits against union suggest the same thing.

Largely the same inference is suggested by the pre-1942 career of the labor injunction in the other southern courts. In Alabama, for example, trial courts denied injunctive relief in both of the cases in which it was sought prior to 1942. In one the denial was affirmed, in the other reversed. Nothing substantially different is observable in any of the other southern states. Except for Texas, few labor injunctions were either sought or granted before 1942 in the


\textsuperscript{149} Henke & Pillot, Inc. v. Meat Cutters No. 408, 109 S.W.2d 1083 (Tex. Civ. App. 1937) (injunction denied to one party and granted to another).


southern states. The most extreme state was South Carolina, where there does not seem to have been any significant use of the labor injunction at all, either before or after 1942.

To this writer, at any rate, the litigation record after 1941 does not differ significantly from that of the pre-1942 period, except insofar as the U.S. Supreme Court’s preemption doctrine added a new element. Although the southern trial courts seem to have granted a greater proportion of the applications for injunctive relief after 1941 (eighty-two percent) than they had earlier (sixty-seven percent), we cannot be sure that this proportion would continue if we exhausted the cases. Again, although the proportion of injunctions vacated after 1941 (eighteen percent) seems small compared to the proportion vacated before 1942 (thirty-one percent), it must be remembered that five of the pre-1942 injunctions vacated, in Texas alone, were in suits by employees against their unions. That type of suit, and that type of disposition by the courts, contribute very little to resolution of the question whether the southern courts were or are anti-union. If they were eliminated from the pre-1942 cases, the proportions both before and after that year would differ little.

In any endeavor to determine whether or not the southern courts were motivated by anti-union sentiment in the disposition of petitions for injunctive relief in labor disputes, the views they expressed on the propriety of injunctive relief in such disputes ought not to be ignored. We now turn to a survey of those views.

B. The Southern Courts’ Views on the Propriety of Injunctive Relief in Labor Disputes and on the Preemption Doctrine

With the labor injunction a relatively undeveloped institution in the South before 1942 and largely so even thereafter, it should not be surprising that southern judges made virtually no contribution to the controversy over “government by injunction.”155 Unions and their academic protagonists could scarcely complain about southern judges when in the entire period before 1942 only forty-eight labor injunctions had been reported in the South,156 especially since many of those were granted to unions and employ-

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155. For a compendium of the crusade against “government by injunction,” see F. Frankfurter & N. Greene, supra note 134; for a critique of that book and of the crusade as a whole, see Petro, supra note 7.

156. State v. Kansas & T. Coal Co., 96 F. 353 (W.D. Ark. 1899), rev’d, 183 U.S. 185 (1901); Riggs v. Tucker Duck & Rubber Co., 196 Ark. 571, 119 S.W.2d 507 (1938); Jones v. State, 170 Ark. 863, 281 S.W. 663 (1926); Local 313, Hotel & Restaurant Employees v. Stathakis, 135 Ark. 86, 205 S.W. 405 (1918); Retail Clerks Local 779 v. Lerner Shops, 140 Fla. 865, 193 So. 2d 529 (1940); Weissman v. Jureit, 132 Fla. 561, 181 S.W. 898 (1938); Jetton-Dekle Lumber Co. v. Mather, 53 Fla. 969, 43 So. 590 (1907); O’Jay Spread Co. v. Hicks, 185 Ga. 507, 195 S.E. 564 (1938); Edrington v. Hall, 168 Ga. 484, 148 S.E. 403 (1929); McMichael v. Atlanta Envelope Co., 151 Ga. 776, 108 S.E. 226 (1921); Callan v. Exposition Cotton Mills, 149 Ga. 119, 99 S.E. 300 (1919); Burgess v. Georgina, F. & A. Ry., 148 Ga. 417, 96 S.E. 865 (1918); Holmes v. Brown, 146 Ga. 402, 91 S.E. 408 (1917); Jones v. Van Winkle Gin & Mach. Works, 131 Ga. 336, 62 S.E. 236 (1908); Employing Printers’ Club v. Doctor Blosser Co., 122 Ga. 509, 50 S.E. 353 (1903); Dehan v. Hotel & Restaurant Employees Local 183, 159 So. 637 (La. 1935); Local 1226, Int’l Longshoremen’s Ass’n v. Ross, 180 La. 293, 156 So. 557 (1934); Keegan v. Board of Comm’rs, 154 La. 659, 98 So. 50 (1923); Schneider v. Journeymen Plumbers, 116 La. 270, 40 So. 700 (1906); Mississippi Theatres
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Moreover, after 1942 constitutional doctrines developed by the United States Supreme Court severely restricted the labor injunction in all state courts, southern and northern. The southern courts accepted this preemption of their authority to prevent irreparable injury without any notable resistance.

The propriety of equitable relief in labor disputes was therefore rarely contested seriously in the southern cases on general principles, although there were arguments against relief based on the facts of a given case. When contested, the general propriety of equitable relief was upheld. For example, the contention that equitable relief in labor disputes should be withheld when the conduct enjoined also constituted a crime was curtly dismissed in an early Alabama case.157 Similarly, the argument that equitable relief should be confined to cases involving rights in real property was rejected without much discussion.158 Probably reflecting widespread judicial sentiment, North and South,159 the Louisiana courts held unconstitutional a state anti-injunction act similar to the federal Norris-LaGuardia Act,160 on the theory that authority to issue injunctive relief in proper cases is inherent in judicial power.161


161. Arkansas Oak Flooring Co. v. United Mine Workers, 227 La. 1109, 81 So. 2d 413 (1955), rev'd and remanded on other grounds, 351 U.S. 62 (1956); Twigg v. Journeyman Barbers Local
The southern courts upheld the propriety of injunctive relief in cases in which unions sought such relief as readily as when employers did, indeed perhaps more readily. Thus the courts of Louisiana, Mississippi, and Texas all granted unions specific performance of compulsory-unionism contracts against defaulting employers. In order to evaluate properly these decisions, one must remember that such relief is the most extreme type awarded by equity courts; it is a species of mandatory injunction, ordering the employer to make employment contracts with union members. No case has ever been found in which union members have been compelled by a court of equity to make, or even to perform, an employment contract with a private employer. Upon occasion, American courts have ordered government employees to abandon illegal strikes and to return to work, but that is as far as they have gone. Such being the case, complaints by unionists of “government by injunction” have an odd ring to them when made about any American court, North or South.

The way appellate courts dealt with petitions for injunctive relief by members against their unions, usually in expulsion cases, again suggests the absence of anti-union animus. For example, in each case in which Texas trial courts granted union members the relief they sought, appellate courts vacated the injunctions or writs of mandamus, usually on the ground that the petitioners failed to exhaust the remedies provided by the unions’ internal procedures. Certainly if southern courts had had leanings toward “government by injunction” these employee suits would have provided strong bases for equitable intervention. Instead, the courts chose to apply to unions generally the rule of exhaustion developed in cases involving the internal disputes of genuinely voluntary associations, despite the monopolistic and coercive tendencies of American trade unions.

Further evidence of the moderation of the southern courts is seen in their attitudes toward and reaction to the U.S. Supreme Court’s preemption doctrine. I do not believe it possible to exaggerate the noxious and inequitable features of that doctrine. Yet, although the inequities and iniquities of pre-

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165. See generally Sturges, Unincorporated Associations as Parties to Actions, 33 Yale L.J. 383 (1924).

166. If the kinds of actionable wrongs committed by trade unions constitute cases par excellence for equitable remedies, as I believe (see Petro, supra note 7, at 364-83), what I wrote twenty-one years ago about the preemption doctrine is relevant to our assessment of the temper and character of the southern courts:
emption were particularly blatant in numerous southern cases, as a general rule the southern courts silently accepted the U.S. Supreme Court's preemption of their equitable powers. Only rarely did a southern judge express his resentments, as Judge Denny did in a North Carolina decision refusing to dismiss an action for damages brought by an employee against a union for violation of the North Carolina right to work law after the NLRB declined to prosecute the case:

It is quite clear, since the NLRB had declined to exercise jurisdiction in this case, if the courts of this State are not open for the adjudication of the plaintiff's claim for damages in tort, based on his wrongful discharge, pursuant to the provisions of our Right to Work Act, then there is no forum in either the federal or state judicial systems where the plaintiff can have his rights litigated and determined. This runs counter to our conception of justice and it makes no difference whether Congress intended to permit the creation of this no-man's-land by giving the NLRB exclusive jurisdiction on the one hand, but not requiring its exercise on the other, or whether this vacuum has been the result of judicial interpretation is beside the point, such a situation affecting the rights of so many employers and employees ought not to be permitted to continue. Congress ought to

What, then, is to be said in favor of the preemption doctrine? It has no constitutional basis; it has no statutory basis. If one wishes to analyze practical consequences, the preemption doctrine looks even worse than it does when exposed to purely legal considerations. [The preemption doctrine has produced] a series of catastrophic and destructive miscarriages of justice. Preemption has permitted unions in hundreds of cases to coerce employees, contrary to the policy of federal and state law. Some employers have been forced out of business. Thousands of employees have been forced to pay tribute to unions which they do not want. The appalling disclosures of the McClellan Committee can be traced back in many cases to the privileged sanctuary afforded thugs and crooks by the preemption doctrine.

The truth of the matter is that the preemption doctrine—not the participation of state courts in adjudicating unfair practice cases—is frustrating national purposes. Establishing justice was one of the principal goals of the people of the United States in adopting the Constitution and remains today one of our most exigent problems. The state courts could play an extremely important part in securing that great objective. In ousting them, with no constitutional or statutory basis for the ouster, the Supreme Court is merely the dupe of those who seek to evade the law. The trade unions have argued for preemption because each case they win gives them the privilege to violate both state and federal law. They have not been advancing the preemption theory because they are dedicated to the enforcement of the Taft-Hartley Act. For them, that moderate and minimal attempt to apply a few decent rules to trade-union aggression is a "slave labor law." Preemption is their device for securing from the Supreme Court an immunity which neither the Constitution nor the Congress would afford them.


correct it. Unnecessary delay in correcting such a situation in the
field of labor-management relations is indefensible. A citizen,
whether employer or employee, is entitled to his day in court if his
rights have been infringed upon contrary to law.

Our courts, in the case before us, are not seeking to administer
the provisions of . . . the Labor Relations Act . . . ; they seek only to
enforce the provisions of our own Right to Work Act, provisions
which have no counterpart in the National Labor Relations Act.

Moreover, this Court does not seek to evade any clear mandate
of the Supreme Court of the United States, whether it agrees with
that Court's opinions or not. . . . On the other hand, we do not
hasten to surrender voluntarily any right which we believe we have
both the legal right and duty to uphold and enforce.

As heretofore pointed out, our Right to Work Act has been held
to be constitutional by this Court and by the Supreme Court of the
United States. . . . Certainly, Congress did not undertake to pro-
vide for the adjustment of unfair labor practices applicable exclu-
sively to intrastate business.168

Our brief review here demonstrates that if the southern courts thought
there was nothing inherently wrong with the labor injunction they at least ap-
plied their conviction evenhandedly to all petitioners for such relief. Certainly
there is no evidence that southern judges were passionately in favor of grant-
ing injunctive relief in labor cases. "Dispassionate" would more accurately
denote the attitudes that their decisions display. Had they been imbued with
any anti-union passion, it is hardly likely that they would have accepted the
U.S. Supreme Court's preemption doctrine without any real objection. In any
event, there is no indication so far in the cases that the southern courts were
either more anti-union or anti-preemption than their northern brethren were.

C. Equity Procedures and Practices in the Southern Courts: Injunctions as
   "Strike-Defeating" Measures

   1. Interlocutory Relief and Labor Disputes

   The idea that the southern courts had an anti-union bent can perhaps best
be tested by looking at how they exercised the discretion inherent in standard
equity procedures and practices in the labor-injunction cases. However,
before reviewing the cases, they need to be placed in factual and legal context.

   First, although employers were most frequently complainants and unions
most frequently respondents or defendants in southern labor-injunction cases,
as they were in the northern cases, the labor injunction was by no means
strictly an employer device. In Texas, for example, of sixty-three labor-injunc-
tion cases, forty-two were brought by employers,169 twelve by unions,170 and

interpretation by a Tennessee judge, see Pruitt v. Lambert, 34 Lab. Cas. 95929, 95939-40 (Tenn.
Ch. 1957).
169. Millwrights Local 2484 v. Rust Eng'r Co., 433 S.W.2d 683 (Tex. 1968); Ex parte George,
163 Tex. 103, 358 S.W.2d 590 (1962), vacated, 371 U.S. 72 (1963) (per curiam); Ex parte Dilley,
nine by employees.\textsuperscript{171} As we saw in the preceding section, unions won a greater proportion of their cases than either employers or employees did. Indi-

individual employees, usually suing unions, lost most frequently. At the outset, therefore, accusations of anti-unionism in the southern courts must cope with the success of unions as both plaintiffs and defendants.

Second, the common union complaint that injunctions were "strike-defeating" instruments of exploitative employers served by compliant judges must be evaluated in light of the reality that in many labor-injunction cases, North and South, there was no strike at all, or that what was called a strike actually involved an attempt by a union to induce or to force unwilling employees to strike. The fact that northern and southern courts rarely enjoined strikes casts further doubt on the validity of this complaint.

Third, if "strike injunctions" really do not enjoin strikes at all, but only the coercive activities accompanying strikes, such as mass picketing, violence, vandalism, and intimidation, then it cannot be that the injunction defeats the strike. If only coercion is prohibited by an injunction, then—even assuming that the injunction is effectively policed and enforced—it is not really the injunction that "defeats" the strike but the free choices of employees. Injunctions in the private sector do not force workers to take jobs vacated by strikers, or strikers to return to work. When strikes are defeated, it is the market, the free choice of employees, that defeats them. Even ardent unionists have occasionally admitted this.

Nevertheless, the contention that "injunctions defeat strikes" was designed to play, and often did play, an extraordinarily significant role in determining whether or not injunctive relief should be issued in suits by employers. When unionists joined with this contention the further one that the labor injunction tended to "resolve" labor disputes in favor of employers upon inadequate evidence, which is usually all that a court has before it at the early, interlocutory stages of an equity case, they induced judges to lean over backwards to avoid the appearance of being pro-employer.

172. This thesis was extensively developed in F. Frankfurter & N. Greene, THE LABOR INJUNCTION 105-33, 200-05 (1930). See also J. Frey, THE LABOR INJUNCTION: AN EXPOSITION OF GOVERNMENT BY JUDICIAL CONSCIENCE AND ITS MENACE (1923). The literature pro and con on the labor injunction is enormous. For further citations and discussion, see Petro, supra note 7, at notes 4, 33, 41, 47, 53-55 and accompanying text.

173. See Petro, supra note 7, at 451-55.

174. Id. at 449-51.

175. Effective policing of picket lines and injunctions may be more the exception than the rule. See Note, The Enforcement of the Right of Access in Mass Picketing Situations, 113 U. PA. L. REV. 111 (1964) for a similar opinion.

176. Professor McCracken, who thought injunctions were largely ineffectual, also implied that they might increase union solidarity among employees. See D. McCracken, supra note 41, at 141-43.

177. D. McCracken, supra note 41, at 137, quotes a union official as saying that "strikes break themselves" when called in economic conditions which make success improbable. I believe it both more true and more significant to say that unions use coercive measures so often in connection with strikes because they tend to call strikes during unpropitious economic conditions. Going further, I believe that most employers are aware enough of economic conditions to pay what is required to avoid strike threats, so that strikes and strike threats are almost predictably unjustified by market conditions. See in this connection a brilliant but as yet unpublished work by W. Hutt, LABOR'S DISADVANTAGE.

178. See Petro, supra note 7, at 436-41.
Let us observe the process more closely in relation to standard equity procedure. In the typical labor-injunction case, an employer complains to a judge of illegal union conduct and irreparable injury, and supports his complaint with affidavits stating that the illegal conduct (picketing, boycott, violence, vandalism, intimidation) is either occurring or is threatened; the prayer is for immediate relief. The employer's irreparable injury charges in the past would emphasize that unions were not legal entities and therefore could not be made to respond in damages, or that the union was insolvent; now employees will charge that it is impossible to quantify in monetary terms lost profits, reduced customer good will, and other such intangible harms.

The union will usually challenge the charge of illegality and deny the factual charges. To the employer's contention that withholding relief will cause him great harm, the union may reply that a grant of relief, without proof that unlawful acts have actually occurred, will create great institutional harm for the union, loss of employee support, demoralization, embarrassment in the community, and so on.

What is a court of equity to do with the "equities" in this posture? The response of equity in cases not involving labor disputes is summed up in two ideas: the prima facie case and the relative hardship test. When a petitioner for temporary injunctive relief comes into court alleging that the respondent is engaging in unlawful conduct that threatens irreparable injury, while the respondent asserts that he is not engaging in the conduct charged or that the conduct charged is not unlawful and that granting relief will harm the respondent at least as much as a denial would harm the complainant, courts of equity have concluded that if the complaint makes a prima facie case of illegality and irreparable injury and if it convinces the court that a grant of relief will hurt the respondent less than a denial would hurt the petitioner, the temporary relief should be granted and the case set for trial as soon as possible. All courts have agreed that the mission of equity can be served only in this way.179

179. The views on equity principle of all Anglo-American judges, North and South, in England and America, including federal judges, have come to be indistinguishable, although, as ensuing footnotes show, there is the usual difficulty in aligning their practices. The single most instructive United States case on equity principle that I have encountered is Salmon v. Clagett, 3 Bland 125 (Md. 1828). For representative United States cases, most of them not involving labor disputes, but selected largely from the period of "government by injunction" (1880-1932) in order to establish the general equity background of the labor injunction, see Machinists v. Gonzales, 356 U.S. 617, 621 (1958) (cited here for its statement by J. Frankfurter, the most strenuous of the crusaders against government by injunction, that the U.S. Supreme Court should not "mutilate the comprehensive relief of equity"); Eagle Glass & Mfg. Co. v. Rowe, 245 U.S. 275 (1917); McLean v. Fleming, 96 U.S. 245 (1877); Associated Press v. International News Serv., 245 F. 244 (2d Cir. 1917), aff'd, 248 U.S. 215 (1918); American Malting Co. v. Keitel, 209 F. 351 (2d Cir. 1913); Sailors' Union v. Hammond Lumber Co., 156 F. 450 (9th Cir. 1907); Irving v. Joint Dist. Council, United Bhd. of Carpenters, 180 F. 896 (S.D.N.Y. 1910); Goldfield Consol. Mines Co. v. Goldfield Miners' Union 220, 159 F. 500 (D. Nev. 1908); Otis Steel Co. v. Local 218, Iron Molders' Union, 110 F. 698 (N.D. Ohio 1901); Coe & Milsom v. Louisville & Nashville Ry., 3 F. 775 (M.D. Tenn. 1880); J.F. Parkinson Co. v. Building Trade Council of Santa Clara County, 154 Cal. 581, 98 P. 1027 (1908); Vincent v. Chicago & A. Ry., 49 Ill. 33 (1868); Vanderbilt v. Mitchell, 72 N.J. Eq. 910, 67 A. 97 (1907); Wheelock v. Noonan, 108 N.Y. 179 (1888); Finnegan v. Butler, 112 Misc. 280, 182 N.Y.S. 671 (1920); Sultan v. Star Co., 106 Misc. 43, 174 N.Y.S. 52 (1919); Lawrence v. Lawrence, 172 N.Y.S. 146 (1918). For an excellent treatise on the development of equity, see G. Spence, THE EQUITABLE JURISDICTION OF THE COURT OF CHANCERY (1846-1850) (2 vols.); see
To withhold relief until the legal and factual issues are fully tried would constitute an abandonment of some of the most valuable features of equitable remedies.

Centuries of development in equity principle have been summed up recently in a masterly way by Lord Diplock. In a case having nothing to do with labor relations or labor disputes, he said:

My Lords, when an application for an interlocutory injunction to restrain a defendant from doing acts alleged to be in violation of the plaintiff’s legal right is made upon contested facts, the decision whether or not to grant an interlocutory injunction has to be taken at a time when ex hypothesi the existence of the right or the violation of it, or both, is uncertain and will remain uncertain until final judgment is given in the action. It was to mitigate the risk of injustice to the plaintiff during the period before that uncertainty could be resolved that the practice arose of granting him relief by way of interlocutory injunction; but since the middle of the 19th century this has been made subject to his undertaking to pay damages to the defendant for any loss suffered by reason of the injunction if it should be held at the trial that the plaintiff had not been entitled to restrain the defendant from doing what he was threatening to do. The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the plaintiff’s need for such

also C. Huston, THE ENFORCEMENT OF DECREES IN EQUITY (1915); F. Maitland, EQUITY (2d ed. 1936); R. Newman, EQUITY AND LAW: A COMPARATIVE STUDY (1961).

protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty were resolved in the defendant's favour at the trial. The court must weigh one need against another and determine where "the balance of convenience" lies.

In those cases where the legal rights of the parties depend upon facts that are in dispute between them, the evidence available to the court at the hearing of the application for an interlocutory injunction is incomplete. It is given on affidavit and has not been tested by oral cross-examination. The purpose sought to be achieved by giving to the court discretion to grant such injunctions would be stultified if the discretion were clogged by a technical rule forbidding its exercise if upon that incomplete untested evidence the court evaluated the chances of the plaintiff's ultimate success in the action at 50 per cent, or less, but permitting its exercise if the court evaluated his chances at more than 50 per cent.\textsuperscript{180}

\textsuperscript{180} American Cyanamid Co. v. Ethicon Ltd., [1975] A.C. 396, 406. There is so much valuable material in Lord Diplock's opinion that I quote him further at length:

*It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial. One of the reasons for the introduction of the practice of requiring an undertaking as to damages upon the grant of an interlocutory injunction was that "it aided the court in doing that which was its great object, viz. abstaining from expressing any opinion upon the merits of the case until the hearing." Wakefield v. Duke of Buccleugh (1865) 12 L.T. 628, 629. So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.*

As to that, the governing principle is that the court should first consider whether, if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage. If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction.

It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises. It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.

Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo. If the defendant is enjoined
Except in labor cases, modern equity practice has been tending more and more to provide interlocutory relief when the plaintiff makes a prima facie case, convinces the court that the balance of the equities is in its favor, puts up an indemnity bond, and agrees to a speedy hearing on the issues. Current equity practice is well illustrated by a preliminary injunction handed down two years ago against the United States Auto Club (USAC). When in 1979 Johnny Rutherford and other racing drivers formed a competing association, USAC excluded them from the Indianapolis 500. On suit by Rutherford and his fellows, U.S. District Judge James Noland in Indianapolis issued a preliminary injunction against the exclusion just twenty days before the race. No opinion was filed with the decree, and none has been filed since. But according to a newspaper report, Judge Noland said in court that while he was not temporarily from doing something that he has not done before, the only effect of the interlocutory injunction in the event of his succeeding at the trial is to postpone the date at which he is able to embark upon a course of action which he has not previously found it necessary to undertake; whereas to interrupt him in the conduct of an established enterprise would cause much greater inconvenience to him since he would have to start again to establish it in the event of his succeeding at the trial.

Save in the simplest cases, the decision to grant or to refuse an interlocutory injunction will cause to whichever party is unsuccessful on the application some disadvantages which his ultimate success at the trial may show he ought to have been spared and the disadvantages may be such that the recovery of damages to which he would then be entitled either in the action or under the plaintiff's undertaking would not be sufficient to compensate him fully for all of them. The extent to which the disadvantages to each party would be incapable of being compensated in damages in the event of his succeeding at the trial is always a significant factor in assessing where the balance of convenience lies; and if the extent of uncompensatable disadvantage to each party would not differ widely, it may not be improper to take into account in tipping the balance the relative strength of each party's case as revealed by the affidavit evidence adduced on the hearing of the application. This, however, should be done only where it is apparent upon the facts disclosed by evidence as to which there is no credible dispute that the strength of one party's case is disproportionate to that of the other party. The court is not justified in embarking upon anything resembling a trial of the action upon conflicting affidavits in order to evaluate the strength of either party's case.


As emphasized throughout this and the first installment of this Article, the combination of the preemption doctrine and state and federal anti-injunction legislation has privileged unions to inflict irreparable injury in ways denied to all other members of society. Section 7 of the Norris-LaGuardia Act, 29 U.S.C. § 107 (1976), works an abortion of equity by placing an absolute limit of five days on temporary restraining orders, no matter how egregious the union conduct restrained, and by requiring, prior to the issuance of a preliminary injunction, proof so onerous that the irreparable injury equity was designed to preclude is bound to occur.


sure that the complainants ultimately prevail on their charge that USAC violated the antitrust laws, the balance of the equities was so clearly in their favor that temporary relief had to be granted. On the one hand no legal remedy could possibly compensate complainants for the loss of their chance to compete in the Indianapolis 500, the most lucrative and famous race in America; on the other hand, respondent USAC could not demonstrate any pecuniary loss at all tracing to the grant of relief.

It is true, as unionists complain about interlocutory relief in labor cases, that the preliminary injunction in the USAC case put an end to the litigation. USAC was not likely to want a hearing after the race; probably it would rather not have had its status under the antitrust laws adjudicated. And the complainants got all they wanted at the time—a chance to compete. But there is nothing new or astonishing in the fact that interlocutory decrees will often end a dispute. This possibility of a quick ending to a dispute may even be beneficial. Equity’s way is often the cheapest and least painful way, even for the defendant. It may cost much less than a long, drawn-out damages action. Moreover, in labor disputes, at any rate, effective injunctive relief may prevent bloodshed. By the turn of the century, judges all over the country, more perhaps in the North than in the South, had begun to realize that equitable remedies might be as salutary and as promising in labor disputes as they were in other disputes.

2. Equity Principle in the Labor Cases, North and South

On the whole, the equity principles applicable to disputes in general have also been applied (to the extent that the preemption doctrine and anti-injunction legislation permit), at least abstractly speaking, to labor disputes. I say “abstractly” because, contrary to common belief, all courts have tended in practice to apply equity principle in a manner far more favorable to unions than they have to other defendants in suits for injunctive relief.

At least in the North in earlier days, employers could count on interlocutory relief in labor disputes much as they could in other kinds of disputes. As elsewhere, they needed to establish a prima facie case of illegality, the absence of any adequate legal remedy for the kind of harm that the unionists were doing or threatening, and a favorable balance of the equities as it appeared from the relative hardship test. To typical union denials of any wrongdo-

185. See W. JONES, THE ELIZABETHAN COURT OF CHANCERY 286-87 (1967), an extremely valuable piece of original research.
186. For example, an injunction might have prevented a riot in State v. Hoffman, 199 N.C. 328, 154 S.E. 314 (1930).
188. E.g., Cathey v. Norfolk & W. Ry., 228 F. 26 (4th Cir. 1915); Charleston Dry Dock & Mach. Co. v. O'Rourke, 274 F. 811 (E.D.S.C. 1921); Employers' Teaming Co. v. Teamsters' Joint Council, 141 F. 698 (C.C.N.D. Ohio 1901); Otis Steel Co. v. Iron Molders' Union, 110 F.698 (C.C.N.D. Ohio 1901); United States v.
ing, many northern courts, especially federal courts, and many New York judges, would respond that an injunction confined to unlawful conduct could not hurt defendants who swore that they were not engaging in such conduct. These courts understood that withholding injunctive relief merely because the defendant denied the plaintiff's allegations of fact and law would put an end to equitable remedies in labor disputes. For if relief were denied pending a full trial of the issues, the irreparable injury that equity might have prevented would occur. Despite early success with the labor injunction, however, it did not take employers long to realize that they would have to cope with union aggression some other way; the enactment of the Norris-LaGuardia Act in 1932 virtually abolished temporary relief in labor disputes in the federal


The following trial court decisions indicate that a large number of New York judges, quite possibly a majority, felt that no exception to general equity principles should be made in labor disputes. Thus "liberal" New York may have been more "conservative" (and even more "anti-union") than the allegedly "conservative" southern judges: Engelking v. Independent Wet Wash Co., 142 Misc. 510, 254 N.Y.S. 87 (1931) (breach of contract by employer enjoined despite denials); Liebowitz v. Bronx Shoe Salesmen, N.Y.L.J. (Apr. 1, 1927); Greenfield v. Schachtman, N.Y.L.J. (June 25, 1925); Bart v. Markowitz, N.Y.L.J. (Dec. 30, 1924); Russell v. Oberscheuer, N.Y.L.J. (May 10, 1924); Yates Hotel Co. v. Meyers, 195 N.Y.S. 558 (1922); Schlesinger v. Quinto, 117 Misc. 735, 192 N.Y.S. 564, aff'd, 201 A.D. 487, 194 N.Y.S. 401 (1922) (Justice Wagner enjoined employer breach of collective agreement despite doubts of validity of agreement); Schlang v. Ladies' Waist Makers' Union, 67 Misc. 221, aff'd, 124 N.Y.S. 289, 290 (1910) (a somewhat contrary decision in which the judge stated that union denials do not provide injunctive relief but then proceeded to respect the denials). Compare Segenfeld v. Friedman, 117 Misc. 731, 193 N.Y.S. 128 (1922) (Justice Wagner denied injunctive relief against violence by unionists when union denied responsibility; perhaps it all depended, with the author of the Wagner Act, on whose ox was gored); United Traction Co. v. Droogan, 115 Misc. 239, 189 N.Y.S. 39 (1921); Schwartz & Jaffee, Inc. v. Hillman, 115 Misc. 61, 189 N.Y.S. 21 (1921); Pre' Catelan, Inc. v. International Fed'n of Workers, 114 Misc. 662, 188 N.Y.S. 29 (1921); Michaels v. Hillman, 111 Misc. 284, 181 N.Y.S. 165, permanent injunction & damages awarded, 112 Misc. 395, 183 N.Y.S. 195 (1920) (Felix Frankfurter was of counsel to Sidney Hillman in this case, a fact that may help to explain the strong stand against injunctions taken ten years later in his book, FRANKFURTER & N. GREENE, supra note 134); New York Cent. Iron Works Co. v. Brennan, 105 N.Y.S. 865 (Sup. Ct. 1907); W.P. Davis Mach. Co. v. Robinson, 41 Misc. 329, 84 N.Y.S. 837 (1903); Foster v. Retail Clerks' Int'l, 39 Misc. 48, 78 N.Y.S. 860 (1902).

courts, and the United States Supreme Court's preemption doctrine has accomplished a similar function in the state courts, except for cases of blatant violence.190

The application of general equity principle to labor disputes was less clear in the South than in the North, owing in part to the scarcity of thoughtful and thorough discussion of equitable remedies in the southern labor-injunction cases. Perusal of the cases reveals not a single one in which the pure doctrine of temporary equitable relief is stated, at least not with any great power. That is, no southern court seems to have said that once a prima facie case of illegal conduct and irreparable injury is made, the complainant may dispense entirely with proof that the unlawful conduct is actually occurring. Likewise, few if any southern courts said, as northern judges did so often, that if the union denied the allegations of unlawful conduct it could scarcely complain of an injunction specifically and narrowly addressed to the conduct denied. If the reader inspects the cases cited to this paragraph, he or she will see practically every southern court taking a close look at the evidence before affirming temporary relief. This has been especially true of the North Carolina courts, but the other southern cases do not differ greatly. They may deny the necessity of full proof of the facts when a prima facie case is made, but they nevertheless examine the facts closely in reviewing the decrees.191

The foregoing discussion has been confined to the courts that seem to have accepted the prima-facie-case principle of temporary, interlocutory relief. While no court to my knowledge has explicitly rejected this principle, many, North and South, have done so in fact. The worst offenders have been some of the New York courts.192 While many New York judges followed the normal

190. See note 181 supra.


192. One of the worst was Justice Wagner, who was to have the original National Labor Relations Act named after him. Compare Schlesinger v. Qunito, 117 Misc. 735, 192 N.Y.S. 564, aff'd, 1981...
practice of issuing or affirming temporary relief, despite union denials, when a prima facie case of illegality was made, other New York judges withheld relief or reversed grants of relief, on the ground that the complainant did not adequately prove that the conduct alleged was occurring. Throughout the South, as in the North, adherence to basic equity principle was spotty in labor cases. While southern courts tended to require considerable evidence of illegal conduct before they would enjoin or affirm injunctions against union action in labor disputes, even while saying that only a prima facie case was needed, many of the southern judges went considerably further in denying relief, or in reversing grants of relief. Never did they say that as much proof is required to get a preliminary injunction as there is to get a permanent injunction, but they often seemed implicitly to expect as much.

In doing the research for this Article it occurred to me that something might be learned about judicial attitudes in the South by carefully examining the way in which appellate judges reviewed the findings and conclusions of trial judges in labor-injunction cases. Here too, however, nothing very enlightening or surprising turned up. Like their northern colleagues, southern appellate judges took the usual position that the factfindings and orders of trial

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201 A.D. 487, 194 N.Y.S. 401 (1922) (employer breach of collective agreement enjoined despite doubts of validity of agreement) with Segenfeld v. Friedman, 117 Misc. 731, 193 N.Y.S. 128 (1922) (injunctive relief against violence by unionists denied when union claimed no responsibility).

193. See cases cited in note 188 infra.


195. Hotel & Restaurant Employees Int'l Alliance v. Greenwood, 249 Ala. 265, 30 So. 2d 696 (1947), cert. denied, 332 U.S. 847 (1948); Hotel & Restaurant Employees Local 156 v. Cothren, 39 So. 2d 366 (Fla. 1952); Johnson v. White Swan Laundry, 41 So. 2d 865 (Fla. 1949); Johnson v. White Swan Laundry, 41 So. 2d 865 (Fla. 1949); Henderson v. Coleman, 150 Fla. 185, 7 So. 2d 117 (1942); Weissman v. Jureit, 132 Fla. 861, 181 So. 898 (Fla. 1938); Millwrights Local 2484 v. Rust Eng'r Co., 433 S.W.2d 683 (Tex. 1968); Truck Drivers Local 941 v. Whitfield Transp., Inc., 154 Tex. 91, 273 S.W.2d 157 (1954); Ex parte Tucker, 110 Tex. 335, 220 S.W. 75 (1920); The Fair, Inc. v. Retail Clerks Local 131, 157 S.W.2d 716 (Tex. Civ. App. 1941); Tipton v. Hotel Employees Local 808, 149 S.W.2d 1028 (Tex. Civ. App. 1941); ILGWU Local 123 v. Dorothy Frocks Co., 95 S.W.2d 1346 (Tex. Civ. App. 1936).

196. The outstanding case of reluctant appeals-court acceptance of a trial court's decision (to
judges should not be disturbed in the absence of a mistake of law, an abuse of discretion, or a gross misreading of the evidence. In a majority of the cases, as we have seen, the decisions of the trial courts were affirmed. The only exceptions were in Florida and Texas where in certain cases there were a disproportionate number of reversals. In both states, however, the reversals favored union defendants. If this suggests an anti-union set in the trial judges, it also suggests a pro-union set in Florida and Texas appellate judges.

The single most important fact about the labor-injunction cases in the South, as in the North, is that they all reflect a tendency in the judges to use injunctive relief much more sparingly against unions than against defendants in other equity cases. If the principles stated by Lord Diplock in the *American Cyanamid* case and by Federal Judge Noland in the *Rutherford* case were applied without modification in the typical labor case, injunctive relief would never be denied against coercive union action. Either by the common law or by statutes, all coercive union action is prima facie unlawful (or actionable). Furthermore, in every case of coercive union conduct the harm to employers and to nonunion or anti-union employees ensuing from a denial of relief is immeasurably greater than the harm to unions ensuing from a grant. While unions lose nothing that the law is designed to protect when they are enjoined from coercive action, when there is even the slightest delay in granting injunctive relief employers and nonunion or anti-union employees suffer severe damage of the type the law is designed to prevent or discourage.

This is not to say that injunctions are always one hundred percent effective in labor disputes. But they are the best remedial and protective measures that the legal system has as yet produced. The severe impairment of the availability of injunctive relief in labor disputes, North and South, created by anti-injunction laws and the preemption doctrine thus amounts to a national catastrophe. The charge that southern judges are anti-union, clearly unsupported by the cases, pales into insignificance against this fact.

### D. Contempt in the Southern Labor Injunction Cases

The preceding sections of this Article, like the first installment, all reveal that the southern courts have been at least as indulgent toward union conduct as the most "liberal" northern courts have been, and markedly more indulgent than the "conservative" northern courts have been. It would therefore have been surprising to find the southern courts stricter in contempt cases, and the cases spare us any such surprise. The indulgent attitude of the southern courts

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198. See notes 132-54 and accompanying text supra.
199. See notes 25-27, 85-87 and accompanying text supra; see also Table 1 infra.
200. See notes 46-52, 64-72, 109-16 and accompanying text supra; see also Table 1 infra.
201. The substantive-law basis of the labor injunction is developed at length in Part III of this Article, to be published in volume 60 of this Review.
toward unions continues in the contempt cases, even those in which union defendants blatantly defied the decrees that the southern courts finally issued.\(^{202}\)

The normal rule in this country is that collateral attacks upon injunctions are not permitted in contempt proceedings. Even void orders must be obeyed.\(^{203}\) Although this rule is followed in some southern states,\(^{204}\) in several southern states the courts permit collateral attacks.\(^{205}\) Perhaps this is another reason for the disrespect so frequently shown southern decrees.\(^{206}\)

Respect for southern labor injunctions is not encouraged, either, by those judges who believe that they inhibit picket-line coercion by “limiting” the number of pickets to twenty-five.\(^{207}\) Of course, contumacious unionists have often been found in contempt by southern judges, usually after conscientious trials.\(^{208}\) But one wonders how significant such findings are when penalties for contempt are limited by law to seventy-two hours imprisonment and one hundred dollars, as they are in Texas.\(^{209}\)

\(^{202}\). Derisive disregard of North Carolina and Tennessee injunctions is a constant theme in D. McCracken, supra note 41, e.g. at 107-13, 121-30, 173-86.

\(^{203}\). United States v. United Mine Workers, 330 U.S. 258 (1947); 250 Ala. 64, 33 So. 2d 324 (1947).

\(^{204}\). E.g., Georgia. See, e.g., Mason & Dixon Lines, Inc. v. Odom, 193 Ga. 471, 18 S.E.2d 841 (1942).

\(^{205}\). See Ex parte Hacker, 250 Ala. 64, 33 So. 2d 324 (1947). See also Ex parte George, 371 U.S. 72 (1973) (per curiam), vacating and remanding 163 Tex. 103, 358 S.W.2d 590 (1962), decision on remand, 364 S.W.2d 189 (Tex. 1963) (defendant discharged); Ex parte Dilley, 160 Tex. 522, 334 S.W.2d 425 (1960); Ex parte Twedell, 158 Tex. 214, 309 S.W.2d 834 (1958); Ex parte Henry, 147 Tex. 315, 215 S.W.2d 588 (1948); Ex parte Tucker, 110 Tex. 335, 220 S.W. 75 (1920). The virtual equivalents of collateral attack have been allowed in North Carolina, Carolina Freight Carriers Corp. v. Teamsters Local 61, 11 N.C. App. 159, 180 S.E.2d 461, cert. denied, 278 N.C. 701, 181 S.E.2d 602 (1971); and Tennessee, American Glanzstoff Corp. v. Miller (Tenn. Ch. 1929) (reviewed in D. McCracken, supra note 41, at 94-113) (no further citation available). \(\text{But see Nash-}


\(^{208}\). See cases cited at note 206 supra.

III. Final Conclusions

In every area of law or legal administration examined in this and the preceding installment, as well as in many other areas that have not been included for lack of space, we have found the southern courts dealing at least as gently with trade-union aggression as the most "liberal" northern courts ever did, and far more gently than the "conservative" judges did in either the federal courts or the state courts of the more industrialized northern states. This has been true with respect to both substantive-law rules and the even more significant procedural doctrines and principles of the labor-injunction cases.

In the substantive-law areas of strikes, picketing, boycotts, compulsory unionism, violence, and other tortious conduct, we have seen that the southern courts largely adopted the views prevailing in the most "liberal" northern state, New York. In my opinion, however, the most significant and revealing comparison we have made is that of the practices of the southern courts and the New York courts in the labor-injunction cases.

While a number of New York trial judges virtually negated equitable remedies against coercive union conduct, an even greater number applied equitable principles as rigorously against union aggression as anyone could reasonably desire. The same cannot accurately be said of any of the southern decisions. None "laid down the law" as sternly to unions as a majority of New York trial judges did. This, it seems to me, is the most remarkable fact turned up in the present research. It alone should put forever to rest the belief that "unions have done badly in the South" because of legal-institutional restraints or anti-union bias in the southern courts.

The material in this installment has strengthened my conviction that those who complain of institutional anti-unionism in the South have things backwards. It is not true that unions have done badly in the South because of institutional anti-unionism. The truth is, I believe, that the South did badly, until recently, mainly because of its antibusiness, anticapitalist tendencies, of which pro-unionism was one of the most significant manifestations.

Undoubtedly there were other reasons for the South's undeveloped condition until relatively late in this century. Lack of capital was of course the generic deficiency. However, with the kind of capital investment that we see being made in Taiwan and South Korea, one must wonder why capital did not flow to our South earlier. The answer has to lie generally in deficient politico-economic institutions. I believe that these Articles contribute a little to our understanding of that deficiency.

Unions did not do badly in the South because of southern anti-unionism. The South did badly in part because it was pro-union. The South dealt slightly more firmly with unions after World War II, when unions had become so powerful in the North that they were driving capital out of such states as Massachusetts, which had become an industrial powerhouse earlier in the century partly because of its vigorous judicial resistance to coercive, monopolistic unionism. But when capital came to the South after World War II, it brought along a firm intention to dispense with unions as far as possible.
The most powerful specifics available to employers against unionism are sound and humane personnel policies. The large companies have brought such policies with them in their migration to the sun belt. These companies have also developed relatively sophisticated communication techniques aimed at convincing employees that the interests they have in common with their employers far outweigh those in conflict. These policies and techniques have at least raised doubts in the minds of southern employees over the desirability of union representation. This is why union organizers do not have an easy time "organizing" southern workers. Naturally they prefer to attribute their lack of success to the alleged viciousness of employers. However, in view of the National Labor Relations Act's heavy bias towards unions and against employer resistance to unionism and the National Labor Relations Board's rigorous stand against even the mildest kinds of employer coercion, these union complaints will not be taken seriously by any informed person. Anyway, if employees want unions they will have them, no matter how vigorously employers resist.

Law enforcement in labor disputes may be improving in the South. By this I mean that southern courts today may be less inclined to tolerate union coercion than they used to be when the South was largely undeveloped. However, I do not mean to say that southern judges are requiring unionists to conduct themselves in the same peaceful and civilized manner required of most other elements of society, especially businesses. Unions have acquired coercive privileges denied to most others. In a well-run, civilized society, nothing faintly resembling the coercion of picketing would be allowed, nor would monopolistic boycotts be tolerated. Furthermore, no social resources would be spared in coping with violent union action. But obstructive picketing, monopolistic boycotts, and union violence go to a considerable extent unchecked in many areas of the South (as they do in the North). Hence, while it may be true that law enforcement in labor disputes is improving in the South, there is still a long way to go. In any event, the idea that unions are doing badly in the South because the law is weighted against them is simply laughable.

Since they have rejected free, productive competition as a means of gaining their ends, American unionists, like many other monopolists, are driven constantly to seek immunity for their aggressions. For them, the ideal state of affairs exists when government prevents anyone from interfering with union control of labor markets. If this requires the state on the one hand to bar Japanese imports and on the other to provide special privileges and immunities to unions engaged in violently preventing fellow-Americans from working during strikes, then that, according to unionists and their sympathizers, is the way society ought to be arranged. When unionists complain that the dice are loaded against them in the South, their lament really amounts to this: southern courts should quit enforcing against unions the laws that apply to all others. But if the materials collected and described in these Articles have any meaning at all, they mean that American courts, North and South, are already granting unions special privileges and immunities. That being the case, the
laments must mean that unionists will not be content until they achieve a status of total privilege.

The time is now probably past in this country when such a goal, largely achieved by British trade unionists earlier in this century, is feasible. Hard experience with unionists and relatively satisfactory experience with private employers have produced a largely unfavorable opinion of trade unions in this country. I expect that this opinion will grow. After all, unions produce nothing in the best conditions, and when they enjoy special privileges they also prevent others from producing. This is scarcely a way to endear oneself to a country already suffering from low productivity.

Thus we emerge, finally, with some odd conclusions. We conclude first that unionists are wrong in contending that they have done badly in the South in the past because of anti-union legal institutions. But our second conclusion is that unionists over the next decade or so may be able to assert quite accurately that they are doing badly in the South (and in the North) because they are being made more and more to comply with the same code of civilized law that other members of society must observe.
### Table 1

**General Summary of 186 Southern Labor-Injunction Cases**

#### Pre-1942 Cases

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* That is, by lowest court in which injunction was sought. The succeeding divisions, "Aff'd," etc., indicate final disposition of the case on appeal, either to the intermediate appellate court or to the highest court of the state. The preemption column contains decisions by state courts and the U.S. Supreme Court, holding the state courts without jurisdiction in the particular case. In order to eliminate double counting, the cases in the preemption column do not appear elsewhere, even though they usually involve affirmation of an injunction granted below or a decision that an injunction should have been granted, except for preemption.