But, if the interpretation that has been placed on cases involving constitutional offices is adopted, what would seem to be the true intent of the drafters of the constitution and the statutes will be given expression. The words "eligible to the office," seem to mean precisely that, *i.e.*, "eligible to hold office." Construction of "eligible to the office" to mean "eligible *by election* to the office," which is the construction adopted in the *Bogard* and in the instant cases, is strained and seems unwarranted. Under the literal and ordinary interpretation of the words, when an incumbent had served for the maximum period, and his successor had failed to qualify, a vacancy would exist to be filled by the appointing authority.[16]

LABOR LAW

AVAILABILITY OF LABOR INJUNCTION WHERE EMPLOYER FAILS TO COMPLY WITH REQUIREMENTS OF INDIANA ANTI-INJUNCTION ACT

A consent election[1] held by the National Labor Relations Board determined Local No. 309, CIO, United Furniture Workers of America, as the majority representative of the employees of the Smith Cabinet Manufacturing Co. The Smith Co. refused to recognize Local No. 309 until it had been certified as the majority representative by the NLRB.[2] The refusal led to picketing with accompanying violence.[3] The Company petitioned the Daviess County Cir-

16. See note 2 *supra*.

1. The consent election involved in the instant case was held a few days prior to the effective date (August 22, 1947) of those sections of the Taft-Hartley Act making the filing of certain information pre-requisite to the availability of services of the NLRB—including the holding of elections—to labor unions, but no official certification had been made before the Sections became effective.
2. The NLRB could not officially certify Local No. 309 because the union refused to comply with filing requirements. No investigation of a question concerning the representation of employees, raised by a labor organization, can be entertained by the Board unless certain information concerning the organization has been filed and kept up to date by annual reports, and the officers of the organization have filed non-communist affidavits. 61 STAT. 143, 29 U. S. C. A. § 159 f, g, h (Supp. 1947).
3. State police were called in to restore order. It is interesting to note in this connection the case of Local No. 309, United Furniture Workers of America, CIO v. Gates, 75 F. Supp. 620 (N. D. Ind. 1948). State police were attending union meetings held in

cuit Court for injunctive relief. After a hearing a temporary injunction was issued against some hundred persons who were participating in the strike.[4] There was no showing that the Smith Co. had complied with Section 8[5] of the Indiana Anti-Injunction Statute which provides that no injunctive relief in a "labor dispute" shall be granted to any complainant who has failed to make every reasonable effort to settle such dispute by negotiation, mediation or voluntary arbitration. On appeal from the decree granting the injunction, the strikers urged that Smith Co.'s failure to show compliance with Section 8 barred its right to injunctive relief. The Appellate Court of Indiana, relying upon an interpretation of the Taft-Hartley Act, held that there was nothing to negotiate, mediate or arbitrate since the Smith Co. was under no obligation to recognize Local No. 309 as the bargaining agent in the absence of certification of the Local by the NLRB; and that therefore it was unnecessary to show compliance with Section 8 of the Indiana Anti-Injunction Statute. *Fulford et al. v. Smith Cabinet Mfg. Co.*, 77 N. E.2d 755 (Ind. App. 1948). (Bowen, J., dissented.)[6]

The issue presented to the Indiana Appellate Court called for a determination of whether the Indiana Anti-Injunction Statute withheld jurisdiction to enjoin the strike. It was

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the county court house. An injunction was granted prohibiting this activity as being a deprivation of freedom of speech and assembly.

4. The wording of the injunction is not set out in this case but is discussed in Local No. 309, United Furniture Workers of America, CIO v. Gates, 75 F. Supp. 620 (N. D. Ind. 1948). It restrained the various individuals from mass picketing, from arming themselves while on the picket line, and from threatening with violence any who wished to enter the Smith Co.'s premises.

5. IND. STAT. ANN. (Burns 1933) § 40-508.

6. Presiding Judge Bowen points out that the Indiana Anti-Injunction Act represents the firm legislative policy of the state on the issuance of injunctions in labor disputes. Section 8 of that Act expressly provides that no injunction shall be issued unless the complainant has made every reasonable effort to settle the dispute by negotiation, mediation or arbitration. This provision is a condition precedent to injunctive relief. The facts were undisputed that the Smith Co. had opportunity to negotiate, mediate and arbitrate but did not do so. The Smith Co. had not fulfilled the condition precedent. Therefore, "the action of the lower court in granting this injunction was in direct conflict with the legislative policy of this State and the provisions of the statute. . . ." Fulford v. Smith Cabinet Mfg. Co., 77 N. E.2d 755, 757 (Ind. 1948). Further, "I fail to see how the Taft-Hartley Act in any manner amends or nullifies the requirements of the [Indiana Anti-Injunction Statute] setting forth the conditions precedent to an employer's right to injunctive relief." *Id.* at 758

conceded that there was a "labor dispute."[7] The trial court had made the findings of fact required by Section 7 of that Act.[8] It was conceded that the Smith Co. had made no effort to negotiate, mediate or arbitrate. The question for the court became: Under these circumstances—where a labor union engages in mass picketing, cutting off ingress to the plant; where pickets trespass on company property to arm themselves with staves; where pickets use threatening language and physical force; and where they cause damage to and loss of property—was the employer required by Section 8 of the Indiana Anti-Injunction Statute to mediate, negotiate or arbitrate before he was entitled to injunctive relief?

Although this was the issue presented by the facts, it was not faced by the court; rather, the decision was based upon an interpretation of the Taft-Hartley Act. Seizing upon Local No. 309's failure to file certain information specified by the Taft-Hartley Act, the court conceived the issue to be whether such failure excused the Smith Co. from compliance with Section 8.[9] The majority held that Local No. 309's failure did excuse compliance. It is to be noted that Local No. 309 had no statutory duty to file with the NLRB. The Taft-Hartley Act simply makes filing a condition to the securing of the legal assistance of the NLRB.[10] Although the court concerned itself primarily with an interpretation of the Taft-Hartley Act, it nevertheless gave an implicit

7. IND. STAT. ANN. (Burns 1933) § 40-513.

8. IND. STAT. ANN. (Burns 1933) § 40-507.

9. The court in the instant case admitted the fact that before the Taft-Hartley Act the employer would have had to comply with Section 8. The question assumed by the court to be involved here could not have risen under the Wagner Act as the union was not required to meet any conditions to the right to services of the Board. Under the Wagner Act compliance with Section 8 of the Norris-LaGuardia Act was held not be a prerequisite to injunctive relief where picketing was engaged in by a minority union. *E.g.*, Grace Co. v. Williams, 20 F. Supp. 263 (N. D. Mo. 1937), *aff'd*, 96 F.2d 478 (C. C. A. 8th 1938); Donnelly Garment Co. v. International Union, 99 F.2d 309 (C. C. A. 8th 1938), *cert. denied*, 305 U. S. 662 (1939). Those cases are not persuasive in the instant case, for in those cases a majority union had been certified and it was the duty of an employer under the Wagner Act to bargain exclusively with the certified representative. In the instant case no union had been certified, and the Smith Co. was under no duty to bargain with another union so as to excuse noncompliance with Section 8.

10. See note 2 *supra*.

answer to the real question at issue—the effect of violence—by holding that it was unnecessary to show compliance with Section 8. In the light of the history of Section 8 and of the decided cases this implicit decision is subject to criticism. And the decision upon the assumed issue—the effect of the Taft-Hartley Act—is open to serious question.

Although the problem presented by the *Fulford* case was one of state law, involving a state statute, before a state court, the history of Section 8 of the federal Norris-LaGuardia Act[11] is a primary aid in determining how Section 8 of the Indiana Anti-Injunction Statute[12] should be interpreted. The state statute follows identically the wording of the federal act, and was enacted, presumably for identical purposes, only a year after the federal act became effective. The construction given the federal act is therefore applicable authority for construing the state statute.[13]

Congressional reports on the Norris-LaGuardia Act characterized Section 8 as a "clean hands" section.[14] Very generally, the equitable doctrine of clean hands is that he who seeks relief must come into court free from reproach in his conduct with respect to the subject matter of his claim.[15] And so, Section 8 requires that before a petitioner for injunctive relief in a labor dispute is entitled to relief he must show that his hands are clean, *i.e.*, that he has sought diligently to settle the dispute by methods—mediation, negotiation and arbitration—short of recourse to the court. Nevertheless, the United States Supreme Court has indicated by way of dictum that under certain circumstances violence by a defendant union may relieve an employer seeking an injunction from the necessity of complying with Section 8. Whether the violence of the strikers in the *Fulford* case had such an effect depends upon the principlees which the Supreme Court has suggested as guideposts. That Court[16] in denying an injunction in a case involving violence where an

11. 47 STAT. 70 (1932), 29 U. S. C. §§ 101 to 115 (1946).
12. IND. STAT. ANN. (Burns 1933) §§ 40-501 to 515.
13. Roth v. Retail Clerks Union, 216 Ind. 363, 24 N. E.2d 280 (1939).
14. 75 CONG. REC. 5464 (1932). This characterization was used in Brotherhood of Railroad Trainmen v. Toledo, P. & W. R. R., 321 U. S. 50 (1944).
15. 2 POMEROY, EQUITY JURISPRUDENCE § 397 (5th ed. 1941).
16. Brotherhood of Railroad Trainmen v. Toledo, P. & W. R. R., 321 U. S. 50 (1944).

employer had not complied with Section 8 stated that if any exception to the Section's requirement is created by employees' violence, it is "when the particular circumstances show the complainant has had no opportunity to comply with such requirements. . . ."[17] Reasoning that the purpose of Section 8 is "to head off strikes and the violence which too often accompanies them,"[18] the Supreme Court would free the employer of the necessity of compliance with the Section only where he had no chance to avert the strike and its violence, *i.e.*, only when it was factually impossible to resort to negotiation, arbitration or mediation. Under this test, an employer could ask a court to enjoin violence where his property suddenly and unexpectedly became the object of a violent strike; his unawareness of the need to negotiate would make impossible any attempt to head off the strike. But Section 8 "was intended to apply when he had had ample opportunity [to comply with its terms] but refused to do so."[19] In the *Fulford* case, violence did not precede the employees' demand for negotiation; only after Smith Co. had refused to negotiate did the employees resort to violence. Smith Co. had ample opportunity to try "to head off" the strike by a good faith attempt to negotiate. Therefore the violence which attended its refusal to take advantage of its opportunity does not excuse its failure to comply with Section 8. "There was indeed no expression of concern in Congress for the complainant who, having full opportunity to comply with the Section, might refuse deliberately and steadfastly to do so."[20] Thus both as a matter of equity principles and as a matter of statutory interpretation, there is no authority for the position that the violence of Local No. 309 would excuse the Smith Co. from showing compliance with Section 8.[21]

If it be admitted that prior to the passage of the Taft-

17. *Id.* at 65.
18. *Ibid.*
19. *Id.* at 66.
20. *Ibid.*
21. Also to be noted in this connection is General Electric Co. v. Gojack, 68 F. Supp. 686 (N. D. Ind. 1946) where findings were made entitling the employer to an injunction under § 7 of the Norris-LaGuardia Act concerning the threat of unlawful acts and the unwillingness of the police to furnish adequate protection. Judge Swygert held that even in the face of *mass picketing* § 8 of the Act must be complied with and refused to grant the injunction because an attempt at settlement had not been made.

Hartley Act, the single fact of violence could not relieve an employer of the obligation imposed by Section 8 of the State Anti-Injunction Act and the Norris-LaGuardia Act, it becomes material to determine whether the Taft-Hartley Act can be interpreted so to relieve him. The Indiana Appellate Court held that it could.

As an historical matter, the Norris-LaGuardia Act of 1932[22] had deprived the federal courts of jurisdiction to interfere by injunction with labor disputes except in a very limited class of cases; and the Wagner Act of 1935[23] had provided affirmative remedies for employees against certain employer activities. It is said that the 80th Congress thought that the legal armament which employees and labor organizations were able to muster as a result of such legislation (and the administrative and judicial interpretation of it) had unbalanced the scales which weigh the legal power of labor and management. Designed to bring the scales into balance was the Taft-Hartley Act.[24]

Because of this very purpose to equalize the power of labor and management it is obvious that Congress in drafting the Taft-Hartley Act thoroughly considered all existing labor-relations legislation and administrative and judicial interpretation of such legislation. That it considered the Wagner Act is demonstrated by the fact that the Taft-Hartley Act is built around that statute, retaining many of its features.[25] That Congress considered the Norris-LaGuardia

22. See note 11 *supra.*

23. 49 STAT. 449 to 457 (1935), 29 U. S. C. §§ 151 to 166 (1946).

24. "To amend the National Labor Relations Act, . . . , to equalize legal responsibilities of labor organizations and employers, . . . Be it enacted. . . ." 61 STAT. 136 to 161, 29 U. S. C. A. §§ 141 to 197 (Supp. 1947).

25. *E.g.*, The National Labor Relations Board is continued. 61 STAT. 139, 29 U. S. C. A. § 153 a (Supp. 1947). A distinctly new unfair labor practice is coercion by a labor organization of employees in the exercise of their rights under the Act. 61 STAT. 140, 29 U .S. C. A. § 158 (b) (1) (A) (Supp. 1947). An NLRB trial examiner investigating a charge growing out of the instant case recommended to the Board that the union be found guilty of "coercing employees" in violation of the Taft-Hartley Act. It is not clear who filed the complaint leading to this investigation. Probably it was the employer. The recommendation of the trial examiner was to become the final order of the Board if no exceptions were filed within 20 days. No further disposition of this investigation has been discovered. Smith Cabinet Manufacturing Co., 22 LAB. REL. REP. (Labor-Management) 3 (May 3, 1948).

Act is clear from the fact that that statute was expressly made inoperative in certain instances.[26] And that the Taft-Hartley Act does not *expressly* relieve an employer from complying with Section 8 of the Norris-LaGuardia Act where that employer seeks an injunction against a union striking for recognition as employee representative is obvious from a reading of that statute.[27] The question then becomes whether Congress implicitly abrogated the application of Section 8 of the Norris-LaGuardia Act in such a situation.[28] This is the question answered in the affirmative by the *Fulford* case.

But Senator Taft, in commenting upon the Taft-Hartley Act, said: "It does not increase in any way the right of an individual employer to injunctive relief free from the provisions of the Norris-LaGuardia Act."[29] Nor have the courts

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26. One notable instance is where the Board makes application to the courts for appropriate relief in conjunction with cases pending before it. 61 STAT. 146, 29 U. S. C. A. § 160 h (Supp. 1947). Further, the Attorney Geenral acting at the direction of the President can in case of an emergency secure an injunction without complying with the Norris-LaGuardia Act. 61 STAT. 155, 29 U. S. C. A. § 178 h (Supp. 1947). When granting injunctions in cases dealing with the violation of restrictions on employer payments to employee representatives the courts are not bound by the Norris-LaGuardia Act. 61 STAT. 157, 29 U. S. C. A. § 186 e (Supp. 1947).

27. It is an unfair labor practice to strike with the object of forcing *another* employer to bargain with an uncertified labor organization. 61 STAT. 140, 29 U. S. C. A. § 158 (b) (4) (B) (Supp. 1947). It is to be noted that this does not include the activity in the instant case, but only activity in the nature of a secondary boycott. As said in the Senate Report: "It is to be observed that the primary strike for recognition (without a Board certification) is not proscribed." SEN. REP. No. 105, 80th Cong., 1st Sess., 22 (1947). A primary strike to force any employer to recognize a labor organization if another labor organization has already been certified is an unfair practice under 61 STAT. 140, 29 U. S. C. A. § 158 (b) (4) (C) (Supp. 1947). No prior certification was involved in the instant case.

28. The Indiana Anti-Injunction Act should be construed the same as the Federal Norris-LaGuardia Act. Roth v. Retail Clerks Union, 216 Ind. 363, 24 N. E.2d 280 (1939). In construing the operation of the Taft-Hartley Act the court must find its intended effect on the Norris-LaGuardia Act in order to determine how federal courts should interpret the Norris-LaGuardia Act in the future. Having found the intended interpretation, and having determined that Indiana's Anti-Injunction Act is to be interpreted the same way, it follows that the intended effect on the Norris-LaGuardia Act became material to the effect on the Indiana Act.

29. Taft, *The Taft-Hartley Act, What It Does Do, What It Does Not Do.* 15 I. C. C. PRAC. J. 466 (1948).

found implicit in the Taft-Hartley Act any effect upon the employers' injunctive remedies, restricted by the Norris-LaGuardia Act. Relief at the behest of an individual has been denied in both federal[30] and state[31] courts when the right of an individual to sue for an injunction has not been created by clear words of the Taft-Hartley Act. It may be concluded that under the *Fulford* facts not only does the Taft-Hartley Act not require the nullification of Section 8 of the Norris-LaGuardia Act or the Indiana Anti-Injunction Statute; thre is explicit authority that that interpretation was not intended.[32]

Quite probably the decision in the *Fulford* case may be explained by the extreme violence which attended the strike involved. The appellate court, very properly deploring the strikers' invasion of the public peace,[33] may have felt that

30. Amazon Cotton Mills v. Textile Workers Union, 167 F.2d 183 (C. C. A. 4th 1948).

31. Gerry of California v. Superior Court, 194 P.2d 689 (Calif. 1948).

32. The reasoning of the majority in reaching their conclusion is invalid upon more technical legal grounds also. One basis of the court's decision in the *Fulford* case is founded upon a consideration of what the result would be if the Smith Co. were required to comply with Section 8 of the State Anti-Injunction Act. The court apparently was troubled by the thought that even if the Smith Co. had negotiated with Local No. 309 the parties would not have settled the dispute unless one acceded completely to the other's demand. Having decided that it was a legal privilege of the Smith Co. to refuse to recognize Local No. 309 as the bargaining representative in the absence of official certification, and that the Smith Co. could not be compelled by law to give up this privilege, the court concluded that there was nothing to mediate, negotiate or arbitrate and hence that Section 8 was necessarily inoperative. But the Smith Co. could have voluntarily given up its legal privilege to refuse to recognize Local No. 309. Section 9 of the Taft-Hartley Law, "Representatives and Elections," 61 STAT. 143, 29 U. S. C. A. 159 (Supp. 1947), does not forbid an employer's recognizing a union as majority representative without an election or certification. Section 9 provides procedures for determining the majority representative when that question cannot be agreed upon voluntarily. Evidence of this in the statute is that Section 9 (a) speaks of "representatives designated *or* selected for purposes of collective bargaining. [Emphasis added] And Section 9 (c) (1) (A) requires that a petition for a Board investigation of a question of representation contain an allegation that *the employer declines to recognize* the representative in whose behalf the petition if filed. Thus the Taft-Hartley Act clearly recognizes that parties may agree voluntarily upon who the labor representative is to be. Contrary to the court's reasoning therefore, what the parties could voluntarily have agreed upon *was* a subject for mediation, negotiation or arbitration.

33. Courts are likely to issue injunctions on less substantial grounds if violence or threats are present. *See e.g.*, Duplex Printing Co. v.

an injunction was called for at any cost and that its interpretation of the Taft-Hartley Act was the only available path to that result. It may be suggested that other paths were not closed. Had the court faced the question of whether Section 8 of the Norris-LaGuardia Act and of the Indiana Anti-Injunction Statute rendered it powerless to enjoin violence no matter how extreme and no matter what the cost to the public order, it might legitimately have determined that the statute intended no such result.[34] A court is within its proper sphere when it interprets a statute in the light of the facts before it. It is a tenable position to assert that the Norris-LaGuardia Act and the State Anti-Injunction Statute are concerned primarily with the rights of employers and employees and that only so long as no serious public interest is involved must their provisions be rigidly adhered to. Without here attempting to draw lines it may be suggested that it is consonant with the purposes of the statutes for a court to use its injunctive power to enjoin violence on the part of the strikers when that violence reaches dimensions which threaten not merely an employer but an entire community.[35] Such an interpretation of the statutes would achieve the result at which the legislators aimed; the use of the injunction simply as a strike-breaking weapon would still be prohibited.[36] But Section 8 would not stand as a bar to the protection of society if such protection became imperative.

Deering, 254 U. S. 443 (1921); Truax v. Corrigan, 257 U. S. 312 (1921).

34. *See*, NLRB v. Fansteel Corp., 306 U. S. 240 (1939), where the employees would have been entitled to reinstatement but for the violence involved in the case. The Supreme Court was influenced by the presence of violence to hold that the statute did not intend that employees should have the rights they might otherwise be entitled to in such circumstances.

35. To construe a state anti-injunction statute to prohibit injunctive relief where *violence* is present might make the statute unconstitutional as a deprivation of the state's power to enjoin dangerous activity. See Busch Jewelry Co. v. United Retail Employees Union, 281 N. Y. 150, 156, 22 N. E.2d 320, 322 (N. Y. 1939).

36. Cf. Judge Amidon's classic discussion of the abuses of the labor injunction and his formulation of an injunction in the light of the facts so as not to allow it to be simply a strike-breaking measure. Great Northern R. Co. v. Brosseau, 286 Fed. 414 (D. C. N. Dak. 1923).