Judicial Creativity and State Labor Law

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That courts must and do make law is a proposition which no longer admits of debate. What remains debatable, however, is whether they choose the proper subjects and occasions for exercising their law-making powers as well as whether the products which they fashion are the best or most suitable for governing the affairs to which they will apply. Logically these questions involve separable issues, although there is a noticeable tendency on the part of some commentators to refer to the products of which they disapprove as judicial legislation and to those of which they approve as fine examples of common law sensitivity to the needs of the times. It is with this understanding and caution that the following analysis of two recent creative decisions of state courts in the field of labor law is offered.

In the first of these cases, Krystad v. Lau, the Washington Supreme Court held that employees who had been discharged because of their union membership were entitled to an order reinstating them to their former positions as well as an injunction against any future interference, restraint, or coercion by the employer in relation to their joining a labor organization or designating it as their bargaining representative. The basis for the court's determination was found in the statement of public policy contained in Washington's little Norris-LaGuardia Act.

The second of the cases, Johnson v. Christ Hospital, held that under the law of New Jersey employers must bargain collectively with properly chosen representatives of their employees and that to enforce this obligation a superior court might order an election to be held by an independent agency chosen by the parties, or appointed by the court, in a unit determined to be appropriate by the court. The basis for the New Jersey court's determination was found in the rights and privileges

* Professor of Law, University of Washington. The author wishes to acknowledge that at an early stage in the development of Krystad v. Lau, discussed in this article, he was consulted by counsel for the employer. He took no part in the litigation of the case.

1 See, e.g., Cardozo, The Growth of the Law (1924); Cardozo, The Nature of the Judicial Process (1921); Frank, Courts on Trial (1950); Frank, Law and the Modern Mind (1930); Gray, The Nature and Sources of Law 84-112 (2d ed. 1921); Levi, An Introduction to Legal Reasoning (1949); Traynor, Comment on Courts and Lawmaking in Legal Institutions Today and Tomorrow 48 (1959); Keeton, Creative Continuity in the Law of Torts, 75 Harv. L. Rev. 463 (1962).


3 Wash. Rev. Code §§ 49.32.010-.910.

article of the New Jersey constitution of 1947. It is a single sentence reading,

Persons in private employment shall have the right to organize and bargain collectively.\(^5\)

The significance of these cases is limited by the doctrine of federal pre-emption\(^6\) and at most the substantive principles declared will have application only in those areas in which the NLRB does not have jurisdiction or in which it has declined to exercise its jurisdiction.\(^7\) Thus, in the Washington case the state court had jurisdiction because the employer realized gross receipts of less than 500,000 dollars in conducting a laundry business and therefore did not satisfy the requirements which the NLRB has established for the exercise of its jurisdiction in such cases.\(^8\) In the New Jersey case, the employer was a charitable hospital, and hence not an employer within the meaning of the National Labor Relations Act.\(^9\) For this reason there was no dispute with respect to the state court's jurisdiction over the matters involved.\(^10\)

Putting these limitations aside, it is apparent that both holdings go beyond what is immediately suggested by a reading of the supporting texts, and thus share the touch of judicial creativity. The New Jersey decision, which involves the court in a more elaborate undertaking, serves to mark the extent to which the policy embraced by the Washington court may carry in the development of state labor law. Both excite inquiry as to the proper role of courts in the development of new legal principles.

I. Krystad v. Lau

The fact pattern of the Washington case leaves no doubt that the discharges involved occurred because the employees had joined a labor

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\(^5\) Art. I, para. 19.


\(^7\) In 1959 Congress authorized the NLRB to decline to assert its jurisdiction over labor disputes which, in the opinion of the NLRB, did not have a sufficient impact on interstate commerce to warrant the exercise of NLRB jurisdiction. State courts may assert jurisdiction over disputes as to which the NLRB has declined to assert its jurisdiction. Act of Sept. 14, 1959, § 701(a), 73 Stat. (1959), 29 U.S.C. § 164(c) (1) & (2) (1964).


union. The employer, an American citizen of Chinese ancestry, had
previously experienced difficulties with the Laundry and Dye Works
Drivers' Union, which in 1947 refused to admit him to membership
because of his race. In 1961 when four of his fifty-eight employees
joined the union and designated it as their bargaining agent, he
summarily discharged them, solely because they had done so. The four
employees thereupon brought what the Washington Supreme Court re-
ferred to as a unique action, seeking damages and an injunction
against coercion or interference with an asserted right to join and
designate a union as a collective bargaining agent. The employer moved
for a summary judgment, resting his case upon the proposition that
under Washington law he had a right to discharge employees because
of their union activities.

The trial court granted the employer's motion, acting, as the supreme
court saw it, with "few, or perhaps no, guideposts in the literature."11
Indeed, after extensive research the Washington Supreme Court found
but one authority which it considered directly in point. While the
authorities were not quite so limited as suggested by the supreme
court's citations, their scarcity provides some evidence that the Wash-
ington court was entering an area which few courts had previously
entered or had even been invited to enter. On the other hand, the
authorities were abundant and there seemed to be no question that
at common law an employer could terminate employment at will by
discharge without cause or for any cause however frivolous, including
an employee's union membership.12 The question as seen by the court
was whether this rule had been changed by statute. The statute upon
which the appellant employees placed principal reliance was the state's
little Norris-LaGuardia Act. The court said:

The whole case resolves into a problem of statutory construction.

Does Laws of 1933, Ex. Ses., chapter 7, § 2, p. 10 (RCW 49.32.020,
the little Norris-LaGuardia Act), grant employees an affirmative, sub-
stantive right to be free from interference, coercion, or restraint by the
employer in joining a labor union? Or, is this section purely a declara-
tion of policy to aid the courts in interpreting the remainder of the act?13

13 Id. at 805-06, 400 P.2d at 74. Appellant employees also placed reliance upon a
statute enacted in 1919 and now found in WASH. REV. CODE § 49.36.010, which declares
that it shall be lawful for working men to organize labor unions for the purpose of
lessening hours of work, increasing wages, or otherwise bettering conditions of the
members of such organizations. The Supreme Court apparently viewed the statute as
declaratory of common law principles developed from the decision in Commonwealth
Having put the question for decision as one of construction of a relatively recent statute, the court then undertook an historical survey of the law applicable to labor unions, beginning with the Statute of Labourers,\(^\text{14}\) enacted in 1349 in response to the labor shortage caused by the great plague. The purpose of this survey appears to have been to establish that as of 1933 the common law in the state of Washington had evolved with statutory support, to the point where labor unions were recognized as lawful and legitimate organizations. Thus the little Norris-LaGuardia Act was taken to have some purpose in addition to that of legitimizing labor unions.\(^\text{15}\)

Section 2 of the Washington little Norris-LaGuardia Act makes the following statement of policy:

In the interpretation of this chapter and in determining the jurisdiction and authority of the courts of the state of Washington, as such jurisdiction and authority are herein defined and limited, the public policy of the state of Washington is hereby declared as follows:

WHEREAS, Under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protections; therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the state of Washington are hereby enacted.\(^\text{16}\)

The Supreme Court of Washington reached the conclusion that in enacting this statement of policy the legislature of Washington intended to confer substantive rights on employees for the violation of which actions might be brought. The alternative conclusion which the court might have reached was that the declaration was intended to be only an aid to construction of other provisions of the act defining and limiting the jurisdiction of Washington courts in the issuance of injunct-

\(^{14}\) 1349, 23 Edw. 3, c. 1 (repealed).
\(^{15}\) 65 Wash. Dec. 2d at 812, 400 P.2d at 79.
\(^{16}\) Wash. Rev. Code § 49.32.020.
tions in labor disputes or the enforcement of "yellow dog" contracts. Under this alternative the policy statement itself would have created no legally enforceable rights.

The single authority which the court found to be in point was the decision of the Supreme Court of Wisconsin in Trustees of Wisconsin State Fed'n of Labor v. Simplex Shoe Mfg. Co.\textsuperscript{17} The Wisconsin State Labor Code\textsuperscript{18} contained provisions which included a statement of policy very similar to that of the Washington statute. The Wisconsin court concluded that the statement of policy conferred upon employees the substantive and enforceable right to be free of interference, restraint or coercion of employers in matters of self-organization or designation of bargaining representatives. It held that an injunction might issue restraining the defendant employer from engaging in such conduct.

Support for the conclusion reached by the Washington Supreme Court was also found in decisions rendered under which the court considered to be analogous legislation—the Railway Labor Act.\textsuperscript{19} This act established machinery for settling labor disputes which arose in the railroad industry, relying extensively upon mediation and voluntary submission to arbitration with judicial enforcement of awards.\textsuperscript{20}

Disputes not adjusted under these processes may be subjected to investigation by an emergency board appointed by the President, with a further provision that no change of conditions shall be made by the parties, except by agreement, for a period of thirty days after appointment of the emergency board.\textsuperscript{21} The act provides that all disputes between a carrier and its employees shall, if possible, be settled between the carriers and authorized employee representatives.\textsuperscript{22} The employee representatives select the labor members of the Railroad Adjustment Board which is established by the act to hear certain disputes submitted for arbitration\textsuperscript{23} as well as the members of boards of arbitration which hear other types of disputes.\textsuperscript{24} The act also provides that the employee representatives shall be designated "without interference, influence, or coercion..."\textsuperscript{25} by carriers, but it states no remedy or penalty which may be invoked if carriers resort to such tactics in dealing with their employees.

\textsuperscript{17} 215 Wis. 623, 256 N.W. 56 (1934).
\textsuperscript{18} Wis. Stat. §§ 268.18, 268.24 (1933).
In *Texas & New Orleans R. Co. v. Brotherhood of Ry. & S.S. Clerks*, the Supreme Court of the United States held that the absence of a statutory penalty against interference, influence or coercion of employees in designating their representatives did not control the question of whether a carrier might be enjoined from engaging in such conduct. Because the system of negotiation, mediation, and arbitration depended upon the existence of freely chosen representatives, that kind of conduct would thwart the declared purpose of the legislation. Even with regard to failure to comply with arbitral awards the statute made no provision for penalties. The Court concluded that remedies existed for violation of the rights stated in the statute even though no remedies were stated in the statute. Accordingly it affirmed a decree entered in contempt proceedings directing a railroad company to disestablish a company union, to reinstate the previously authorized union as representatives of its employees, and to restore to service certain employees who had been discharged. The Supreme Court said:

The absence of penalty is not controlling. The creation of a legal right by language suitable to that end does not require for its effectiveness the imposition of statutory penalties. Many rights are enforced for which no statutory penalties are provided. . . . The right is created and the remedy exists.

The Washington court also found support for its conclusion that the policy statement of the little Norris-LaGuardia Act had created substantive rights in a number of its previous decisions under the act. These decisions did not involve the precise point presented in *Krystad v. Lau*, but they were taken to point in the direction of the substantive construction because of language which had been used that indicated the policy section was more than an aid to construction.

Turning to the legislative history of the federal Norris-LaGuardia Act, the Washington court decided that the purpose of the legislation was to impose a curb on the jurisdiction of the district courts of the United States, but it concluded that the curb had been accomplished.

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26 281 U.S. 548 (1930).
27 Id. at 568.
28 Id. at 569.
29 Id. at 569-70.
31 The sole citation to the legislative history in the opinion was to 75 Cong. Rec. 5461 (1932), which must have been the result of a clerical error, since that page contains no discussion of the Norris-La Guardia Act.
by both a grant of rights and a limitation of powers. Noting that section 3 of the act had the substantive effect of making "yellow dog" contracts unenforceable legally as well as equitably, the court concluded that the policy language of section 2 was suitable to a finding of secondary purposes other than that of limiting the court's power in issuing injunctions in labor disputes.

For the purposes of this article, the significant thing is that the majority opinion purports to do no more than carry out the intent of the legislature which adopted the little Norris-LaGuardia Act. According to the majority's analysis, the court played no creative role. The majority did not view the case as one in which the court, using its own powers to make and revise judge-made law, had looked to legislative sources for guidance in formulating the rule which would be applicable to the changed conditions of society. Instead, the court purported to do merely what the legislature had dictated in 1933. The case was said to have resolved into one of statutory construction.2 The court gave the words of the policy statement their usual and ordinary meaning so that it could determine the legislative intent.3 The court's guiding rule and major goal was, "to seek out, ascertain and give effect to the legislature's intentions...."4

Judge Hill, with whom Judges Weaver and Ott concurred, dissented. As he saw it, the court was, "legislating—skillfully, graciously, and in a righteous cause, but nonetheless legislating."5 He found it difficult to understand why such a lengthy opinion was necessary if the result reached was simply what a statute commanded. The change in law—and he was certain that there had been a change in law—was one which should be made by the legislature prospectively and not by the court retroactively.

Without accepting Justice Hill's view that the majority opinion in effect constituted "legislation," with the implication that it thereby violated constitutional principles, one may readily agree with his conclusion that the result reached was not, as the majority said it was, simply a consequence of the legislative intent or purpose underlying the little Norris-LaGuardia Act. Indeed, familiarity with the history of the federal Norris-LaGuardia Act compels one to the conclusion that it was not.

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2 65 Wash. Dec. 2d at 805, 400 P.2d at 74.
3 Id. at 820, 400 P.2d at 82.
4 Id. at 819, 400 P.2d at 82.
5 Id. at 822, 400 P.2d at 83.
II. THE Norris LaGuardia ACT

It must be remembered that at the time the Norris LaGuardia Act was adopted the prevailing constitutional view was that the power of Congress under the commerce clause did not extend to regulation of manufacturing even though the products of manufacturing might later move in interstate commerce. According to that view Congress could not legislate under the commerce clause upon substantive matters affecting the relations between employees and their employers. The adoption of the Norris-LaGuardia Act also preceded the decision in *Erie R.R. v. Thompkins*, and, though federal courts then applied federal common law in diversity cases under the doctrine of *Swift v. Tyson*, the substance of that federal law was developed by the courts exercising judicial power and not by Congress exercising legislative power. For present purposes it is irrelevant whether those doctrines were correct for the times or that they have subsequently been abandoned. The important thing is that it was with this view of its powers that Congress undertook to pass the Norris-LaGuardia Act.

The theory upon which the draftsmen drew to support the act was that since Congress has the power to create the inferior federal courts under article III, section 1 of the United States Constitution, it could define and limit the jurisdiction of those courts as it saw fit. This was the view expressed in congressional debates. This was the constit-

37 304 U.S. 64 (1938).
39 Thus Senator Blaine of Wisconsin, one of the supporters of the bill, stated in the Senate debates:

It [the bill] is drawn upon the theory that Congress has authority to define and limit the jurisdiction of the Federal courts, other than original jurisdiction conferred upon the Supreme Court by the Constitution. All inferior Federal courts are created by law and it is within the power of Congress to prescribe their jurisdiction. This power has heretofore been exercised on numerous occasions, and has often been recognized by the Supreme Court.

Proceeding upon this theory, this bill defines and limits the jurisdiction of the Federal courts in the issuance of injunctions in cases involving and growing out of labor disputes. It limits this jurisdiction both with reference to the situations in which injunctions may be issued and the procedure which must be followed. 75 Cong. Rec. 4626 (1932) (remarks of Senator Blaine).

Other statements indicating a similar understanding of the Constitutional basis for the legislation appear throughout the debates. See, e.g., Id. at 4693 (remarks of Senator Walsh); Id. at 4776 (remarks of Senator Logan); Id. at 5005 (remarks of Senator Logan); Id. at 5502 (remarks of Representative Sweeney).

Of particular relevance in determining the effect of the policy provision of the act is the following statement made by Senator Blaine:

"... I just want to suggest to the Senator, if he will permit, that that is my conception of the bill, that the primary purpose of the bill is to make the so-called "yellow-dog" contract unenforceable in the Federal courts, and that the declaration of public policy perhaps has no other effect than to aid the court in the inter-
tional basis advanced by the then Professor Frankfurter, and his colleague Nathan Greene, whose scholarly research provided so much of the support for the legislation. The same view was expressed by Edwin E. Witte, who with Professor Frankfurter had been called to assist Senator Norris in the drafting of a predecessor of the bill which ultimately became law. Frankfurter and Greene were explicit on the point that the law went only to restrict and limit equitable remedies and not to making substantive changes in the law. "[T]he immunity accorded is circumscribed: it is not immunity from legal as distinguished from equitable remedies, —hitherto unlawful conduct remains unlawful. . . ." "Yellow Dog contracts' are not invalidated; they are only rendered unenforceable in the federal courts." Indeed, the bill was criticized by one of those upon whom Senator Norris had called for assistance because it went simply to the remedy and not to substantive law.

Many of the abuses which led to enactment of the Norris-LaGuardia Act did not occur as a result of actions at law and hence desired reform could be achieved without change in the substantive law. Thus com-

40 Frankfurter & Greene, The Labor Injunction 208-11 (1930); Frankfurter & Greene, Congressional Power Over the Labor Injunction, 31 Colum. L. Rev. 385, 401, 407-09 (1931)

41 Witte, The Federal Anti-Injunction Act, 16 Minn. L. Rev. 638, 649 (1932).
43 Frankfurter & Greene, The Labor Injunction 215 (1930).
44 Frankfurter & Greene, Congressional Power Over the Labor Injunction, 31 Colum. L. Rev. 385, 401 (1931)
45 S. Rep. No. 1060, supra note 42
46 Sayre, Labor and the Courts, 39 Yale L.J. 682, 684 (1930).
plaints were directed at the issuance of ex parte restraining orders or temporary injunctions on the basis of only the employer's presentation. In many instances this was dispositive of the matter, since the employer could continue his campaign to destroy the union while the union stood immobilized by the order. Complaints had also gone to the vagueness and obscurity of injunctions directed to uneducated workmen, leaving them with no certainty as to what they might do or not do in pursuit of their dispute with their employer. Violations of the terms of injunctions resulted in trials without juries before the judges who had issued the injunctions. The doctrine of conspiracy had produced contempt convictions in situations in which the defendants had neither participated in nor authorized the acts constituting a violation, and this also had given rise to criticism. Withdrawal of the equity jurisdiction of the federal courts provided a means of eliminating these grievances with the existing system, and a substantial victory for labor could be accomplished by a jurisdictional or remedial approach to the question.

The withdrawal of equity jurisdiction was not complete, although the practical application of the law came close to achieving that result. Section 4 of the act sets out a comprehensive list of types of conduct involved in labor disputes not subject to injunction, and section 7 of the act requires as the condition for the issuance of any injunction in a labor dispute that the court make findings of fact which can not be made in most cases. Other procedural limitations respecting the issuance, breadth and enforcement of injunctions contemplate that in at least some instances injunctions will be issued. The significance of these features for present purposes is the emphasis they give to the orientation to remedies and not to substance.

48 Id. at 89-105. See also 75 Cong. Rec. 4625 (1932) (remarks of Senator Blaine); id. at 4689 (remarks of Senator Walsh); id. at 4770 (remarks of Senator Norris); id. at 4919 (statement of Mr. Hogue); id. at 5464 (remarks of Representative O'Connor).
49 Id. at 56-59, 123-33. See United Bhd. of Carpenters v. United States, 330 U.S. 395, 419 (1947) (Frankfurter, J., dissenting). See also 75 Cong. Rec. 4620, 4625 (1932) (remarks of Senator Blaine); id. at 4689 (remarks of Senator Walsh).
50 See, e.g., United States v. Debs, 64 Fed. 724 (N.D. Ill. 1894). See also 75 Cong. Rec. 4507, 4508 (1932) (remarks of Senator Norris). Id. at 5464 (remarks of Representative O'Connor).
52 41 Stat. 71 (1932), 29 U.S.C. § 107 (1964). For example, the court must find, among other things, "That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection." 47 Stat. 71 (1932), 29 U.S.C. § 107(e) (1964).
One of the reasons for limiting the jurisdiction of federal district courts in the issuance of injunctions in labor disputes is also relevant to the question of judicial creativity in the field of labor law. Certainly a great deal of support for the legislation came from those who saw the matter simply as a case of the courts having unfairly assumed the role of protector and protagonist of employer interests at the expense of, and without recognition of, the interests of labor. But it also seems clear that, speaking at a higher level of generalization, there had developed a widespread dissatisfaction with the ability of courts to play the role of policy-makers in an area which called for balancing of the fiercely competing demands of labor and industry.

In his famous dissent in *Duplex Printing Co. v. Deering* Justice Brandeis said:

The conditions developed in industry may be such that those engaged in it cannot continue their struggle without danger to the community. But it is not for judges to determine whether such conditions exist, nor is it their function to set the limits of permissible contest and to declare the duties which the new situation demands. This is the function of the legislature which, while limiting individual and group rights of aggression and defense, may substitute processes of justice for the more primitive method of trial by combat.\(^5\)

Speaking of the competition between large aggregations of capital and organizations of labor, Frankfurter and Greene said,

Wise statesmanship here enters to determine at precisely what points the cost of competition is too great. Primarily this is the task of legislatures. Only within very narrow limits is it the function of courts to apply their own notions of policy.\(^5\)

As they saw it, federal courts, following their own notions of policy under the doctrine of *Swift v. Tyson* had invaded areas of state-made policy and refused to follow it.\(^5\) A questioning attitude toward the ability of courts as policy makers in the labor area also appears in the congressional debates on the Norris-LaGuardia Act.\(^5\)

By removing the injunctive remedy from the scene of labor disputes, Congress put labor unions on a par with employers. Both management and labor could use economic pressure to compel the other to accede

\(^5\) 254 U.S. 443, 488 (1921).
\(^5\) Frankfurter & Greene, op. cit. supra note 43, at 205.
\(^5\) Frankfurter & Greene, supra note 44, at 390
\(^5\) E.g., 75 Cong. Rec. 5470 (1932) (remarks of Representative Browning); id. at 5466 (remarks of Representative Dyer); id. at 5479 (1932) (remarks of Representative LaGuardia)
to demands or at least to reach a compromise on conflicting positions. The laissez-faire doctrine previously applicable to employer conduct with respect to unions was thereby made applicable to union conduct with respect to employers. This was a significant advance for organized labor, but not to be confused with an affirmative intervention by government on behalf of labor such as occurred in the Wagner Act.

It seems clear then, that the Washington court was mistaken in concluding that the statement of policy in the Norris-LaGuardia Act was intended to create enforceable substantive rights. The draftsmen of the act did not believe such power existed. The asserted constitutional basis of the legislation would support no more than a construction going to remedies rather than substance—a construction giving effect to the statute only as a limitation on the jurisdiction of federal courts in the issuance of injunctions in labor disputes and as a withdrawal of both legal and equitable jurisdiction to enforce yellow dog contracts. If this is the correct reading, the Washington court obviously played a creative role in the construction it gave the Washington copy of that act. And there is a special irony in the Washington court having embarked on a creative role, because it did so on the basis of legislation stemming from dissatisfaction with judicial creativity in the field of labor law.

This is not to say that the draftsmen of the Norris-LaGuardia Act would not have undertaken substantive legislation in conformance with the policy statement of the act if they had thought they had the power to do so. Indeed, Frankfurter and Greene even suggested that the policy statement might serve as a guide to the federal judiciary in exercising judicial power to settle the labor controversies which would continue to come before them. As mentioned above, the federal courts had fashioned a federal common law for labor disputes prior to Erie R.R. v. Tompkins. They had also developed a considerable body of law in decisions construing statutes. And, in his opinion in United States v. Hutcheson, Justice Frankfurter demonstrated that the guidance taken from the legislative policy underlying the Norris-LaGuardia Act could and did result in a thorough dismantling of judicial encrustations which had accumulated on labor statutes antedating that act. As he saw it, by the Norris-LaGuardia Act Congress placed its own authoritative interpretation on section 20 of the Clayton Act, dis-

59 Frankfurter & Greene, supra note 44, at 394-95
60 312 U.S. 219 (1941).
placing the construction which the Supreme Court had placed upon it in the *Duplex Printing Co.* decision.\(^6\) The result was a very significant revision of substantive labor law, freeing unions from restraints which had been created by the judiciary. But it was not the equivalent of enactment of a comprehensive law governing employer-employee relations and affirmatively protecting the right to organize. Instead, it is clear that at the federal level another major legislative effort—enactment of the National Labor Relations Act—was necessary to achieve what the Washington court attributed to Washington's adoption of the little Norris-LaGuardia Act.

### III. Other Anti-Injunction Statutes

As mentioned above, the only authority which the Washington court believed to be directly in point was the decision of the Wisconsin Supreme Court in *Trustees of Wis. State Fed'n of Labor v. Simplex Shoe Mfg. Co.*\(^4\) This case involved the Wisconsin version of the Norris-LaGuardia Act. The legislation had been adopted in Wisconsin prior to adoption of the Norris-LaGuardia Act, although apparently it was based upon a bill then pending in Congress incorporating most of the provisions of the Norris-LaGuardia Act.\(^5\) More important for purposes of the present discussion, the Wisconsin act was not drafted as going only to the equity jurisdiction of Wisconsin courts. Instead it made substantive changes in the law. Thus section 3 of the Wisconsin act\(^6\) specifically declared certain types of conduct to be "legal," while section 4 of the Norris-LaGuardia Act provided only that conduct of this nature should not be subject to injunction by suits in federal courts. Moreover, whereas the policy statements of both the federal and Washington statutes begin and conclude with phrases relating the policy statement to determination of the jurisdiction and authority of the respective courts, the Wisconsin statement of policy contains no such designation for its use. To give substantive effect to the policy statement of a statute making substantive provisions of law is quite a different thing from giving substantive effect to a policy statement made for the purpose of construing a statute relating to the equitable jurisdiction of courts. To put it another way, the only case which the

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\(^{62}\) 312 U.S. 219, 234-36 (1941).


\(^{64}\) 215 Wis. 623, 256 N.W. 56 (1934).

\(^{65}\) Wisconsin Laws of 1931, ch. 376. See GREGORY, *op. cit. supra* note 58, at 185-86.

Washington court believed to be directly in point was subject to distinction on significant grounds.

A number of other states have enacted statutes closely modeled after the Norris-LaGuardia Act and containing a similar policy statement. Some states have enacted statutes substantially different but nevertheless containing policy statements recognizable as copies of the policy statement of the act. It appears that the problem with which the Washington court was concerned has not arisen in those states which have adopted little Norris-LaGuardia Acts including the policy statement. However, California courts have considered similar claims based upon a statement of policy for a chapter of the California labor code which is to a large extent copied from the policy statement of the Norris-LaGuardia Act. That policy statement was adopted by the California legislature in 1933, when it outlawed yellow dog contracts but refused to adopt a comprehensive anti-injunction statute. On its face, the policy statement would appear to be applicable only to interpretation of the sections outlawing yellow dog contracts, thus strengthening the analogy to the Washington case. A California District Court of Appeals and the Los Angeles County Superior Court have held, however, that it gives rise to an action for damages or reinstatement with back pay by employees who have been discharged because of their union activities. Other lower court decisions have by dictum indicated that the statute would have such an effect in a proper suit. The authoritative word has not yet been spoken by the supreme court. As will be seen, a decision by Justice Traynor in a related context indicates that the California Supreme Court will not undertake the creative work of fashioning a labor code on the basis of this policy statement. And an earlier California Supreme Court decision refuses...

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67 HAWAII REV. LAWS § 90-13 (Supp. 1963); IDAHO CODE ANN. §§ 44-701—44-713 (1947); IND. STAT. ANN. §§ 40-501—40-514 (1932); MD. ANN. CODE art. 100, §§ 63-75 (1957); MINN. STAT. §§ .07-22 (1946); ORE. REV. STAT. §§ 662.010-622.130 (1953); PA. STAT. ANN. tit. 43, §§ 206a-206r (1964); UTAH CODE ANN. §§ 34-1-23—34-1-34 (1953). There are, of course, other close copies of the Norris-LaGuardia Act, but they do not include the statement of policy found in the federal and the Washington acts.

68 CALIF. LABOR CODE § 923; 7 N.D. CENT. CODE 34-08-02 (1960); 7 WYO. STAT. 27-239—27-245 (1957).


to find a prohibition of union shop agreements through a literal application of the policy statement. Nevertheless, these California decisions do support the position taken by the Washington court and they are more in point than the Wisconsin decision upon which the court primarily relied.

IV. OTHER AUTHORITIES

Another authority upon which the Washington court relied, recognizing that it was only analogous, was the United States Supreme Court decision in *Texas & New Orleans R. Co. v. Brotherhood of Ry. & S.S. Clerks*. As the discussion of that case above indicates, employee freedom from employer coercion was essential to effectuation of the statutory scheme. This was not the case with the Washington Labor Disputes Act, since its provisions limiting the jurisdiction of the courts in labor disputes could be given effect without attributing a substantive effect to the policy statement. Indeed, the United States Supreme Court described the conduct prohibited by the Railway Labor Act as conduct which would thwart the purposes of the act. In this context, the question before the United States Supreme Court was not whether the statutory language was to be given substantive effect. The statutory scheme made it clear that affirmative duties had been created and that the employee freedom in designating representatives must be protected if the balance of the statute were to be effective. The question presented was simply whether the Court would provide certain remedies to protect the rights and enforce the duties which Congress had created. The question before the Washington court was whether substantive rights and duties had been created by the statement of policy. The cases presented distinct and separate questions, and the decision in one does not control the decision in the other.

Decisions of the supreme courts of New Jersey and Missouri which were not brought to the attention of the Washington court provide some support for the result reached, though they involve provisions of state constitutions rather than the policy statement of little Norris-LaGuardia Acts.

As mentioned above, article I, section 19 of the New Jersey constitution of 1947 contains a sentence reading:

74 Shafer v. Registered Pharmacists Union, Local 1172, 16 Cal. 2d 379, 106 P.2d 403 (1940).
75 281 U.S. 548 (1930).
76 See text accompanying note 26 supra
77 281 U.S. at 568.
Persons in private employment shall have the right to organize and bargain collectively.\textsuperscript{78}

The New Jersey Supreme Court recently considered the impact of this provision in a suit brought by nine individuals against an employer, alleging the discharge of some and threats of discharge to others because of their union activities.\textsuperscript{79} The New Jersey court concluded that:

This constitutional provision leaves an employer free to discharge an employee as he sees fit, for good reason or no reason at all, subject only to the limitation that he cannot exercise this right as a subterfuge for interfering with the right of employees freely to organize and bargain collectively.\textsuperscript{80}

For lack of evidence concerning the events which had transpired, the court did not decide to what relief the plaintiffs were entitled, but its decision leaves no doubt that upon proper proof a decree of reinstatement with back pay might be obtained for discharged employees. The court recognized that the granting of such relief was not expressly provided for or directed by the constitution, but it considered such an implementation of a constitutional provision to be well within the equitable powers of a court to grant appropriate relief for a wrong done.\textsuperscript{81}

A similar provision in the constitution of Missouri has received a less expansive treatment in decision of the supreme court of that state. Article I, section 29 of the Missouri constitution provides:

That employees shall have the right to organize and to bargain collectively through representatives of their own choosing.\textsuperscript{82}

In 1957 the Supreme Court of Missouri held that while individual employees may obtain preventive relief by enjoining an employer from further interference with their organizational rights, or damages for violations which had already occurred, they are not entitled to mandatory relief requiring the employer to recognize and bargain with the union of their choice.\textsuperscript{83} More recently, the court again recognized that the constitutional provision had resulted in a modification of an em-

\textsuperscript{78} Art. 1, para. 19
\textsuperscript{80} 36 N.J. 189, 175 A.2d at 644
\textsuperscript{82} Mo. Const. art. 1, § 29.
\textsuperscript{83} Quinn v. Buchanan, 298 S.W2d 413 (Mo. 1957).
ployer's common law right to discharge without cause so that an action for damages might be maintained for a discharge for union activities. But it reversed an order requiring an employer to reinstate the employee with back pay and bargain with the representative he had selected. In both cases the court considered private action infringing constitutional rights to be a legal wrong for which courts should fashion a remedy, but it looked upon any implementation of the constitutional right which would impose affirmative duties upon an employer as a matter for legislative development.

The support which the New Jersey and Missouri decisions give to the result of the Washington case comes in part from the manifested willingness of those courts to fashion legal and equitable remedies for the protection of a stated right. More important, in both states the courts refused to restrict the protection given constitutional rights to protection against governmental invasions alone. This, of course, has been the reading given constitutional rights at the federal level. The approach of the New Jersey and Missouri courts thus involves a degree of judicial creativity in that they have undertaken what might have been left for legislative development. But in the New Jersey case there are indications that the framers of the constitution intended the provision to be self-implementing. And, for purposes of the present discussion, it is less startling to find remedies provided and a substantive meaning given to rights stated in a constitution than it is to find a substantive meaning given to the policy statement of an anti-injunction statute.

84 Smith v. Arthur C. Bane Funeral Home, 370 S.W.2d 249 (Mo. 1963).
88 A decision of the Supreme Court of North Dakota, Sand v. Queen City Packing Co., 108 N.W.2d 448 (N.D. 1961), might also have been relied upon to give support for the Washington decision in the way of a demonstrated willingness of courts to fashion remedies for a stated statutory right. The North Dakota court held that employees discharged for their union activities were entitled to damages by virtue of the state's right-to-work law, even though the statute contained no provision specifically establishing such a remedy. The Supreme Court of Georgia has also fashioned a remedy of damages for employees discharged in violation of that state's right-to-work law, although in the particular case it limited those damages to a week's wages upon the theory that the contract of employment was for a term of one week, Sand v. Mason, 208 Ga. 541, 67 S.E.2d 767 (1951). Other remedies specifically provided for by the statute, including injunction and criminal penalties, were inapplicable to the claim asserted. The Georgia court refused, however, to issue an injunction requiring reinstatement upon the theory that an injunction is not a proper remedy against completed acts. Courts in Texas have not taken such a limited view of that state's right-to-work law, but instead have adopted the position that reinstatement may be ordered for em-
The other major source of authority upon which the Washington court relied lay in decisions which it had previously handed down under the Washington Labor Disputes Act. As mentioned above, these cases did not involve the precise point presented in *Krystad v. Law*, but they were taken to point in the direction of a substantive construction of the policy statement because they had used that statement as support for substantive rules of law which they applied. All but one of these decisions involved the issuance of injunctions against picketing, an area of Washington law which, as Professor Wollett has noted, is marked by the multiplicity of theories applied by the court to judge the legality of picketing and the ease and frequency with which the court has shifted from one theory to another. As Professor Wollett’s detailed account of developments makes clear, the major developments in the litigation under the Labor Disputes Act start with the court’s decision in *Safeway Stores v. Retail Clerks Union, Local 148*,” in which the court held that an injunction might issue because the picketing did not grow out of a labor dispute. The majority reached this conclusion because the union involved did not include in its membership any employee of the employer, and hence, the picketing constituted what is referred to as “stranger picketing.” To reach the conclusion that there was no labor dispute within the meaning of the statute the majority had to ignore the provision of section 13 (c) which provides that,” the term ‘labor dispute’ includes any controversy...concerning the association or representation of persons in fixing, maintaining, changing or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.” This the majority did despite the fact that the provision had been called to their attention and its effect extensively argued in the union’s brief.
The next major development was the court’s decision in *Blanchard v. Golden Age Brewery*, in which the court invalidated sections 7, 8, and 9 of the Labor Disputes Act upon the ground that they constituted an unconstitutional interference by the legislature with judicial power. One might have concluded that the Labor Disputes Act had by this time lost its vitality and was no longer a significant factor in the labor law of Washington. However, three years later the Washington court relied upon the policy statement of the act as a basis for invalidating a municipal anti-picketing ordinance. Even more surprising was the subsequent use of the policy statement in *Gazzam v. Building Serv. Employees Int’l Union* to support the issuance of an injunction against stranger picketing for recognition and a modified union shop. The legerdemain involved in basing the issuance of an injunction in a labor dispute upon the policy statement of a statute designed to prevent the issuance of injunctions in labor disputes incites wonder at the nature of the judicial process—a wonder which grows with recognition that the same feat has been accomplished in other jurisdictions.

In any event, the continued vitality of the Labor Disputes Act was thereafter attested by decisions refusing injunctive relief against what would otherwise have been enjoinable picketing upon the ground that the picketing grew out of a labor dispute within the meaning of the act. Uncertainties grew, however, with respect to exactly what consequences the court would attribute to the policy statement of the act.

Thus, in one case a union which represented only one employee out of twenty-five picketed in support of a union demand for a contract with a union shop clause. The case grew out of a labor dispute
within the meaning of the act and within the meaning which the court
had also developed because the one employee was a member of the
union. However, the court held that the picketing should be enjoined
upon the theory that, in violation of the policy statement, the union
sought to compel the employer to coerce his employees into joining
the union. After remand of the case the union dropped its demand
for a union shop contract, but continued to picket, in part to divert
trade to union shops and in part for the purpose of persuading the
non-union employees to join the union. The trial court thereupon
dissolved the injunction, and on the second appeal the supreme court
held that it had done so properly. No explanation was given as to
why the use of economic pressure to obtain members through a union
shop contract violated the policy statement, while the use of economic
pressure to obtain members through a threatened curtailment of an
employer's business did not. Indeed, within five years the court
handed down a decision holding that the latter type of pressure did
violate the policy statement of the act because it inevitably and
unavoidably put pressure on the employer to coerce his employees
into joining the union. And, to complete the picture of confusion
and uncertainty, the court in the meantime had held that a union
whose status as a majority representative had not clearly been dis-
placed might picket to compel an employer to enter into a contract
containing closed shop and exclusive hiring hall provisions. Certainly
the policy statement of the Labor Disputes Act makes no distinc-
tion between the coercive effect of a closed shop provision negotiated
by a minority union and a closed shop provision negotiated by a
majority union, although such distinctions have been drawn in other
legislation.

From these conflicting decisions one can assemble an argument
that the policy statement of the Washington Labor Disputes Act
has the substantive effect of prohibiting both employer and union
interference with employee freedom of association, organization, and
designation of bargaining representatives. If the policy reaches so
far as to preclude union pressure on employers because of the like-
lihood that it will result in employer pressure on employees on these

101 Brief for Respondent, p. 16, Ostroff v. Laundry & Dye Works Drivers, 39 Wn. 2d
693, 237 P.2d 784 (1951).
103 Audubon Homes, Inc. v. Spokane Bldg. & Constr. Trades Council, 49 Wn.2d 145,
298 P.2d 1112 (1956).
104 Isthmian S.S. Co. v. National Marine Eng'rs Beneficial Ass'n, 41 Wn. 2d 106,
247 P.2d 549 (1952).
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matters, it ought a fortiori to preclude similar spontaneous employer pressures on employees. Professor Wollett suggested the wooden logic of this analysis when writing for this Review many years ago, but he did not seriously press it as the construction to be given the act. It is true that any fair appraisal of those picketing cases leads to the conclusion that the policy statement has been misused in establishing substantive rules limiting picketing by unions. But that two wrongs do not make a right is an elementary proposition which the Washington court itself mentioned in *Krystad v. Lau.*

The basic impression received from a reading of the Washington picketing decisions is that their reasoning is extremely confused and that the results lack any consistent rationale. To build on this morass of decisional law is to build on quicksand. Perhaps the only sound use to which this body of law can be put is to demonstrate the danger which accompanies the development of labor law by the judiciary on its shifting notions of policy. If the problems raised by the decision in *Krystad v. Lau* are to be disposed of with no greater consistency or certainty than that produced by other litigation under the Labor Disputes Act the labor law of Washington has entered a hectic and prolonged period of confusion.

V. UNRESOLVED PROBLEMS

If the logic of *Krystad v. Lau* is pursued to its ultimate, the Supreme Court of Washington will eventually produce a labor code nearly as comprehensive as the National Labor Relations Act, as amended by the Taft-Hartley Act of 1947 and the Labor-Management Reporting and Disclosure Act of 1959. Even if the court stops short of this full development, the problems which can arise are numerous. For example, the National Labor Relations Act, as amended, contains a number of exclusions from its definitions of employer and employee. One of the major exceptions from the definition of employees is that of individuals employed as agricultural laborers. A similar exemption is made in a number of the comprehensive state

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106 His analysis in accord with that suggested above, was that the Norris-LaGuardia Act and the Washington copy did not make any conduct lawful or unlawful. It withdrew a remedy and made procedural adjustments. Id. at 182.

107 65 Wash. Dec. 2d at 821.


labor relations acts modeled after the National Labor Relations Act. The first reading of the decision of Krystad v. Lau indicates that its principles are as applicable to agricultural employment as they are to employment in a laundry. Yet the conclusion that Washington, by a judicial decision interpreting a 1933 statute, has taken a position of leadership in establishing protection for organizational activities of farm laborers is sufficiently novel that one is inclined to await the result before asserting that it has occurred. A similar question is whether the policy statement extends its protection to other types of employees who do not enjoy such protection under the National Labor Relations Act, such as employees of charitable hospitals, domestic servants, supervisors, independent contractors, and government employees.

The policy statement of the Labor Disputes Act contains a phrase to the effect that it is necessary that the unorganized worker "... have full freedom of ... designation of representatives of his own choosing, to negotiate the terms and conditions of his employment." Will the Washington court undertake the task of giving full meaning to this phrase by determining what is an appropriate bargaining unit, as the National Labor Relations Board does under section 9(c) of the National Labor Relations Act, and ordering an employer to bargain with the designated representative as required by section 8(a)(5) of that act? If so, is that representative the exclusive bargaining representative, or, as is the case in some other countries, may several unions represent those employed who are their members? Even if it will not affirmatively enforce a duty to bargain, would the Washington court hold that if Lau’s other employees had gone on strike to protest the four discharges he could not permanently replace them, as is the case under the National Labor Relations Act? If so, will employers be subject to liability if they discharge employees who go on strike in support of contract demands, or will their rights be limited


117 See, e.g., NLRB v. Thayor Co., 213 F.2d 748 (1st Cir. 1954).
to terminating the employment of those whom they have actually replaced? Would not a discharge for engaging in an economic strike violate the policy statement as much as a discharge for joining a union?

In exercising their right to self-organization do employees have the right to orally solicit memberships and to distribute union literature on company property? Do non-employee organizers have the same right? Will the court enjoin and provide other remedies against coercive employer tactics less than discharge, such as discriminatory pay policies, interrogation about union activities, promises of benefit, or threats of reprisal? Will a spontaneous, concerted protest, such as a walk-out, without formal union organization constitute a protected concerted activity, as has been held at the federal level?

If the court undertakes protection of employee rights against employer misconduct, will it do likewise with union conduct other than picketing, over which it has already asserted controls? What limitations will it impose upon union security devices, such as the closed shop, the union shop, and maintenance of membership clauses which have been the subject of extensive legislative treatment under the National Labor Relations Act? Do exclusive hiring hall agreements have a prohibited coercive effect? Do hot cargo clauses, which excuse employees from the obligation of working on goods produced by or for a non-union employer, violate the policy statement because of the pressure they bring upon that employer's employees to join the union? If so, what other types of secondary boycott pressures are subject to regulation?

These, and just about every other question which has arisen under the National Labor Relations Act, may be asked concerning the extent to which Krystad v. Lau has involved the court in the process of fashioning a labor law for Washington. Of course, some of the questions might have been presented to the court for resolution in

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119 See, e.g., Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945).
121 See, e.g., International Ass'n of Machinists v. NLRB, 311 U.S. 72 (1940).
typical common law fashion. But the chances are that many more of these questions will now be presented because of the interest of both labor and management in determining the full extent of the substantive rights which the court has found in the policy statement of the Labor Disputes Act. If it is thought that asking these questions is but idle speculation because the Washington court would never undertake such a monumental task, consideration of the recent developments in New Jersey suggest that judicial development of a state labor law is a real possibility.

VI. CREATIVITY IN NEW JERSEY

Paragraph 19 of the rights and privileges article of the New Jersey constitution makes the following provision:

Persons in private employment shall have the right to organize and bargain collectively. Persons in public employment shall have the right to organize, present to and make known to the State, or any of its political subdivisions or agencies, their grievance and proposals through representatives of their own choosing.

As mentioned above, in Johnson v. Christ Hosp., the Supreme Court of New Jersey held that non-profit hospital employers are obliged to bargain in good faith with representatives of their employees for the purpose of reaching an agreement as to wages, hours, and conditions of employment, and that for the purpose of determining whether the union involved was the representative of the employees, the superior court might order that an election be held by an independent agency, either selected by the parties, or, if the parties failed to agree, appointed by the court, in the unit of employees which the superior court found to be appropriate. Because the supreme court issued only a per curiam opinion affirming the superior court's judgment, resort must be made to the superior court's opinion for much of the reasoning supporting the decision. However, the supreme court's opinion makes it clear that the court believed it would be more expedient to have the problems arising out of disputes concerning wages, hours and conditions of employment regulated by legislation than for the courts to establish procedural and substantive precedents on a case-to-case basis. Indeed, it invited such action. However, absent legislative action to implement the rights intrenched in the

127 N.J. Const. art. 1, § 19.
state constitution, the court believed it would be derelict in the discharge of its historic function if it allowed rights so created to fail for lack of a means of enforcement. It also reserved the resolution of the question of whether employees of a charitable hospital have the right to picket or to strike, but suggested that the courts might impose conditions precedent to or qualifications on the exercise of the right.

The superior court's decision deals with a number of issues and contentions not touched in the supreme court opinion. Thus, it held that the union had standing to invoke the jurisdiction of the court even though it had not been established that it was the representative of a majority of the employees.\(^{130}\) A reading of the constitutional provision which did not impose an affirmative duty upon an employer to bargain with his employees was rejected as rendering impotent the rights guaranteed to employees.\(^{131}\) Moreover, a review of the proceedings of the New Jersey Constitutional Convention produced rather convincing evidence that the intent of the authors of the provision was to create rights which could be enforced in court proceedings.\(^{132}\) Reliance was also placed on the earlier decision of the supreme court in *Cooper v. Nutley Sun Printing Co.*,\(^{133}\) indicating that on the basis of the constitutional provision a court might order reinstatement with backpay for employees discharged for union activities. After considering the reliability of determining the union's support by a check of application cards and the difficulties of compelling the presence of every employee in court to determine his desires, the court decided that the only feasible way to determine whether the union was the

\(^{130}\) Id. at 2918-19.

\(^{131}\) Id. at 2921.

\(^{132}\) Excerpts from *Proceedings, New Jersey Constitutional Convention* 238-41 and *Proceedings, New Jersey Constitutional Convention* 659, are reproduced at 56 L.R.R.M. 2922 (1964). Among the strongest indications is the statement made by the representative of the New Jersey AFL, Mr. Thomas Parsonnet, before the Committee on Rights, Privileges, Amendments, and Miscellaneous Provisions, *Proceedings, New Jersey Constitutional Convention* 238-41:

> Labor has the right to bargain collectively, but it is unenforceable in our courts, as you know. Now, what I am trying to suggest to you is that instead of saying the right of labor shall not be impaired, the Constitution says that employees shall have the right to organize and bargain collectively, so that we can enforce those rights in the court.

Mr. Parsonnet apparently prevailed in his argument. In any event an amendment was proposed and adopted, changing the language of the original draft to the effect that the right to bargain collectively shall not be impaired to the present language. The purpose of the amendment was explained to the delegates as follows, *Proceedings, New Jersey Constitutional Convention* 659:

> It meets the objection to the language of the Committee proposal in two respects—the criticism of the word "impaired" and the suggestion that the language should be positive rather than negative, to have more of a self-implementing factor.

representative of the majority was by secret election. The court decided to give the parties sixty days within which to present an orderly program of information. The election was to be held within a minimum of seventy days after issuance of the order but, as the decision of the supreme court discloses, the election was not held because an appeal was taken. (In this respect, the procedure evolved permits greater delay than does the procedure under the National Labor Relations Act.) Without explanation, the court excepted doctors, registered nurses, licensed practical nurses, all professional employees, and all supervisors from the group at which organizational activities of the union might be directed. The cost of conducting the election was to be borne equally by the union and the employer.

The superior court found it necessary to distinguish decisions of courts in New York and Missouri with respect to the effect of constitutional provisions which guarantee the right to organize and bargain collectively. The first of these decisions, Trustees of Columbia University v. Herzog, involved the question of whether Columbia University was exempt as an educational institution from the provisions of the New York State Labor Relations Act with respect to the operation of a building leased for commercial operations. The appellate division held that the statutory exemption for employees of charitable, educational or religious associations applied, despite general recitals in the findings and policy section of the act suggesting that coverage would be more appropriate. The New York Labor Relations Board argued that a construction giving such a broad effect to the exemption was of doubtful constitutionality because in 1938 there had been added to the New York constitution a guarantee of the right to organize and bargain collectively. The appellate division rejected the argument, expressing the view that the constitutional amendment was not intended to invalidate existing legislation which imposed a duty to bargain on employers because it contained exemptions which made the statutory obligation less extensive than the constitutional statement of employee rights. Otherwise every limitation on the duty to bargain would be unconstitutional.

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134 56 L.R.R.M. at 2926-27.
136 56 L.R.R.M. at 2927.
137 Ibid.
Subsequently, in *Quill v. Eisenhower*, a union sought to compel Columbia University to bargain collectively upon the theory that the constitutional provision imposed an affirmative duty upon employers to bargain with representatives of their employees. The court held that it did not, saying:

> It is evident that the constitutional provision guaranteeing employees the right to organize and bargain collectively through representatives of their own choosing does not cast upon all employers a correlative obligation. The constitutional provision was shaped as a shield; the union seeks to use it as a sword.

The New York decisions were relied upon by the Supreme Court of Missouri in determining the reach of the provision of the Missouri constitution guaranteeing employees the right to organize and bargain collectively. As mentioned above, by virtue of this provision the Missouri court will allow recovery of damages by an employee who has been discharged because of union activities, but will not order reinstatement with backpay. The Missouri court has also decided that it will not require an employer to recognize and bargain with the representative of his employees. As the Missouri court saw it, the constitutional provision was not the equivalent of a labor relations act, specifying rights, duties, practices and obligations of employers and labor organizations. The court would furnish remedies against any violation of constitutional rights on the theory that the violation constituted a legal wrong for which there should be an appropriate remedy. But, citing and quoting from the New York decision in the *Quill* case with respect to the constitutional provision being a shield and not a sword, the court held that the implementation of the right by way of imposing affirmative duties on an employer was a matter for the state legislature.

The New Jersey superior court thought the Missouri court's reliance upon the New York decisions to be erroneous. As the New Jersey court saw it, the New York cases turned upon the sequence of events in that state. There the state labor relations act had preceded adop-

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139 113 N.Y.S.2d (Sup. Ct. 1952).
140 *Id.* at 889.
141 See notes 83-84 supra, and accompanying text. A circuit court in Missouri recently decided that it would enjoin the holding of an election pursuant to an agreement between an employer and one of several rival unions upon the ground that the election agreement violated the rights of employees under the constitutional provision. Jackson v. Hilpert, 51 L.R.R.M. 2159 (Cir. Ct., St. Louis, Mo. 1952).
142 Quinn v. Buchanan, 298 S.W.2d 413 (Mo. 1957).
tion of the constitutional provision, and for this reason the constitutional provision would not be interpreted to impose any duty to bargain which had not existed under the prior law.

Implicit in this analysis is the proposition that the New Jersey legislature could not constitutionally exempt charitable hospitals from the duty to bargain should it undertake the enactment of a comprehensive labor relations act. This proposition is at odds with the reservation of the court's power to determine whether special limitations may be imposed upon the right of hospital employees to picket and strike. The whole analysis, by focusing upon the narrow problem of exemption of charitable hospitals, fails to deal with the basic proposition that such constitutional provisions result only in the establishment of defensive protection against governmental or private action and do not impose affirmative obligations.

Related to these cases interpreting constitutional guarantees of the right to organize is a decision of Justice Traynor dealing with the policy statement found in the California Labor Code. It is also of particular importance with respect to the reach of the Washington decision in *Krystad v. Lau* because, as pointed out above, the California policy statement was copied from the policy statement of the Norris-LaGuardia Act. The case, *Petri Cleaners v. Automotive Employees*, involved a union's request for a preliminary injunction to compel the employer to bargain with it rather than an independent union of his employees. The union's contention that the policy statement of the California Labor Code established an obligation of employers to bargain was based upon three decisions relating to a union's power to compel employer agreement to a closed or union shop in the absence of employee designation of the union as their bargaining representative. Although they were not all picketing cases, they did rest upon the proposition that the policy statement imposed restrictions upon a minority union's attempt to cause employer interference with the stated employee rights. In this respect, they were like the Washington picketing cases discussed above. Speaking for the majority, Justice Traynor overturned those decisions as having been made without realization that the principles there adopted would lead to the positive obligations which the union asserted in the pending case.

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143 See note 68, supra.
144 53 Cal. 2d 455, 349 P.2d 76 (1960).
Justice Traynor believed that the original and correct reading of the California policy statement was that it did not have the substantive effect of compelling an employer to bargain with a representative of his employees. He then said:

It is for the Legislature to determine whether voluntary bargaining should now be displaced by a rule compelling the employer to bargain with the representatives of a majority of his employees. Recognizing that trial courts are hardly labor relations boards, defendant requests affirmative relief, avowedly because the record is so clear as to raise only issues of law. But, as the United States Supreme Court observed of a similar argument, "we write not only for this case and day alone, but for this type of case." Carroll v. Lanza, 349 U.S. 408. . . . A host of problems attend compulsory bargaining that only the Legislature can resolve. What constitutes an appropriate bargaining unit? See §§ 8(a)(3)(i); 9(b), 29 U.S.C.A. §§ 158, 159. How is the majority's choice to be determined? See § 9(c)(1); 29 U.S.C.A. 159. Which employees constitute the relevant majority, those presently employed or those employed at the time the employer's refusal to bargain precipitated the strike? Congress recently changed the federal definition of the relevant majority. . . . The enforcement of the duty to bargain under the federal act has been practicable only because the necessary administrative machinery and statutory guides have been provided. This court cannot usurp legislative power by enacting rules of law patterned on the Labor Management Relations Act, and it cannot create the administrative machinery necessary to make such rules workable.147

Justice Schauer, with whom Justices Spence and McComb concurred, did not take such a pessimistic view of judicial capacities. As he saw it, "the courts of California are capable of dealing with these and related problems and refusal to undertake solution of such problems is a gratuitous and unwarranted assertion of judicial impotence."148 He agreed that a California court probably could not, without cooperation from at least one of the parties, require resort to the auspices of an administrative body constituted for the purpose of conducting or supervising representation elections.149 But he thought the power of the court to enjoin picketing or to enjoin the grant of recognition might induce a more cooperative attitude on the part of the parties, leading them to resort to the services of the State Conciliation Service.150 He did not undertake to offer solutions to the other questions raised by Justice Traynor.

147 349 P.2d 76, at 87
148 349 P.2d at 91
149 349 P.2d at 101
150 349 P.2d at 101-102
VII. Evaluation

This article began with the statement that it is no longer a debatable proposition that courts must and do make law. What followed was not offered in proof of that proposition. It was offered to provide a basis for determining whether in the cases discussed the courts chose the proper subjects and occasions for exercising law-making powers. The substantive rules which they have developed, of course, are of tremendous interest and might be the subject of extensive inquiry, but it is not the purpose of this article to pass judgment upon the merits of the substantive law produced.

I have previously suggested that one must not seek a single answer to the complicated problem of the role of courts and legislatures in revision, reform and development of the law. The creative role of the courts in the area of contracts or property law, or in an area dominated by legislation and administrative regulation is markedly different from the role courts should play in the areas of torts and procedure. Even within these traditional legal categories a discriminating approach should be taken because the nature of the problem varies with the particular change under consideration. In any event, even with specific changes, the question of whether a court acted correctly when it assumed or rejected a creative role is not one which permits of simple answers. As with the question of whether an administrative agency should use its rule-making powers to establish new law or instead develop that law on an ad hoc basis utilizing its quasi-judicial powers, the question of whether a court should act or leave the matter for legislative treatment is one that must be answered primarily by the court's exercise of an informed discretion.

Certain factors which deserve consideration may be noted. One of the most important considerations is the magnitude of the undertaking assumed by the court. Supplementing a statutory scheme with remedies unstated in the text as the Supreme Court of the United States did with the Railway Labor Act in Texas & New Orleans R.R. Co. v. Brotherhood of Ry & S.S. Clerks, does not commit the court to any greater role than that of giving detailed support to that scheme. To play upon the analogy suggested by Judge Jerome Frank's article on statutory interpretation provocatively entitled "Words and Music,"

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it is simply a case of a court playing a creative role comparable to
that of an orchestra's conductor, giving vitality to the legislative pur-
pose underlying the statute with an imaginative and sympathetic inter-
pretation going slightly beyond that which would be compelled by
the word symbols alone. The creative role of the court is limited to
the area and scheme which has already been elaborately defined by
the legislature, just as the conductor's creativity is limited to the area
defined by the score.

However, a direction to play beautiful music can not serve as a
score, and a conductor who accepts it as such must necessarily play
the role of composer. In the same way, effectuation of a broad and
abstract principle, such as a right to organize and bargain collectively
or a right to select representatives for the purpose of negotiating terms
and conditions of employment, involves an undertaking without clearly
marked limits. Thus vindication of such abstractly stated rights by
enjoining picketing which puts pressure on employers to coerce their
employees led courts in New Jersey, Missouri, Washington and Cali-
ifornia to protect employees from spontaneously motivated employer
corruption. Affording this protection suggests that further meaning
should be given the stated right by compelling employers to bargain
with representatives of their employees and providing the mechanisms
for determining which organizations, if any, are representatives. The
New Jersey court has been willing to do this. The Missouri court's
commitment rests uneasily upon a distinction between providing legal
remedies for accomplished wrongs and refusing to create duties and
obligations by ordering affirmative action. The California Supreme
Court, recognizing the extent to which commitment to the abstract
principle would carry, has responded by overturning the foundation
decisions. The Washington court has not yet been called upon to
decide how much farther its commitment to the principle will carry
it. Presumably, any of the various solutions reached in other juris-
dictions are open to the Washington court. The total picture is one
of the confusion and uncertainty which arises when courts undertake
a creative role in an area which is without convenient conceptual
limitations.

The problem is not one which exists only with judicial proliferation
of an abstract principle. To a considerable extent the same problem
exists with respect to the general statements of rights and duties
incorporated in the National Labor Relations Act, and in recent years
the United States Supreme Court has found occasion to reverse the NLRB for having pursued abstract principles to a point at which they created the type of conflict with other abstract principles which should be settled legislatively. In any context, it becomes necessary to strike a compromise between the abstract principle which is pursued and others which also have a degree of acceptability in the community.

Of course, courts must and do strike such compromises in making decisions in many of the cases which come before them. Resolution of constitutional questions, contract questions, tort questions, and property questions necessarily involves compromise between conflicting abstract principles. From this background, a strong argument can be made that the same creativity should be exercised in the labor area. But a significant difference may be found in that there is no commitment to resolution of constitutional questions through the ordinary political process. Likewise, changes in contract law by enlargement of the concept of promissory estoppel, in tort law through development of liability for intentionally inflicted emotional distress, or in property law through abandonment of the rule in Shelley's case are unlikely to occur as a result of political agitation, and they are not likely to stimulate politically organized responses. The same does not seem to be the case in the labor area.

At the federal level Congress has engaged in at least three major attempts to adjust and resolve the competing principles which impinge upon one another in the labor area. The National Labor Relations Act of 1935, the Taft-Hartley Act of 1947, and the Labor Management Reporting and Disclosure Act of 1959 are each major pieces of legislation embodying the compromises struck and the resolutions agreed upon as the culmination of prodigious political efforts. Each differs so much from the other as to indicate that the political process can produce solutions with significantly different configurations of employer and union rights, powers, duties, and obligations. The differences provide their own caution against accepting any one as the model which will receive a dispassionate approval as the proper solution to the problems presented in the area of state labor law. The Wash-


The Washington scene is now one in which the equivalent of a substantial part of the Wagner Act is apparently law. Whether the restrictions on union activities added by the Taft-Hartley Act and Labor Management Reporting and Disclosure Act should have been added to, or substituted for, the severe restrictions which the court previously developed in the picketing cases as a price for obtaining this protection for union activities is a matter which would have been resolved by political compromise if the change had been accomplished legislatively. Inactivity in the legislature does not indicate a lack of political appeal in the questions; it is more likely a stalemate reflecting a balance of forces or an unwillingness to run the risks associated with legislative change.

A danger to judicial administration from ad hoc innovation and revision is apparent. Unions or employer groups may undertake programs of experimental litigation to develop a favorable body of legal doctrine. The cases chosen as the vehicles for experiment will be those thought to produce the most sympathetic response, and not necessarily those which present the problem in its more typical aspects. Legal reasoning and lawyer's arguments have no exclusive prerogative over the correct solution to labor problems, and existing rules of evidence present difficulties in connection with developing a proper record for making the necessary policy decisions. What is won or lost in the course of litigation may be contested again in the legislative process, which is, of course, unobjectionable unless it creates a challenge to the integrity of the judicial process and involves the judiciary in political contests. But if the creative role of the courts in a politically active area becomes well known, the chances are that more of the traditional political techniques will become involved in the initial selection and re-election of judges.

In this respect, it may be noted that in deciding *Krystad v. Lau* the Washington court used a judicial technique perhaps best exemplified by Justice Cardozo's decision in *McPherson v. Buick Motor Co.* His decision in that case revolutionized the law of manufacturers' liability, but one may search his opinion without finding an indication that a novel proposition of law was being developed or that the result was anything except that dictated by principles laid down long ago. One may likewise search the majority opinion of the Washington court for any indication that it is doing anything except that which the legis-

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ature directed in 1933. The technique does provide a defense to a charge that the court has improperly assumed a creative role. But the defense is easily penetrated, if not by dissenting opinions, by the analysis of those familiar with the judicial process. And, while it may be difficult to gather an audience interested in an exposition of the changed law of manufacturers' liabilities, the chances are that audiences interested in problems of labor law can be more easily assembled. Moreover, if the conviction is that existing law has become outmoded, a frank request for legislative assistance, such as that made by the New Jersey court, has much to commend it.

The concern here expressed—that the judiciary be protected from the political repercussions of its creative decisions in the labor area—may be misplaced. Indeed, if the Washington judiciary could survive a series of decisions enjoining picketing in labor disputes upon the basis of the policy statement of an act designed to prevent the issuance of injunctions in labor disputes, the chances are that its immunities and other survival qualities will carry it through the difficulties discussed above.

In any event, creativity in the labor field poses other problems for courts. Some of the more important are the lack of administrative machinery and a budget to support the activities undertaken. In New Jersey the solution proposed for meeting the expense of conducting an election to determine whether the union was the representative of a majority of employees was to impose the cost equally on the union and the employer. This seems fair enough if the union wins the election, or loses it by a narrow margin. But will it be acceptable if an overwhelming proportion of the employees vote against union representation? In California, Justice Schauer proposed in his dissent in *Petri Cleaners v. Automotive Employees,*\(^7\) that the power of the court to grant or deny injunctive relief could be used to induce the parties to resort to the state Conciliation Service for the purpose of having an election held. This might work in most cases, but what would be the solution in those in which it did not? At the federal level allegations of conduct which improperly affects the results of elections are investigated by the staff of the National Labor Relations Board. Similar problems will arise with elections conducted under the direction of a court, but it will not have an equivalent staff for investigation and resolution of the problems presented.

\(^{157}\) 53 Cal.2d 455, 349 P.2d 76, 88 (1960).
The determination of questions such as what constitute appropriate bargaining units, when craft units may be severed from broader plant-wide units, or when an existing contract between an employer and union should bar a request for an election made by a rival union, constitutes a refined area of administrative specialization under the National Labor Relations Act.\textsuperscript{158} Trial judges sitting in the courts of first instance throughout a state are unlikely to have the interest or background for making such determinations, but they will be called upon to do so in New Jersey. Charges of unfair labor practices are investigated by employees working under the supervision of the regional directors of the National Labor Relations Board and complaints are issued and prosecuted by representatives of the General Counsel only in those cases in which the public interest is thought to have been injured through the commission of unfair labor practices. Courts independently enforcing the right to organize and bargain collectively will not have the benefit which comes from a neutral evaluation of a case, but instead will be required to decide those cases which are brought before them on the basis of self-interest of the parties. A possible consequence is that discharge cases under state law will have a nuisance value for settlement purposes not present under the federal law. Indeed, the lack of an administrative staff will probably result in a significantly different product—a different summation of law in action—than that produced under the National Labor Relations Act, as amended, even if all of the substantive rules developed under that law are incorporated in the law developed by a state court in vindication of an employee right to organize and bargain collectively.

Another difficulty with judicial development of the law is found in attempting to limit the degree to which the principles adopted by a court will extend. As mentioned above, the rule of \textit{Krystad v. Lau} would appear to be as applicable to agricultural employment as it is to employment in a laundry. The statutory exclusions of agricultural employees found in most labor relations acts may be the consequence only of political considerations. Nevertheless, those considerations could be given effect by the legislature though it is difficult to see how a court can do so by creating a similar exemption. Discharges for engaging in strikes in support of contract demands, discriminatory

pay policies, or threats of reprisal and promises of benefit interfere with organizational rights just as much as discharges for joining a union. If the policy is carried to prevention of these kinds of employer conduct other extensions will ultimately be sought. If they are not, the result of *Krystad v. Lau* becomes an isolated instance of a rule of law for but one case, and hence a great injustice. In short, courts unlike legislatures cannot act in the somewhat arbitrary manner of legislatures by limiting the application of principles on the basis of expediency or other pragmatic considerations.

Much of what has been written here is critical of judicial creativity in the field of labor law. It should be emphasized, however, that upon occasion the creative touch is appropriate if not essential. Thus the proceedings of the New Jersey Constitutional Convention indicate that the court would have defeated the stated expectations that the right to organize and bargain collectively be self-implementing if it had not given that right a reading more comprehensive than that of a protection against governmental restrictions. The Supreme Court of the United States has certainly made known that because of the "Delphic nature" of the statutory directions, it was developing the law of federal preemption through "the process of litigating elucidation." Congressional failure to act upon the subject in 1959 reflects the difficulty of formulating a legislative solution to the problem and confirms the necessity if not the desirability of an experimental, ad hoc development of that aspect of labor law. Likewise, in 1957 the Supreme Court undertook the development of a substantive federal law governing collective bargaining agreements pursuant to uncertain statutory directions. The Supreme Court may take Congressional inactivity with respect to the subject in 1959 as approval of a similar experimental and ad hoc development of that aspect of labor law. Or, where the legislative history of a labor statute indicates that ambiguity was purposefully chosen as a legislative compromise, as was the case, for example, with some of the changes made by the Labor-Management Reporting and Dis-


160 Section 701 of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 541, did amend section 14 of the National Labor Relations Act, 29 U.S.C. § 164, so as to eliminate the "No-Mans Land" problem created by the decision in *Gus v. Utah Labor Relations Bd.*, 351 U.S. 1 (1957). But it left untouched the more difficult question of determining when and by what criteria it should be determined what powers were left to the state and what powers could not be exercised by the states over questions susceptible of characterization as labor law problems.

closure Act of 1959, the NLRB and the courts must play a role in completing the legislative process. As previously suggested, one must not seek a single answer to the complicated problem of the role of courts and legislatures in the revision, reform, and development of law, even within the confines of a traditional legal category.

To the extent that one may generalize with respect to the creative role of courts in the labor law field, it seems appropriate to note that to understand that courts must and do make law is to gain a part of the truth. To understand that upon occasions courts should restrain themselves even though change in law is necessary is to add to that truth. And in this respect it seems significant that Justice Traynor of California, who has justifiably received recognition as one of the most creative of American judges, and who has stated that concern for judicial activity should focus on the scarcity of creative opinions rather than on the overabundance of activity, emphatically rejected the suggestion that the California court undertake a creative role encompassing a major part of the area of state labor law.

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104 TRAYNOR, COMMENT ON COURTS AND LAW MAKING IN LEGAL INSTITUTIONS TODAY AND TOMORROW 48, 52 (1959). See also Frank J., concurring in Aero Spark Plug Co. v. B.G. Corp., 130 F.2d 290, 296 (2d Cir. 1942).