# SOME ECONOMIC AND SOCIAL ASPECTS OF UNION PRIVILEGE UNDER THE NATIONAL LABOR RELATIONS (WAGNER) ACT 1935-45

by

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# INTRODUCTION

The period 1935-45 was a significant one in the economic affairs of the United States. It saw the economy change from one of deep depression and uncertainty to one of unparalleled productivity, with the end of the decade marked by a confidence of still greater productivity to come. It was a decade of complete alteration in the labor picture--from one where the belief that there would never be enough work for all found wide acceptance to a condition where a shortage of labor became commonplace. The decade saw labor unions grow from a membership of less than three millions to almost fifteen millions. The rapid growth can be largely attributed to the National Labor Relations Act, usually referred to as the Wagner Act.(1)

The passage of the Act in 1935 represented a turning point in the affairs of American trade unionism. From a previous peak membership in 1920, America's unions had suffered a steady decline until 1933 and made but small gains in the two following years. This decline continued despite boom and depression; the prosperous years of the 1920's showed unionism unable to succeed against company inspired organization presented as the "American Plan", while the early years of the depression

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(1) 49 U.S. Stat. 449 (1935).

indicated that unionism was unable to profit by economic adversity. In contrast to this statistically depressing past, the years immediately following the passage of the Wagner Act showed great strides, with the year 1937, the first in which the legality of the Act was beyond question, showing an estimated 57% gain in membership over the preceding year.(1) The statistics suggest, therefore, that the growth in unionism had a very direct connection with changes in labor legislation.

An examination of the history of unionism in America will show that the labor movement operated under serious disabilities prior to the passage of the Wagner Act. Reflecting, with a lag, a constituency which was probably much less interested in measures to gain stature within an accepted stratification than in the protection of conditions favorable to social mobility, the American government retained belief in what one could call a frontier philosophy long after the justifying conditions had ceased to exist. The extent to which the crisis of the early 1930's ended such a philosophy is open to question, but the middle year of that decade saw a startling change in the government's attitude towards unions. It could be charged that, in an effort to atone for past failures to keep legislative pace with social conditions, the government attempted to overcome the resulting lag in one sudden measure.

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(1) See Florence Peterson, American Labor Unions, (New York: Harper and Brothers, 1945), p. 56.

This measure saw unions advance from groups whose only previous contact with government had been one of constant harassment to a position of being promoted and privileged by law. It is with these privileges that this study is concerned.

Both the economic and the social aspects of these privileges are to be discussed, for to attempt the rigid separation which discussion of either aspect alone would involve is to deny the very close interrelationship between the economic and the social. In any society generally above the subsistence level, economic gains must always be weighed against their social cost to the individual and to the society. In America this means a weighing of security against opportunity, the fruits of group pressure against the sacrifice of individual freedom which membership in an effective group requires. Whereas by definition no price is too great to pay for subsistence, a society possessing an overall surplus is constantly examining the route by which that surplus was secured or enlarged and asking the question whether the tangible result was worth the intangible costs.

The great body of attack on labor legislation in recent years has been directed against these intangible costs. The direction of this attack has been well founded in that if one accepts a causal relationship between the form and degree of labor organization and the output of the labor force so organized, the decade 1935-45 proved the desirability of the former by the outstanding growth of the latter. While this relationship

is of doubtful acceptance, the record disposes of those who would claim that overall labor performance disproved the virtue of the overall labor organization then prevailing.

The social and non-statistical economic aspects of the decade are more thought provoking. The union protections established by the Wagner Act constituted an undisguised championing by the government of one economic class against its adversaries. This move to strengthen the weak and curb the strong had profound effects on the fabric and balance of American enterprise and society. The resulting relocation of power in enterprise has been accepted not at all by a small group and with serious misgivings by a much larger one. Accepting the former as a desirable balance against those uncritical in their admiration, the large doubt-ridden group is the one which will determine whether this venture into industrial relations by government edict is to prove either a guidepost or a warning.

The misgivings arose from the manner in which the privileges granted labor by the Wagner Act were used. The ground for the attitude of questioning is based on the fact that the privileges were a voluntary grant of power and immunity by the entire society to one segment of the society. Although granted with the aim of succoring the recipients, the body of privilege could hope to survive only if the desired aims were accomplished in a manner acceptable economically and

socially to the grantors. In attempting to assess how the body of privilege has been utilized, it is necessary to examine how responsibly the trade unions acted toward the three groups concerned--their members, the employers, and the public. Charges of irresponsibility are not susceptible to exact statistical proof in that intangible values (e.g. freedom) tend to be its victim. In a relatively prosperous society, however, the maintenance of individual freedom has a position of sufficient importance compared to that of purely economic gain as to make judgment of trade unions veer strongly to the social as opposed to the purely economic.

It is proposed first to outline the history of American labor legislation prior to 1935. The aim of the National Labor Relations Act and its provisions dealing with labor privileges will then be discussed. Following a briefly sketched framework of criticism, the major areas of criticism will be examined in considerable detail. In conclusion it is proposed to indicate the directions in which the Act failed to promote the responsible unionism its authors envisioned.

# CHAPTER I

## BACKGROUND OF THE WAGNER ACT

### Prior to 1932

Early Legislation. The legal history of trade unionism in America far antedated the passage of the first positive legislation on the subject. In 1842 the Massachusetts Supreme Court in Commonwealth v Hunt[1] set forth the dictum that "a union is lawful or unlawful as the means by which it attempts to reach its objectives are lawful or unlawful."[2] Recognition of the legality of the end was thus tacitly accepted, with the area of inquiry shifted to legality of the means. The years following this decision bore out this view, with one writer observing that "until the 1880's practically all legal actions growing out of labor disputes were criminal prosecutions for conspiracy."[3]

There gradually arose an outcry to have the rights of labor stated more affirmatively, with most of the agitation directed toward having labor put on a legal equality with

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[1] 45 Mass. 111 (1842).

[2] Kurt Braun, The Right to Organize and Its Limits, (Washington: The Brookings Institution, 1950), p. 32.

[3] Edwin E. Witte, The Government in Labor Disputes, (New York: McGraw-Hill Company, 1932), p. 46.

capital. The National Labor Union, on its formation in 1866, included in its platform the statement, "Voluntary associations of working men and women are entitled . . . to the same chartered rights and privileges granted to associated capital."(1) This cry bore fruit in an incorporation bill which became law on June 29, 1886, a bill giving national trade unions incorporated under the act "the right to sue and be sued, to implead and be impleaded."(2) While the act was to prove completely ineffectual in operation, the hopes held for the measure by those who testified before the Congressional Committee read remarkably like a contemporary plea for pro-union legislation: "The various witnesses . . . expressed the belief that as legal entities trade unions would be in a better position to enforce contracts, discipline members, control strikes, and institute arbitration proceedings."(3) While the law did not meet with the unqualified approval of labor, it was hailed by labor as recognizing "the principle of the lawful character of trades unions, a principle we have been contending for years."(4) The hopes of the bill's supporters were so dampened by the subsequent decision of the

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(1)"Historical Review of Trade Union Incorporation", Monthly Labor Review, (January, 1935), p. 39.

(2)Ibid. p. 41.

(3)Ibid. p. 40.

(4)Ibid. p. 41.

British House of Lords in the Taff-Vale case that in his 1901 presidential report to the American Federation of Labor Samuel Gompers stated that in the interval since the passage of the incorporation bill "we have repeatedly warned our fellow-unionists to refrain from seeking the so-called protection of that law."(1)

Perversely enough, the very factors which led labor to shun the protection it had once sought led to a demand by business that labor be forced to incorporate. It was claimed that business men incurred millions in responsibility in obedience to the law, while labor, much more closely knit, was immune. No national union took advantage of the law of 1886, and in 1932 repealing legislation passed both Houses of Congress with no discussion whatever.(2) While this measure was of no effect, it is of interest in that it was the first emergence of the incorporation proposal which was later to be regarded by labor as a "way to meet the injunction menace"(3) and, much later, to be sponsored by anti-union forces as a means of imposing on labor the concept of union responsibility those forces held.

The early decades of the present century found labor

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(1) Ibid. p. 41.

(2) 47 U.S. Stat. 741 (1932).

(3) Monthly Labor Review, Op. cit. p. 43.

fighting against legal disabilities which arose under the common law rather than ones which had their genesis in specific labor legislation. For a period it was feared by labor that the Sherman Anti-trust Act would be used as an anti-union measure. There was conflicting evidence as to the intent of the sponsor and the majority in the ratifying Congress, with subsequent court decisions doing little to clarify the issue. The Clayton Act of 1914 was an attempt to dispel the cloudiness caused by this uncertainty of intent and application of the act in relation to union activities. At the worst, the act was dismissed as either "a gold brick or an example of poor draftsmanship";(1) the most favorable interpretation put on it regarded it as "declaratory of existing law and as not substantially changing the legal status of concerted labor activities."(2) Intended by its legislative sponsors to simply preclude "suits for the dissolution of labor unions under the anti-trust laws and actions directed against their normal and lawful activities",(3) the Clayton Act exploded any hope on the part of the opponents of unionism that unions could be broken up per se by the use of anti-trust legislation. Rather, it threw the question back to the point

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(1) Witte, op. cit. p. 270.

(2) Braun, op. cit. p. 36.

(3) Witte, op. cit. p. 67.

originally stated in Commonwealth v Hunt, as shown by one writer's summary of the effects of the Clayton Act:

> When a labor combination seeks by lawful means to increase wages, reduce hours of labor, or otherwise improve conditions of work, incidental restraint of trade does not render these activities unlawful. When the court finds, however, that the combination aims primarily at restraint of trade, then all activities to this end are unlawful, whether or not they are undertaken by or on behalf of a labor organization.(1)

The Clayton Act weakened labor's position in that it enabled any private person who claimed injury through unlawful restraint of interstate commerce to secure an injunction against the injuring party, whereas formerly such injunctive relief could be requested only by the federal government.

Injunctions. Labor's principal struggle during this period was against injunctions and yellow-dog contracts. The attitude of labor towards the use of injunctions is well summarized in the then current epigram, "In the case of an injunction in labor disputes, contempt of court is respect for law."(2) There was a very definite feeling on the part of labor that "employers have found our courts ever ready and willing to throw the forces of the state on the side of capital and against that of labor."(3)

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(1) Ibid. p. 69.

(2) Trade Union Epigrams, an official publication of the American Federation of Labor, cited Ibid. p. 123.

(3) Report of the Executive Committee of the American Federation of Labor to the convention of the Federation, 1922, cited Ibid. p. 7.

Bitter as was the feeling of labor against the use of injunctions, the fault perhaps can be laid more squarely on two aspects of their use--what they intended to do and the means available for doing it. While the purpose of an injunction--to preserve the status quo until such time as the matter can be judicially examined--is completely defensible in a situation where justice must be something less than immediate, the weakness of its use in labor disputes lies in the fact that "labor disputes are dynamic occurrences, and there is no possibility of merely preserving the status quo."(1) While labor claimed that injunctions operated exclusively to the benefit of capital and came to regard the judicial process as a means of persecution rather than protection or even prosecution, a more carefully weighed view ascribes the unsatisfactory situation to the attempt to treat labor disputes as any other lawsuit:

> It is not corruption, nor usually even prejudice, which accounts for so many injunctions against labor, but the present condition of the substantive law and the unfairness of the usual equity procedure when followed in labor cases.(2)

The argument for the use of injunctions was that they gave to peace officers and the police courts backbone to enforce the criminal law; since the use of the injunction technique made non-compliance a matter for contempt proceedings

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(1) Ibid. p. 89.

(2) Ibid. p. 130-131.

or, alternatively, criminal action, they had, through threat of the former, a curbing effect on the actions of those labor leaders to whom prosecutions on petty criminal charges were almost badges of honorable service to the cause. The arguments against the employment of injunctions as used in the early years of this century lay in their frequent vagueness, their denial of a fair trial to those accused, by implication, of plotting wrongdoing, and their denial of any effective means of appeal. The available statistics bear out labor's contention that the injunction was largely an instrument of capital: during one period, quoted by Witte, 43 injunctions were secured by labor compared with 1,845 secured by employers.(1) The record also indicates that few of them were used as anything but stalling devices in a situation where time is of the essence:

> Of eighty-eight reported federal cases between 1901 and 1928 in which temporary injunctions were allowed, only thirty-two went to a final hearing, and of the total of thirty-five temporary injunctions issued in New York City in the five years 1923-1927 not a single one was followed by a permanent injunction.(2)

Yellow-dog Contracts. The yellow-dog contract reached its greatest use in the years 1921-1922. Such a contract, by which an employee, in consideration of securing employment, agreed to forego any right to join a union while the employment

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(1) Ibid. p. 234.

(2) Ibid. p. 93.

prevailed, would seem, on the surface, to be a legitimate screening device for employers. Within the then prevailing concept of workers' rights it was claimed to represent a voluntary yielding of an individual freedom for consideration, i.e. employment, and thus have the essentials of a valid contract. It was in its effect on third parties, trade unions and their organizers, that it worked the greatest hardship. In 1917, the Supreme Court, in the Hitchman case,(1) held yellow-dog contracts to be legal, but the use of them was forbidden by a directive of the World War I Labor Board. When the cessation of hostilities removed the authority of that body, the full impact of the decision became apparent. By this decision the court not only decided that such contracts were legal, but denied to third parties the right to exercise persuasion on employees to violate the contracts into which they had entered. This made it illegal for a union or its representatives even to attempt the organization of employees who had signed such contracts.

Lawsuits. It is an interesting sidelight of the labor picture of the period that despite the failure of unions to incorporate and thus be subject to the same legal liabilities as corporations, several hundred lawsuits were instituted against them. Only two, the Danbury Hatters' Case(2) and the

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(1)Hitchman Coal and Coke Co. v Mitchell, 245 U.S. 229, 38 Sup. Ct. 65 (1917).

(2)Loewe v Lawlor, 208 U.S. 274, 28 Sup. Ct. 301 (1908).

Coronado Coal and Coke Case,[1] resulted in any substantial damages, and then under conditions of such protracted litigation as to give little satisfaction to the successful employer plaintiff. The history of the period thus serves to indicate that while unincorporated status was no bar to lawsuits, the existing legal procedures made lawsuits of little effective value in punishing a union for an illegal course of conduct. The reasons ascribed by one writer for this failure are still not without relevance when incorporation is suggested as a means of affording relief to those who would claim injury by the actions of a union:

> 1. procedural difficulties in suing labor unions,
> 2. inability under the established principles of agency law to connect unions or their members with alleged unlawful acts.[2]

In reviewing the labor legislation of the first three decades of this century, the only landmark to break the bleak terrain is the Railway Labor Act of 1926. Before it is taken as a guiding star it must be pointed out that the nature of the business covered therein very much weakens the favorable analogy which might be drawn from the success of the act. The railroad industry is so rigidly controlled as to quantity and quality of service that the employer group by no means has the same freedom to fight unionization as do other employer

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(1) United Mine Workers v Coronado Coal and Coke Co., 259 U.S. 344, 42 Sup. Ct. 570 (1922).

(2) Witte, op. cit. p. 142.

groups. Since the employer group is compelled in the public interest to give up certain prerogatives which other private businesses enjoy, the point at which balance between employer and employee can become reasonably stable is quite different.

Prior to 1932, therefore, it may be said that the position of labor in the United States was one of almost no legally guaranteed privileges and, in effect, serious disability. Since labor was given no substantial legal rights by the public through its elected lawmakers, there was little ground to expect any collective responsibility on the part of labor. The position of labor in its own mind, and perhaps in fact, was one of such disability as to make talk of labor's responsibilities quite removed from the sphere of relevance. Any gains which labor had made could truthfully be claimed to have been entirely the fruits of its own efforts and to have been made not only without the support of affirmative law but despite the judicial process on the significant levels. The first half of the 1930's was to see the picture change radically--to see not only the removal of disabilities but the conferral of statutory rights. The decade then following was to see the question of the collective responsibility of labor removed from the arena of Labor Day speeches into the very center of the stage of labor relations.

## Norris-LaGuardia Act, 1932

The first break in the labor picture came with the passage of the Norris-LaGuardia Anti-injunction Act[1] in 1932. The act had both a corrective and an affirmative significance. On the corrective side, it reduced the use of injunctions to a more defensible ground by requiring the hearing of both parties before the court would act, and it outlawed the enforcement in the Federal Courts of yellow-dog contracts. While this trimming of the scope of injunctions was not to signal the end of their use, it served to remove much of the grounds for labor's claim that they were unjustifiably broad and issued without adequate presentations by both sides. The outlawing of yellow-dog contracts opened up for union organization large segments of American industry previously closed off by the Hitchman decision.

The affirmative significance of the Norris-LaGuardia Act lay in section 2 which stated that "as a matter of basic policy employees should have full freedom of association; the right of self-organization; and the right to choose their own representatives without interference by employers; and finally, that the principle of collective bargaining is recognized."[2]

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[1] 72 Cong., 1st Sess., Public Law No. 65 (March 23, 1932).

[2] Harold W. Metz and Meyer Jacobstein, A National Labor Policy, (Washington: The Brookings Institution, 1947), p. 10.

The act was to have no great immediate positive effect, in that no machinery to effect or protect these rights was set up; such was left to the normal court procedures which, because of necessary delays and expense, were not, in fact, equally available to labor and employers. It was, however, to serve as the foundation stone for subsequent legislation in which, after one short-lived failure, employer recognition of trade unions was to be made not only permissible but mandatory.

## National Industrial Recovery Act, Section 7a

Between the stated but unenforceable rights conferred by the Norris-LaGuardia Act and the very real rights legislated and protected by the Wagner Act was to intervene the National Industrial Recovery Act. Although concerned primarily with resuscitating the entire economy, the NIRA in its section 7a gave position both in theory and in practice to trade unions:

> Every code of fair competition . . . shall contain the following conditions: (1) That employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; (2) That no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing . . . ."(1)

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(1) 48 Stat. 198 (1933).

While this section may seem to have done little that was not implied by the Norris-LaGuardia Act, it made more specific the rights of labor and represented the initial statement of the existence of areas in the field of labor relations in which certain actions on the part of employers was prohibited. The brief period before the act was declared unconstitutional[1] prevented any demonstration of how well such guarantees would work without specially constructed and powerful enforcement agencies. However, the adverse court decision did not end the matter, for the significant sections of the act were carried over in almost identical phraseology to the next major labor legislation, the National Labor Relations Act.

## Summary

The years before 1935 may be summarized into three periods--an early one when labor sought legal recognition and felt that such recognition would give it the desired parity with employers, a middle period when it was strenuously fighting what it considered to be injustices being suffered under the substantive law, and a very brief final period when it saw the disabilities removed and a start made on a positive labor policy. The net result was that in 1935 labor had no positive legal rights although the political and economic

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[1] Schechter Corp. v United States, 295 U.S. 495 (1935).

climate was ripe for the granting of them. A federal court some years later outlined labor's position in 1935 thus:

> The right of employees to form labor organizations and to bargain collectively through representatives of their own choosing with employers has long been recognized. The right is protected by the Constitution against governmental infringement, as are the fundamental rights of other individuals. But prior to the National Labor Relations Act no federal law prevented employers from discharging employees for exercising these rights or from refusing to recognize or bargain with labor organizations. The National Labor Relations Act created rights against employers which did not exist before.(1)

It was the securing of legally enforceable rights that turned the labor picture in 1935, and in the turning conferred, somewhat indirectly, on labor organizations a body of privilege with enormous attendant responsibilities--to their members, to their employers, to the public. The manner in which these privileges were used it is the purpose of this study to examine.

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(1) NLRB v Edward G. Budd Manufacturing Co., 169 Fed. (2d) 571 at p. 577 (1948), cited by Braun, op. cit. p. 49 (footnote).

## CHAPTER II

## THE NATIONAL LABOR RELATIONS (WAGNER) ACT

### Change in Union Picture, 1935-45

In dealing with the effects on the American labor scene of the National Labor Relations Act too much stress cannot be laid on the contrast between the labor conditions under which it was conceived and those under which it was to operate. For any legislation to prevail virtually unamended for over ten years would result in economic change putting it, in its later years, at variance with society's needs assuming only normal changes in that society. To have a statute remain fixed over a period marked by a full swing from deepest depression to unprecedented boom made very serious obsolescence almost inevitable. The Wagner Act was to be operative over such a period. In the economy generally, there was the shift from labor surplus to labor shortage; within the union movement there was the unanticipated rise of strong dual unionism. The latter aspect is pointed up by one writer thus:

> The fact that the policies concerning representation and union security agreements, as formulated in the original National Labor Relations Act, led to labor trouble of an extent not anticipated by the legislators has been due in part to a relatively recent change in the general structure of American unionism. . . . The whole statutory scheme was based on the trend toward singularism,

> prevailing at the time when the labor relations bill was discussed in Congress.(1)

Industrial unionism's principal proponent, Mr. Lewis, stressed this point at a very early date when industrial unionism had not reached full flower:

> The craft unions as a whole, on the basis of their reports to the American Federation of Labor, showed a growth in membership of only 13 percent in the year 1935 as compared with the year 1933. In sharp contrast, the only four industrial unions of the American Federation of Labor increased their membership 132 percent, or practically ten times as much, during the same period. . . . What might be called the "semi-industrial unions" in the American Federation of Labor . . . reported a combined membership 126 percent greater in 1935 than in 1933.(2)

The list of industries in which almost complete unionization was achieved by 1945--"coal, steel, automobile, rubber, meat-packing, construction, all forms of transportation, men's and women's apparel, aluminum, agricultural implements, maritime and longshoring, newspaper printing, publishing, and aircraft"(3)--indicates the extent to which industrial unionism had challenged craft unionism. Prior to the emergence of the CIO, almost all union activity was limited to those workers who had a definite skill. The rise of the CIO and industrial unionism brought forth three aspects which could not have been anticipated in the singularistic days of 1935--jurisdictional

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(1) Braun, op. cit. p. 241-42.

(2) John L. Lewis, "Adapting Union Methods To Current Changes--Industrial Unionism", Annals of the American Academy, vol. 184 (March, 1936), p. 180.

(3) Harold W. Metz and Meyer Jacobstein, op. cit. pp. 32-33.

disputes on a massive scale and on a level where labor itself could not reasonably be asked to resolve them, the industry-wide agreement with its power to cripple a large segment of the economy, and the introduction of compulsion as a factor in union membership. Coupled with this growth was what one writer refers to as "geometric accretions of economic and political power."(1)

## Aim of the Act

To state the aim of the National Labor Relations Act it is best to begin with the statements of its sponsor, Senator Wagner. His starting point he describes thus:

> In this modern aspect of a time-worn problem the isolated worker is a plaything of fate. Caught in the labyrinth of modern industrialism and dwarfed by the size of corporate enterprise, he can attain freedom and dignity only by cooperation with others of his group.(2)

That the measure was proposed with a calculated acceptance of a certain amount of industrial strife as the inescapable price was indicated by his statement that "a tranquil relationship between employer and employee, while eminently desirable, is not a sole desideratum."(3) Senator Wagner intended that the Act operate within certain limits, that it involve "no

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(1) Carroll R. Daugherty, "Union Policies And Leadership In Post-War America", American Economic Review, vol. 34, no. 1, supp., part 2, (March, 1944), p. 166.

(2) Cong. Rec., May 15, 1935, p. 7565.

(3) Senator Wagner, "Company Unions; a Vast Industrial Issue", New York Times, (March 11, 1934).

encroachment by the government upon the operations of our economic system",(1) but merely establish "a single basic industrial liberty--the right of workers to organize and bargain collectively."(2) The details of the Act he described as being "for the purpose either of defining practices which interfere with that fundamental right, or for the purpose of establishing a well tested procedure for preventing and redressing interference with that right."(3) This last point is of major import in that it was the first effective recognition of the fact that the peculiar nature of labor relations makes the usual common law procedures of slight protective value to a workman deprived of his rights.(4)

All subsequent discussions of the Wagner Act stress the point that the measure set up only the framework within which labor and management were to jockey, i.e. outlined the allowable area of conflict. This attempt on the part of the government "to disembarrass itself from the complex task of choosing between the rights and wrongs of all parties to a

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(1) Senator Wagner, introduction to The Wagner Act: After Ten Years, Louis G. Silverberg, ed., (Washington: The Bureau of National Affairs, 1945), p. 3.

(2) Ibid. p. 3.

(3) Ibid. p. 3.

(4) Workmen's compensation laws are here excluded in that they dealt with bodily injuries rather than injuries to a worker's rights.

dispute"[1] limited the working of the Act to "removing unfair labor practices by employers and to determining disputes as to who is authorized to represent employees for collective bargaining purposes."[2] The rigid limits of the Act were succinctly stated by the Senate Committee on Education and Labor in reporting the measure to the Senate:

> The committee wishes to dispel any possible false impression that this bill is designed to compel the making of agreements or to permit governmental supervision of their terms. It must be stressed that the duty to bargain collectively does not carry with it the duty to reach an agreement, because the essence of collective bargaining is that either party shall be free to decide whether proposals made to it are satisfactory.[3]

## Union Rights Conferred

The purpose of the Act therefore resolved into an effort to set the stage within which collective bargaining could be carried on by the interested parties without governmental interference. To set such a stage there must be some preconception of the factors which require adjustment. In the case of the Wagner Act the preconception hinged on "the premise that there was an imbalance in our economy between the

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(1) Harold J. Laski, Trade Unions in the New Society, (New York: The Viking Press, 1949), p. 17.

(2) William M. Leiserson, "To Strengthen the Act", in The Wagner Act: After Ten Years, Louis G. Silverberg, ed., (Washington: The Bureau of National Affairs, 1945), p. 115.

(3) National Labor Relations Board, S. Rept. 573, 74 Cong. 1 sess., p. 12.

respective power of industry and of labor . . . [which] . . . was preventing us as a Nation from enjoying equitably or stably the maximum productive capacity of our resources and our skills."(1) This restriction of the Act so as to provide "no machinery or devices for the settlement of a labor dispute . . . no mediation or arbitral functions",(2) confined the intent of the Act to the elimination of employers' unfair labor practices in order to establish what the law refers to as "actual liberty of contract." Thus the heart of the Act lay in its definition of unfair labor practices on the part of employers.

The Act defined them as follows:

> 1. To interfere with, restrain, or coerce employees in the exercise of their rights to self-determination, to bargain through representatives of their own choosing, and to engage in concerted activities.
> 2. To dominate or interfere with the formation or administration of any labor organization, or contribute financial or other support to it.
> 3. To enter into a closed-shop agreement with an employee organization in which only a minority of the employees are represented.
> 4. To discharge or discriminate against an employee who files charges or gives testimony with respect to a complaint against the employer.
> 5. To refuse to bargain with the representatives of his employees.

By this list of prohibited practices the Act affirmatively

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(1)Leon H. Keyserling, "Why the Wagner Act?", in The Wagner Act: After Ten Years, Louis G. Silverberg, ed., (Washington: The Bureau of National Affairs, 1945), p. 26.

(2)Metz and Jacobstein, op. cit. p. 16.

supported those activities essential to make effective labor's pre-existing rights.

## Lack of Provision for Union Responsibilities

The Act did not in any place outline any responsibilities on the part of labor nor outline any practices prohibited to labor. Rather, it placed responsibilities by implication on the shoulders of labor in that its aim to overcome a one-sidedness in the previous power balance would remain defensible only so long as the pitiably weak did not become the arrogantly strong--the oppressed the oppressor. The much criticized one-sidedness of the Act was stoutly defended by Senator Wagner in an address at Yale University on April 16, 1937:

> If an uninitiated person were to examine the Act in a vacuum or on the planet Mars, he would be overwhelmed by the ostensible justice of this criticism. No one would assail a traffic law because it regulates the speed at which automobiles run and not the speed at which people walk. . . .(1)

A catechism of the Act's failures to impose obligations on its beneficiaries makes a very impressive list:

> The Wagner Act . . . imposes no restrictions or obligations on labor. There is no such thing as an unfair practice by labor within the meaning of the act. The law imposes no restrictions on the right of labor to strike, picket, or boycott. It imposes no responsibility on unions with respect to violations of contracts which had been entered into as a result of the intervention

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(1) Cited by Leon H. Keyserling, op. cit. p. 23.

> of the NLRB. Nor does the Act directly or indirectly regulate the internal organization of unions. Finally, although this act is to encourage and promote collective bargaining the obligation to bargain collectively is not imposed on labor.(1)

One writer from the vantage point of ten year's operation categorizes the shortcomings of the Act's sponsors as having "given little or no heed to the paucity of union and industrial leadership . . . discounted, apparently, the stupendous task of creating trade-union consciousness and responsibility among the millions of union recruits . . . missed sight of a split in the labor movement and its devastating results . . . over-estimated industry's capacity to adapt itself to a new type of employer-employee relationship . . . discounted the opportunities for abuse by power-drunk union leaders."(2)

The Wagner Act therefore was attempting to bring labor and capital nearer to equality in power. It tried to do this by outlawing the acts on the part of management which had most seriously impeded labor's efforts to organize in the past. It evaded any assumption by government of the actual settlement of disputes. In its outlawing of certain acts on the part of management it did in effect give to labor certain privileges and immunities which could be used with responsibility or with

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(1) Metz and Jacobstein, op. cit. p. 16.

(2) C. F. Mugridge, "Better Management and Better Union Leadership", Annals of the American Academy, vol. 248, (November, 1946), p. 76.

lack of responsibility. This responsibility of labor was not so much a legal as a social one. The significant consequences of a failure to meet it lay not so much in court actions as in the nurturing in society of an attitude towards labor sufficiently reactionary to undermine the admittedly desirable aim of the Act--to promote industrial peace by more nearly equalizing the bargaining power of management and labor.

# CHAPTER III

## A FRAMEWORK OF CRITICISM

### Conduct Conditioned by Circumstances

In seeking a criterion of union conduct it is necessary to form some concept of the ideal. This ideal must attempt to balance the economic, the social, and the ethical so as to secure the best whole. The weight each aspect will carry depends on the state of society then prevailing. The conduct of American unionism has reflected the prevailing conditions. A simple credo for a union movement is that of getting for its members the maximum immediate material return. Exemplified by Samuel Gompers' description of unionism's aim, "All you can get, here and now", this statement of policy, admirable in its simplicity, did not survive the demise of the pure business unionism its author pursued. Business unionism was a logical course of conduct for an unprivileged and sometimes persecuted union movement, when survival was the immediate problem and some degree of financial affluence the zenith of its hopes. Under such conditions the union leader could point to the hindrance rather than the help of society in his efforts and conclude that to society he owed nothing. As the leader of a weak and struggling movement, the union leader's primary

function was, in the words of Peter Drucker, "to be opposition pure and simple", "the spirit that always negates."(1)

## Need for Development of New Standards

The rise of an active, positive and sympathetic policy toward unions turned the problem from that of whether they should exist to that of what part they should be expected to play in the society and the economy. Since society abetted the unions in their growth, it was not unreasonable for the society to expect the sponsored unions to develop in directions conducive to its well-being. While it might be argued that no sponsored group would work counter to the interests of its sponsor, it must be remembered that those engaged in union activity cannot be tagged as unionists solely and therefore impelled by a single allegiance. A union member is possessed not only of the interests of a union member, but also of the interests of a citizen of a contemporary society, and, more remotely but not, thereby, any less deeply, of a hope for a future. The psychological foundations of this hope are laid far back in the individual's past: while he may be unable to define this hope very precisely, he is likely to recognize trends which diminish the likelihood of its realization. He is, to paraphrase Drucker, favoring by high wages

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(1) Peter F. Drucker, The New Society, (New York: Harper and Brothers, 1949), p. 114.

and resistance to productivity the worker's today over the enterprise's tomorrow.[1] To a society which rejects even comfortable stratification in favor of the possibility of upward mobility economically, every gain for today is perhaps unconsciously assessed for its effects on tomorrow and thereby made somewhat less sweet.

The directions of conduct which will most expeditiously further the various interests of each individual are by no means the same or always compatible. While the union member cannot always separate his conduct according to its effects on these various motives, he cannot be unaware of the conflicts they involve. His conviction of the necessity of united action is tempered by a subconscious fear of suppressing a minority of which he may, some time on some issue, find himself a member. His desire to gain the greatest economic return by block action is accompanied by doubt as to whether mass action does not blur his own special and superior capabilities.

Aside from the creation of a privilege-responsibility balance, the labor legislation of recent decades has brought into the picture an aspect which is peculiarly American. This is the introduction into union life of large numbers of lukewarm adherents. Where unionism is not state supported, it may be assumed safely that all unionists are at least reasonably convinced of the virtues of the union creed.

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(1) Ibid. p. 98.

However, when large numbers of workers are legislatively encouraged into assuming union membership without any internal conviction of either its absolute necessity or unquestionable virtue, there is apt to be a lack of the philosophical cohesion which has held together labor movements in countries where they were built up and maintained only after long and bitter struggle. This lack of a strong philosophical core in the American labor movement has made it more sensitive to its relationships with society as a whole, albeit no more responsible thereby.

The general abstention from predictable political activity, either by the formation of its own labor party or by extended fidelity to either of the traditional parties, has made the American trade union movement more interested in working within the framework of the existing social order than in reforming it fundamentally. This tendency to regard unionism and politics as oil and water has forced the movement to attempt a philosophical rationale infinitely more complex than that facing movements in countries where unionism takes a declared political and social stand. Whereas a labor movement with revolutionary or reformist aims need not concern itself with the effects of its present actions on the present order but only on how they affect the present of its members while working for a more desirable future, the American labor movement, in its eschewal of all political and reformist ends, has set

for itself a much more difficult task. Almost all its actions must be judged in the light of how they affect the status quo with the development of that status quo left to the politicians and reformers working on union members as individual citizens. This obsession with present ratios rather than future absolutes, coupled with a good deal of looking backward by the more conservative wing, indicates the vaguely defined framework against which its actions must be weighed and criticized.

## Three National Goals

A list of national goals and conceptions against which it is proper to judge the performance and responsibility of unions must take cognizance of three aspects of labor's relationships to the society and the economy--relationships between the unions and the other productive factors in the economy, relationships connected with the direction and rate of economic growth, and relationships within the union. The first named is largely a question of how adequately the existing union organization permits reward to equal effort expended. The second concerns the production of an ever-expanding national income (which assumes that no bars are put in the way of reduced effort in production and no hindrances placed in the path of the fullest development of individual capacities). The third, relationships within the union, are concerned largely with reconciling individual freedoms with

the majority rule which effective group action requires.(1)

Reward Based on Effort. The desirability of assuring reward based on effort expended in production, and its extension of permitting the full development of individual capacities, is important both within the union and in the society. While the former could be categorized as an inter-union or inter-group (i.e. workers, enterprisers, consumers) aspect, its real significance lies in the fact that much of the dissatisfaction with unions, both from within and without, arises from their rating of the job, rather than of the performance of it, in setting compensation. Although this method seems, to the confirmed unionist, the only alternative to the despised piece-work basis, it receives considerable criticism within the unions by those members who consider that, by their superior ability or application, they are carrying their less able or less ambitious brothers. While this matter should be considered a prime concern of union discipline, investigation suggests that disciplinary action has been much more concerned with union-member disputes than with those between members. In contemporary American unionism efforts to make reward commensurate with effort are very largely restricted to attempting to get group rewards on a par with group efforts.

Even here it is difficult to see how anything resembling

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(1) Metz and Jacobstein, op. cit. p. 50-53 discuss these goals in slightly different arrangement.

final justice can accrue when one is faced with comparing the relative effort expended, for instance, by unionized hairdressers and unionized bricklayers. It might be argued that differentials are the result of the interplay of the forces of classical economics and reflect relative marginal productivity. Such a thesis loses validity when applied to a situation where the major union development has occurred in a period when the strike, which would be the equating force under classical theory, has been less a contest between various groups of workers than a test of the endurance of one group of labor compared to one group of capital. This blocking off of great segments of labor and capital suggests that the hope of having relative reward equal to relative effort as between various groups of workers is very remote, barring a great recession in the level of economic activity, with the restoration thereby of the hordes of workers at the factory gates.

To secure such parity within the unions does not seem very promising unless union discipline should take a decided shift in emphasis--a shift from the one level of pay which most contracts demand to some form of individual incentive pay. The prospects for such seem very slight. Labor's traditional fear of the speed-up makes straight piece work rates likely to diminish in importance. While incentive pay schemes give unions a motive for hurrying the laggard, even here the group reward for group effort basis prevails. Whether unions

will ever see and seek advantage in pitting one worker against another over pitting workers against employers is questionable. The concern of unions with the average--and possibly it is a necessary concern--diminishes the probability of a worker securing his exact just deserts within a unionized employment area.

A Larger and More Widely Distributed National Income. The aim of an ever-expanding national income and a progressively wider distribution of it are primarily concerns of the relationship of labor to the other segments of the economic body. Taking national income in the sense of productivity rather than in purely financial terms, it can be seen that union policies in the matter of preference for leisure either in the form of shorter hours or reduced expenditure of energy during normal working hours can have a decisive effect. If one takes an "energy fund" view of the potentialities of the economy this can, under conditions of full employment, only result in something less than the optimum real income level.

Whether a progressively wider distribution of income is attainable through the functioning of unions depends on two factors--the trend of union expansion (i.e. whether they bolster the poor or enhance the already comfortable), and the relative resistance of the employer group and the consumer group in preventing labor's gains being at the expense of profits or prices respectively. Should unions expand through

concentration of organizational efforts on the underpaid segments of the working force they may make a contribution to the wider distribution of income: however, even this is accompanied by a danger of such action going beyond justifiable limits (justifiable within the "reward based on effort" aim) under the block effects of our present organization of business and labor. The effects on income distribution of having specific higher labor costs absorbed through higher prices or lower profits can be traced to no definite conclusion.

Preservation of Basic Freedoms. The operations of the Wagner Act spotlighted the problem of the extent to which one freedom should be abridged in the interests of making real and effective a perhaps greater freedom. The greater freedom was the right to self-organization which the Act's sponsor had uppermost in his mind. The freedoms which were curtailed in the interests of this primary aim were those of speech and individual choice in whether to enter the union fold or remain without. The latter hinges on the question of whether compulsion to associate was a necessary and desirable consequence of the right to associate. Against the standard defence of curtailment of speech within unions that such is necessary at times to maintain discipline, the question arises whether suppression has exceeded the necessary limits.

It will be seen from the above that the manner in which

unions can further incontestable national goals and aspirations is not a simple one. In almost every case there can be some sort of cohesive argument made, with the particular viewpoint largely a matter of emphasis--the short view versus the long view, the fruits of collective action versus the restrictions it requires, the interests of the individual as a union member versus his interests as a consumer. In seeking ground, therefore, to approve or condemn some union action, it becomes a matter of weighing the gain in the direction of one of these goals against the loss incurred in another.

# CHAPTER IV

## MAJOR AREAS OF CRITICISM

In studying the great volume of criticism of unions which has been issued since the passage of the Wagner Act, four general areas emerge with regularity. It is around these that this section of the study is to be constructed. While not all criticisms of unions can be so neatly ticketed, the vast majority are concerned with one of the following:

a. use and abuse of the right of association,

b. union regulations and practices which tend to reduce production or retard increase in production to the technologically possible maximum,

c. union actions which injure third parties,

d. the difficulties of making union contracts enforceable.

### Right of Association

The intent of the Wagner Act to make collective bargaining the cornerstone of American labor relations was based on legislative support of the majority rule principle within working groups. Senator Wagner defended this principle by eliminating the two alternatives--dealing with workers as individuals or dealing with a variety of minority groups. The first he declined on the ground that "the inequality of

bargaining power between the isolated employee and the employer is so great that liberty of contract becomes a fiction";(1) the second he considered undesirable in that it gave "the unscrupulous employer an opportunity to play one group against another constantly."(2) The conferral of legal blessing on the right of association shifted the danger from infringement by capital on labor's freedom of association to a danger of a majority of labor dealing unfairly with a minority. This dilemma with the consequent fine balancing required by constitutional authority, is summed up by one writer thus:

> Public authorities thus have been confronted with the complex problem of safeguarding simultaneously freedom of association and freedom from association; the right of the individual to combine with others and his right to pursue his calling without belonging to an association; individual freedom of contract and collective bargaining; the right of organizations to recruit members and the freedom of the individual from undue pressure to make him join.(3)

While the claim has been advanced that the Act "was intended as a grant of right to employees rather than as a grant of power to union",(4) the relative interest and resources of a union in maintaining its interest, compared to the much lesser interest and means of the individual in maintaining his

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(1)"National Labor Relations Bill", a radio address by Senator Wagner, N.B.C., May 21, 1935, cited by Keyserling, op. cit., p. 20.

(2)Ibid.

(3)Braun, op. cit. p. 195.

(4)NLRB v Schwartz, 146 F. (2d) 773, (5th C.C.A., 1945).

sometimes contrary interest, had the effect of making the Act more a conferral of rights on the union than on the member. The existence of this tendency in unions, especially the older and more firmly grounded ones, to regard the Act as conferring rights on them is indicated by another writer as being responsible for "nearly a million workers . . . [being] . . . organized into unaffiliated groups whose very existence is a tacit criticism of the old-line organizations."(1) That this legal protection of the workers' right to organize was an outgrowth of the speed with which unionism developed in America is pointed out by Harold Laski in comparing American action with that of Great Britain and other democracies, where "union recognition and the collective bargaining which is its necessary corollary have been accepted . . . as an essential element in industrial organization."(2)

Compulsion to Associate. A major criticism of the working of American labor policy in the realm of union privilege lies in the application of "two fundamental principles which are not . . . applied in the European countries of comparison: namely, the concepts of the indispensability of a certain type of bargaining unit and of majority rule."(3) It is in

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(1)Mary Klemm, "The Rise of Independent Unionism and the Decline of Labor Oligopoly", American Economic Review, vol. 34, no. 1, (March, 1944), p. 76.

(2)Laski, op. cit. p. 55.

(3)Braun, op. cit. p. 171.

connection with the application of the concept of majority rule that the greatest claim of the abuse of privilege is charged. The adoption of the majority principle has the inevitable result of increasing the effective power of the majority and of decreasing the freedom of action of the minority. The carrying of the right of association to the point where it verges on a compulsion seems a peculiarity of the American labor movement, for "in almost all liberal countries the opinion prevails that recognition of the right of workers to organize does not compel any employees to make use of it . . . this freedom has been called negative freedom of association."(1)

While negative freedom of association was offered to workers in the "no union" option in bargaining group elections, it was still reserved for group action in that such must be chosen by a majority group in order to prevail. The law offered the indecisive worker no great protection against union pressure, in that it assumed that the usual criminal law prohibitions against assault, intimidation, unlawful compulsion, duress, etc., served adequately. It did, however, insulate him from employer pressure of types not illegal under the criminal law. Employers frequently claimed that they were not only denied freedom of speech on the subject of unions but,

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(1) Ibid. p. 69.

through operation of jurisdiction combined with closed shops in various forms, were often laid under an obligation to force workers into a union which was distasteful to both the worker and the employer.

The right of association when combined with some form of closed shop must become a compulsion under the American system of exclusive jurisdiction which "functions through a one-party system."(1) This seems to be a peculiarity of union organization in America where inter-union transfers with or without retention of previously accumulated privileges are virtually unknown, whereas in certain European countries the issue has become one of membership in any union rather than membership in a specific union. Under the one-party system with the result of "having the government compel thousands, perhaps millions, of working people to join or to remain members against their will"(2) the question becomes pertinent: "Will such people be a source of strength or of weakness if employers do launch an antiunion drive?"(3) With the Act having operated only under phenomenally favorable economic conditions this question is one which well may be pondered.

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(1) Clinton S. Golden and Harold J. Ruttenberg, The Dynamics of Industrial Democracy, (New York: Harper and Brothers, 1942), p. 214.

(2) William M. Leiserson, "Growing Pains of the American Labor Movement", Annals of the American Academy, vol. 224, (November, 1942), p. 7.

(3) Ibid.

By explicit prohibitions and by use of the exclusive bargaining unit, the Act outlawed completely the company dominated or company supported union. It could be charged that this not only represented a redundancy under a law guaranteeing freedom of choice to workers but also constituted an abridgement of the freedom of speech of employers. That a sound foundation for this suppression existed is indicated by a discussion in a business-slanted publication of the effects of NIRA:

> Section 7a . . . merely said that any laborer had a right to organize in any way he chose. The U.S. burst out into a rash of organizations . . . the employers turned out to be far smarter than labor after all: under the protection of labor's so-called Magna Charta they stepped into the shops and coolly organized the masses into company unions (usually under Latinized names) in which the principle of collective bargaining was compromised.(1)

Once the worker's right to representatives of his own choosing is established in fact as well as in theory, is it defensible to permit unlimited proselytizing by one side and prohibit any counter action by the other? While it might be argued that management is, of necessity, concerned with dividing output as advantageously to itself as it can, and so cannot possibly offer any but bad advice to its workers, the argument can be turned and a case made that a union can survive only by being in opposition and so is led to emphasize that

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(1)"The Great Labor Upheaval", unsigned article, Fortune, vol. XIV, no. 4, (October, 1936), p. 142.

opposition as the price of survival.

The final argument against the freedom of association which so easily becomes a compulsion to associate is based on the inherent danger of monopoly. This is a problem of comparing gains and losses, with the balance stated by one writer thus:

> . . . while union security makes for a strong, disciplined union, it also makes for monopoly and that carries with it dangers to production.(1)

While the conditions under which such monopoly has operated in America, i.e. an almost constant shortage of labor, have prevented its outline becoming clear, it could be an important factor were economic conditions to return to the heretofore traditional situation of there being a constant surplus of labor.

It can thus be seen that the guarantee of the right of association carries with it a danger--a danger which both anti-unionists and disinterested observers have been quick and persistent in pointing out. While there is no denying that all group action is founded on the principle of majority rule, there must be limits to what can be considered just ground within which it may be permitted. In the matter of its application to labor relations, the problem is one of assuring to unions sufficient power to fulfill their

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(1)Louis Stark, "Union Security and Its Implications", Annals of the American Academy, vol. 248, (November, 1946), p. 67.

obligations without delivering into their hands a large and unprotected minority. With America's economy committed to a policy of freedom of enterprise, the question is how far it is desirable to go in effecting the cartelization, through compulsory group action and the concommitant restriction of individual action, of one of its important ingredients. While much of the criticism is inspired by anti-union sentiment, there is a hard core of logical reasoning behind the objection to the granting of near-sovereign powers to a group within a free functioning economy. That such is not entirely free from either governmental interference or possible discrimination or hardship to the individual will be shown below. The problem therefore becomes one of either removing these near-sovereign powers, or so controlling the dominant majority in its use or abuse of them as to confine the abridgement of minority rights within acceptable limits. The importance of this aspect to this study lies in the fact that since the freedom to associate becomes, to many individuals, a compulsion to associate, the unions enjoying the benefits of this compulsion are thereby given a serious and continuing minority problem. The reasonable criticisms of the compulsory aspect of trade union organization hinge not on the mere fact of compulsion but the practices which that compulsion may permit without adequate recourse to relief open to the injured individual.

In assuring workers the right to freedom of association the Wagner Act refused to face, or did not realize, the vital nature of the problem of determining the appropriate bargaining unit. This the Act has been charged with turning over to the NLRB "without any chart or compass or rule to guide it."(1) The weakness of assuming that the power of government could stop at the guaranteeing of labor's right to organize was pointed out by one of the Senate committees reporting on the Act: "employees themselves cannot choose these bargaining units because the units must be determined before it can be known what employees are eligible to participate in a choice of any kind."(2) This circular question seriously undermines the picture of unrestricted freedom of choice which the Act envisioned in that "any government agency performing this function (i.e. the determination of the bargaining unit) cannot help but interfere with the free right of workers to choose their own form of labor organization."(3) The administration of the Act has also been charged with 'sacrificing the workers' right of self-determination by using its power to designate bargaining units in such a manner as to increase bargaining

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(1)George W. Alger, "Labor Must Decide", The Atlantic Monthly, vol. 165, (June, 1940), p. 760.

(2)NLRB, S. Rept. 573, 74 Cong. 1 sess. (1935) p. 14, cited by Braun, op. cit. p. 62.

(3)Metz and Jacobstein, op. cit. p. 25.

power, i.e. selecting larger units for economic power and thereby forcing upon a large minority the loss of self-determination. One writer has charged that the NLRB placed "the attainment of increased bargaining power above the protection of the workers' right of self-determination."(1)

The effect of this drawing of government into the very heart of the labor picture through the key factor of bargaining unit determination has been to make labor "increasingly dependent on the executive branch of the government not only for those things that it ordinarily strives to get by collective bargaining with employers, but also for the maintenance of its own membership and the stability of its structure as a combination of labor organizations."(2) Carried to its logical conclusion this results in appeals "to government to use its coercive powers to force workers into the unions or to prevent members from resigning."(3)

The effects of the Act in the creation of compulsory membership for the individual through application of the majority principle, and effective government intervention in the determination of the complexion of the majority, both created minorities which may have been the victims of union irresponsibility and placed on the government an obligation to assure

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(1) Ibid. p. 30.

(2) William M. Leiserson, op. cit. p. 6.

(3) Ibid. p. 6-7.

maximum protection to minorities so created. As to whether this problem can be resolved within the present theory of American enterprise economy is not clear. However, it means that the form of compulsory union membership instituted by the Wagner Act has permanently shifted unions from the sphere of completely voluntary organizations into one where minorities are to be expected as a permanent feature. It means that the relationships of a union to its members are not a matter of internal import solely, since economic survival forces membership on large portions of the working force. It means that if unions regard protections afforded by the Wagner Act and succeeding legislation as desirable they must move to make the position of the involuntary unionists created thereby such as to render criticism of their treatment lacking in sound foundations.

Aside from the matter of treatment of minorities, the unions are, by their acceptance of exclusive bargaining rights on a majority principle, charged with a responsibility to exercise those rights in such a way as to further the national interest. It must be kept in mind that the right to representatives of their own choosing and the granting of exclusive representation rights are by no means inseparable. Since the latter is considered fundamental to union security, the unions enjoying it must act in such a manner as to counteract the "foregone conclusion that union security arrangements

must give an employment monopoly to the contracting union."[1] It becomes the duty therefore of unions to prove that whatever degree of monopolistic power they hold is exercised with proper regard for the public interest.

Discrimination. A common criticism of American trade unions arises from their practice of discrimination in admissions to membership. It most commonly takes the form of discrimination in respect to color, with sex, creed, or citizenship following. There are three methods by which discrimination is practiced: color bars in union bylaws, exclusion by tacit consent, and the admission of certain groups only to "auxiliary" locals with restricted powers and autonomy. Unions which practice numerical restrictions on new members also tend to discriminate in that the basis for such limited admissions is usually such as to deny an equal opportunity to join to all. The most common basis, and one much used in trades requiring an apprenticeship period, is to admit new members on a basis of their blood relationship to present members. While the prime fault here is with the restriction itself rather than the method, the fact that restrictions are, in craft unions, almost unshakable leads to the focussing of attention on the method rather than on the act itself.

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(1) Braun, op. cit. p. 220.

The numerical extent of discrimination is much exaggerated. After ten year's of operation of the Wagner Act one writer reported:

> Of the 13 million union members, not over 2 million belong to unions fairly characterized as undemocratic in essential practices. If this proportion appears to be high, it is certainly no higher than that of other voluntary associations . . . but since the unions have won special protection in law, higher standards may fairly be demanded of them(1)

This writer lists thirty-one unions which exclude Negroes or segregate them, twenty-five which exclude women, and a few which exclude Orientals or aliens. The fact that "important unions in expanding industries are favorably disposed toward continued improvement in the economic status of the Negro"(2) suggests that color discrimination is dying out, both in numbers of unions practicing it and in their importance, for "most of the unions which habitually discriminate against Negroes either are relatively small or else are confined to industries in which the trend of employment had been declining, particularly the railroad industry."(3)

That the National Labor Relations Board regarded discriminatory practices as outside its province is indicated

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(1) Roger N. Baldwin, "Union Administration and Civil Liberties", Annals of the American Academy, vol. 248, (November, 1946), p. 54.

(2) Herbert R. Northrup, "Unions and Negro Employment", Annals of the American Academy, vol. 244, (March, 1946), p. 46.

(3) Herbert R. Northrup, "Organized Labor and Negro Workers", Journal of Political Economy, vol. LI, no. 3, (June, 1943), p. 221.

by the fact that it has been willing to "designate as the exclusive representative of a bargaining unit a union that refuses to admit Negroes."(1) This reflection of the reluctance of the government to use the Act as a ground for the interference with what are construed to be the internal affairs of a union could be dismissed as a small facet of a much larger American problem. To the liberal mind, however, it is much less defensible than the condoning of Negro political discrimination in that the latter has been a part of the fabric of American political life for many years, while government support of union discrimination is of recent origin.

The record of the two major labor organizations on their attitude towards race discrimination is enlightening: "Officially, the American Federation of Labor opposes race discrimination without reservation. . . . Actually, it has condoned it in all its forms. . . . On the other hand, no national union affiliated with the Congress of Industrial Organizations bars colored workers or confines them to separate locals."(2) The relative growth trends of these two organizations suggest that the problem may be solved largely with the course of time; however, the difference in attitude may tend to widen rather than heal the breach between the two

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(1) Metz and Jacobstein, op. cit. p. 125.

(2) Herbert R. Northrup, "Let's Look at Labor", The Nation, vol. 157, no. 7, (August 14, 1943), p. 178.

rival organizations in that "the CIO will not run the risk of inducting its members into international unions which are still to rid themselves of undemocratic practices."(1)

Color discrimination constitutes a threat not only to the social fabric of American life but also to the very existence of certain of the unions. Unless the progress of recent years has been one of change of heart and attitude and not simply a result of a tight labor market, the discrimination tactics carry the seed of destruction to the unions themselves in certain economic and geographic areas. Laski points out the danger thus:

> Nor must one overlook the temptation, almost endemic in American industry, to create racial hostility, which is normally the immediate parent of violence, by using Negro labor to maintain production . . . the trade union which discriminates between workers on the ground of colour is bound, sooner or later, to fight the employer with weapons it has blunted through its own clumsiness.(2)

In assessing the final effect of discrimination as practiced by American unions it must be reiterated that "we are not considering here a case analogous to the member of a church or a political club; nor even of the stockholder of a corporation, who can usually sell his stock and get out."(3)

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(1) Aaron Levenstein, "Interfederation Warfare and Its Prospects", Annals of the American Academy, vol. 248, (November, 1946), p. 48.

(2) Laski, op. cit. p. 53.

(3) John P. Troxell, "Protecting Members' Rights Within the Union", American Economic Review, vol. 32, no. 1, supp., part 2, (March, 1942) p. 462.

Comforting as this analogy would be, it cannot be applied properly to a situation where a matter as serious and central as the right to work and livelihood is involved. While it is factually true that discrimination is disappearing from the growing part of the union movement, the fractional improvement is of little comfort to the worker concerned who must, as an individual, be totally excluded or totally accepted. The crux of the problem is that of reconciling discriminatory practices with the promotion of union security through the various closed shop arrangements; while the extent of discrimination is diminishing, the growth of union security makes the position of the discriminatee more difficult. Although the effects of discrimination may not have been apparent at the time the Act was framed, the feeling has since developed that

> The conflict between the right to work and . . . /discriminatory practices/. . . considered in relation to the phenomenon of the growth of the closed shop doctrine requires a re-examination of the effect on the public welfare of the rules of admission to labor unions and demands the discovery of an effective method of eliminating unreasonable and socially unsound restrictions on admission to, or retention of membership in, unions.(1)

Expulsion. The problem of expulsion from unions is of a piece with discrimination in that it too serves to deprive the individual of the right to work. It differs to the extent that there must be cause for the action shown. It differs also

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(1) Ralph A. Newman, "The Closed Union and the Right to Work", Columbia Law Review, vol. XLIII, no. 1, (January, 1943), p. 42-43.

in that the individual concerned is being deprived of a positive identifiable right, whereas the victim of discriminatory admissions policies can generally prove no right in the work of which he is being deprived.

The use of expulsion to further the ends of a union was early recognized: Mr. Justice Taft in an 1894 decision, discussing the relationships of union authorities and union members, stated that a union authority was justified in enforcing discipline "on pain of expulsion from their union."(1) This decision was given in an atmosphere of relative freedom of action for both the employer and the worker, a situation under which the employee was free to choose with which side he chose to ally himself. With the restriction on action on the part of both employers and individual employees which came with the Wagner Act such a privilege acquired an added social significance. Since expulsion from a union could, theoretically, prevent the worker from securing any employment in the industry even if an employer wished to hire him, it came within the public interest that expulsion from unions be subject to some form of control in the interests of the employee. While the number of cases in which expulsions were made on the whim of a union official or in the following out of a grudge have been much exaggerated, even the rare cases

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(1) Thomas v Cincinnati, etc. R. Co., 62 Fed. 803 at 817 (1894).

can be so serious to the victim as to arouse public ire.

The real problem in this matter is in attaining a point where both union discipline and a right on the part of the individual member to be critical of the union and its leadership are made possible of maintenance. While the right of a union to discipline its members is in the interest of the union, the employers, and society, this right must not be so construed as to silence criticism within the union. Many unions in an effort to permit the disciplining of members who are acting contrary to the union's ends in spirit more than in provable fact inserted in their charters clauses giving "the right to expel not only in the instances provided by its laws but for a 'gross breach' of a member's obligations of loyalty."(1) Such clauses provide ammunition for those who use the expulsion powers of unions as an anti-union argument. There is some justification for this objection in that "the meaning and applicability of such rules are learned, in each case, only ex post facto."(2) Balancing this is the practical necessity in any charter or constitution of having a general clause to permit action against those who transgress in ways which have not been anticipated or encountered previously.

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(1) Copal Mintz, "Trade Union Abuses", St. John's Law Review, vol. VI, no. 2, (May, 1932), p. 302.

(2) Ibid.

The real objection therefore is not the the existence of such a general clause but to the manner in which it may be used.

The expelled member comes into a difficult legal position: ". . . the expulsion of employees from union membership has not been a direct concern of the federal government. Most of the state courts show little interest in considering the rights of expelled members beyond ensuring that the procedures provided in the constitution of the union and by-laws are followed."(1) The expelled member therefore is faced with an almost insoluble problem: a federal law made his employment hinge on union membership, the federal law exercised no control over union constitutions and by-laws, neither the federal nor the state courts are willing to go beyond the point of assuring that the union constitution and by-laws have been scrupulously observed. Tortuous as this path is, the injured party still has to overcome what has been described as "an exceptional inertia" on the part of the courts to deal with such cases. The essential conflict in the expulsion issue is that the Act conferred rights equivalent to those of a public body on a trade union but exacted only the standard of conduct expected from a private, voluntary organization.

The union in its disciplinary actions can meet the legal requirements yet act in a manner which can represent only

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(1) Metz and Jacobstein, op. cit., p. 125-126.

injustice to the expelled individual. It can thus be legally right yet have acted so as to outrage public standards of fair play and justice. Thus the responsibility of a union to act with scrupulous justice is not a legal but rather a social one--a matter of meeting the public's standards to the point where the public will not rise against the union and demand that its privileges be removed or curbed. In discussions of cases of expulsions there is a tendency to regard them as proof of the iniquity of any form of closed shop. In defence of the advantages of the closed shop the unions must counter these arguments by showing unfair expulsion cases to be an unfortunate aspect rather than an inescapable result of the closed shop. This requires the will and the wisdom to restrict most carefully the extent and circumstances under which use is made of this power of economically condemning to death the erring individual.

## Restriction of Production

The union action which is held to be of most economic harm is that of featherbedding, i.e. the restriction of productive efficiency by union working rules. These restrictions are generally defended on grounds of health or safety--three coats of plaster protect the health of the dwelling's occupants, a second movie projectionist reduces the fire danger. The forms featherbedding takes are listed by one

writer:

1. restriction on technological improvements in processes and machinery (example: painters' refusal to use spray guns)
2. restrictions upon the use of prefabricated materials (example: carpenters' refusal to install prefabricated cabinets)
3. rules requiring the performance of unnecessary work (example: printers' insistence on breaking down and resetting pre-set type)
4. the requirement of the hiring of unnecessary men (example: musicians employed on a standby basis)
5. rules which place limitations upon employee output (example: bricklayers' quota of bricks per day)(1)

Estimates of the cost of such practices vary widely. One government official's report made claim that:

> . . . labor restrictions on production, which have nothing to do with wages, hours, or conditions of labor, are today costing the American consumer over one billion dollars a year.(2)

On the other hand, one conservative authority concludes his summary of the effects of featherbedding with the view that "unions tend somewhat to retard the introduction of technological changes, but that their influence is not great."(3) Whatever the true cost, the significance of featherbedding is in the manner in which it is regarded by the public.

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(1) Robert M. C. Littler, "The Public Interest in the Terms of Collective Bargaining", The American Economic Review, v. 35, no. 2, (May, 1945), p. 211 et seq. (The examples are those of this writer.)

(2) Annual report of the Attorney-General of the United States, (1941), p. 61. Cited by Littler, op. cit. p. 217.

(3) Sumner H. Slichter, "The Responsibility of Organized Labor for Employment", The American Economic Review, v. 35, no. 2, (May, 1945), p. 200.

The attitudes vary from indignation to an academic view that workers who practice featherbedding are merely choosing to sell less of their time and/or energy for a lower total return. Exemplifying the former view is the cry that "the community's interest in industrial progress is too great to permit any private group, labor or other, to exercise an enduring veto upon it."(1) The latter view substitutes economics for passion:

> If the union elects to impose higher costs on the employer in the form of restrictive rules, it is to that extent less able to impose higher costs upon him in the form of higher wages. Consequently the workers must choose whether they wish to use their bargaining power to get restrictive rules or to get higher wages.(2)

The soundness of the latter view is challenged when it is removed from the realm of abstract economics and applied to reality, where featherbedding, arising from a belief that a worker has a property right in a job, sometimes sees this property right "stretched into the claim that he has a property right in a job that no longer exists or has never existed."(3) It is in such cases, most obviously exemplified by the musicians' union stand-by rules, that the practice

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(1) Corwin D. Edwards, "Public Policy Toward Restraints of Trade in Labor Unions", The American Economic Review, vol. 32, no. 1, supp., part 2, (March, 1942), p. 440.

(2) Sumner H. Slichter, "Collective Bargaining at Work", The Atlantic Monthly, vol. 161, (January, 1938), p. 24.

(3) Edwards, op. cit., p. 442 et seq.

becomes something more than a concealed wage drive and so of genuine concern to the public.

In their social implications featherbedding practices fall into three main groups: those which are a concealed form of wage raising, those which aim at maintaining some geographic monopoly, and those which aim at maintaining some form of group monopoly. The repugnance expressed for such practices can be traced to their disregard for two of the most basic of American mores--that only the industrious or daring should prosper, and that practices which tend to diminish or eliminate competition are undesirable unless proved otherwise. Featherbedding runs counter to the two assumptions basic to collective bargaining in a free economy--comparative equality of bargaining power and conflict of interest between capital and labor. Invalidation of these assumptions can logically and easily lead to a situation where "management and labor are seeking their joint advantage at the expense of the public."(1) One writer suggests that "the remedy for this would seem to be more universal organization, both within given industries and throughout industry in general."(2) While this would undoubtedly have the final

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(1)Littler, op. cit. p. 219.

(2)George Soule, "Organized Labor's Role in Our Economic Life", The Annals of the American Academy, vol. 184, (March, 1936), p. 9.

effect of enabling all workers to be potential monopolists and thus reduce the inter-worker effects of monopoly, it breaks down when it is noted that but a fraction of the American consumer group is so employed as to make organization along trade union lines feasible.

Accepting the thesis that "the broader the front on which labor bargains, the more beneficial is the social result",[1] the question resolves into whether the maximum organization would result in such diffusion of this inherent monopoly potential as to be self-defeating or whether it would result in a greater and perhaps intolerable squeeze on the unorganized and the unorganizable. The immediate social consequence of such restriction is, under a condition of full employment, to reduce the real income of the economy by the conferral of leisure or unexpended energy on those who are, under union restrictions, producing but a part of their capacity. Such subtle wage drives are apt to price the product out of the market or to spur enterprisers to develop a substitute which may not be subject to such union control: the gradual decline of the craft which this produces may be accepted by a union which prefers present security and prosperity for its existing membership over a promising future. It is manifestly unfair to attribute all low volume-high price policies to union

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(1) Ibid.

practices. However, with the effective idleness of a worker so much more obvious than the equal degree of idleness on the part of capital or engineering ability, it is not surprising that public censure more generally is aimed at the workers.

Geographic monopolies, for example the printers' refusal to use plates shipped in already set up, can be regarded only as pure economic waste. They exemplify a provincialism at variance with the American living standard goals which are predicated and maintained on the theory of centralized production by methods which can be broken into smaller units only with a substantial sacrifice in efficiency. They lend themselves to especially bitter criticism in that frequently the interloper against whom they attempt to protect the local workman is not a non-union competitor but a union brother. They are make-work practices purely and simply. It is unfortunate that they are so mercilessly obvious as compared to policies of similar effect pursued by management. Sumner Slichter brings out this comparison of the actions of labor and capital on the output available to society thus:

> . . . trade unions affect employment in many ways--some favorable, some unfavorable. Can they be held responsible for their effects upon employment? They can be expected to conform to such laws and such ethical rules as the community may seem [sic] fit to impose. Until the community outlaws by its ethical code or laws every action which is unfavorable to the general level of employment, trade unions cannot be expected to avoid certain types of behavior or certain types of policy

simply because these policies are bad for employment . . . .(1)

As a defence of featherbedding the argument is weakened by its academic nature. The losses in productivity by restrictive policies on the part of capital are losses in indeterminate potential; the losses in productivity through union featherbedding are more visible. Thus they become a basis for charges that unions are exploiting the public through publicly conferred privileges.

Restrictive practices aimed at the retention or strengthening of group monopoly are largely confined to the established unions which "have vested interests in the continuation of older methods which require more labor and thus provide more jobs."(2) While predicated on a position which is indefensible from an economy viewpoint, it has, for the individual, a measure of soundly based attraction. It is a case where "the short-term advantage of small groups of workers can be furthered by practices that conflict with the long-term interests of those workers and of the community."(3) The appeal of such a short-term view has been summarized thus:

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(1) Sumner Slichter, "The Responsibility of Organized Labor for Employment", American Economic Review, vol. 35, no. 2, (May, 1945), p. 204.

(2) C. O. Gregory, "Some Problems of Policy in Collective Bargaining Practices", American Economic Review, vol. 33, no. 1 supp., part 2, (March, 1943), p. 180.

(3) Metz and Jacobstein, op. cit. p. 61.

> The usual pleas of academicians about the long-run benefits of technological progress to public, labor, and management will fall on deaf ears for two reasons: (1) It is by no means certain that the immediate working group will participate in these benefits, even in the long run; and (2) practically all workers live in the short run, they marry in the short run, they bring up children in the short run, and they either starve or prosper in the short run between birth and the grave. Democratically conducted unions are the organs of expression of these short-run human beings.(1)

The possibility that rate of economic change may become such as to make individual security by work restrictions of doubtful worth is suggested:

> The primary effect of a policy of restriction is to promote the security of the group, but the secondary effect is to undermine security of the group. Hence, in a rapidly changing world real security is only achieved by pursuing a policy of adjustment.(2)

From the viewpoint of the individual, therefore, his restrictive practices eliminate the trials of constant adjustment but hasten the day of oblivion; if pursued thoughtfully they indicate that he considers the latter catastrophe unlikely in his time.

Socially, the employment of restrictive practices to prevent introduction of newer methods of production incurs public anger both in cases where there is an effort to protect

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(1) William Gomberg, "Union Participation in High Productivity", The Annals of the American Academy, vol. 248, (November, 1946), p. 73.

(2) Sumner H. Slichter, "The Changing Character of American Industrial Relations", American Economic Review, vol. 29, supp., no. 1. (March, 1939), p. 123.

a job which still exists and, more heatedly, in cases where it is utilized to protect a job which has ceased to exist. The latter (e.g. musicians' standby rules) are almost universally the object of public detestation, frequently being regarded as little more than racketeering masquerading as unionism. Where restrictions take the form of resistance to the introduction of new methods, they run counter to the faith in America in things new, although positive proof is lacking that the newer methods would necessarily result in a saving to the consumer.

## Injuries to Third Parties

Unions are much condemned by members of the general public for trying to enforce their demands by means of attempting to inflict loss or injury on those who stand in the way of their attainment. In attempting to assess the rights and wrongs of these moves it is difficult to find any clear line demarcating motive from intent--separating the ultimate object from the immediate purpose. The error into which strict logic can lead is pointed out by one writer not unsympathetic to labor:

> The distinction between motive (the ultimate object) and intent (the immediate purpose) is far from clear-cut. All strikes are actuated by an immediate purpose to injure the employer. This is the immediate purpose even in a strike for higher wages, and such a strike ought

logically to be held unlawful.(1)

This "immediate purpose" usually takes the form of the boycott, with the primary boycott relatively insignificant for purposes of this study.

Injuries to Producers by Secondary Boycotts. A primary boycott is defined as consisting "simply of cessation by concerted action of dealing with another",(2) a secondary boycott as one in which "an attempt is made to procure parties outside of the combination to cease dealing as well."(3) The relative importance of the primary and secondary boycott was not recognized by the Wagner Act which was interpreted as declaring it illegal to discharge an employee because he indulges in any form of boycott. The unwillingness of the courts to attempt to draw any line between the two forms of boycott was indicated by the decision in the Hutcheson case, which stated at one point:

> So long as a union acts in its self-interest and does not combine with non-labor groups the licit and the illicit . . . are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness of the end of which the particular union activities are the means.(4)

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(1)Witte, op. cit. p. 49.

(2)Edwin Stacey Oakes, The Law of Organized Labor and Industrial Conflicts (Rochester: The Lawyers Cooperative Publishing Co., 1927), p. 606.

(3)Ibid.

(4)312 U.S. 219 (1940), cited by Taft "Jurisdictional Disputes", Annals of the American Academy, vol. 248, (Nov. 1946), p. 42.

That this represented an excessive reaction from the untrammelled power of employers in past decades was suggested by Mr. Justice Jackson's dissent in an unidentified case quoted by Laski:

> The labor movement has come full circle. . . . This court now sustains the claim of a union to the right to deny participation in the economic world to an employer simply because the union dislikes him. This Court permits to employees the same arbitrary dominance over the economic sphere which they control, which labor so long, so bitterly, and so rightly asserted should belong to no man.(1)

Having accepted injury as the aim of the boycott, the disparate acceptability of the primary and the secondary boycott--with the former occupying a revered position in the liberal mind--arises from the directness of the connection between the injured party and the issue at dispute. In an economy so intertwined as that of contemporary America, it resolves into pressure, with the intent of economic injury on the party directly concerned, being applied to groups or individuals who are in no position either to assess the merits of the dispute or to settle it. Secondary boycotts may result from seemingly unsolvable jurisdictional disputes (which will be discussed below), or they may be founded on a supposition of labor class solidarity, using union membership as foundation for the supposition. The latter seems less applicable in America than in countries with strong unions of political bent.

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(1) Laski, op. cit. p. 17.

The justification on a class solidarity basis of secondary boycotts in the consumer goods field founders when the labor movement eschews ultimate political or social ends or where it is of such stature and composition that there may be greater envy and resentment between competing unions or between unions and consumers than between unions and employers. Where unions have raised their returns above the subsistence level it is unreasonable to expect secondary boycotts to be observed without question by unionists generally. Where a union is seeking an increment to an already above-average return, only a high degree of class-consciousness can guarantee that the object of pressure, i.e. the consumer once removed, will regard the measure as anything but a legalized nuisance. While the existence of the preferred position which is being protected by the boycott may be used as an example of the efficacy of union organization, it can more easily turn into envy between groups than into a feeling of triumph over class gains. The relative failure of the secondary boycott in the consumer field in America seems to indicate that envy or resentment does not exist solely between the employing class and the employed.

Carried to its logical conclusion the secondary boycott is ancestor of the general strike. The general strike is founded on the assumption that laboring individuals and laboring groups cannot possibly suffer more from their fellows than from their opposition. It is founded on the assumption that

labor and consumers, groups largely but not entirely overlapping, have at all times more community of interest than matched pairs of labor and capital, or consumers and capital. While the call for a secondary boycott indicates a falling out of labor and capital in a specific case, the unconcerned union member and consumer has at all times the fear that he is being drawn into the conflict merely as one of the strange bedfellows of war, to be discarded or exploited as soon as the temporary differences have been patched.

The unwillingness of the American union member to consider his interests primarily with the union movement has resulted in a good deal of criticism from within the unions themselves of the legal support of the losses and nuisances arising from secondary boycotts. While the legal support of boycotts is ostensibly on a par with that of strike picketing, i.e. protection of the workers' right to inform the public of the existence of a dispute, an effective boycott, as an effective strike, depends on the ever-lurking threat of violence. The tacit acceptance by labor of this view is shown by its refusal, on grounds of safety, to cross the picket lines of another union.

At the most favorable, the attitude of the consumer inconvenienced by a boycott is one of being witness to an economic contest and free to pursue his own self-interest. At the least favorable, it may become one of acting deliberately to

defeat the boycott as a means of weakening an undesirable sovereignty in American economic life. In either case, the effective boycott adds up to an attempted infringement of his liberty. If confined to a purely information level it would be defensible as the other side of the coin of liberty. Since boycotts on the consumer level tend to succeed only to the extent that they become something more than an information device, this view lacks acceptability.

The secondary boycott in the field of producers' goods becomes essentially a form of jurisdictional dispute geographically shattered. It commonly takes the form of refusing to handle or process materials which have been produced or previously processed under conditions not within the area of acceptability. Prior to the passage of the Wagner Act it most frequently took the form of resisting the use or handling by union members of materials which had previously been subject to non-union labor. Under the Wagner Act the general materials of commerce and industry could be produced by non-union labor only with the consent of the workers involved. The employer thus being free neither to choose to have union labor or non-union labor, nor to choose what variety of the former, successful pressure through a secondary boycott could not be relieved by the primary producer. To the extent that the dilemma was not within the power of the injured party to solve, such boycotts were even less favorably regarded than those in which a

nuisance is legally condoned, i.e. the consumer secondary boycott.

The most common form was that exemplified by one labor dispute in New York City. An AFL union had a closed shop in the installation of certain types of electrical equipment. The only practical source of supply of such equipment was a factory in which the CIO had bargaining rights. The AFL union struck against installing equipment made by CIO labor. In this case the installation contractor had no alternative to dealing with an AFL union since his employees had so voted under their right of self-determination. The CIO manufacturer, similarly, had no alternative to dealing with the CIO union. Unless and until the two unions made a truce the strike was not within the power of the struck contractor to resolve. The only solution offered by the AFL union in this case was that of rewiring the equipment on the scene of installation, using AFL labor. The sheer waste of such a solution would naturally discredit the practicing union in the eyes of the public. Such a case spotlights the monopolistic aspect of the closed or union shop in that, while competition is not despised but rather admired in American life and business, the hold in this case was one stemming not from demonstrated competitive superiority but from legal protections.

Injuries to Producers by Jurisdictional Disputes. While the example above offered a solution at an exhorbitant cost,

straight jurisdictional disputes offer no solution to the employer concerned. The straight jurisdictional dispute is one in which two unions are claiming the right of their members to certain types of work. They become most heated when technological or style changes throw a large area of production open to unionization with no one union clearly entitled to jurisdiction: a wooden trim is supplanted by a metal trim--are the metal workers or the carpenters to have jurisdiction over its installation? Slacks become an item of female apparel--are the ladies' garment workers or the tailors to organize the workers there employed? Such disputes can be, and frequently have been, between two unions under the same banner, either AFL or CIO. When within the same federation it appears to be reasonable to claim that "logically, organized labor should bear the burden of resolving such controversies, since they are of organized labor's making."(1) Even here, within one federation, to hold this view, one must assume a discipline and a solidarity at variance with the facts. The former has no legal basis in that the centralized control in the federations is very weak. The latter is lacking because of the "scarcity thinking" which permeates most union economics. The latter is illustrated by the argument of one writer:

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(1) Ludwig Teller, "Requirements of a National Labor Policy", Annals of the American Academy, vol. 248, (November, 1946), p. 177.

> The feeling of proprietorship or vested right over a given task is reinforced by "scarcity feeling"--the notion that the amount of work available is limited . . . the argument that the amount of work in the world is not fixed but is responsive to factors such as income and costs, and that jurisdictional disputes to the extent that they increase costs and introduce elements of uncertainty reduce the total amount of work, will not necessarily convince union members and their leaders that they should surrender parts of their job territory. . . .(1)

To the member of a union, and most certainly to a member possessing seniority, such an argument may hold theoretical appeal but it will do little to controvert his experience.

The value of seniority is a function of the volume of work and the worker's relative position on the preference list to receive that work: thus any action which will enhance either of these factors will add to his seniority's value. Improvement in the worker's relative position is much less open to positive action than the alternative of widening the area over which that relative position applies. While there is undoubted merit in the claim that such practices may reduce the available jobs, this is an argument which is true for the economy as a whole but lacks validity when applied to the individual whose economic conduct is determined, as noted above, by relative seniority and scope. While the latter is to some extent influenced by the actions of individuals it is essentially a reflection of the activity

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(1) Philip Taft, "Jurisdictional Disputes", Annals of the American Academy, vol. 248, (November, 1946), p. 38.

level of the whole economy. The former is strictly an individual function and it may be to the individual's interest to press for enhancement of his seniority with full cognizance that the means employed are reducing the effective scope.

The determinable losses caused through jurisdictional strikes have not been such as to justify the stress laid upon them. For the period 1938-45, the jurisdictional dispute accounted for an average of only 5.8 percent of the man days lost through all strikes. In no year did it account for more than 10 percent and in half the years for less than 5 percent.(1) Thus a cessation of jurisdictional disputes would have made but little difference in the strike record of the years under review. Their prominence in views critical of unionism therefore cannot be supported by fact. Two grounds for this exaggeration are suggested.

The first is that they do not seem to bear out the claim of labor's solidarity on which many of its demands are based in theory. When labor, in the interest of a favorable and responsible position, stresses the fact that it is a disciplined, democratic body prepared, given favorable conditions, to make great contributions to society, the suggestion is inherent that there will be no large wastes from friction

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(1) Ibid., p. 37. The figures are based on annual compilations in the Monthly Labor Review.

within the movement. If this is taken at face value, although an examination of the legal basis of American union organization would give no grounds for such, the jurisdictional dispute can be at best a blunder and at worst a crime. While the fault lies in ascribing to the labor movement a cohesion which it would like to, but does not, possess, proof of the hollowness of the solidarity claim tends to make for the feeling that great privileges have been deposited in an unworthy receptacle.

The second reason for the unjustified stress placed on jurisdictional disputes lies in their departure from the common belief that both the rewards and the injuries resulting from a matching of economic power should devolve principally on the parties concerned. While the two unions so involved undoubtedly suffer a loss, the position of the entrepreneur commands wide public sympathy. It seems to the public to be an outrage to force a businessman into the position where he is being denied the right to do business unhindered but is offered no means of removing the hindrances which do arise. The Wagner Act legalized the jurisdictional dispute to an extent which severely limited the entrepreneur in the directions in which he could overcome the injuries attendant upon it. It prevented him from attempting to influence either union in its actions. It prevented him from attempting to operate with non-union labor under conditions which would promise sufficient permanency to enable him to muster an

efficient working force. The relative appeal of the position of the business and the relatively indefensible position of the union movement as a whole in the case of a jurisdictional dispute inconveniencing the public caused this form of union activity to earn dislike to a degree in excess of its importance.

Injuries to the Public by Industry-wide Bargaining. The possibility of industry-wide bargaining was anticipated long before it emerged as a factor in American industry. Mr. Justice Taft in a 1921 case declared:

> To render this combination at all effective, employees must make this combination extend beyond one shop. It is helpful to have as many as may be in the same trade in the same community united, because in the competition between employers they are bound to be affected by the standard of wages of their trade in the neighborhood. Therefore, they may use all lawful propaganda to enlarge their membership and especially among those whose labor at the lower wages will injure their whole guild.(1)

If one interprets the word "neighborhood" to mean economic neighborhood, thus, in many cases, embracing the entire country, it will be seen that what was here given blessing could develop into what we now know as industry-wide bargaining.

The case for industry-wide bargaining stems from a conviction of the desirability of removing wages from the

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(1) American Steel Foundries v Tri-City Central Trades Council, 257 U.S., 184 at p. 209, (1921).

competitive area:

> If a whole industry agrees upon a uniform contract with labor, it could largely eliminate labor as a competitive factor, at least, within that particular industry . . . different companies would therefore have to convert competition into a striving for improved services and reduced distribution costs.(1)

Whether it is desirable to remove labor costs from competition is open to serious question. It puts on an industry-wide basis labor's claim to its share in the fruits of improved production in that it assumes that all units within the industry are able to pay equally. While according to classical economics this would be the trend through the elimination of substandard units, it seems unlikely to occur in a large scale industry where units are of such size as to make their disappearance unlikely. The greater likelihood is that labor, in the interest of protecting job rights of large numbers of members employed in the less productive units, will have to set a rate lower than could be obtained from the more efficient producers on a unit-bargaining basis. On the other hand, industry-wide bargaining puts greater pressure on the individual producer in that his resistance to a wage settlement may have to be sufficiently strong to withstand settlement pressure from both the union and the other employers in the industry.

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(1) Ralph M. Blagden, "Industrial Relations: a Triangular View", Christian Science Monitor Magazine, (December 7, 1938), p. 3.

The arguments against industry-wide bargaining have a more social tone. It is primarily claimed that "industry-wide bargaining as it now exists gives a monopolistic position to labor organizations . . . from the fact that the law permits unions to take disciplinary measures to enforce decisions upon their members."[1] A line of reasoning both social and economic in its ramifications is commonly stated thus:

> . . . the most significant result will be the centralization of tremendous power in the hands of a few national labor leaders, with a corresponding curtailment of local autonomy in collective bargaining. . . . Once a union obtains the closed shop on a national basis, the hierarchy of officials in charge of that union possesses the power to determine whether any individual citizen shall have the right to earn a livelihood in that industry in any part of this nation.[2]

In its opening sentence this view falls into the commonly used propaganda technique of using local rights as a mask for defending an otherwise weak position. In its last sentence, however, it points up a likelihood which strikes very real fear into many honest defenders of economic liberty, a fear which is not completely groundless if industry-wide bargaining rights are permitted unions with discrimination and expulsion records not above reproach. Labor here is in danger of opening the way to a reversal in source of the blacklist which it fought for so many years.

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[1] Metz and Jacobstein, op. cit. p. 63.

[2] Almon E. Roth, "Is Nation-wide Bargaining Ahead?", The Atlantic Monthly, vol. 172, no. 2, (August, 1943), p. 72.

A more reasonable objection lies in the fact that, in order to obtain any parity, both sides to such a bargain must have equal power to combine and equal power to discipline their members into acceptance of group decision. The danger of the necessary parity undermining anti-trust legislation is pointed out by one writer:

> For the Board to approve of a multiple-employer unit, not only must collective bargaining have been practiced on that basis, but the existing employers' bargaining association must have the authority to bargain for and bind its members. Obviously such an agreement would violate the Sherman Antitrust Act. . . .(1)

The public's objections to any cooperative action on the part of ostensibly competing business units is claimed by some writers as supporting evidence of their argument against industry-wide bargaining:

> An industry can't sit down with labor as a unit, if anti-monopoly hysteria is to pulverize that industry into hard and fast little atoms. . . .(2)

Whether such "anti-monopoly hysteria" is well or badly grounded is not pertinent here. Pertinent, however, is the question of whether it is possible to encourage or even force industry-wide action in a vital pricing component without weakening the case against such group action in other aspects of the same whole.

Public fear of industry-wide bargaining is based on the

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(1) Metz and Jacobstein, op. cit. p. 118.

(2) Ralph M. Blagden, op. cit. p. 3.

power of public inconvenience or harm which it gives both to unions and to industry; the power is obvious and offensive in the former case, more concealed and generally more defensive in the latter. The tendency of industry-wide bargaining to centre in the production of the necessities of life or commerce (for which no reasonable substitutes are available) shifts the real burden of an industry-wide work stoppage from the industry to the public:

> When there is a complete stoppage of the production of a basic commodity, the strike is in reality a strike against the general public, including workers indirectly affected, quite as much as it is a strike against the employers.(1)

The outcome of such disputes, and the lack of a reasonable and available substitute, which lack removes inter-industry competitive losses as a settlement pressure on either workers or employers, is coming, with increasing frequency, to be a political settlement. The public is quick to demand such and "unions have come to expect federal intervention when an industry-wide strike affects the general public."(2) While such settlements have, during the past decade, been generally favorable to labor, they carry a danger to labor's well-founded opposition to government enforced arbitration.

While it would be equally just to blame the employers'

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(1) Metz and Jacobstein, op. cit. p. 34.

(2) Ibid. p. 34.

organization for the prolongation of an industry-wide strike in a vital area as it is to blame the unions, the reaction of the average citizen is conditioned by his awareness of the foundations on which those two organizations are based. Within the theory of industrial competition, any effective employer organization seems more a product of circumstances than design: more a temporary defensive measure than a preconceived plan. The union's industry-wide bargaining structure seems neither temporary nor secret. It is founded on a stepped gradation of smaller units all of which have been given a monopoly, albeit a democratically managed one. Undoubtedly there is a form of skewness in these attitudes--a skewness which implies more centrifugal force than exists in the case of the unions and more centripetal force than exists in the case of the employers. There is some legal background for this error in that the Wagner Act tended to enhance the centrifugal force in unionism and the anti-trust laws the centripetal force in corporate organization.

The protective tendency of the Wagner Act and the corrective tendency of the anti-trust laws did little to soften the harshness with which major inconveniences due to industry-wide stoppages were viewed. A show of strength between parties so abetted or regulated tended to drive public resentment against the party which was considered to have attained its strength through government intervention rather than the party which had attained it despite government, regardless of

the merits of the respective cases. While the unions are not necessarily any more able to do the decisive yielding in an industry-wide stoppage than is industry, they tend to bear the brunt of public animosity due to their protected position. The vital nature of this protected position should impel unions to consider well the effects of any action which would lead the public to charge them with responsibility for an economic stalemate.

The importance of public reaction is enhanced by the tendency to force it to bear the major discomforts and losses of an industry-wide shutting off of supplies. Whereas the public can bypass a dispute between one employer and one union, and in that bypassing perhaps hasten settlement by a shifting of trade, it can do nothing in an industry-wide stoppage other than press for a political settlement. The importance of union realization of its close connection with the public is stated by Laski:

> In this complex postwar world there is no industrial community at the heart of which the relation between trade unions and the public is not of pivotal importance.(1)

## Non-enforceability of Contracts

A common charge in protracted and bitter disputes is that the union has violated its contract. The seriousness of such

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(1)Laski, op. cit. p. 49.

charges is evident when one considers that sanctity of contract is fundamental to a free and orderly economy. The regarding of union agreements as being substantially similar to other business contracts becomes a doubtful comparison when one works back to the basic definitions. A contract is an agreement enforceable at law. If a law is accepted as "a rule of conduct which the courts enforce", the reluctance, and in some cases the inability, of the courts to enforce union agreements throws doubt on whether they may be considered contracts in the usual meaning of the term. This line of reasoning makes the definition of a contract subject to the areas in which the courts can and will act. However, since it is in the working out rather than in the theory that the legal position of union contracts must be judged, this conclusion is not without sound grounding.

Minority Right to Picket. There are three major points of dissatisfaction with the extent to which union agreements were enforceable under the Wagner Act. The first of these was the inability to prevent a minority from picketing an establishment which had signed an agreement with a majority. Since the establishment was bound under the Act to deal only with a majority which had been given the exclusive representation rights for the entire group of employees, it can be seen that the injuries from minority picketing could not be resolved by the employer. Since picketing is successful only to the extent

that it injures the establishment concerned, it can thus be considered an action directed against a party deprived of the right of self-protection.

Any attempt to rectify such a condition must throw into the courts the entire question of passing on the permissibility of picketing. Any such attempt to punish a union which permitted its members to picket in violation of the Act "would again put up to the courts the constitutional question whether or not they will enjoin picketing that is designed for an illegal or an undesirable purpose."(1) Under the Act relief from picketing became available only when the picketing went beyond the point of being considered peaceful. The criminal prosecutions then possible failed to meet the situation in that picketing can be successful, i.e. injurious to the establishment being picketed, by implied violence without departing in fact from the area considered peaceful.

It might be claimed that the right to picket on the part of a minority could not be suppressed without removing the source of vitality and democracy in unions. While it is desirable to keep the minority groups in unions active in the interests of constant critical surveillance of the actions of the majority, in the past any vitality so gained has often been gained at the expense of an innocent third party. Since the

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(1) Metz and Jacobstein, op. cit. p. 94.

the basis of difference is not with the establishment but with the majority within the union, it would seem undesirable to permit the pressures of an intra-union dispute to devolve on parties estopped from any effective counteraction.

Jurisdictional Disputes. The second of the major points of dissatisfaction with the way union agreements were enforceable under the Act was that of its failure to act affirmatively to prevent jurisdictional disputes. The fact that the majority in the Board-determined bargaining unit was given sole representation rights and that the employer was forbidden to bargain collectively with any other group, made illegal any attempt on his part to settle a jurisdictional dispute. In awarding exclusive jurisdiction to the majority, the Board was following out the practice of democratic self-determination. Such an award would seem to carry with it an obligation to compel the minority to restrict to reasonable limits its efforts to unseat the majority. Undoubtedly the Board had a significant influence on the fortunes of any union or group within a union by its power to determine bargaining units. With conflicting power drives in the union movement, it was to be expected that the decisions of the Board would not and could not further all such ambitions. While the problem of resolving conflicts arising from bargaining unit decisions does not suggest any easy solution, the Act seems to have failed even to face the problem squarely.

The unenviable position of a business plagued by jurisdictional disputes under the Wagner Act was such as to carry wide appeal. The Act appeared to put the business at the mercy of warring factions yet denied the business the right to attempt settlement: it supported two or more warring factions without forcing peace by internal conciliation or external fiat. Following a listing of such cases one writer concluded:

> The foregoing cases . . . give point to the unfairness of the present Federal regime, which on the one hand places upon management the burden of resolving jurisdictional labor controversies, and on the other hand punishes management for taking action necessary to recue a business threatened with ruin by such controversies.(1)

Important as is the power aspect of American unionism, and important as the right to jurisdictional disputes may be to the pursuit of that power, it is very questionable whether the union movement as a whole does not suffer more from their use than it stands to gain. Certainly the employer can in the case of a jurisdictional dispute claim to be without sin, and can effectively promote the suggestion that the enemy of economic peace is not the greed of capital but the power ambitions of organized labor. Whether disruptions were any more frequent in number or intensity under the Wagner Act than they would have been without some such act is a matter of conjecture. However, the record under the Act indicates that such disputes could not be settled within the union

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(1) Ludwig Teller, op. cit. p. 178.

movement itself; this leaves open only two paths--that of allowing employers to attempt to influence a decision or the acceptance by the government of full responsibility for the policing of the state which it has legislatively created.

At Law Generally. The third major difficulty in making union agreements correspond in enforceability to the ordinary contracts of commerce lies in the division of power over unions between the federal government and the state governments. The extent to which this division made any cohesive labor policy procedurally difficult while the Wagner Act was operative has been thus summarized:

> Although the law has conferred upon workers a right to organize unions, the legal basis of such labor organizations at present springs entirely from state statute or common law. Employers have an obligation under national law to engage in collective bargaining, but the legal enforceability of the agreement arrived at by the collective bargaining is generally determined by state law. Under federal law it may be legal for a trade union and an employer to enter into a closed-shop contract, but the right of a specific worker to join a union and the power of the union to expel him are determined not by the laws of the U.S. but by those of the several states.(1)

The legal division thus covered the two significant aspects of enforcement of contracts and the member's rights within the union. It made collective bargaining mandatory under federal law with the enforceability of any resulting bargains a matter dependent on the applicable state law. Such a situation,

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(1) Metz and Jacobstein, op. cit. p. 21-22.

where the intent of federal laws was not clearly enforceable in the federal courts would seem to lead inevitably to matters urgently requiring rectification falling between the two legal jurisdictions.

Even assuming the solution of the not inconsiderable procedural difficulties, the cry to make union contracts legally enforceable seems to be based on a comforting but not entirely valid analogy, i.e. that the matter at dispute in a civil lawsuit and in a union dispute are equally reducible to terms of money and hence open to the same monetized settlement. The only worthwhile settlement, other than perhaps punitive damages, in a suit to end a strike is one which will assure the return to work of the group on strike; experience of recent years has indicated that this is a matter where theory and fact are by no means one and the same. The possibility of legal action against each individual striker being obviously impractical, there remains only the course of ordering the union leaders to issue a return to work order. The experience with the United Mine Workers has proved how ineffective such an order can be. The sole examples of effectively forcing illegal strikers to return to work have been in cases where the government has taken over the industry and thus made continued absence a form of military desertion. Rather than representing solutions, these have constituted glaring examples of admission of defeat.

While the Wagner Act could not be held entirely responsible for the legal difficulties in enforcing contracts, it did make those difficulties more pressing. Representing, as it did, the first steps toward a national labor policy, it could not help but expose glaringly the legal difficulties any national labor policy must face under a federated form of government. It can, however, be justly criticized for setting up certain powers without ensuring the adequacy of legal remedies against abuses of those powers.

## CHAPTER V

## CHANGES UNDER THE ACT

In weighing the social and economic effects of ten years of operation of the NLRA, one must first recognize the demise, with the passage of the Act, of the validity of what one writer calls "the absolute rights theory"[1] of labor relations, with its weighing of all happenings in the field against the constitutional guarantees of free speech, freedom of assembly, etc. Supplanting these absolute concepts one sees "institutionalized coercion which has developed in labor relations . . . /presenting/ . . . a sharp contrast to the principles of free contract without private duress which govern the legal relations of individuals and groups elsewhere in modern industrial society."[2]

### Legal Sanction of Coercion by Unions

The existence of coercion has not been denied by the more realistic labor spokesmen. An unnamed union official is quoted as follows in addressing a group of management

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[1] Witte, op. cit. p. 59.

[2] Corwin D. Edwards, "Public Policy Toward Restraints of Trade by Labor Unions; an Economic Appraisal", American Economic Review, vol. 32, no. 1. supp., part 2, (March, 1942), p. 433.

executives who questioned whether the union shop was not running counter to the freedoms guaranteed by the American constitution:

> Of course, it's coercion. That's what all the argument is about: the right to force someone to do something against his will. But this is not a legitimate objection to the union shop, as coercion is the fundamental basis of organized society. In fact, civilization can be said to have attained maturity when men become intelligent enough to order their affairs and compel the recalcitrant man, the ignorant man, to submit to certain compulsory rules for the common good of all men.(1)

The question therefore hinges not on the existence or the use of coercion per se, but rather on the economic and social effects of the manner in which it is used. The efficacy of any system of labor relations must therefore prove itself according to J. M. Clark's standard: "A good system of control must economize coercion."

That we have progressed to the point where we must accept coercion and try to direct and control it, rather than look backward to an illusory past, is suggested by one writer. He points out that such

> . . . would be to attempt to return to the classical economist's Garden of Eden of pure competition, small units of production, flexible prices and costs, free trade, and virtually complete laissez faire. Such a paradise never existed, and the trend of economic history is steadily away from it.(2)

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(1) Golden and Ruttenberg, op. cit. p. 217.

(2) George Soule, "Organized Labor's Role in Our Economic Life", The Annals of the American Academy, vol. 184, (March, 1936), p. 5.

The preceding organization of capital has been presented as justification for the subjugation of the rights of the individual worker. This subjugation of individual freedom is considered compensated for by the right to participate in an effective group decision:

> Depersonalized financial power covered the whole of society with economic units so inclusive, so integrated with each other, that personal adventure was of less and less relevance either as social motive power or as individual opportunity. Out of this struggle grew the impetus for labor organization as the power of labor to face the power of capital, as opportunity for individual participation and power.(1)

Accepting individual freedom unscathed as being far behind the point of no return, the means of safeguarding the individual against the inroads of profit-motivated capital are two--the direct legislation of government (through hour and wage laws, etc.), and the activities of unions. Since any bedrock condition is most easily secured by the former, the activities of unions must be regarded as being primarily responsible for those aspects which represent a struggle of interests but something less than the prevention of an "unlimited degradation of the standards of life and work."(2) The decision on the justification for coercion therefore has little of the purely humanitarian about it; rather, it becomes

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(1) Louis L. Jaffe, "The Fight for Union Security", The Atlantic Monthly, vol. 171, no. 5, (May, 1943), p. 91 et seq.

(2) Edwards, op. cit. p. 434.

a matter of choosing the extent at which it most economically contributes to a workable balance between the worker, the employer and the consumer.

## Extension of Union Affairs Into Public Domain

Since the actions of unions thus come to be scrutinized under the criterion of how the legislative power increments have been used, it is pertinent to move into the public domain matters which were, in effect, legislated there by the conferral of powers on unions. These matters of internal management and method are private concerns of a private body. When the body passes from the state of being private to being at least semi-public, the definition of what constitutes an internal matter requires amendment. That the necessity for this amendment was not anticipated by the framers of the Act is indicated by an early statement of the Board:

> The Board should not interfere with the internal affairs of labor organizations. Self-organization of employees implies a policy of self-management. . . . In its permanent operation the Act envisages cohesive organizations, well constructed and intelligently guided.(1)

Criticism of the Act has very generally been directed toward amendment rather than repeal. As early as 1939 a survey disclosed that 68.4% of the executives questioned answered

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(1) In the matter of Aluminum Company of America and Aluminum Workers Union No. 19104, NLRB, Case R-4, April 10, 1936. Cited, New York Times, (April 13, 1936), p. 36, col. 2.

that they thought it would be "foolish for management of businesses to try to keep unions from organizing in their plants."(1) Another poll in the same year disclosed that modification appealed to as many (41.9%) as did repeal (40.9%).(2) The general tenor of such modification proposals was founded on the conviction "often honestly disclosed and clearly articulated, that the Act has so extensively affected the play of industrial forces that labor has now become too strong and management relatively too weak."(3)

Such amendment proposals were challenged by the bill's sponsor. Speaking in 1939, Senator Wagner declared:

> I say that the proposals purporting to make the labor Act less one-sided, to equalize it, to prevent interference from any source, are based upon the reactionary view that the worker should not have the right to organize, or upon the false view that today the worker has become a privileged character receiving more than the just fruits of his labor.(4)

While this view tended, and perhaps with current justification, to regard any amendment as an attack upon the right to organize, it carried the trace of a suggestion that amendment would

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(1) "The Fortune Survey, XVIII," Fortune Magazine, vol. XIX, no. 2, (October, 1939), p. 68 at 91.

(2) Unsigned article, "What Business Thinks", Fortune Magazine, vol. XX, no. 4, (October, 1939), p. 52.

(3) Keyserling, op. cit., p. 26.

(4) Hearings before the Committee on Labor, House of Representatives, on proposed Amendments to the National Labor Relations Act, vol. 1, May 18, 1939, p. 288-89, cited by Keyserling, op. cit. p. 29-30.

come to be in order when the need for the one-sidedness had been corrected. A suggestion that such had come to pass was contained in a government committee report four years later:

> Labor has come of age, and the country expects these (labor) leaders to recognize that labor has duties as well as rights.(1)

Ten years of operation of the Act had solidified the cry for amendment, with business in the lead with such declarations as:

> . . . something has to be done to make unions more responsible . . . to their members concerning internal policy and finance, to the truth when they promote their causes verbally or in writing, to employers when they have entered into a contract, and to the public at all times.(2)

While such declarations were sometimes more productive of heat than light, they were indicative of a profound change in attitude towards unions over the decade. Emphasis was shifted from whether unions should be permitted or encouraged to the manner in which they should be expected to reciprocate for the encouragement they received. The rights of the member within the union were drawn into the public domain with good cause although not always with admirable motive. The observance of contracts superseded the question of the right to contracts. Finally, the effects of union-industry

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(1) Report No. 10, part 6, p. 3 of the (Truman) Special Committee investigating the National Defense Program, (April 2, 1943).

(2) Charles O. Gregory, "Something Has to Be Done", Fortune Magazine, vol. XXXIV, no. 5, (November, 1946), p. 132.

relations on the public interest were recognized as being of such import as to justify a very thorough scrutiny of the manner in which legislatively supported groups had outgrown any humanitarian justification for such support.

## CHAPTER VI

## WEAKNESSES DISCLOSED IN THE ACT

### Limited Scope

Almost all amendment suggestions arising from a decade's experience were based on the removal of what has been called "a piece of legerdemain beyond the comprehension of the non-legal mind."[1] This legerdemain was the assumption that unions were essentially private combinations and thus beyond the reaches of the law in what were considered their internal affairs. While the ideal of a group which is self-disciplining is an admirable one, the problem remains of what provision is made in the event of default. Although such sins of omission were rare statistically, the question remained of what provision was to be made for those cases where discipline, justice, and democracy did not prove coexistent.

That a strictly legal interpretation could give authority to a state lacking in both justice and democracy is illustrated by a 1938 New York court decision. This declared that a union had "power and right to take action reasonably calculated to advance its objects, even though such action involves

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(1) Philip Taft, "Democracy in Trade Unions", American Economic Review, vol. 36, no. 2, (May, 1946), p. 363.

interference with the employment of a member who has committed no wrong and against whom no charges have been preferred."(1) The necessity for union acceptance of regulation in directions which had previously been considered strictly intra-union was recognized by the president of the Pattern Makers' Union, a body of but a few thousand craft "aristocrats". Speaking in 1938, he stated:

> Unless the responsible unions actively support reasonable legal union regulations in the public interest, then all unions will feel the wrath of public reaction, and also without reference to merits. . . .(2)

Stated from the academic viewpoint of weighing complete freedom against the sacrifice of a measure of freedom for security:

> It seems also to be true that any group which, through state encouragement and protection, receives a delegation of authority must be prepared to accept responsibility for its actions and be prepared to accept a certain amount of regulation from the state.(3)

The complete absence of this regulation under the NLRA was not entirely an administrative choice of the governing board, since the NLRA was "limited to the correction of unfair

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(1) O'Keefe v Local 463 of the United Association of Plumbers and Gas Fitters of the U.S. and Canada, 277 New York 300 1938, cited by Taft, op. cit. p. 366.

(2) Oswald Garrison Villard, "Why Unions Must be Regulated", The American Mercury, vol. LVIII, no. 246, (June, 1944), p. 667.

(3) Carroll R. Daugherty, "Union Policies and Leadership in Post-war America", American Economic Review, vol. 34, no. 1, supp., part 2, (March, 1944), p. 169.

labor practices on the part of the employer only."(1) In line with this limitation, the Board "since early in its history . . . expressly adopted a hands-off policy as to internal affairs of labor unions."(2) The acceptance of such a limitation seemed, from the vantage point of hindsight, to have led to the sacrifice of a desirable end through fear of the difficulty of the means. The ultimate necessity for accepting this difficult task rests on the consequences of declining it:

> To meet such problems by intervention in the internal affairs of the various unions would involve almost insuperable difficulties of public control of union fees, standards of admission, discipline of members, and similar thorny issues. To fail to meet them at all when union membership has become practically compulsory for large numbers of workers is to deny workers protection against exploitation and abuse.(3)

Whether the corrective legislation could best take the form of the trimming of labor's group rights or the positive form of declaring the rights of labor's opposition is immaterial. The Wagner Act had a positive aim and effect, the promotion of union organization, but hinged largely on a negative clause, the list of activities prohibited to employers. Suggestions brought forward for its amendment ranged from the creation of "a bill of rights for union members in their relations with

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(1) Ralph A. Newman, "The Closed Union and the Right to Work", The Columbia Law Review, vol. XLIII, no. 1, (January, 1943), p. 51.

(2) Ibid.

(3) Edwards, op. cit. p. 439.

their officers and leaders and . . . a bill of rights for employers in their dealings with unions"[1] to measures so vindictive in nature as to bring dismay to those who hold that progress should bring the pendulum of labor-employer relations to a final rest.

Failure to Deal with Expulsions and Discrimination

Under the Act an injured member was faced with a stated disinclination of the courts to judge such matters in anything but a strictly legal light. The traditional reluctance of the courts to ensure justice when such seemed to be the victim of a procedurally impeccable union decision was defended by one court thus:

> Courts do not sit in review of decisions thus made by such officers even though it may appear that there has been an honest error of judgment, an innocent mistake in drawing inferences or making observations, or a failure to secure all information available by a more acute and searching analysis.[2]

That the following of this precedent was considerably tempered toward the end of the decade under study is indicated by a summary of the results of over three hundred cases brought to court by union minorities in the period 1930-45:

> Despite the disinclination of the courts to intervene unless union rules were grossly violated, relief was given in a third of the cases, increasingly in recent

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(1) Daugherty, op. cit. p. 178.

(2) Snay v Lovely, 276 Mass., 160 (1931), cited by Taft, op. cit. p. 363.

years.[1]

Although the Board regarded its overall policy as having "no express authority to remedy undemocratic practices within the structure of union organization",[2] it did act on the policy of refusing to certify a union "if it should discriminate in representing its constituency on the ground of race.[3] This guaranteed equality of representation to all without giving the discriminatee an equal voice in the affairs of the union. It represented a somewhat ironic twist to the general union objection to "free riders" in that the union was insisting on their existence and the Board insisting on their receiving the equality of treatment which unions generally begrudged them.

The implied recognition by labor that the conditions under which a worker may be admitted to a union must pass a test for reasonableness is indicated by the statement of William Green:

We deny that any person is denied his right to work when

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(1) Roger N. Baldwin, "Union Administration and Civil Liberties", The Annals of the American Academy, vol. 248, (November, 1946), p. 56.

(2) Larus and Bro. Co., 62 NLRB No. 154 (16 LRR 717, 16 LRR man. 242), cited by Joseph Rosenfarb, "Protection of Basic Rights", in The Wagner Act: After Ten Years, Louis G. Silverberg, ed., (Washington: The Bureau of National Affairs, 1945), p. 96.

(3) Joseph Rosenfarb, "Protection of Basic Rights", in The Wagner Act: After Ten Years, Louis G. Silverberg, ed., (Washington: The Bureau of National Affairs, 1945), p. 96.

> his failure to obtain employment in a union shop is due only to his own voluntary act in refusing to become or remain a union member, although membership is open to him under reasonable terms.(1)

The significant final phrase is repeated in a union brief:

> . . . Where the enjoyment of rights is conditioned upon compliance with reasonable conditions, individuals who voluntarily refuse to comply with such conditions are not being deprived of those rights.(2)

To accept both of these statements at their face value bases the whole question upon the interpretation of the phrase "reasonable conditions". Since obviously to every rule maker his rules are reasonable, to hang the case on such a phrase implies a confidence on the part of the rule maker in his ability to prove the reasonableness to an impartial authority. Labor and its representatives, therefore, have implied their acceptance of an outside judgment of the reasonableness of the conditions they impose.

The general tenor of most suggestions advanced to correct the unsatisfactory expulsion and discrimination possibilities was reflected in the proposals of "a committee of pro-labor men from the American Civil Liberties Union . . . /which/ . . . declared in its view the only legal measures justified at

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(1) Amendments to the National Labor Relations Act, Hearings before the House Committee on Education and Labor, 80 Cong., 1 Sess., pp. 1631, 1632.

(2) Brief for Appellants in re A.F. of L. v American Sash Co., 335 U.S. 538 (1949); Lincoln Union v Northwestern and Whitaker v North Carolina, 335 U.S. 525 (1949), cited by Braun, op. cit. p. 146.

present [1947] are these:

1. Punishing the exclusion from membership of any qualified persons on account of race, religion, sex, national origin or political affiliation.
2. Providing for hearing by an administrative agency on suspensions or expulsions, with review by an appelate court.
3. Similarly providing for the review of the application of democratic rights under union constitutions."(1)

To the objection of extreme complexity of government interference in what have traditionally been the private affairs of unions, the answer was given that:

> . . . the assumption of such jurisdiction is practicable and . . . essential. The review of the reasonableness of union rules of admission would be no more difficult than is the exercise of control over the elusive element of bona fides in the bargaining processes or over practices in hiring and discharging. On the question of necessity, it is submitted that governmental control is essential in order to avoid the peak of inequity which would be attained if government's assistance in collective bargaining were to enable organized labor to deny arbitrarily to individual workers the right not only to bargain but to join the organizations and hence to work.(2)

## Failure to Assure Democratic Conduct of Unions

A common criticism of unions under the Act was that their internal affairs were frequently managed with something less than perfect democracy. The protected positions which unions enjoyed gave weight to such objections if they were well grounded in fact:

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(1) Villard, op. cit. p. 670.

(2) Newman, op. cit. p. 54.

> Beyond all other private associations, trade unions have a public obligation to practice democracy in their internal affairs because of their protection by law in organizing, in functioning free from employer coercion, and in bargaining collectively. Being now accorded these democratic rights, both the government and public opinion may properly exact of them, in turn, the practice of democracy in their own affairs.(1)

The critical problem was and is that of reconciling firm discipline with maximum freedom for the individual member. Every live union is faced with the problem of providing a hearing for well-founded, and even for merely well-intentioned, opposition to its current policies without permitting the forces of disruption to prevail.

The great growth in the size of unions, both locals and internationals, under the Wagner Act was claimed to have been responsible for a reduction in the strength of the democratic processes within them. One writer describes and ascribes the trend thus:

> . . . the evidence seems to indicate that most unions tend to become less democratic, more highly centralized, and more autocratic with time. A number of reasons may account for this trend. Large increases in membership . . . greater patronage controlled by the officers . . . unconcern with internal union affairs as long as officials "deliver the goods" . . .(2)

The emergence of union locals with as many as 65,000 members would of necessity bring to an end the simple and direct

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(1)Baldwin, op. cit. p. 54.

(2)Philip Taft, "Opposition to Union Officers in Elections", Quarterly Journal of Economics, vol. LVIII, (February, 1944), p. 263.

democracy which unions once displayed. The connection between the individual member and bargains which are concluded in his name became, therefore, of necessity less direct. Whether it remained clear and controlled in the essentials, with only the details enmeshed in the machinery necessary to control a group numbering in the scores of thousands, has been disputed. The claim that the membership has retained the essential control has been stated thus:

> The ultimate control over collective bargaining in most unions does rest with the rank and file. This is true of all steps from the formulation of demands to the final approval of the contract. True, the full power of settlement is sometimes vested in the negotiators, but the significant point is that this power is voluntarily entrusted to the leaders by the rank and file in most instances. It is true, further, that (especially) in national negotiations, the actual control over the bargaining--in practice--rests with a small sub-committee of the negotiating group. But here again the condition has been brought about by necessary structural conditions and was not imposed on the rank and file by leadership.(1)

While delegated power such as here described may permit of many miscarriages of the intent of the delegators, it is reasonable to assume that the mere fact of delegation, carried even to the point of enormous concentration, is not proof of undemocratic processes. Rather, it is the introduction into one segment of society, a segment so large as to acquire characteristics of society itself, of the large problem which faces highly organized industrial societies:

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(1) Joseph Shister, "Union Control in Collective Bargaining", Quarterly Journal of Economics, vol. LX, (August, 1946), p. 545.

> . . . delegation of power always creates the possibility of abuses, and the unions are microcosms which reflect the dilemma of the modern world: how to combine efficiency in administration with democratic process.(1)

Delegation of authority on an extensive basis undoubtedly opens the way for the building up of personal machines within unions. While such organizations are frequently charged with being a cancer attached to a worthy body, such charges must be judged as questions of fact rather than principle:

> Unions must . . . have the power to direct their membership. Refusal by an official to yield to every whim of the rank and file, or the insistence by the officers that unpleasant compromises be made, demonstrates no basic fault in the structure of intra-union government.(2)

The lack of provision for judicial review of union decisions on questions of fact led to a great deal of public resentment. In this resentment the public was ahead of the courts and the legislators in recognizing that unions had outgrown the category of private organizations. A frequently proposed solution was that of some form of review within the labor movement itself:

> . . . the labor movement should itself create an impartial tribunal--a sort of Federal Trade Commission--which would furnish quick and inexpensive review. Most unions regard such suggestions with extreme distaste, but only some such program . . . can ward off permanent and more stringent

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(1) Philip Taft, "Democracy in Trade Unions", American Economic Review, vol. 36, no. 2, (May, 1946), p. 360.

(2) Philip Taft, "Judicial Procedure in Labor Unions", Quarterly Journal of Economics, vol. 59, (May, 1945), p. 371.

regulation of labor unions. . . .[1]

Solutions of this type most certainly challenge the undisputed sovereignty of the union concerned. However, they would guarantee a more sympathetic interference than might result should government be compelled to enter through union default.

## Lack of Provision for Settling Jurisdictional Disputes

The permitting of jurisdictional disputes with their seemingly impossible stalemates was one of the most criticized features of the Wagner Act. The suggestions for their removal were many but few faced the question of finally solving the matter. One writer, typical of many, placed the responsibility but did not indicate the means of correction:

> The government ought to assume the burden of doing that which neither management nor organized labor is able and willing to do.[2]

While correct in stating that management was unable to resolve such conflicts and probably correct in stating that labor was unable to do so by any recognized and acceptable means, this view lacked any practical suggestion as to the means which government should employ. While it seems certain that any government action to end jurisdictional disputes must involve

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[1] Philip Taft, "Democracy in Trade Unions", American Economic Review, vol. 36, no. 2, (May, 1946), p. 369.

[2] Ludwig Teller, "Requirements of a National Labor Policy", The Annals of the American Academy, vol. 248, (November, 1946), p. 177.

some form of government dictation to unions, it is essentially a matter of degree, in that government decisions in bargaining unit determination, an accepted practice, represent intervention of a somewhat comparable nature.

There was considerable support for the use of maintenance of membership provisions combined with the outlawing of the picketing of any properly unionized establishment. Under such plans, the jurisdiction of any union would be determined by each of the workers concerned, and determined only for a limited period, the life of the contract. Such a scheme tended to undermine the argument against outlawing picketing of a unionized employer based on the fact that to do so without some provision for worker expression on bargaining agency tended to entrench one union to the exclusion of others.

The past record suggests that the probability of an end to jurisdictional disputes without governmental action seems very dim. There is also the need to end jurisdictional disputes without freezing jurisdictions. The problem, therefore, becomes one of containing such disruptions to the time of contract negotiation and assuring the employer unbroken performance once he has complied with his legal duties. This type of solution is a compromise but one which recognizes that labor relations are a dynamic thing--one in which unruffled peace may signify either the complete dominance of one group or the complete stagnation of its opposition. Neither

possibility is to be contemplated with equanimity. The need to strike some sort of working middle was indicated by a pro-business writer's view of the two alternatives:

> The closed shop, even the union shop or the preferential shop, breeds an autocratic atmosphere inside a union. At the other extreme the open shop is often intolerable, for it means that management can break a struggling union.(1)

Undoubtedly sufficient centralization of American unionism would open the way for a solution of the problem. It would clearly end the most senseless of jurisdictional disputes, those between two groups organized under the same auspices. It would not settle those cases where an item of work does not fall clearly within the province of any one of the existing organizations, barring centralization to the degree of one all-powerful central organization. Such cases are more likely to increase than to decrease, for, if the American economy is to develop, there will certainly be obsolescence in occupations to the same extent that there are shifts in emphasis between various areas of production.

The objection to jurisdictional peace by the route of intense centralization in unionism lies in the other uses to which this centralization could be put. Assuming it was effectively handled, it would mean a still greater concentration of power with a concurrent ability to paralyze the entire

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(1) John Chamberlain, "Labor Has a Choice", Fortune Magazine, vol. XXVII, no. 6, (June, 1943), p. 222.

economy. It would probably mean fewer disputes but much more serious ones. It would mean the spread of political settlements with their admission of the failure of collective bargaining. It would certainly increase the difficulties of promoting the dispersion of power on the entrepreneur side, already seriously challenged by the direction of technological advance, when the economic opposite was being encouraged to centralize and as a natural concomitant of that centralization to control.

## Failure to Control Featherbedding

The charge that featherbedding was being sheltered by the Wagner Act was again a case of the molehill being promoted to the status of mountain. It is questionable whether the government is justified in entering the dispute, except insofar as featherbedding may be protected by health and safety codes. These latter are more effectively attacked as a matter of health and welfare law revision than as a problem in unionism. As was pointed out previously, featherbedding which is the result of pure union power is simply an oblique method of pricing labor. To attack it as an organized bar to a higher living standard is to open up an immense field which the government could well hesitate before entering. The step logically subsequent to an attack on union featherbedding was pointed out in discussions inspired by Mr. Thurman Arnold's

proposals in 1941 to pass a law which would regard featherbedding as illegal and subject to action of an anti-trust nature:

> If working people are to be prosecuted because they place restrictions on the use of materials, machines, and equipment which Mr. Arnold deems unreasonable, why should not the same treatment be accorded to employers who fall short of attaining maximum possible production because they, without reasons satisfactory to the Anti-trust Division, fail to utilize the most advanced techniques or because they allow some or all of their equipment to be idle?(1)

While undoubtedly the worker who through union rules keeps his production below his potential deprives society of some possible goods, to attack featherbedding beyond that with legal protections is to single out one aspect of a very large social problem--the problem of those people and resources in effect partially unemployed through being inefficiently employed.

## Failure to Control the Closed Shop

The Wagner Act, in its support of the closed shop, gave legal status to certain of the most criticized aspects of intra-union procedure. As has been indicated above, the correction of certain of these abuses did not require action on the closed shop but rather a willingness by the

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(1) Edwin E. Witte, "A Critique of Mr. Arnold's Proposed Anti-labor Amendments to the Antitrust Laws", American Economic Review, vol. 32, no. 1, supp., part 2, (March, 1942), p. 453.

government, through some administrative agency, to undertake the policing of areas previously considered to be not of public concern. Assuming such correction of the more flagrant discrimination and expulsion aspects, the closed shop has social significance only when accompanied by a closed union. The closed union is generally beyond the reaches of any action on discrimination grounds in that individual loss as a result of its application is difficult to prove. No amount of buttressing of the right of the individual would serve to open the way for effective attack on the closed union in that the ordinary individual refused admission could prove a property right in the denied employment only at great expense.

The Wagner Act neither admitted nor prohibited the combination of closed shop and closed union. One court decision of the period pointed up the social undesirability of these two factors coexisting:

> A union may restrict its membership at pleasure; it may, under certain conditions, lawfully contract with employers that all work shall be given to its members. But it cannot do both.(1)

The monopolistic effect of a closed union operating in conjunction with a closed shop overruled the claim usually advanced that a closed shop strengthened the union in its worth to society. Rather,

> . . . closed unions do not seek a closed shop to force

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(1) Wilson v Newspaper Union, 197 A 720 (1938), cited by Braun, op. cit. p. 275.

> nonmembers into its ranks, but primarily to secure certain job opportunities exclusively for its present members and a relatively small number of special proteges.(1)

The trend of union growth in the decade of the Wagner Act toward large industrial unions removed much of the real importance of the evils of a closed shop-closed union combination. Very few of the large industrial unions ever claimed a closed shop but rather chose a union shop, which gave the union an equally large membership without throwing on the union the hiring hall responsibility which appears under the closed shop.

The stronghold of the closed shop combined with the closed union was the old-line trades, where the closed union could be maintained through union control of apprenticeship regulations. With the relative decline in importance of such unions, the problem has become one which is more in the public eye than its importance justifies. Admittedly there are examples which smack strongly of monopoly, and certain of these examples will, by their key position, remain sore spots even if they become minute percentagewise in the great mass of industrial unionists. To meet such situations it would be necessary to outlaw the closed shop, with the union shop permitted under conditions of legal supervision of the reasonableness of admission requirements.

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(1)Braun, op. cit. p. 274.

## CHAPTER VII

## GENERAL LEGISLATIVE PROPOSALS

In outlining what legislative changes a decade's experience with America's first comprehensive and positive labor law would suggest, it is first necessary to dispose of certain popular measures. These, hardy perennials in legislative halls,

> . . . ignored the basic problem, preferring instead to concentrate on irrelevant and less pressing proposals often grounded in ignorance of established law, like the suggestions that labor unions should be required to incorporate, or open their books to the public, or secure licenses to carry on their affairs.(1)

On the question of making unions suable, Sumner Slichter wrote in 1938:

> . . . there are eighteen states . . . in which unions may be sued today, and no one can detect by any difference in industrial relations which states permit unions to be sued and which do not.(2)

The nature of the faults disclosed by the operation of the Wagner Act are ascribable more to the nature of unionism itself than to the terms of the Act. A list of matters which were considered demanding of legal attention in 1932 included

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(1) Teller, op. cit. p. 173.

(2) Sumner Slichter, "Collective Bargaining at Work", The Atlantic Monthly, vol. 161, (January, 1938), p. 25.

the following:

1. Prohibit the requirement of any but nominal initiation or other admission fee or charge.
2. Prohibit classification within unions (i.e. work permits, junior members, etc.).
3. Prohibit fining, suspension, or expulsion for any except acts specifically outlined in by-laws.
4. Prohibit discipline for member fulfilling duties as a citizen.
5. Prohibit discipline for any statements reflecting on union or officers.(1)

From this list, predating the Wagner Act, it can be seen that many of the most criticized union abuses under the Act were recognized as critical before its passage. The Act can be fairly criticized therefore on only two general grounds--promotion of the inherent abuses of the existing unionism by the promotion of the growth of unionism, and failure to rectify the conditions which gave rise to these abuses.

Almost all proposals for amendment of the NLRA covered the above points. In addition, they commonly added two factors which were not in existence prior to 1935--legislation against industry-wide bargaining so extensive as to endanger the public health or safety, and legislation against striking in violation of an agreement or for the purpose of compelling an employer to violate the law. The usual proposal to meet the first named was to bring labor organizations under the anti-trust laws: to meet the second, to deny to unions so

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(1) See Copal Mintz, "Trade Union Abuses", St. John's Law Review, vol. VI, no. 2, (May, 1932), p. 311 et seq.

striking the protections which the law affords.

Both of these proposals, if implemented, would present great difficulties in enforcement. To bring labor under the anti-trust laws would undoubtedly subject labor to the harassments which an unfriendly administration might choose to instigate. However, when labor deserted the stand of strict business unionism to accept promotional help from government, it is reasonable to assume that it thereby signified its willingness to plead its case on broad grounds. The retention of a genuinely unfavorable administration could hardly occur without at least partial support from within labor's house itself. To remove the control of unions from an internal basis to the public domain would therefore place its broad outlines in an arena where such matters are, by their broad magnitude, comparable to the constituency deciding them. The need for some broad social check on the larger aspects of labor policy is indicated by the contention that

> As unions become stronger and their rights to coerce more compelling, the market's checks upon them are weakened and the need for a legal check becomes more striking.(1)

The suggestion that the long standing rule against extending anti-trust legislation to cover unions be revoked deserves some consideration. To regard it as settled by the Clayton

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(1)Corwin D. Edwards, "Public policy Toward Restraints of Trade in Unions", American Economic Review, vol. 32, no. 1, supp., part 2, (March, 1942), p. 447.

Act would be to overlook the tremendous change in conditions over the succeeding years. The Wagner Act, by its guarantee of certain union rights, opened the way for practices and developments which were not anticipated at the time of its passage. To use anti-trust legislation against unions would be to fail to profit by past proof of the unsuitability of general business law to labor relations problems.

As to whether the removal of the protections of the Act from those who violate it would prove an effective deterrent or cure is not clear. Undoubtedly it would make union leaders examine more closely their plans before either disregarding, or condoning the disregard of, the law. Admittedly it would not be a simple measure to enforce, in that it would spotlight the question of whether the law had been broken in fact. With the peculiar nature of unionism, where the problem of agency clouds any clearcut decisions on many questions of fact, this would be no easy task. It could, however, force a tightening internally in the unions in that failure to control the union's agents to the satisfaction of the courts would carry heavy penalties. There would still devolve on the courts the decision as to the bona fides of the union leadership in its claim that responsible agency was vigorously sought and irresponsibility firmly disciplined.

## CONCLUSION

The decade of operation of the National Labor Relations Act indicated that it was possible by government promotion to encourage the growth of unions and collective bargaining. It indicated that control is not an isolated matter. In the complex economy of contemporary America, there is no aspect of economic and social life which can be controlled without forcing intervention in some related area. The mere fact that economic control cannot be quarantined is not an indication of the error of that original control. Rather it is a guidepost to subsequent action.

The decade's experience indicated three directions in which amendment was desirable: the protection of the worker against union injustice, the protection of the employer against injuries from inter-union feuds, and the protection of the consuming public against union-employer collaboration. The operation of the Act indicated that in removing the worker from the danger of personal injustice at the hands of the employer, it ran the risk of subjecting him to a greater danger of injustice from the union. While the rise of the jurisdictional dispute was more a matter of time than legislation, the legislation served to give protection to those unions engaged in them. It might be argued that the plight

of the consumer under a condition where big unions and big business were frequently able to join forces at his expense was traceable more to the general economic situation than to the labor legislation prevailing. The answer would be that to decline consumer protection on those grounds would be to trust to a depression to correct a wrong.

The peculiar conditions of the decade under study undoubtedly gave impetus to this combination. It is difficult, however, to foresee any conscious move on the part of government to have economic conditions any different. With national survival dependent upon a minimum of industrial warfare, and the public interest demanding a control over union-management collusion, the future may well demand governmental intervention in labor matters to an extent which surpasses all previous hopes or fears:

> Do such developments as these mean that we must look forward to some form of compulsory arbitration to determine major provisions of union agreements? There are many who think so. A common view is that when powerful and well-financed national labor organizations are pitted in bargaining against great industrial corporations, the inevitable result is either industrial war or collusion against the consuming public; and, however reluctant the government may be to decide the issues, public opinion will force it to do so. That the current trend is in this direction can hardly be denied. But whether it is more or less inevitable, whether there is no other choice, may well be doubted.(1)

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(1)William M. Leiserson, "Public Policy in Labor Relations", American Economic Review, vol. 36, no. 2, (May, 1946), p. 338.

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