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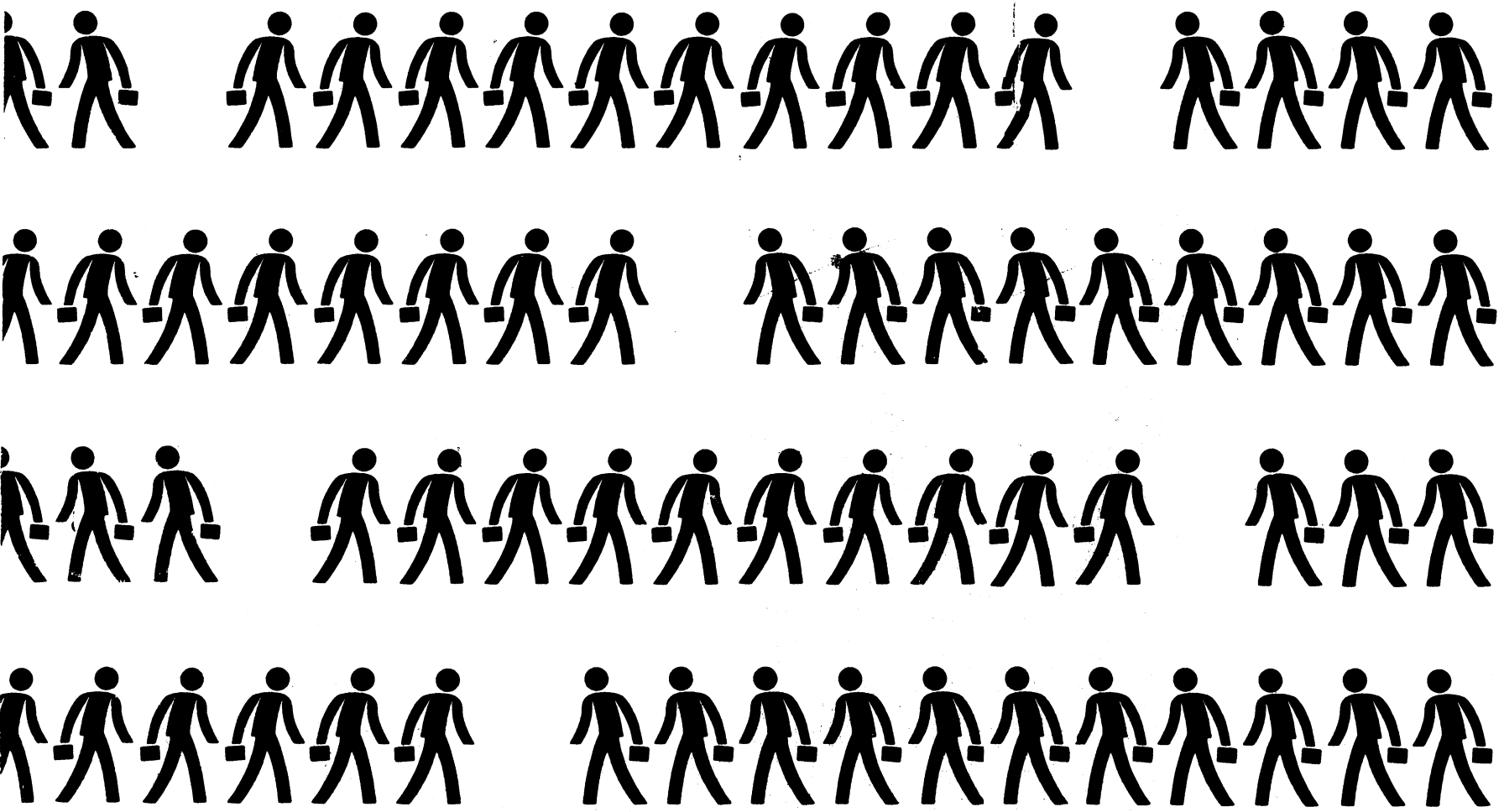

RIGHT-TO-WORK LAWS·

A STUDY IN CONFLICT

by Paul Sultan

Institute of Industrial Relations • University of California, Los Angeles

RIGHT-TO-WORK LAWS: A STUDY IN CONFLICT

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INSTITUTE OF INDUSTRIAL RELATIONS
UNIVERSITY OF CALIFORNIA • LOS ANGELES

Industrial Relations Monographs of the
Institute of Industrial Relations

No. 1. *Due Process on the Railroads: Revised Edition,*
by Joseph Lazar

No. 2. *Right-to-Work Laws: A Study in Conflict,*
by Paul Sultan

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Foreword

The Institute of Industrial Relations is pleased to offer, as the second in its new monograph series, Right-to-Work Laws: A Study in Conflict, *by Professor Paul Sultan. This series is intended to include studies of medium length, and will receive a distinctive cover treatment to set them apart from the Institute's other publications.*

Professor Sultan's study deals with a subject of timely interest. It is written for the general reader, rather than for the specialist, and provides a wealth of background material, as well as a balanced statement and analysis of the arguments advanced by those favoring or opposing right-to-work laws. The study also considers the general problem of union security in its economic, social, and legal contexts.

Many current discussions of the right-to-work issue are clouded by emotions and extravagant partisan claims. The Institute believes that Professor Sultan's informative work will assist the interested citizen to clarify his thinking on this important public issue.

Professor Sultan holds a Doctor of Philosophy degree from Cornell University and is currently Associate Professor of Finance at the University of Southern California. He is the author of a recent book entitled Labor Economics.

The Institute is grateful for the critical comments and suggestions of Paul Bullock, Jr., J. A. C. Grant, Charles R. Nixon, and Melvin Rothbaum, all of whom are associated with the University of California, Los Angeles. Mrs. Anne P. Cook edited the manuscript. The cover was designed by Marvin Rubin.

The viewpoint expressed is that of the author and is not necessarily that of the Institute of Industrial Relations or the University of California.

BENJAMIN AARON, *Acting Director*
Institute of Industrial Relations
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Contents

Part I

The Historical Setting for the Right-to-Work Controversy

Chapter 1

Sources of the Right-to-Work Conflict

Whether one believes the permanence of the Taft-Hartley law is due to the tactical mistake of union leadership in demanding the law's all-or-nothing repeal (a position recently characterized as "one of the most calamitous errors of labor statesmanship in modern times"[1]), or believes instead that union resistance to legislative repression, no matter how skillfully constructed, would inevitably have been swamped by the resurgence of postwar conservatism, it is agreed that contemporary labor law is in a delicate state of balance. Though admittedly losing the battle for Taft-Hartley repeal, unions have not, of course, admitted defeat in the war and are continuing a stubborn rear-guard action against legislative enactments that would involve further limits on union bargaining power. Thus, the "hot war" for repeal has been replaced with the brush fires of a continuing cold war, a conflict made all the more apparent because of the post-Taft-Hartley campaign to "nail down" the principles embodied in the Taft-Hartley Act with a number of additional legislative enactments. The most lively issue centers on state laws that would outlaw the union shop. Section 14(b) of the Taft-Hartley law, allowing states to make this prohibition, provided the ideal point of departure for such a mopping-up operation. It involves no poetic license to claim that the "right-to-work" law has replaced the "slave-labor" law as the major labor legislation issue of the day.

A study of the strategy of campaigns to secure these laws in the eighteen states that now have them reveals the multidimensional aspects of the conflict. The arguments involve labor economics, industrial sociology, state and federal politics, and constitutional law. But more than this, state campaigns have often acquired the characteristics of a holy crusade; and both reason and morality frequently give way to pure emotionalism. Proponents of right-to-work legislation depict, in cartoon form, the stubble-bearded, cigar-smoking union boss cracking his horsewhip over a cowering membership ("Will YOU Dance to the Tune of

[1] Benjamin Aaron, "Amending the Taft-Hartley Act: A Decade of Frustration," *Industrial and Labor Relations Review,* XI (April, 1958), 327.

Labor Bosses?") and present their own arguments in pamphlets illustrated with the Statue of Liberty and the Stars and Stripes. Unions, on the other hand, show an oversized, jagged-toothed dragon emerging from a letter box ("Beware of the dragon: It is an initiative petition requesting your signature in order to have the RIGHT TO WRECK law on the ballot!") and depict heartless employers cutting employee checks in half (with scissors) upon the collapse of union bargaining power following the passage of a "right-to-wreck" law.

Even the more rational arguments often generate more heat than light. Employers, for the most part, stress the theoretical and abstract aspects of the controversy. They argue that the union shop denies the worker his freedom of association (though granting that the employee's complete freedom *not* to associate can extinguish a majority rule requiring union membership); that right-to-work laws expand the freedom of contract (though in reality they narrow the area of bargainable issues between labor and management); that right-to-work laws protect a man's right to work (though stressing that no man has an absolute "right" to a particular job and, further, that no man should have such a right); that right-to-work laws expand the opportunity for democratic unionism (though there is no convincing evidence that employee abdication from his union, or nonparticipation in its affairs, leads to this result); that right-to-work laws increase the responsibility of unionism (though prevailing opinion leans toward the view that union responsibility and union security vary directly with each other, rather than inversely); that reliance on voluntary rather than compulsory unionism will strengthen unionism rather than weaken it (though this argument usually follows a cataloging of the evils arising from the *existing* excess of union power).

Union arguments are not always more persuasive. Unions proclaim that only through uniform membership will all employees become exposed to union participation (though available evidence establishes low participation rates for members and, under existing law, union members are protected from penalties attached to nonparticipation); that right-to-work laws lead to the collapse of union membership (though there is little or no convincing evidence that this has been the case); that such laws undermine the very foundation of union bargaining power (though under federal law a union shop is possible only after a union has been certified as the bargaining agent for all employees, and hence there must be some presumption of union power in the

absence of the union shop); that the union shop increases the employee's freedom (though union spokesmen agree, "Of course it's coercion").

Whether we view this controversy from the labor or management viewpoint, it brings into sharp focus the conflict both among and within pressure blocs and, in a more general sense, the contradictions between our economic and political philosophies. These contradictions have developed because our dedication to political and economic individualism has not been extinguished by the growth of industrial absolutism. Stated in other terms, society has revealed the ambivalence of its values by paying ideological homage to individualism and competition while simultaneously becoming enmeshed in the organization of economic power blocs. The right-to-work controversy reflects the puzzlement of a society facing the reality of power blocs with an economic philosophy that largely denies their existence.

While the existence of power blocs in the labor market has done much to kill public confidence in automatism and laissez faire, the task of finding substitutes for competition as the regulator of economic life has proven to be enormous indeed. In effect, society has vacillated between the conviction that power blocs capable of controlling market forces, rather than being controlled by them, do not exist, and the belief that should they exist, they will readily respond to admonitions to behave "responsibly."

Proponents of right-to-work legislation believe, in effect, that the growth of union power has not yet passed the point of no return and that legal sanctions for voluntary unionism can, and should, infuse competition both into the recruitment of union members and into the sale of labor service. Unions, on the other hand, see little reason why competition should be a norm in the sale of labor service when it is not a reality in the purchase of labor. Thus, in the final analysis the study of the right-to-work controversy is a study of the competitive struggle for power between labor and management. Ironically, however, both partisans disclaim any interest in increasing the power they currently possess; they want only to prevent the abusive exercise of power by the "other fellow." Thus, the debate often acquires the characteristics of a pitchman's shell game, a characteristic pointedly explained by J. K. Galbraith: "Power obviously presents awkward problems for a community which abhors its existence, disavows its possession, but values its exercise."[2]

[2] John K. Galbraith, *American Capitalism: The Concept of Countervailing Power* (Boston: Houghton Mifflin, 1952), p. 30.

The Substantive Issue: Definitional Aspects

What does the right-to-work controversy involve? Right-to-work laws are designed to revitalize the principle of union voluntarism, or to make explicit the complete freedom of choice of the individual worker as to whether he should join, or not join, a union. The Taft-Hartley law gave labor both the right to join unions and also the right—with some reservations—not to join unions. Right-to-work laws are designed to clear away these reservations, or to make more explicit labor's freedom to reject union membership. Their purpose is to prohibit every form of compulsory unionism.

At the outset, it is important to appreciate that, conceptually, various degrees of compulsion can operate to force an employee into a union. Under a *closed shop* contract provision (outlawed by the Taft-Hartley law but operating in intrastate commerce in some states today), all employees must be union members at the time they are hired by an employer and must remain members of the union as a condition of employment. Frequently in such an arrangement, hiring of new employees is done through the union, and if the union is unable to supply needed workers, employees hired outside of the union are required to join the union before starting to work.

The *union shop* is the chief arrangement at issue in the current right-to-work controversy. Such an agreement does not require that employees be members of the union at the time that they are hired, but they are nevertheless required to join the union within 30 or 60 days after beginning employment. While compulsory union membership is a feature of both the closed and the union shop, the employer has complete discretion in hiring. Under a closed-shop arrangement, that discretion is initially limited to the available and qualified union member.

Even under a union shop, employer discretion may be qualified by an added proviso that the employer enter into a *preferential hiring* agreement with the union, requiring that he give preference to union members in hiring and/or that hiring be done through the union. The Taft-Hartley law, however, outlaws any such arrangement in interstate commerce.

Several devices have been built into union-shop provisions to reduce the degree of compulsion on individual employees opposing union membership. First, a *modified union shop* may be negotiated in which existing employees are not compelled to join the union, but new employees are expected to join within 30 days. A second modification is the *maintenance of membership* proviso, which gives all employees the

choice of joining or not joining the union. Usually all union members have a 15-day escape period, following the signing of an agreement, at which time they may withdraw from the union. But those who elect to remain in the union, or subsequently elect to join the union, must maintain that union status as a condition of employment for the period of the agreement.

Other provisions have been developed to minimize compulsory membership and yet to give the union assurance of financial support from the work force. An *agency shop* provision involves the compulsory checkoff (payment of union dues through payroll deductions by the employer) for all employees whether members of the union or not. This provision, sometimes referred to as the *Rand formula,* does not involve compulsory union membership, but instead compulsory taxation of all employees to compensate the union for the presumed services it offers all employees, whether members of the union or not. *Fee bargaining* arrangements may be established providing for a nominal payment by nonmembers to the union for services rendered, with the fee generally lower than union dues.

A wide variety of checkoff arrangements have been negotiated, involving company cooperation in the collection of union dues. While the Taft-Hartley law limits the duration of any individual employee commitment to the checkoff arrangement and provides for individual employee endorsement of such a plan, several state laws impose further restrictions on checkoff plans. In isolated instances the union makes a payment to the company for the clerical expenses involved in such deductions.

In terms of these alternative forms of union security, a national right-to-work law would add prohibition of the union shop and lesser forms of union security to the present prohibition of the closed shop. Membership in a union would not, of course, be prevented by such legislation, but the decision to accept or reject such membership would not be restricted by any contract term that the union might negotiate with the company. This point is the fulcrum around which so much of the controversy turns. In the remainder of this chapter, we shall catalog some of the more important considerations that have catapulted this issue into national prominence.

Sources of Agitation for Right-to-Work Legislation

No broad reform movement can operate in a vacuum, and no agitation to outlaw compulsory unionism can succeed if large portions of the economy are not receptive or sympathetic to that cause. Following are

a few of the more important considerations that give the right-to-work argument more than surface plausibility and appeal today.

Full Employment and Job Security

The tragic severity of the Great Depression jarred America's economic philosophy from its foundation of classical orthodoxy. As unemployment deepened, "We saw," as one observer noted, "a crowd of some fifty men fighting over a barrel of garbage which had been set aside outside the back door of a restaurant. American citizens fighting for scraps of food like animals."[3] It was out of the reality of labor's helplessness and the indignity labor faced in its competitive scramble for subsistence that the public shifted its support from employer to employee, believing, as it did, that it could no longer endorse unregulated competition between labor and management in a labor market characterized by mass unemployment. Legislation encouraged union growth and allowed the use of union-security clauses to facilitate that growth.

It was not until the economy experienced full employment that trade-union organizational strength became apparent and the exercise of union power set in motion a counterreaction to it. What were some of these forces?

First, there was a growing satisfaction with the performance of the free enterprise economy. Employers were "delivering the goods" and were no longer defensive about the mass unemployment of the thirties; they displayed satisfaction with current accomplishment and confidence for the future. The psychology of success permeated the labor force, and as employees became more certain that industry had the capacity to satisfy their basic needs, the role of the union became less apparent.

Second, individual employees could secure benefits from employers without union pressure. The source of union power is usually found in the ability of a union to withdraw from the employer 100 per cent of his labor force, just as the source of management power is its ability to deprive labor of 100 per cent of its income. In the context of this power relationship, it is usually concluded that the alternative to collective bargaining is no bargaining. But during an era of full employment, individual employees enjoyed a windfall of individual bargaining power. If the employer did not, for example, meet the wage standards

[3] As described by Louise V. Armstrong and cited in Stephen Kemp Bailey, *Congress Makes a Law: The Story Behind the Employment Act of 1946* (New York: Columbia University Press, 1950), pp. 6–7.

prevailing in the labor market, he would face a "silent strike" characterized by the "melting away" of his employees attracted to better employment opportunities in other plants. Furthermore, if the negotiated wage were below the equilibrium level set by demand and supply in the labor market, the employer was encouraged to make concessions, both to hold his existing labor force and to attract new employees. These concessions could take diverse forms, including everything from laxity on the matter of coffee breaks to more generous treatment in merit wage adjustments. In such a labor-scarce market, he could not afford to treat employees in an autocratic manner. It was "good business" to be paternalistic, considerate, to satisfy the employee's precept of fairness.

Third, the era of full employment did much to destroy those grievances that had given the union movement its most convincing reason for organization. In recent years, an increasing number of the labor force have never known serious depression and lack the firsthand experience of economic hardship. While the postwar era has been characterized by the "adjustments" of 1948, 1953, and 1958, the first two of these lapses from full employment proved to be transitory and the five-year interval between them left few employees brooding about difficulties in the labor market. Thus there has been little recent hardship experienced by the work force to identify material welfare with union strength. Union officials, frustrated by the new generation's lack of understanding, have appealed for support with such slogans as "The Job You Save May Be Your Own," on the assumption that what is true today may not be true tomorrow.

Finally, there is no doubt that a "problem" provides the unifying influence, the glue that gives any group its cohesive quality. In a full employment economy, the concept of militant unionism is often out of tune with the times; employers espouse the need for labor welfare and provide that welfare. In this setting, the individual may entertain suspicions that he could advance more quickly if not restricted by union seniority provisions, if pay increments were geared to merit rather than being based on automatic progressions. Few workers are willing to make life a lottery or to gamble with such matters as employment security and wage standards. But when the possibility of a loss appears slim, the number of employees willing to "live dangerously" (that is, without union protection) is likely to grow; and organized labor's anxiety about union security is likely to increase as more employees grow less convinced that union membership is necessary for them.

Labor Unrest and Strike Data

Historically, right-to-work campaigns have been launched on the rising tide of union agitation. For example, the mass industrial unrest of 1894 involved 8.3 per cent of the labor force, and the index of employees involved in strikes reached a new plateau by 1903, the year the open-shop offensive gained momentum. The second campaign of the early twenties, dubbed the "American Plan," was preceded by the industrial unrest at the end of World War I. In 1919 an unprecedented 20.8 per cent or over 4 million of the civilian labor force were involved in strikes. Similarly, following World War II, a peak of 14.5 per cent of labor-force participation in strike activity developed in 1946. In the following year, the Taft-Hartley restrictions on union security became law. Frequently the public views such unrest as the product of irresponsible trade-union leader agitation, as indisputable evidence of union disregard for the public welfare and the need for public regulation and control of union power.

Wage Inflation: The Cost Push

The attention given to postwar inflation inevitably raises the question as to whether price increases are necessary to absorb wage adjustments and whether, in effect, unions are to be "blamed" for inflation. If wage demands do, in reality, outstrip labor productivity, the resulting increase in per unit labor costs creates the problem of either inflation or unemployment. The publicity attending recent price adjustments and the frequent practice of announcing price increases following new wage contract terms have created the impression that unions are largely responsible for such price increases. Furthermore, the recent refinement distinguishing between "cost push" and "income pull" inflation has directed additional attention to wage-price distortions. This dichotomy has encouraged the view that unions are to be blamed for price instability: because unions have pursued irresponsible wage demands, it is necessary to destroy the power base from which such demands are launched.

Corruption: Political Regulation of Unionism

A further source of public concern, and one that can hardly be exaggerated as a source of antiunionism, is the revelations of the McClellan Committee regarding the scope of corruption within the union movement. A firm foundation of public opinion has been created to support congressional action to regulate union activities more closely.

Public views unions responsible for:
1. Labor unrest & strikes
2. wage inflation & unemployment
3. corruption

That further regulation is in the offing is almost a certainty, but whether it will take the form of federal legislation to bar the union shop is less probable. Certainly at the state level, efforts to secure right-to-work legislation have received tremendous encouragement. As one company spokesman explained to the author: "There never was a better time for right-to-work legislation than now. If we miss this chance, I don't know when, if ever, we'll have another one like it."

Technology and Job Upgrading

Another source of conservatism, operating both in and out of the labor market, is found in the changing composition of the labor force. The demand for unskilled labor service has been steadily declining: the technician's white smock rather than the shovel may well symbolize labor service in the future. With the diversity of job skills required in an era of automation, the opportunity for labor to develop a common interpretation of common job problems is considerably reduced. Employees, acquiring semitechnical or semiengineering job functions, are less likely to feel like "badly designed single-purpose machine tools." Automation permits the worker to escape his cog status in the plant mechanism by allowing him to control the machine rather than being controlled by it. Such employees are less likely to develop a sense of identification with the "labor force" or to suffer that sense of job monotony and personal anonymity out of which unions, in the past, have derived so much support.

Technology + more white collar jobs free workers from feeling that they need unions

Community Life and Conservatism

The postwar trend to suburban living has established new patterns of social and political orientation within the community, shaping in turn the employee's attitude toward his union. The labor force is even less the "abstract mass in the grip of the abstract force." The pressures of do-it-yourself projects, the distance to the union hall, the opportunities for evening shopping, the entertainment provided by television, all combine with the predominant conservatism of the suburban community to discourage vigorous support of union affairs. Just as the functional separation of the employee from the employer paved the way for unionism, so does the spatial separation of employee from employee reduce that cohesion out of which unionism derives strength.

modern social life, encourages workers not to join unions,

The New Social Ethic: Individualism

Analysis of the community, like analysis of the economy, often provides a body of doctrine which shapes, and is shaped by, the substance

being analyzed. Economic conservatism has its counterpart in social conservatism: Today, the heroes of fiction are frequently the rebels, the individuals who flaunt public opinion or the conventions of society. Sociologist David Riesman provides the keynote for this new theme with his studies, *Individualism Reconsidered* and *The Lonely Crowd.*[4] Even that assumed sanctuary of free enterprise—the corporation—is the latest to be dissected and found to be a dangerous collectivism, crushing the spirit of independence and individualism.[5] Industrial sociologists, after carefully laying to rest the economic man (that income-maximizing individualist who confidently believed that in looking after himself he looked after all), are now happily serving as midwives to the reincarnation of this person in the form of the inner-directed disorganization man. Individualism is the new vogue, reacting against adjustment theories and the spirit of groupism and togetherness. The implications of this new ethic for unionism are self-evident.

Democracy and Industry

Current interest in the right-to-work controversy is a symptom of the shifting power balance within contemporary society. While it is easy to exaggerate the power currently possessed by organized labor, it cannot be denied that the union movement is a "right"-changing institution, and has had success in reducing the unilateral authority of management in dealing with labor. This shift or redistribution of power from management to unions has been supported by many, on the assumption that the union movement gave labor a formal voice in industry. More than this, unionism represented the penetration into industry of that democratic ideal held so important in political affairs. But when the union is viewed as a power center, new questions arise: Is the union less autocratic in dealing with employees than management? Does the employee have an effective voice in shaping union policies, or is the individual worker now confronted with two pockets of authority, and expected to hold dual loyalties to competing power centers?

Proponents of right-to-work legislation frequently charge that unions represent a power bloc of enormous proportions, and that the axiom, power corrupts and absolute power corrupts absolutely, is just as relevant to unionism as it is to management. Ultimately, then, the right-to-

[4] David Riesman (in collaboration with Reuel Denney and Nathan Glazer), *The Lonely Crowd* (New Haven: Yale University Press, 1950), and David Riesman, *Individualism Reconsidered, and Other Essays* (Glencoe, Ill.: The Free Press, 1954).

[5] William H. Whyte, *The Organization Man* (New York: Simon and Schuster, 1956).

work controversy will have to resolve the question whether compulsory unionism serves to strengthen the democratic character of the union process. On the one hand, it is suggested that union leadership can be sensitive to the wishes of the rank and file only if employees have the freedom to resign union membership. On the other hand, it is contended that union democracy cannot thrive when citizens are allowed to abdicate their citizenship in the union. Even the friends of organized labor are taking a second look at the scope of abuse within the union movement, and those most vitally concerned with individual civil liberties within the union find themselves exploring problems which right-to-work proponents believe would not exist in the absence of compulsory unionism.

Taking these forces together, we see the convergence of direct and indirect pressures supporting the right-to-work movement. To some, this dispute is seen as the pathetic rear-guard action of ultraconservatives, hoping to stay the wave of the collectivist future with the soggy mop of nineteenth-century liberalism. To others, it is seen as the long-awaited and overdelayed counterreaction, the returning swing of the pendulum, to restore once again some semblance of equal power between labor and management.

Chapter 2

A Capsule History of the Union-Security Controversy

The continuing character of the compulsory-union-membership controversy is simply one facet of the larger struggle of American unionism to secure recognition and status in a hostile environment. This chapter is not designed to provide the detail, but only the major contours, of this history. We shall attempt to establish why the dispute has its origins in the development of the labor market, how employers found in the compulsory-membership issue an argument particularly persuasive in eliciting public support for antiunion campaigns, and why anti-compulsory-union-membership statutes became an issue when the exercise of union power became explicit.

One should keep in mind throughout this study that the federal statutes relating to the union-security issue cover those employees working in businesses affecting interstate commerce. State law covers intrastate commerce, and in addition, under Section 14(b) of the Taft-Hartley Act, is controlling in firms affecting interstate commerce if its provisions are more restrictive of union security than the federal law. Unless otherwise indicated, our analysis of the status of union-security clauses will be within the framework of federal law.

Restrictionism in the Pre-Union Era

While it is generally agreed that the guild was not the father of unionism, it can at least claim to be its stepfather; and it was in the guild that the right-to-work controversy first emerged. Prior to the commercial dislocation that preceded the industrial revolution, the status of individuals within society was dictated by custom and church law. Generally there was a well-defined function, however humble it might be, for each individual in medieval society. The crumbling of what sociologists have dubbed the "status system" required a new philosophy, a new set of rules to explain the new relationship of man to man. The emerging political and economic philosophy of mercantilism filled the vacuum created by discredited church law: Status was now defined by the gov-

ernment. The baptism of the church, converting privilege and power into office and duty, was replaced by the innumerable statutes of political and judicial authority.

But the more important change was that which identified the good wage with the good life. The acquisitive germ was planted in man, and soon all society was infected with the acquisitive itch. The guild emerged as a response to this pressure. Its purpose was not to re-establish the "good old days," but rather to secure an ever-improving economic status for its members. Since there did not seem to be enough economic benefit to provide for the emancipation of all, the guild stressed the organization of particular trades, of small pockets, or, to use the apt phrase of the Webbs, vertical slices of the occupational hierarchy. But guild sectionalism and exclusionism could be successful only if its regulations were supported by the state.

Such government cooperation was not lacking. While the mercantile philosophy was far from humanitarian, it believed that government regulation was necessary to maintain full employment. The common laborers were thought to be as lazy as they dared be; the only force motivating them to labor was the pressure of starvation and hence the mass must be kept poor if the whole were to survive. Regulations and statutes were designed to compel labor activity, to impose ceilings on wage demands, and to punish, through fines, jail terms, mutilations, and hangings, those roving bands wandering from place to place without useful employment. The guild represented that agency through which the skilled artisan could set himself apart from the mass of the laboring poor. Guild members had the will to resist the economic and political pressures depressing labor's standards by constructing barriers against the influx of strangers to their trades. Petitions for city government support of guild exclusionary policies were sympathetically received in an era characterized by the belief that he who governed best governed most. In some communities, these guilds acquired semimunicipal authority. Emotionally and ideologically, employee-employer relations became a unified whole: the hazard galvanizing this harmony of interest was the constant threat to quality and price standards posed by the swarming mass of unskilled workers.

The success of this system depended, then, on the ability of certain trades to exclude those eager to get on the escalator to economic well-being. The long frock coat and tall hat were symbols of the new-found status of these exclusive trade clubs. As Sidney and Beatrice Webb point out:

At all times in the history of English industry there have existed large classes of workers much debarred from becoming the directors of their own industry.... Besides the semi-servile workers on the land or in the mines, it is certain that there were in the towns a considerable class of unskilled labourers, excluded, through lack of apprenticeship, from any participation in the gild.[1]

Certainly, at that time large numbers of workers were deprived of an opportunity to work in occupations of their choice. Here is the origin of the right-to-work controversy. But the deprivation of individual rights had little significance to a society which had embraced the concept that the poverty of the mass was a necessary precondition for the welfare of the state.

Union Security in the Colonial Era

Although we have only fragmentary information on labor conditions in colonial America, evidences of the closed shop and other trade restrictions are not difficult to find. In 1667 the New York City cartmen demanded and received both a closed shop and a closed union in order to protect their standards from newcomers. Three years later the bakers insisted that baked bread, rather than corn, be shipped to foreign ports in order to extend employment in the baking trade. The porters of New York City complained to the Mayor's Court that "strangers" were performing their work, whereupon the court did "Confirme and graunt to the petitioners onely the Liberty to Carry up all Sortes of Corne Salt or planks within this City."[2] In 1674 this early counterpart of the teamsters' union protested that brewers, bakers, and other trades were hiring their own porters rather than using its services. The degree to which such voluntary societies felt they were clothed with a public interest is suggested in a 1675 dispute, where a group of ship carpenters rode an interloper out of Boston because he had not served his seven years' apprenticeship period:

John Roberts and the eight other defendants admitted the charge of having forcibly carried John Langworthy "upon a pole and by violence" from the north end of Boston to the town dock. This "occasioned a great tumult of people, meeting there with the Constable who did rescue him." The defendants justified their conduct on the ground that "he was an interloper and had never served his time to the trade of a Ship carpenter and now came to work in theire yard and they understood such things were usuall in England."[3]

[1] Sidney and Beatrice Webb, *The History of Trade Unionism* (2d ed.; London: Longmans, Green, 1920), p. 43.

[2] Berthold Fernow, ed., *The Records of New Amsterdam from 1653–1674*, VI, 292, cited in Jerome L. Toner, *The Closed Shop* (Washington: American Council on Public Affairs, 1942), p. 61.

[3] Noted by Richard B. Morris, *Government and Labor in Early America* (New York: Columbia University Press, 1946), p. 147.

Unfortunately for these early trade associations, the growing popularity of classical economic philosophy encouraged the government to abandon the increasingly cumbersome task of regulating every phase of economic activity, including labor-management relations. The force of competition was now to replace the government as the regulator of all economic activity. Governments looked with increasing suspicion on licensing arrangements, and skilled workers were astonished to be deprived of the protection of the law on which they had so long relied. By the mid-eighteenth century, most licensing arrangements had faded; most statutory regulations and restrictions were discarded. The worker was on his own and he was forced to turn to "self-help" remedies. The union movement, as we know it today, was born.

Early Unions and Craft Restrictionism

The trade-union movement in America had its origin in the post-colonial era. Labor's early trade associations, while dominated by fraternal and humanitarian ideals, soon found "bread-and-butter" activities absorbing more and more of their time. The craft rather than the industrial organization proved to be the most effective basis for such economic activity, and it was in this form of union organization that the restrictive and exclusionary aspects of the guilds found new expression.

The principle of craft organization proved to be "uniquely correct," as Gompers was to conclude later in the nineteenth century, for America's labor market. Unfortunately, the nation's economic growth was frequently disrupted by recessions, resulting in the plight of unemployment for many workers. Because of the cyclical character of economic development, the demand for labor did not always keep pace with the expansion of labor supply. But most unions rejected the broad responsibility for preventing a disorderly scramble of *all* workers for limited job opportunities and attempted, instead, to isolate certain occupations from this scramble. However attractive and humanitarian the ideal that "the welfare of all depends on the welfare of each," hard experience led to the practice of constructing union protection for only pockets of the labor force.

The success of this program depended, first, on the union's ability to maintain strict observance of standards established for its craft, and second, on its ability to prevent its pocket of organization from being swamped by the increasing tide of the labor supply. It is not surprising, therefore, that early unions gave considerable stress to the maintenance of the length of apprenticeship training and to the control

of the number of apprentices admitted to their trade, and that they agitated against the use of employees—be they women, children, prison workers, or foreigners—not members of their organizations. Worker associations complained bitterly of "runaway apprentices," of "halfway journeymen," and of "shops overcrowded with undertrained apprentices." But whatever the logic of such agitation, the early union movement found the public and the courts hostile to union efforts to pre-empt and preserve portions of the "job territory" for union members.

The Closed Shop and the Conspiracy Doctrine

The closed shop became the *sine qua non* of such restrictionism. Should a worker in a protected trade refuse membership in the union, or refuse to accept the standards established by the union, he faced the hazard of unemployment and social ostracism. The cordwainers, for example, refused to live or eat in the same boardinghouse as a nonunion man. In a Philadelphia conspiracy trial, this pressure was described in detail:

> He was a stranger, he was a married man, with a large family; he represented his distressed condition; they [the union] entangled him, but shew no mercy. The dogs of vigilance find, by their scent, the emigrant in his cellar or garrett; they drag him forth, they tell him he must join them; he replies, I am well satisfied as I am.... No, they chase him from shop to shop; they allow him no resting place, till he consents to be one of their body; he is expelled [from] society, driven from his lodgings, proscribed from working; he is left no alternative, but to perish in the streets, or seek some other asylum on a more hospitable shore.[4]

If competition and laissez faire were the twin pillars of the new economic philosophy, how could the government deal with unions which made competition "imperfect" and therefore reduced the efficacy of that regulatory mechanism? If the government were to assume that competition could only be made effective by regulation, was this solution compatible with the second tenet of economic liberalism, laissez faire?

As one might expect in a laissez-faire economy, it was often the courts rather than the legislature that had to answer this question. As closed-shop demands in the nineteenth century were extended to the printing, shoemaking, cigar-making, tailoring, glass-blowing, mule-

[4] Cited by David J. Saposs, "Early Trade Unions," in J. R. Commons and Associates, *History of Labour in the United States* (New York: Macmillan, 1918), I, 151.

spinning, and iron-molding trades, the courts were, with few exceptions, quick to condemn this "bold and determined tyranny." They often expressed astonishment that in a free country such societies should be permitted to discriminate against "scabs" (those who worked in plants that were struck) and "rats" (those who refused to join unions).

The popularity of classical economic theory helped crystallize the common-law conspiracy doctrine in the first half of the nineteenth century. Within the framework of the new economic orthodoxy, it was not difficult for the courts to speculate that union action could "impoverish or prejudice a third person" or even "prejudice the community." In the words of Judge Roberts, it was clearly unlawful "to conspire to prevent a man from freely exercising his trade in a particular society; or to contribute toward it. . . ."[5]

Unions could not easily appreciate the logic of such pronouncements. In the words of the attorney defending a union in an early conspiracy case, if an individual worker refused to join the association and attempted to better himself at the expense of the larger group of workers, was not the least offensive manner in which the group could show its displeasure to "shake the dust off their feet and leave the shop where they are engaged . . .?" Chief Justice Savage of the New York Supreme Court allowed that a group of men could agree on a rate at which members would work, but could see no reason why it should dictate this rate to others. He observed: ". . . an industrious man was driven out of employment by the unlawful measures pursued by the defendants, and an injury done to the community, by diminishing the quality of productive labour and of internal trade."[6]

A break in the series of conspiracy prosecutions came in 1842, in the now famous Massachusetts case of *Commonwealth v. Hunt.* Jeremiah Horne had been working for less than the union rate and was fined by the association of Boston bootmakers. Under the threat of a strike when Horne refused to pay the fine, the employer was forced to discharge Horne, whereupon Horne filed a complaint of criminal conspiracy against the union. In his decision, Chief Justice Shaw advanced the illegal-purpose doctrine, under which many union-security contracts were later justified. To Shaw, the actions of the union were not illegal in this case. He pointed out that union power could be exerted for either "honorable" or "pernicious" purposes, and he saw nothing pernicious in the union members' refusal to labor with a single worker who was violating codes of their association. Reasoning by

[5] The Pittsburgh Cordwainers' Case (1815), in *ibid.*, p. 145.
[6] *People v. Fisher,* 14 Wendell 10, 19 (1835).

analogy to illustrate the legitimacy of such action, he observed that workers would be justified in refusing to work with an alcoholic, even though such a decision might deprive the employer of a useful worker and make it difficult for the latter to secure re-employment.[7] But not all purposes of union-security clauses were to be construed as "legitimate," as unions were soon to find out.

Further evidence of the union effort to protect particular groups from the pressure of labor competition can be found in the slave issue. Several southern unions opposed any measure which would allow the Negro an opportunity to develop job skills. In 1845 Georgia restricted Negroes from working in the building trades; in 1850 North Carolina mechanics working on railroad construction "petitioned the legislature that a tax be laid on free Negro mechanics for the purpose of colonizing them in Liberia." The Negro was condemned both for accepting low wages and for aspiring to higher wages. In one account Negroes were described as a "degraded class of men" who were "never governed in fixing the prices for their labor by consideration of a fair compensation for the services rendered." But in earlier years the Charleston *Gazette* had complained that Negro workers "had the insolence, by a combination amongst themselves, to raise the usual prices, and to refuse doing their work, unless their exorbitant demands are complied with.... Surely, these are evils that require some attention to suppress."[8]

The discriminatory aspect of union behavior also became apparent when unions attempted to pre-empt employment opportunities already enjoyed by nonmembers. Such a case arose in *People v. Wilzig,* when an employer refused to recognize a union not representing any of his employees; he refused to sign a contract providing for preferential hiring of union members. When the union picketed the employer for his refusal, the pickets were arrested. Judge Barrett, in his charge to the jury, pointed out that

> ... although he [the workingman] has the right to combine for the purpose of obtaining an advance in the rate of wages, he has no right to combine for the purpose of preventing others from exercising their lawful callings, or from working as they please.... The law does not, as yet, permit such a combination as that, and I apprehend it will be a long time before any legislature can be induced to legalize combinations for purposes so contrary to the genius of our people, and to the fundamental principles of our government.[9]

[7] *Commonwealth (Mass.) v. Hunt,* 4 Metcalf III, 38 Am. Dec. 346 (1842).
[8] Both quotations from Morris, *op. cit.,* pp. 188, 185.
[9] *People v. Wilzig,* 4 N. Y. Crim. 403, 417 (1886).

Employment Security and Union Security

As the influx of immigrants increased in the latter half of the nineteenth century, so did interest in union restrictionism. The drive to take labor out of competition acquired fresh significance as more workers were ready to believe that the route to employment security was via union security.

The fact that labor supply frequently expanded more rapidly than labor demand does much to explain the character of union development in the last half of the nineteenth century. First, the employer was willing to profit from the general abundance of labor service, frequently with misleading advertisements regarding the employment opportunities available in his labor market. For example, the bricklayers' secretary made the following plea:

> Subordinate Unions will please instruct their members to pay no attention to any advertisements which may appear in any of the newspapers, or be circulated by handbills, about Bricklayers being wanted in certain localities, as such advertisements are the work of Bosses, or Exchanges, who seek to flood such localities for the purpose of reducing the wages and creating trouble among our Unions.[10]

The amount of labor mobility probably varied geometrically with the levels of unemployment. The disruptive effects of such mobility were apparent to unions hoping to stabilize the employment bargain in their labor markets. For example, the carpenters' union called attention to "the disastrous results to our Unions centered in large cities by having a horde of non-Union men continually flocking in from the country."[11] Coal miners resented the incursions of "cornhuskers" into their trade. The "tramp printer" became a character in American folklore. In 1882 Allan Pinkerton wrote: "Printers are not all tramps, but... there is scarcely a printer who has not at some time been on the road."[12]

The corrosive effect of this labor surplus on union bargaining power is self-evident. For example, in 1899 the president of the Glass Bottle Blowers' Association complained:

> I believe that every floater and strike-breaker in the trade has been at Bridgeton within the last three months, and this class of people are more to be dreaded

[10] *Proceedings of the Bricklayers, Masons and Plasterers' International Union of North America*, 1905, p. 334.

[11] George E. Barnett, *The Printers: A Study in American Unionism* (Cambridge: American Economic Association, 1909), pp. 260–61.

[12] Allan Pinkerton, *Strikers, Communists, Tramps and Detectives* (New York: G. W. Carleton, 1882), pp. 52–53.

than the employer, because it is by their aid that employers have been able to break strikes in many trades.... No matter how good the times may be, every trade-union leader will find during a strike that there are lots of unemployed people in this country, and they are a potent factor in the struggle.[13]

The union movement attempted to meet these difficulties with a variety of policies, most of which involved discrimination against the nonunionist. A common device was the circulation of blacklists of "rats" and "scabs." This was a reciprocal measure, through which each union hoped to prevent widespread violation of its standards. Excessive labor mobility made it necessary to "lengthen the arm of local law." For example, the Typographical Union of 1835 proposed: "That rats pronounced such by one society, be considered as such by all other societies."

It was found, however, that the nonadmission of "rats" to membership constituted a growing threat to the organizational stability of unions, for when the pocket of organized labor was outflanked by the rising numbers of nonorganized and nonadmissible workers, the opportunity for enforcing union standards was much reduced. In facing this tactical difficulty, some unions admitted an employee who displayed "exemplary" behavior, even though once a "rat"; others reasoned that employees were not violating any union regulation in working with nonmembers so long as the latter accepted the union scale; still others waived the initiation fee, particularly for transient workers. The "traveling card" became a device to permit the transient to maintain union membership from community to community, without paying such fees. The difficulties facing unions became particularly serious during unemployment. Secretary O'Dea of the bricklayers' union stressed the need for "leniency" in dealing with "rats" during a depression:

Unions should be very careful and conservative, and as a person is obliged to take medicine against his will, so will organized labor in the present crisis be forced to swallow matters that at other times it would instantly repudiate. Wherever it is deemed necessary I would recommend that the lines of discipline be loosened, and that Charity have a show as well as justice.[14]

But pressure to enforce the observance of union standards nevertheless continued, in spite of tactical concessions necessary during recessions. Labor newspapers advertised "no card, no work" shops, and conventions often admonished members not to work alongside nonmembers. The union card became an important proof of union citizenship. The union label was adopted as a device to attract purchasers to

[13] *Proceedings*, 1899, p. 28.
[14] *Proceedings*, 1893, p. 24.

union products. Above all, the unions never gave up their interest in the closed shop. In the 1890 convention of the American Federation of Labor, it was resolved that "union men should not work with non-union men, especially when they are displacing their fellow unionists who may have been on strike or locked out." In one account, the closed-shop provision became so popular "in all parts of the country that it became increasingly difficult for non-unionists to obtain employment."[15] This undoubtedly exaggerates the scope of agreements, as does the newspaper story that "Unionism ran riot.... The newsboys, the sandwich vendors, even the girls who sold chewing gum on the streets were organized. Civil Service in municipal affairs gave way to the closed shop."

As one might expect, employer opposition kept pace with union-security drives. In 1864 the Buffalo shipowners characterized the union in their industry as "obnoxious... dictatorial... ruinous and monstrously exorbitant" because it had demanded that "this man or that, shall not be employed unless he first becomes a member of their union."[16] The first symptom of the impending major struggle developed in the 1892 Carnegie Steel strike, when the company and union failed to agree, among other things, on the closed-shop demand. The defeat and rout of the Amalgamated Association of Iron, Steel and Tin Workers, then the largest single national in America, indicated the eagerness of employers to avoid dealing with unions.

1900: The Open-Shop Offensive

By the turn of the century, a new characteristic in labor-management relations had become apparent: unions were losing their fragility. Many had survived a series of economic recessions; they no longer seemed to be "fair weather" enterprises. Many employers, apprehensive of the permanent and growing power of unionism, decided to consolidate their resistance. No point of attack seemed more appropriate than the charge that union policies were restricting the employment opportunities of nonmembers. Thus, the right-to-work controversy was joined. The National Metal Trades Association, the National Association of Manufacturers, the National Founders Association, the American Anti-Boycott Association, and the Citizens' Industrial Association began a

[15] Marcosson, "The Fight for the Open Shop," *World's Work,* December, 1905, p. 6961, cited in Frank T. Stockton, *The Closed Shop in American Trade Unions* (Baltimore: Johns Hopkins Press, 1911), p. 43

[16] Cited in J. R. Commons and Associates, *Documentary History of American Industrial Society* (Cleveland: Arthur H. Clark, 1910), IX, 104–05

methodical campaign to mold public opinion to recognize the evils they felt to be inherent in union-security arrangements. The movement gained further support when the Anthracite Coal Strike Commission, arbitrating the 1902 coal dispute, rejected the closed-shop proposal of the United Mine Workers in forceful terms. National attention was also attracted to a dispute in which an assistant foreman in the bindery division of the government printing office had been expelled from the International Brotherhood of Bookbinders and, through union pressure, lost his job. Sensitive to the public clamor that ensued, the Civil Service Commission ordered the employee's reinstatement. President Theodore Roosevelt pointed out that such union action violated the law; he took the occasion to endorse the Anthracite Coal Commission's stricture against the closed shop.

Employer associations were heartened by this support from neutral sources. Citizens' Alliances were formed in many cities to extend the crusade. Washington, D.C., and Los Angeles were designated as model open-shop cities. The National Civic Federation and the American Economic Association held panel discussions on the merits of the controversy. When the constitution of the new State of Oklahoma was being prepared, it was proposed that it contain a right-to-work provision outlawing compulsory unionism, a proposal later rejected. If the pronouncements of the National Association of Manufacturers can be taken as an index of employer sentiment, agitation reached new levels of invective and scorn.

The keynote of the antiunion campaign was sounded by David M. Parry, president of the National Association of Manufacturers, in 1903, when he denounced unions as "socialistic" and added that they "know but one law... the law of physical force, the law of the Huns and Vandals, the law of the savage."[17] In this same year, the Citizens' Industrial Association, formed as a clearinghouse for employers in their common struggle against unionism, gave further impulse to the campaign. The association declared:

> In its demand for the closed shop organized labor is seeking to overthrow individual liberty and property rights, the principal props of our government. Its methods for securing this revolutionary and socialistic change in our institutions are also those of physical warfare.[18]

Unions protested that the semantic distinction between an "open"

[17] Cited in Albion G. Taylor, *Labor Policies of the National Association of Manufacturers* (Urbana: University of Illinois, 1927), p. 35.

[18] *Preliminary Convention of the Citizens' Industrial Association of America,* 1903, p. 17.

and a "closed" shop misled the public. The closed shop, as used in this period, generally involved employer recognition of the union, and frequently employer willingness to show preferential treatment to union members. It did not, however, technically mean that all workers must be members of the union before they could solicit employment. On the other hand, an open shop was one in which the employer did not recognize the union, but did not necessarily disallow the worker union membership. In some situations, however, the employer would require as a condition of employment that all employees agree not to join the union or to participate in a labor dispute; in other cases, the employer would allow union membership without discrimination so long as the union did not attempt a strike.

As a case in point, the Principles of the National Metal Trades Association declared: "No discrimination will be made against any man because of his membership in any society or organization." In 1906 a letter was received by *The Open Shop* protesting the discriminatory discharge of two union members. The protesting letter was printed, along with the reply:

> In the two instances which you cite as examples of discrimination of our company against organized labor, we discharged men who were attempting to incite a strike among our employees, and this we do not class as discrimination, but is simply the exercise of common sense and American manhood.[19]

The Open Shop, the journal of the National Metal Trades Association, maintained a continuous attack on compulsory unionism. First, it alleged that the American Federation of Labor was a dangerous monopopy:

> The American Federation of Labor is controlled by eleven men. These men are not workingmen. They may have been once, but now they live on the labor of others. They undertake to manipulate and regulate the lives of those who toil, and take toll for their services. The result is, that, being human, they are drunk—power-crazed by success. . . .[20]

Second, unions were dedicated to the use of power: "Those who tell you of trade unions bent on raising wages by moral suasion alone are like people who tell you of tigers that live on oranges. . . ."[21] Third, unions discriminated against nonunionists: "They must do their best to starve workmen who do not join them; they must by all means in their power

[19] An open letter to Messrs. Edward J. McMullen and Eugene Sarber, October 24, 1906, in *The Open Shop,* p. 31.

[20] Elbert Hubbard, "The Closed or Open Shop: Which?" *The Open Shop,* VI (January, 1907), 15.

[21] *Ibid.,* p. 16.

force back the 'Scab' as a soldier in battle must shoot down his mother's son if in the opposing ranks."[22] Fourth, unions attempted to dominate Congress. The failure of union-endorsed candidates in the 1906 election led *The Open Shop* to report:

> The election pricked the bubble of self-conceit; its power to harm is scorned. The labor trust can hereafter jabber its threatened vengeance, accompanied with its toothless snarling, as it sees best, and no one cares; its political power is dead, and the public passes on and does not even recognize it as the carcass of a dead lion.[23]

Fifth, the moral justice of the open shop was so obvious that it should not be arbitrated:

> Perhaps one phase of ministerial weakness is the constant insistence on arbitration, never, apparently, recognizing the fact that there are some matters that can not be arbitrated; that there are questions of morality, of equity, of absolute righteousness, that can not be knocked hither and thither like a tennis ball. As well advocate an arbitration in connection with the demands of the Ten Commandments.[24]

Six, the closed shop led to a dangerous monopoly of unions over labor supply:

> The baneful influences of the closed shop—the hell from which all kindred evils radiate, like the spokes from the hub of a wheel, are too numerous and too well recognized to admit of reiteration. The closed shop deprives the employer of the management of his business and places its ultimate management in the hands of irresponsible parties. It places in the hands of the walking delegates, and like demagogues, the power of monopoly.[25]

Finally, the closed shop violated individual employee freedom:

> Not the least among the hardships of the peaceable, frugal, and laborious poor is to endure the tyranny of mobs, who with lawless force dictate to them, under penalty of peril to limb and life, where, when, and upon what terms they may earn a livelihood for themselves and their families. . . .[26]

In his 1907 address before the National Metal Trades Association, J. W. Van Cleave of the National Association of Manufacturers reiterated that unions must abandon the closed shop, boycotting, the restriction of the number of apprentices, and the limitation of output:

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[22] *Loc. cit.*

[23] Samuel Hannaford, "The Record of the Year and the Labor Trust," *The Open Shop,* VI (February, 1907), 79.

[24] Samuel Hannaford, "The Church and Unionism," *The Open Shop,* VI (February, 1907), 95.

[25] A. J. Allen, "The Benefits of Organization," *The Open Shop,* VI (June, 1907), 271.

[26] Mary Hallock Foote, "Coeur D'Alene," *The Open Shop,* VI (February, 1907), 55.

"... *their arrogant attempts to dictate the manner in which their employers' business shall be conducted, and the rest of their vicious and un-American practices must be dropped by the unions finally and forever.*"[27] Van Cleave also pointed out that labor boycotting "is a barbarous and cowardly practice, which is outlawed in many states—which ought to be outlawed in every civilized community, and *whose perpetrators,* wherever they show themselves, *should be promptly placed behind prison bars.*"[28] Ironically, three years earlier Van Cleave had urged that employers avoid purchasing union-made goods.[29]

Los Angeles: The Model Open-Shop Town

Although some consider the depression of 1907 to be the high-water mark of the open-shop offensive, the struggle for union recognition in Los Angeles had a decisive turning point on October 1, 1910. As early as 1876 the Typographical Union in Los Angeles had struck for the closed shop, but the battle was joined when, on August 1, 1882, Harrison Gray Otis assumed editorship of the Los Angeles *Times.* As recorded in Grace Stimson's *Rise of the Labor Movement in Los Angeles,* "Otis 'caught Los Angeles young with the avidity of a mature schoolmaster,' and taught his doctrine so thoroughly that the city, sometimes even called 'Otistown,' became the home of 'True Industrial Freedom'—a motto still serving as the emblem of the *Times*—and eventually a nationwide symbol of the open shop."[30] By 1904 the Los Angeles Citizens' Alliance was reputed to be the strongest such employer group in the country. The *Times* explained:

> Employers of labor should be ready to meet and vanquish those who make unreasonable and arrogant demands upon them. To be forewarned is to be forearmed.... Those who are found to be acting the part of the traitor in fomenting disturbance, should be weeded out, and replaced by men who believe in respecting and protecting the interests of their employer, as well as their own.[31]

A frequent contrast was drawn between the economic development of "free" Los Angeles and "enslaved" San Francisco. As the *Times* indicated in 1903:

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[27] "The Labor Question and Employers' Organizations," *The Open Shop,* VI (August, 1907), 346. Italics in original.

[28] *Ibid.,* p. 347. Italics in original.

[29] *Proceedings of the Second Annual Convention of the Citizens' Industrial Association of America,* 1904, pp. 27–29.

[30] Grace H. Stimson, *Rise of the Labor Movement in Los Angeles* (Berkeley and Los Angeles: University of California Press, 1955), p. 36.

[31] March 29, 1903.

The labor unionists are having great trouble in getting their fingers upon the throat of Los Angeles, or entangling in the strands of her flowing locks. So long as the example of San Francisco—poor bedeviled and union-ridden San Francisco—is before this city, we are likely to see the people hereabouts conducting their own business without advice or direction from the jawsmiths and mischief-breeders who assume to represent "labor."[32]

In San Francisco, the union movement was assailed for implementing make-work rules in construction, for imposing high wage demands on employers, and for inculcating in the work force a "spirit of indifference and surliness" in place of their "high-hearted, clear-minded, self-respecting manhood."[33] The earthquake disaster was compounded, it was claimed, because unionists thought first of personal gain rather than reconstruction:

As it is, it [San Francisco] remains a city of ruins; capital complains that labor has laid too heavy a burden upon it; building is arrested since prices of material and labor render it unprofitable; and trade, which is ruthless and insistent, will soon seek other centers and outlets, if it finds the City of the Golden Gate impedes its progress and embarrasses its necessities.[34]

In contrast, Los Angeles possessed that priceless boon, industrial freedom. As Otis described it, "We have not yet, it may be, entirely thrown off industrial thralldom—but we are steadily approaching that magnificent goal for which brave and free men everywhere should contend, until the entire country is free in this respect."[35] The dynamiting of the *Times* building on October 1, 1910, provided a rallying point for anti-unionism. More than half a million dollars in damage resulted, and twenty lives were lost. Four days later Gompers correctly observed: "The greatest enemies of our movement could not administer a blow so hurtful to our cause as would be such a stigma if the men of organized labor were responsible for it."[36] The subsequent confession of the McNamara brothers to the crime provided convincing evidence to the public that "government by injunction" was much preferable to "government by dynamite." President John Kirby of the National Association of Manufacturers reflected this angry mood:

The type of unionism represented by the American Federation of Labor and advocated by Gompers and Mitchell is as great a menace, if not a greater one,

[32] March 2, 1903.

[33] "A Local View of the Labor Situation in San Francisco," *The Open Shop,* VI (July, 1907), 302–03.

[34] A letter signed "Labor Unionist," in *The Open Shop,* VI (March, 1907), 117–18.

[35] Harrison Gray Otis, "Los Angeles: A Sketch," Sunset, XXIV (January, 1910), 14, cited in Stimson, *op. cit.,* p. 331.

[36] "The McNamara Case," *American Federationist,* XVIII (June, 1911), 435, cited in *ibid.,* p. 370.

to society than the Ku-Klux-Klan, the Molly McGuires, the Mafia and Black Hand societies.... The institution of which I am speaking has proved itself to be a cold, merciless and murderous organization.[37]

The American Plan: The Renewed Offensive against Unionism

Although the open-shop offensive had stopped union expansion "dead in its tracks," World War I gave fresh impetus to unionism. Government boards administering basic industries gave labor the right to organize, free of employer discrimination, and in 1918 the War Labor Board formally evolved the *status quo* agreement under which employers were not to discharge or in any way discriminate against union members, while unions were not to attempt any form of coercion to secure new members. From 1915 to 1920 union membership doubled.

But in the postwar era, "enlightened" management undertook a spirited counterattack on unionism, and a network of open-shop organizations merged as a single movement called the American Plan. The enthusiasm of the employer attack on union discrimination against the nonunionist spilled over into employer discrimination against the unionist. The yellow-dog contract, forbidding union membership as a condition of employment, became an important instrument for holding union growth in check. Capitalizing on the residue of wartime emotionalism, the employers' open-shop campaign acquired the characteristics of a public crusade.

Antiunionism became a reality even before the twenties. When in 1919 the steelworkers' union requested a meeting with the United States Steel Corporation, Judge Elbert Gary issued his often-cited answer: "As you know, we do not confer, negotiate with, or combat labor unions as such. We stand for the open shop."[38] At the Industrial Conference called by President Wilson the same year, Gary again explained his position on the steel strike:

> ... there should be maintained in actual practice, without interruption, the open shop as I understand it; namely, that every man whether he does or does not belong to a labor union, shall have the opportunity to engage in any line of legitimate employment on terms and conditions agreed upon between employee and employer.[39]

The conference broke up when, as Philip Taft explained, "it was evident that the employer group would not concede to labor the right to organize in unions which were uncontrolled by employers."[40]

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[37] Quoted in Los Angeles *Times*, December 13, 1911, and cited in *ibid.*, p. 417.

[38] Cited in Philip Taft, *The A. F. of L. in the Time of Gompers* (New York: Harper, 1957), p. 387.

[39] Cited in *ibid.*, p. 398.

[40] *Ibid.*, p. 399.

This furious assault on unionism probably accounts in large part for the decrease of union membership from a peak of 5,110,800 members in 1920 to 3,592,500 in 1923. The decline of unionism continued throughout the twenties.

The Thirties: The Freedom to Associate vs. the Freedom Not to Associate

By 1932 Louis Adamic reported, "The body [AFL] is undoubtedly a sick body. It is ineffectual—flabby, afflicted with the dull pains of moral and physical decline. . . ."[41] But the dislocation of economic activity led to an upheaval in labor-management relations, largely because of the growing conviction that the industrial stagnation arose from the insufficiency of labor's purchasing power. Inadequate demand arose, in turn, because of the inadequacy of labor's bargaining power. This line of reasoning was to provide the justification for legislative encouragement of the bargaining process.

At the outset of the depression decade, the Norris-LaGuardia Act, in its declaration of public policy, indicated the helplessness of the individual unorganized worker in his bargaining relationship with management. It therefore declared that ". . . though he [the individual worker] 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. . . ."

It has been alleged that the inclusion in this policy statement of the phrase "free to decline to associate with his fellows" gave legislative recognition to the principle that employees shall be equally free to join or not to join unions. Indeed, J. C. Gibson, legal counsel for the Santa Fe Railway, has suggested that the adoption of little Norris-LaGuardia acts by several states, duplicating the declaration of public policy in the federal act, gave those states a form of right-to-work legislation, even though such laws are not always recognized as such.[42] He has also described the shift of the support of "liberals" and "labor agitators" away from the freedom-not-to-join principle as "one of the strangest paradoxes in the history of the labor movement in the United States in the Twentieth Century."[43] But it is clear that the policy statement of this

[41] Louis Adamic, "The Collapse of Organized Labor," *Harper's Monthly Magazine*, CLXIV (January, 1932), 167.

[42] J. C. Gibson, "The Legal and Moral Basis of Right to Work Laws: Legislative Restrictions Upon Union Security Agreements," an address before the Section of Labor Relations Law, American Bar Association, Philadelphia, Pa., August 23, 1955 (distributed by the National Right to Work Committee, Washington, D.C.), p. 1.

[43] J. C. Gibson, "Developments and Issues in the Law of Labor Relations: The Right to Work," an address before the Industrial Relations Research Association, Milwaukee, Wis., May 4, 1956 (processed by Santa Fe Railway, Chicago, Ill.).

act suggests that the right not to organize is parenthetic to the right to organize. Furthermore, the intent of Congress is made clear in Section 3 of the Act, making unenforceable yellow-dog contracts, or those contract terms stipulating nonmembership in a union as a condition of employment. There is no similar restriction on union-security clauses.

During the framing of Section 7(a) of the National Industrial Recovery Act, unions urged recognition of the right to bargain collectively. This right could be made explicit by provisions that would (1) prevent employer discrimination against union members and (2) prevent employer demands that employees, as a condition of employment, join company unions. Union proponents rejected any suggestion that prohibitions be placed on the closed or union shop. The NAM charged that the union version of Section 7(a) would deprive workers of their freedom of association by legalizing the closed shop. On June 16, 1933, President Roosevelt signed the bill supporting labor's freedom to bargain collectively without prohibiting compulsory unionism.

The 1934 Amendments to the Railway Labor Act were somewhat more symmetrical in treating membership and nonmembership requirements as a condition of employment. Section 2, *Fifth* of the Act read: "No carrier, its officers, or agents shall require any person seeking employment to sign a contract or agreement promising to join or not to join a labor organization." Thus, the compulsory union contract as well as the yellow dog was proscribed, in an amendment that enjoyed the support of both management and organized labor.

Why did organized labor accept such an amendment? The railroad brotherhoods feared that compulsory union membership, together with the compulsory checkoff, would enable company unions to raid their membership. While company unions represented only 20 per cent of the industry, Interstate Commerce Commissioner Joseph B. Eastman reported on December 7, 1933, that their organization "appears to have been tainted in many instances with coercion or influence on the part of the carrier managements."[44] At first, union representatives suggested that the Railway Labor Act be amended to bar *company* unions, but the word company was deleted from the final amendment, making provisions to join or not to join any labor organization illegal. In the words of George M. Harrison, "Our needs at the moment were to prevent carrier abuses which threatened our very existence. . . ."[45]

[44] Cited in Employees' Exhibit No. 9, "Security Clauses and Practices Affecting Company Unions on American Railways," before the President's Emergency Board No. 98 (Chicago: Labor Bureau of the Middle West, 1951), p. 4.

[45] *Railway Labor Act Amendments,* Hearings on H.R. 7789 before the House Committee on Interstate and Foreign Commerce, 81st Cong., 2d sess. (May 9, 1950), testimony of George M. Harrison.

The National Labor Relations Act of 1935 provided the framework for contemporary labor policy on the union-security issue. First, it specifically made it an unfair labor practice for employers to discriminate against employees for organizing, bargaining, or engaging in other forms of protected union activity. Second, it formally established the "majority rule" principle, under which a union certified as the bargaining agent for a predetermined bargaining unit became the exclusive representative of all employees in that unit. Third, employees were given the right to form, join, or assist labor organizations, and to bargain collectively through representatives of their own choosing. No mention was made of the employees' right *not* to bargain. Indeed, an added proviso made explicit the legality of the closed shop and other forms of union security where such provisions were negotiated by the representative of the majority of the employees. Thus, while the Wagner Act did not endorse union-security clauses, it made clear that the closed shop was not illegal.

Employer opposition was bitter: They feared that the law would, in effect, "impose" the closed shop, encourage the growth of Communist unions, force employers to hire incompetents, and deny American workers their "right to work." But the nation, still suffering from the whiplash of the depression, seemed more alarmed about the discrimination exercised by employers against unionists than the discrimination exercised by unions against the nonunionist. The significance of this legislation was not fully understood, however. By 1946, 14.8 million workers were covered by collective bargaining agreements and over 11 million worked under some union-security provision.[46]

The stage for the contemporary right-to-work controversy had been set.

[46] U. S. Bureau of Labor Statistics, *Extent of Collective Bargaining and Union Recognition, 1946,* Bull. No. 909 (Washington: 1947), pp. 1, 3.

Chapter 3
Judicial Standards and the Union-Security Issue

Our survey of the political history of the union-security issue has revealed the emotionalism surrounding the controversy. History has, of course, many facets, and one that cannot be neglected in an analysis of the union-security issue is the role of the judiciary. As noted in Chapter 2, because the government in nineteenth-century America felt a reluctance to regulate the details of labor-management relations, the responsibility for defining the substance of legitimate trade-union activity fell to the courts. While the courts since 1842 had been willing to admit that unionism *per se* was not illegal, they were left with tremendous flexibility in determining the content of both the "illegal means" and the "illegal ends" of unionism.

Rather than presenting the more important court decisions on union security in chronological order, this chapter will attempt to isolate the judicial pro and con in the dispute. More specifically, the first section will reveal those standards that ultimately made it possible for the courts to endorse (or at least permit) legislative action giving unions maximum freedom to organize. The second section will attempt to point out the various considerations or criteria utilized by the courts to limit compulsory union provisions.

Judicial Standards Favoring Unionism and Union Security

The *Freedom-of-Association Standard* is rooted in the First Amendment to the Constitution guaranteeing freedom of assembly. The right to organize arises from the freedom of individuals to join or not join, as well as from the freedom of the group to exclude the unwanted. Four alternative situations now arise: First, the individual may not want to join the association and the association may not want the individual as a member. Second, the individual may want to join and the association may desire his membership. In these two situations, no problems need arise. But problems do arise in the following cases: A worker may desire admission to an association—particularly in those instances where mem-

bership is a precondition for employment—and may be denied membership. Alternatively, the association may insist that the individual's membership be a condition of employment, and the individual may reject the requirement of membership and protest the resulting infringement on his "right to work." The unrestricted freedom of association of both the group and the individual cannot coexist, for the individual's freedom to join or not join as he likes can extinguish the freedom of the group to form the kind of association it desires. Similarly, the requirement of the group that individuals (a) must join or (b) must not join deprives the individual of the freedom of choice upon which his freedom of association rests.

In attempting to formulate the optimum combination of freedom of association of the group and of the individual, the courts have tended, by and large, to favor the group rather than the individual. One must not slip into the easy assumption, however, that society can run with both the hounds and the hares, by being equally enthusiastic about the freedom of association and, simultaneously, the freedom *not* to associate. The fact that the freedom of the group not to admit all workers is inconsistent with the freedom of the individual to make up his own mind about membership is sometimes overlooked. As a case in point, Sylvester Petro writes: "If workers want unions they will have them, with or without compulsory unionism. If they do not want unions, it is simply unthinkable to force unions upon them." To Petro, then, it is "unthinkable" that the worker's freedom *not* to join should be extinguished by the union's freedom to force membership. But a few pages later he writes: "... it is unthinkable that union members should be forced to work with nonunion men. This, it would seem, is a measure which no society which claims to be free should enact."[1] Thus, to Petro, it is also "unthinkable" that a union should not be free to exercise coercion (that is, refuse to work with nonunion men). But does not the exercise of such union freedom jeopardize the individual's right not to join?

Today the freedom-of-association standard represents the main plank in the right-to-work platform, simply because it is alleged that there can be no freedom of association unless there is freedom *not* to associate. Somewhat paradoxically, then, a large part of the agitation over the union-security issue does not rest on the exclusionary but on the inclusionary tactics of unionism. But, as we shall see, the union move-

[1] Sylvester Petro, "External Significance of Internal Union Affairs," *New York University Fourth Annual Conference on Labor,* ed. by Emanuel Stein (New York: 1951), pp. 351, 353.

ment has been condemned both for excluding those anxious to become members and including those anxious to avoid membership.

In 1890, in one of the first cases making explicit the freedom of unions to establish their own membership policies, two journeymen stonecutters were denied membership in the Stonecutters' Association and were unable, as a consequence, to secure employment. Justice V. C. Green, in his decision, explained: "A power to require the admission of a person in any way objectionable to the society is repugnant to the scheme of its organization." He distinguished between the right to join an organization and a right to be protected from expulsion:

> While the courts have interfered to inquire into and restrain the action of such societies in the attempted exclusion of persons who have been regularly admitted to membership, no case can, I think, be found where the power of any court has been exercised, as sought in this case, to require the admission of any person to original membership in any such voluntary association.... [N]o person has any abstract right to be admitted to such membership; that depends solely upon the action of the society, exercised in accordance with its regulations, and until so admitted no right exists which the court can be called upon to protect or enforce.[2]

Related to, but not identical with, the freedom-of-association standard is the *Fraternal-Organization Standard.* A union is a private association, traditionally free of judicial interference on matters relating to internal union affairs. As such, the union is free to formulate its own constitution, to establish its own admission and expulsion standards. While a convincing argument can be built for the proposition that union size and responsibility transcend this "private club" function, both legislators and courts have been fully appreciative of the difficulties of detailed regulation. It is significant that in 1947 when Congress considered amendments to the Wagner Act it allowed unions autonomy over their internal affairs.

If freedom of association is allowed the group, and the group is further insulated from judicial interference in determining its admission rules, could these standards be pushed to cover the case where all members of one union refused to work alongside workers affiliated with another union? In *National Protective Association v. Cumming,* Chief Justice Parker of the New York Court of Appeals thought they could, and he added a new argument to justify union exclusionary policies: "... so long as workmen must assume all the risk of injury that may come to them through the carelessness of co-employes, they have the

[2] *Mayer v. Journeymen Stonecutters' Association,* 47 N.J. Eq. 519, 524, 20 Atl. 492, 494 (Ch. 1890).

moral and legal right to say that they will not work with certain men, and the employer must accept their dictation or go without their services."[3] Thus, a *Safety Standard* provided a further rationale for the efforts of unions to isolate job opportunities from nonmembers.

It is not surprising that the courts, imbued with the logic of laissez faire and competitive economic theory, were often reluctant to substitute judicial regulation for the competitive process. While union-security arrangements could create difficulties for nonmembers, especially if the closed shop coexisted with the closed union, this hardship was seen to be inherent in the operation of competitive forces in any market. The advance of the material welfare of members was a legitimate purpose for any union. In several cases, therefore, the courts held that a union could confront the employer with an all-or-nothing proposition. The employer had the choice of hiring only union members or none of them. As long as the alternative was presented by the union in good faith, the courts often felt this was consistent with the competitive process, if not the very essence of that process. Thus, a *Free Bargaining Standard* was also utilized to justify union-security agreements.[4]

Related to this consideration was the *Equality-of-Power Standard.* The courts sometimes contemplated the power balance between labor and management in adjudicating disputes on the union-security issue, and liberal justices found little difficulty in discerning the need for union organization. In the famous Holmes dissent in *Plant v. Woods,* for example, the rationale for both unionism and the closed shop was clearly set forth:

> The immediate object and motive was to strengthen the defendants' society as a preliminary and means to enable it to make a better fight on questions of wages or other matters of clashing interests. I differ from my Brethren in thinking that the threats were as lawful for this preliminary purpose as for the final one to which strengthening the union was a means. I think that unity of organization is necessary to make the contest of labor effectual, and that societies of laborers lawfully may employ in their preparation the means which they might use in the final contest.[5]

In similar vein, Judge Gray of the New York Court of Appeals spoke in 1905 of the "underlying law of human society" which "moves men to unite for the better achievement of a common aim" as a "social principle" justifying organized action. Admittedly, the "surrender of indi-

[3] *National Protective Association v. Cumming,* 170 N.Y. 315, 325, 63 N.E. 369, 370–71 (1902).

[4] For typical reasoning of the courts, see *Reform Club v. Laborers' Union Protective Society,* 29 Misc. 247, 60 N.Y. Supp. 388 (Sup. Ct. 1899).

[5] *Plant v. Woods,* 176 Mass. 492, 505, 57 N.E. 1011, 1016 (1900).

vidual liberty is involved" but this is "an extension of the right of freedom of action. . . ."[6]

If the closed shop was designed to provide benefits to union members, was this intent, to use Justice Shaw's classification, "honorable" or "pernicious"? In contemplating this question, some justices leaned on a *Benefit Standard* to justify union-security clauses. As we have noted, the gain to the union member through such a contract clause can involve a loss to the nonmember, and since gains and losses may vary inversely to each other, the direction of judicial pronouncements frequently depended upon whether the courts elected to look with favor on the gain of some or with disfavor on the complementary loss of others. Chief Justice Parker, in the *Cumming* case, pin-pointed this difficulty in alluding to the "benefits" of competition: "Within all the authorities upholding the principle of competition, if the motive be to destroy another's business in order to secure business for yourself, the motive is good; but, according to a few recent authorities, if you do not need the business, or do not wish it, then the motive is bad. . . ."[7] By analogous reasoning, a demand for a closed shop which was not necessary, or one that provided labor with benefits it did not want, was illegal. But labor's interest in the closed shop seldom arose as a malicious whim, although the courts at times imputed such motives to the union.

The weighing of gains and losses has played an important role in numerous decisions, and in many of these the reality of injury to the nonunionist did not constitute grounds for extinguishing the union-security provision. In *Mills v. United States Printing Co.*, the Appellate Division of the New York Supreme Court made the distinction between "combinations for welfare of self, and that for the persecution of another," adding: "The primary purpose of one may necessarily but incidentally require the discharge of an outsider; the primary purpose of the other is such discharge and, so far as possible, an exclusion from all labor in his calling."[8] Within this context, the court found the closed-shop demand legal. One of the most frequently cited cases on the closed-shop issue is the English case of *Allen v. Flood.*[9] Here the members of a boilermakers' union refused to work alongside two shipwrights, belonging to a separate union, and thereby induced the dis-

[6] *Jacobs v. Cohen*, 183 N.Y. 210, 211, 76 N.E. 5, 7 (1905).

[7] *National Protective Association v. Cumming*, 170 N.Y. 315, 326, 63 N.E. 369, 371 (1902).

[8] *Mills v. United States Printing Co.*, 99 App. Div. 605, 613, 91 N.Y. Supp. 185, 190 (2d Dep't 1904).

[9] *Allen v. Flood* (1898), A.C. 1 (H.L.).

charge of the shipwrights. The British court found for the defendant union, reasoning that such union action was designed to promote the trade interests of its members and, though it was unfortunately injurious to rival union members, the reality of that injury did not make the action of the defendant illegal.

Judicial Standards Restricting or Nullifying Union Security

The several standards supporting union security represented an interlacing whole, binding in a sense the very essence of unionism. But, as we shall see, there were strings that could frequently come undone. Antiunionism flourished, both before and after World War I. In these periods of resurging individualism, the public might tolerate the concessions unions secured from management as the "fortunes of war," but it could never understand why fellow workers should suffer at the hands of the union power mechanism, or why the strong (organized) worker should be allowed to hustle the weak (unorganized) employee out of the queue providing economic benefits. Let us review a few of the more important standards offering judicial support to the right-to-work movement.

Of the several standards utilized by partisans in the right-to-work controversy, the *Freedom-of-Contract Standard* has played an unusual role. Originally employers contended, in spite of the bitter opposition of unions, that the freedom to make nonmembership in a union a condition of employment was an inherent contract right not to be restricted by legislative enactments. More recently unions have embraced the freedom-of-contract standard, while many employers protest the hollow content of their "freedom" to reject union demands in the face of union power. Such contractual freedom is, of course, limited by any legislation declaring that (a) membership or (b) nonmembership cannot be a condition of employment. Originally, the courts protected this freedom of contract from legislative restrictions. When Section 10 of the Erdman Act (1898) outlawing the yellow-dog contract was invalidated by the Supreme Court in the *Adair* case, Justice John Marshall Harlan explained: "It was the right of the defendant to prescribe the terms upon which the services of Coppage would be accepted, and it was the right of Coppage to become or not, as he chose, an employee of the railroad company upon the terms offered to him. . . .'"[10] Similarly, when the State of Kansas outlawed yellow-dog contracts in 1903, the United States Supreme Court reasoned that the worker has no "inherent right to do this [join a union] and still remain in the employ of one who is unwill-

[10] *Adair v. United States*, 208 U.S. 161, 172–73 (1908).

ing to employ a union man, any more than the same individual has a right to join the union without the consent of that organization."[11] On freedom of contract, the Court held:

> Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is substantial impairment of liberty in the long-established constitutional sense. The right is as essential to the laborer as to the capitalist, to the poor as to the rich; for the vast majority of persons have no other honest way to begin to acquire property, save by working for money. . . .[12]

The freedom-of-contract argument was driven home with further force in the *Hitchman Coal & Coke* case, when the Supreme Court validated the use of injunctions to restrain attempts to organize workers bound under a yellow-dog contract. Again the Court declared that ". . . the employer is as free to make non-membership in a union a condition of employment, as the working man is free to join the union. . . ."[13]

The Supreme Court took a new approach in the 1937 *Jones and Laughlin* decision validating the Wagner Act. This Act made the yellow-dog contract a management unfair labor practice. In contrast, the 1934 Amendments to the Railway Labor Act, as well as 16 of the 18 state right-to-work laws,[14] outlawed both the union-membership and the non-union-membership proviso as a condition for labor employment. Today, the proponents of right-to-work legislation argue that "half" of the issue was settled when the courts upheld legislation nullifying yellow-dog contracts, but that victory can be complete only when the other restriction, union membership, is outlawed.

As we noted at the outset, management and unions have switched sides on this issue: Traditionally the courts reinforced the vigorous struggle of management to preserve its freedom of contract against the legislative restrictions of the federal and state governments. Now with the yellow-dog contract illegal, management complains: "It is a little inconsistent for labor leaders, at this late date, to try to resurrect the old freedom of contract in respect to union membership."[15] In the company view, the pre-Wagner-Act prohibitions imposed by management on labor were clearly against public policy and deserved to be outlawed,

[11] *Coppage v. Kansas,* 236 U.S. 1, 19 (1915).

[12] *Id.* at 14.

[13] *Hitchman Coal & Coke Co. v. Mitchell,* 245 U.S. 229, 251 (1917).

[14] The Arizona and Nevada right-to-work laws do not outlaw the yellow-dog contract but proscribe all forms of union security.

[15] J. C. Gibson, "State Authority in Labor Relations," an address before the Western Labor Management Relations Conference, California Chamber of Commerce, San Francisco, January 18, 1956.

and by similar logic, clauses requiring union membership as a condition of employment should also be illegal. Unions have now become the champions of contract rights, while management advocates legislative restrictions on the uninhibited exercise of those rights.

The *Illegal-Purpose Standard* has also been utilized by the courts to condemn union-security clauses. In *Plant v. Woods,*[16] a split within a local led to a jurisdictional fight between competing factions for complete representation. The winning group declared it would not work alongside members of the rival organization and secured a closed-shop agreement with the employer to implement that decision. The court ruled that such actions represented the commission of harm for harm's sake and further that a strike to secure a closed shop was unlawful when its purpose was to inflict harm on others. In several cases the courts held that the union was liable for damages arising from the discharge of an employee occasioned by union pressure.

As one might expect, such a flexible standard gave considerable scope to judicial restraint on the "malicious and wanton" interference of unions in labor's right to work. In some cases maliciousness was not difficult to establish. In *Connell v. Stalker,*[17] for example, the plaintiff became involved in a dispute regarding the books that he, as treasurer of the union, was required to turn over to other officers of his union. When he refused to cooperate, he was "knocked off" by his union and ultimately discharged. The City Court of New York held that the man's discharge was illegal and that union pressure to secure it was illegal. In *De Minico v. Craig,* a group of workers forced the discharge of a foreman because, in the workers' minds, he enforced the rules of the establishment too rigidly. The Supreme Judicial Court of Massachusetts denied that the right of the foreman to his job could be jeopardized in this manner: "... to humor their personal objections, their likes and dislikes, or to escape from what 'is distasteful' to some of them is not in our opinion a superior or an equal right."[18] Similarly, in *Hanson v. Innis,*[19] a union forced the discharge of a foreman because he had refused to employ additional union members, even though there was no need for more workers. Again the Supreme Judicial Court of Massachusetts ruled the union action illegal and held the union liable to the foreman for damages resulting from his discharge.

[16] *Plant v. Woods,* 176 Mass. 492, 57 N.E. 1011 (1900).

[17] *Connell v. Stalker,* 20 Misc. 423, 45 N.Y. Supp. 1048 (City Ct. N.Y. Gen. T. 1897), aff'd, 21 Misc. 609, 48 N.Y. Supp. 77 (Sup. Ct. App. T. 1897).

[18] *De Minico v. Craig,* 207 Mass. 593, 599, 94 N.E. 317, 320 (1911).

[19] *Hanson v. Innis,* 211 Mass. 301, 97 N.E. 756 (1912).

The fear of union dominance in the labor market frequently led to the use of a *Monopoly-of-Labor Standard.* In *Berry v. Donovan,* a shoe workers' union required that an employer discharge the plaintiff, an employee of some years' standing, because he refused to join the union after a closed-shop agreement had been signed. The Supreme Judicial Court of Massachusetts denied that the contract was lawful, charging that such a provision led directly to a monopoly of the labor supply and ultimately to union dominance of all industry. The court reasoned that if unions could force all workmen to join their organizations, they "would have complete and absolute control of all the industries in the country. Employers would be forced to yield to all their demands, or give up business. The attainment of such an object in the struggle with employers would not be competition, but monopoly."[20] Fears of monopoly control were also raised in *Connors v. Connolly.* The Supreme Court of Connecticut condemned the closed-shop agreement "which takes in an entire industry of any considerable proportions in a community, so that it operates generally in that community to prevent or to seriously deter craftsmen from working at their craft, or workingmen obtaining employment under favorable conditions, without joining a union. . . ."[21] Similarly, in *Curran v. Galen,* the New York Court of Appeals acknowledged that a union-shop arrangement may avoid disputes and conflicts within the union but held that "that feature and such an intention cannot aid the defense, nor legalize a plan of compelling workingmen, not in affiliation with the organization, to join it, at the peril of being deprived of their employment and of the means of making a livelihood."[22]

Interest in the monopoly standard gained momentum with the wider use of union-security arrangements in the latter part of the thirties, reflecting the growing strength of the union movement. The need for a union-security clause had always been persuasive when fragile unions faced hostile employers, but with the ground-swell expansion of union membership in the thirties, the union-monopoly problem acquired new significance. If a union had the economic power to secure a closed shop and the legal right to close its "private club" to new members, the union had maneuvered into a position of not only controlling the point of ingress to vital employment opportunities, but also controlling the size of the stream of workers available to the employer. The monopoly implications of any arrangement which controls the *direction*

[20] *Berry v. Donovan,* 188 Mass. 353, 359, 74 N.E. 603, 606 (1905).
[21] *Connors v. Connolly,* 86 Conn. 641, 651, 86 Atl. 600, 603–04 (1913).
[22] *Curran v. Galen,* 152 N.Y. 33, 39 (1897).

of employer demand as well as the *volume* of labor supply are self-evident.

In *Wilson v. Newspaper & Mail Deliverers' Union,* the union had secured a closed-shop agreement and had shut its doors to new members. The plaintiff, who had worked with the company for twelve years, applied, along with three other nonunion employees, for membership in the union, but all were rejected. Thereupon the men were discharged and their jobs taken by union men. It appeared that there was no personal objection against the plaintiff, but "the books of the union were closed to new membership, by reason of the fact that many members in good standing of the union were unemployed," and the plaintiff had no alternative employment opportunities in his trade in the city. The Court of Chancery of New Jersey declared the union's closed-shop agreement void: "The question presented in the instant case is not one of prices or of serving the public but one of employment—the right of a man to sell his own labor. However, the principle is the same; the holders of the monopoly must not exercise their power in an arbitrary, unreasonable manner so as to bring injury to others. . . ."[23] In *Schwab v. Moving Picture Machine Operators, I.A.T.S.E.,* the Oregon Supreme Court declared: "Labor unions which close their ranks to the public thereby assume a sovereignty which is not theirs to assume. . . . The closed shop at the hands of a labor union which substantially excludes the public from its benefits . . . is a means whereby an anti-social monopoly is foisted upon the industrial body politic."[24] In *Carroll v. Local No. 269, I.B.E.W.,* the New Jersey Court of Chancery was even more explicit: Holding that a labor monopoly for permissible objectives is legal, the court added that "unions obtaining such monopolies must be democratic and admit to their membership all those reasonably qualified for their trade. . . . A voluntary union should be one in which a law-abiding individual of good moral character, possessing the essential qualification of his trade, can enter upon compliance with rules and by-laws reasonably appropriate for the stability and usefulness of the association. Autocracy is no less inimical to our American ideals if practiced by many rather than by one."[25]

One of the most important cases in recent times is that of *James v. Marinship.* James, a Negro, brought action on behalf of himself and approximately a thousand Negro workers similarly situated, against

[23] *Wilson v. Newspaper & Mail Deliverers' Union,* 123 N.J. Eq. 347, 348, 350–51, 97 Atl. 720, 721, 722 (1938).

[24] *Schwab v. Moving Picture Machine Operators, I.A.T.S.E.,* 165 Ore. 602, 623–24, 109 P.2d 600, 608 (1941).

[25] *Carroll v. Local No. 269, I.B.E.W.,* 133 N.J. Eq. 144, 147, 31 A.2d 223, 225 (1943).

the International Brotherhood of Boilermakers, Iron Shipbuilders and Helpers of America for not admitting Negroes to membership. In 1937 this union established separate locals for Negroes. In 1943 Negroes were required to join such locals, but the plaintiff's refusal led to his discharge. He took action, charging that the auxiliary local was not a bona fide union local offering the full privileges of regular union membership. He was willing to join the union, but only on equal terms with all other members. Though the defendant argued that the business agent of the brotherhood acted with "equal zeal" for members of both white and colored locals, and though it was agreed that the closed-shop contract was legal in California, the Supreme Court of California pointed out:

> It does not follow... that a union may maintain *both* a closed shop agreement or other form of labor monopoly together with a closed or partially closed membership. We have found no case in this state that supports such a right and there is no decision of the United States Supreme Court that compels its recognition as a proper labor objective.... [A]n arbitrarily closed or partially closed union is incompatible with a closed shop. Where a union has, as in this case, attained a monopoly of the supply of labor by means of closed shop agreements and other forms of collective labor action, such a union occupies a quasi public position similar to that of a public service business and it has certain corresponding obligations. It may no longer claim the same freedom from legal restraint enjoyed by golf clubs or fraternal associations. Its asserted right to choose its own members does not merely relate to social relations; it affects the fundamental right to work for a living.[26]

Objection to "unreasonable" membership restrictions can be invoked on grounds other than race. In *Bautista v. Jones,* the California Supreme Court affirmed that where a milk peddler met reasonable membership requirements imposed by a milk wagon drivers' union, the union must either accept his membership or surrender its demand for a closed shop.

> The interests of the peddler member may not be identical with the other union men, but the resultant conflicts and inequalities must be overcome if the legitimate objectives of organized labor are to be achieved.... The rights involved are too fundamental to be ignored by either group; they cannot be flouted but must be reconciled, regardless of the difficulties which may confront those faced with the task.[27]

Conclusion

This brief summary of the standards utilized by the courts in defining justice in the relationship of the union to the nonunionist reveals not only the complexity of the problem, but also the pliability of the courts

[26] *James v. Marinship Corp.,* 25 Cal. 2d 721, 730–31, 155 P.2d 329, 335 (1944).
[27] *Bautista v. Jones,* 25 Cal. 2d 746, 753, 155 P.2d 343, 347 (1944).

when facing the peculiar combination of circumstances in each test case. The courts, like society as a whole, are groping for the optimum combination of freedom for the individual and for the group. There can be no doubt that union organization poses limits on individual freedom. Whether the union exercises exclusionary or inclusionary policies, its refusal to admit all individuals or its effort to capture all employees reduces individual choice in the matter of union membership. Even if exclusionary or inclusionary policies are restricted by law, the question must still be resolved whether union members should have the freedom not to work with nonmembers and whether the individual may exercise a reciprocal freedom by refusing to work with union members. The coercive element inherent in the exercise of such freedom is, of course, much more apparent in the former case than in the latter. The historical roots of this controversy are deep, and it is not likely that this issue will be easily or quickly resolved.

Chapter 4

The Contemporary Right-to-Work Campaign

Present interest in the right-to-work issue reflects the ever-changing power relationship between unions and management. While the basic issue in this controversy—the individual's freedom to decide for himself whether he will or will not join a union—has not changed since the open-shop offensive of 1903 and the American Plan of the twenties, the reality of union power in present society has given new significance to old arguments. Furthermore, several new dimensions have been added to the controversy. The purpose of this chapter is to outline the immediate background of the present dispute. The first half of the chapter will deal primarily with federal legislation on this issue, involving employees engaged in interstate commerce. The final section will provide a survey of state right-to-work laws.

The Growth of Union Security

The laissez-faire attitude of the government toward union security, as reflected in the Wagner Act, allowed a rapid expansion of compulsory-union-membership contract provisions. As Table 1 indicates, by 1941 about 40 per cent of all employees covered by collective bargaining provisions were also covered by some union-security provision. This proportion increased steadily each year from 1942 to 1946. But a sharp increase in "sole bargaining" (involving noncompulsory provisions) developed in 1949–1950, following the Taft-Hartley prohibition of the closed shop. By 1951, however, only 26 per cent of employees covered by union contracts were exempt from either union-shop or maintenance-of-membership provisions, and by 1954 only 19 per cent of employees under union contracts were free of union-security agreements. About 13 million workers, or 81 per cent of the 16 million union members, were covered by union-security clauses in 1954. This is about 27 per cent of the 48.4 million nonagricultural employees in the labor force.

The growth of the checkoff arrangement has kept pace with the growth of union-security clauses. By 1954, 75 per cent of all collective bargaining agreements contained checkoff provisions.[1]

[1] Rose Theodore, "Union-Security Provisions in Agreements, 1954," *Monthly Labor Review*, LXXVIII (June, 1955), 651.

TABLE 1

CHANGES IN UNION RECOGNITION IN THE UNITED STATES BY PROPORTION OF EMPLOYEES: 1941–1954

Workers under agreements providing	Percentage distribution[1]								
	1941	1942	1943	1944	1945	1946	1949–1950	1950–1951	1954
Closed shop	40%	45%	30%	28%	30%	33%	..	..	..
Union shop			20	18	15	17	49%	58%	64%
Maintenance of membership	n.a.	15	20	27	29	25	20	16	17
Preferential hiring	n.a.	5	2	2	3	3	..	..	..
Others[2]	n.a.	35	28	25	23	22	31	26	19
Total		100	100	100	100	100	100	100	100

n.a. Not available.

[1] Percentage changes from year to year are not strictly comparable because of changes in the volume of employment during the period.

[2] No membership or hiring requirements are mentioned in these agreements, which have clauses specifying sole bargaining, maintenance of union dues, and bargaining for members only.

SOURCE: U. S. Bureau of Labor Statistics, *Extent of Collective Bargaining and Union Recognition, 1946*, Bull. No. 909; Rose Theodore, "Union Security Provisions in Agreements, 1954," *Monthly Labor Review*, LXXVIII (June, 1955), 655.

The War Emergency and Government Policy

When President Roosevelt created the tripartite National Defense Mediation Board on March 19, 1941, the board assumed responsibility for disputes threatening to "burden or obstruct" national defense. The success of this agency depended upon the willingness of labor and management representatives to continue their participation, even in the face of unfavorable majority decisions.

This delicate arrangement was soon put to the test over the union-security issue. The Federal Shipbuilding and Drydock Company refused to accept the Mediation Board's recommendation of a maintenance-of-union-membership provision to settle a dispute with the Industrial Union of Marine and Shipbuilding Workers. The rejection was followed by a strike on August 6, 1941. On August 23, the government seized the plant, and employees returned to work "for the government." But the government also refused to accept the maintenance-of-membership provision.[2] Before the impasse could be resolved, the plant was returned to private operation on January 5, 1942, following Pearl Harbor.

The Federal Shipbuilding case did not resolve the union-security issue, and the National Defense Mediation Board faced the problem again in the captive coal mine case. In this situation, the United Mine Workers insisted on a union-shop contract with all bituminous coal mines operated by steel companies. When the operators refused the demand, the miners struck. The Mediation Board assumed jurisdiction and the men returned to work. However, the board could not reach a settlement of the issue itself and recommended arbitration. This the union rejected and the strike was resumed. Finally, with presidential pressure, the Mine Workers agreed to submit the dispute to the Mediation Board for its recommendation, and on November 10, 1941, by a vote of nine to two, the board recommended against the union shop. As public representative Frank P. Graham reasoned:

> To press for this private monopoly [of union membership], through private agreement between the parties or through the use of economic power, raises questions not only of public regulation of labor unions, but also of hasty restrictions in an unpropitious hour.

Charles E. Wyzanski pointed out that coal mining is a specialized craft and that under a union-shop contract "the individual miner will have no economic choice except to join this union." Further support for this position was given by President Roosevelt:

[2] U.S. Bureau of Labor Statistics, *Report on the Work of the National Defense Mediation Board,* Bull. No. 714 (1942), pp. 185–92.

I tell you frankly that the Government of the United States will not order, nor will Congress pass legislation ordering, a so-called closed shop.... The Government will never compel this 5 percent [the nonunionists] to join the union by a Government decree. That would be too much like the Hitler methods toward labor.

The union would not, however, be placated, and the CIO participants resigned from the National Defense Mediation Board. The coal strike was resumed.

Again with presidential urging, the dispute was submitted to a separate arbitration panel made up of Benjamin Fairless, John L. Lewis, and John R. Steelman, with the award of the panel to be binding. On December 7, 1941—the date of Pearl Harbor—the panel awarded the union shop to the miners in a two-to-one decision. Steelman pointed out that only about one out of every 200 employees in the coal mining industry did not belong to the union. While he agreed with the Mediation Board's statement that "the emergency should not be used either to tear down or to artificially stimulate the normal growth of unionism in defense industries," he could not see how the status quo of unionism in this industry could be seriously affected by the union-shop decision.[8]

This decision had considerable effect on labor-management relations during World War II. It was apparent that labor and management were still sharply split on the union-security issue. While the NDMB had dealt satisfactorily with the union-security problem in about one half of its ninety-six cases, the problem proved ultimately to be the undoing of that board. Furthermore, in spite of the President's statement that the government would never sanction compulsory unionism, the government-appointed arbitration board did rule for the union shop. This ruling probably encouraged many employers in the war period to consider the maintenance-of-membership formula as a much more desirable arrangement than the union shop; it may, therefore, have softened employer resistance to the efforts of the National War Labor Board to impose this compromise settlement.

Even following Pearl Harbor, employers were not willing to agree that the new National War Labor Board should have jurisdiction over the union-security issue, but President Roosevelt blandly ignored employer opposition and granted the board final power to determine *all* disputes certified to it.

In spite of the serious military crisis facing the nation, the partisans seemed more determined than ever to maintain their positions. As Louis L. Jaffe has explained, it was as though the crisis served to telescope

[8] *Ibid.*, pp. 117–34, 268–76. Quotations appear on pp. 128, 132, 268, 275.

the issue of union security, "crowding all its sprawling elements into high relief so that it comes to us with the deceptive clarity of a laboratory demonstration."[4] The National War Labor Board itself concluded: "No issue presented to the War Labor Board precipitated more furious debate than union security."[5] On the one hand, unions feared that with the rapid expansion of employment, nonmembers might outnumber union members, a condition that "might even set back the cause of employee organization by a hundred years."[6] On the other hand, employers felt that union demands for union-security clauses represented "attempted extortion of an exorbitant price for cooperating in the defense of the country."[7]

At the outset, the board approved union-security provisions only in instances where such a contract was required to preserve union organization in the face of hostile employers or rival unions. For example, in the Walker-Turner case, it was found that the company's attitude of noncooperation with the union, combined with a policy of paying low wages, was resulting in the union's disintegration and that the union could not check this trend in view of its obligation under the national agreement to refrain from striking.

Later, however, the board developed a somewhat more liberal policy in granting "maintenance of membership" subject to several safeguards. In the International Harvester case, the board granted maintenance of membership on condition that the majority of union employees voted in secret to support that provision.[8] This procedure, anticipating a provision of the Taft-Hartley law, proved too costly and cumbersome for general application. But other provisions were not. First, a general 15-day escape period was provided to allow employees to resign from union membership before the union-security clause became operative. Second, the union had to demonstrate responsible adherence to the no-strike pledge. Third, unions were required to conduct elections with opportunity for the participation of all members, and to make audited financial reports to the members. Employer representatives on the board consistently demanded that when maintenance of membership was granted, it should be accompanied by additional restrictions

[4] Louis L. Jaffe, "Union Security: A Study of the Emergence of Law," *University of Pennsylvania Law Review*, XCI (December, 1942), 276.

[5] U. S. Department of Labor, *Termination Report of the National War Labor Board* (Washington: n.d.), I, 81.

[6] As reported by George W. Taylor, *Government Regulation of Industrial Relations* (New York: Prentice-Hall, 1948), p. 123.

[7] *Loc. cit.*

[8] *Termination Report of the National War Labor Board*, I, 83–84.

upon unions. The majority of the board was, for the most part, unsympathetic with this view. In the newspaper industry, however, when the issue of freedom of the press was raised, the board did provide special safeguards for any employee who might be expelled by the Newspaper Guild because of what he wrote.[9] In the Humble Oil case, the industry representatives expressed their opposition to the maintenance-of-membership provision in the following terms:

> We are confronted with a theory of finality in the decisions of this Governmental agency, without provision for judicial review, to which we cannot subscribe. We find expressed in the majority opinion a flood of idealistic declamations but a dearth of demonstration. We assert that the philosophy expounded by the majority leads inevitably to denial of the very ideals for which our country is fighting the present war. We condemn the majority proposed policy on union maintenance because, in our opinion, its application contemplates widespread undemocratic restriction of the rights of workers and employers; because it would spread more or less indiscriminately in industry a device unproved as an aid to production; and because it would constitute a potent threat to harmonious industrial relations so necessary now and in the postwar period.[10]

In the railroad industry, meanwhile, the nonoperating employees insisted on a union-shop agreement, a demand that culminated in the appointment of the Sharfman Emergency Board in 1943. In this instance, interest in union-security provisions did not arise because of employer hostility, but because of CIO interest in recruiting members from among railway workers already members of the independent railroad brotherhoods.[11] The board denied the demand, however, pointing out that the union shop was not "legally permissible," that union membership was not declining, that all but 10 per cent of employees were members, and that there was no evidence of union jeopardy by reason of carrier opposition. It further noted, from an examination of 15 labor union constitutions, that several nationals discriminated against Negroes. "These provisions raise questions of public policy that cannot be disregarded by a government agency."[12]

Taft-Hartley and the Railway Labor Act Amendments

The 1945 Labor-Management Conference called by President Truman made no progress on the union-security problem. But industry demands

[9] *Ibid.*, p. 86, n. 12.

[10] *Ibid.*, p. 89.

[11] Leonard A. Lecht, *Experience Under Railway Labor Legislation* (New York: Columbia University Press, 1955), p. 177.

[12] Cited in the exhibit of Certain Western Carriers and the Pullman Company, "The Union Shop Case: Index to the Record and Summary of Evidence," before the President's Emergency Board No. 98 (1952), p. 27.

for "management-security" legislation became insistent, and the intransigence of union representatives in the face of moderate proposals to amend the Wagner Act undoubtedly encouraged a general recasting of labor law.

Furthermore, by 1947 over 5 million workers were covered by closed-shop agreements. The requirement that membership in good standing in a union be a condition of employment gave rise to several serious problems. As H. A. Millis and Emily C. Brown pointed out, several difficult cases confronted the National Labor Relations Board over discharges under closed-shop agreements:

> Some were clearly the result of union-employer collusion that smelled of racketeering. Some were simply a form of illegal assistance to a preferred union. And some were the result of a union's attempt to prevent its own overthrow by a change of choice by the employees. Sometimes it was not easy to tell the difference, and careful analysis of the actual situation was called for. . . .[13]

Should rivalry within a union permit the certified union with a closed shop to expel dissident members for dualism? Because a closed- or union-shop contract jeopardized a worker's employment rights if he were expelled from his union, under what circumstances should the NLRB and the courts intervene in the internal affairs of unions to prevent such expulsion? What standards exist for determining the "legitimate" basis for such expulsions? As these questions suggest, the security of the union could be challenged not only by employer hostility but also by membership defection and rival unionism. Thus the NLRB found itself with the awkward task of preserving the stability of union-management relations while at the same time preserving the individual employee's freedom to criticize his union.

Because abuses did exist within the umbrella protection of union-security arrangements, and because these often received considerable national publicity, Congress decided that reform was long overdue. It had the choice of either opening the shop, a procedure involving the restriction of all forms of union-security arrangements, or opening the union, a procedure involving regulation of the admission and expulsion policies of the union. As Senator Taft stated:

> My own philosophy is that we have to decree either an open shop or an open union. The Committee decreed an open union. I believe that will permit the continuing of existing relationships . . . and yet at the same time it will meet the abuses which exist.[14]

[13] H. A. Millis and E. C. Brown, *From the Wagner Act to Taft-Hartley* (Chicago: University of Chicago Press, 1950), p. 215.

[14] *Congressional Record,* 80th Cong., 1st sess., 93:4 (May 9, 1947), 4886.

Each alternative posed some fresh problems, however, and Congress attempted to move half-way in both directions. It imposed restrictions on the form of union-security clause that could be negotiated and limited the discharge of workers denied admission to or expelled from the union in a shop covered by such an agreement.

First, the closed shop, making union membership a precondition of employment, was proscribed. Second, discriminatory hiring halls and all provisions offering preferential treatment to union members were outlawed. Third, if a union-shop clause (requiring union membership after a minimum of 30 days of employment) were to be negotiated, such negotiations would have to be preceded by an election conducted by the NLRB. If a majority of all those employees eligible to vote (not only those voting) favored the union-shop provision, the union would then be free to negotiate, but not necessarily secure, such a contract with management. The union could require that the employer discharge an employee under such a union-shop arrangement on only two conditions: (1) failure of the employee to tender the regularly required initiation fee, and (2) failure of the employee to tender the regularly required dues. Furthermore, on evidence that 30 per cent of the workers desired to deauthorize an existing union-shop arrangement, the NLRB would be required to conduct a secret ballot to determine if a majority of all employees eligible to vote wanted to revoke the provision. If a majority should so vote, the union-shop provision would be withdrawn, and the union deprived of any right to negotiate such a clause for a one-year period. Finally, Section 14(b) of the Act permitted states to enact legislation restricting union-security arrangements more than the federal law did. Section 14(b) reads:

> Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

In 1951, two changes in federal legislation were made. Public Law 189, approved by the President on October 22, 1951, abolished the union-shop authorization poll, for it was found that in the four years since such elections had been required, of the 46,145 polls conducted by the board, 97 per cent resulted in authorization to negotiate a union-shop agreement. About 91 per cent of workers voting favored the union-shop clause.[15] These data must color any discussion of the right-to-work issue. Management spokesmen have discounted the election results,

[15] *Seventeenth Annual Report of the National Labor Relations Board* (Washington: 1953), Appendix C, pp. 304–09.

charging that such polls were conducted only in selected areas, where the likelihood of a union victory was self-evident. But the surprising support by the rank and file for such provisions undoubtedly reinforced demands for union-security clauses. Separate provisions of the law thus sharpened the conflict. The voting requirement probably gave unions fresh incentive to campaign for employee support for union-security clauses. But simultaneously some state legislatures, with the invitation of Section 14(b), moved with vigor to outlaw all such clauses.

The second change arose from the agitation of unions in the railroad industry for the union-shop provision, culminating in the 1951 Amendments to the Railway Labor Act. Railway union membership had reached a high of 1.2 million during World War II, but had declined to 900,000 by 1949, largely because of the reduction of employment in the industry. Bipartisan support existed in Congress for an amendment that would make the railway labor legislation more comparable to the Taft-Hartley provision. Again, Congress reviewed the pros and cons of the union-security issue.

George M. Harrison, speaking for the Railway Labor Executives Association, pointed out that the union shop would make union policy more sensitive to employee wishes, since, "if only 51 percent of the bargaining unit are members, the policies of the craft . . . can be determined by only 26 percent of the group."[16] Furthermore, union-shop provisions would result in fewer disputes "because the union will be in a better position to reject unsound claims. . . . The grievance procedure will cease to be a battleground for rival unions."[17] The employers were not, of course, persuaded by such arguments, contending that the freedom to elect nonmembership in a union served as a powerful deterrent to abusive union leadership. Furthermore, the union-shop provision would change the status of some 266,000 unorganized employees whose nonmembership in the union operated as a "balance wheel . . . between labor and management."[18] In addition, the American Civil Liberties Union pointed to the discrimination practiced by railroad organizations in excluding Negroes from membership or full privileges

[16] *Railway Labor Act Amendments,* Hearings on H.R. 7789, House Committee on Interstate Commerce, 81st Cong., 2d sess. (Washington: 1950), testimony of George M. Harrison, p. 10.

[17] *Ibid.,* p. 11.

[18] *To Amend the Railway Labor Act . . . Providing for Union Membership and Agreements for Deduction from Wages of Carrier Employees for Certain Purposes,* Hearings on S. 3295, Senate Subcommittee on Labor and Public Welfare, 81st Cong., 2d sess. (Washington: 1950), testimony of Paul J. Neff, chief executive officer of the Missouri Pacific Railroad, p. 185.

in the union, and expressed fear that the union shop might "lend authority of the Government to such practices."[19]

While the 1951 Amendments permitted the negotiation of union-shop agreements in the railroad industry, and made the Act's union-security provisions conform generally to those of the Taft-Hartley law, one vital distinction was established: The "permissive" feature of Section 2, *Eleventh* of the revised Railway Labor Act could not be invalidated by any state legislation. Section 2, *Eleventh* reads in part:

> Notwithstanding any other provisions of this Act, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier... and a labor organization... shall be permitted—
>
> (a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment... all employees shall become members of the labor organization representing their craft or class....

Senator Spessard L. Holland of Florida proposed an amendment to this amendment which would, in effect, have given validity to state right-to-work legislation for railroad employees. Much of the debate on this issue was taken up with the reading of letters submitted by union members to protest the closed and union shop. In one such letter a railroad clerk stated:

> If the majority of Americans are willing to turn this country and the world over to Joe Stalin, then I see no harm in having a closed shop union law. In fact, we then will have a lot of shops closed soon after the closed shop law hits the American worker. Take a gander of the coal mines today. Their shop is closed; many mines are closed. John L. Lewis is never closed.[20]

But in spite of spirited states-rights support, the Holland amendment was defeated 59 to 23.

Further attention, in congressional debates, was directed to the discrimination practiced by railroad unions. Senator William Jenner protested that the 1951 Amendments would not only increase union power but would "at the same time, deliver into their hands, bound hand and foot, without recourse to appeal, those employees of the railroads who happen to have been born Negroes, or of Filipino, Mexican, or Spanish extraction."[21] Senator Jenner also argued that

> ... unions would be at perfect liberty to refuse to admit to membership any employee they saw fit to exclude, regardless of the wishes and desires of that employee. It is difficult for me to understand how Congress would even consider

[19] American Civil Liberties Union, *Memorandum in Opposition to S. 3295*, in *ibid.*, p. 308.

[20] *Congressional Record*, 81st Cong., 2d sess., 96:12 (December 7, 1950), 16277.

[21] *Ibid.*, 96:12 (December 11, 1950), 16376.

sacrificing the freedom of the individual to join or not to join a union and at the same time protecting the right of a union to discriminate against employees whose economic fate and livelihood are completely under its control.[22]

The 1951 Amendments (S. 3295) passed Congress without difficulty. In the House, they were supported by 91 per cent of the voting Republicans and 81 per cent of the voting Democrats. The Senate passed the bill by a voice vote and the provisions became law on January 10, 1951.

Railroad unions lost little time in making union-shop demands: early in February, 17 labor organizations served identical demands on railroad employers for a union shop and the checkoff. Negotiations failed to bring an agreement, and on November 15, 1951, the President appointed an Emergency Board, under the chairmanship of David L. Cole, to investigate the dispute.

On February 14, 1952, the Emergency Board filed its report, recommending the union shop on the following grounds: (1) Congress had considered carefully the extent to which permitting union-shop agreements might jeopardize individual rights. "It would be inappropriate for us to say that Congress valued those interests too lightly or protected them too meagerly. . . . This Board could hardly take a position which would so completely stultify the action of Congress." (2) The unions requesting the union shop have "conducted themselves properly and have not engaged in undemocratic or dishonorable activities." Such stability and responsibility constituted "reasons for rather than against their right to have a union shop provision. . . ." Furthermore, "Security [of the union] may be a fleeting quality," as was evidenced by the collapse of union strength in the railroad industry following World War I. (3) By virtue of their right and duty to represent all employees whether union members or not, unions do, for all practical purposes, control the economic destiny of the employees within their respective groups. Because such authority is reposed in the organizations by law, should not all employees participate in the formulation of union policy? "If a union is following an ill-advised or harmful course, why shouldn't the persons affected thereby who are qualified to do so become active members and express their criticism and displeasure?" The board doubted that union democracy would be enhanced by substituting "resignation" for "discussion, debate and the ballots." It denied that compulsory unionism would force a split of employee loyalty, and suspected that a not uncommon reason for resignations and nonmembership arose because of the "unwillingness of the union to prosecute grievances or claims which it does not deem to be meritorious. . . ."

[22] *Ibid.*, 96:12 (December 7, 1950), 16267.

This hardly constituted legitimate grounds for nonmembership. (4) Finally, a review of the data made available by both unions and management suggested "that the compulsion to join a union has presented difficulties leading typically to the termination of employment by about one-tenth of 1 percent of the employees." The restriction of membership obligations to payment of dues, initiation fees, and assessments did much to protect the individual's employment rights against arbitrary union discrimination. The board noted that representations were made to the board "under oath" that unions intended to eradicate at their next conventions whatever traces might remain of discriminatory practices of union admission, and strongly urged that membership provisions be "modernized" to eliminate "personal, arbitrary and indefensible" restrictions. Furthermore, "labor organizations must make membership as available and easy as possible financially. . . ."[28]

Union Security and the Korean Crisis

The thesis that the union shop is a "crisis" issue received further support when, during the Korean emergency, the Wage Stabilization Board faced the full violence of the controversy. An impasse was reached in the negotiations between the United Steelworkers of America and 157 steel and iron ore companies for the union shop. On December 22, 1951, the President, in order to avoid a strike that would imperil the national health and safety, referred the dispute to the Wage Stabilization Board. Employers protested that this board did not have authority to deal with such a noneconomic issue. The board, however, derived its dispute authority from the President's Executive Order 10161, as amended by 10233, and Congress itself, in Title 5 of the Defense Production Act, provided for the handling of disputes without any distinction as between economic and noneconomic issues.

The board set up a six-man tripartite panel to hear the details of the case. Hearings were held for over two weeks, followed by two months of further deliberation. This was followed, in turn, by several meetings of the Stabilization Board and the panel. The board, on March 20, 1952, reached its decision. The board noted that the union shop existed in much of the steel producing and fabricating industries. An examination of 2,200 contracts of the United Steelworkers covering production and maintenance in basic steel and fabricating plants revealed that the union shop had been agreed to by employers in 994 (45 per cent) of

[28] *Report to the President by the Emergency Board No. 98,* appointed by Executive Order 10306, November 15, 1951, National Mediation Board Case No. A3744 (Washington: February 14, 1952), pp. 7–24.

those agreements. Although the employer representatives on the Stabilization Board urged that the dispute be returned to the parties for further negotiation on the basic issue, the public members joined with the union members in recommending that some form of union shop be agreed to, with the precise form to be determined through further negotiation.

The emotionalism aroused by this controversy was reminiscent of the open-shop and American-Plan campaigns: Benjamin Fairless declared in his radio address, April 6, 1952, entitled "Your Stake in the Steel Crisis":

> ... if the day ever comes when a man—in order to earn his living—must join one particular church, one particular party, or one favored union, then we may as well join forces with Russia, for we shall have reached that strange socialistic Utopia where freedom is unknown, and where everything that is not forbidden is compulsory.

A statement by the steel companies on July 5, 1952, declared:

> We are shedding our blood and spending our treasure in foreign lands for the sake of individual freedom. This freedom at home must be protected from every threat.

Replying to this, John C. Cort wrote: "Unlike the steel companies, I don't happen to be shedding my blood this minute, but it seems to me that this statement is a bald-faced lie."[24]

The Pattern of State Right-to-Work Legislation

This is the background for the present right-to-work controversy at both the federal and state levels. Unions hope that Section 14(b) of the Taft-Hartley law can be repealed in Congress[25] so that the complex pattern of state right-to-work laws will be invalidated; management hopes that Section 2, *Eleventh* of the Railway Labor Act can be repealed so that state right-to-work laws will be operative in the railway industry. As shown in Table 2, 18 states have right-to-work legislation in effect at this time, but active campaigns to repeal the existing laws are underway in at least 14 of these states. In several states, repeal attempts have been undertaken in each session of the legislature. In four states, Maine, New Hampshire, Delaware and Louisiana, such repeal attempts have been successful. At least 15 of the states without such

[24] John C. Cort, "The Labor Movement: Freedom and the Union Shop," *The Commonweal,* LVI (July 25, 1952), 389.

[25] Congressman James Roosevelt has introduced H.R. 430 repealing Section 14(b) of the Taft-Hartley Act.

TABLE 2

STATUS OF RIGHT-TO-WORK LEGISLATION, 1958

State	With Right-to-Work Law	Status of Right-to-Work Proposals
Alabama	YES: By electoral vote, August, 1954	Repeal attempt failed, 1955; repeal efforts continuing
Arizona	YES: By constitutional amendment, November, 1946	Proposals to stiffen law introduced; repeal efforts underway
Arkansas	YES: By constitutional amendment, November, 1947	Repeal efforts underway
California	NO	Proposal defeated in general election, 1944; referendum petition secured, 1958
Colorado	NO	Proposals defeated in legislature, 1953 and 1955; efforts continuing; ballot possible in 1958 elections
Connecticut	NO	Bills introduced have died in committee; efforts continuing
Delaware	NO: Repealed June, 1949[1]	
Florida	YES: By constitutional amendment, November, 1944	Repeal efforts underway
Georgia	YES: By electoral vote, March, 1947	
Idaho	NO	Defeated in legislature, 1955; efforts continuing; ballot possible in 1958 elections
Illinois	NO	Campaign for legislation underway
Indiana	YES: By electoral vote, August, 1957	Repeal efforts underway
Iowa	YES: By electoral vote, April, 1947	Repeal defeated, 1955; efforts continuing
Kansas	NO	Bill vetoed by governor, 1955; efforts continuing; vote scheduled for 1958 elections
Kentucky	NO	Defeated in legislature, 1956
Louisiana	NO: Repealed June, 1956, excepting agriculture[2]	
Maine	NO: Repealed September, 1948[3]	
Maryland	NO	Proposal defeated, 1955; efforts continuing
Massachusetts	NO	Defeated in general elections, 1948
Michigan	NO	Bill defeated, 1955
Minnesota	NO	Bill defeated, 1955; efforts continuing
Mississippi	YES: By electoral vote, February, 1954	Repeal efforts underway
Missouri	NO	Defeated in legislature, 1956; efforts continuing

[1] The Delaware provision was part of a general labor relations act which was repealed as a whole.
[2] The Louisiana law was repealed following union successes in first general election after enactment. The law still applies to agricultural employees.
[3] Court action kept the Maine law from operating until the referendum at which it was defeated was held.

TABLE 2—*Continued*

State	With Right-to-Work Law	Status of Right-to-Work Proposals
Montana	NO	Initiative campaign failed
Nebraska	YES: By constitutional amendment, December, 1946	Repeal efforts underway
Nevada	YES: By electoral vote, December, 1952	Repeal efforts failed, 1954; initiative petition to repeal failed, 1956
New Hampshire	NO: Repealed March, 1949[4]	
New Jersey	NO	
New Mexico	NO	Defeated in referendum, 1948
New York	NO	
North Carolina	YES: By electoral vote, March, 1947	Repeal efforts underway
North Dakota	YES: By electoral vote, June, 1948	Repeal efforts underway
Ohio	NO	Legislative proposal died in committee, 1955; efforts continuing; ballot possible in 1958 elections
Oklahoma	NO	Efforts for legislation underway
Oregon	NO	Defeated in legislature, 1953; efforts continuing
Pennsylvania	NO	Defeated in legislature
Rhode Island	NO	
South Carolina	YES: By electoral vote, March, 1954	
South Dakota	YES: By constitutional amendment, November, 1946	
Tennessee	YES: By electoral vote, February, 1947	Efforts to repeal in every session of legislature all failed; efforts continuing
Texas	YES: By electoral vote, September, 1947	Repeal efforts underway
Utah	YES: By electoral vote, May, 1955	Repeal efforts underway
Vermont	NO	
Virginia	YES: By electoral vote, April, 1947	
Washington	NO	Initiative petition defeated, 1956; efforts continuing; ballot possible in 1958 elections
West Virginia	NO	Efforts for legislation underway
Wisconsin	NO	Defeated by legislature; efforts continuing
Wyoming	NO	Defeated by legislature

[4] New Hampshire did not have a full-fledged right-to-work law since union-security provisions were permitted by two-thirds vote if the employer had five or more employees.

SOURCES:
"The Growing Controversy over the Right-to-Work Laws," *Congressional Digest*, February, 1956, pp. 37–43.
Stephen C. Noland, "Facts About Right to Work," Indiana Right-to-Work Committee.
A. Wecksler, "Should a Man Have to Join a Union to Work?" *Mill and Factory*, April, 1956.
National Right-to-Work Committee, *The Right-to-Work National Newsletter*, Fact Survey No. 2, March, 1956.
"Showdown in 'Right to Work,' " *Business Week*, July 19, 1958, pp. 58, 63.
" 'Right to Work' in 5 State Votes," *New York Times*, July 20, 1958, p. 36.

legislation face an active campaign for such a law. California, Maine, Massachusetts, New Mexico, and Washington have defeated right-to-work laws in referendum; California voters face the issue again in the fall of 1958. This patchwork pattern is made more confusing by the fact that 11 states expressly permit union-security contracts. Colorado requires approval of three quarters, Wisconsin two thirds, and Kansas a majority of all employees before such contracts can be negotiated.

In Table 3, the detail of right-to-work legislation is provided. In all of the 18 states where laws have been passed, both the closed and the union shop are now outlawed. The laws frequently regulate the circumstances and tenure of checkoff arrangements. Ten of the statutes forbid any contract provision that requires that employees pay dues, fees, fines, assessments, or other charges to the union. Georgia's right-to-work law specifies that the checkoff provision may be revocable at will; the Iowa law declares that the checkoff must be consented to by the employee's spouse, and is terminable with 30 days notice. In the 1953 Utah law, the employer must comply with the checkoff arrangement if the employees make such an assignment, but it cannot exceed 3 per cent of the wages. Though the 1947 Virginia law did not restrict the checkoff, 1950 legislation declared that the checkoff of union dues was unlawful.[26]

The statutes contain a wide variety of provisions relating to violations of the statute. Some provide no statement of penalties; some specify that union efforts, whether by picketing, strike or boycott, to enforce illegal union-security contracts shall be enjoined. Apparently, the extent to which the laws are adhered to, and enforced, varies considerably from state to state. Some employers are willing to enter into illegal union-security "understandings" with unions, as part of the *quid pro quo* for concessions on the part of the union. One Virginia employer testified, "This law is making liars out of some of the most respected citizens of Virginia."[27] In ten states, right-to-work statutes specifically enable workers denied employment because of union-security contracts the right to sue for damages, while eight state laws provide for criminal sanctions against violators of the law.

It is apparent that, with the important exception of Indiana, right-to-work campaigns have been most successful in those states that are predominantly agricultural. Legislation has been enacted mainly in

[26] For review of state provisions, see Stephen J. Mueller, *Labor Law and Legislation* (Cincinnati: South Western Publishing Co., 1956), Ch. 12.

[27] John M. Kuhlman, "Right to Work Laws: The Virginia Experience," *Labor Law Journal,* VI (July, 1955), 459.

TABLE 3

PROVISIONS OF STATE RIGHT-TO-WORK LEGISLATION, AS OF 1958

State	Closed and union shop outlawed	Agency shop* outlawed	Yellow-dog contract outlawed
Alabama	YES: Sec. 1, 2, 3	YES: Sec. 5	YES: Sec. 4
Arizona	YES: Art. 2 S 35, Sec. 56–1302	No provision	No provision in right-to-work law
Arkansas	YES: Sec. 81–202	YES: Sec. 81–202	YES: Sec. 81–203
Florida	YES: Sec. 12 (Fla. constitution)	No provision	YES: Sec. 12
Georgia	YES: Sec. 2, 4, 5	YES: Sec. 3, 4, 5	YES: Sec. 2, 4, 5
Indiana	YES: Sec. 1, 3	No provision	YES: Sec. 1, 3
Iowa	YES: Sec. 736 A1, A2, and A3	YES: Sec. 736 A4	YES: Sec. 736 A1, A2, and A3
Mississippi	YES: Sec. 1 (a) (b) (c)	YES: Sec. 1 (a)	YES: Sec. 1 (d)
Nebraska	YES: Sec. 48–217	No provision	YES: Sec. 48–217
Nevada	YES: Sec. 613.250	No provision	No provision in right-to-work law
North Carolina	YES: Sec. 95–78, 79, 80	YES: Sec. 95–82	YES. Sec. 95–78, 81
North Dakota	YES: Sec. 34–0114	No provision	YES: Sec. 34–0114
South Carolina	YES: Sec. 1, 2, 3 (a)	YES: Sec. 3 (c)	YES: Sec. 1, 3 (b)
South Dakota	YES: Sec. 2, Art. 6	No provision	YES: Sec. 2, Art. 6
Tennessee	YES: Sec. 11412.8, Sec. 11412.9	YES: Sec. 11412.10	YES: Sec. 11412.9
Texas	YES: Art. 5207A, Sec. 2, 3, Art. 7428.1, Sec. 1	No provision	YES: Art. 5207A, Sec. 2, 3, Art. 7428.1, Sec. 1
Utah	YES: Sec. 2, 4, 8	YES: Sec. 10	YES: Sec. 2, 4, 9
Virginia	YES: Sec. 40–68, 69, 70	YES: Sec. 40–72	YES: Sec. 40–71

* Provision generally prohibits contract provisions requiring that the employees pay dues, fees, fines, assessments, or "other charges" to the union.

SOURCE: "State Right-to-Work Laws: A Text of State Laws Prohibiting Discrimination in Employment Because of Membership or Non-Membership in a Labor Organization," prepared by the Labor Relations and Legal Department, Chamber of Commerce of the United States, October, 1957.

TABLE 3—*Continued*

State	Statute enumerates penalties for violations of statute	Statute restricts checkoff	Statute prohibits monopoly of labor
Alabama	No provision	No provision	YES: Sec. 2
Arizona	No provision	No provision	No provision
Arkansas	Violators guilty of misdemeanor, $100–$5,000 fines for each day of violation: Sec. 81–204	YES: Sec. 81–202	No provision
Florida	No provision	No provision	No provision
Georgia	Violators guilty of misdemeanor: Sec. 9	Checkoff revocable at will: Sec. 6	No provision
Indiana	Violators guilty of misdemeanor, $100 fine and possible 10 days in jail: Sec. 5 (c)	No provision	No provision
Iowa	Violators guilty of misdemeanor, Sec. 736A.6	YES: Sec. 736A.5	No provision
Mississippi	No provision	No provision	YES: Sec. 1 (b)
Nebraska	Violators guilty of misdemeanor, $100–$500 fine: Sec. 48–219	No provision	No provision
Nevada	No provision	No provision	No provision
North Carolina	No provision	No provision	No provision
North Dakota	No provision	No provision	No provision
South Carolina	Violators guilty of misdemeanor, $10–$1,000 fine and/or 10–30 days in jail: Sec. 8	YES: Sec. 4	YES: Sec. 2
South Dakota	Violators guilty of misdemeanor, maximum of 90 days and/or $300 fine; each violation separate offense: Sec. 17.9914	No provision	No provision
Tennessee	Violators guilty of misdemeanor, $100–$500 and sentence of not more than 12 months; each day separate offense: Sec. 11412.12	No provision	No provision
Texas	No provision	No provision	YES*
Utah	Violators guilty of misdemeanor	No provision	YES: Sec. 4
Virginia	Violators guilty of misdemeanor, maximum fine $500; each day separate offense: Sec. 40–74.5	No provision	YES: Sec. 40–69

* Texas amended its antitrust laws in 1951, declaring union-security agreements a conspiracy in restraint of trade.

TABLE 3—*Continued*

State	Statute permits suits against violators	Conspiracies to induce violations illegal*	Statute provides for injunctive relief from violations
Alabama	YES: Sec. 6	No provision	No provision
Arizona	YES: Sec. 23–1306	YES: Sec. 23–1303, Sec. 23–1305	YES: Sec. 23–1307
Arkansas	No provision	No provision	No provision
Florida	No provision	No provision	No provision
Georgia	YES: Sec. 8	No provision	YES: Sec. 8
Indiana	YES: Sec. 6	YES: Sec. 4	No provision
Iowa	No provision	No provision	YES: Sec. 736A–7
Mississippi	YES: Sec. 1(f)	No provision	No provision
Nebraska	No provision	No provision	No provision
Nevada	YES: Sec. 613.290	YES: Sec. 613.280	YES: Sec. 613.300
North Carolina	YES: Sec. 95–83	No provision	No provision
North Dakota	No provision	No provision	No provision
South Carolina	YES: Sec. 9	YES: Sec. 5	YES: Sec. 9
South Dakota	No provision	YES: Sec. 17.1101	No provision
Tennessee	No provision	No provision	No provision
Texas	YES: Sec. 4, S.B. 45, L.1955	No provision	YES: Sec. 4, S.B. 45, L.1955
Utah	YES: Sec. 11, 13	YES: Sec. 6, 7	YES: Sec. 11, 12
Virginia	YES: Sec. 40–74	YES: Sec. 40–74.1, Sec. 40–74.2	YES: Sec. 40–74.3

* Some statutes prohibit strikes and picketing to induce violations of the law.

the South, where unionism has always been weak. In Florida, for example, where the first right-to-work law in this country was passed in 1944, the leading position of agriculture in that state and the success of the right-to-work movement in winning the rural vote proved to be crucial. The Florida Farm Bureau *Bulletin* became a forum in which unionism was attacked as a vicious monopoly. Constant reference was made to "certain racketeering labor leaders"; support of the right-to-work amendment to the constitution would "put the selfish dictator of labor out of business" and prevent a continuation of the situation where industrialists were so afraid of losing government priorities on materials "they swallow insults and injustices . . . and let racketeers walk up and down their alleged spines."[28] As John Shott observed in his study of the campaign to secure the Florida law:

> The Farm Bureau's role was an active one both in pressing for the adoption of the amendment by the legislature and for its ratification by the voters in the general election of 1944. The prominence of Farm Bureau officials in the right to work Committee and the Florida Voters for Constitutional Government suggests the determination of the state Farm Bureau to place the prohibition of the closed shop in the state constitution.[29]

In the general election on November 7, 1944, 49.7 per cent of the urban vote favored the constitutional amendment, while 67 per cent of the rural vote approved it.[30]

[28] Cited in John G. Shott, *How "Right to Work" Laws Are Passed: Florida Sets the Pattern* (Washington: Public Affairs Institute, 1956), pp. 25–30.

[29] *Ibid.*, p. 32.

[30] *Ibid.*, p. 38.

Chapter 5

The Right to Work: Pro and Con

The preceding historical review of the right-to-work controversy has suggested not only its complexity, but also the deep emotionalism that usually surrounds it. The purpose of this chapter is to present both sides of the major issues, without attempting to reconcile the arguments one with the other. Each argument in support of right-to-work legislation will be stated positively and will be followed by a brief summary of the union response to it.

One important reservation must be made: It cannot be assumed that the pro and con compartments, though designed to contrast the positions taken, represent the viewpoints of all labor unions or of all management. It is sometimes contended that the right-to-work controversy is not actually a contest between unions and management but one between labor and union bosses. Proponents of right-to-work legislation claim strong support from many employees victimized by union bossism. As a case in point, unionists and ex-unionists have often provided damaging testimony against compulsory unionism. Although it is true that this is an issue involving union-employee relations, it is certainly much more a contest between unions and management. Nevertheless, some employees may be vigorous supporters of the arguments that are often labeled as "management's." On the other hand, not all employers are equally enthusiastic about voluntary unionism, and it is not difficult to find cases where employers acknowledge the advantages of union security. Thus, some employers may be supporters of the arguments we have labeled as "union's."

1. Compulsory unionism deprives labor of its right to work.

Proponents of right-to-work laws stress that the requirement that all employees be members of a union as a condition of employment provides a screen between the labor force and employment opportunities, a screen effectively preventing some employees from exercising their "right" to employment. No right, it is alleged, can be more vital and more worthy of protection than that which enables a man to subsist, and no provision can be more damaging than one which prevents a

man from working. As J. C. Gibson has pointed out, "To deny this basic right [to employment] is not only a deprivation of liberty, not only an impairment of the opportunity for advancement in life, but it also imperils life itself."[1] Historically, he notes, the United States Supreme Court has recognized this right and has protected it from encroachments by unreasonable pressure groups within the community. Justice Douglas' dissent in *Barsky v. Board of Regents* provides a clear expression of this sentiment: "The right to work, I had assumed, was the most precious liberty that man possesses. Man has indeed as much right to work as he has to live, to be free, to own property."[2]

Unions reply to this argument with the claim that there is no constitutional "right to work." Furthermore, when an effort is made to reduce the "right" to work from a judicial abstraction to economic reality, this right can exist only when labor has assurances of securing job opportunities. Thus, the exercise of a right to employment is possible only when the number of job opportunities is equal to, or greater than, the number of job applicants. But management groups carefully isolate or distinguish their case from any such "full employment" target embodied in government legislation, claiming that the latter is "Marxian" or, at best, "socialistic."

2. Compulsory unionism is discriminatory.

Proponents of right-to-work legislation stress that when laws allow unions to insist that membership be a condition of employment, strong unions can force management (often at "gun point") to join with them in discriminating against the economically helpless and politically weak nonunionist. Such bullying tactics are both a symptom of union power and a further stimulant to it. Proponents contend that discrimination in all forms is evil, but discrimination against the person who elects—for any number of legitimate reasons—to avoid union membership is indefensible.

The union replies that the employment relationship is honeycombed with discriminatory provisions. The employer may specify age, the degree of skill and training, the sex, and, in some instances, the race, creed, or color of any prospective job applicant. Furthermore, employment is frequently contingent upon participation in hospitalization plans, and so on. The government, too, establishes conditions of employment, specifying minimum wages, contributions to social security

[1] J. C. Gibson, "The Challenge to Compulsory Union Membership" (Chicago: Santa Fe Railway, May 7, 1957), processed, pp. 6–7.

[2] *Barsky v. Board of Regents*, 347 U.S. 442, 472 (1954).

funds, and so on. The question is not, in the union view, "Shall there be discrimination?" but rather "Shall management be allowed to establish unilateral standards for discrimination?"

Because the union movement considers compulsory unionism as a guarantee of its bargaining strength, the requirement of membership is not viewed as a discriminatory condition. Rather it is a device to prevent the unilateral exercise of management discrimination. Unions feel that compulsory union membership is a small price to pay for protection against employer discrimination. Such membership allows the worker to become a "citizen" rather than a "subject" of industry.

Proponents of right-to-work legislation are often anxious to distinguish and isolate their cause from Fair Employment Practices legislation, on the presumption that their crusade may suffer guilt by association through such identification. Thus, in the union view, proponents are not against employer discrimination for reasons of race, creed, or color, but only against union discrimination against the nonunionist.

3. Compulsory unionism imposes hardship on the nonmember.

It is a questionable "freedom" to confront the employee with the choice of membership in the union or nonemployment, for frequently nonemployment in a union shop involves virtual unemployment. This is particularly true when the craft skills of the displaced worker are not required in alternative nonunionized employment outlets. Moreover, as the pervasiveness of the union-security contract is extended, the number of alternative nonunion jobs is reduced. Management fears that if present trends continue, the availability of nonunion employment outlets will soon be so narrowed as to destroy even the limited amount of freedom of choice exercised by workers today.

Unions, in response, find it difficult to understand why persons should prefer nonemployment to union membership, but take comfort in the fact that regardless of protestations, very few employees do in fact elect nonemployment.[8] Persons rejecting union membership, they claim, are often "cranks" or agitators, disgruntled about some isolated instance of union policy or representation. Besides, the opportunities for alternative employment are good so long as the economy enjoys relatively high employment. Hardships resulting from nonmembership are less likely to be serious if labor demand exceeds labor supply. Yet proponents of right-to-work legislation often fear any government policy that would

[8] For discussion of data, see *Report to the President by the Emergency Board No. 98*, appointed by Executive Order 10306, November 15, 1951, National Mediation Board Case No. A3744 (Washington: February 14, 1952), pp. 20–23.

assure that the number of job openings will be greater than the number of job applicants. In the union view, the leveling-off in union membership growth in recent years should reassure those who fear that shortly all workers will face compulsory union membership.

4. Compulsory unionism denies labor the freedom of association.

Although the freedom of association is nowhere mentioned in the Bill of Rights, it is generally assumed to be a corollary right of the freedom of assembly mentioned in the First Amendment. The freedom of association can be operative only when individuals have a choice to join or *not* to join. One cannot speak of freedom of religion, freedom of political faith, or freedom of association if the individual is compelled to support a particular religious faith, to advocate a single political philosophy, or to join a union.[4] This freedom of association rests, then, on the twin pillars of the *freedom to join* and the *freedom not to join.* It is therefore contended that because compulsory unionism denies the individual the freedom not to join, the entire concept of freedom of association tumbles to the ground. Furthermore, allowing unions to obtain compulsory membership establishes a dangerous precedent for denial of religious and political freedoms. As J. C. Gibson has pointed out, "It [compulsory union membership] is the sole example of its kind found among private associations. No other private organization has the right to conscript members."[5]

Unions reply that the freedom of labor association is one that has only in recent decades been recognized by law. Until the nineteen thirties, employers campaigned aggressively to deny labor its freedom of choice regarding union membership through the use of the yellow-dog contract. The larger part of our industrial history is characterized by the employer's concern over his own freedom of contract, or more specifically his freedom to deny the individual worker the freedom *to join* a union. The stress today on the freedom *not to join* unions is, in the union view, simply an extension of management's traditional effort to prevent union organization.

Unions contend that they are not alone in narrowing the exercise of freedom of choice in membership in private associations. Law associations, medical associations, and a growing list of semiprofessional groups have adopted exclusionary practices, often on the pretext of preserving and maintaining professional standards, but actually in order to preserve and extend earning opportunities for members. The desire of the

[4] Gibson, *op. cit.*, p. 13.
[5] *Ibid.*, p. 12.

union to have all employees participate and share in the benefits of unionism is in sharp contrast to the exclusionary policies of many professional or semiprofessional agencies, and yet many of the same professionals are most articulate in condemning the union threat to freedom of association.

5. Union-security clauses contribute to union monopoly.

Proponents of right-to-work laws contend that the best method for minimizing the abuses of contemporary unionism is to minimize the power base from which such abuses stem. In effect, if allowed the guarantee of a security clause, the union gains exclusive representation and control of the labor force. Such control can be particularly hazardous where unions both enjoy a closed shop and have a closed union. If union-shop provisions are outlawed, union leadership is less able to disregard the welfare of the rank and file and less able to impose irresponsible demands on industry. Right-to-work laws are not, therefore, designed to destroy unionism, but only to prevent the growth of excessive union power.

Unions reply that, under a union shop, the employer is free to hire anyone that he likes. The union, in interstate commerce, has both the legal responsibility and the duty to represent all employees in the unit, whether union members or not and whether or not a right-to-work law exists. Unions cannot lawfully request or force the discharge of any employee denied admission to, or dropped from, the union for any reason other than the unwillingness of the employee to tender his regularly required initiation fees and dues. This provision protects the individual from any potential abuse by union leadership; it discourages the application of unreasonable entrance requirements. Furthermore, management's interest in outlawing compulsory unionism in the name of competition cannot be easily reconciled with the degree of imperfect competition in the purchase of labor. Management is interested only in maintaining competition in the "sale" of labor service, not competition in the purchase of labor. In the union view, to argue that the sale of labor should be highly competitive while the purchase of labor is not equally competitive is simply to argue that the balance of bargaining power should be sharply tilted in management's favor.

6. Compulsory unionism violates civil liberties: the issue of religion.

Advocates of right-to-work laws contend that, in some cases, an individual's religious conviction may prevent his membership in a union.

It is tragic that compulsory union membership provisions should deprive a person of the opportunity of employment simply because his religious beliefs prevent him from signing or swearing to an oath of allegiance to the union.

The union replies that in federal law no obligation other than the tender of initiation fee and dues is legally required to fulfill "membership" obligations. No loyalty pledge need be signed. No union meeting need be attended. The "fee only" content of union membership destroys the substance of this argument. Furthermore, some contracts allow the payment of union dues to a charity in those isolated instances where a person's religion forbids payments to a union.

7. Compulsory unionism denies a person political freedom.

Related to the question of religion is the issue of political belief. Those favoring right-to-work legislation point out that unions are becoming more and more involved in the affairs of government. In spite of the prohibition against union contributions to support political candidates for federal office, unions do, under the pretext of freedom of speech, give widespread publicity to the voting records of both state and federal representatives, classifying these as "right" or "wrong" from the union viewpoint. Union newspapers are generously sprinkled with "political education" articles. The consolidation of political activity under the Committee on Political Education in the merged AFL-CIO offers further evidence of union interest in extending labor's political influence. Even though, under the Taft-Hartley law, the union member's financial obligation is limited to regularly required dues and initiation fee, it is contended that such financial contribution makes possible the support of political causes and candidates opposed by the individual unionist. The well-known DeMille controversy is a case in point. Cecil B. DeMille, rather than pay a $1.00 assessment to finance agitation against right-to-work legislation, accepted expulsion from his union, and subsequent loss of a network radio show. Few employees have the financial resources to accept the loss of employment in order to stand against the demands made by union leadership for support of political causes they may personally oppose.

In reply, unions point out that the use of funds to support federal candidates is circumscribed; that union leaders seldom profess the ability, and in reality are not able, to "deliver the vote." The union may urge support of particular candidates, but it cannot be assured that the rank and file will support recommended candidates. Individual employees are politically independent, and frequently become more so

in the face of vigorous union "educational" campaigns for their support. Furthermore, union assessments for nonfederal campaigns are usually nominal, and often contested or voted down by popular will. The union member is not, of course, deprived of his freedom to agitate as a citizen for candidates of his own choosing, but he can be held legally responsible for meeting assessments uniformly required of all members. Unionists claim that the press and the editorial viewpoint of most newspapers are usually promanagement. Union newspapers, radio broadcasts, and television programs provide a "balance" necessary to form intelligent political decisions.

8. Compulsory unionism destroys union democracy.

Management argues that the notion of an employee becoming an enthusiastic participant in union affairs because he is forced to join the union defies common sense. Not only will a worker forced into membership be resentful of that compulsion, but with guaranteed membership and guaranteed revenues, union leaders grow insensitive to the wishes of the rank and file. They become labor bosses, not leaders.

Unions reply that an employee will often be willing to take something for nothing, enjoying the benefits of union representation while rationalizing nonparticipation in the union on the ground that, as an individual, he can do little to affect union policy. But unions believe that an employee, following initial exposure to the union, often develops an interest and becomes active in union affairs. Democracy is not encouraged when individuals have the option of avoiding union obligations and are allowed to abdicate citizenship in the union rather than participate in the affairs of their industrial government.

9. Compulsory unionism destroys morale and efficiency.

A corollary of the previous argument is the hypothesis that employees so resent compulsory unionism that they become disgruntled; the decline of employee morale related to forced membership is reflected in lower efficiency on the job. The fact that union leaders are indifferent to the problems of the individual worker compounds the morale problem.

Unions reply that the serious morale problem is likely to arise from tensions and resentment between the union members and "free loaders." Because the benefits of union organization are enjoyed by all employees in the bargaining unit, unions feel it is unfair that members alone carry the entire burden of their organizational costs. Actually, industrial efficiency is likely to increase in a union-shop plant, for the union

is in a better position to evaluate employee grievances judiciously and support only those with merit. In a nonunion shop, union leadership is often forced to make grandstand gestures, to uphold strong and weak cases alike in order to convince employees of the advantages of union membership. Furthermore, a secure union is likely to cooperate with management in maintaining plant discipline and to support management decisions to discharge employees who violate work rules. The union is not likely to construe layoffs or discharges as circuitous devices to weaken the union so long as union survival is assured.

10. Compulsory unionism compels support of a union's injurious economic policies.

Advocates of right-to-work laws argue that union policies involve a determination of the distribution of collective bargaining gains. These policies are often discriminatory. A guaranteed annual wage plan is likely to benefit the newer employee; seniority protects the older employee at the expense of the newer. Whether wage increases are expressed in percentage or absolute terms affects the wage structure and the amount of gain for various labor grades. Similarly, decisions to press for a shorter work week rather than higher pay, or for fringe benefits rather than a wage increase, represent judgments that may contravene the individual member's personal interest. Furthermore, a wage increase may cause layoffs. Thus, with compulsory unionism a member may be compelled to support a union policy that jeopardizes his employment security.

Right-to-work supporters often express doubt that a union does, in reality, improve labor's economic status. They point out that statistical studies of the impact of unionism do not offer uniform evidence that unions provide members with earnings higher than those granted in nonunionized plants, or that labor's distributive share has increased more rapidly in unionized than in nonunionized sectors of the economy. Some studies even suggest that negotiation of the wage contract, particularly in a period of full employment, may cause a lag in wage adjustments compared to those that would occur if the union contract did not exist. Thus, it is contended not only that union policy is necessarily discriminatory as between workers, but that union policy may not even benefit the workers as a whole. If this be true, it is hardly reasonable to charge employees with "free loading" through nonmembership when the alternative is the compulsory support of injurious policies.

Unions reply that whether workers are organized or not, decisions

must be made regarding the size, form, and direction of benefits given to labor. There is no reason to believe that standards unilaterally established by management will be more equitable, or more democratically determined, than those established by employees through their union. Similarly, unions contend that no person familiar with the reality of the labor market can seriously doubt that unions provide genuine economic benefits to their members. Labor should not be misled into thinking that productivity gains are automatically shared by labor. To the claim that production gains, in the absence of wage increases, would benefit all through lower prices, unions reply that prices have proved to be rigid because of the lack of competitive pressure in the product market. In the union view, labor can secure its fair share of economic benefits only by negotiating with management from a position of strength.

11. Right-to-work laws represent a logical extension of states' rights.

Management contends that the principle of Section 14(b) of the Taft-Hartley Act should be extended to Section 2, *Eleventh* of the Railway Labor Act, for the scope given to state legislation by the former is consistent with the need to decentralize the economic regulation of labor-management relations. The principle of "federalism" stresses the value of state autonomy, an autonomy that should not be abandoned.

Unionists charge that Section 14(b) is a perverted form of "states' rights," for that provision does not give complete discretion to the state in enacting union-security legislation. Rather, it invites the states to establish even more restrictions on union security. The "right" exists only so long as the states choose to move in one direction. Just as management has argued that the full right to work cannot exist unless the employee has the right not to join a union, so it must be true that the states' right to legislate on the union-security issue is necessarily incomplete if the states are allowed only to pass more restrictive, and never less restrictive, legislation.

Part II

A Critique of Right-to-Work Laws

Chapter 6

Right to Work: Some Conceptual Aspects

In previous chapters, we have noted the long and bitter history of the right-to-work controversy. Agitation for restrictions on the union's power to require membership may be viewed as a rising tide, with the level and turbulence of agitation increasing sharply during periods of national emergency. At the present time we can observe a high-water mark in public concern. A complex of circumstances, including reports of union racketeering, concern with cost-push inflation, and the resurgence of political conservatism, has combined with the traditional fear of monopoly to give new relevance to the compulsory-membership issue.

Whereas Part I has been focused primarily on history and has therefore been largely descriptive, Part II will be analytical and critical. In this chapter we shall analyze a few conceptual and definitional issues in the right-to-work debate.

The Definitional Issue

Do right-to-work advocates misrepresent their position by advancing their cause under a "right-to-work" banner? Webster defines a right as "that to which one has a just claim." There is general agreement that no constitutional authority exists for guaranteeing a worker the right to continuous employment in any particular job. What is at issue in this controversy is whether workers shall have the freedom to retain employment, unrestricted by union-membership regulations. The exercise of freedom involves (a) the actual existence of alternatives, (b) awareness on the part of the individual of alternatives, and (c) the ability of the individual to make the choice, without being subject to arbitrary or external authority. But more than this, freedom is not simply the unrestricted opportunity to move in any direction or to stand still, as caprice may dictate. In Geoffrey Vicker's opinion, such a view is a "modern and calamitous delusion. . . . A castaway on a desert island, hunting gull's eggs for his food, would not count his freedom from interference as liberty."[1] By our definition, freedom would exist

[1] Cited in Barbara Wootton, *Freedom Under Planning* (Chapel Hill: Unversity of North Carolina Press, 1945), p. 15.

only if the individual enjoyed a reasonable expectation of finding employment (gull's eggs) and, in a more perfect sense, if the individual had a choice of several alternative sources of subsistence. Hence the "right" of labor to work implies a just claim to alternative employment opportunities. Freedom cannot exist where a person is not confronted with a choice, and hence the "right" to work is meaningful only when labor is confronted with more employment opportunities than there are workers available to accept them. To return to our island analogy: assuming that subsistence (employment) can be found, under a closed-shop agreement the castaway is required to join the union in order to begin his search. The contemporary issue does not hinge primarily on this situation, because under federal law such an arrangement is illegal. Under the presently legal union-shop arrangement, the worker is free to search for employment opportunities where he can find them. But once having secured a job, he can be required to maintain union membership (that is, pay dues and initiation fee) as a condition for the continuous enjoyment of his gull's eggs.

Freedom, therefore, has at least two dimensions: the ability of the worker to search, and the reasonable expectation of fulfilling that search. The right-to-work advocates stress the former and ignore the latter. Indeed, the bulk of right-to-work literature concedes that such legislation does not create new rights to employment, but stresses that individuals "shall be free to *seek* and *retain* employment." Conspicuous by its absence in most pronouncements is the key center word, "obtain." It is only in a full-employment environment that the primary principle—the employee's guarantee of the fundamental American right of free choice—can be fully operative.

The Employment Effects of Right-to-Work Laws

Does the existence of right-to-work legislation lead to a widening of employment opportunities? One management spokesman answers: "They [right-to-work laws] do not directly create any jobs, but by helping to keep the economy free and by keeping opportunities open, they inevitably in the long run lead to more and more chances for employment."[2] The opposing sentiment can be found in a telegram sent by Archbishop Rummel of New Orleans to the Louisiana legislature while it was debating a right-to-work law:

It [the bill] is insincere because, while it pretends to guarantee the right to

[2] J. C. Gibson, "Legislative Restrictions upon Union Security Agreements," paper presented before the Section of Labor Relations Law, American Bar Association (Philadelphia: August 23, 1955), p. 4.

work, it actually frustrates that right, in effect exposing labor to lose security, a decent standard of living and humane working conditions. It makes a mockery of the constitutional right to organize for the common good and welfare. In a word, it is unfair and unsocial class legislation contrary to the common good.[8]

It should be remembered, in this context, that the economic rationale for union strength, developed during the depths of the depression, was the argument that inadequate union strength created inadequate consumer purchasing power. Has the recent experience of high employment outmoded the purchasing-power theory? Stated in other terms, to what extent today can one justify union security as the route to employment security?

If we assume that full employment will continue regardless of the distribution of income, obviously the degree of union power is of little significance in determining the level of employment. We assume the problem away. Even in this special case, however, it can be reasoned that any stability or reduction in the wage or consumption share of income arising from union weakness permits a higher volume of investment. This allows a more buoyant rate of economic development and ultimately a more rapid improvement in labor's real living standard. Labor's "freedom" increases as does its claim to a larger slice of the real national product. By this rather circuitous chain of reasoning, the absence of union security increases, not labor's freedom to secure employment (for we have assumed full employment), but labor's opportunity to secure employment at an ever-increasing wage level.

There are, however, several weak links in this chain of reasoning. Most economists agree that the distribution of income is undoubtedly affected by the distribution of power within markets. Furthermore, it is often assumed that a balance of power in the labor market between labor and management may provide that balance of wage-profit shares that can best sustain economic activity. For example, should unions possess excessive power (via union-security contracts), ambitious union demands may lead to cost increases that can so narrow profit margins as to undermine the production process. High wages, while stimulating the ability of wage earners to consume, may at the same time reduce the ability of management to sustain and improve the economy's capital structure. Thus, the resulting cost-push pressure on profit margins leads ultimately to a decline in total employment. The operation of union-security clauses has, by this reasoning, reduced rather than increased the total of employment opportunities.

[8] Cited in John C. Cort, "The Battle over Right to Work," *The Commonweal,* LXII (April 22, 1955), 75.

On the other hand, should management have excessive power, the ability of management to capture a larger share may increase management's ability to invest, but at the same time may reduce the consumer's ability to spend. In this situation, the drop in consumption may undercut the incentive of management to invest. Any decline in expenditure—either for consumption or for investment—boomerangs in an immediate decline of aggregate income, leading in turn to layoffs and unemployment. By this reasoning, the *weakness* of unions has reduced rather than increased the total of employment opportunities.

The extreme positions in this argument are self-evident. It is equally clear that if we assume that the power balance determines income, the effects of union-security clauses in generating employment or unemployment can be determined only by the consequence of wage pressures on both consumption and investment expenditures. Unions argue simply that high wages provide both the incentive and the means for additional investment. Higher wages make possible increased sales, and these revenues make additional investment expenditures possible. By such reasoning anything that strengthens unionism cannot help but maximize the total of employment opportunities and thus give substance to labor's right to work. Management, on the other hand, points out that employment can be expanded only when management enjoys the expectation that the revenues generated by additional workers will be greater than their cost. In this context, increasing the cost of labor to management can hardly stimulate employment. Thus, the application of union power leads to cost increases which narrow rather than widen the opportunity for labor employment. The above arguments do not encourage dogmatism: One cannot predict with confidence the effect of union-security clauses on union strength; the effect of union power on wage rates; the effect of wage-rate adjustments on labor's distributive share; the effect of labor's distributive share on the ability and desire of management to invest; or even, for that matter, the employment effect of changing the pattern of wage/profit or consumption/investment ratios. We can only return to our original premise: whatever the causes of high employment, labor's freedom to work will vary directly with the total of employment opportunities.

Even when full employment exists, this does not assure everyone a job, nor for that matter does it assure freedom from road-blocks constructed by both unions and management. It only assures labor that there are gull's eggs to be found if it can gain access to the proper terrain. As a case in point, when the champion of full employment,

Henry Wallace, was cross-examined by Representative Clare Hoffman regarding proposals to enact the Employment Act of 1946, Hoffman was determined to find out whether the nonunionist's right to a job would be more circumscribed than the unionist's right to a job:

Mr. Hoffman: "All Americans have a right to employment." Do you endorse that?
Mr. Wallace: I think they do.
Mr. Hoffman: Then that wouldn't exclude any man from a Federal job created under this, because he didn't belong to a union would it? I just want to know whether in your opinion it is a bill to relieve all who are unemployed, or just the union unemployed.
Mr. Wallace: I have been over this a great many times, Mr. Congressman. The point which troubles you I don't believe belongs in this bill. I don't think it should be considered in this particular bill.
Mr. Hoffman: Then, Mr. Secretary, you do not approve of that language, "All Americans have a right to an opportunity for employment," do you?
Mr. Wallace: Yes; I do.
Mr. Hoffman: Then you wouldn't deprive a non-union man of a job created by the Federal government?
Mr. Wallace: No; I wouldn't want to see a non-union man deprived of a job.
Mr. Hoffman: And you think that no construction could be placed on this bill that would deprive a non-union man of participation in a Federal-works program?
Mr. Wallace: I don't think that belongs . . .
Mr. Hoffman: Why don't you answer that right off? You do or you don't. You come here and endorse a bill which on its face, says that all Americans have the right to jobs. Now if you don't believe it, that is all right with me.
Mr. Wallace: I do believe it.
Mr. Hoffman: All right then. Then you don't believe that a man should be deprived of a job created by the Federal Government, and with tax money, just because he don't [sic] belong to a union; is that right?
Mr. Wallace: I think . . .
Mr. Hoffman: I want to say that for a man with your experience who has been so successful in the corn-breeding business, and in the Agriculture Department, and who has pleased so many farmers, I can't see why you should have so much difficulty with that little simple question.
Mr. Wallace: Your question is very complex.[4]

Discrimination and Right-to-Work Laws

The right-to-work issue is a problem of discrimination. Should the union be free to compel the discharge of any individual who is unwilling to support the union? While the word "discrimination" has sordid connotations, a moment's contemplation suggests that our entire

[4] *Full Employment Act of 1945*, Hearings on H.R. 2202 before the House Committee on Expenditures in the Executive Departments, 79th Cong., 1st sess. (Washington: 1945), p. 918. See also pp. 910–11.

life is permeated with discrimination. The success of free enterprise in large part depends on the ability of management to reach wise business decisions, all of which by their very nature are discriminatory. It is true, too, that the union represents a challenge to management's ability to reach decisions unilaterally. Thus, through unionism, the source of discriminatory power is shifted in part from management to labor, and the question before us is whether the union should be permitted to exercise its discriminatory power against the nonunion worker.

This issue is placed in interesting cultural perspective by one of the most noted supporters of the right-to-work movement, J. C. Gibson, when he poses the question: "Is it inappropriate to inquire how one can justify firing a man because, for one reason or another, he does not want to join a union, while at the same time, condemning the firing of a man because of the color of his skin?"[5] Without attempting to justify at this moment either form of discrimination, one would suppose that the right-to-work movement would cement an alliance with groups anxious to eliminate discrimination based on race, creed, or color. But there is evidence that some right-to-work proponents are anxious to avoid identification with the broader antidiscrimination movement, an ambivalence made all the more explicit by the support given the right-to-work movement in the South. For example, in a speech before the Central California Employers Council of Fresno, California, on February 19, 1957, a representative of the DeMille Foundation said:

> It is often falsely charged that RIGHT TO WORK Laws, which are almost universally known by that name, are deceptively titled. Labor bosses, communists, socialists, professional eggheads and the persistent left-wingers in both the major political parties continually bleat that these laws are frauds and are deliberately misnamed to fool the unwary public. . . . Our opponents sometimes try to persuade the unwary that a RIGHT TO WORK law is a fiendish substitute for an E.E.P. bill. It is not.[6]

As a further case in point, the DeMille Foundation draft of a model right-to-work law is accompanied by various possible objections to such a law:

> Objection: This talk about the right to work opens the door to FEP legislation. Answer: Nothing of the kind. The right to work does not mean the right of a particular individual to a particular job. The job is created by the employer, and the right to hire should remain in the employer's hands.

[5] J. C. Gibson, "The Challenge to Compulsory Union Membership" (Chicago: Santa Fe Railway, May 7, 1957), processed, p. 11.

[6] Processed speech distributed by the DeMille Foundation (Los Angeles), p. 3.

It is not convincing to argue that only union discrimination against nonunionists should be proscribed by law, and not employer discrimination for such reasons as race, creed, or color. Certainly it is no answer to allow employer discrimination because "the employer creates the job." But employers are on firm ground in opposing the union shop in the case of a union that discriminates against applicants for membership for reasons of race, creed, or color. J. A. McClain, Jr., has pointed to the "schizophrenic" status of employees who by contract provisions must apply for union membership, but who may be rejected at the whim of the union.[7]

The Semantic Issue at the Polls

Many right-to-work supporters express concern at the "smoke screen" thrown up by those concerned with the definitional issue, but obviously the phrase "right to work" has misleading connotations. For example, a proponent of voluntary unionism whose statements have been widely quoted by right-to-work supporters, Selwyn H. Torff, has pointed out:

> The proponents of legislation to prohibit or restrict compulsory union membership as a condition of employment have done themselves a disservice by labeling such legislation "right to work" laws. The assailants of such legislation have repeatedly—and correctly—argued that these laws do not give any worker, union or non-union, the "right" to obtain or keep a job. A more proper nomenclature would easily have obviated this type of sophistic quibbling.... [I]t is far more accurate to describe such legislative measures as "voluntary union membership" laws rather than "right to work" laws.[8]

Evidence of ignorance and confusion on the substance of right-to-work laws is not hard to find: In a poll of University of Southern California students, 10 per cent of those who favored right-to-work legislation answered "No" to the question: "Do you believe that the State of California should prevent a union from negotiating a contract with employers that would require all employees to join that union?" Similarly, the Denver *Post* received a letter: "I noted in the Post that the Chamber of Commerce endorsed a state Right to Work Law. I think the Chamber is doing a fine thing by supporting such a law. For two months now I have been out of work and I think it is about time that we had a state law that would guarantee a man the right to work."[9]

[7] J. A. McClain, Jr., "The Union Shop Amendment: Compulsory 'Freedom' to Join a Union," *American Bar Association Journal,* August, 1956.

[8] Selwyn H. Torff, "The Case for Voluntary Union Membership," *Iowa Law Journal,* XL (Summer, 1955), 625.

[9] Cited in Earl F. Cheit, "Union Security and the Right to Work," *Labor Law Journal,* VI (June, 1955), 360.

The proponents of right-to-work legislation do not discount the value of this phrase in winning support for their position. In the 1956 campaign in the State of Washington, petitions for Initiative Proposal 198 were circulated through the mails to get the right-to-work issue on the ballot. The state attorney general insisted on modification of the right-to-work caption, and substituted instead the words "Restricting Employer-Employee Agreements." The sponsors appealed to the courts and were successful in having the caption changed to "Affecting Employer-Employee Relations." It is probably true, nevertheless, that the official description of Initiative 198 was not self-evident:

> Affecting Employer-Employee Relations
>
> An Act defining the terms "employer" and "labor organization" and declaring unlawful certain agreements and practices relating to membership in such an organization, payments to such an organization as a condition of employment, discrimination and coercion in connection with employment, and providing civil actions and criminal penalties for violations.

In the words of one of the right-to-work proponents, such a description was "a long way from stating the true purpose of the act and constituted a substantial handicap at the polls."[10] Similarly, when the attorney general of California ruled that initiative petitions under the title of "Right to Work" would be invalid and would have to be entitled "Employer-Employee Relations," proponents vigorously protested that this designation misrepresented the intent of right-to-work legislation. Serious students of the political campaign suggested that this title might undercut the efforts of the California right-to-work movement to secure sufficient signatures to place the issue on the November, 1958, ballot. The initiative campaign, nevertheless, went over the top with near-record public support.

In summary, it can hardly be denied that the phrase "right to work" is misleading. Citizens are likely to support "rights," just as they would "virtue" and "justice." The question of labels is an old one; as we noted in Chapter 2, as early as 1903 unions bitterly complained that public support for the "open" shop offensive was based on the misleading premise that a union shop was necessarily a "closed" shop. But management spokesmen have replied that the designation of management discrimination against unionists as "yellow-dog" tactics involves more poetic license than the "right-to-work" slogan.

[10] David Pollack, "Initiative Proposal No. 198 in the State of Washington" (Washington, D.C.: June 18, 1951), processed, p. 8.

The Freedom of Association: The International View

One dimension of this problem has been the effort of international organizations to codify and standardize the basic rights of the world community. As one might suspect, world agencies have not successfully reconciled the right to organize with the right not to organize.

As early as 1927, the International Labor Organization attempted to establish a convention supporting the freedom-of-association principle. But when an amendment was proposed which would have safeguarded the right of labor *not* to join unions, the labor representatives protested. The ILO decided that under such circumstances it was preferable not to proceed with the matter.[11] In 1948, however, a convention was established, making clear that "freedom of association was to be guaranteed not only to employers and workers in private industry, but also to public employees and without distinction or discrimination of any kind as to occupation, sex, colour, race, creed, nationality or political opinion."[12] The antidiscrimination stress of this resolution did not touch upon the freedom-*not*-to-join issue, but it created, nevertheless, a lively controversy in the ILO. The omission of the negative side of freedom of association was "without prejudice," and it was further understood that the question of restrictions on union-security clauses could be raised at subsequent sessions of the Conference.[13] On December 10, 1948, the Plenary Meeting of the General Assembly of the United Nations adopted the "Universal Declaration of Human Rights." Article 20, paragraph (2), of this declaration provided that no one may be compelled to join an association. Employer representatives of the ILO felt that this gave formal sanction to the freedom-not-to-join element in freedom of association.

But labor representatives were not persuaded. They charged that Article 20(2) of the Human Rights Declaration was not intended to cover the issue of unionism, for Article 23(4) of that same resolution dealt specifically with the right to form trade unions, and no mention was made here of the right not to join. Mr. James Thorn, the New Zealand government member, served as president of the Economic and Social Council of the United Nations, under whose jurisdiction the Human Rights Declaration was developed, and also served as chairman

[11] For a review of ILO policy, see C. Wilfred Jenks, *The International Protection of Trade Union Freedom* (London: Stevens & Sons, 1957), p. 23.

[12] Cited in *ibid.*, p. 25. The United States has not ratified this convention.

[13] International Labour Conference, *Provisional Record,* Thirty-first session, San Francisco, No. 36, p. III.

of the ILO Industrial Relations Committee working on the freedom-of-association standards. It was his position that Article 20(2) of the Declaration of Human Rights was not intended to apply to trade unions, for Article 23(4) dealt specifically with that subject.[14]

In the discussion, the Italian government representative pointed to the danger of union-security clauses, particularly in those cases where a plurality of union movements might result in jurisdictional discrimination by union members against workers belonging to different unions.[15] The United States labor representatives pointed out that providing formal sanction for the right not to join would result in depriving labor of the right to organize. The lively debate on this issue led only to agreement on a "hands-off" resolution:

> The Committee finally agreed to express in the report their view that the Convention could in no way be interpreted as authorizing or prohibiting union security arrangements, such questions being matters for regulation in accordance with national practice.[16]

Thus, the international labor code supports the freedom *to* associate and is silent on the freedom *not* to associate. But the ILO has made no attempt to list in detail the basic elements of such freedom to organize or the forms of interference by public authorities which might impede this freedom. Article 8 of the ILO resolution simply states that "the law of the land shall not be such as to impair, nor shall it be so applied as to impair the guarantees provided for in this convention."[17]

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[14] As reviewed in Employees' Exhibit No. 13, "The Union Shop and Human Rights," before the President's Emergency Board No. 98 (Chicago: Labor Bureau of the Middle West, 1951), p. 3.

[15] Kurt Braun, *The Right to Organize and Its Limits* (Washington: Brookings Institution, 1950), p. 171 n.

[16] Jeter S. Ray, "International Regulation of Labor Relations," *Labor Law Journal,* II (September, 1951), 647–54, esp. p. 650, n. 9.

[17] Jenks, *op. cit.,* p. 28.

Chapter 7

The Membership's Legal Responsibility to Its Union

Before one can appraise the coercion involved in union-shop arrangements, it is important to understand the legal definition of union membership. Union-security arrangements are designed to compel union membership. Union spokesmen do not deny this but simply argue that the means are justified by the ends. As Clinton S. Golden and Harold J. Ruttenberg make the point:

> Of course, it's coercion. That's what all the argument is about: the right to force someone to do something against his will. But this is not a legitimate objection to the union shop, as coercion is the fundamental basis of organized society. In fact, civilization can be said to have attained maturity when men became intelligent enough to order their affairs and compel the recalcitrant man, the ignorant man, to submit to certain compulsory rules for the common good of all men. I cannot drive carelessly through an intersection; but, because other men lack such sense, for the common good I am coerced into stopping for a red light although no cars may be coming from the opposite direction.[1]

Is the compulsion of union membership equivalent, then, to the obvious requirement that society obey traffic rules, or is it a more dangerous form of coercion? We can reply to this question only by understanding the meaning of the union-membership requirement.

Legislative Intentions

It was the obvious intent of the legislators, in framing the Taft-Hartley law, to minimize the coercive influence that the union might exercise over the individual employee. More specifically, the individual's employment rights were to be protected from union discrimination. Under the Wagner Act, a union member often lost his job automatically when expelled from a union. But several provisions of the Taft-Hartley law were designed to eliminate the union's power to cause a discriminatory discharge of an employee. These include:

[1] C. S. Golden and H. J. Ruttenberg, *The Dynamics of Industrial Democracy* (New York: Harper, 1942), p. 217.

Sec. 8 (a) (3) . . . *Provided further,* That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership. . . .

Sec. 8 (b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; . . .

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership. . . .

These provisions suggest that Congress did not want to regulate the admission or expulsion policies of the union. But union autonomy should not allow the union the power to restrict the employee's freedom to seek, obtain, and retain employment except in specific and carefully defined circumstances. While the union would be allowed to negotiate an agreement requiring all employees to support the union, such support need be financial only.

What was the logic behind this "fee only" dimension of union membership? Obviously, Congress accepted the union's "free-rider" argument and was therefore willing to allow unions the power to cause the discharge of employees who received the benefits of union representation but who were unwilling to contribute to the financial support of the union. Even Senator Taft seemed willing to accept the premise that the union did provide labor with benefits, and felt that it was not, therefore, unreasonable that unions should have the opportunity to make the matter of uniform membership at least a bargainable issue. But if an employee should be forced into a union because of a collective bargaining agreement, Taft was anxious that the authority of union leadership over the individual worker be circumscribed. Under the Taft-Hartley law, the union was permitted to seek the discharge of an employee under only two conditions: failure of the employee to tender the regularly required (and reasonable) initiation fee, and failure of the employee to tender the regularly required union dues. A union-

The right to seek, obtain & maintain employ.

shop agreement, in Taft's view, took care of the major union complaint that the free rider was able to enjoy the benefits of union organization without contributing to union support. It was, in his words, a "satisfactory" form of union security. In the 1947 debate over the Ball-Byrd amendment to outlaw the union shop, Senator Taft explained his opposition to the amendment:

> Mr. President, this amendment, as I understand, proposes completely to abolish the union shop. I recognize the strength of the argument made by the Senator from Minnesota. We considered the arguments very carefully in the committee and I myself came to the conclusion that since there had been for such a long time so many union shops in the United States, since in many trades it was entirely customary and had worked satisfactorily, I at least was not willing to go to the extent of abolishing the possibility of the union-shop contract.[2]

In summary, Congress hoped to have the best of both worlds by allowing unions a fair degree of autonomy in internal union affairs, but nevertheless providing that nonpayment of dues and initiation fees could be the only basis on which a union might seek to have an employee fired. As one student put it, the "internal affairs of the union were divorced from the right of a union member to hold his job with but one exception, the payment of union dues."[3]

This review of congressional intent raises the question whether the union shop under the Taft-Hartley law is not, in reality, the agency shop. In the 1946 dispute between the Ford Motor Company of Canada and the United Automobile Workers, Justice I. C. Rand of the Supreme Court of Canada ruled against the union shop,[4] but offered in its place a compulsory checkoff. In his decision, Justice Rand reasoned that a union shop would deny the individual worker the right to seek employment independently of personal association with any organized group. Furthermore, such a clause would expose the individual employee to the discipline of the organization and the danger of arbitrary actions of the union. But Rand agreed that all employees are the beneficiaries of union action, and thus it would be equitable to require all employees to contribute toward the administrative expenses of the union.

In ruling for the compulsory checkoff, but not compulsory union membership, Rand hoped that the obligation of all employees to pay dues might induce membership and stimulate general employee interest

[2] *Congressional Record,* 80th Cong., 1st sess., 93:4 (May 9, 1947), 4885.

[3] Edward F. Kearney, "The Ability of a Union to Cause a Discharge for Nonpayment of Dues under the Taft-Hartley Act," *The Georgetown Law Journal,* XLV (Winter, 1956–57), 252.

[4] "Award on Issue of Union Security in Ford Dispute," *The Labour Gazette* (Ottawa), January, 1946.

in the problems of the union. This arrangement would give fresh incentive for the union to justify its actions to all employees. Rand could see no serious danger in the entrenchment of the union that the compulsory checkoff might make possible. He added that those who control capital are scarcely in a position to complain of the power of money in the hands of labor.

Under the compulsory checkoff, the payments required of all employees in the bargaining unit would not include special assessments or contributions to finance union insurance not available to the nonmember. No initiation fee would be required. Furthermore, if the union were to call a strike, it would be necessary to have a strike sanction by a secret ballot, conducted by the government, with all employees eligible to vote. Any wildcat walkout undertaken by any of the union members without the sanction of the majority of voting employees would have to be repudiated within 72 hours by the union. Furthermore, employees participating in an unauthorized strike would be subject to a fine of $3.00 a day for every day's absence from work, and to a loss of one year's seniority for every continuous absence for a calendar week. If the union should support a strike not authorized by the majority of all employees, or fail to repudiate a wildcat walkout, the union would face a suspension of checkoff privileges from a minimum of two to a maximum of six monthly deductions, with the penalty above the minimum at the discretion of the company. Finally, any employee would enjoy the right to become a member of the union by paying the entrance fee and complying with the constitution and bylaws of the union. By this decision, the union was guaranteed revenues from all employees, but specific mandates restricted the union leadership's ability to call a strike without the support of the majority of all employees, whether union members or not.

To what extent does this Rand formula differ from the present status of the union shop? Senator Taft's observations are again significant:

> Mr. President, while I think of it, I should like to say that the rule adopted by the committee is substantially the rule now in effect in Canada.... [T]he present rule in Canada is that there can be a closed or a union shop, and the union does not have to admit an employee who applies for membership, but the employee must, nevertheless, pay dues, even though he does not join the union. If he pays his dues without joining the union, he has the right to be employed. That in effect, is a kind of tax, if you please, for union support, if the union is the recognized bargaining agent for all the men, but there is no constitutional way by which we can do that in the United States.[5]

[5] *Congressional Record*, 80th Cong., 1st sess., 93:4 (May 9, 1947), 4887.

The first part of this statement obviously condones the strict interpretation given to the union-shop requirements. The union shop can, at most, be an agency shop. But the sentence indicating the absence of any constitutional method by which an agency shop can be established has puzzled many law students, for as one points out: "The concept of the agency shop haunts the proviso [the present substance of the union shop]."[6]

NLRB and Court Interpretations

Since Taft-Hartley, it has become increasingly clear that union efforts to secure the discharge of employees for reasons other than the failure to tender fees and dues are proscribed.[7] The content of union membership obligation is perhaps best seen in the *Union Starch* decision of the National Labor Relations Board.[8] In this case, a union had negotiated a union-shop agreement with the Union Starch and Refining Company. The business agent of the union informed a husband and wife and a third person working for the company that union membership would be a condition of employment. He explained that membership in the union could be obtained if they (1) filed an application for membership, (2) appeared at the union meeting and were voted upon, (3) took the oath of loyalty to the union, and (4) paid the regularly required fee and dues. They expressed a willingness to join the union and pay the fee and dues, but said they would never sign an oath of loyalty to the union. They terminated their contact with the business agent at this point. They made no application; they failed to attend the union meeting; none of them was admitted to the union. Following an investigation by the company, they were discharged for nonmembership in the union.

In considering the case, the Trial Examiner looked for a willingness of the parties to join the union. Actually, they had said they were willing to join, but refused to do anything but (4) above to implement that willingness. Because the intent was not supported by action, the Trial Examiner recommended that the employees not be protected from their discharge. But the majority of the NLRB pointed out that an actual tender of union dues was made, and the fact that they did not conform to other membership requirements did not legalize the discharge. The

[6] Vincent G. Macaluso, "The NLRB 'Opens the Union,' Taft-Hartley Style," *Cornell Law Quarterly*, XXXVI (Spring, 1951), 450.

[7] The Supreme Court held to this interpretation in *Radio Officers' Union, AFL v. NLRB*, 347 U.S. 17 (1954).

[8] *Union Starch and Refining Co.*, 87 N.L.R.B. 779 (1949), enf'd, 186 F.2d 1008 (7th Cir. 1951).

dissent of the minority of board members was very much to the point: "We find no evidence of an intent to distort the union shop agreements into mere devices by which unions can insure that all employees pay for the right to work. Yet that is the clear effect of the decision."

This case deserves additional consideration. It raised the question whether willingness to join a union was a necessary precondition for establishing that union membership had been denied. Obviously, the union could not deny an application that was never made. In discussing this case, Jerome L. Toner pointed out that "stating and alleging a willingness, and at the same time refusing to give any overt indication or manifestation of this claimed conscious state of mind does not establish legal proof of its existence or good faith declaration. . . ."[9]

In Toner's view, this case established that the individual need not even intend to join the union to satisfy membership requirements. But Charles Cogen gave a different interpretation of the *Union Starch* case.[10] First, he argued that a person must intend to join the union. As a case in point, he noted the *Pan American World Airways* arbitration case in 1953. Here an employee tendered dues and initiation fees, but added that she was not joining the union. Arbitrator Aaron Horvitz ruled:

> An employee has not applied for membership until he has given some outward manifestation of his desire or intent to join the union. It is immaterial that the manifestation may be grudgingly given, or accompanied by mental reservations. What is required is conduct which a reasonable man would take as signifying an intent to apply for membership. The existence of intent is properly determined by the objective manifestation of the parties, reasonably interpreted. . . . *This makes it completely clear, in my view, that she has not applied for membership.*[11]

Second, Cogen argued that in the *Union Starch* case there was considerable evidence of the intent of the parties to join the union. Toner, in his review of Cogen's analysis, could see no evidence to support this thesis: "Cogen's argument comes out in a seance of semantics as an 'I-will-but-I-won't' mental attitude which is actually nothing."

To Toner, two conclusions are readily apparent: First, under a union-shop arrangement, a worker cannot be discharged for nonmembership in a union even when he fails to make formal application for

[9] Jerome L. Toner, "The Taft Hartley Union Shop Does Not Force Anyone to Join a Union," *Labor Law Journal,* VI (October, 1955), 693.

[10] Charles Cogen, "Is Joining the Union Required in the Taft-Hartley Union Shop?" *Labor Law Journal,* V (October, 1954), 659–62.

[11] Cited in *ibid.,* p. 735.

membership, so long as he has offered to pay the initiation fee and dues. Second, such a policy is a radical departure from the original concept of the union shop. In his words, "Anyone who claims that 'good standing' in a union could have been obtained or retained before the Union Starch decision by 'merely tendering initiation fees and dues' is grossly ignorant of union labor history in the U.S."[12] In a separate study, he stressed the novelty of this new definition of union membership:

> The difference between being *forced* and *compelled to join a union* as a condition of employment and being *forced* and *compelled only to pay initiation fees* and *dues without* being *forced* and *compelled to join a union is real* and *fundamental.* It is as different as the right to work *without* joining any union and the right to work *only* by joining a union.[13]

Several additional cases point up the restricted scope of union-security contracts, or more specifically the limitations on union discrimination. When a worker refused to sign a non-Communist affidavit and the union insisted that the worker be discharged pursuant to the union-security clause, the NLRB ruled that, however understandable and laudable the provision, the ground for discharge was one other than failure to tender dues.[14] In another case, the union had negotiated a contract provision with the employer under which the union would supply the employer with personnel for a particular classification; the union issued assignment slips to those to be employed, but various union members were denied such assignments because of their support of a rival union. Both the employer and the union were found responsible for an unfair labor practice, for it was held by the board that the employer knew of the discrimination practiced by the union and acquiesced in it.[15] The board has also ruled that an employee could not be discharged because of expulsion from the union when that expulsion arose from a disagreement between the employee and the union.[16] In a further case, it was found that the union had negotiated a contract provision preventing an employee's promotion to a supervisory position during the pendency of charges against the employee by the union. One employee, who faced union charges because of his premature return to work during a strike, was denied a promotion because of this con-

[12] Toner, *op. cit.*, p. 694.

[13] Jerome L. Toner, "Union Shop in the Steel Crisis," *Labor Law Journal,* III (September, 1952), 592.

[14] *Kingston Cake Co.,* 97 N.L.R.B. 1445 (1952).

[15] *Brown v. National Union of Marine Cooks & Stewards,* 104 F. Supp. 685 (1951).

[16] *NLRB v. Acme Mattress Co.,* 192 F.2d 524 (7th Cir. 1951).

tract provision, but the board ruled that he was protected in law against this form of discrimination.[17]

The board has also prevented penalties imposed upon employees and in some circumstances the lump-sum payment of back dues. In the *Eclipse Lumber Co.* case, an employee was suspended from the union and thus lost his job. He was told he could regain union membership only by paying past dues, an initiation fee, advance dues, and a fine for failure to picket in a prior strike by the union. In this case, both the employer and the union were charged with an unfair labor practice.[18] In a somewhat similar case, an employee had been dropped from union membership because of his activities in support of another union. He was told by the union that he would be readmitted only if he paid his back dues and initiation fees and a fine of $500. In this case, even though the worker did not offer to pay either the initiation fee or his dues, the union was found guilty of an unfair labor practice for urging his discharge.[19] In other cases, the board has ruled that a worker's employment security can in no way be jeopardized by his refusal to pay union fines or special assessments. In the *Electric Auto-Lite* case, the union constitution defined assessments as dues, and levied nonattendance assessments against workers who did not attend union meetings. The board held that the union could not, by the simple expedient of altering a definition, make nonattendance assessments anything but fines. Discrimination based on nonpayment was clearly within the ban of the statute since the charges were not "uniformly required."[20]

The board has further held that a union could not ask for the discharge of an employee for failure to pay union dues and fees which were payable prior to the execution of the union-shop provision.[21] Nor would the board allow a union to demand a larger initiation fee from those employees who had refused to join the union prior to the effective date of the union-security provision.[22] In another case, a worker sought to pay his dues and reinstatement fee, and each time was informed he would have to see the executive board. But he was never permitted to see the executive board. When the employee was discharged for nonmembership, the NLRB found both the union and the company guilty of an unfair labor practice. It pointed out that an employee was not

[17] *NLRB v. Bell Aircraft Corp.*, 206 F.2d 235 (2d Cir. 1953).
[18] *Eclipse Lumber Co.*, 95 N.L.R.B. 464 (1951), 199 F.2d 684 (9th Cir. 1952).
[19] *NLRB v. International Association of Machinists*, 203 F.2d 173 (9th Cir. 1953).
[20] *Electric Auto-Lite Co.*, 92 N.L.R.B. 1073 (1950), aff'd per curiam sub nom. *NLRB v. Electric Auto-Lite Co.*, 196 F.2d 500 (6th Cir. 1952), cert. denied, 344 U.S. 823 (1952).
[21] *NLRB v. United Automobile Workers, CIO*, 194 F.2d 698 (7th Cir. 1952).
[22] *Ferro Stamping & Manufacturing Co.*, 93 N.L.R.B. 1459 (1951).

obligated to continue to make useless gestures in order to fulfill the requirement of tendering dues to the union.[23]

The question of the time of payment of union dues has also assumed considerable importance. On the one hand, the board has upheld the union's right to cause the discharge of a person who had failed to pay his union dues at the required time. In the *Chisholm-Ryder* case the union resolved to pull the union card from anyone not paying his dues by August 31. Three days after the deadline an employee tendered his dues, and the union refused to accept them. The board upheld the subsequent discharge of the employee, on the ground that the legal sanction of the union shop involved the statutory duty of the union member to pay his dues on time.[24] But in subsequent cases the board has taken a different position. In the *Aluminum Workers* case, a worker delinquent in her payment of dues was automatically suspended. She mailed the union the delinquent dues, but the money was returned with the explanation that the payment must be made at the union meeting. Three weeks later she was given the opportunity to pay her dues, but this time the settlement was not effected because of the additional requirement that she pay a $15 reinstatement fee. A few days later, following the request for her discharge, the company loaned the employee enough money to pay her dues and reinstatement fee, but these payments were rejected. She was ultimately expelled from the union and dismissed from the company. Because the union constitution specified only that the reinstatement fee be not less than $15, the board ruled that there could be no obligation for an employee to pay an undetermined amount. Therefore, the tender of dues any time prior to the union's request for discharge was valid.[25] In a further consideration of the case, the board broadened this dictum, holding that the only date that must be considered was the date of actual discharge: "... a full and unqualified tender made anytime prior to actual discharge, and without regard as to when the request for discharge may have been made, is a proper tender and a subsequent discharge based upon the request is unlawful."[26] In the *Technicolor Motion Picture Corp.* case, the board ruled that an employee who procrastinated for four months in the payment of his initiation fees, but who tendered these fees before actual discharge, could not be discharged.[27] In an analysis of this prob-

[23] *Baltimore Transfer Co.*, 94 N.L.R.B. 1680 (1951).
[24] *Chisholm-Ryder Co.*, 94 N.L.R.B. 508 (1951).
[25] *Aluminum Workers Union*, 111 N.L.R.B. 411 (1955).
[26] *Aluminum Workers Union*, 112 N.L.R.B. 619, 621 (1955).
[27] *Technicolor Motion Picture Corp.*, 115 N.L.R.B. 1607 (1956). See also *W. J. Sloane Co.*, 116 N.L.R.B. 1267 (1956).

lem, Edward F. Kearney notes the significance of the change in the cutoff date for dues payment:

> This rule [of discharge following the union notice of nonpayment] gave the union an effective weapon in the regulation of its internal affairs. The great significance of this weapon is that it was entirely dependent on the relationship of the union member vis-à-vis the union, and the employer was a passive factor in that he could not refuse to discharge the employee so long as the union's request was based on nonpayment of dues. Under the rule now in effect, the right of the union to have an employee discharged is not solely dependent on the nonpayment of dues and the time of the request for discharge, but is dependent on the actual discharge of the employee. The time of actual discharge is dependent, in turn, on the unilateral action of the employer.[28]

The board has also held that the union could not ask for the discharge of an employee who had accepted a wage lower than the one established by the union,[29] or an employee who had undertaken activities for a rival union,[30] or who had failed to attend union meetings,[31] or who had circulated petitions criticizing the method of selecting a shop steward.[32] Furthermore, it was found to be an unfair labor practice to cause a discharge for dues owed, when the real motive for the discharge was the employee's dual unionism.[33]

The Implications of Union-Membership Decisions

What is the significance of these decisions? It is apparent that, in an effort to establish the optimum combination of the union's freedom to regulate its own internal affairs and the individual's freedom from union discrimination, the NLRB and the courts have favored the individual rather than the union. This development weakens the grip the union has on its membership, but it also weakens the argument that union-security clauses allow union leadership to disregard the rights of the members.

There has been considerable speculation that the union's status (and even its power) could be undermined by the narrow construction placed on union-membership obligations. Clearly, under federal law, the individual member is free to criticize his union officers, to refuse to sign a loyalty pledge, to refuse to attend union meetings, and to refuse pay-

[28] Kearney, *op. cit.*, pp. 259–60.

[29] *International Brotherhood of Teamsters, AFL,* 110 N.L.R.B. 287 (1954).

[30] *Wagner Iron Works,* 104 N.L.R.B. 445 (1953).

[31] *Hunkin-Conkey Construction Co.,* 95 N.L.R.B. 433 (1951).

[32] *Air Product, Inc.,* 91 N.L.R.B. 1381 (1950).

[33] *NLRB v. Local 169, International Brotherhood of Teamsters, AFL,* 228 F.2d 425 (3d Cir. 1955); *Special Machine and Engineering Co.,* 109 N.L.R.B. 838 (1954); *Victor Metal Products Corp.,* 106 N.L.R.B. 1361 (1953).

ment of any fines and any assessments not uniformly required. Moreover, the individual member is permitted some laxity in the payment of union dues.

There is no persuasive evidence, however, that individual employees have taken advantage of these new freedoms. This may be because (a) the individual union member is unaware of his "emancipated status" vis-à-vis his union; (b) the individual member, if aware of the technical freedom he enjoys in law, is equally aware of the possibility that union officials may not understand or appreciate the law and may pursue discriminatory policies in spite of the law; or (c) the individual employee is not usually agitated about the manner in which the union is representing him. The last explanation seems most plausible, for union leadership is, for the most part, interested in satisfying the rank and file rather than defying it. Expulsion from the union was a rarely utilized expedient even before Taft-Hartley; while flagrant abuses did occasionally arise prior to 1947, it is probably safe to conclude that the Taft-Hartley Act restricts the ability of the union to do that which it does not want to do.

Vincent G. Macaluso, among others, has expressed some concern over the narrow construction placed on union-membership obligations:

> The right to discharge for nonmembership where there is a union shop has never been circumscribed so severely.... What happens to the meaning of "membership" and "joining" here? They are not recognizable if the union cannot even require that the applicant give his name. It is extremely doubtful that Congress meant the board to open the door of the union by taking the door off its hinges.[84]

But unionism today is not seriously disturbed by legislation "taking the door off its hinges," for union strategy has been to increase membership rather than restrict it. To state the issue in different terms, the protest of the right-to-work controversy arises not because the union has a bouncer on the inside unceremoniously depriving workers of membership and participation, but because the union has a bouncer on the outside, throwing employees into the union.

One additional conclusion emerges. Excluding from the concept of union-membership obligations any compulsion to "sign on the dotted line," any compulsion to pledge loyalty to the union, and any compulsion to attend union meetings significantly recasts those obligations. It eliminates a good part of the argument claiming that the Taft-Hartley union-shop provisions violate the political, religious, and moral scruples an individual may have against membership.

[84] Macaluso, *op. cit.*, pp. 452, 461.

Chapter 8

Union Responsibilities to the Membership

In Chapter 7 we noted the restrictions placed on the freedom of the union to compel the discharge of an employee. Nevertheless, the union does have substantial powers: It determines bargaining policy; its bargaining strategy may have a significant influence on the amount of concessions secured from the employer; its policy determines not only the form of benefits to be enjoyed, but also the distribution of benefits to the employees it represents. In day-to-day operations under the contract, the union has freedom of action in pushing particular grievances and abandoning others. Furthermore, the union still has considerable discretion in deciding which persons shall be admitted to membership. Although the employment rights of employees can be jeopardized by the union only in a "special case," it is still possible for the union to deprive employees of genuine benefits through loss of union membership.

In this chapter we shall examine those union policies that involve discrimination in admission and expulsion. Such an evaluation is necessary to determine whether the employee, forced to support a union under a union-shop contract, is thereby forced to support policies inconsistent with his own welfare. We have reviewed the responsibility of the union member to his union; now we shall review the reciprocal responsibility of the union to its membership.

Union Admission Policies

Paradoxical as it may seem, the freedom of the union to exclude individuals from membership is relevant to the union-security problem. Maintaining the stability and organizational strength of the union has several dimensions, only one of which is the requirement that all workers support the union. Inclusionary policies can also pose problems. For example, the admission of all persons making application for membership can create a new bloc within the union, raising fresh issues in bargaining strategy as well as problems of orientation to existing policies. Furthermore, the union may attempt to establish quality standards for the labor service it is marketing. A requirement to admit all

applicants can complicate this task and postpone the day when members acquire a semiprofessional status in industry. An open-door policy may involve membership of persons with highly controversial political affiliations: Communists, Trotskyites, Socialists, Stalinists, and others may pervert legitimate trade organizations to political ends.[1] Finally, an open-door policy may invite agents from other unions and spies from a hostile management to penetrate the union. Thus, union security may involve not only the ability of the union to call on all employees for financial support, but also the freedom of the union to protect itself against any "fifth column" attempting to penetrate it. Obviously, it is difficult for the union to protect itself on all flanks or, putting the argument another way, to support simultaneously inclusionary and exclusionary membership policies.

However necessary the exclusionary policies of the union, they are usually difficult to defend. The *Catholic Encyclopedia,* under "Labor Unions, Morality of," explains, "If a union is willing to admit all capable workers, and has sufficient reason for pursuing a union shop policy, it will be neither unjust nor uncharitable."[2] In this context, the denial of admission deprives unions of the moral sanction of the union shop. As Samuel Gompers put the position of the American Federation of Labor:

> We do not deny the non-union man the right to work: but we do seek wherever it is expedient and possible, exclusive contracts to furnish the employer with labor. We believe that in this way the best interest of the workman is served. The doors of unionism stand open to all workmen in good standing. We hold it is morally wrong . . . for a man to remain outside the union in his trade. If he does so it is his legal right, but the union should have the right to treat him as a competitor.[3]

As noted earlier, the abuses of the "closed-door" policy are apparent in those situations where the union has negotiated a closed-shop contract, for with a combination of the closed shop and the closed union, the union can control the point of contact between the employer and the job applicant. In this situation, the union is not "the arbiter of social pleasure" but, in reality, "the dispenser of bread."[4] As Clyde

[1] John V. Spielmans, "Union Security and the Right to Work," *Journal of Political Economy,* LVII (December, 1949), 540.

[2] Cited in John H. Sheehan, "Safeguards for the Right to Work: Right to Work Law Does Not Correct Abuses of Labor," *Catholic Home Weekly,* April 23, 1955, p. 725.

[3] Cited in Howard T. Lewis, "The Economic Basis for the Fight for the Closed Shop," *Journal of Political Economy,* XX (November, 1912), 950–51.

[4] *Dusing v. Nuzzo,* 177 Misc. 35, 37, 29 N.Y.S.2d 882, 884 (Sup. Ct. 1941), aff'd, 263 App. Div. 59, 31 N.Y.S.2d 849 (3d Dep't 1941).

Summers makes the point: "To exclude a man from a club may be to deny him pleasant dinner companionship, but to exclude a worker from a union may be to deny him the right to eat."[5]

Even though only a small number of unions engaged in exclusionary policies prior to the Taft-Hartley law, frequently through subtle devices relating to apprenticeship conditions and competency tests, Congress, by 1947, felt that the isolated instances of abuse were sufficient to warrant its extending greater protection to the individual employee. As noted previously, under federal law the union can no longer legally control the point of ingress to the plant by requiring union membership as a precondition of employment. While it is still true that no employee has a legal claim to union membership, the fact that union membership has been denied cannot serve as a lever for the union to have the employee discharged.

The courts have not been altogether consistent in their judicial review of union admission policy. For the most part, they have not ordered the union to alter its admission policies, but have simply restricted the exercise of the union's statutory authority because of discrimination. Thus, in *Wilson v. Hacker,* the judge dismissed the union's contention that it should be allowed to picket taverns employing barmaids, noting that women had been denied membership in the union, and observing that the union is not the keeper of the public morals.[6] More important than union discrimination on the ground of sex is racial discrimination. In the railroad industry in particular, unions have persisted in a policy of discrimination.

In 1944, in *Steele v. Louisville & Nashville Railroad,* the U. S. Supreme Court reiterated that a certified union was the exclusive bargaining agent for all employees, whether union members or not. The Court reasoned that since the union secured, by authority of the Railway Labor Act, the right to be the exclusive bargaining representative of a craft, it must represent all employees without discrimination on the basis of race. In this case, Negro firemen, not eligible for union membership, were deprived of their seniority rights by a contract negotiated by the union. Chief Justice Stone, in his opinion, pointed out that

> the representative is clothed with power not unlike that of a legislature which is subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates. . . .

[5] Clyde Summers, "The Right to Join a Union," *Columbia Law Review,* XLVII (January, 1947), 42.

[6] *Wilson v. Hacker,* 101 N.Y.S.2d 461 (Sup. Ct. 1950).

But we think that Congress, in enacting the Railway Labor Act and authorizing a labor union, chosen by a majority of a craft, to represent the craft, did not intend to confer plenary power upon the union to sacrifice, for the benefit of its members, rights of the minority of the craft, without imposing on it any duty to protect the minority.[7]

Although the Court did not proscribe those acts of the union that involved an uneven distribution of the benefits of collective bargaining, nor attempt to define the "allowable limits" of discrimination involved in many contract terms, it did make it clear that "the discriminations based on race alone are obviously irrelevant and invidious. Congress plainly did not undertake to authorize the bargaining representative to make such discriminations."[8] Justice Murphy, in a concurring opinion, added: "The utter disregard for the dignity and the well-being of colored citizens shown by this record is so pronounced as to demand the invocation of constitutional condemnation."[9]

The Court was careful to admit, however, that the union was not compelled to admit Negro members. But with certification, the union could not avoid the legal duty to consider the requests of nonunion members with respect to collective bargaining. The Court enjoined the union from further discrimination and from taking the benefits of such discriminatory action.

Two subsequent court decisions narrowed even more the judicial tolerance of union discrimination. As noted in Chapter 3, the California Supreme Court, in *James v. Marinship,* held that the union could have either a monopoly of employment or a closed membership policy but not both. If the union persisted in maintaining "Jim Crow" auxiliaries, the employer and union must refrain from enforcing their closed-shop agreement. The court did not, however, knock down all union barriers to membership, but indicated that membership conditions must be "reasonable."[10]

Since 1945, 15 states have passed Fair Employment Practices legislation.[11] A test case of the constitutionality of such legislation was made in *Railway Mail Association v. Corsi.* In the arguments before the New

[7] *Steele v. Louisville & Nashville R.R.,* 323 U.S. 192, 199–200 (1944).

[8] *Id.* at 203.

[9] *Id.* at 208.

[10] *James v. Marinship Corp.,* 25 Cal. 2d 721, 155 P.2d 329 (1944). For further discussion, see "Closed Shops and Closed Unions," *Labor Law Journal,* I (December, 1949), 165, and I (January, 1950), 259–62, 335–36.

[11] Colorado, Connecticut, Indiana, Kansas, Massachusetts, Minnesota, Michigan, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Washington, and Wisconsin.

York Court of Appeals, it was contended that Section 43 of the Civil Rights Law, prohibiting labor organizations from discriminating on the ground of race, creed, or color, violated the Fourteenth Amendment. But Chief Justice Lehman could see no way in which this statute interfered with federal public policy or invaded any field from which the state was constitutionally excluded.[12] Support for this position was provided by Justice Reed in his decision for the U. S. Supreme Court in this case:

> To deny a fellow-employee membership because of race, color or creed may operate to prevent the employee from having any part in the determination of labor policies to be promoted and adopted in the industry and deprive him of all means of protection from unfair treatment arising out of the fact that the terms imposed by a dominant union apply to all employees, whether members or not.
>
> We see no constitutional basis for the contention that a state cannot protect workers from exclusion solely on the basis of race, color or creed by an organization . . . which holds itself out to represent the general business needs of employees.[13]

Further support for the policy of denying unions the freedom to discriminate for reasons of race was found in the celebrated case of *Betts v. Easley*.[14] In this case, the Kansas Supreme Court ruled on the legality of union discrimination against employees because of race and color. The plaintiffs, six in number, were Negro employees of the Santa Fe Railway. In 1943, the Brotherhood of Railway Carmen gained certification for certain employees following a secret-ballot election. In soliciting union membership, the union organizer assured the plaintiffs and other Negro employees that they would be entitled to full membership in Local Lodge No. 850. But when the local was established, a separate lodge was set up for Negro employees. It was determined that under the constitution and bylaws of the defendant union:

> Where these separate lodges of Negroes are organized they shall be under the jurisdiction of and represented by the delegate of the nearest white local in any meeting of the Joint Protective Board, Federation or Convention where delegates may be seated. . . .[15]

The court found that Negro members of the separate lodge were not permitted to attend meetings of the white lodge, vote in the election

[12] *Railway Mail Ass'n v. Corsi*, 293 N.Y. 315, 56 N.E.2d 721 (1944), aff'd, 326 U.S. 88 (1946).

[13] 326 U.S. 88, 94 (1946).

[14] *Betts v. Easley*, 161 Kan. 459, 169 P.2d 831 (1946).

[15] Brotherhood of Railway Carmen, Subordinate Lodge Constitution, Ed. 1941, Section 6, Clause C, and cited, 161 Kan. 459, 462.

of any officers, representatives, or delegates, participate in any determination of policy, or vote upon the question of the amount of dues to be paid by union members. In their petition before the Kansas Supreme Court, the plaintiffs indicated that they were willing to pay the initiation fees, dues, and assessments necessary to comply fully with the requirements of the union, but were deprived of that opportunity solely on the basis of their race and color. They requested that the defendant union be enjoined from acting as the bargaining agent so long as they, and approximately one hundred other Negroes similarly situated, were not given equality of participation in union affairs. Furthermore, they asked that the company be restrained from recognizing the union as a collective bargaining agency so long as the acts of discrimination continued.

The trial court denied the application for injunctive relief. It reasoned that since the actions complained of were those of a private association of individuals, and not actions of the federal government or the State of Kansas, there could be no violation of either the Fifth or Fourteenth Amendment. The Kansas Supreme Court was not, however, persuaded by such reasoning. The court pointed out that the issue was not whether the union should be allowed to establish segregated locals, but whether the union should be free to discriminate through the inequality of participation of Negro members in such locals. The court denied that a union was, in reality, a private association of individuals; rather, it was "an organization acting as an agency created and functioning under provisions of federal law." Thus, the Fifth Amendment was relevant to the case, and members of the union were protected by the constitutional guaranties of due process. These guaranties, the court explained, serve as a restraint upon "all administrative and ministerial officials who act under government authority."[16] Therefore the union could not exercise the rights incident to its designation as a bargaining agent and at the same time avoid the responsibility related to such "statutory" status.

Following this line of reasoning, the Kansas Supreme Court declared that the union's denial of the Negro member's right to participate in local union affairs was "repugnant to every American concept of equality under the law. It is abhorrent both to the letter and the spirit of our fundamental charter. Never was it more important than now to reject such racial discrimination and to resist all erosions of individual liberty. The acts complained of are in violation of the Fifth Amend-

[16] 161 Kan. 459, 467.

ment."[17] Driving home the point with further force, the court declared that "the denial to a workman, because of race, of an equal voice in determining issues so vital to his economic welfare, under the Railway Labor Act, is an infringement of liberty if indeed it may not also be said to be deprival of property rights."[18] Thus, the Kansas Supreme Court took the rather unusual position of declaring that racial discrimination in collective bargaining by a union enjoying statutory authority under the Railway Labor Act was in violation of the constitutional guaranties of the Fifth Amendment.

But the courts have not consistently held to the position that unions should be restricted in applying discriminatory admission requirements. In *Feinne v. Monahan,* a steamfitter complained of his arbitrary exclusion from membership in a defendant union, resulting in his inability to obtain employment at his trade. Holding to the traditional view, the New York court stated: "Membership in a labor union is a privilege which the law in this state permits a union to deny, however worthy the applicant and unfortunate his economic plight because of his exclusion."[19]

The move for antidiscrimination received a setback in *Ross v. Ebert,* in a 1957 decision of the Wisconsin Supreme Court. Here the court ruled that a union could not be prevented from excluding applicants against whom it had no grievance except that the applicants belonged to a particular race, the Wisconsin Fair Employment Code notwithstanding. The court felt that the Wisconsin statute was designed to "encourage and foster" employment without discrimination, but did not compel nondiscrimination. The remedy for discrimination was "investigation, publicity and a commission recommendation," even though the court admitted that this might be "cold comfort" to those discriminated against. In an analysis of employee freedom, the court explained that those discriminated against "are as free as other citizens are to form labor unions with all the rights and privileges of other labor unions, and . . . free . . . to join any existing unions which will have them."[20] Justice Fairchild, in his vigorous dissent, pointed out that allowing second-class citizenship to develop impaired the very substance of that citizenship, and that the economic opportunities for the individual were much less than those for the group.

It is apparent that an individual who has not yet secured employ-

[17] *Id.* at 469.
[18] *Id.* at 474.
[19] *Feinne v. Monahan,* 92 N.Y.S.2d 112, 113 (Sup. Ct. 1949).
[20] *Ross v. Ebert,* 275 Wis. 523, 531, 82 N.W.2d 315 (1957).

ment is in a much more vulnerable position in the face of union discrimination than one who is already employed. In the *Courant* case, a skilled cameraman was denied membership in the defendant union solely because of a closed membership. There was no suggestion that the plaintiff was not qualified professionally, but because of the closed-shop agreement between the union and the employer, the plaintiff was unable to secure employment. The United States Court of Appeals denied him relief, holding that the union's duty not to discriminate extended only to those already employed in the bargaining unit. "Where members of the group which the union represents are discriminated against, the United States Court... will take jurisdiction of the complaint. There is, however, no authority for the idea that the union has any corresponding duty toward persons not employed who are employable...."[21]

In summary, the negotiation of a union-security clause encourages a closer scrutiny of union admission policies. It is evident that the moral position of the union, insisting that all persons be required to apply for union membership, is greatly weakened when that union maintains the privilege of refusing admission to applicants for reason of race, creed, or color. Because union-security clauses necessarily increase the importance of admission and expulsion policies of the unions, right-to-work proponents have suggested that the best interests of the union are not served by such clauses. It is reasoned that, with union-security clauses, the judicial and public review of union admission and expulsion policies must inevitably narrow the opportunity for union discrimination. The loss of this freedom to discriminate is a price too high to pay for union security. This reasoning implies, however, that unions place a high premium on their ability to discriminate. But, in reality, unions have done much to reduce racial discrimination, and though antidiscrimination policies are not uniformly applied, the AFL-CIO has undertaken to continue and accelerate the antidiscrimination campaigns of the CIO.

The prevalence of the union shop has, nevertheless, placed the union movement on the defensive and has given it fresh impetus to eliminate discriminatory practices. Furthermore, the conviction is rapidly growing that unions are no longer private fraternal organizations, and union-security clauses do more than perhaps any other contract term to establish the quasi-public character of unions. If unions fail to satisfy the public's standard for performance, neither legislatures nor courts

[21] *Courant v. International Photographers,* 176 F.2d 1000, 1003 (9th Cir. 1949).

will have much difficulty in finding reasons for imposing restrictions on union admission policies. In this respect, self-reform is better than a Fair Employment Practices law, and an FEP law is better than a right-to-work law.

Expulsion from the Union

Expulsion from a union poses an issue considerably different from that raised by nonadmission. Although the courts have been reluctant to intervene, an expelled member may have cause for seeking court review if he has been deprived of some property interest related to membership, if the expulsion is a breach of contract, or if the expulsion is viewed as a tort for unjustified interference with employment. The breach-of-contract criterion has been most widely utilized by the courts, with the union constitution serving as an important standard for justifiable union expulsion. The court will determine whether an individual's actions are covered by the frequently broad requirements of a union constitution in such matters as loyalty, whether the individual was offered a fair hearing free from malice or bad faith, and whether he had exhausted the internal machinery for appealing the expulsion decision. Unfortunately, the trial proceedings within many unions leave much to be desired, but an individual is not without recourse to judicial review should he be expelled from a union.

Expulsion procedures, like admission requirements, are relevant to the right-to-work controversy. The freedom to deprive a person of union membership, while not often involving jeopardy to an individual's employment rights, can affect his social status, limit the extent to which he might undertake to criticize union officers, inhibit support of "outside" unions, discourage participation in the life of the union, and deny individuals an equity they might build up in union pension funds.

Among the most difficult expulsion cases to resolve is that arising when an individual protests against existing union leadership at a critical moment, or urges rank-and-file support for a new union not the certified bargaining agent. In the *Rutland Court Owners* case, the National Labor Relations Board determined that those campaigning for different union representation for the employees in the bargaining unit could not be fired for their efforts. When six of seven members of an AFL local became dissatisfied and signed cards designating a CIO local to represent them, five of the six were fired and a closed-shop agreement then signed with the AFL local. The NLRB ruled the contract illegal, explaining that any effort of the union to establish itself in perpetuity, regardless of the desires of the employees, was contrary

to the purposes of the federal act.[22] Similarly, in a bitter contest for representation of the Wallace Corporation employees in 1943, an independent union won by a small majority and thereupon signed a closed-shop contract. The union then refused to admit to membership 43 persons because of their alleged hostility to the union, and under the terms of the contract the employees were discharged. The board found such discharge illegal.[23] Generally, discharges have been permitted for dual unionism only when worker agitation began early in the contract so as to jeopardize the stability and status of the existing contract. In the 1949 case of *NLRB v. Geraldine Novelty Co.,* the United States Court of Appeals upheld the board's ruling that an employer could not discharge three employees who had lost their union membership because of their activities for a rival union. In line with the *Rutland Court* decision, since the rival union activities had occurred at the end of the current union-shop contract, the employees were held to be legally privileged to advocate a change in their collective bargaining agent.[24]

While interunion rivalry, particularly jurisdictional dispute over job assignments, is often viewed as costly combat when an employer's plant becomes the battleground for such strife, unions cannot push their security to the point where one union can never be replaced by another. But a certified union can seldom appreciate why it should lose its representation rights to a rival, and it is likely to regard support for an outside union as treasonable action rather than a healthy exercise of competition. As we have seen, the NLRB has attempted to find a balance between competition and stability by discouraging the activity of outside unions until an existing contract or certification is about to expire, thus minimizing the raiding of one union by another during the contract period.

But more difficult to resolve is the problem where a schism develops within a union—between the local and the national, between union officers and rebellious members, or between a majority supporting the parent body and a minority rejecting such affiliation. In reality, the union may fear intraunion rivalry even more than interunion. To what extent, then, will the individual union allow dissent to gain ground? To what extent will the union expose its organizational stability to the "hazards" of democracy?

Unfortunately, it is not difficult to locate cases in which expulsions

[22] *Rutland Court Owners,* 44 N.L.R.B. 587 (1942), 46 N.L.R.B. 1040 (1943).
[23] *Wallace Corp.,* 50 N.L.R.B. 138 (1943), enf'd, 323 U.S. 248 (1944).
[24] *NLRB v. Geraldine Novelty Co.,* 173 F.2d 14 (2d Cir. 1949).

occurred over the expression of legitimate criticisms of union officers. Critical employees are not usually regarded as members of the "loyal opposition," and an entrenched union leadership has often attempted to choke off criticisms from minorities.

Union members have been expelled or suspended for demanding the right to examine the union's financial statements,[25] for opposing the re-election of union officials,[26] for publicly criticizing a union president for "mismanagement" of a strike,[27] for "working against the interest and harmony of the Brotherhood because a unionist wrote a letter urging all labor people to clean house and get rid of labor racketeers . . .",[28] for testifying under subpoena before the Interstate Commerce Commission and making statements under oath unfavorable to the position taken by the union.[29] Furthermore, one Edmundson was expelled from the United Mine Workers because he announced he would run as a candidate against John L. Lewis for president of the union.[30] Two veterans were expelled because they refused to purchase tickets in a raffle sponsored by their union.[31] In the bulk of these cases, the courts have ruled the expulsions illegal. But it is clear that even though an individual or minority may have recourse to the NLRB for arbitrary expulsion, not all individuals want to become involved in litigation.

The union movement has also attempted, on occasion, to restrict the exercise of employee freedom off the job. But here again, the courts have consistently held that unions may not expel or discipline members who pursue normal political activities contrary to official union policy. In the leading case of *Spayd v. Ringing Rock Lodge,* the Supreme Court of Pennsylvania held that a union could not prevent its members from signing a petition urging the state to repeal its full-crew law, for this would infringe on the political liberty of union members.[32] But unions have, particularly before Taft-Hartley, expelled

[25] *Labor Relations Program,* Hearings on S. 55 and S. J. Res. 22 before the Senate Committee on Labor and Public Welfare, 80th Cong., 1st sess. (Washington: 1947), p. 1826.

[26] *Ibid.,* p. 1832.

[27] *Ibid.,* p. 2079.

[28] *Gaestel v. Brotherhood of Painters, Decorators and Paperhangers,* 120 N.J. Eq. 358, 185 Atl. 36 (1936).

[29] *Abdon v. Wallace,* 95 Ind. App. 604, 165 N.E. 68 (1929).

[30] Sidney Lens, *Left, Right, and Center* (Hinsdale, Ill.: Henry Regnery, 1949), pp. 98–99.

[31] *Congressional Record,* 80th Cong., 1st sess., 93:4 (May 2, 1946), 4558–59.

[32] *Spayd v. Ringing Rock Lodge,* 270 Pa. 67, 113 Atl. 70 (1921).

employees for opposing the union's efforts to re-elect a national political candidate.[83]

As noted earlier, the Taft-Hartley Act has done much to reduce the injury that may be caused by capricious union behavior. It has limited the ability of unions to make payments to the support of political candidates; it has limited the substance of union membership; and it has severely restricted the ability of the union to cause the discharge of an employee.

Unfortunately, the individual union member may not be as completely free to express his dissent on union policy without recrimination as the several court decisions would suggest. The union may expel a member, confident that he will not trouble to pursue the matter through the union machinery available to protest such expulsion and through the courts. Social and group pressures often operate to encourage the individual to go along with union decisions, particularly if there is no two-party system within the union through which dissenting opinion can consolidate itself. But if the individual cannot lose his job through dissent, what are the consequences if he should lose his union membership?

As early as 1912, Howard T. Lewis observed that in the railroad industry "the unions possess strong insurance features. The men, unable to get insurance elsewhere at low rates owing to the danger of their calling, have a powerful inducement to remain in the union, and to keep up their dues."[84] The right to participate in insurance benefits not only offers a strong incentive to union membership, but also gives the union great power over its members if it has freedom to expel them. Thus, although present legislation has done much to restrict the power unions can exercise over the employment security of members and nonmembers, the freedom of unions to expel members (with no resultant pressure for discharge) may still jeopardize important worker interests.

First, expulsion from the union may involve social and psychological costs. If the majority of the work force is identified with the union and giving vigorous support to its policies, expulsion may result in a measure of ostracism. The worker loses his status in the social system of the plant, and the psychological cost of this loss, while difficult to measure, may be substantial.

[83] See 16 Lab. Rel. Ref. Man. 720.

[84] Howard T. Lewis, "The Economic Basis for the Fight for the Closed Shop," *The Journal of Political Economy*, XX (November, 1912), 941.

Second, expulsion can, as noted above, involve the loss of accrued insurance benefits. In several of the pension plans negotiated by employers and unions, the employee is required to be a member in good standing in the contracting union for a specified number of years to be eligible for pension benefits. Some contracts require that the employee maintain his union membership after his retirement in order to continue to receive those benefits. The loss of such pension equities should not be possible because of the whim of union officials.

In Charles D. Preston's opinion, the courts "have found without difficulty that Section 302(c)(5) [of the Taft-Hartley law] did not prohibit union membership eligibility requirements for retirement benefits."[85] But if the expulsion deprives the worker of insurance or pension benefits, the courts have held that a property right does exist and have been willing to review the basis for expulsion. In cases involving a threat to pension rights, the courts examine the bylaws and constitution of the union to determine whether the individual has exhausted the machinery within the union for the adjudication of the dispute, to determine whether the worker had a fair trial, and so on.

The penalty of loss of participation in union insurance and pension funds may not always be justified even though expulsion from the union is. If such be the case, participation in benefit plans should not be contingent upon union membership. Clyde Summers has pointed out that providing the expelled worker with the cash surrender value of his insurance fund is not an adequate solution, for the expelled member "might be unable because of age or health to obtain other insurance. A number of railroad brotherhoods have created separate benefit departments, but they have not made general provision for separate membership. Usually expulsion from the union results in forfeiture of the insurance."[86] Relevant to this issue are the conclusions of a congressional committee investigating welfare and pension funds:

> The investigation to date indicates that union membership in good standing is invariably a prerequisite to eligibility for welfare fund benefits. Our study has shown few exceptions to this condition. In many cases the insurance policies specify that all employees shall be eligible. But the trust agreement often defines an eligible employee as a union member "in good standing." We have found that the parties generally interpret such a trust provision to override the terms of the insurance policy. The result, of course, can deny benefits to a nonunion employee for whom welfare contributions were made in lieu of

[85] Charles D. Preston, "Union Membership as an Eligibility Requirement for Retirement Benefits," *Labor Law Journal,* I (February, 1950), 357.

[86] "Union Powers and Workers' Rights," *Michigan Law Review,* XLIX (April, 1951), 837.

wages. We can see great compulsion to join and remain in good standing, even where a worker does not wish to do so, when his welfare and pension rights depend upon his union standing.[87]

Clearly, when unions have the power to deprive expelled members of pension benefits, such power must be exercised judiciously.

[87] Interim Report of a Special Subcommittee to the House Committee on Education and Labor pursuant to H.R. 115 (Washington: 1954), p. 10.

Chapter 9

Democracy and Compulsory Unionism

Right-to-work laws are based on Spinoza's tenet that "a good which prevents us from enjoying a greater good is really an evil."[1] Proponents of right-to-work laws do not deny that the union movement can be a force for good, but its evil increases out of all proportion to that good when it insists on compulsory membership. Unions, they argue, cannot obscure the coercive element in union-security clauses by equating force with freedom, by identifying submission with emancipation, for the acceptance of compulsory unionism is a step down the road to tyranny. Industrial freedom and compulsory unionism are not allies but opponents. In effect, the effort to enhance the status of the individual employee via compulsory unionism destroys that greater good, individual freedom.

This argument is persuasive, plausible—and unpopular. But it cannot be dismissed with the observation that "the loudest singers in church are those who sing out of tune"; for however general and glamorous the concept of economic collectivism, acknowledging the reality—and perhaps even the inevitability—of collectivism should not obscure the very real problems created by large-scale industrial organization. In this chapter, we shall attempt to appraise union democracy, on the assumption that unionism receives widespread support today because it is a force capable of imbuing industry with democratic ideals and practices.

To most right-to-work proponents, responsible unionism is equivalent to democratic unionism. At the verbal and abstract level, both sides in this controversy are "for" union democracy, but the heat generated by this dispute reveals the grating and discomforting consequences of two imperfectly synchronized gears. In reality, the process of price and wage determination in economic markets provides a sharp contrast to the process of policy formulation in political forums. In our political system each citizen enjoys one vote, and thus the egalitarian ideal infuses each one, however humble his economic status, with the con-

[1] Spinoza, *Ethics,* Part IV, as cited in Emil Korner, *The Law of Freedom as the Remedy for War and Poverty* (London: Williams and Norgate, 1951), p. 47.

viction that he has equal influence with everyone else in shaping political policy. But not so in the economic arena, for here the individual's influence is a function of his command of society's resources and income; and only those considered to be on the "lunatic fringe" seriously suggest that wealth and income be equally distributed in order that each individual have an equal influence on the pricing mechanism. In spite of the essential differences in our economic and political philosophies, proponents of right-to-work legislation utilize the norms of political democracy to evaluate the structure and performance of unionism. This is not to suggest that democracy is an inadequate norm, but only to remind proponents that "industrial democracy," if taken literally, involves a radical alteration of our existing economic organization. Industrial democracy, in the sense of complete equality of influence and power, is not to be found in the framework of orthodox economic theory.

This dispute represents, in a sense, an aspect of that wider search of society for the proper balance between order and liberty, democracy and efficiency, restraint and privilege. In many debates, advocates espouse a shift in existing power relationships in order to advance, within the framework of existing law, the cause of individual freedom. The right-to-work debate is more complex than most, however, because the issue involves changing the law. Most contests are difficult when the rules of the game are changing, but they are even more difficult when there is disagreement over the way in which the rules of the game should be changed.

It is the fashion today to point to the imperfectly competitive nature of the free enterprise system. Monopoly, oligopoly, and monopsony have assumed a central position in descriptions of industrial activity. In our domestic economy, as in our international relations, we are involved in an armaments race between economic power blocs. As Earl Latham explains it, today we see organizations comprising "an aggregation, a collection, an assemblage, a plurality of collectivities, an intersecting series of social organisms, adhering, interpenetrating, overlapping—a single universe of groups which combine, break, federate, and form coalitions and constellations of power in a flux of restless alterations. . . ."[2] The individual is lost in the crowd.

It is not surprising that society, when unable to escape the possibility of the abusive exercise of power (because that power is no longer scattered throughout society), should turn to admonitions, exhorting power

[2] Earl Latham, *The Group Basis of Politics: A Study in Basing Point Legislation* (Ithaca: Cornell University Press, 1952), p. 49.

blocs to use their power responsibly. But, while individualism may be swamped by collectivism, democracy need not be. Today there is a widespread presumption that democratic power blocs can be more responsible than undemocratic power blocs. Thus it is hoped that the disruptive force of group competition, the jostling and jockeying for power and position, will be counterbalanced by the re-emergence of democratic decision-making. This argument, however, has several limitations which should be noted at the outset.

First, democracy itself is not always a tranquilizing element. Democracy produces, as DeTocqueville observed, "an all-pervading and restless activity, a superabundant force," and this force can intensify those problems created by group bargaining.

Second, it is not likely that democratic standards will be uniformly applied. Certainly the argument that the shareholder is free to dispose of corporate stock at the prevailing price does not introduce into industry a degree of democracy analogous to the freedom of the individual employee to quit his union. Decision-making within the corporate structure is not usually a "democratic" process. However sensitive the pocket of decision-making authority may be to the shareholder, employee, or public interests, there is no compulsion to count noses, to conduct a secret ballot of either shareholders or employees on the day-to-day decisions of management.

Finally, the establishment of the democratic form and democratic procedures is no assurance that the mechanism will perform as designed. It is not likely that democracy alone can deflect the growth of big unions, big corporations, or even big government. As Alpheus T. Mason complains, "On all sides freedom and responsibility have shrunk. . . ."[3] The reason is to be found in Michels' maxim: "Who says organization says oligarchy."[4]

The larger the organization, the greater the distance between the elected and the electorate, the more thinly is spread individual control of leadership. It is out of the anonymity of the industrial citizen, out of his feeling of personal helplessness or inability to affect the policies of his industrial government, that apathy and indifference develop. The industrial structure routinizes job functions, standardizes wage rates, and reduces individuals to anonymous entities to be more easily managed and manipulated. The collective will is based on a numbers game, and the art of democratic administration is often the art of mass

[3] Alpheus T. Mason, "American Individualism: Fact and Fiction," *American Political Science Review*, XLVI (March, 1952), 1.

[4] Robert Michels, *Political Parties* (Glencoe, Ill.: Free Press, 1949), p. 401.

persuasion. A few economists have picked up the Orwellian thesis. Kenneth Boulding has envisaged the "nightmarish" state: "Physical science merely culminates in the pain and death of the body under the bomb; social science may culminate in the damnation of the soul in the manipulative society."[5]

The Union as a Democracy

If the union movement presumes to be a device for democratizing industry, it cannot avoid public scrutiny of the democratic nature of union machinery. As Clyde Summers makes the point, "Once it is clearly recognized that unions are economic legislatures engaged in determining the laws by which men work, and eat, and live, the importance of guaranteeing workers the right to share in making those laws is self-evident."[6] Similarly, the American Civil Liberties Union points out: "An autocratic union, run without the full participation of its members and without the leadership responsive to its membership, cannot morally claim democratic rights in dealing with employers through the intervention of public agencies."[7] Clearly, members must be granted the full opportunity to participate, to share in the legislative activities of their union. The union is, in effect, the industrial government of labor, and whether the relationship of the union with the employer be characterized as an "armed truce" or "accommodation," the employee must have a voice in the preparation of the terms of the "peace treaty" or "industrial constitution."

Some proponents of right-to-work legislation take exception to the concept of unionism as the employee's voice in industry. It is reasoned that the union movement was never organized to provide its members with an economic government, but only to enable workers to bargain more effectively with employers. In their view, the whole notion of industrial democracy has been grafted on to this primarily economic function in order that union leaders may maintain tighter control over members. As George Rose explains, the union "has no right to claim a political authority, under the guise of economic rights.... Such authority would be unconstitutional and presumptuous."[8] It is not sur-

[5] Kenneth Boulding, *The Organizational Revolution* (New York: Harper, 1953), p. 220.

[6] Clyde Summers, "The Right to Join a Union," *Columbia Law Review*, XLVII (January, 1947), 74.

[7] *Democracy in Trade Unions: A Survey with a Program of Action* (New York: November, 1943), mimeographed by the New York State School of Industrial and Labor Relations (Ithaca: April, 1947), p. 5.

[8] George Rose, "The Right to Work," *Labor Law Journal*, I (January, 1950), 295.

prising, therefore, that many proponents of right-to-work legislation criticize the "political" theory of unionism because, when the union poses as labor's "industrial government," it assumes an authority and a power (including the right to tax its citizens) that no free society should assign to a private organization.

Unionism faces further problems as a political agency operating in the economic arena. Union officers have difficulty in understanding that they should be prepared to eliminate themselves from office in the name of abstract democratic principle.

Several studies of union democracy conclude that most union leaders strive for membership participation and that most union constitutions are designed to encourage that participation.[9] But union democracy can take many forms and be perverted in many ways. A distinction must be made between constitutional provisions—that static shell of unionism—and the dynamics of union life which these obscure. As an extreme case in point, John L. Lewis has testified:

> We have more democracy in the United Mine Workers of America than any other labor organization I know. The UMWA is one of the few national labor unions that has the referendum system of voting. All local unions of the many thousands composing the organization carry on their elections through secret ballots, counted by a board of six tellers. In addition to that, any member can run for president of the UMWA who can secure the nomination of the five of those local unions. It is mandatory for his name to go on the ticket and he has a perfect privilege of contesting the election.[10]

But at the 1948 convention of the UMW, Lewis also explained:

> You are reaching for something in this country, you are reaching for improved conditions, the safety of our men, the future of our men, and the future of our union. I want a functioning organization to do it with. If any of our officers don't do the right thing, you know what I do with them don't you? Some of you ought to know it, because there are a lot of former officers digging coal now that used to be in office, and just because they didn't do the right thing they are not in office now. The mere fact that a man is elected sometimes by a group of men who do not really know him doesn't always mean that he is good. We can look at Congress and find that out.[11]

The reason for this contradiction is found in the multiple roles that the union must perform. A union is first a business enterprise, dedi-

[9] Philip Taft, *The Structure and Government of Labor Unions* (Cambridge: Harvard University Press, 1954).

[10] *John L. Lewis and the International Union United Mine Workers of America,* ed. by Rex Lauck (United Mine Workers of America: 1952), p. 245.

[11] *Proceedings of the Fortieth Consecutive Convention of the U.M.W. of America,* I (1948), 303. This comparison is made by Edward D. Wickersham in his review of the cited book, *Industrial and Labor Relations Review,* VI (July, 1953), 602.

cated to bread-and-butter purposes, designed to improve working conditions and wages for its members. Second, it is a political instrumentality, requiring membership and revenues and demonstrating all the survival instincts of other political institutions. Third, it is a fighting force, facing the resistance of employers, the hostility of the public, the legislature, and the courts, and even challenged from time to time by its own membership and competing unions. Fourth, it is a social reform movement, attempting to inculcate into its membership recognition of the need for various reforms, ranging all the way from reduced racial discrimination to foreign aid. As Arnold Weber argues, the leader must, then, play a number of roles, including that of the entrepreneur, the general of the army, the astute parliamentarian, the servant of the constituents, and he must be able to switch from one to the other at a moment's notice. Weber has pointed to the multiple demands that can strain the exercise of union democracy:

> In the guise of a business enterprise, a fighting force, or a social reform movement, numbers are an invaluable aid. But the political organization, forced to mediate the interests of a large number of members with divergent goals and perceptions, may find it difficult to operate within the framework of democratic government lest the energies of the institution be dissipated in fruitless argumentation.[12]

The hostility of the environment in which the union movement lives serves, more than any other circumstance, to color the character of union behavior. Historically, political democracy has not grown out of the soil of political and economic turmoil but emerges during a time of social and spiritual well-being, when people face a long period of stability and security.[13] A period of frustration, tension, or hostility is more likely to lead to a totalitarian government. In the labor market, therefore, the state of siege, the cold war, and the strike do not provide a healthy climate for the growth of democratic processes within the union. During periods of crisis, union leaders reason by analogy to military conflict: Dissent becomes treason; dualism is an evil as great as the fifth column of Hitler's fascism; the need to present a common front in the face of the enemy assumes crucial significance, at the expense of any consideration of the civil liberties of union members or the need to entertain discussion on the merits of the conflict.

[12] Arnold Weber, *Union Decision-Making in Collective Bargaining: A Case Study on the Local Level* (Urbana, Ill.: Institute of Labor and Industrial Relations, University of Illinois, 1951), p. 5.

[13] For documentation of this thesis, see Zevedei Barbu, *Democracy and Dictatorship: Their Psychology and Patterns of Life* (New York: Groves Press, 1956), pp. 5, 22, 49, and 91.

Even the American Civil Liberties Union, in its critical analysis of union democracy, has conceded that unions cannot be expected at all times to follow wholly democratic procedures:

> When they are engaged in a life-or-death struggle to attain the right to organize, it would be folly to ask them to postpone every action until it could be done democratically. Under such requirements there would be no trade unions.[14]

It is because of this hostility that unionists have pointed out that their organizations are neither debating societies nor film festivals. They are organized for the rough-and-tumble task of exacting benefits from management.

Most union constitutions contain vague mandates for members regarding loyalty to the organization. Such provisions are necessarily vague, for it would be difficult for a union to anticipate, and inexpedient to list, every kind of loyalty it may require of its members. As noted in our previous chapter, punishable offenses have included disobedience to union officers, slandering of officers or fellow members, creating dissension undermining the union, and circulating written material critical of the union without its permission. Obviously, these measures can stifle well-founded criticisms. Studies of union organization have pointed to instances of the perpetuation of entrenched union officials in national office, the difficulty of organizing formal opposition to contest the re-election of national officials, the lack of adequate machinery for review of union expulsions and suspensions, the various penalties imposed on the critics of union leadership, the lack of control over expenditures, and discrimination in admission and job assignment based on race, sex, creed, or political connection. We cannot conclude, however, that the absence of turnover in the national office, or even the lack of the two-party system within the national, is evidence of rank-and-file discontent with the affairs of the union, any more than a contest for union offices is "proof" of union democracy. As noted at the outset, the atmosphere of conflict or the continuing "state of siege" has caused some union leaders to view democracy as an expensive luxury they could ill afford. On the other hand, as unions grow more secure and increase in size, such size weakens the grass-roots, town-hall character of union democracy. As Lloyd Reynolds has observed, "most of the common 'proofs' that unions are undemocratic merely prove that government of many thousands of men scattered throughout the U. S. is a rather complicated matter."[15]

[14] *Democracy in Trade Unions, op. cit.*, p. 6.

[15] Lloyd Reynolds, "Democracy in Trade Unions: Discussion," *American Economic Review, Proceedings* (1946), p. 381.

The Competition for Worker Loyalties

Many right-to-work proponents, like supporters of the Taft-Hartley Act, firmly believe that the union movement represents a new form of tyranny capable of abusing individual employees just as ruthlessly as any employer ever did. The worker is viewed as a person who must be free to choose between two philosophies, two loyalties, or two "ways of life." The union way stresses collectivism, submission to the group, egalitarian ideals, standardized wage policies, reliance on seniority for promotion, and so on. The alternative view, holding for loyalty to management, stresses economic individualism and political conservatism, the need for the individual to prove himself to management, to earn merit increases, to face more fully the competitive pressures of the labor market, and to trust more completely in management's discretionary capacities. The tragedy of compulsory unionism, it is held, is that it deprives the employee of this choice: he is compelled to travel the union road. Legislation must protect the individual from such coercion.

Implicit in this analysis is the argument that the union and the labor force are separate entities, with separate problems. Thus, the underlying philosophy of the Taft-Hartley law implied that the union was an intruder quite separate from employees, cutting the bond of employee-employer loyalty. Archibald Cox has noted the testimony of Stephen F. Dunn on this point:

> The same philosophy was repeatedly in the consideration of the Taft-Hartley amendments but seldom as strongly as in the assertion that the employee is now . . . in the position of a customer about to buy an article with both the union and the employer competing for his allegiance, trade and support.[16]

Cox explains that this is a misleading premise: ". . . there is still more truth in the philosophy which asserts that the union and the employees are one than there is in the opposing view. The union is the employee's organization, not an outsider; no, not merely the mechanism through which he bargains for higher wages and increased security, but the instrument by which some measure of industrial democracy is achieved."[17]

It should be remembered that the employee is free to vote against union representation in a certification election. His membership, fol-

[16] *Labor Relations Program,* Hearings on S. 55 and S.J. Res. 22 before the Senate Committee on Labor and Public Welfare, 80th Cong., 1st sess. (1947), testimony of Stephen F. Dunn, p. 1700.

[17] Archibald Cox, "Some Aspects of the Labor Management Relations Act: 1947," *Harvard Law Review,* LXI (November, 1947), 46.

lowing the negotiation of a union shop, is justified as part of the majority-rule principle of democracy. As a member, he is free to criticize his union, and even to urge the recision of the union-shop provision. Should evidence be forthcoming that 30 per cent of the employees are opposed to the union shop, this provision will be repealed if a secret ballot by the NLRB indicates that the majority of those eligible to vote oppose it.

But apart from the freedom to "escape" from union representation, recent studies suggest that the employee is not blindly loyal to the union philosophy. When both unions and management take extreme positions, the employee is likely to abandon any sympathy for either partisan. Furthermore, there is evidence to suggest that he can be both a "good union man" and a loyal company man as well. Union members are not usually dominated by the union even if it wishes for such dominance. In a very real sense, unionism is a force that broadens the perspective of the employee, adding to his plurality of ends and also to that tolerance of viewpoint that strengthens democracy. It has been rightly observed that the conformity of the individual to a single set of opinions is possible when an organized power bloc dominates its members, when it compels, if not inner conviction, at least outer compliance. But the multiplicity of organized groups serves as an invaluable bulwark against excessively strong coalitions around single national policies. In this sense, the proliferation of pressure blocs—among them unions—serves to increase the number of places of "refuge" that individuals may have in their nonconformity. It is in such nonconformity that democracy finds its energy and strength.[18]

Organization Limits to Union Democracy

While one can reason that compulsory union membership will not strengthen the democratic nature of unions, this proposition does not establish that free choice in the matter of membership is a more direct stimulus to union democracy. Several forces are at work to discourage union democracy, whether or not a union-security agreement exists.

First, as we noted at the outset, the growth of monopoly and cartels, with the resulting consolidation of the labor-buying function by large-scale industry, has encouraged the development of that countervailing force, unionism. Increasing centralization of power within business leads naturally to corresponding centralization within the organizations that must negotiate with business. As early as 1924, Sylvia Kopald

[18] David Spitz, "On Tocqueville and the Tyranny of Public Sentiment," *Political Science*, IX (September, 1957), 10.

(Selekman) pin-pointed the dilemma of bargaining based on bilateral monopoly:

> We have seen how it is possible to capture the external shell of democracy [through unionism] with all its finest shadings and trappings, only to find within the shell the substance of oligarchy. We have seen how formal democratic institutions seem to lend themselves quite readily to the purposes of small but powerful economic groups.[19]

The pressure to "democratize" the union will be less convincing, as a matter of public policy, should the power of management, arising from business consolidations, be extended. The public is still persuaded that distributive justice is more likely to be achieved when equal, rather than unequal, power blocs face each other.

Second, the source of union bargaining power is found in its ability to demand the uniform support of all members in moments of crisis. Those formulating union policy control the machinery of union government and stress the need for discipline and solidarity. A right-to-work law allowing nonmembership in the union hits at the very nerve center of this control. It is not likely that union leadership could easily be persuaded that the "freedom" of employees as to membership is an adequate *quid pro quo* for the loss of union power. Nor is it likely that a union would appreciate democracy when struggling for its own survival.

Third, because of the "curse of bigness," power in unionism gravitates to the top. In the classical explanation of this bureaucratization process, the union begins as a protest movement. There is excitement and drama as the union strives for membership and recognition. The interest and participation of members are high, as each new member knows he can help determine the character and destiny of his organization. But over time, grass-roots participation diminishes, and union meetings lose their early New England town-meeting characteristics. Once the union's survival is no longer in serious doubt, once it is recognized as a permanent institution in the plant, the stimulus for participation in the day-to-day affairs of the union decreases. As the union grows in numbers, the growth in its organizational structure necessitates the delegation of administrative and executive powers. A bureaucratic machinery is created. At this point, an important change occurs: those vested with the responsibility for the maintenance of day-to-day union affairs give primary attention to the survival of the union. The maintenance of the machine can easily become an end in itself. The success

[19] Sylvia Kopald, *Rebellion in Labor Unions* (New York: Boni and Liveright, 1924), p. 9.

of the union is identified with the success of the union officer, and frequently he is returned to office by the membership with monotonous regularity. But leadership often develops its own idea of what is best for the union, and as the rank and file grows more apathetic about the day-to-day problems of running the union, the leaders fill the vacuum by extending their own control. They consolidate their positions and become champions of legality, discipline, and solidarity.

Thus union leadership frequently finds it difficult to disassociate the welfare of the union from its own decisions and policies. Soon rebellious outbursts of the membership are regarded as threats to the stability and solidarity of the union and its leadership. A war psychology is utilized to quell opposition. The longer the union leader holds his office, the more difficult it is for him to return to the shop. Moreover, the union leader possesses some powerful weapons to crush dissent: Through nepotism and paternalism, he can generally command or demand loyalty from those officers in the hierarchy whom he has appointed to office. He usually controls the union newspaper, which focuses attention on the virtues of his leadership. His influence can dominate the convention, particularly through his control of the agenda. Between conventions he may "interpret" and "defend" the union constitution. As Sylvia Kopald observed:

> The very fact that the leaders occupy the seats of power gives them a sharp-edged weapon against the members which they use quite generally. They could—and did—translate every phase of protest into terms of constitutionality, and demand that the protesters obey the constitution or be crushed as disrupters of the union.[20]

In spite of these considerations, autocracy is not a dominant feature of union organization. The picture of the union leader tyrannizing membership can be easily exaggerated. It must be appreciated, first, that this process of bureaucratization is not resisted by the membership; second, that members for the most part regard their union as a form of insurance or investment and hope to maximize returns with a minimum of personal cost, time, and effort. Available studies of rank-and-file attitudes indicate that most members feel that their unions are run in a democratic manner, that member participation is much less than is desirable to sustain the democratic character of their union, and that they themselves are not participating sufficiently. They acknowledge their apathy. As Will Herberg has explained:

> . . . the process of bureaucratization and whittling down of effective democracy is not usually carried through against the will of the membership. By and large,

[20] *Ibid.*, p. 278.

it is a gradual affair, proceeding imperceptibly with the approval or at least the passive assent, of the rank and file. As long as things go well, the average union member doesn't want self-government, and is annoyed and resentful when an attempt is made to force its responsibilities upon him. What he wants is protection and service, his money's worth for his dues.[21]

There are, of course, several plausible reasons for lack of rank-and-file participation, but seldom does the dominance of union officers over union affairs discourage participation. Attendance at union meetings is low because meetings are long and dull, frequently because of the willingness of the presiding officer to hear everyone. He is reluctant to choke off wrangling on the floor to avoid antagonizing participants. Union meetings compete with the leisure time of the worker; attendance may require a long trip for the "suburbanized" employee. Competition for local union office is usually low simply because the rewards are hardly commensurate with the responsibility and criticism the local officer faces. As one labor paper described the qualities required for a union steward: "He should have the patience of Job, the skin of a rhinoceros, the cunning of a fox, the courage of a lion, be blind as a bat and silent as a sphinx."[22] Similarly, an editorial comment of the New York *Times* explained:

Trade union leadership is a "cause" that has enlisted the untiring efforts of many unselfish men who have wished above all to help the worker improve his material and social well-being. It is not, and should not be regarded as a business.[23]

We return, then, to the question as to whether compulsory unionism or voluntarism best serves to strengthen union democracy. First, it is quite likely that many individuals have built up a misleading picture of unions. A firsthand exposure to the activities of the group may encourage participation, as officers strive eagerly for the assistance and support of the membership. The individual has an opportunity to learn about the mechanics of union decision-making, and to observe the frequently frustrating task the officers face in attempting to sustain employee interest and participation. At the local level it is apparent that holding an office requires an enormous amount of time and energy, and that self-seekers are not usually found at this level.

But let us suppose that the person compelled to accept membership

[21] Cited in Paul Victor Johnson, "Democracy and the Decision Making Process under Collective Bargaining" (unpublished Ph.D. dissertation, Department of Economics, Western Reserve University, 1956), p. 152.

[22] Cited in Ely Chinoy, *Automobile Workers and the American Dream* (New York: Doubleday, 1955), p. 103.

[23] July 16, 1952.

increases his hostility to the whole philosophy or principle of unionism. Would his attendance at the union meeting destroy or strengthen union democracy? If his hostility is to be effective, it will focus on the shortcomings of union policy. The value of such scrutiny is self-evident. Thus compulsory membership provides the union with an interesting challenge: if it cannot win over the individual to the need for continuing participation, it may build into its membership a bloc of hostile critics. Either alternative can strengthen union democracy.

On the other hand, it is not altogether certain that nonparticipation will encourage union democracy. First, union leadership is likely to develop fears—almost a neurosis—about the survival of the union and to provide an unfavorable environment for the development of democracy within the union. Every move of management is likely to be regarded as a circuitous device to undercut union authority and strength. Second, if apathy and indifference are the sources of union tyranny and corruption, it is not likely that these will be lessened when the union, representing all employees, is not exposed to the firsthand criticism of all employees.

But proponents of right-to-work legislation are firmly convinced that the only safety valve on union abuse and tyranny is to allow employees the freedom to reject or abdicate from membership in the union. Selwyn H. Torff poses the question:

> Should an individual employee not be permitted to express his opposition to union programs and policies which he opposes by withdrawing his financial support from those programs and policies, that is by "touching the pocketbook nerve" of the union . . . ?[24]

He argues that such abdication is necessary, for the employee must be allowed some effective device for showing his disapproval of union policies. The only effective way, in Torff's opinion, is to withhold financial support from the union, and he adds: "There is something disquieting about any organization that demands that the law give it the right to compel where it has failed to persuade. . . ."[25] Perhaps the most widely cited statement on this problem is that made by Louis D. Brandeis:

> It [the union] need not include every member of the trade. Indeed, it is desirable for both the employer and the union that it should not. Absolute power leads to excesses and to weakness: Neither our character nor our intelligence can long bear the strain of unrestricted power. The union attains success when

[24] Selwyn H. Torff, "The Case for Voluntary Union Membership," *Iowa Law Journal*, XL (Summer, 1955), 623.

[25] *Ibid.*, p. 626.

it reaches the ideal condition, and the ideal condition for a union is to be strong and stable, and yet to have in the trade outside its own ranks an appreciable number of men who are non-unionist. In any free community the diversity of character, of beliefs, of taste—indeed mere selfishness—will insure such a supply, if the enjoyment of this privilege of individualism is protected by law.[26]

It is agreed that diversity and opposition within the union movement are desirable. The greater problem is one of establishing the means to this end. On the one hand, the existence of a pool of employees outside of the union is seen as a balance wheel, preventing union abuse. On the other hand, it is reasoned that uniform membership may lead to uniform participation in the affairs of the union, and whether that participation be critical or cooperative, it tends to strengthen rather than weaken union democracy.

The need for right-to-work laws is sometimes explained in somewhat different terms: Because of union size and its related bureaucratization, leadership is no longer sensitive to the wishes of the rank and file. Under compulsory union provisions, leadership becomes further entrenched and increasingly indifferent to the wishes of the rank and file. Two observations are important in this regard.

First, the lack of day-to-day participation of membership in the affairs of the union should not lead to the conclusion that the wishes of the rank and file can be safely disregarded, or in fact are disregarded, in the formulation of union policy. Frequently the rank and file assumes a "plebiscite" function in approving or disapproving of the actions of its leadership, and on occasion ground-swell dissent on union policy can arise. The fact that such agitation is possible, that the inert mass of membership can erupt into a hostile fighting force, places a limit on leadership discretion. Thus, the lack of turnover in national office may not necessarily indicate the complete dominance of the union leader, but rather leadership skill in satisfying the rank and file.

Second, wildcat uprisings of the membership seldom arise because the leadership has been too militant, but more frequently because it is not sufficiently aggressive. As Sayles and Strauss point out, a move to "kick the rascals out" arises generally in three circumstances:

1) When members feel their economic conditions have worsened due to inefficient or insufficiently militant officers.
2) When serious differences arise over how to divide the concessions gained by the union.

[26] L. D. Brandeis, Symposium on "Peace with Liberty and Justice," *National Civic Federation Review*, II (May 15, 1905), 16.

3) When a large number of departments in a plant are frustrated over small, individual problems which have somehow coalesced.[27]

The employees are not agitating, in other words, about the lack of opportunity to participate, but more frequently because union officers are not aggressive or because union policy does not give adequate attention to minority interests. This observation leads to a third point.

There can be no presumption that a democratic union is necessarily one more moderate in its bargaining demands.[28] Sumner Slichter, for example, has raised the question as to whether unions are not too democratic in terms of the uneconomic and extreme wage demands that are often made.[29] Students of labor have often noted the impatience of the rank and file for "more," the manner in which this pressure on union leaders is reflected in the bargaining session, and the "political" character given to the wage bargaining in those situations where the concessions gained in collective bargaining are simply means to a more important end: the survival of union leadership. A corollary of this argument is that "strong" unions (that is, those less sensitive to the wishes of the rank and file) are frequently considered more desirable by management than one dominated by the exuberance of rank-and-file demands. Right-to-work legislation undoubtedly imposes pressures on union leadership to dramatize the "service" performed by the union. This process in turn encourages aggressive union behavior. It is not surprising, therefore, that some management spokesmen have expressed satisfaction with union-security arrangements, for a secure union gives management "another arm" in dealing with the problems of rebellion within the rank and file. It is only when the union is secure that leadership would dare side with management in demanding adherence to contract provisions, in sustaining the efficiency of plant operations, and so on. But some proponents fear that the efficiency gained by collaboration between union leadership and management is insufficient a return for the "cost" of weakening dissent within the union movement.

Intraunion Conflict: Economic Issues

One of the more recent arguments against union-security provisions has stressed the economic conflict of interests within union labor. This

[27] Leonard R. Sayles and George Strauss, *The Local Union: Its Place in the Industrial Plant* (New York: Harper, 1953), p. 153.

[28] Frank C. Pierson, "The Government of Trade Unions," *Industrial and Labor Relations Review*, I (July, 1948), 596.

[29] Sumner H. Slichter, *Union Policies and Industrial Management* (Washington: Brookings, 1941), p. 374.

argument has two parts: First, since union policies cannot satisfy the particular interests of all workers, it is cruel irony to compel employees whose interests deviate from those of the union, to support the union. Further, if union policies discriminate against particular workers, can they be called "free riders" for not supporting the union? Second, it is argued that the whole concept of union service to employees, by which the courts have justified union-security clauses, is misleading if not erroneous, for there exist no convincing statistical data to establish that unions actually provide substantial benefits to their members, compared to benefits enjoyed by the unorganized.[30]

The union faces many alternative bargaining targets. It cannot advance on all fronts simultaneously, and the task of formulating collective bargaining strategy and demands inevitably involves discriminatory judgments. Should an across-the-board or percentage wage increase be sought? Should bargaining be directed to wage adjustments for the lower or upper end of the wage structure? Should attention be given to fringe benefits or wage increments? Should the union focus on increased leisure or increased income? Such issues reflect a contest between the skilled and unskilled workers, between income and leisure, between the future and the present. Right-to-work proponents point out the dangers to individual freedom when the union attempts to base policy on what it thinks the majority of workers desire. Speaking of union interest in fringe benefits, Philip Bradley explains:

> The novel feature in the compulsory plans promoted by most union leadership does not lie in what the unions took from the companies but rather in what they took from their own members, namely, the power to decide freely on how to dispose of a portion of each member's income.[31]

The contests within union membership cover a variety of issues. Any change in the perimeter of the seniority unit can pit worker against worker. The seniority principle, giving priority to length of service as a standard for job promotion, results in discrimination against newer employees and shifts the incidence of unemployment from the long-term to the short-term employee. In representing workers' grievances, the union has to determine which problems deserve to be pushed to the final stages of settlement because of the expense of arbitration. Although unions are obligated under law to give equal attention to all employees, whether members or not, probably the nonunionists do not enjoy the same representation available to the unionist. When many

[30] Philip D. Bradley, *Involuntary Participation in Unionism* (Washington: American Enterprise Association, 1956), pp. 12–14.

[31] *Ibid.*, p. 11.

workers face a strike vote ultimatum with widely diverse interests, the ability of each to absorb idleness varies considerably. If the strike becomes a prolonged war of attrition, bitterness about union strategy and policy can easily develop.

For such reasons as these, the group decision is often condemned by the individual. Nor is it unnatural that many workers entertain the hope that they can advance within industry without relying on the "crutch" of union power. Even if it should be found after the fact that such ability is absent, the notion that the individual should be free to try dies a hard death. Indeed, some have reasoned that on balance, the union-negotiated wage rate may not keep pace with that otherwise dictated by supply and demand, and hence the lag in wage adjustments, arising from union institutionalism, represents a deterrent to the advance in labor's living standard.

There is no need to entertain illusions about the harmony of interests that exists within the union, but in the final analysis, the conflict-of-interest thesis can be evaluated only by balancing the gains accruing to labor through collective bargaining against those that might otherwise accrue through individual bargaining. Furthermore, the formulation of collective bargaining demands must be rooted in the wishes of the rank and file, for leadership cannot turn the corner in negotiations if the rank and file does not turn the corner with it. In reality the preparation of the package demands of the union reflects an attempt to compress the multiplicity of worker desires into a composite package. The more spirited the demands of minority elements within the local, the more difficult will be such a compressing process.

Does the Union Provide Economic Benefits?

Would labor enjoy its present living standard in the absence of union organization? Such a question cannot be answered by reference to historical experience because we cannot relive history in order to determine the improvement of labor's income in the absence of union pressure for employee benefits. Under federal law, a union certified as the bargaining agent is not free to discriminate in the distribution of bargaining gains between union members and nonmembers. The issue here, however, is not related to the alleged inequitable distribution of benefits of collective bargaining, but whether the existence of the union creates *any* benefits that would not otherwise be made available to employees. Obviously, if no benefits are provided, the charge that nonmembers of the union are free loaders has no substance either in fact or in logic.

Labor economists, in their efforts to secure an approximation of the economic impact of the union, have been examining parameters for "unionized" and "nonunionized" sectors of the economy. The benefits that unions presumably offer labor can be divided into many categories, but current research has been centering on two measurable variables: hourly earnings and the proportion of total industry income represented by wage payments. In the former case, it is assumed that unions increase earnings to a level higher than would otherwise be possible in the labor market; in the latter that unions capture a larger distributive share of income than would otherwise accrue to labor.

It is out of the inconsistency and indeterminacy of the growing volume of research on this problem that the premise of the unfed free loader is built. These studies reveal inconsistencies in comparisons of union and nonunion wage levels, depending on whether the differentials are measured in percentage or in absolute terms, depending on the time periods involved, and depending on whether correlations are made with the proportion of workers covered by the union movement, the rate of growth of unionism, and so on.

At the outset, it is unconvincing to denounce the oppressive power of giant labor monopolies and simultaneously maintain that unions have been unable to secure benefits for their membership. To attempt to reconcile these two propositions with the argument that the earnings of industry are diverted into the pockets of labor bosses is certainly to overestimate the income of union officers or the scope of corruption within the union movement. It seems reasonable to conclude that the power of organized labor has been utilized to secure revenues from industry which might otherwise go to other distributive shares. Certainly most antiunion arguments are inspired by union strength rather than union weakness. As noted above, if members believed that their unions were impotent, that they had not "delivered the goods" and could not do so, unions would quickly disappear from the American scene. Labor has a "slot machine" mentality: it will not continue to put quarters into a machine that never pays off.

In addition, while statistical studies do not reveal a consistent discrepancy between union and nonunion sectors, several do support the thesis that substantially higher benefits have accrued to unionized workers than to the unorganized. The inherent weakness of all such studies is that the lack of a differential does not establish the absence of union influence. It is undoubtedly true that employers in nonunion sectors have been willing to offer sympathetic adjustments to their own em-

ployees in order to avoid unionism. It must be remembered that the underlying premise of most studies is that unionism is a single force, operating on a single variable, wages, whereas in reality any wage adjustment produces a multiplicity of repercussions which are, to use Arthur Ross's well-chosen phrase, "unpredictable before the fact and undecipherable after the fact." For example, union pressure to raise wages may lead to a larger wage bill, leading in turn to higher prices and to the possibility of a greater dollar volume of industry sales. The ratio of the wage bill to sales may end up near its original level, but this does not mean that the absolute living standard of the workers enjoying the wage increase has not improved.

We have noted the challenge facing union leadership because of the multifunctional operations of the union. As an economic agency, the union is striving for higher wages, shorter hours, improved working conditions. As a political agency, it challenges management's authority and creates a code of industrial jurisprudence. As a social agency, it provides an additional outlet for the fraternal or social activities of members. While the economic and political functions are undoubtedly much more important to most members than the social function, the services rendered by the union movement cannot be measured in dollars alone. The employee may enjoy a measure of self-assurance in industry because of the protection given him by the union contract; he enjoys the benefits of union representation through the grievance machinery; he enjoys the pleasures of social cohesion and the cooperative effort to solve common problems. Such psychic rewards of membership cannot be easily quantified. One conclusion does seem warranted: Whatever the quarrels within the union over the appropriate distribution of collective bargaining gains, however much union members may disagree with each other on whether their union should stress economic, political, or social targets, the union movement could not survive if the majority of employees rejected the principle of union representation or believed the union incapable of providing benefits.

Chapter 10

Summary and Conclusions

Our survey of the right-to-work controversy can hardly satisfy those with a two-valued orientation who would characterize all legislation as either "good" or "bad." Dogmatism is particularly hazardous in viewing the merits of a right-to-work law, unless one is willing to hold to a narrow or single standard in making those evaluations. For example, classical economic theory holds that any measure to sustain the competitive nature of the labor market is worth while; certainly, allowing the wage earner "sovereignty" in determining whether membership is in his own personal interest is consistent with the best tradition of nineteenth-century liberalism. Furthermore, it is still fashionable to verbalize about the merit of competition and, more important, to retreat to competition as the regulator of economic activity when society faces the difficulty of establishing and implementing standards of public policy to serve in its place. Nor can the competitive standard be dismissed by simply explaining to those who are "for" competition that we live in an imperfectly competitive world, any more than one can argue that the trouble with religion is that we live in an irreligious world.

But other standards also exist. For example, if a distinction is made between what ought to be and what is, it is apparent that most labor markets are far from perfectly competitive. This reality raises the question of relative power between labor and management. At the outset, it is obvious that the number of persons buying labor service seldom approximates the number of persons selling their labor service. This imbalance between the number employed and the number employing tends to shift the bargaining advantage to the employer. Nor is it likely in the future that labor can absorb a war of attrition as readily as management. Thus, in the event of an impasse in bargaining, management usually faces labor with superior weapons. Granted that the Antitrust Division has exercised closer surveillance and control over management monopoly than union monopoly, it is not likely that symmetry in competition, or equality of bargaining power between labor

and management, will be established by making unions "compete" for union members.

It is no accident, therefore, that unions do not attempt to disprove the arguments of management, rooted as they are in classical theory. They simply ignore them. Instead, unions concentrate on what they conceive to be the reality of the labor market. The justification for compulsory unionism is built on the plausible but unprovable premise that unions have provided economic and other benefits to their members. Those benefits can be exacted only by applying pressure on management; that pressure can be most effectively applied only with the uniform cooperation of all employees. Unions question the validity of management's role as the champion of individual employee freedom and civil rights, and note that the individual worker is not so alarmed about compulsory unionism as is management. Unions fear that the campaign to substitute the principle of "voluntarism" for the "majority rule" standard is simply a circuitous device to undercut union bargaining power.

In contemporary society, organized groups and organized power are but two sides of the same coin, and power emerges as a reality that can no more be ignored by the social sciences than energy can be ignored by the physical sciences. As noted at the outset, orthodox economic theory is ill-equipped to deal with the reality of such power because it largely denies its existence. But classical theory notwithstanding the union movement is a power mechanism. It is an agency designed to meet power with power, a strategy made necessary in a society that embraced Edgeworth's dictum: "the one thing from an abstract point of view visible amidst the jumble of catallactic molecules, the jostle of competitive crowds, is that those who form themselves into compact bodies by combination do not tend to lose but tend to gain."[1]

Thus, it seems more reasonable to appraise the compulsory union issue, not in terms of whether it reduces competition in an already imperfectly competitive world, but whether it provides labor with power comparable to that possessed by management. In this context, unions are highly sensitive to their own weaknesses. First, labor in America has never possessed the homogeneity of interests assuring automatic understanding of, sympathy for, or participation in union affairs. The labor force possesses conflicting values and multiple loyalties, and the union must always act with vigor in order to sustain employee support. Second, the rapid turnover in American industry intensifies the

[1] Edgeworth, *Mathematical Physics* (1881), p. 44.

problem of union organizational stability, and it is not surprising that interest in union security varies directly with employee turnover rates. Third, competitive pressure in the product market poses a constant threat to union standards in the labor market. The more intense consumer interest in the "best deal," the greater the risk that nonunion labor can pose to union standards. Behind all of these considerations lies another: Whether union-security arrangements affect union power or not, most union leaders perceive that they do. To most union leaders, the survival of the union is a necessary precondition for collective bargaining. Thus, it is not only on the basis of logic or even statistical fact that one must appraise the ultimate effect of the right-to-work movement. The contest is likely to leave a heritage of suspicion and hostility. Though one is tempted to speak of the "neurosis" of union leadership on the subject of union survival, this attitude is probably a normal conditioned-reflex of any organization perceiving that its survival is threatened.

In a wider context, union interest in staking out and protecting particular areas of job territory is no idle pastime, simply because of the unfortunate fact that our economy has not operated at full capacity at all times. Historical data on unemployment are incomplete and rather speculative, but if the estimated average of unemployment of 12 per cent from 1890 to 1940[2] is approximately correct, this statistic alone suggests the grim—almost desperate—significance of the struggle to labor. The issue of right to work reflects, then, the effort of particular groups to "avoid throwing the bread of their children into the scramble of competition." It reveals labor's underlying concern with job security.

But if the right-to-work controversy can be explained by the reality of unemployment, by what logic did the contest over job rights gain national attention in an era characterized by high employment? As noted in Chapter 1, several forces operate to catapult this issue into national prominence. First, during any era of full employment, political and economic conservatism flourish. Second, it is during a period of full employment that trade unions have the power base upon which to consolidate their organizational strength. Though the need for job security is less apparent during full employment, unions still fear the uncertainties of the future, suspecting always that their current power is transitory. Finally, second in importance to the security of the job

[2] Carroll R. Daugherty, *Labor Problems in American Industry* (New York: Houghton Mifflin, 1948), p. 64.

is the wage the job receives. This is the union's trump card; for as long as labor's actual earnings do not keep pace with its soaring aspirations for immediate improvement in its living standard, the discrepancy between actual and desired earnings will provide a continuing source of agitation, the glue to give the union its adhesive quality. Thus union-security arrangements are inspired by both the job and wage interests of labor. Fair weather or foul, the union has a rationale for continued existence and the worker has a continuing vested interest in union strength.

No matter what strategy the union employs to advance the welfare of its members, it is accused of discrimination. The original interest in exclusionary policies, stressing the short-run sectional gains of the few, was built on what the Webbs classified as the "restriction-of-numbers" principle. This approach had several advantages. It was easier to police union standards for small groups. Furthermore, with the induced labor scarcity, both the forces of supply and of demand reinforced the union's bargaining goals. But in confining benefits to the few, the union was open to the charge of depriving the many of benefits.

Alternatively, if the union attempted to organize all workers, it had the much more ambitious task of establishing standards to which all members must conform if the organization were to have any force. Here again the cry of discrimination was (and is) raised, for the individual might not want to conform to group-dictated norms. Of necessity, unions employing this strategy could not accept responsibility for allocating in an orderly way all labor to all available jobs, since both the total of employment outlets[8] and the total of job claimants were beyond union control. The union target was to establish the "administered" wage rate, or those conditions under which all labor was to be hired. The key to the success of this strategy was the strict observance of the negotiated rate, an observance more likely if all workers joined the union. But more than this, uniform labor support for union demands, particularly during the crucial moments of negotiation, was the key to union bargaining power. Equality of power was presumably achieved when labor could threaten the withdrawal of 100 per cent of the labor force, as the counterbalance to the employer's ability to deprive employees of 100 per cent of their income.

[8] Economic orthodoxy still insists that the quantity of labor demanded is a function of labor cost, and hence the volume of labor employment is determined in a very real way by union demands. Unions generally deny any responsibility for unemployment, but prefer to believe that high wages can lead only to expanded employment rather than to unemployment.

We return, then, to the nerve center of the right-to-work issue: the problem of equalizing bargaining power. In a full employment era, management contends that a strike, and even the threat of a prolonged war of attrition, represents no serious threat to union members. Furthermore, widespread publicity given to union abuses, including corruption, racketeering, violence, and even wage inflation, has reinforced the conviction that a serious imbalance in the labor-management power relationship already exists. Sixty years ago, Sidney and Beatrice Webb wrote: "The captains of industry, like the kings of yore, are honestly unable to understand why their personal power should be interfered with, and kings and captains alike have never found any difficulty in demonstrating that its maintenance was indispensable to society. . . ."[4] Today, this same argument is being applied to labor leaders.

The demand for that "agonizing reappraisal" of the present distribution of bargaining power within the labor market has given new relevance to Justice Jackson's 1944 prophecy that we are entering a "new phase" of labor-management relations, a phase in which society must "reconcile the rights of individuals and minorities with the power of those who control collective bargaining groups."[5] In other words, the two-dimensional study of unions and management must now give way to a three-dimensional approach, involving unions, management, and the individual. It is a dispute that can no longer be approached within the framework of the "good and bad guys" of a television movie. Unions, management, and the individual are inextricably related to each other, and any adjustment in the status of one upsets the equilibrium of the whole. An evaluation of the right-to-work controversy cannot neglect this three-way interdependence. The dispute involves the delicate balancing of the rights and freedom of each, and the even more delicate balancing of power that gives significance and meaning to that freedom.

The search for this balance of power continues and promises to be endless because of the difficulty of defining or agreeing on the content of that balance. Proposals are being made in increasing number to "democratize" the union, to "atomize" the bargaining process, and even to "socialize" the control of unions. But no simple panacea, no single solution, can be anticipated. Meanwhile legislatures and courts have to deal with reality. In recent years, the substance of individual employee responsibility to a union, even under a union-shop agreement,

[4] Sidney and Beatrice Webb, *Industrial Democracy* (London: Longmans, Green, 1920), p. 841.

[5] *Wallace Corporation v. NLRB*, 323 U.S. 248, 271 (1944).

has been surprisingly narrowed. As noted at the outset, agitation for right-to-work legislation in many states is continuing, and proposals for a national right-to-work law are receiving more serious attention.

In this struggle, however, one truth remains apparent: proposals to increase the power of the individual in the labor market are built on the illusory premise that a worker can exert substantial bargaining power as an individual. We must be ever mindful that the alternative to collective bargaining is no bargaining, and any policy leading, consciously or not, to the balkanization of the bargaining process cannot help but increase management power. In other words, power in the labor market cannot be destroyed; it can only be redistributed. The reality of the market place does not inspire the conviction that individualism and freedom always march hand in hand, for whether we like it or not, power is a determinant of freedom, and in the labor market collective action is a determinant of power.

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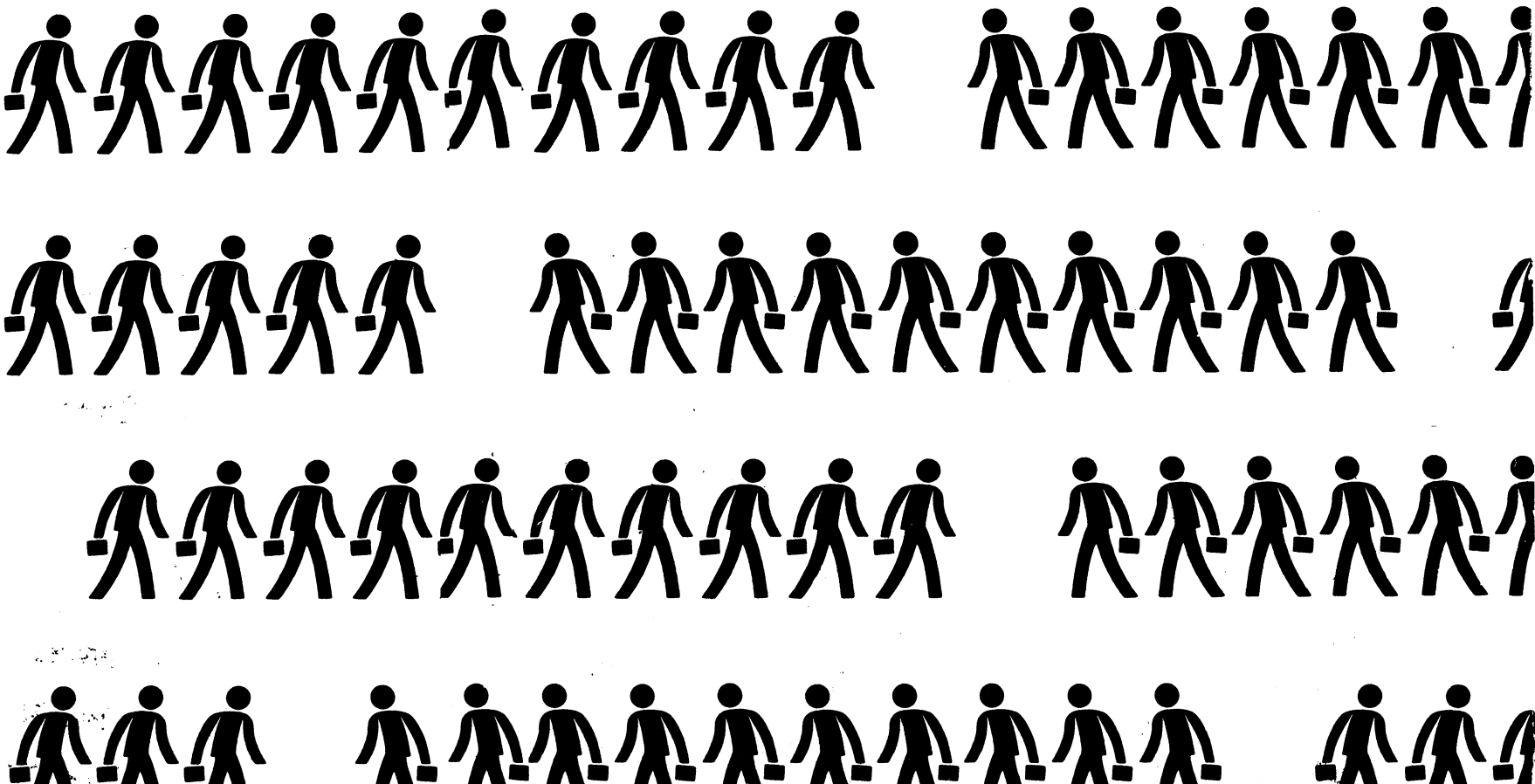

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