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J. T. Cutler

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UNION SECURITY AND RIGHT-TO-WORK LAWS: IS CO-EXISTENCE POSSIBLE?

J. T. CUTLER

THE UNION STRUGGLE

At the beginning of the 20th Century management was all powerful and with the decision in *Adair v. United States*¹ it seemed as though Congress was helpless to regulate labor relations. The Supreme Court had held that the power to regulate commerce could not be applied to the labor field because of the conflict with fundamental rights secured by the Fifth Amendment. Moreover, an employer could require a person to agree not to join a union as a condition of his employment and any legislative interference with such an agreement would be an arbitrary and unjustifiable infringement of the liberty of contract.

It was not until the first World War that the federal government successfully entered the field of industrial relations with the creation by President Wilson of the War Labor Board. Upon being organized the Board adopted a policy forbidding employer interference with the right of employees to organize and bargain collectively and employer discrimination against employees engaging in lawful union activities².

The next stage of federal entry into the struggle between union and management came with the enactment of the Railway Labor Act of 1926³ which provided for collective bargaining and allowed an injunction against a railroad that interferes with its employees' right of self-organization. A change in judicial thinking concerning the propriety of government action in the labor field was evidenced by a Supreme Court which

¹ 208 U.S. 161 (1908).

² Note, 5 Law & Contemp. Prob. 175, 177 (1938).

³ 44 Stat. 577 (1926).

upheld the Act declaring: "We entertain no doubt of the constitutional authority of Congress to enact the prohibition⁴."

The tide began to run strongly in favor of the unions with the passage of the Norris-LaGuardia Act⁵ in 1932 which provided that contracts in which employees agreed not to join a labor union could not be enforced in the federal courts. This act was also commonly known as the anti-injunction act since its key provision prohibited a federal court from issuing an injunction in a case involving or growing out of a labor dispute.

The growing political power of labor meshed with the era of the New Deal and the unemployment problems of the depression-ridden thirties brought about the enactment of the National Labor Relations Act⁶ or the Wagner Act in 1935. This legislation was a tremendous boost for the unions, providing security in the form of the closed shop and the union shop⁷ and setting out the unfair labor practices of management. The Act was promptly challenged and declared unconstitutional in several lower courts, setting the stage for the crucial test in the classic case of *National Labor Relations Board v. Jones & Laughlin Steel Corporation*⁸. By the same slim majority of five to four which arose during the dramatic days of the court packing plan to reverse the constitutional doctrines blocking the New Deal program, the Supreme Court upheld the Na-

⁴ Texas and New Orleans Railroad Company v. Brotherhood of Railway and Steamship Clerks, 281 U.S. 548, 570 (1930).

⁵ 47 Stat. 70 (1932).

⁶ 49 Stat. 449 (1935).

⁷ A union shop is one in which the employee may be hired without first joining the union, but it requires him to join and continue his membership in the union after he is hired. The closed shop is one in which the employee must join the union prior to becoming employed. Section 8(a)(3) of the Labor-Management Relations Act makes it mandatory for the employee to join the union within thirty days should the union have a security contract with the employer incorporating the union shop agreement. The closed shop is unlawful under the Labor-Management Relations Act. See also, S.Rep. No. 573, 74th Cong., 1st Sess. 16 (1935) and Stone, *Trade Unionism In A Free Enterprise Society*, 14 U.Chi.-L.Rev. 339, 403 (1947).

⁸ 301 U.S. 1 (1937), 25 Calif. L.Rev. 593 (1937), 32 Ill. L.Rev. 196 (1937), 23 Va. L.Rev. 946 (1938).

tional Labor Relations Act. Speaking out for the majority, Chief Justice Hughes gave legal recognition to the place which the worker and his union already occupied in economic reality, and had no difficulty holding that:

The statute goes no further than to safeguard the right of employees to self-organization and to select representatives of their own choosing for collective bargaining or other mutual protection without restraint or coercion by their employer.

That is a fundamental right. Employees have as clear a right to organize and select their representatives for lawful purposes as the respondent has to organize its business and select its own officers and agents. Discrimination and coercion to prevent the free exercise of the right of employees to self-organization and representation is a proper subject for condemnation by competent legislative authority⁹.

Thus ended the long struggle for survival. Firmly secured by the provisions of the Wagner Act compelling the employer to bargain with the union chosen by the employees¹⁰ and further strengthened by the union shop, closed shop, and maintenance-of-membership¹¹ clauses in the collective bargaining agreements, the unions began to assume the dominant role.

For twelve years the unions strengthened their hold on labor-management relations until the inevitable reaction occurred in 1947 with the passage of the Labor-Management Relations Act¹² commonly known as the Taft-Hartley Act. The Taft-Hartley Act partially restored the balance of power between labor and management by providing that unions, as well

⁹ *Id.* at 33.

¹⁰ 49 Stat. 452 (1947).

¹¹ Maintenance-of-membership provisions do not necessarily mean that all employees must be union members but they do require employees who are members to maintain their membership in good standing.

¹² 61 Stat. 136 (1947).

as employers, could be charged with unfair labor practices¹³. Further, the Taft-Hartley Act made the closed shop unlawful¹⁴, permitting however, the union shop where it was not prohibited by state law. Thus the states could enact anti-union shop legislation or right-to-work laws and a man could work without ever being compelled to join a union. Such a provision, argued the unions, would be a death-blow to organized labor. The proponents of the measure, however, feel that the right to choose whether or not to join a union is a fundamental freedom which every worker in a democratic society should enjoy.

Section 14(B) of the Taft-Hartley Act which provides the legal sanction for the right-to-work law is still the subject of wide controversy. The following discussion is offered as an attempt to examine the issues underlying this controversy from a practical and legal standpoint.

SURVEY OF THE STATES ENACTING RIGHT-TO-WORK LAWS

The right-to-work law permits the employee to exercise a right to either join or refrain from joining a union¹⁵. It pro-

¹³ 61 Stat. 140 (1947).

¹⁴ Cases declaring the closed shop agreements illegal and making the contract per se illegal are: Charles E. Hires Co., 85 N.L.R.B. 1208 (1949); Jandel Furs, 100 N.L.R.B. 1390 (1952); Monolith Portland Cement Co., 94 N.L.R.B. 1358 (1951); and Port Chester Electrical Constr. Co., 97 N.L.R.B. 354 (1951). Union security provisions containing the traditional closed-shop requirement were struck down in the following cases: McCloskey & Co., 116 N.L.R.B. (No. 142) (1956); Plumbers' Pipefitters, Local 231, 115 N.L.R.B. 594 (1956); Daugherty Co., 112 N.L.R.B. 986 (1955); Goren, d.b.a. City Window Cleaning Co., 114 N.L.R.B. 906 (1955); C. A. Batson Co., 108 N.L.R.B. 1337 (1954); Hager & Sons Hinge Mfg. Co., 80 N.L.R.B. 163 (1948); Wm. W. Kimmins & Sons, 92 N.L.R.B. 98 (1950).

¹⁵ A typical statute, such as that found in Va. Code, § 40-68 through § 40-74 (1950), is as follows: ¶ § 40-68. Policy of article.—It is hereby declared to be the public policy of Virginia that the right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union or labor organization. ¶ § 40-69. Agreements or combinations declared unlawful.—Any agreement or combination between any employer and any labor union or labor organization whereby persons not members of such union or organization shall be denied the right to work for the employer, or wherever such

vides a freedom of choice not present where the union shop is allowed.

A survey of the laws of the various states indicates that twenty states have enacted right-to-work laws. The enactment of such laws began in 1944 when Florida and Arkansas amended their Constitutions. This was emulated by Nebraska in 1947, and Arizona in 1948.

As distinguished from constitutional amendments the State of South Dakota enacted a right-to-work law in 1945 and this method was followed in 1947 by Georgia, Iowa, North Carolina, Tennessee, Texas, and Virginia.

Following the adoption of the Taft-Hartley Act and the sanctions expressed in section 14(b) by Congress the following states enacted right-to-work laws: North Dakota in 1948; Nevada in 1952; Alabama in 1953; Mississippi, South Carolina, and Louisiana in 1954 (the latter State repealed its law

membership is made a condition of employment or continuation of employment by such employer, or whereby any such union or organization acquires an employment monopoly in any enterprise, is hereby declared to be against public policy and an illegal combination or conspiracy. ¶ § 40-70. Employers not to require employees to become or remain members of union.—No person shall be required by an employer to become or remain a member of any labor union or labor organization as a condition of employment or continuation of employment by such employer. ¶ § 40-71. Employers not to require abstention from membership in union.—No person shall be required by an employer to abstain or refrain from membership in any labor union or labor organization as a condition of employment or continuation of employment. ¶ § 40-72. Employer not to require payment of union dues, etc.—No employer shall require any person, as a condition of employment or continuation of employment, to pay any dues, fees or other charges of any kind to any labor union or labor organization. ¶ § 40-73. Recovery by individual unlawfully denied employment.—Any person who may be denied employment or be deprived of continuation of his employment in violation of §§ 40-70, 40-71 or 40-72 or of one or more of such sections, shall be entitled to recover from such employer and from any other person, firm, corporation or association acting in concert with him by appropriate action in the courts of this Commonwealth such damages as he may have sustained by reason of such denial or deprivation of employment. ¶ § 40-74. Application of article to contracts.—The provisions of this article shall not apply to any lawful contract in force on April thirtieth, nineteen hundred and forty-seven, but they shall apply in all respects to contracts entered into thereafter and to any renewal or extension of an existing contract.

in 1956 and re-enacted it in the same year limiting it to agricultural workers); Utah in 1955; Indiana in 1957; and in 1958 Kansas became the twentieth State to enact such a law.

Mississippi¹⁶, North Carolina¹⁷, South Carolina¹⁸, Utah¹⁹, Virginia²⁰, and Alabama²¹, all have virtually the same right-to-work law. All of these States make unlawful agreements that require union membership as a condition of employment, and in addition they: 1) outlaw payment of "dues, fees, or other charges of any kind" to a labor union as a condition of employment; 2) make "any agreement or combination between any employer and any labor union" whereby union membership is a condition to employment "an illegal combination or conspiracy"; and 3) allow recovery of damages by persons deprived of employment by reason of non-membership in a union or the non-payment of dues to a union.

Louisiana²² has similar provisions, except that it applies only to agricultural workers. Louisiana, Utah, and Virginia have a further provision that prohibits picketing and other conduct "the purpose or effect of which is to cause, force, persuade or induce any other person . . . to violate any provisions of this Act . . ." Except as to this additional provision giving the State power to prevent anyone from interfering with the purpose of the law, the Arizona²³ and Nevada²⁴ statutes are similar to the Virginia statute. Arizona and Nevada do not, however, have an express provision prohibiting the payment of dues, fees and other charges; and they declare illegal not only conspiracies

¹⁶ Miss. Code Ann. § 6984.5 (Supp. 1956).

¹⁷ N.C. Code §§ 95-78 to 95-84 (1949).

¹⁸ S.C. Code §§ 40-46 to 40-46.11 (1956).

¹⁹ Utah Code Ann. §§ 34-16-1 to 34-16-18 (Supp. 1955).

²⁰ Va. Code Ann. §§ 40-68 to 40-74 (1950).

²¹ 26 Ala. Code § 325 (1955).

²² La. Act. No. 397 at p. 776 (1956).

²³ Ariz. Rev. Stat. Ann. §§ 23-1301 to 23-1307 (1956).

²⁴ Nev. Rev. Stat. c. 613.230-300 (1955).

between employer and union but the union and its members as well.

Arkansas²⁵, Georgia²⁶, Iowa²⁷, and Tennessee²⁸, agree on prohibiting compulsory payment of union dues or other monetary consideration and denying compulsory union membership.

Nebraska²⁹, North Dakota³⁰, South Dakota³¹, and Texas³² do not contain the extensive procedural provisions and limitations found in most States.

The latest States to pass right-to-work laws are Indiana³³, and Kansas³⁴. The former is the most industrialized State to pass such a law; the latter became the sixth State to enact the law by constitutional amendment³⁵. The Kansas Constitutional Amendment nullified existing union security clauses except those negotiated under the Railway Labor Act.

It has been noted above that three States expressly provide that picketing may be prohibited when it is done in regard to the right-to-work law. The United States Supreme Court upheld this anti-picketing provision in Virginia's right-to-work law in *Local Union No. 10 v. Graham*³⁶. A Virginia trial court had

²⁵ Ark. Stat. Ann. §§ 81-202 to 81-206 (1947).

²⁶ Ga. Code Ann. §§ 54-901 to 54-908 (Supp. 1955).

²⁷ Iowa Code Ann. §§ 736 A.1 to -.8 (1950).

²⁸ Tenn. Code Ann. §§ 50-208 to 50-212 (1955).

²⁹ Neb. Rev. Stat. §§ 48-217 to 48-219 (1952).

³⁰ N.D. Rev. Code §§ 34-0114 (Supp. 1949).

³¹ S.D. Code §§ 17.1101, 17.9914 (Supp. 1952).

³² Tex. Rev. Civ. Stat. Art. 5207(a) (1947).

³³ CCH Lab. L.Rep. Vol. 4, par. 41,025, Indiana (1959).

³⁴ Kan. Const. amend. art. 15, § 12 (1958).

³⁵ Kan. Const. amend. art. 15, § 12 (1958).

³⁶ 345 U.S. 192 (1953). Cf., *Edwards v. Virginia*, 191 Va. 272, 60 S.E.2d 916 (1950); *Finney v. Hawkins*, 189 Va. 878, 54 S.E.2d 872 (1949); *Electrical Workers v. Labor Board*, 341 U.S. 694, 705 (1951); *Building Service Union v. Gazzam*, 339 U.S. 532 (1950); *Teamsters Union v.*

enjoined peaceful picketing that was aimed at pressuring contractors to hire only union men. The Supreme Court state the injunction did not violate the Fourteenth Amendment; and furthermore, that section 14(b) of the Taft-Hartley Act recognizes the validity of such State legislation.

A recent Kansas decision³⁷ has upheld a prohibition on picketing based on that State's right-to-work law despite the lack of a specific anti-picketing provision as is found in the Virginia, Utah and Louisiana statutes. The case presented a fact situation strikingly similar to the *Graham*³⁸ case.

Non-union workmen were employed on a construction job along with union workers. In an effort to organize the non-union workers a construction union placed a solitary picket at the job site with a placard which carried an invitation to join the local union. The union workers refused to cross this "picket line" and as a result the non-union workers were laid off since the absence of the union laborers halted all work on the project.

Although the Kansas Supreme Court determined that this picketing was solely for an organizational purpose its effect was to deprive the non-union workers of their employment and was therefore prohibited under the Kansas laws providing:

It shall be unlawful for any person . . . to coerce or intimidate any employee in the enjoyment of his legal rights, including those guaranteed in . . . [the right-to-work law] . . .³⁹

Hanke, 339 U.S. 470 (1950); *Hughes v. Superior Court*, 339 U.S. 460 (1950); *Giboney v. Empire Storage Co.*, 336 U.S. 490 (1949); *Thomas v. Collins*, 323 U.S. 516, 537-38 and 543-44 (concurring opinion) (1945); *Bakery Drivers Local v. Wohl*, 315 U.S. 769, 776-777 (concurring opinion) (1942); *Carpenters Union v. Ritter's Cafe*, 315 U.S. 722 (1942); *Carlson v. California*, 310 U.S. 106 (1940); *Thornhill v. Alabama*, 310 U.S. 88, 103-104 (1940); *Senn v. Tile Layers Union*, 301 U.S. 468, 479-481 (1937). See also, Rose, *Labor Management Relations Act & the States' Power to Grant Relief*, 39 Va.L.Rev. 765 (1953).

³⁷ *Binder v. Construction & General Laborers Local Union*, 181 Kan. 799, 317 P.2d 371 (1957).

³⁸ *Local Union No. 10 v. Graham*, 345 U.S. 192 (1953).

³⁹ Kan. G.S. 1955 Supp. 44-809.

Thus the picketing was enjoined without the benefit of any specific anti-picketing provision.

A third case, *International Brotherhood of Teamsters, A.F.L. v. Vogt, Inc.*⁴⁰ enjoined picketing which attempted to coerce and intimidate an employer into pressuring his employees to join the union. This case is an interesting comparison with the *Graham*⁴¹ and *Kansas*⁴² decisions since it arose in Wisconsin which does not have a right-to-work law. Nevertheless, the Wisconsin Supreme Court found that the picketing violated the public policy of the State as established in the Wisconsin Employment Peace Act and was therefore subject to a restraining injunction.

The United States Supreme Court affirmed the injunction of the Wisconsin Court in an important decision formulating the current policy for state regulation in this area⁴³. In an opinion which extensively reviews the cases which have developed the law on this subject, the Court seems to be bearing away from the broad protection which it formerly gave picketing under the First Amendment, toward a policy which will give the states a much wider discretion to make their own determination of when picketing is a violation of state law.

Thus picketing has been successfully enjoined under an anti-picketing provision of a state right-to-work law, under a state right-to-work law not having an anti-picketing provision, and as merely violative of state public policy.

Unfortunately, something of a cloud still remains on the status of the law in this area due to a Supreme Court decision⁴⁴ just 21 days prior to the *Vogt*⁴⁵ case, in which the Court

⁴⁰ 270 Wis. 315, 74 N.W.2d 749 (1956).

⁴¹ *Supra*, note 38.

⁴² *Supra*, note 37.

⁴³ *International Brotherhood of Teamsters, A.F.L. v. Vogt, Inc.*, 354 U.S. 284 (1957).

⁴⁴ *Board of Elec. Workers v. Farnsworth & Chambers Co.*, 353 U.S. 969 (1957)

⁴⁵ *Supra*, note 43.

granted certiorari only to say that it reversed a Tennessee Supreme Court decision affirming an injunction against picketing found violative of that state's right-to-work law. Without a more complete explanation the significance of this case can only be the subject of speculation. One commentary⁴⁶ has suggested that the picketing activity enjoined by the Tennessee Court was either prohibited or protected by the Taft-Hartley Act and thus the doctrine of federal preemption deprived the state of jurisdiction. Another possibility is that *Vogt* is limited in application to purely intrastate situations, however, the lack of any mention in the decision of a commerce factor seems to preclude this interpretation.

The thoroughness of the *Vogt*⁴⁷ opinion and the fact that it is the later decision, although only by a few days, would seem to place it in a secured position as being the best indication of the Supreme Court's stand in this area.

THE CONSTITUTIONALITY OF THE RIGHT-TO-WORK LAWS

The basic constitutionality of the right-to-work laws was established in two leading cases decided in 1948. In the first decision⁴⁸, which consolidated two cases concerning the right-to-work laws of Nebraska and North Carolina, the statutes were challenged as violating free speech, impairing the obligation of contracts, depriving unions and members of equal protection of the laws, and constituting a deprivation of due process. The Supreme Court gave varying degrees of consideration to each of these contentions and upheld the validity of the right-to-work provision in both states. As to the question of free speech the court said: "Nothing in the language of the laws indicates a purpose to prohibit speech, assembly, or petition"⁴⁹.

⁴⁶ See, Mamet, *Free Speech and Right to Work*, 52 Nw.U.L.Rev. 143 at 168, 171 (1958).

⁴⁷ *Supra*, note 45.

⁴⁸ *Lincoln Federal Union et. al. v. Northwestern Iron and Metal Co. et. al.*, 335 U.S. 525 (1949).

⁴⁹ *Id.* at 530.

The Court dismissed the question of impairing the obligation of contracts by saying: "That contention is without merit and is now too clearly established to require discussion⁵⁰." Rejecting the argument that right-to-work laws destroy equal protection of the laws, the court said:

Because the outlawed contracts are a useful incentive to the growth of union membership, it is said that these laws weaken the bargaining power of the unions and correspondingly strengthen the power of employers. This may be true, but there are other matters to be considered. The state laws also make it impossible for an employer to make contracts with company unions which obligate the employer to refuse jobs to union members. In this respect, these state laws protect the employment opportunities of members of independent unions⁵¹.

On the following day the Supreme Court rendered its second decision upholding Arizona's right-to-work law⁵². The Court felt that the difference in wording of the Arizona provision compared with the Nebraska and North Carolina provisions justified a separate opinion. The language of the Arizona provision prohibited employment discrimination against non-union workers but did not provide the same protection for union workers. It was argued that such a provision discriminated against union members and denied them equal protection of the laws.

The Court's answer to this argument was that there were other Arizona laws which afforded protection to union members, pointing specifically to a statute making it a misdemeanor to coerce an employee to sign a non-union agreement. It is not necessary that the same provision protecting non-union workers also protect union members. The most effective statutory scheme for striking at labor discrimination is a matter for

⁵⁰ *Id.* at 531.

⁵¹ *Id.* at 532.

⁵² *A.F.L. v. American Sash and Door Co.*, 335 U.S. 538 (1949).

legislative judgment which had in fact been exercised in Arizona and there was no denial of equal protection of the laws.

THE RIGHT-TO-WORK LAW UNDER THE RAILWAY LABOR ACT: THE HANSON CASE

Congress amended the Railway Labor Act in 1951⁵³ to provide that union-shop provisions in collective bargaining agreements between railroads and their employees would be upheld irrespective of state law. Thus, state right-to-work laws were no longer of any consequence to the railroad industry.

This amendment was challenged in the leading case of *Railway Employees' Department, A.F.L. v. Hanson*⁵⁴, on the grounds that it violated the First and Fifth Amendments by depriving employees of their freedom of association and forcing them to pay for many things besides the cost of collective bargaining. The Court rejected these contentions in an opinion which stressed the power of Congress, under the commerce clause, to enact such legislation. However, the Court was extremely cautious to limit the scope of their decision in regard to the First Amendment and it carefully noted that:

Congress endeavored to safeguard against . . . [the] . . . possibility . . . [of compulsory membership impairing freedom of expression] . . . by making explicit that no condition to membership may be imposed except as respects 'periodic' dues, initiation fees, and assessments⁵⁵.

The Court further stated expressly that its ruling on the First Amendment was not to prejudice any case beyond the narrow bounds of *Hanson*.

This qualification indicated that if conditions in the collective bargaining agreement were only a front for the enforcement of

⁵³ 64 Stat. 1238 (1951).

⁵⁴ 351 U.S. 225 (1956).

⁵⁵ *Id.* at 238.

ideological conformity, then the protection afforded by the First Amendment would compel a different result. Acting on this interpretation of *Hanson*, the Georgia Supreme Court has recently held that an allegation that dues and other payments required of union members would be used to support ideological and political doctrines and candidates which plaintiffs were unwilling to support and in which they did not believe was sufficient basis for an injunction against the enforcement of a union shop agreement⁵⁶. In view of the notorious political expenditures made by labor unions the theory of this case, if followed, could have an enormous effect on the enforceability of union shop clauses—not only under the Railway Labor Act—but also in states which do not have right-to-work laws.

THE PRO AND CON OF RIGHT-TO-WORK LAWS: A PROPOSAL

At one time the courts held it was constitutional for an employer to make an employee sign a non-union contract, commonly known as a "yellow-dog contract"⁵⁷. Now the majority of courts, except for those found in the right-to-work states, say the union may compel the employee to join the union or lose his job⁵⁸; and the unions, of course, frequently have a union shop provision incorporated into their collective bargaining agreements. Between these extremes there ought to be a middle ground. Do not the right-to-work laws provide the solution?

On behalf of the unions, it is contended that the strength of a union, like any organization, depends on the number of its members and therefore the union shop is necessary as a means of providing union security. But this argument fails in light of the common knowledge that unions are no longer in their infancy. The need for union security through sheer numerical force is not as great today as it was when

⁵⁶ *Looper v. Georgia Southern & Florida Ry. Co.*, 213 Ga. 279, 99 S.E.2d 101 (1957).

⁵⁷ *Adair v. United States*, 208 U.S. 161 (1908).

⁵⁸ See, *Radio Officers' Union v. N.L.R.B.*, 347 U.S. 17 (1954).

the injunction was used to suppress union growth before the enactment of the Norris-LaGuardia and Taft-Hartley Acts. Furthermore, this argument presupposes that members will desert the union in vast numbers upon the enactment of a right-to-work law. Such a disaster seems hardly likely to befall those unions who are truly providing their members with the proper benefits of union membership.

A far more serious contention made by unions in opposition to the right-to-work law is that those who are allowed to remain outside the union and yet work alongside union members are "free riders". A "free rider" is one who receives the benefits of union representation but does not contribute his fair share to the support of the union by becoming a member.

The United States Supreme Court upheld the union's concept of the "free rider" in a 1954 decision which said:

. . . legislative history [of the Taft-Hartley Act] clearly indicates that Congress intended to prevent utilization of union security agreements for any purpose other than to compel payment of union dues and fees. Thus, Congress recognized the validity of unions' concern about "free riders," . . . Thus an employer can discharge an employee for non-membership in a union security contract valid under the Act with such union, and if the other requirements of the proviso are met⁵⁹.

But was it within Congressional intent, as endorsed by the Court, that union dues and fees would be used for anything more than the costs of collective bargaining? Unions are engaged in the insurance business, maintain welfare funds⁶⁰, and are highly active in political affairs⁶¹ which hardly seem connected with collective bargaining.

⁵⁹ *Id.* at 41.

⁶⁰ Hearings Before Committee on Interstate and Foreign Commerce on H.R. 7789, 81st Cong. 2d Sess., 42 (1950).

⁶¹ See, Editorial Board's Comments, *Regulation of Labor's Political Contributions & Expenditures: The British and American Experience*, 19 U.Chi.-L.Rev. 371 (1951); and Ruark, *Labor's Political Spending and Free Speech*, 53 Nw. U.L.Rev. 61 (1958).

The realization that payment of dues covers more than the costs of collective bargaining seems to put the "free rider" argument in a different light. The Georgia Supreme Court, in the case previously discussed, has provided one example of judicial response to this situation in refusing to enforce compulsory unionism where it was alleged that payments would be used to support certain ideological and political views⁶².

The contrary position was presented by the California Supreme Court in *De Mille v. American Federation of Radio Artists*⁶³ in which the petitioner faced expulsion from the union because he refused to pay a one dollar assessment which was to help finance opposition to a proposed right-to-work law. Although the petitioner favored the proposed law the Court held that his First Amendment rights were not violated since his individual interest in union funds was terminated upon payment to the union. Furthermore the Court felt that the use of the union funds for political purposes is only to be interpreted as an expression of the majority of the members and is not at all indicative of the personal opinion of any one individual member.

This reasoning, however, begs the question of whether the payment could be properly required in the first place. Because one side is put in power by a majority vote should not mean that the minority is compelled to join that side and help finance its campaign for further power. The freedom of choice is a fundamental and underlying concept of a democratic society. Compulsory support of a particular ideology would mean the end of that freedom. Rule by the majority should mean the preservation of minority rights and minority opposition.

It is interesting to consider the restrictive barriers of the union shop in the light of a reference to the United Nations Charter by Mr. Justice Black in his concurring opinion in *Oyama v. California*⁶⁴:

⁶² *Supra*, note 56.

⁶³ 31 Cal.2d 139, 187 P.2d 769 (1947).

⁶⁴ 332 U.S. 633 (1948).

. . . [the alien] law stands as an obstacle to the free accomplishment of our policy in the international field. One of these reasons is that we have recently pledged ourselves to cooperate with the United Nations to 'promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all . . .' How can this nation be faithful to this international pledge if state laws which bar land ownership and occupancy by aliens on account of race are permitted to be enforced . . .⁶⁵

A similar point could be made opposing the union shop since the United Nations, in its Universal Declaration of Human Rights recognizes the right of everyone to work. It expressly states:

- 1) Everyone has the right to freedom of peaceful assembly and association.
- 2) No one may be compelled to belong to an association.
- 3) Everyone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment⁶⁶.

While international events, since this mention by the Supreme Court of our obligations under the United Nations Charter, have focused attention on the maintenance of separate national concepts rather than the blending of philosophies among nations, this conflict serves to point up a more realistic and practical inconsistency within the Taft-Hartley Act itself.

Under the Act it is provided that an employee cannot be restrained or coerced into joining a union⁶⁷. Yet the Act allows the union shop, which in itself is coercion in its most compelling form. Thus the Act, in effect, says that no one

⁶⁵ *Id.* at 649.

⁶⁶ Decl. of Human Rights, Art. 22, Act 22, § 1, United Nations.

⁶⁷ 61 Stat. 140 (1957).

shall be coerced into joining a union, however if he is going to work in over half the States he must become a member because the union shop is lawful. The result of this is a rule with a built-in exception which is broader than the rule itself.

Another problem arising from the Taft-Hartley Act and bearing on the question of whether or not the individual worker should be free to choose to join a union concerns the election at which employees choose a union to represent them. The Act only requires a majority of the employees to decide on the union which is to be their bargaining agent⁶⁸.

The Act further provides that no election need be held in order for the union to enter into a union shop agreement unless thirty percent voice an objection to such an agreement⁶⁹.

Admittedly there are those who desire the union to represent them but do not agree with the union shop concept. Moreover, they do not desire to be compelled to remain in a union as requisite to their continuing to hold their jobs. To consider an extreme example, assume that there are one hundred employees working for a company and of this one hundred, fifty-one desire that a particular union represent them. Out of this fifty-one there are fifteen who do not want a union shop, but are in favor of a union so long as it is a voluntary union. An election is held under the provisions of the National Labor Relations Act in accordance with the law and the union is voted upon and elected to represent the employees. The forty-nine employees opposing the union find a job elsewhere. Of the fifty-one left the fifteen opposed to a union shop voice their objection only to find that they do not satisfy the thirty percent requirement. Is this not a result of thirty-six out of one hundred employees deciding to have a union shop provision? Further, would it not be arguable that the union would not have been sanctioned by the majority of the employees had the union shop question been considered when the union itself was considered? If the union-shop is

⁶⁸ *Ibid.*

⁶⁹ 61 Stat. 143 (1957).

going to continue as a part of the law, why cannot the vote on the union and union-shop be considered simultaneously in order to give all employees an opportunity to express their opinion on compulsory unionism from the outset? As noted previously the Taft-Hartley Act requires only a majority of the employees to decide whether or not they will become unionized. What is the magic to the concept of the majority when by definition it need be only one more than half?

Also, as noted above, the Taft-Hartley Act requires no election to incorporate a union-shop agreement into a collective bargaining contract; except when thirty percent of the workers object and then a secret ballot is required. In contrast the State of Wisconsin requires that two-thirds of the membership agree before a union-shop provision becomes a part of their collective bargaining agreement⁷⁰ and Hawaii⁷¹ and Colorado⁷² require a three-fourths majority vote for such a provision. Query: should there not be some majority vote required prior to entering into such an agreement if the agreement is not to be considered initially when the union itself is considered?

Over fifty years ago Chief Justice Hughes said in regard to the right-to-work:

It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure⁷³.

⁷⁰ Wisc. Laws of 1939, Chap. 57, § 111.05.

⁷¹ Rev. Laws of Hawaii, Title 11, § 90-10 (1955).

⁷² Colo. Rev. Stat., Art. 5, Ch. 80, § 80-4-6 (1953).

⁷³ *Truax v. Raich*, 239 U.S. 33, 41 (1915); see also, *Cummings v. Missouri*, 4 Wall. 277, 321 (1866); *Ex parte Garland*, 4 Wall. 333 (1866); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); *Powell v. Pennsylvania*, 127 U.S. 678, 684 (1888); *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897); *Smith v. Texas*, 233 U.S. 630, 636, 638 (1914); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Takahashi v. Fish & Game Commission*, 334 U.S. 410 (1948).

In 1956 Justice Douglas dissented in a case which upheld the right of the State of New York to suspend from the practice of medicine a doctor who had been convicted of contempt of Congress. He said:

The right to work, I had assumed, was the most precious liberty that a man possesses. Man has indeed as much right to work as he has to live, to be free, to own property⁷⁴.

These two quotes are expressive of the sentiments of those who would place the right to work in a predominant position over union security which is maintained by the union shop. This view values the individual freedom of association more highly than the purported necessity of the union shop to support labor unions.

Nevertheless the Supreme Court passed favorably on the validity of the union shop in the *Hanson*⁷⁵ case, and thus gave legal sanction to the denial of the right to work to one who is not a member of a labor union. In theory it is hard to reconcile this result with the following choice of decisions of the Court holding that one could not lawfully be denied work because of his status as a Catholic priest⁷⁶, a Chinese immigrant⁷⁷, a teacher of German⁷⁸, a freight train conductor⁷⁹, a State employee⁸⁰, a Negro⁸¹, or a teacher in a municipally supported school⁸².

The real reconciliation of the *Hanson* decision is that the labor union has now become one of the country's accepted

⁷⁴ *Barsky v. Board of Regents*, 347 U.S. 442, 474 (1956).

⁷⁵ *Railway Employees' Department, A.F.L. v. Hanson*, 351 U.S. 225 (1956).

⁷⁶ *Cummings v. State of Missouri*, 4 Wall. 277 (1866).

⁷⁷ *Yick Wo v. Hopkins*, 118 U.S. 336 (1886).

⁷⁸ *Meyer v. Nebraska*, 262 U.S. 390 (1922).

⁷⁹ *Smith v. Texas*, 233 U.S. 630 (1913).

⁸⁰ *Wieman v. Updegraff*, 344 U.S. 183 (1952).

⁸¹ *Steele v. Louisville & N. R. Co.*, 323 U.S. 192 (1944).

⁸² *Slochower v. Board of Education of New York City*, 350 U.S. 551 (1956).

institutions. Its function in our modern society has become such that it can successfully compete against long standing concepts of individual freedoms, both in legislative halls and judicial chambers.

The real dilemma in the controversy over union security and right-to-work legislation does not lie in forcing a choice of one which will inevitably lead to the destruction of the other. The greatest problem is how to get labor to adopt a philosophy which gives proper recognition to its new role as a fully matured member of the industrial community, rather than the purely defensive strategy which was more in keeping with its struggle for survival in the thirties. The only real union argument against the right-to-work movement which has any validity concerns the problem of the "free rider".

How then can the basic freedom of association be preserved in each individual worker and yet insure that he bears his fair share of the cost of collective bargaining?

Prior to the Taft-Hartley Act there had been some attempts made to reach a compromise solution of the problem by adopting a "support money" plan and "work permit system." Under these arrangements all workers for whom the union acted as a bargaining agent were required to make payments to support the union's bargaining efforts, whether members or not. The National Labor Relations Board has upheld the validity of these plans⁸³, but their effectiveness has been impaired by Section 302 of the Taft-Hartley Act which prohibits employers from making any collections from workers under the check off system except union dues.

Another device which has been used to solve the problem of compulsory unionism is the agency shop. This plan exacts union dues from all workers on the theory that collective bargaining is equally beneficial to the entire work force, but does not compel union membership. The operation of this arrangement is open to the same objections as the union shop

⁸³ Public Service Company of Colorado, 89 N.L.R.B. 418 (1950).

since there is nothing to insure that the non-union worker is paying solely for collective bargaining.

Furthermore, the union shop is lawful and there is a strong argument that union membership can be required in any event. The leading case involving the question of whether union membership is an absolute necessity under a union shop contract is *Union Starch and Refining Company*⁸⁴. The case is open to wide interpretation, but apparently the N.L.R.B. decided that the only condition of membership which a worker is required to meet is the tender of dues and if the union "imposes any other qualifications and conditions for membership with which he is unwilling to comply, such an employee may not be entitled to membership, but he is entitled to keep his job." Because there have been contrary analyses made of this decision it must be said that the question is still unsettled⁸⁵.

But, whatever the present law on compulsory membership, it is evident that a statutory framework is not in existence for insuring that payments by a protesting minority will only go for the proper union purpose of collective bargaining.

Since there appears to be no presently effective method of protecting the interests of the union through control of the "free rider" and at the same time permitting the individual worker to retain his inherent freedom of association, the proposal is offered that serious consideration be given the Swiss system of union security as a possible compromise between these presently opposing views in the United States⁸⁶. The Swiss system is based on requirements in collective agreements that non-union workers make "contributions of solidarity" which are essentially payments for the worker's share of the costs of collective bargaining. The Swiss Supreme Court has upheld the enforcement of these "contributions" provided that

⁸⁴ 87 N.L.R.B. 779 (1949), *enforced* 186 F.2d 1008 (7th Cir. 1951) *cert. denied*, 342 U.S. 815 (1951).

⁸⁵ See Coger, *Is Joining the Union Required in the Taft-Hartley Union Shop?*, 5 Lab.L.J. 659 (1954).

⁸⁶ Dudra, *The Swiss System of Union Security*, 10 Lab.L.J. 165 (1959).

they are less than the dues paid by union members⁸⁷. This holding coupled with prior Swiss judicial doctrine opposing compulsory unionism has resulted in a system which apparently has met the main objections from both the advocates and opponents of the union shop⁸⁸.

While the Swiss system has primarily developed as judicial doctrine, the inauguration of a similar type program in the United States at this stage of development in our labor law would undoubtedly require legislative enactment. Compulsory unionism would have to be abolished on a nation-wide basis while at the same time establishing requirements which would force a strict accounting upon the unions for their outlays as bargaining agents to insure that such expenditures go solely for the purpose of collective bargaining. The bookkeeping complexities involved in allocating certain mixed expenditures between collective bargaining and other union activities could presumably be worked out according to regulations prescribed by the National Labor Relations Board and based on accepted cost accounting procedures. The administration of our tax laws through a combination of law and regulations is a strong precedent for the success of such a program.

The political implications involved in adopting the proposed change based on the Swiss system are obviously enormous. It is not the purpose here to go into the almost unending debate which is provoked by such a proposal beyond a brief mention of its possibly beneficial aspects.

It is essential that the advancing form of our modern industrial society not be allowed to over-run the individual freedoms which are the foundation of our form of government. The freedom of association is fundamental and basic and the individual worker should be allowed to exercise his own judgment in electing whether to join or remain outside of the organized union. But to the extent that he receives direct benefits from the union he should expect to return adequate

⁸⁷ *Id.* at 169.

⁸⁸ Dudra, *supra*, note 86.

compensation based on the principle of restitution which has long been established in our legal system. In so far as these two aspects of the problem are concerned the Swiss system seems to be an effective safeguard for protecting both the interests of the union and the individual worker.

However it is not enough to dispose of the "free rider" argument since the unions are firmly convinced that compulsory membership is one of the most effective weapons in their arsenal of union security. Nevertheless it is submitted that abolishment of compulsory unionism will in the long run prove highly beneficial to organized labor⁸⁹.

Unions today still imagine themselves as they were a quarter century ago when management had the upper hand and unionism was something of a crusade for the underdog. Yet unions today are organizations of enormous power. It is undoubtedly true that much of this power has resulted from the mass membership flowing from the union shop. Yet this source of power has proved to be double-edged and has had its own detrimental effect. Now the very size of unions has forced an almost ponderous approach to the problems of the worker on the assembly line. The union is no longer the readily available brotherhood which offered the personal appeal that attracted the downtrodden worker in former days.

Today the average union worker counts his union dues as merely one of his necessary recurring expenses such as an insurance premium or the water bill. Many have little knowledge of the tremendous improvements brought about on behalf of the working man through the evolution of unionism. This situation is the direct result of compulsory membership which has placed power in the hands of a few without compelling any return of responsibility by those few to the many who are the source of the power.

The further consequences of unrestricted power are currently being illustrated by the disclosure of corrupt and illegal practices on the part of organized labor. While these dis-

⁸⁹ Cf. Niebank, *In Defense of Right-to-Work Laws*, 8 Lab.L.J. 459 (1957).

closures relate to only a small segment of the unions it need hardly be pointed out that the resulting public indignation has magnified these revelations to cover the entire organized labor movement.

Without the crutch of compulsory membership the unions would be forced to return to their old campaigns to sell themselves to the workers. Orientation programs would be necessary to acquaint members with the inner workings of their union and the benefits of union membership. Such a change would promote a type of union renaissance which would restore the true purpose of unions and consolidate their gains for further advances.

While some loss would inevitably occur in numerical membership it would be more than made up for by the awakened interest which could be expected from those members who are presently inactive participants. Far from fearing complete annihilation the unions should realize that the American working man is too economically astute to stand by and watch the unions die from lack of support.