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FOUNDATIONS OF UNION POWER:  
THE COMPLEX PATTERN OF  
EMPLOYMENT LAWS

JOHN M. COURT\*

EDITOR'S NOTE: *The following article is a republication of a section of a paper which was the winner in 1961 of a \$7,500 award offered annually by the Labor Policy Association in Washington, D. C., for the best graduate-student essay submitted to it on the topic of power of labor unions. Mr. Court was a student at the Marshall-Wythe School of Law at William and Mary when he prepared and submitted his paper, which has been published in book form by the Association. (The Problems of Union Power Vol. I Series I, 1961; Labor Policy Association, 1624 Eye St. N. W., Washington 6, D. C.) The Committee which selected the award-winning paper for 1961 consisted of three eminent scholars and teachers in this field of study: Dr. C. L. Stephens of Denison University, Dr. O. Glenn Saxon of Yale University, and Dr. C. F. Phillips of Washington and Lee University.*

*The article here published, with special permission of the Association, is an extract comprising that section of Mr. Court's book which undertakes to explain the peculiar federal statutory treatment of the employer-employee relationship. In a subsequent section of his book Mr. Court proposes (1) that full judicial power be restored to the judiciary in labor cases with the establishment of Referees in Labor Relations comparable to Referees in Bankruptcy, (2) that the focus of effort of the National Labor Relations Board be concentrated on administrative and not judicial functions, and (3) that the Congress, by a statement of national policy similar to that in the Employment Act, redefine the scope of the "Commerce Clause" of the Constitution consistent with what Mr. Court believes to be its original intent, giving greater emphasis to local and regional responsibility and authority in the economy. The author also suggests that the Railway Labor*

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*Act, which was an antecedent to the existing pattern of labor legislation, be integrated with other labor statutes.*

*The book undertakes to evaluate not only the legal aspects of the problem, but the sociological and economic aspects as well, and accordingly is aimed at an audience broader than the legal profession. The section here republished should be of particular interest to those in the legal profession confronted with labor problems.*

## I

One eminent and perceptive observer, the Harvard economist Sumner Slichter, scanning the American economic scene fifteen years ago, drew a sharp profile of the American labor movement, identifying in it these prominent characteristics:<sup>1a</sup>

(a) Tremendous power—big unions are “the most powerful economic organizations the country has ever seen.”

(b) Professional leadership—the leaders of the movement are full time professionals, “as remote from the rank and file as are the heads of large corporations.”

(c) Concentration of power within each union—“any competition for office at the national level is ruthlessly suppressed.”

(d) Intense rivalry—rivalry, rather than economic considerations, guides union policy.

(e) Specialized objectives—the movement is “characterized by strong particularisms and by lack of an organization which represents labor as a whole.”

(f) Failure to recognize the public interest—the trade union movement has failed to “adjust itself to the increasingly important role of government in determining conditions of employment.”

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<sup>1a</sup>*The Challenge of Industrial Relations*, Cornell University Press, 1947, pp 14-18.

Despite the subsequent nominal merger of the American Federation of Labor and the Congress of Industrial Organizations, achieved in 1955, the eventful intervening years have little changed the character of union power. Legislation enacted to abate its intemperance and stabilize its growth has tended primarily to consolidate its position.

Archibald Cox, while a Harvard law professor, testifying to the Senate Judiciary Committee in 1959, said,<sup>1b</sup>

. . . labor unions enjoy their present power by virtue of Federal statutes, chiefly the National Labor Relations Act. Other voluntary associations are different in two respects: (1) they lack the statutory power of a union designated as a bargaining representative; (2) no other voluntary association has as much power over an individual's livelihood and opportunities or over the rules governing his daily life. The union bulks much larger in the life of a worker than a corporation in the affairs of a stockholder.

The legal basis of union power is found in the immunities and privileges which attach by statute to labor union activities. The significance of these will be lost unless the reader keeps in mind, in general outline at least, the basic pattern of law into which these immunities or privileges are set.

By 1776 English common law had digested not only the old ecclesiastical law but a sort of international code developed over the centuries as special law for those engaged in commerce. Thus the colonies began their independent course with a cohesive body of judicial precedents comprehending all civil justice. Each citizen could protect his rights through the courts of law without aid of new legislation. If the absence of suitable precedent prevented adjudication at law or if action were needed in the cause of justice to forestall prospective rather than to remedy past transgressions, the complainant could petition the sovereign for special relief through courts of equity whereupon, on the more abstract basis of "natural law", the chancery court would determine a just solution in the circumstances proven and upon an equitable decree or in-

<sup>1b</sup> See U. S. CODE CONGRESSIONAL AND ADMINISTRATIVE NEWS (1959), 2418.

junction the officers of the court could enforce its determination. As our own statutory law developed, reliance on precedent and "natural law" declined and the major judicial function became the interpretation and adaptation of the expressed legislative will of the sovereign into a myriad of unique and frequently unanticipated situations. Nevertheless the common law concept of one code for all citizens and of equality before the bar of justice carried over into the statutes of the new government. The Comity Clause in the Articles of Confederation became the Privileges and Immunities Clause of the Constitution.<sup>2</sup> Their intent was to assure that all citizens enjoyed in the eyes of the law the same privileges and immunities. Government would proceed by impersonal law of general application. The Fifth Amendment in the Bill of Rights placed on the federal government substantially the same obligation to recognize the equal status of all citizens in the legal sense.<sup>2a</sup>

Labor law texts often cite a few scattered opinions<sup>3</sup> rendered in labor disputes in the early days of the federal republic as evidence of a general bias of the courts in favor of property owners and against labor. The cases reveal, however, a pattern of attempted coercion by the labor groups wherever the courts were assertive.<sup>4</sup> The great accomplishment of the common law had been the substantial elimination of bias or privilege and of special codes, digesting all into a balanced comprehensive system of marked stability which was accepted with grateful respect and keen understanding by the people at large. The common law back through the Middle Ages is replete with cases on trade regulation illustrating that the courts persistently struggled to maintain individual freedom of action.<sup>5</sup> Open or

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<sup>2</sup> *Constitution of the United States, Analysis and Interpretation*, U. S. Government Printing Office, Washington, D. C., 1953, 686.

<sup>2a</sup> The clauses in 2 *supra* applied only to the States.

<sup>3</sup> The favorite citation is some dicta from the Philadelphia Cordwainers Case (1806) 3 Commons and Gilmore, *Documentary History of American Industrial Society* (1910) 59, 233.

<sup>4</sup> See FRANKFURTER AND GREENE, *THE LABOR INJUNCTION*, The Macmillan Company, New York, 1930, p 3 and notes.

<sup>5</sup> See Milton Handler, "Schoolmaster Case," (1410), 12; "Meat Market Case," (1433), 13; "Case of the Tailors of Ipswich," (1614), 32; "Case of Monopolies," (1602), 44; *TRADE REGULATION*, Foundation Press, 1960.

covert agreements to interfere with public access to open exchange was not only a tort but such combinations in the eighteenth century were also penalized by statute law in England,<sup>6</sup> that is, Parliament declared it a punishable misdemeanor to conspire to effect a monopoly or a restraint of trade. The most onerous early monopolies were the result of Sovereign grants of special privilege and first occurred in royal patents. The abuse of these led to the sharp curtailment of royal power by Parliament.<sup>7</sup> Legalized monopolies thereafter took the form of corporations chartered by Parliament with a narrow delegation of sovereign powers for a specified purpose.

The corporation is a legal concept in which an unlimited number of persons may pool a part of their resources in a formal organization recognized at law as an entity separate from its members and clothed with many of the rights of citizenship. Its permanence, its limited liability, and its flexibility of ownership as well as some of its tax advantages have made the corporation a much greater power in the economy than the individual entrepreneur or proprietor. As industrialization expanded, our states gradually relaxed the formalities for creation of corporations so that by 1880 incorporation often no longer required a special act of the legislature but had become in many states a routine administrative procedure. Thereafter incorporators could write their own charters pretty much to suit themselves. The idea of forwarding a governmental purpose in the creation of corporations became lost except for a relatively small number of those government and municipal corporations still created by legislative act. Meanwhile the perpetuation of concentrated wealth in a family by trusts or by entail had been made very difficult by statute both in England and here. Modern estate and inheritance taxes will ere long complete the job of fragmenting family fortunes. The corporation meantime has steadily grown in economic importance. Professor Mason in *The Corporation in Modern Society* states:<sup>8</sup>

The five hundred largest business corporations in this country embrace nearly two-thirds of all non-agricultural

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<sup>6</sup> See Lerwin, *English Common Law Concerning Monopolies*, 21 UNIV. OF CHICAGO LAW REVIEW 355 (1955).

<sup>7</sup> Statute of Monopolies, (1624) in the reign of James I.

<sup>8</sup> Edward S. Mason, Harvard University Press, 1959, 5.

activity. These and similar figures are reiterated with such frequency that they tend to bounce off our heads rather than to penetrate. But by now we are all aware that we live not only in a corporate society but a society of large corporations. The management, that is, the control, of these corporations is in the hands of, at most, a few thousand men. Who selected these men, if not to rule over us, at least to exercise a vast authority, and to whom are they responsible? The answer to the first question is quite clear: they selected themselves. The answer to the second is at best nebulous. This, in a nutshell, constitutes the problem of legitimacy.

This language is also substantially true of national and international labor unions, except that labor's controlling hierarchy appears to be a smaller group, less inhibited by public scrutiny. Abram Cheyes, former Professor of Law at Harvard, lately counsel to the State Department, states in the same text: "They (the big corporations) are repositories of power, the biggest centers of non-governmental power in our society."<sup>9</sup> At the outset we noted a similar comment by Professor Slichter about labor unions. Such views are the basis for the doctrine of countervailing power which appears to dominate our present thinking in economic policy.<sup>10</sup>

The private corporation has gradually lost its original sovereign flavor but the labor union, once simply an association of artisans interested in maintaining the standards of skill in a given trade, has developed steadily into an important quasi-public institution. The reach of the private corporation, no longer accorded rights other than those possessed by individual citizens, can be delineated through the title to its property and the scope of its contracts. The union is a more nebulous entity and as a bargaining agent it acquires a distinct political authority and responsibility such that its power extends beyond the reach of its property, its membership or the corporation or proprietorship in which the bargaining unit is located.<sup>11</sup>

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<sup>9</sup> *Id.* at 25.

<sup>10</sup> See J. K. GALBRAITH, *AMERICAN CAPITALISM—THE CONCEPT OF COUNTERVAILING POWER*, Houghton Mifflin Company, 1952.

<sup>11</sup> See particularly § 9, National Labor Relations Act, 29 U. S. C. § 159.

The corporation, stemming from a royal institution, has always been formally organized, owing specific responsibilities to its creator, certain contractual obligations to its members, and possessed of distinct internal structure. It has taken many forms and been adapted to an extraordinary variety of common endeavors, the primary classifications of which being profit (stock), charity (non-stock), and municipal government. We have in every state a comprehensive body of law as to the conduct of corporations, well-expounded in judicial interpretation. Surprisingly, though corporations have long been the primary instruments of interstate commerce, we have no general federal corporation law. The Securities and Exchange Commission, the Federal Trade Commission and other regulatory agencies take an active role in special areas, as when corporate securities are offered for public disposal, but the act of incorporation and the direct control of corporate conduct remains a state function.

Labor unions are not required to incorporate although there are various reasons advanced as to why it might be advisable to require it, not the least of which would be to standardize and simplify their legal treatment. Although a few unions have incorporated there are a few distinctions which in this country make the union *sui generis*. The union in its present role bears close resemblance to an ancillary municipal corporation, such as a transportation authority or a water district, in that it exercises special authority of a nonvoluntary nature in a public function extraneous to the conventional subdivisions of government. Unions began simply as voluntary associations, not recognized as entities at law. Resembling at this stage a charitable group or fraternal lodge they were quite difficult to pin down to a contractual responsibility. This uncertainty of substance substantially explains the initial disinclination of management to deal with them; you could make an agreement with them but when you went to enforce it at law you found yourself largely fanning the air. Responsibility was indistinct, membership was transient and rarely was property attached. There was seldom any effective legal action available to a party aggrieved by a union other than to seek a preventive decree or judicial injunction from a court in equity because an award of damages usually proved uncollectible. Only individuals could be sued at law, these had little property, and they could not be jailed for debt. For union misdeeds the only practicable



remedy was a court order which said in essence to this nebulous group—"Don't do it again or we'll slap some bold fellow with contempt of court."

With this elementary explanation of prestatute labor law let us proceed to consider five major facets of union power from the standpoint of statutes now governing industrial relations:

(a) What is the role of the unions in the macroeconomic sphere? Why do they have special status in the maintenance of the national economy? These questions are vitally important because they furnish the *raison d'être* of the original National Labor Relations (Wagner) Act<sup>12</sup> and the Norris-LaGuardia (Anti-Injunction) Act.<sup>13</sup> The authors of this legislation reasoned that only by improved communications between management and labor and by an improved distributing device for the national income could economic peace and prosperity be achieved. The union was imagined to be the perfect instrument for these purposes. Therefore its growth became a purpose of public policy high in priority.

(b) What is the position of the union in the microeconomic sense? How does the union exercise power over the community and vice versa? Here we encounter the effect of various immunities to conventional judicial procedure which, coupled with the doctrine of federal preemption, leave our component communities virtually powerless before an aggressive national union.

(c) Although the political stigma affixed to corporate wealth makes the average American apathetic to the tribulations of employers, our study cannot ignore the legal position of the harassed managements of industrial enterprise. Whether or not we sympathize with the captains of industry, the fact remains that the productivity of each worker depends in good measure upon the efficiency of his management and the amount of capital invested in the tools he uses. If the climate of the law fails to encourage either, we shall find ourselves steadily losing ground in world markets and in comparative economic strength.

<sup>12</sup> See 49 Stat. 449, Act of 5 July 1935, 29 U. S. C. § 151.

<sup>13</sup> 47 Stat. 70, Act of 23 March 1932, 29 U. S. C. § 101-115.

(d) What is the status of the union at law *vis-a-vis* the individual worker? The federal government has come to consistently ignore or preempt the prerogatives of the state and community governments. The hapless industrial property owners have been chief quarry in a seeming endless game of hare and hounds. Only the workers themselves appear to comprise a sufficiently significant element of the electorate to ultimately exercise corrective leverage on the federal political machinery. Their legal status is therefore quite important to our analysis.

(e) A fifth aspect can be touched on only briefly herein. This is the relationship of a local union with the national and international goliaths, the community organization versus the professionals who operate on a country-wide perspective. Were the antitrust immunities of the unions to be modified this relationship might acquire great importance.

## II

The macroeconomic role of unions developed from the economic theory adopted by President Roosevelt in his first administration.<sup>13a</sup> It had as its original premise the necessity for halting competition and ambitiously expanding the role of the federal government. Senator Wagner in presenting the National Labor Relations Act to the Senate on 1 March 1934 offered the following explanation:<sup>14</sup>

The keynote of the recovery program is organization and cooperation. Employers are allowed to unite in trade associations in order to pool their information and experience and make a concerted drive upon the problems of modern industrialism. If properly directed, this united strength will result in unalloyed good to the nation. But it is fraught with great danger to workers and consumers if it is not counterbalanced by the equal organization and equal bargaining power of employees. Such equality is the central need of the economic world today. It is necessary to insure a wise distribution of wealth between management and

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<sup>13a</sup> 19 ENCYCLOPEDIA BRITANICA 536 (1957).

<sup>14</sup> *Legislative History of the National Labor Relations Act, 1935*, Volume I, United States Government Printing Office, Washington, D. C. 1949, 15.

labor, to maintain a full flow of purchasing power, and to prevent recurrent depressions.

On May 27, 1935 the Supreme Court handed down the memorable decision of *Schechter Poultry Corp. v. United States*,<sup>15</sup> holding that the federal regulation of local trade under the National Industrial Recovery Act exceeded the delegated powers of Congress and violated the Tenth Amendment. This necessitated a reorientation of the justification for the measure proposed since the powers assigned to the federally sponsored trade association to which Wagner had referred were thereby made unconstitutional. The modified justification, recited in the Act itself, as approved in July 1935, declared:<sup>16</sup>

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and employers who are organized in corporate or other forms of ownership association substantially burdens and affects the flow of commerce and tends to aggravate recurrent business depressions by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment or interruption and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours or other working conditions and by restoring equality of bargaining power between employers and employees.

When the emergency had passed, a post-war Congress added another paragraph under the above "Findings and Policies" of the National Labor Relations Act which read as follows:<sup>17</sup>

<sup>15</sup> 295 U. S. 495.

<sup>16</sup> 49 Stat. 449, 29 U. S. C. § 151 (1935).

<sup>17</sup> 61 Stat. 136 (1947).

Experience has further demonstrated that certain practices by some labor organizations, their officers and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

As Justice Holmes pithily observed, "The life of the law has not been logic; it has been experience."<sup>18</sup> It was the happy hope of the early depression Congresses that industrial strife would cease to plague the freedom of commerce if only employers were thwarted from interfering with unionization of their employees and were required to share control of their enterprise with these unions through "collective bargaining." The sponsors theorized that since this procedure would raise wages and stimulate consumption it would thereby accelerate growth of the overall economy, whereas otherwise the excess profits of industry would merely be salted away in "unproductive" savings.

Unions are an essential feature of an industrial economy. Their recognition as collective bargaining agents is a legal necessity, but as our subsequent discourse will develop, laws conferring exclusive privileges upon unions and segregating the system of law in the field of industrial relations from the basic judicial system of our federal society have overshot the mark at which they were purportedly aimed, in spite of the corrections attempted in more recent legislation.

In the meantime the federal government has undertaken to stimulate the distribution of national income by important other means. It has elaborately built a floor of fair labor standards and wages,<sup>19</sup> cushioned it with social security of steadily increasing coverage and generosity,<sup>20</sup> sponsored comprehen-

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<sup>18</sup> Quoted in *Livingston Shirt Corporation Case*, 107 NLRB No. 109 (1953) and also in HENDRICKS, *BULWARK OF THE REPUBLIC*, Little Brown & Company, Boston, 1937, 425.

<sup>19</sup> 52 Stat. 1060, Act of 25 June 1938, 29 U. S. C. § 201-219.

<sup>20</sup> Social Security Act, 42 U. S. C. § 301.

sive unemployment insurance and workmen's compensation acts,<sup>21</sup> underwritten vast housing outlays and given away mountains of comestibles to improve the lot of the low income bracket in our economy. For almost thirty years the federal legislative mills have steadily ground out welfare legislation which has engulfed the originally conceived economic function of the unions. To this fact Sumner Slichter referred in his sixth major union characteristic, their disregard of the increasing importance of the government's role.

Following the departure of Franklin Roosevelt from the national scene there came a reassessment of the basic policies of the federal government. Some fundamental legislation bordering on a constitutional nature was enacted in the early post-war years; the Administrative Procedures Act<sup>22</sup> and the Employment Act<sup>23</sup> were especially noteworthy. In the area of macro-economics perhaps the most significant statement of policy is that set forth in the first section of the Employment Act in 1946 which reads thus:

The Congress declares that it is the continuing policy and responsibility of the federal government to use all practicable means consistent with its needs and obligations and other essential considerations of national policy, the assistance and cooperation of industry, agriculture, labor and state and local governments, to coordinate and utilize all its plans, functions and resources for the purpose of creating and maintaining, in a manner calculated to foster and promote free competitive enterprise and general welfare, conditions under which there will be afforded useful employment opportunities, including self-employment, for those able, willing and seeking to work, and to promote maximum employment, production, and purchasing power.

That long awkward sentence, obviously hammered out painfully in legislative compromise, says a good deal and implies a great deal more. It is the mark of John Maynard Keynes

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<sup>21</sup> Employers Liability Act, 45 U. S. C. §§ 51-60; Railroad Retirement Act 45 U. S. C. § 215; Federal Insurance Contributions Act, 26 U. S. C. § 1400; Unemployment Compensation Act, 42 U. S. C. § 501.

<sup>22</sup> 60 Stat. 237 (1946).

<sup>23</sup> 60 Stat. 23, as amended, 15 U. S. C. § 1021.

on our faltering federalism. The federal government is declared responsible for the concentration of all its vast powers (1) upon the creation of conditions affording employment for those desiring it and (2) upon the acceleration of the national economy to the fullest extent practicable. Implicit is recognition that, rightly or wrongly, the federal government will be held responsible for any economic decelerations. Implicit also is recognition that the federally controlled section of the economy had reached such mammoth proportions as to make it essential that the exercise of this economic-flywheel function be open, above-board and official. The knowing observer could rightly reason that the necessary authority to discharge such a vast responsibility would be assumed by future Congresses, future administrations and future Courts, the basic Constitutional concept of a limited federal government and of latent reserved powers in the states to the contrary notwithstanding.

It is worthy of note that in the whole Constitution the only thread of connection between the economic responsibility set forth in the Employment Act and the basic authority granted to the federal government by the people of the States lies in that heavily trafficked clause under Article I, section 8 assigning to Congress power "... to regulate commerce with Foreign nations, among the several States, and with the Indian tribes."

An aggressive expansion of the meaning of the power to "regulate commerce . . . among the several States" had been undertaken by the judiciary since the start of Mr. Roosevelt's second term after he broached his controversial plan to pack the Supreme Court. Their historic change in position was spelled out in 1937 in the *Jones and Laughlin* case<sup>24</sup> in which the application of National Labor Relations Board authority to a local employment controversy at a steel plant was upheld on the rationale that its production "affected" commerce and therefore was intended to be covered in the constitutiona

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<sup>24</sup> See *NLRB v. Jones and Laughlin Steel Corp.* 301 U. S. 1 (1937). This opinion by Chief Justice Hughes reversed 3 cases from different U. S. Circuit Courts of Appeal, challenging the powers of NLRB, each of which had come unanimously to an opposite conclusion. Perhaps no event since the Civil War has had greater long term impact on the subsequent political character of the United States.

grant of implementing power to Congress. This 5 to 4 decision substantially annulled the Ninth and Tenth Amendments and opened the legislative floodgates for the establishment of the welfare state.

The only real bounds of federal authority today in the economic field appear to lie in the inclination of the Congress framing the statute and in the zeal of the respective regulatory body for handling the workload entailed. To illustrate, the courts have declared the following workers to be encompassed by the federal power over interstate commerce: window-washers contracting to wash windows in an office building whose tenants do some interstate business,<sup>25</sup> employees of an ice plant whose customers occasionally carry ice out of the state,<sup>26</sup> workers on an irrigation ditch the water from which waters fields in which produce is raised to be sold out of state,<sup>27</sup> and office workers in a news service which collects news from out of state and distributes it locally.<sup>28</sup> The National Labor Relations Board is empowered to write its own ticket to the limits of federal jurisdiction in this field.<sup>29</sup>

Although the student may marvel that a responsibility such as that of the Employment Act, with all its pervasive attendant authority, could have been assumed without contemplation of any Constitutional Amendment, he should appreciate the fact that by 1946 the Congress, acting *ex post facto*, was conscientiously trying to spell out a restraint rather than an extension of federal responsibility, as is revealed in the Senate-House conference report with which the Act was finally presented:<sup>30</sup>

The Senate declared that it is the responsibility of the federal government to maintain full employment and to assure at all times sufficient opportunities for employment to enable all Americans able and willing to work to exercise their right to continued full employment.

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<sup>25</sup> 328 U. S. 108 (1945) and 156 F. 2d. 958 (2d Cir. 1946).

<sup>26</sup> Southern United Ice Company v. Hendrix, 153 F. 2d. 689 (6th Cir. 1946).

<sup>27</sup> Farmers Reservoir and Irrigation Co. v. McComb, 337 U. S. 755 (1948).

<sup>28</sup> Lorain Journal Co. v. United States 342, U. S. 222 (1951).

<sup>29</sup> See Sec. 14(c) of National Labor Relations Act, 29 U. S. C. § 164(c).

<sup>30</sup> U. S. Code Congressional Service, 79th Congress 2d. Session 1946, 1068.

The House substitute declared it is the continuing policy of the United States to promote employment, production and purchasing power under the system of free competitive enterprise and that the function of the government is to *promote and not to assure or guarantee employment*. It is the theory of the House substitute that employment is not the sole responsibility of the government and that industry, agriculture and labor have their responsibility . . . The term 'full employment' is rejected and maximum employment is the objective to be promoted . . . The United States is to promote by all practicable means which may well include, but need not be limited to taxation, banking, credit and currency, foreign trade, public works, loans. Studies are to be made and causes of economic dislocations ascertained. Causes of unemployment are to be removed or eliminated. The goal is maximum or high levels of employment; the emphasis on spending, expenditures and disbursements is omitted from the conference agreement.

Our traumatic experience in the Great Depression has been popularly attributed to a maldistribution of national income caused by an increasingly unbalanced concentration of economic power in big corporations. The cure prescribed was a cartelization of labor, industry and agriculture followed by a grand scale collaboration with government to conduct a substantially planned economy. A generation of consolidation followed, after which gnawing doubts began to stir a deep concern as to the wisdom of encouraging such unwieldy concentrations of economic power. Meanwhile unintelligibly complex codes of regulatory law and interpretations have grown tier on tier acquiring a defense in depth almost beyond penetration short of revolution. Behind not the least of these citadels of verbosity stands the nationwide combine of organized labor.

The most significant attack on the *status quo* of union power comes now from the same academic quarter which thirty years ago insisted that the unions be put on the macroeconomic map in large letters. Economists now perceive an unbalance opposite to that which then tilted the economy heavily to one side.<sup>31</sup>

<sup>31</sup> See generally: S'ICHTER, HEALY AND LIVERNASH, *THE IMPACT OF COLLECTIVE BARGAINING ON MANAGEMENT*, Brookings Institute, Washington, 1961, and BRADLEY, *THE PUBLIC STAKE IN UNION POWER*, University of Virginia Press, Charlottesville, 1959.



The broad immunity so long extended to unions from restraints applicable to the other elements of our society has permitted and encouraged such a strong concentration and deep entrenchment of their collective power that they may ultimately prove more difficult to dislodge from political dominance than any prior vested interests. The unions' base is broader, their source of wealth more secure, their organization more compact, and their opposition more completely cowed.<sup>32</sup>

Let us therefore examine some of the unique union privileges and immunities which have made their economic power inaccessible to the normal processes of the law. In a practical sense what was accomplished by the Norris-LaGuardia Act and by the Wagner Act?

The Norris-LaGuardia Act of 1932 rigidly constrained the authority of the federal judiciary in labor disputes. The use of one of the basic tools of equity, the injunction, by the federal judiciary against union activity of any sort was almost wholly outlawed. A "labor dispute" was officially defined in the Act so broadly that union organizers actually representing no one in an industrial community, could, without any local occasion, instigate picketing under the protection of the act, and be held blameless for any resultant concerted violence or economic damage.<sup>33</sup> Thus the stranger picket and the secondary boycott were made inviolate in any industry with a scintilla of interstate activity. Neither the strike nor the boycott needed to involve any local employees or issues. National or International unions accordingly could project their activities nationally without need of reasonably persuading a significant number of employees to join or finding any conflict between labor and management in a given bargaining unit. The tools of coercion were theirs and they were extensively used.<sup>33a</sup>

Beyond this roving commission for the national organizations the Wagner Act of 1935 spelled out a stringent list of

<sup>32</sup> See SYLVESTER PETRO, *POWER UNLIMITED*, Ronald Press Company, New York, 1959.

<sup>33</sup> Sec. 13 of Norris-LaGuardia Act, 29 U. S. C. § 113 and *United States v. Hutcheson*, 312 U. S. 219 (1940).

<sup>33a</sup> The classic example of this is the *Apex Hosiery Case*, *Apex Hosiery v. Leader*, 310 U. S. 469 (1940); see also *NLRB v. International Rice Milling*, 341 U. S. 665 (1951).

prohibitions on employers.<sup>34</sup> The enforcement of these privileges and restrictions was assigned to a new administrative agency, the National Labor Relations Board which had two primary functions, one administrative, one judicial. To quickly develop labor's leverage on the economy, the Board administratively determined which union was to be the collective bargaining agent for what industrial bargaining units.<sup>35</sup> The independent or community union became branded as the tool of employers and effectively removed from the industrial scene.<sup>36</sup> The Board, thereupon assumed, under the Act, the combined roles of complainant, judge, jury and prosecutor to determine whether any violations of the code had been committed and how to punish the recalcitrant employer.<sup>37</sup> If an "unfair labor practice" were found to have been committed by the employer the Board was authorized to issue an order comparable to a court decree directing such corrective action as it saw fit. The original itemization of unfair labor practices by the employer included:<sup>38</sup>

(1) direct or indirect interference with employees' right to organize or to conduct, for mutual aid, any concerted activities (strikes, boycotts, slowdowns, picketing, meetings, proselytizing, etc.),

(2) showing any approval or disapproval of any employee organization or assisting one union against another in any way,

(3) showing any bias relative to union status in treatment of prospective or actual employees,

(4) penalizing any employee for invoking Board action,

(5) refusing to "bargain" with a union about any condition of employment—this perhaps the most dangerous clause of all and highly controversial, is now broadly interpreted to

<sup>34</sup> Sec. 8(a) of National Labor Relations Act, 29 U. S. C. § 158.

<sup>35</sup> *Id.* § 159.

<sup>36</sup> See S. REP. NO. 105, 80th Congress, 1st Sess. 12-13 (1947) and *International Association of Machinists v. NLRB*, 311 U. S. 72 (1940).

<sup>37</sup> §§ 10 and 11, National Labor Relations Act, 29 U. S. C. §§ 160, 161.

<sup>38</sup> Sec. 8(a) of National Labor Relations Act, 29 U. S. C. § 158.

outlaw any unilateral action by an employer even in the improvement of his production facilities or the subcontracting of work which can be more efficiently done elsewhere.

By the express language of the Act the "bargaining agent" is bequeathed exclusive monopoly power in dealing with the employer.<sup>39</sup> It is virtually a criminal act for an employer to take any action affecting working conditions, wages, hours, shifts, or staffing without prior consultation with the union.<sup>39a</sup> Only the agent union may speak for employees in the bargaining unit, regardless of their membership or non-membership in the union.<sup>39b</sup> If the union calls a strike because of an unfair labor practice, such as the employer's refusal to bargain over what the management might erroneously consider its own prerogatives, e.g., the installation of labor saving devices, not only is the union freed of any responsibility under a no-strike contract clause but the employer must keep the strikers on his payroll.<sup>39c</sup> The "right to strike" though ill-defined, is taken to mean not simply the right to quit work in unison, but the right to stop others from working, to peacefully picket all the employer's operations and to retain a vested interest in the jobs abandoned as well.<sup>39d</sup> An individual who quits his job because he believes his employer to be treating him unfairly has no such vested right. With rare exceptions only a union may exercise it since what is protected is "concerted" action. Therefore the employee has job security only by remaining in the good graces of the union. The union's exclusive privilege in achieving job security is of inestimable value in maintaining union discipline and in exercising economic leverage on a national scale over both the employer, who may lose heavily in a work stoppage while the union leadership actually has very little to lose, and over the employee, whose rights are derived through the union. The privilege applies not only to the strike but to any "concerted activity" decided upon by the union leadership,

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<sup>39</sup> *Id.* Sec. 159.

<sup>39a</sup> *NLRB v. J. H. Allison Company*, 165 F.2d. 766 (6th Cir. 1948).

<sup>39b</sup> *Matter of National Tube*, 76 NLRB 1199 (1948).

<sup>39c</sup> See *NLRB v. Lion Oil Company*, 352 U. S. 282 (1957).

<sup>39d</sup> *NLRB v. Business Machine and Office Appliance Mechanics*, 228F.2d. 553 (2d Cir. 1955).

such as a refusal to handle certain work, to work at certain hours, or on certain days, to permit any changes in "work rules," to allow introduction of labor-saving devices, to permit relocation of operations, and similar tactics which help to consolidate the existing membership.

By contrast in our wonderland of industrial relations the government's policy is "do as I say, not as I do." The following clause of the Labor Management Relations Act abruptly forecloses for millions of civil service personnel the conventional "right to strike."<sup>40</sup>

It shall be unlawful for any individual employed by the United States, or any agency thereof including wholly owned Government Corporations to participate in any strike. Any individual employed by the United States or by any such agency who strikes shall be immediately discharged from his employment and shall forfeit his civil service status, if any, and shall not be eligible for reemployment for three years by the United States or any such agency.

In the civilian economy, in economic strikes, e.g., for higher wages or fringe benefits, as distinguished from "unfair labor practice" strikes, retroactive pay rights are not protected by law but reinstatement rights are.<sup>41</sup> The economic strike becomes ineffective, therefore, if replacements can be hired on the open market, unless an unfair labor practice can be conveniently employed as an occasion to gain economic benefits or, by the coercion of concerted discipline, the union is able to economically excommunicate the employer's whole operation. To bring pressure to raise wages or shorten hours or block discontinuance of jobs the union must depend on its comprehensive discipline. It should be clear then that the macroeconomic role of the union in our planned economy is to serve as an instrument through which there can be maintained sufficient discipline in the working forces throughout the whole industrial complex to enable them to extract their optimum share of the Gross National Product.

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<sup>40</sup> 61 Stat. 136. See particularly Sec. 305 of statute, 129 U. S. C. §§ 141-197.

<sup>41</sup> *NLRB v. Remington Rand*, 94 F.2d. 862 (2d Cir. 1938).

The popular assumption has been that the Taft-Hartley Act of 1947 and the Landrum-Griffin Act<sup>42</sup> of 1959 corrected the distorted features of the Wagner Act of 1935. Amendments were made which were helpful in restoring confidence to industry but the fundamental privileges and immunities of organized labor actually were preserved in toto. The Taft-Hartley amendments to the Wagner Act<sup>43</sup> attempted to spell out a parallel list of unfair practices on the part of labor to balance those previously specified for management. Piecemeal amendment has proven ineffectual in many ways however, and judicial interpretation has substantially vitiated much of what Senator Taft sought to achieve in his legislation. The featherbedding and secondary boycott provisions are illustrative of the gap between theory and practice.<sup>43a</sup> Minor modifications in union technique permit easy evasion of the intent of the law. The provisions for judicial review of the activity of the National Labor Relations Board<sup>44</sup> still leaves the courts substantially preempted of original jurisdiction. Union responsibility undeniably has been greatly enhanced by the legal entity concept<sup>44a</sup> under which they may sue and be sued for breach of contract but the finding of the Supreme Court that courts lack cognizance of arbitration proceedings has furnished an effective escape from this clause.<sup>44b</sup>

The effect of the Taft-Hartley has been to strengthen the *status quo*; new unions are harder to organize, but the established unions are more firmly established. Labor discipline has become tighter in the already highly concentrated industrial power centers, because, due to the seniority rules in nearly all contracts, entrenchment gets steadily deeper until, as in the railroads only old age can reduce the rolls. The extensive

<sup>42</sup> 73 stat. 519.

<sup>43</sup> These clauses although enacted in Taft-Hartley are in the form of amendments to the Wagner Act and are found now as parts of 8(b) therein.

<sup>43a</sup> See 39(d) above and 10 *Labor Law Journal* 175 (1959) as to boycotts; as to featherbedding 345 U. S. 100 & 345 U. S. 117 (1953); the make-work problem under the Railway Labor Act is even more troublesome.

<sup>44</sup> Sec. 10(f) National Labor Relations Act, 29 U. S. C. § 160(f).

<sup>44a</sup> § 301 Labor-Management Relations Act.

<sup>44b</sup> 363 U. S. 593 (1960) also see Paul R. Hays, *Supreme Court and Labor Law, October Term 1959*, 60 COLUMBIA LAW REVIEW 901, 919-935 particularly.

government machinery for arbitration, mediation and conciliation established in the Taft-Hartley Act<sup>45</sup> has reduced the frequency of work stoppages by facilitating adjudication of contract interpretation disputes, but the trend toward nationally centralized control of contract terms continues unabated. The prestige of national unions is closely tied to the size and consistency of their contract gains. The provisions for handling national emergency industrial disputes by an eighty day "cooling off" period<sup>46</sup> is a weak substitute for injunctive process against interference with individual freedom of choice. So long as our basic law tends to encourage tightly organized international and national unions with protected interests in abandoned jobs, there will be industrywide bargaining or follow-the-leader bargaining. We shall be confronted with a most dangerous situation as long as a small handful of labor leaders are privileged to throw the country into economic paralysis. This is not a necessary adjunct to unionization.<sup>46a</sup>

To summarize the present legal status of unions in the national economy, they have been furnished the exclusive prerogatives to maintain very effective discipline not merely within their own ranks but throughout our industrial complex. This discipline is conducive to national rather than local organization. Immunity to laws against the restraint of trade and to conventional equity jurisdiction together with their special "bargaining agent" monopoly give the national union the tools to maintain tight discipline which in turn wields tremendous economic power.

### III

Let us change our focus of interest from the area of macroeconomics, the national economic entity, to microeconomic area, the individual firm, community or innocent bystander. The classic statement of current policy was set forth in the case

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<sup>45</sup> § 202 Labor Management Relations Act establishes the Federal Mediation and Conciliation Service.

<sup>46</sup> *Id.* at §§ 206-210.

<sup>46a</sup> U. S. CONST. art. I, § 10 forbids any state from entering into an alliance or confederation. Sherman and Clayton Acts control corporate combinations. That we should countenance in labor what neither government nor industry is permitted speaks more clearly than words the power of unions.

of *Garner v. Teamsters Union* in 1953.<sup>47</sup> Here a small trucking firm in Pennsylvania had been subjected to a typical teamster "stranger" strike. There was no labor dispute between the firm and its twenty-four employees of whom only four were union members. The firm handled local intrastate deliveries and pickups for a railroad. Mr. Beck's international organization sought designation as "bargaining agent." It sent outsiders to picket all operations of the trucker. The trucker's business fell off 95% because no other drivers would cross the picket lines. The trucker, his business ruined, asked for an equitable injunction in the Pennsylvania state courts to halt the picketing since there was no majority of union men in his own organization and no dispute with his own employees. The lower court granted the injunction to thwart an obvious unfair labor practice. The Pennsylvania Supreme Court declared the injunction exceeded the State's powers. The case was appealed to the Supreme Court on the constitutional principle that private rights were enforceable at state law. Mr. Justice Jackson writing the affirming opinion said:<sup>47a</sup>

Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply the law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies . . . This case would warrant little further discussion except for a persuasively presented argument that the National Labor Relations Board enforces only a public right on behalf of the public interest while state equity powers are invoked by a private party to protect a private right . . . We conclude that when federal power constitutionally is exerted for the protection

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<sup>47</sup> 346 U. S. 485 (1953).

<sup>47a</sup> *Id.* at 490.

of public or private interests, or both it becomes the supreme law of the land and cannot be curtailed, circumvented or extended by a state procedure merely because it will apply some doctrine of private right. To the extent that the private right is in conflict with the public one the former is superceded . . . Of course Congress in enacting such legislation as we have here, can save alternative or supplemental state remedies by express terms or by some clear implication if it sees fit.

We cannot but wonder what might have been conceived to be the meaning of the Ninth and Tenth Amendments to the Constitution which read, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." and, "The powers not delegated to the United States by the Constitution nor prohibited by it to the States are reserved to the States respectively or to the people." Presumably the Court concedes that Congress in its wisdom may place centralized economic control higher in our scale of values than abstract personal or community rights.

In 1895 when Eugene Victor Debs was challenging the authority of the courts to hold him for contempt in the continued violence of the Pullman Strike, Justice Brewer in explaining the authority exercised said:<sup>48</sup>

It is curious to note the fact that in a large proportion of the cases in respect to interstate commerce brought to this court, the question presented was of the validity of state legislation in its bearing upon interstate commerce. If a State with its recognized powers of sovereignty is impotent to obstruct interstate commerce can it be that any mere voluntary association of individuals within the limits of that State has a power which the State itself does not possess?

Today the answer to Justice Brewer's question is not as obvious as at the turn of the century. Confronted with challenging problems in industrial relations the injured party appears to have no alternatives under the present laws other than

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<sup>48</sup> *In re Debs*, 158 U. S. 564 (1895).



acceding to the union demands or passing the responsibility to the executive branch of the Federal Government. Celebrated recent episodes include the steel strike two years ago, the tugboat strike in New York harbor in January 1961 and the tie up of air traffic a month later. The final settlement in the 1959 industry-wide steel dispute was arranged only after the personal intervention of Vice President Nixon. Furious legal battles had ended in the application of the Taft-Hartley injunction after collective bargaining had proceeded fruitlessly for several months. In the settlement wages gained another lap on productivity. The price-profits squeeze became more intense. Markets for structural materials, lost to other producers, stayed lost, and the foreign trade balance remained badly distorted. One year later the tugboat crew dispute<sup>49</sup>, involving merely sixty-two jobs, forced President Kennedy to dispatch his Labor Secretary straight from the Inaugural to devise a deferral of the crucial featherbedding issue; 100,000 commuters to Manhattan had been stranded for a week and the strike, coupled with blizzards, had threatened the great metropolis with gradual starvation. Trains were halted from Cleveland to Providence. Less than a month later all civilian air traffic was shut down and 80,000 employees idled by a wildcat walkout of highly paid flight personnel in a jurisdictional dispute.<sup>50</sup> Again the President found it necessary to intercede and defer the issue by appointing a special *ad hoc* conciliatory body.<sup>51</sup> The dilemma has been created by excluding labor issues from federal courts on the grounds they are *not* commerce and from state courts on the ground of federal preemption under the National Labor Relations Act and the Railway Labor Act,<sup>51a</sup> which are predicated on the *conduct* of commerce!

State "right to work" laws and State Court authority to award tort damages in certain labor cases or injunctions in certain obvious cases of impending or continuing violence are

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<sup>49</sup> For a thrilling blow-by-blow account of this comic-opera type affair involving the employment of one extra deckhand on each of nine ferry boats and fifty-one tugboats, see front page of the *New York Times*, January 20 to January 31, 1961.

<sup>50</sup> See News items in the *New York Times*, February 18, 1961, 1, col. 1.

<sup>51</sup> *Id.* February 24, 1961, 1, col. 8.

<sup>51a</sup> Sec. 6 Clayton Act, 29 U. S. C. § 17.

at best peripheral influences in the industrial relations field.<sup>52</sup> The Sovereign constitutional authority of the State and of its component communities to act in either their own public interest, or on the behalf of injured citizens whose personal rights have been transgressed, has been so frequently countermanded in the field of labor disputes that that main element of order, prestige and sovereign dignity, has been effectively destroyed. Few intelligent persons will waste time attempting to get a local remedy when the odds clearly indicate the remedy will be overruled by exercise of the doctrine of federal preemption.<sup>52a</sup> Thus in the microeconomic sense there is little a community can do in self-defense. Union power is of a larger order than state sovereignty.

#### IV

As to the capacity of employers to exercise effective bargaining power in their relations with union organizations under the present legal ground rules the following extract from a report of the Senate (McClellan) Subcommittee on Labor Management Relations speaks for itself:<sup>53</sup>

When it comes to immunities, business enterprises enjoy none while labor unions enjoy many. The latter are immune from the Federal income tax and similar taxes in a number of the States. Only employers pay the unemployment compensation tax, the railroad unemployment insurance tax, and the payments required under workmen's compensation laws by both Federal and State Governments. Unions are not subject to the Federal antitrust laws and have substantial immunity from the granting of injunctions against them by the Federal courts under the Norris-LaGuardia Act and in some States which have little Norris-LaGuardia Acts.

Among the additional privileges and immunities enjoyed by labor unions are the following:

<sup>52</sup> See Arnold Schlossberg, *Current Trends in Labor Law in Virginia*, 42 VA. L. REV. 691, particularly 701 (1956).

<sup>52a</sup> *Amalgamated Association v. Wisconsin Employment Relations Board*, 340 U. S. 383 (1958); see generally ALBION TAYLOR, *LABOR AND THE SUPREME COURT*, 2nd ed., Brown Brumfield, Ann Arbor, Michigan, 1961, 167-185.

<sup>53</sup> *Legislative History of Labor-Management Reporting and Disclosure Act of 1959*, Vol. I Office of General Counsel, NLRB, 511-512.

(1) The Federal Government in the Taft-Hartley Act specifically guarantees them against interference with their internal affairs, nor are they required to be incorporated under either State or Federal law. Corporations on the other hand owe their existence to State corporation law and their activities are limited to the provisions of their corporate charters which are required to be in conformity with State Law.

(2) Labor unions have immunity against the misconduct of their members who are engaged in union activity as, for example, strikes and picketing. This kind of immunity is not possessed by other types of unincorporated associations.

(3) Labor unions enjoy the right to bargain exclusively for all the employees in the unit, including those employees who are strongly opposed to the union. This can mean, as it often does, that a union selected as the bargaining agent by as few as twenty-five percent of the employees in the unit becomes the bargaining spokesman for all the employees.

(4) Labor unions are not subject to anything similar or equivalent to suits by minority corporate stockholders against their corporations.

(5) Through collective bargaining contracts labor unions may require union membership as a condition of continued employment although employers are forbidden by law to require nonmembership in a union as a condition of employment.

(6) Unions enjoy a right to strike without either the union or its members being penalized therefor. If the strike results from the employer's unfair labor practice, the strikers cannot be replaced. The employer does not have any equivalent right to engage in a lockout, except in two types of situations, both extremely rare and both of minor significance. All other types of lockout are illegal under the Taft-Hartley Act.

(7) The prohibition imposed on unions by the Taft-Hartley Act against restraint and coercion of employees is limited to physical violence, direct economic coercion or to

threats of either of these two types of conduct. On the other hand, the prohibition imposed on employers under the act is against interference as well as restraint and coercion which is forbidden to unions.

(8) When management discriminates against an employee in violation of the Taft-Hartley Act, the Board may issue not only a cease-and-desist order but may require the employer to reinstate such employee and to pay him backpay as well. These remedies are in substance sufficient to take care of most of the unfair labor practices committed by employers and to restore employees to the status they would have enjoyed if the unfair labor practices had not been committed. Unions, on the other hand, even though they may engage in illegal conduct which results in loss of pay for employees, are not required to compensate employees for such loss, except where the union itself was responsible for causing an employer to discriminate. Thus an illegal mass picket line where picketing denies access to the plant to employees who wish to continue to work and which as a result causes such employees to lose pay is not the type of misconduct which the NRLB has required the offending union to remedy by compensating the employees for loss of such pay, but an employer must compensate for loss of pay suffered by locked-out employees.

(9) Unions have the right under certain circumstances to examine an employer's books and records in the course of collective bargaining. The employer has no equivalent right.

(10) Labor unions in many situations have a legal right of access to the employer's property, the right to compel the employer to make his property available for use by the union, and the right to invade the privacy of employees who are not union members and sometimes even against their wishes. Employers enjoy no equivalent or similar rights.

If the public is relying on corporate management to balance union power, it is relying on a badly handicapped champion. Those who wonder what became of the "equal protection" clause in the Constitution must remember that it occurs in the Fourteenth Amendment which applies to the States and not to

the federal government. The more uncharitable might say it was passed to humiliate the South and should not be taken out of context.

## V

We come now to an area in which legal relationships begin to become quite tenuous. This is the area of intra-union and inter-union affairs. It has already been indicated that the union as an entity is much less distinct than the corporation. The union may officially act for many employees who are not members and it may have many members who are not employees of the bargaining units for which it is the official agent. In theory it is a voluntary non-profit unincorporated association and historically it has had great privacy, flexibility and diversity internally. As anyone with any experience in purely voluntary organizations is keenly aware, their records, their financial dealings, their adherence to any purportedly authentic by-laws or constitution leaves much to be desired. Members not part of the controlling group are usually powerless to make their opinions or interests felt in the administrative procedure, particularly if strong-willed or unscrupulous persons have acquired office. It is only natural if members and non-members are both represented by a bargaining agent that the non-members will suffer a comparative disadvantage. Further as Bertrand Russell has pointed out<sup>54</sup> "Love of power is very unevenly distributed. Those who most desire power are the most likely to acquire it. In a social system in which power is open to all, posts which confer power will be occupied by men who differ from the average in being exceptionally power loving." Human inertia makes unions undemocratic.

Understandably the governments both federal and state have been exceeding hesitant to project themselves into internal affairs of unions or any other voluntary associations. A concept of "freedom of association" has been virtually annexed to our Bill of Rights.<sup>55</sup> The First Amendment declares the "right of the people peaceably to assemble and to petition the government for a redress of grievances." The Railway Labor Act

<sup>54</sup> POWER, W. W. Norton Company, New York, 1938, 14-15.

<sup>55</sup> See *U. S. v. Cruikshank*, 92 U. S. 542 (1876) and *Hague v. Committee for Industrial Organization*, 307 U. S. 496 (1939).

states among its purposes the intent "to provide for the complete independence of carriers and of employees in the matter of self organization."<sup>56</sup> The Norris-LaGuardia Act declares in its statement of the public policy of the United States " . . . though (the individual unorganized 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, and that he shall be free from the interference, restraint or coercion of employers of labor . . ." <sup>57</sup> The National Labor Relations Act declares "Employees shall have the right to self-organization, to form, join or assist labor organizations . . . and to engage in other concerted activity . . . for mutual aid or protection."<sup>58</sup>

Clearly at the onset of modern labor legislation there was an intent simply to equate the employees' freedom of action in the forming of associations with the freedom of action of their already highly organized employers. Actually, the employers through the state corporation laws and through special federal regulatory legislation were already extensively regulated as to the form of their internal organization. Though the regulation of business enterprise has grown since by leaps and bounds, the first hesitant steps toward regulation of the internal affairs of labor by the Federal government were taken in the Labor-Management Disclosure and Reporting (Landrum-Griffin) Act of 1959.

The events leading to the passage of this Act were authoritatively summarized in the Final Report of the Select Committee on Improper Activities in the Labor or Management Field, U. S. Senate 1960, popularly known as the report of the McClellan Committee. The activities of this committee were a springboard for several important statesmen, including Senator John Fitzgerald Kennedy, his brother Chief Counsel Robert F. Kennedy, and Senator Barry Goldwater. The disclosures of the Committee centered around corruption in labor's officialdom, particularly the underworld typified at the infamous Appalachin conference muscling into legitimate business in

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<sup>56</sup> 45 U. S. C. § 153.

<sup>57</sup> 29 U. S. C. § 102.

<sup>58</sup> *Id.* § 157.

the guise of organized labor; the collusion and bribery by which employers and labor officials exploited workers notably in the Chicago area; the coercive activities of the Teamsters Union to destroy small enterprises, envelop unwilling employees, and misuse the vast financial resources of the unions and the large scale employment of coercion, open and covert, by the United Auto Workers in the Kohler strike in Wisconsin and in the Perfect Circle strike in Indiana.

The resultant legislation was a compromise which neither of the major protagonists, the labor and management lobbies, were happy about. Primarily the enactment sought to ensure a modicum of democracy in the unions. The method of accomplishing this objective was to promulgate for every union which sought, directly or indirectly, to function as a bargaining agent under the National Labor Relations Act a set of minimum requirements as to: (a) the rights of its members to express ideas at variance with those of the union hierarchy;<sup>59</sup> (b) the reasonable control and publication of financial decisions and dealings of union officials;<sup>60</sup> (c) the conduct and frequency of elections;<sup>61</sup> (d) the private enforcement of members' rights in federal and state courts;<sup>62</sup> (e) the limitations of the trusteeship concept whereby national unions arbitrarily exercise control of the funds, voting power and operations of local unions;<sup>63</sup> (f) the screening and bonding of union officials with fiduciary responsibilities;<sup>64</sup> (g) the more specific prohibition of collusive practices between dishonest employers and labor officials;<sup>65</sup> (h) and by means of amendments to earlier legislation the distinct assurance that some judicial or quasi-judicial forum would be authorized to accept jurisdiction of each labor dispute.<sup>66</sup>

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<sup>59</sup> 73 Stat. 519, § 101 (a) (1) and (2).

<sup>60</sup> *Id.* § 201.

<sup>61</sup> *Id.* § 401.

<sup>62</sup> *Id.* §§ 102 and 103.

<sup>63</sup> *Id.* §§ 301-305.

<sup>64</sup> *Id.* §§ 501-504.

<sup>65</sup> *Id.* §§ 202 and 203, and § 302 Labor Management Relations Act.

<sup>66</sup> § 14(c) (1) and (2), National Labor Relations Act, 29 U. S. C. § 164(c) (1) and (2).

This legislation has not as yet been sufficiently digested by the judicial system to appraise its effectiveness. It marks a distinct retreat from the blanket immunity which unions enjoyed from internal regulation and the injunctive process. The authority of state courts as well as of federal courts is partially reasserted.<sup>67</sup> The administration of protective ground rules similar to those which states employ in regulating the internal affairs of corporations has been allocated to the Federal Department of Labor for all formally constituted labor organizations.<sup>68</sup> Many aspects of the law appear to require further clarification and particularization but the primary theme appears to be further preemption by the federal government and greater centralization of authority, particularly in the Secretary of Labor, now an immensely powerful post.

## VI

From this analysis of the legal status of union power, successively from the aspects of macroeconomics and microeconomics, from the viewpoint of the management and of the wage earner it should be evident that although the climate of the laws of employment has varied considerably over the last thirty years, the basic pattern has remained the same. The inviting mirage of countervailing economic power led us on and on into centralization of labor, of industry and of government. But centralization has brought its own fearsome train of undesired side-effects. Democracy is no more sure in a national union than in a huge corporation. Government is not more benign because it is larger. Freedom in the sense of diversity of choice of employment for the worker and of economic alternatives for management has become substantially less. For the lobbyists and the propagandists the task has been made much simpler, for the responsibilities have been transferred to fewer and more pliable hands, further removed from public view. The relationship of cause and effect, and of incentive and impetus has been increasingly beclouded. In a figurative sense the embrace of our society by the long arms of George Orwell's Big Brother has become a tight bear hug.<sup>69</sup>

<sup>67</sup> Labor Management Reporting and Disclosure Act, §§ 102, 603, 609, 610.

<sup>68</sup> *Id.* §§ 607, 610.

<sup>69</sup> GEORGE ORWELL, NINETEEN EIGHTY-FOUR, Harcourt Brace & Company, New York, 1949.



Economics is the science of allocation of goods and resources to meet the requirements of a given society or economic unit. The economy of our society is necessarily based on free enterprise rather than state socialism, because the principles of free enterprise are intimately interwoven with the concept of political liberty. The free market is one which anyone so desiring is at liberty to enter as a buyer or a seller, be it services or commodities. Such a market must be governed by the natural laws of economics rather than the artificial restraints of politics. But the pretense of open competition is patently false when the allocation of the most vital element in the economy, employment or labor, depending on your perspective, is largely controlled by a privileged monopoly or cartel. With competition hobbled it becomes impossible to achieve a satisfactory allocation of goods and resources unless there is put into effect some comprehensive plan of arbitrary distribution, the political routine of ever greater taxing and spending, which becomes finally expropriation and redistribution. Wittingly or unwittingly the sector of our national economy governed by arbitrary political expropriation and redistribution is now steadily eclipsing the once open market governed by competitive principles.

Our post-war administrations have been forced to accelerate the pace of expansion of governmental responsibility at the federal level because of the severe artificial restrictions in the mobility of labor and in the freedom of action allowed employers under our employment statutes. The net effect of our labor monopolies is that workers are unable to move freely into the highly compensated fields where demand exceeds supply and industry has been increasingly inhibited from moving into areas where labor is in ample supply and living costs are low.

To illustrate, if carpenters and pipefitters were paid up to \$600 per week at missile sites it was because of the throttle-hold of union monopoly on such services. Thousands of patriotic workers, ready, willing and able to furnish equivalent services for more reasonable wages obviously were artificially restricted from competing. Meantime the Federal government as customer, made the sky the limit by giving *carte blanche* to contractors to pay, on a cost reimbursement basis, whatever was necessary to get the job done under such handicaps.

We can no more blame the unions for getting the best they can for their members than we can blame the auctioneer who gets the best price he can for his seller and so sells to the highest bidder. We can only blame ourselves for our negligence in letting the market be so easily rigged against the public interest. As they say in the Law, he who sleeps on his rights has no complaint. The logical economic correction is to rescind the special privileges of the monopolists, but the probable political correction will be another commission, division or bureau which will employ an assorted collection of experts in labor relations, statistics, economics, data processing, program planning, etc. These honorable servants will make a whale of a project out of their undertaking. Later, as the dust of confusion rises and as the access to the elementary facts becomes utterly impenetrable, some practical determinations will be made and a compromise will be reached whereby a basic wage of \$450 a week will be established plus \$150 in fringe benefits. In return the union hierarchy will probably agree not to publicly oppose the administration's program. Such is the standard operating procedure for any good self-maintaining bureaucracy. The easy answer is simply to leave things as they are so long as an electorate comprised of the progeny of Barnum's customers are gullible enough to keep on paying the bills.