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Legal Framework of Public Intervention in Industrial Disputes

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STUDENT ANALYSIS

THE LEGAL FRAMEWORK OF PUBLIC INTERVENTION IN INDUSTRIAL DISPUTES

I. HISTORICAL BACKGROUND

A. The Period of Formation

1. Early Background
2. The Conspiracy Doctrine
3. The Labor Injunction

B. The Period of Consolidation

1. The Wagner Act
2. The Taft-Hartley Act and "Right-to-Work" Laws
3. The Reform Acts of 1958-59

II. GOVERNMENT INTERVENTION IN COLLECTIVE BARGAINING

A. Methods of Achieving Settlement

1. Good Faith Bargaining
2. Mediation and Conciliation
 - a) federal
 - b) state
 - c) foreign
 - d) conclusion
3. Arbitration
 - a) voluntary
 - b) compulsory
 - c) conclusion

B. Methods of Maintaining Production

1. Emergency Strike Injunction
2. Plant Seizure
 - a) federal
 - b) state
3. Employee Draft
 - a) federal
 - b) state

Introduction

Much has transpired since the early development of the American trade union movement. Less than a million of the nation's 29 million gainfully employed population were unionized in 1900;¹ today union membership stands at approximately 18.1 million.² Union wealth was minimal until about 1942;³ estimates today place

¹ Clague, *The American Worker and American Industry*, 71 MONTHLY LABOR REVIEW 11 (1950).

² Cohany, *Union Membership, 1958*, 83 MONTHLY LABOR REVIEW 4 (1960). Union membership today is also often a prerequisite to the acquisition and retention of employment. Under the LMRA § 8(a)(3), however, the closed shop is illegal. Hence it would appear that union membership would not be a prerequisite to the acquisition of employment. But such is not always the case. See, e.g., *Thorman v. International Alliance of Theatrical Stage Employees*, 49 Cal. 2d 625, 320 P.2d 494 (1958). Further, closed shop provisions were found in approximately 4 per cent of 1,162 collective bargaining contracts recently surveyed by the Bureau of Labor Statistics, although it should be noted the agreements were principally concerned with intra-state activity not subject to the LMRA. On the other hand, the survey revealed that 74 per cent of the agreements provided for the union shop, clearly indicating that union membership is often a prerequisite, at least, to retaining employment. *Union Security Provisions in Major Union Contracts, 1958-59*, 82 MONTHLY LABOR

its total value at nearly \$34 billion,⁴ and union welfare and pension plans cover one half the population of the United States.⁵

Paralleling the factual growth of the trade union movement has been a change in legal attitudes. Unions were first suppressed, then promoted. Today an attitude of supervision is developing and collective bargaining, once seen as an invasion of individual freedom, has become the cornerstone of the nation's industrial policy.⁶

Recent events, however, have raised questions which probe to the very heart of this commitment to collective bargaining. National attention was focused on the steel industry even before the expiration of the contract on June 30, 1959, and the beginning of the strike two weeks later. By December 5, the chairman of the National Labor Relations Board spoke of a breakdown in collective bargaining, a breakdown which had cost the steel worker \$1,750,000,000, the industry \$1.5 billion, and the government \$1.6.⁷ Before the dispute was settled on January 5, the Vice-President of the United States had personally intervened in the conflict, and the Supreme Court was faced with the issue of the constitutionality of the emergency strike provisions of the Taft-Hartley Act.⁸

Two issues seemed central to the dispute, inflation and work rules. The settlement resolved neither,⁹ and prospects are that similar questions will soon result in a national railway strike.¹⁰ The seeming failure to find, through normal channels, solutions to the problems posed by the strike raises doubt, in some quarters, of the validity of collective bargaining as a viable method of resolving industrial conflict.

It is the purpose of this survey, then, first, to review the history of the American commitment to collective bargaining, and, second, to outline the present legal framework designed to achieve industrial accord through governmental intervention in, and supervision of, the collective bargaining process.

I. Historical Background

A. The Period of Formation

1. Early Background

While the evolution of the modern labor union is traceable to the industrializa-

REVIEW 1348, 1349 (1959). This situation should be contrasted with the "yellow dog" contract era. See generally, Lieberman, *Hitchman Coal & Coke Company v. Mitchell: The "Yellow Dog" Contract (1907-1917)*, in READINGS IN LABOR ECONOMICS AND INDUSTRIAL RELATIONS 469-76 (2d. ed. 1956).

3 Dubinsky, *Safeguarding Union Welfare Funds*, AMERICAN FEDERATIONISTS, July, 1954, p. 10.

4 It has been estimated that it will continue to increase until it reaches \$80 billion. Estimates also place total annual contributions at \$9 billion and benefits at \$5 billion. Levitan, *Welfare and Pension Plans Disclosure Act*, 9 LAB. L.J. 827, 828 (1958).

5 SUBCOMMITTEE ON WELFARE AND PENSION FUNDS OF THE SENATE COMMITTEE ON LABOR AND PUBLIC WELFARE, FINAL REPORT ON WELFARE AND PENSION PLAN INVESTIGATION, S. REP. NO. 1734, 84th Cong., 2nd Sess. 6 (1956).

6 The number of collective bargaining agreements in effect in the United States exceeds 150,000. Cohany, *supra* note 2, at 9. These agreements in many ways have a greater significance to the average worker than congressional legislation. In a challenge to traditional legal thinking, one judge, in *NLRB v. Highland Park Mfg. Co.*, 110 F.2d 632, 638 (3d Cir. 1940), described them as

a statement of principles and rules for the orderly government of the employer-employee relationship in the future. This . . . becomes, as it were, the industrial constitution of the enterprise . . . They not only provide standards by which industrial disputes may be adjusted, but they add dignity to the position of labor and remove the feeling on the part of the worker that he is a mere pawn in industry subject to the arbitrary power of the employer.

7 South Bend Tribune, Dec. 5, 1959, p. 2, col. 1.

8 United Steelworkers of America v. United States, 361 U.S. 39 (1959).

9 A wage increase was granted, and the issue of work rules was submitted to a joint committee to make, at a later date, non-binding recommendations.

10 Cohany, *supra* note 2.

tion of the manufacturing process and the attendant chasm between owner and worker,¹¹ it would be erroneous to say that concerted activity among laborers to improve their lot is an invention of the "industrial man." As early as 1548 in England it was deemed necessary to make criminal "conspiracies" among "victualers," "handicraftsmen," and "labourers." Apparently they were engaging in agreements to sell only at "unreasonable prices," to labor only a certain number of hours per day, or to complete only a certain amount of work per day.¹²

In this country, concerted activity among laborers to improve their economic position appeared as early as the 17th century.¹³ For instance, twice in 1659 the bakers of New York went on strike to win from the burgomasters a more favorable wage.¹⁴ The earliest American example of labor organization, in a stricter sense, is provided by the journeymen tailors of New York, who in 1758 combined to work at a certain rate.¹⁵ In 1778 the printers of the same city took a similar course of action.¹⁶

In the period immediately following the American Revolution, labor, for the first time, turned to a more permanent type of trade organization.

Among the early strikes of the post-Revolutionary era one of the most notable was that of the New York shoemakers in 1785 for higher wages. . . . After a strike lasting three weeks both sides withdrew their demands. . . . Labor union activity in Philadelphia in this period surpassed that in New York. In 1786 the journeymen printers went on strike to protest a reduction in wages and passed a resolution of joint support for the duration of the strike — probably the first instance on record of a union strike-benefit fund. . . . Following the organization in 1789 of the Philadelphia Society of Master Cordwainers, the journeymen in the same trade formed in 1794 a union known as the "Federal Society" to protect themselves against "scab labor." On at least three occasions before the end of the century they went on strike for higher wages.¹⁷

This period of formation carried through the first quarter of the 19th century.¹⁸ For the first time organizations comprised solely of journeymen, and concerned primarily with the advancement of the economic interests of the employee, asserted themselves.¹⁹

2. *The Conspiracy Doctrine*

As these "unions" gathered momentum in the early years of the 19th century,

11 "The modern labor movement is, of course, distinct from anything that had evolved before the industrial era, being primarily the struggle of the newly evolved wage earning class to improve its economic status." CUMMINS & DEVYVER, *THE LABOR PROBLEM IN THE UNITED STATES* 4 (3d ed. 1947). As to the effect of the separation of the worker from the owner, see YODER, *LABOR ECONOMICS AND LABOR PROBLEMS* 79 (1933).

12 GREGORY, *LABOR AND THE LAW* 13 (2d rev. ed. 1958).

13 MORRIS, *GOVERNMENT AND LABOR IN EARLY AMERICA* 156-60 (1946).

14 *Id.* at 161.

15 Labor conflicts of the era are reflected in articles in *New York Journal*, April 7, 1768.

16 Foreshadowed a decade earlier in disputes in the same city. See *New York Royal Gazette*, Nov. 14, 1768.

17 MORRIS, *op. cit. supra* note 13, at 200-01.

18 MILLIS & MONTGOMERY, *ORGANIZED LABOR* 18-23 (1945).

19 The Philadelphia shoemakers organized in 1792 and although the society lived only a year, a second organization, formed in 1794 under the name of Federal Society of Journeymen Cordwainers, maintained its existence until 1806. The carpenters and cordwainers of Boston organized in 1793 and 1794, respectively, the printers of New York in 1794 and of Philadelphia in 1802, and the shoemakers of Pittsburgh and the printers of Boston in 1809. During the period 1810-1815 printers' societies were also formed in Albany, Washington, and New Orleans, and a continuous organization was maintained in Baltimore between 1800 and 1805. The bakers, tailors and other groups affiliated in organizations that attained some permanency in the larger cities; and in the smaller towns organizations also sprang up, some of which were able to raise appreciably the rate of wages then obtaining. MILLIS & MONTGOMERY, *op. cit. supra* note 18, at 19.

their effectiveness was increasingly countered by the action of the judiciary. With the historical background of English legislation,²⁰ the authority of a random statement in *Hawkins's Pleas of the Crown*,²¹ and such dubious precedent as *Rex v. Journeymen Tailors of Cambridge*,²² courts found it possible to declare that a combination to refuse to work for less than a certain wage was a criminal conspiracy in restraint of trade.²³

The most famous of the criminal conspiracy cases is, without doubt, the *Philadelphia Cordwainers Case*,²⁴ decided in 1806 in the Mayor's Court of Philadelphia. A group of cordwainers were charged with agreeing not to labor for less than certain wages and further agreeing to prevent others, by unlawful means, from laboring for any rate other than that set by the association. The court, in convicting the defendants, stated:

... a combination of workmen to raise their wages may be considered from a twofold point of view; one is to benefit themselves, the other is to injure those who do not join their society. The rule of law condemns both.²⁵

In 1842, this application of the conspiracy doctrine was repudiated in *Commonwealth v. Hunt*.²⁶ The *Hunt* case required a positive showing, either that the objective of the conspiracy was unlawful, or that the means employed to secure a lawful objective were unlawful. In the court's opinion, absent specific legislation, the raising of wages could not be said to be an illegal end, nor combination, as such, an illegal means.

In the interval between the *Philadelphia Cordwainers Case* and *Commonwealth v. Hunt*, there were a series of indictments and convictions for criminal conspiracy.²⁷ As late as 1835, the Supreme Court of New York, construing a statute which in effect restated the common law doctrine of restraint of trade, declared that combinations to raise or lower wages were criminal offenses.²⁸

The next year a New York attorney, in defense of a group of cordwainers of the city of Hudson, addressed the following remarks to a jury:

20 In 1799 the first Combinations Act was passed. 39 Geo. III, c. 81. In the following year this statute was substantially re-enacted, omitting a series of arbitration clauses. 1800, 40 Geo. III, c. 106. In substance these statutes declared illegal and punishable "contracts," "covenants" and "agreements" entered into by any persons for the purpose of obtaining an "advance of wages," a "lessening or altering" of their hours of work, a decreasing of their "quantity of work," or for preventing any person from hiring "whomsoever they shall think proper." By 1825 this act had been repealed; the Combinations Act of 1825, substituted in its place, provided for the legality of combinations to raise wages, improve working conditions, etc. 1825, 6 Geo. IV, c. 129. The scope of the protection afforded to labor by such legislation was narrowed by the interpretation of the courts. See, e.g., *Rex v. Bykerdike* [1832] 1 Moody & Rob. 179, where the court found a strike to prevent non-union men from continuing in the employ of the colliery an illegitimate concerted activity and not protected by the Combinations Act of 1825.

21 "There can be no doubt but that all conspiracies whatsoever wrongfully to prejudice a third person are highly criminal at common law." 1 HAWKINS, PLEAS OF THE CROWN 190 (1st ed. 1716). "In the case of labor combinations the most frequent wrongful purpose for which combinations were formed was restraint of trade." MILLIS & MONTGOMERY, *op. cit. supra* note 18, at 502.

22 8 Mod. 10, 88 Eng. Rep. 9 (K.B. 1721). See also *R. v. Eccles*, 1 Leach C. C. 274, 168 Eng. Rep. 240 (K.B. 1783). These cases were cited by the court to justify a conviction of laborers in New York in 1810. *People v. Melvin*, Yates Select Cases 112 (N.Y. 1810); 3 COMMONS AND GILMORE, DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY 251 (1910).

23 Between 1806 and 1815, at least six conspiracy cases were tried before juries that were judges of both law and fact, four of them resulting in verdicts adverse to the journeymen; and during the years between the lifting in 1820 of the depression and 1827 still other indictments were returned.

MILLIS & MONTGOMERY, *op. cit. supra* note 18, at 22.

24 3 COMMONS AND GILMORE, *op. cit. supra* note 22.

25 *Id.* at 67.

26 45 Mass. (4 Met.) 111 (1842).

27 In criminal cases as contrasted to civil litigation the jury were the judges of both law and fact. GREGORY & KATZ, LABOR LAW: CASES, MATERIALS AND COMMENTS 19 (1948).

28 *People v. Fisher*, 14 Wend. 9 (Sup. Ct. N.Y. 1835).

You will observe also that the Court admit the right of the journey-men to get an advance of wages and their right to refuse to work for less. The end in view, viz: an advance in wages and the means of obtaining it, viz: by refusing to work, are both lawful. Yet it is the combination which is offensive — it is the conspiracy for which they may be indicted. What is this but saying in plain language that it is a criminal act, — a conspiracy for men to combine together to attain a lawful end by lawful means? Can plain men of common sense comprehend it? Why, even Chitty in his treatise on criminal law . . . says . . . that "it is impossible to conceive a combination as such to be illegal."²⁹

The illegality, then, which the courts saw in unionism was the combination which forced an "unnatural" rise in wages. The spirit of individualism was the prevailing mood of the era, a mood which gave to the individual unabridged freedom to pursue his economic interests as he saw fit. This disposition, and the betterment of society that was thought to be attendant on its observance, was not to be jeopardized by concerted action among working men. Each individual must fend for himself. To join with others was to break the rules of the game.³⁰

Although *Commonwealth v. Hunt* categorically disavowed the prevalent theory that there was a special unlawfulness peculiar to labor organizations, it can hardly be said that it marked the emancipation of labor.³¹ The questions of what means unions might use to advance their economic interests, and what ends they might lawfully attempt to achieve, occupied the courts until the close of the 19th century, even as they do today.

In the 20 years after *Commonwealth v. Hunt* only three conspiracy prosecutions are known to have occurred in connection with labor disputes.³² The crisis of 1837 and the subsequent depression of the economy militated against the newly formed unions, and many of them lacked the resources necessary to weather the storm.

For the first time in American history the labor movement, if such can be said to have existed during this period, was dominated by the so-called intellectuals:

When there is general unemployment and when those who are fortunate enough to obtain work must accept low wages, the general unrest and discontent make fertile soil for the reformer, the dreamer, the political and social theorist, the fanatic. These bad times were no exception. The idealists were not slow to put in their appearance and soon were in possession of the social forum. The laborer himself was little heard. He was supposed to listen. Not infrequently he yielded and joined the band of reformers and theorists, knowing not whither he was going but glad to be on his way.³³

In the early 1850's, due partly to the discovery of gold in California and Australia, there was an upsurge of business activity. The laborer returned to the trade union, but union activity had hardly revived when the panic of 1857 once again depressed industrial activity.³⁴

During the Civil War, government activity stimulated industry. At first, the rise in prices, accompanied by a decline in real wages, the dislocation of industry,

29 John W. Edmonds, Esq., in defense of a group of cordwainers in the city of Hudson, 1836.

30 The economist was up to the task of supporting this theory. David Ricardo developed what was known as the "iron law of wages." Wages are of necessity the amount necessary to enable the worker to subsist and to perpetuate his race without either increase or diminution. To increase wages arbitrarily is to increase population. Thus, concerted activity to raise wages above subsistence is a self-defeating experiment. CUMMINS & DEVYVER, *op. cit. supra* note 11, at 12-15.

31 Witte, *Early American Labor Cases*, 35 YALE L.J. 825, 828 (1926).

32 *Id.* at 829, n. 18.

33 CUMMINS & DEVYVER, *op. cit. supra* note 11, at 115-16.

34 *Id.* at 116-17:

The Typographical Union was organized nationally in 1850. The stone cutters organized nationally in 1853, the hat finishers in 1854, the locomotive engineers in 1855, the iron moulders, the machinists and black-smiths in 1859.

and the introduction of machinery placed labor organizations in a helpless position. By 1863 nearly all those organizations which had survived the depression of 1857 had disappeared.³⁵ By the closing years of the war, however, trade unionism was revived,³⁶ stimulated by an abnormal demand for goods and an increasing shortage of manpower.³⁷

Between 1863 and 1880 there were at least seven labor conspiracy cases in Pennsylvania, five in New York, three in New Jersey, and one each in Connecticut, Illinois, and Missouri.³⁸ Post-war legislative activity was designed to thwart the advance of labor organization. An Illinois statute of 1863 made it a crime for "any person" by threat, intimidation or otherwise, to prevent any other person from working at a lawful business on whatever terms he saw fit. Also proscribed was combined activity for the purpose of depriving the property owner of his right to manage, or preventing any person from being employed on whatever terms the parties might agree upon.³⁹ In 1869 the trend of legislation reversed itself and in Pennsylvania, New York, New Jersey, Maryland and Illinois, statutes were enacted to nullify the common law conspiracy doctrine.⁴⁰ For the most part these laws required a showing that either the ends sought or the means used were illegal. Their effectiveness, however, is doubtful,⁴¹ primarily because of their broad terminology.

In 1867, the New Jersey Supreme Court upheld a lower court's refusal to quash an indictment which charged, in substance, that the defendants combined to compel their employer to discharge certain of their fellow workmen by simultaneously quitting in a body.⁴² Harking back to the days prior to *Commonwealth v. Hunt*, the judge declared:

I conclude, then, . . . that cases may occur in which the purpose designed to be fulfilled becomes punitive as a public offense solely from the fact of the existence of a confederacy to effect such purpose.⁴³

Hunt was endorsed both in principle and result,⁴⁴ but distinguished, since in the New Jersey case the defendants combined to compel their employer to discharge fellow workers by an announced determination to quit their employment in a body.⁴⁵ This was an unlawful objective.

The Supreme Court of New York decided in the same year *Master Stevedores' Association v. Walsh*.⁴⁶ Suit was brought by the association to enforce a penalty against Walsh, who had undertaken to charge less than the amount stated in the association's schedule. The penalty was set out in the by-laws of the association of which Walsh was a voluntary member. The court overruled Walsh's demurrer,

35 MILLIS AND MONTGOMERY, *op. cit. supra* note 18, at 45.

36 Witte, *supra* note 31, at 829.

37 MILLIS AND MONTGOMERY, *op. cit. supra* note 18, at 46.

38 Witte, *supra* note 31, at 829.

39 ILL. L. 1863, 70. See also CONN. GEN. STAT. 1866, § 122, at 264, wherein conspiracies to interfere with the operation of railroads, gas, and telegraph companies are declared illegal and punishable.

40 PA. L., Act 1242, 1869; PA. L., Act 1105, 1872; PA. L., Act 33, 1876; PA. L., Act 230, 1891; N.Y.L. 1870, c. 19; N.Y.L. 1882, c. 384; N.Y. PENAL CODE, 1881, § 170; N.J. ACTS 1883, c. 28; MARYLAND L., 1884, c. 266; ILL. L. 1873, 76.

41 Witte, *supra* note 31, at 830.

42 State v. Donaldson, 32 N.J.L. 151, 90 Am. Dec. 649 (N.J. Sup. Ct. 1867).

43 *Id.* at 153-4, 90 Am. Dec. at 651. In support of this conclusion the court cites such cases as Rex v. Lord Grey, 3 Hargrave; State Trials 519; Rex v. Francis Deleval, 3 Burr. 1434, 97 Eng. Rep. 913 (K.B. 1763). These cases involved a conspiracy to induce a young female to leave the house of her parents in order to facilitate her prostitution. Also cited were Rex v. Armstrong, 1 Vent. 304, 86 Eng. Rep. 196 (K.B. 1688); Rex v. Kimberty, 1 Lev. 62, 83 Eng. Rep. 297 (K.B. 1674); Rex v. Timberly, 1 Sid. 68, 82 Eng. Rep. 974 (K.B. 1670). These cases involved combinations to charge a man with being the father of a bastard. The court pointed out that in law these actions if done by an individual would not constitute a criminal offense, the combination being alone the quality of the transaction which made them indictable. *Id.* at 153, 90 Am. Dec. at 650.

44 *Id.* at 157, 90 Am. Dec. at 654.

45 *Ibid.*

46 2 Daly 1 (N.Y. Sup. Ct. 1867).

holding that the object of such an association was not in restraint of trade and that the doctrine of criminal conspiracy to raise wages was not a part of the common law. The court seemed to suggest that the scope of concerted activity was limited to refusals to work for less than a determined wage. Any other reason for a strike was apparently suspect.

It may, therefore, be laid down . . . that it is lawful for any number of journeymen or of master workmen to agree, on the one part that they will not labor below certain rates or on the other hand that they will not pay above certain prices; but that any association or combination for the purpose of compelling journeymen or employers to conform to any rule, regulation, or agreement fixing the rate of wages, to which they are not parties, by the imposition of penalties, by agreeing to quit the service of any employer who employs a journeyman below certain rates, unless the journeyman pays the penalty imposed by the combination, or by menaces, threats, or intimidations, violence or other unlawful means, is a conspiracy for which the parties entering into it may be indicted.⁴⁷

Arguably, the *Walsh* case represents no advance in the clarity of the law of conspiracy.⁴⁸ It is likely, in view of the bias represented by the concluding remarks in the opinion, that labor was in no better position in New York than it was under the *Donaldson* decision in New Jersey.

In any event the doctrine of the *Donaldson* case was followed in a series of labor cases throughout the early 1870's.⁴⁹ After 1875 the number of conspiracy prosecutions diminished,⁵⁰ although more such cases were reported in the 1880's, particularly from 1885 to 1887, when there was great public alarm over the increasing number of strikes and boycotts.⁵¹ By the turn of the century, however, this legal weapon was used rarely, partly because of the increasing reluctance of the courts to find union activity illegal,⁵² but primarily because of the increasing use of the injunction as a standard form of action in legal controversies growing out of labor disputes.

3. *The Labor Injunction*

The use of the labor injunction can be traced to the late 1870's and a national wave of railway strikes. The railroads, by reason of their methods of financing, were by this time reduced to a position of insolvency.⁵³ Most of them were in receivership and those entrusted with their management were, of course, officers of the court.

Because of the insolvency of the industry wages were low. The answer of the laborer was to strike. Whatever might have been the contemporary judicial opinion of strikes against private railroad management, strikes against receivers were regarded as interferences with the administration of the courts; they were punished as contempts of court.⁵⁴ Although these cases did not involve disobedience to injunc-

⁴⁷ *Id.* at 7.

⁴⁸ *Contra*, see Boudin, *The Sherman Act and Labor Disputes*, II, 40 COLUM. L. REV. 14, 47 (1947).

⁴⁹ LANDIS AND MANOFF, *CASES ON LABOR LAW* 37, n. 15 (2d ed. 1942).

⁵⁰ *Id.* at 38.

⁵¹ *Commonwealth ex rel. Valletti v. Sheriff*, 15 Phil. Rep. 393, (Ct. Quar. Sess. 1881); *State v. Stewart*, 59 Vt. 273, 9 Atl. 559 (1887); *State v. Glidden*, 55 Conn. 47, 8 Atl. 890 (1887); *Crump v. Commonwealth*, 84 Va. 927, 6 S.E. 620 (1888).

⁵² See, e.g., *State v. Stockford*, 77 Conn. 227, 58 Atl. 769 (1904), where the court held that a conspiracy, the purposes of which were to compel truckmen to employ only union drivers and to pay certain wages, was not illegal. Nor was picketing an unlawful means to achieve these ends. The crucial question was whether there was force or violence and this was properly left to the jury.

⁵³ Nellis, *A Strike and Its Legal Consequences — An Examination of the Receivership Precedent for Labor Injunctions*, 40 YALE L.J. 507 (1931).

⁵⁴ See *King v. Ohio & M. Ry. Co.*, 14 Fed. Cas. 539 (No. 7800) (C.C.D. Ind. 1877); *Secor v. Toledo, P & W R.R.*, 21 Fed. Cas. 968 (No. 12605) (C.C.N.D. Ill. 1877).

tions, they involved disobedience to court orders directing receivers to operate trains,⁵⁵ and thus they were summary proceedings.

The first reported cases of injunctions being issued in labor disputes are *Sherry v. Perkins*⁵⁶ and *United States v. Debs*.⁵⁷ In both, the justification for the use of the injunction was imminent peril to property. The right to do business was equated with a property right; it, too, was protected by an injunctive remedy.⁵⁸ The action of the Supreme Court in the *Debs* case was the ultimate approval of the injunction in labor disputes.⁵⁹

Prior to 1931 at least 508 injunctions were issued in the federal courts and 1,364 in state courts.⁶⁰ The scope of these injunctions was generally broad.⁶¹ In one case striking miners, who were apparently residing in a company town and refusing to quit their homes, were ordered to refrain

. . . from disbursing any funds for any further appeal bonds, attorney services, . . . for the purpose of enabling, aiding (or) encouraging . . . any person to occupy against the plaintiff's will any . . . mining houses of the plaintiff.⁶²

In 1890, Congress passed the Sherman Act,⁶³ which declared combinations in restraint of trade among the several states to be illegal. Whether Congress intended it to apply to labor organizations as well as to industrial combinations is a question that has provoked much debate. In any event, it was upon this statute that the Circuit Court for the Northern District of Illinois rested its decision in the *Debs* case.⁶⁴ In affirming the issuance of the injunction the Supreme Court declined to base its decision on the Act,⁶⁵ and chose instead a statute which protected the government's interest in the mails.⁶⁶ The lower federal courts, however, continued to make use of the Sherman Act as the foundation for their jurisdiction over labor disputes,⁶⁷ a practice finally sanctioned by the Supreme Court in 1908 in the *Danbury Hatters* case.⁶⁸

In national elections from 1908 to 1912, unions waged an aggressive campaign to amend the Sherman Act. In 1914 these efforts culminated in the passage of the Clayton Act.⁶⁹ The first paragraph of Section 20 provided that no injunction should issue in any dispute between an employer and employees involving the terms or conditions of employment, unless necessary to prevent irreparable injury to property. When passed, this legislation was hailed as the redemption of labor.

55 Nellis, *supra* note 53, at 524.

56 147 Mass. 212, 17 N.E. 307 (1888). Injunction was issued to restrain picketing.

57 64 Fed. 724 (C.C.N.D. Ill. 1894), *aff'd*, *In re Debs*, 158 U.S. 564 (1895). On appeal to the Supreme Court from the conviction for contempt of the injunction the court stated "that the jurisdiction of courts to interfere in such matters by injunction is . . . recognized from ancient times and by indubitable authority." *Id.* at 599. For a criticism of the "indubitable authority" on which the court relied, see FRANKFURTER AND GREENE, *THE LABOR INJUNCTION* 20-3 (1930).

58 Witte, *supra* note 31, at 833-34.

59 Early cases involving the use of injunctions are *Blindell v. Hagan*, 54 Fed. 40 (C.C. E.D. La. 1893); *Coeur d'Alene Consolidated & Mining Co. v. Miners Union*, 51 Fed. 260 (C.C.D. Idaho 1892); *Casey v. Cincinnati Typographical Union No. 3*, 45 Fed. 135 (C.C. S.D. Ohio 1891); *Barr. v. Essex Trades Council*, 53 N.J. Eq. 101, 30 Atl. 881 (1894); *Murdock v. Walker*, 152 Pa. 595, 25 Atl. 492 (1893); *Brace Bros. v. Evans*, 5 Pa. Co. Ct. 163 (1888).

60 WITTE, *THE GOVERNMENT IN LABOR DISPUTES* 84 (1932).

61 See FRANKFURTER AND GREENE, *op. cit. supra* note 57, at 86-122. See also *Newton Co. v. Erickson*, 70 Misc. 291, 298, 126 N.Y. Supp. 949 (Sup. Ct. 1911).

62 FRANKFURTER AND GREENE, *op. cit. supra* note 57, at 101, n. 91.

63 Act of July 2, 1890, C. 647 § 1, 26 Stat. 209 (1890), 15 U.S.C. §§ 1-7 (1958).

64 *United States v. Debs*, 64 Fed. 724 (C.C.N.D. Ill. 1894).

65 *In re Debs*, 158 U.S. 564 (1895).

66 U.S. Criminal Code § 201, 35 Stat. 1127 (1909).

67 FRANKFURTER AND GREENE, *op. cit. supra* note 57, at 9, n. 39.

68 *Loewe v. Lawlor*, 208 U.S. 274 (1908).

69 38 Stat. 738 (1914), 15 U.S.C. §§ 12, 13, 14-19, 20, 21, 22-27, 44 (1958); 29 U.S.C. §§ 52, 53 (1958).

Seven years elapsed between the time of its passage and its first interpretation by the Supreme Court. Between 1916 and 1920, in 13 reported cases applying Section 20, only three courts held that the act prevented the issuing of an injunction.⁷⁰ With this judicial background the Supreme Court in 1921 decided *Duplex v. Deering*.⁷¹

In *Duplex*, an injunction was issued against members of the International Association of Machinists in New York City who were attempting to carry on a secondary boycott of the plaintiff's distributors and retailers. Claiming the privilege of the Clayton Act, the Machinists were taken before the Supreme Court by the Duplex Company, who appealed from adverse judgments in both district⁷² and circuit⁷³ courts. The Supreme Court reversed; irreparable injury to one's business is irreparable injury to property, the Court said; insofar as the first paragraph of Section 20 had reference to employees, it did not comprehend the New York machinists, who were in no substantial way connected with the Duplex Company. Furthermore, the specific activity condoned by the second paragraph of Section 20 — the persuading of a person to stop work or patronizing — must be "peaceful and lawful," which a secondary boycott is not, the Court stated.

Before *Duplex*, a number of states⁷⁴ had enacted legislation similar to the Clayton Act. Most states, through a narrow construction of these statutes, reached the same result as the Court in *Duplex*.⁷⁵ When the Supreme Court of Arizona held that such an enactment prohibited the issuing of an injunction to restrain continuous picketing and general rowdiness, the Supreme Court of the United States reversed, declaring that such activity was a deprivation of the plaintiff's property without due process of law and a denial of equal protection; picketing by anyone other than striking employees, the Court said, was both tortious and enjoined.⁷⁶

The strike as such had by the turn of the century received legal sanction.⁷⁷ Other means of effectuating union demands did not fare so well. The courts, for instance, took a dim view of picketing; the statement of Judge McPherson in *Atchison, T. & S. F. Ry. Co. v. Gee* is illustrative:⁷⁸

There is and can be no such thing as peaceful picketing, any more than there can be chaste vulgarity, or peaceful mobbing, or lawful lynching.

When men want to converse or persuade, they do not organize a picket line.

Nonetheless another federal court, dealing with a factually similar case, was reluctant to enjoin picketing. It recognized it as a legitimate weapon of the union and trusted that the "officers . . . among the men who have gone on strike . . .

70 FRANKFURTER & GREENE, *op. cit. supra* note 57, at 165.

71 254 U.S. 443 (1921).

72 Duplex Printing Press Co. v. Deering, 247 Fed. 192 (S.D.N.Y. 1917).

73 Duplex Printing Press Co. v. Deering, 252 Fed. 722 (C.C.A. 2d 1918).

74 ARIZ. REV. CODE ANN. § 4286 (1928) (enacted 1913); ILL. REV. STAT. c. 22, § 58 (1933) (enacted 1925); KAN. REV. STAT. ANN. §§ 60-1104, 1107 (1923) (enacted 1907); MINN. STAT. § 4256, 4257 (1927) (enacted 1917); N.J. COMP. STAT. 9, § 107-131a (1925); N.D. COMP. LAWS ANN. §§ 7214a1, 7214a2 (1925) (enacted 1919); ORE. CODE ANN. § 49-902, 903 (1930) (enacted 1919); UTAH REV. STAT. ANN. § 49-2-6, 49-2-7 (1933) (enacted 1917); WASH. REV. STAT. ANN. § 7612 (1932) (enacted 1919).

75 FRANKFURTER & GREENE, *op. cit. supra* note 57, at 181, n. 184.

76 Truax v. Corrigan, 257 U.S. 312 (1921).

77 [T]here is no question of the general right of a labor union to strike . . . [w]hen and for what end this power of coercion and compulsion . . . may be . . . used is the question . . . this case calls upon us to decide. *Pickett v. Walsh*, 192 Mass. 572, 78 N.E. 753, 757 (1906).

78 139 Fed. 582, 584 (S.D. Ia. 1905). Thirty-five years later the Supreme Court, in *Thornhill v. Alabama*, 310 U.S. 88 (1940), equated peaceful picketing with free speech, thus rendering state restrictions on its exercise subject to 14th Amendment objection. However, by 1957 the Court retreated from this simple equation and held that a valid public policy — prohibition of acts seeking to compel an employer to make his employees join a union — would support a ban on such picketing. *International Bhd. of Teamsters v. Vogt*, 354 U.S. 284 (1957). The law today is apparently where it was in the pre-1940's. See *Senn v. The Tile Layer's Union*, 301 U.S. 468 (1937).

will understand the views of the court as to their rights and duties. . . ."⁷⁹ The Supreme Court of the United States, while not condemning picketing, nevertheless spoke of it as "sinister" and was not able to ignore "the necessary element of intimidation in the presence of groups as pickets."⁸⁰

The existence of peaceful picketing was also considered by some of the state courts.⁸¹ The Supreme Court of Indiana, for instance, said:

The law, having granted workmen the right to strike to secure better conditions from their employers, grants them also the use of those means and agencies, not inconsistent with the rights of others, that are necessary to make the strike effective.⁸²

The secondary boycott was authoritatively condemned as an illegal means to gain valid economic benefits.⁸³ To attempt to

. . . influence A by exerting some sort of economic or social pressure against persons who deal with A — has been condemned by the Federal and Massachusetts courts in a series of instances revealing a great range of versatility. Whether the means of pressure upon a third person be a threat of strike against him, a refusal to work on material of non-union manufacture, an unfair list backed by the show of concerted action . . . , coercion and intimidation measures generally, or merely notice by circularization, banners or publication — the ban of illegality has fallen upon all alike.⁸⁴

Outside of the Massachusetts and federal courts, opinions were divided on the lawfulness of secondary boycotts. While Illinois⁸⁵ and Minnesota⁸⁶ condemned the activity, California⁸⁷ and New York⁸⁸ saw no illegality involved in it.

No less did the courts question the object of a strike than they did the means used. When the object was shorter hours, or better wages and working conditions, there was little difficulty. But if the immediate object was to secure a union shop, then the courts once more were thrown into dissension. While some courts were quite sure that strikes to compel the discharge of non-union men were illegal *per se*,⁸⁹ others were certain that such activity was directly connected with the best interests of the union members and thus any resulting injury was to be tolerated.⁹⁰

In seeking a union shop a large part of the difficulty unions encountered was the increasing use of the "yellow dog" contract, requiring the laborer to sign an agreement not to become a member of any labor organization. Concerted activity to force the laborer to join a union despite his agreement with the employer constituted intentional interference with contractual relations and as such was properly enjoined.

79 Pope Motor Car Co. v. Kugon, 150 Fed. 148, 152 (C.C.N.D. Ohio 1906).

80 American Steel Foundries v. Tri-City Control Trades Council, 257 U.S. 184, 207 (1921).

81 Everett Waddey Co. v. Richmond Typographical Union, 105 Va. 188, 197, 53 S.E. 273 (1906); Root v. Anderson, 207 S.W. 255 (Mo. Ct. App. 1918); Cumberland Glass Mfg. Co. v. Glass Bottle Blowers Ass'n, 59 N.J. Eq. 49, 46 Atl. 208 (1899); Foster v. Retail Clerks Protective Ass'n, 39 Misc. 48, 57 (Sup. Ct. 1902); Greenfield v. Central Labor Council (Ore. 1920); Steffes v. Motion Picture Union, 136 Minn. 200, 161 N.W. 524 (1917); but see Jones v. Van Winkle Gin & Machine Works, 131 Ga. 336, 340, 62 S.E. 236 (1908).

82 Karges Furniture Co. v. Amalgamated Woodworks' Local Union, 165 Ind. 421, 430, 75 N.E. 877, 880 (1905).

83 See Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n, 274 U.S. 37 (1927).

84 FRANKFURTER & GREENE, *op. cit. supra* note 57, at 43.

85 Wilson v. Hey, 232 Ill. 389, 83 N.E. 928 (1908).

86 Gray v. Building Trades Council, 91 Minn. 171, 97 N.W. 663 (1903).

87 Pierce v. Stablemen's Union, 156 Cal. 70, 103 Pac. 324 (1909).

88 Bossert v. Dhuy, 221 N.Y. 342, 117 N.E. 582 (1917).

89 Bausbach v. Reiff, 244 Pa. 559, 91 Atl. 224 (1914); Ruddy v. Plumbers, 79 N.J.L. 467, 75 Atl. 742 (1910); State v. Dyer, 67 Vt. 690, 32 Atl. 814 (1895); Lucke v. Clothing Cutters, 77 Md. 396, 26 Atl. 505 (1893).

90 Cohn & Roth Electric Co. v. Bricklayers' Union, 92 Conn. 161, 101 Atl. 659 (1917); Grant Construction Co. v. St. Paul Bldg. Trades Council, 136 Minn. 167, 161 N.W. 520 (1917); Kemp v. Division No. 241, 255 Ill. 213, 99 N.E. 389 (1912); Kissam v. United States Printing Co., 199 N.Y. 76, 92 N.E. 214 (1910); Jetton-Deke Lumber Co. v. Mather, 53 Fla. 969, 43 So. 590 (1907).

able.⁹¹ In the leading case of *Hitchman Coal & Coke Co. v. Mitchell*,⁹² the Supreme Court of the United States upheld the use of an injunction to restrain union organizers from soliciting membership among non-union men who had entered into such contracts.⁹³ While many courts displayed the same general readiness to support the non-union agreement,⁹⁴ the New York Court of Appeals disclosed an independent attitude and allowed solicitation of non-union men even though they were members of a "company union" and had agreed not to become associated with any outside labor organization.⁹⁵

The usefulness to the employer of the "yellow dog" contract is hardly to be doubted. Prior to 1921 and the *Hitchman* case numerous states had attempted to declare criminal the making of such contracts.⁹⁶ These laws were held unconstitutional, usually by state courts;⁹⁷ in Kansas such a law was upheld,⁹⁸ but the Supreme Court of the United States reversed.⁹⁹ Such legislation was held to be violative of the due process clause of the 14th Amendment.¹⁰⁰ Comparable federal legislation was invalidated in *Adair v. United States*.¹⁰¹

The next approach taken by legislatures was declaring such contracts void and unenforceable both in law and equity.¹⁰² These laws were enacted during the early 1930's and "due to the fundamental changes in the prevailing points of view about these matters, the older constitutional objections against this type of legislation seem to have gone by default."¹⁰³

In the Great Depression measures to equalize bargaining power came to be more widely favored. In 1932 a Republican Congress passed the Norris-LaGuardia Anti-injunction Act,¹⁰⁴ which effectively curbed the use of injunctions as a device to thwart the activities of labor unions.¹⁰⁵ Differing from its precursor, the Clayton Act, the Norris-LaGuardia Act broadly defined "labor dispute" and set out in detail specific types of union activity which were not to be the grounds for the issuing of an injunction. The bill, supposedly drafted by Professor Frankfurter, was immediately copied by a dozen or more state legislatures.¹⁰⁶ It marked the climax in a period which saw the labor movement slowly freed from legal restrictions.

B. The Period of Consolidation

1. The Wagner Act

On July 5, 1935, Congress passed the National Labor Relations Act,¹⁰⁷ known for its sponsor as the Wagner Act. This act represented a positive national commitment to the policy of collective bargaining in all major industries.¹⁰⁸ It af-

91 *Jonas Glass Co. v. Glass Bottle Blowers Assoc.*, 77 N.J. Eq. 219, 233, 79 Atl. 262 (1911).

92 245 U.S. 229 (1917).

93 An additional element of the case was the attempt by the union organizer to keep secret their proselytizing until the majority of the men had indicated a willingness to join. This seemed particularly to disturb the court. *Id.* at 246, 47, 54-57.

94 *McMichael v. Atlanta Envelope Co.*, 151 Ga. 776, 108 S.E. 226 (1921); *Floersheimer v. Schlesinger*, 115 Misc. 9, 187 N.Y. Supp. 891 (Sup. Ct. 1921).

95 *Interborough Rapid Transit Co. v. Lavin*, 247 N.Y. 65, 159 N.E. 863 (1928).

96 FRANKFURTER AND GREENE, *op. cit. supra* note 57, at 146, n. 52.

97 See, e.g., *People v. Marcus*, 185 N.Y. 257, 77 N.E. 1073 (1906).

98 *State v. Coppage*, 87 Kan. 752, 125 Pac. 8 (1912).

99 *Coppage v. Kansas*, 236 U.S. 1 (1915).

100 *Id.* at 11.

101 208 U.S. 161 (1908), which held unconstitutional a provision of the Erdman Act, 30 Stat. 424, c. 370 (1898).

102 5 FORD. L. REV. 125, 140, n. 88 (1936).

103 *Gregory and Katz, op. cit. supra* note 27, at 141.

104 47 Stat. 70 (1932).

105 *New Negro Alliance v. Sanitary Grocery Company*, 303 U.S. 552 (1938); *Senn v. Tile Layers' Protective Union*, 301 U.S. 468 (1937).

106 *Gregory, op. cit. supra* note 12, at 185.

107 49 Stat. 452 (1935), 29 U.S.C. § 157 (1958).

108 49 Stat. 449 (1935); 29 U.S.C. §§ 141-166. (1958).

forded unions protection in their organizational activities,¹⁰⁹ penalized certain unfair labor practices on the part of employers,¹¹⁰ and established a federal agency to administer its provisions.¹¹¹

The shift of attitudes in favor of the labor movement represented in this legislation did not occur overnight. President Wilson in 1917 had established a Mediation Commission to try to settle some of the labor problems arising out of the war effort. Its report in 1918 recommended the establishment of a national labor policy based on: (1) the principles of collective bargaining, (2) an administrative agency to adjust labor disputes, and (3) a central agency to provide a unified labor-relations policy.¹¹²

In April of 1918, the National War Labor Board was established along these lines.¹¹³ Although compliance with its decisions was not mandatory, the Board was able to put a good deal of its program into effect, perhaps on account of the patriotic fervor prevalent at the time. At the close of the war the Board disbanded and a surge of interest in economic expansion quickly put the interests of employees and employers in opposition. The voluntary recognition of mutual rights and the willingness to cooperate soon disappeared.¹¹⁴

Another forerunner of the Wagner Act was the Railway Labor Act of 1926,¹¹⁵ passed at the end of a series of unsuccessful attempts on the part of Congress to deal with labor problems in the field of transportation.¹¹⁶ The act permitted workers to choose bargaining agents free from outside influence¹¹⁷ and imposed on both railroads and labor organizations the duty to make reasonable efforts to arrive at agreements concerning wages, hours and working conditions.¹¹⁸ In cases where industry and labor failed to reach agreement,¹¹⁹ a Board of Mediation was given the duty to mediate and to attempt to persuade the parties to arbitrate if mediation failed.¹²⁰ Arbitration, however, was voluntary and could be rejected.¹²¹ If the breakdown of negotiations threatened an emergency the Board was authorized to investigate and report to the President.¹²² The Board as established by the Railway Labor Act was to have significant effect upon the later development of the National Labor Relations Board.¹²³

The constitutionality of the act was attacked in *Texas & New Orleans Rd. Co. v. Brotherhood of Ry. Clerks*.¹²⁴ It was upheld, since "freedom of choice in the selection of representatives on each side of the dispute [was] the essential foundation of the statutory scheme."¹²⁵ Here, incidentally, the Supreme Court gave a quiet burial to the *Adair* and *Coppage* cases.¹²⁶

109 49 Stat. 452 (1935), 29 U.S.C. § 157 (1958).

110 49 Stat. 452 (1935), 29 U.S.C. § 158 (1958).

111 49 Stat. 451-455 (1935), 29 U.S.C. § 153, 159-161 (1958).

112 See McNAUGHTON & LAZAR, *INDUSTRIAL RELATIONS AND THE GOVERNMENT* 140 (1954).

113 For a full discussion of the creation and functioning of the War Labor Board see Gregg, *The National War Labor Board*, 33 HARV. L. REV. 39 (1919).

114 *Ibid.*

115 44 Stat. 597 (1926), 45 U.S.C. §§ 151-163, 181-188 (1958). The act was finally passed as a result of negotiations between employee representatives and the carriers. Agreement was reached upon a bill which would be acceptable to both parties. It was introduced into Congress, and after hearing and debate, it was enacted without amendment. McNAUGHTON & LAZAR, *op. cit. supra* note 112, at 107-09.

116 *Id.* at 95-107.

117 44 Stat. 578 (1926), 45 U.S.C. § 152 (1958).

118 44 Stat. 577 (1926), 45 U.S.C. § 152 (1958).

119 44 Stat. 580 (1926), 45 U.S.C. § 155 (1958).

120 44 Stat. 582 (1926), 45 U.S.C. § 157 (1958).

121 *Ibid.*

122 44 Stat. 586 (1926), 45 U.S.C. § 160 (1958).

123 The Railway Labor Act and the activities of the Board of Mediation are discussed in MILLIS & MONTGOMERY, *ORGANIZED LABOR* 737-48 (1st ed. 1945).

124 281 U.S. 548 (1930).

125 *Id.* at 569.

126 See cases cited notes 99, 101 *supra*.

The first federal legislation to attempt to extend the principle of free collective bargaining to all industries was the National Industrial Recovery Act of 1933.¹²⁷ Section 7(a) of the act provided that:

employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from 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.¹²⁸

The passage of the N.I.R.A. was a stimulus to trade-union activity,¹²⁹ although many workers were shunted into company unions by employers seeking to preserve their power positions.¹³⁰ The increase in union strength also was not without opposition. Strikes continued to occur,¹³¹ and the act proved inadequate in the case of these disputes.

In 1934 a Board created by the President pursuant to a joint resolution of Congress became active in the administration of these provisions.¹³² Less than a year later, however, the entire program was invalidated by the Supreme Court in the famous *Schechter* case,¹³³ and the labor provisions fell with the rest.¹³⁴ At this point, the evolutionary process which produced the Wagner Act was at an end. The Act was the proposed solution to socio-economic problems which were becoming more apparent over the course of years; it was a combination of previous limited actions. Still in its comprehensiveness it went far beyond anything which had been done in the past. Section 7¹³⁵ carried over the provisions of Section 7(a) of the NIRA and insured the right of employees to organize and bargain collectively through freely chosen representatives, and to engage in concerted action for that purpose or for other mutual aid or protection. To guarantee the rights of employees, Section 8¹³⁶ prohibited acts by employers which were inconsistent with the rights recognized by Section 7. The Act established a National Labor Relations Board¹³⁷ which, for the first time, had power to enforce its decisions. No longer was the employee merely free to try to organize and bargain collectively. Under the Wagner Act the employer was compelled to remain inactive and to permit unionization;¹³⁸ "company unions" were disestablished.

The remarks of Senator Wagner might indicate that labor was to be the chief benefactor of this legislation. "And today, with economic problems occupying the center of the stage, we strive to liberate the common man from destitution, from insecurity and from human exploitation."¹³⁹ In a large sense this was true, but the Act was more than a "pro-labor" law. It came in the midst of the nation's worst depression. In 1933, 25 per cent of the civilian labor force, almost 13 million persons,

127 National Industrial Recovery Act, ch. 90, 48 Stat. 195 (1933).

128 *Id.* at 48 Stat. 198 (1933).

129 On October 1, 1933, William Green, President of the American Federation of Labor, announced that his membership had increased 1,300,000 since the enactment of the National Industrial Recovery Act. *New York Times*, October 2, 1933, p. 1.

130 McNatt, *Organized Labor and the Recovery Act*, 32 MICH. L. REV. 780, 795-800 (1933); Note, 37 COLUM. L. REV. 816, 827 (1937); Note, 35 COLUM. L. REV. 1098, 1102, n. 36 (1935); Note, 34 COLUM. L. REV. 1529, 1537, n. 44 (1934).

131 MILLIS AND BROWN, *FROM THE WAGNER ACT TO TAFT-HARTLEY* 22 (1950).

132 McNAUGHTON & LAZAR, *op. cit. supra* note 112, at 143.

133 295 U.S. 495 (1935).

134 For a general account of the constitutional litigation of this period see generally, Stern, *The Commerce Clause and the National Economy, 1933-1946*, 59 HARV. L. REV. 645 (1946).

135 49 Stat. 452 (1935), 29 U.S.C. § 157 (1958).

136 49 Stat. 452 (1935), 29 U.S.C. § 158 (1958).

137 49 Stat. 451 (1935), 29 U.S.C. § 153 (1958).

138 See S. Rep. No. 573, 74th Cong., 1st Sess. 11 (1935); Note, 37 COLUM. L. REV. 816 (1937); BUFFORD, *THE WAGNER ACT*, §§ 74-98 (1941).

139 79 CONG. REG. 7565 (1935) (remarks of Senator Wagner).

were unemployed.¹⁴⁰ Unemployment stood at nearly 11 million in 1935.¹⁴¹ The gross national product had slumped from a 1929 high of \$104.4 billion to \$56 billion in 1933.¹⁴² No one, neither labor nor management, could prosper under those conditions. Senator Wagner, in urging the Senate to pass the bill, traced the economic maladies of the day to unequal treatment of the laboring force.¹⁴³ The same view was expressed in the statement of findings and policy, Section 1 of the Act.¹⁴⁴ Collective bargaining was offered as a vehicle for producing general prosperity; it was expected to raise the position of the worker without seriously limiting the freedom of the parties.

In the face of a crescendo of constitutional objections,¹⁴⁵ the Supreme Court, in the *Jones & Laughlin* case,¹⁴⁶ upheld the Wagner Act on principles by then fairly familiar. The Court refused to "shut our eyes to the plainest fact of our national life and deal with the question . . . in an intellectual vacuum."¹⁴⁷

The framers of the Wagner Act did not expect to see the employers' traditional power of unfettered unilateral decision eliminated overnight. Collective bargaining obviously could not take place without recognized bargaining units. It was the intention of Congress that such units be formed and be sufficiently strong to make meaningful the collective bargaining process. Past experience had shown that union growth and acceptance did not follow from the mere expression of the congressional will. Employees were fearful of losing their jobs; employers, anxious to conserve their economic power position, were willing to fight the labor organizations at every turn. This explains the almost one-sided provisions of the NLRA — the adoption of employer unfair labor practices, the explicit protection of the right to strike, and the later court protection of boycotts and picketing. These things were tools, necessitated by the times, to overcome the opposition to unified employee action and to produce, quickly, the strong unions necessary to give importance to collective bargaining.¹⁴⁸

The prediction that protection of the right to organize would induce collective bargaining proved to be correct. The unions gained in size and strength and the collective bargaining process won wide — if sometimes reluctant — acceptance. Under the original NLRA, union membership increased from four million in 1935 to about 15 million by 1947.¹⁴⁹

The Wagner Act was not a panacea; it was subjected to constant and caustic criticism. The employer could not file representation petitions unless faced with conflicting claims; there were no provisions made for decertification. Split loyalty was fostered when supervisors were permitted to organize, a practice upheld in *Packard Motor Car Co. v. NLRB*.¹⁵⁰ Legitimate independent unions were discriminated against by the Board. Too much deference, said some critics, was paid to the "expert-

140 OFFICE OF BUSINESS ECONOMICS, U.S. DEPT. OF COMM., *Business Statistics* 59 (1959 ed.).

141 *Ibid.*

142 *Id.* at 2.

143 79 CONG. REC. 7565-74 (1935) (remarks of Senator Wagner).

144 National Labor Relations Act, ch. 372, § 1, 49 Stat. 449 (1935).

145 Before the new Board even had a chance to promulgate its procedure, a National Lawyers Committee of the American League printed an assault on its constitutionality.

The process was like a rolling snowball. The allegations in a pleading filed by an employer in Georgia, for example, would show up in precisely the same wording in a pleading in Seattle. NATIONAL LABOR RELATIONS BOARD, *First Annual Report*, p. 46.

146 301 U.S. 1 (1937).

147 *Id.* at 41.

148 "The prime requisite and first step to collective bargaining is, therefore, union recognition." National Labor Relations Board v. Griswold Mfg. Co., 106 F.2d 713, 715 (1939), quoting National Labor Relations Board, Reply Brief, page 9.

149 McNAUGHTON & LAZAR, *op. cit. supra* note 112, at 154.

150 330 U.S. 485 (1947).

ise" of the Board.¹⁵¹ Others objected to the authorization of the closed shop.¹⁵² It was only a matter of time before these criticisms could be expected to ripen into concrete proposals to amend the Wagner Act.

The public interest in full production superseded all other considerations during the years of World War II. The unions accepted their responsibilities towards the national defense effort; they entered and adhered to voluntary no-strike contracts.¹⁵³ But the period following the war produced a rash of strikes and exercises of union power,¹⁵⁴ the production delays coming when the usual post-war desire for consumer goods was at its peak. There was strong public feeling against a movement which hampered a rapid transition to a peacetime economy; conditions were ripe for the enactment of labor legislation which would re-adjust the legal situation in the labor management field.

2. *The Taft-Hartley Act and "Right-to-Work" Laws*

Just as the Wagner Act cannot be fairly characterized as purely "pro-labor," the Labor Management Relations Act of 1947,¹⁵⁵ called the Taft-Hartley Act after its co-sponsors, cannot be fairly termed "anti-union." The original bill was passed to correct a perilous situation. It swung the pendulum of the law towards more powerful unions. By 1947 the factual situation had shifted appreciably. Unions which had been broken in the postwar strikes of 1919-20 were now able to survive. Membership in unions had increased by 11 million.¹⁵⁶ The most important objective of the Wagner Act had been largely accomplished: collective bargaining as a means of settling labor disputes had become a reality.

If it is difficult fully to assess those factors which finally led to the enactment of Taft-Hartley over President Truman's veto, there is little question that,

the authors of the Taft-Hartley Act proceeded on the premise that labor unions had become too powerful and that it was therefore necessary to bring about a new balance of power in the collective-bargaining process. . . . Government was no longer to throw its full weight to the side of the union in industrial conflicts; instead, the balance of power . . . was to be equalized, and the government was to side with neither party but rather to safeguard the public welfare.¹⁵⁷

Perhaps the key factor which finally made possible its passage was John L. Lewis' mine strike of 1946.¹⁵⁸ Some bituminous mines had been seized by the government. When the Interior Department refused to reopen contract negotiations, the miners struck. The strike eventually resulted in contempt proceedings and fines of \$700,000 against the union and \$10,000 against Lewis. The dispute finally terminated before the Supreme Court in *United States v. United Mine Workers*;¹⁵⁹ the fines were upheld.

151 *NLRB v. Hearst Publications*, 322 U.S. 111 (1944) was a case in point. There the Supreme Court paid deference to the "expertise" of the Board and followed their determination that some newsboys were "employees" within the meaning of the act. They were not independent contractors.

152 See S. REP. No. 573, 74th Cong., 1st Sess. 11-12 (1935), and BUFFORD, *THE WAGNER ACT*, §§ 192-96 (1941).

153 There were, of course, numerous instances of work stoppage during the war. For a textual and statistical analysis of labor conditions during and immediately following the war, see MILLIS AND BROWN, *FROM THE WAGNER ACT TO TAFT-HARTLEY* 271-362 (1950).

154 There were about 38 million man-hours lost through strikes in 1945; 116 million lost in 1946 and 34 million lost in 1947. This is in contrast to the war years, 1942 through 1944, during which a total of only 26.5 million man-hours were lost as a result of strikes. Significant were the lengths of the strikes. There were nearly as many strikes in 1944 as in 1946 or 1947. Yet strikes during the war were settled quickly (average length in 1944, 5.6 days); strikes during the post-war years were dragged out (average length in 1946, 24.2 days, in 1947, 25.6 days). BUREAU OF THE CENSUS, U.S. DEPT. OF COMM., *STATISTICAL ABSTRACT OF THE UNITED STATES* 236, at 237 (1958).

155 61 Stat. 136 (1947). 29 U.S.C. §§ 101, 102 (1958)

156 BUREAU OF THE CENSUS, *op. cit. supra* note 154, at 236.

157 McNAUGHTON & LAZAR, *op. cit. supra* note 112, at 154.

158 *Id.* at 93, 157.

159 330 U.S. 258 (1947).

The Taft-Hartley Act corrected many of the abuses of the Wagner Act. The union shop was substituted for the closed shop,¹⁶⁰ supervisors were excluded from the definition of employee;¹⁶¹ employers were permitted to file representation petitions;¹⁶² employees were guaranteed the right not to organize;¹⁶³ unionization itself was not to be fostered contrary to a majority's wishes; a number of activities on the part of unions were denounced as unfair labor practices.¹⁶⁴

But the Taft-Hartley Act by no means represented an abandonment of the commitment to collective bargaining. For example, one of the new union unfair labor practices was a refusal to bargain in good faith.¹⁶⁵ Senator Taft himself "felt that if bargaining power could be equalized, many of the industrial-relations problems . . . would tend to disappear through the action of collective bargaining."¹⁶⁶

An important positive feature of the Act was the creation of the Federal Mediation and Conciliation Service.¹⁶⁷ The Act also embodied national emergency strike provisions, which, it was hoped, would avert situations like the mine strike of 1946.¹⁶⁸ Section 14(b), enacted without much discussion, has proved one of the most controversial provisions. The Act prohibits the closed shop, but permits the union shop. Section 14(b), in substance, permits states to enact legislation which prohibits both forms of union security. Federal law no longer was to pre-empt this phase of union activity,¹⁶⁹ and the "right-to-work" issue was born.¹⁷⁰

Today, 18 states have taken advantage of Section 14(b). Some take the form of constitutional amendments,¹⁷¹ others are only legislative enactments.¹⁷² Most prohibit any form of union security contract.¹⁷³ Three states have repealed "right-to-work" laws,¹⁷⁴ and one has limited the application of its provisions.¹⁷⁵

Discussion of the "right-to-work" issue is seldom unemotional. Proponents usually argue that such laws protect the freedom of the individual.¹⁷⁶ Opponents generally consider them purely an anti-union measure.¹⁷⁷ The tendencies to enact such legislation seem to have run their course.¹⁷⁸

3. *The Reform Acts of 1958-59*

The Wagner Act as amended by the Taft-Hartley Act still remains the basic charter of the national labor policy. One further aspect of the labor movement—

160 LMRA, § 7 when read with § 8(a)(3) had this effect.

161 LMRA, § 2(3).

162 LMRA, § 9(c)(1)(B).

163 LMRA, § 7.

164 LMRA, §§ 8(b)(1)-(6).

165 LMRA, § 8(b)(3) and § 8(d).

166 MCNAUGHTON & LAZAR, *op. cit. supra* note 112, at 154.

167 LMRA, §§ 202-04.

168 LMRA, §§ 206-10.

169 H. COM. REPORT 510, 80th Cong., p. 60.

170 The acts were quickly challenged on constitutional grounds but were upheld in *Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949), and its companion cases. For an excellent discussion of the union securities issue, see Skinner, *Legal and Historical Background of the Right to Work Dispute*, 9 LAB. L.J. 411 (1958).

171 Arizona, Arkansas, Florida, Nebraska, South Dakota.

172 Alabama, Georgia, Indiana, Iowa, Mississippi, Nevada, North Carolina, North Dakota, South Carolina, Tennessee, Texas, Virginia, and Utah.

173 Virginia is typical. It provides, in part:

It is hereby declared to be the public policy of Virginia that the right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization.

VA. CODE ANN. § 40-68 (1950).

Four other states also have legislation restricting but not totally prohibiting union security agreements: Colorado, Wisconsin, Kansas, and Louisiana.

174 Delaware, New Hampshire and Maine.

175 Louisiana.

176 Powell, *The Right-to-Work Laws*, FED. B.J. 1955 January-March at 68.

177 Woll, *State Anti-Union Security Laws — A Tragic Fraud*, *Id.* at 68.

178 See Brown, *Right to Work Progress and Prospects in 1958*, 9 LAB. L.J. 583 (1958).

the relation between the union member and his union — merits discussion.¹⁷⁹

Following the passage of the Taft-Hartley Act in 1947, a campaign developed to repeal or amend the new act. "Actually, it was not one campaign but many, and the participants had widely differing motives and objectives."¹⁸⁰ It can in general be said that labor favored repeal rather than modification, while employers generally sought more restrictions on unions.¹⁸¹

Not until after the revelations of the McClellan Committee, however, did sufficient pressure build up to support a successful drive to enact new labor legislation.¹⁸² The Welfare and Pension Plans Disclosure Act of 1958¹⁸³ was the first of the two new labor bills. Its purpose was to protect, through disclosure and reporting, the rights of pension plan participants and beneficiaries.¹⁸⁴ The second of these two measures was the Labor Management Reporting and Disclosure Act of 1959.¹⁸⁵ Its purpose was twofold:

First, it sought, through the enactment of a comprehensive "Bill of Rights" for union members, to secure the realization of union democracy.¹⁸⁶ Equal rights and freedom of speech and assembly, limitation on the executor of fees and assessments and the collection of dues, protection of the right of access to civil courts, or to sue or testify and safeguards against improper disciplinary action are now all guaranteed to union members. Various reports concerning union activity,¹⁸⁷ certain bonding requirements¹⁸⁸ and limitations on union trusteeships¹⁸⁹ and union elections¹⁹⁰ are also provided for.¹⁹¹

Second, the act sought to change the restriction on picketing and secondary boycotts¹⁹² found in the Taft-Hartley Act, and to re-adjust conflicts in jurisdiction between the federal and state courts which had arisen under the federal pre-emption doctrine.¹⁹³

179 For an analysis of state and federal activity in the area of union membership, union discipline, union financial affairs, and union government just prior to the passage of the recent reform acts see Note, *Civil Liberties Within the Labor Movement*, 34 NOTRE DAME LAW. 384-483 (1959).

180 Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 HARV. L. REV. 851, 852 (1960).

181 *Ibid.*

182 See generally S. REP. NO. 187, 86th Cong., 1st Sess. (1959); H.R. REP. NO. 741, 86th Cong., 1st Sess. (1959); S. REP. NO. 1417, 85th Cong., 2d Sess. (1958); *Hearings Before the Select Committee on Improper Activities in the Labor Management Field*, 85th Cong., 2d Sess. (1958).

183 72 Stat. 997, 29 U.S.C.A. §§ 301-09 (Supp. 1958).

184 72 Stat. 997, 29 U.S.C.A. § 301 (Supp. 1958).

185 73 Stat. 519, 29 U.S.C.A. § 401 (Supp. 1959).

186 LMRDA, §§ 101-05.

187 LMRDA, §§ 201-10.

188 LMRDA, §§ 501-05.

189 LMRDA, §§ 301-06.

190 LMRDA, §§ 401-04.

191 For a general discussion of these provisions see Aaron *supra* note 180, at 855-905.

192 LMRDA, §§ 701-07. See Aaron, *supra* note 180, at 1099-1121.

193 LMRDA, § 701. See Aaron, *supra* note 180, at 1089-98. Section 701, which ends the "no-man's land" problem which resulted from a series of Supreme Court cases in recent years, is perhaps one of the more significant provisions of the new act. *Garner v. International Bhd. of Teamsters*, 346 U.S. 485 (1953), held in 1953 that a state court could not enjoin peaceful picketing, although violative of state public policy, if such activity also constitutes an unfair labor practice under section 8(b)(2) of the Taft-Hartley Act. *Guss v. The Utah Labor Relations Board*, 353 U.S. 1 (1957), held that a state agency could not exercise jurisdiction even where the NLRB had refused to act. A "no-man's land" was thus created.

Section 701 amends section 14 of Taft-Hartley Act so as to overrule this series of cases. States may now exercise jurisdiction in labor cases where the NLRB refuses to do so. A crucial question, however, remains. It is not clear what standards — state or federal — are to be applied. Professor Aaron *supra* note 180, at 1098, observes that

the real issue is whether the state courts must apply state law. Those who take the affirmative in this debate must necessarily elevate hope above

It is perhaps too early to attempt definitive comment on these acts; but certain points seem to stand out. Conceding that strong unions are the foundation of an effective collective bargaining process, the highly organized union, like the highly organized industry, poses a threat to the freedom of the individual member. In one view, there is positive value in the adoption of a policy to promote internal union democracy. In another view, these acts are a return to older values, or, perhaps, a recognition of change in the character of the labor movement. It is possible to see in the modern labor union no longer a quest by the individual for a participation in the fruits of his labor, but the emergence of a new form of business activity, motivated to the same ends as other forms of business activity.¹⁹⁴ Certainly some of the history of the trade union movement may be read as a contest for economic power.¹⁹⁵ Samuel Gompers' famous "more" contained implicitly the foundation for today's "business unionism."¹⁹⁶ For those who wish to see a return to older values, the acts may be viewed as an attempt to impede the further growth of the union movement; for those who see the modern union as only another form of business activity, the acts may be viewed as a legitimate limitation on union power. But for those who still see in the union movement positive value, the acts may be seen, in their attempt to secure union democracy, as part of a solid tradition of legislation designed to deal with the problems raised by the industrialization of the manufacturing process, and an inevitable chasm between owner and worker.

II. Government Intervention in Collective Bargaining

Having considered the historical development of the national legal commitment to collective bargaining as the appropriate vehicle for settling industrial conflict, it is logical to turn to a consideration, in greater detail, of the machinery of government intervention in labor-management relations. Government intervention is largely directed at seeking, first, to promote agreement between parties, and, second, to protect the public interest by maintaining production.

A. Methods of Achieving Settlement

1. Good Faith Bargaining

In the United States today, great faith is placed in a system of free collective bargaining as the best method of resolving industrial conflict,¹⁹⁷ and the one most likely to prevent strikes and lockouts. This approach is based on the theory that the responsibilities of self-government will be carried into the bargaining session, and that the voluntary "give and take" process will result in an equitable solution to the conflict. America's basic industrial approach has been and is that it is desirable for the parties themselves voluntarily to enter into negotiations and there determine the framework of their future conduct.¹⁹⁸ This is the general policy of collective bar-

reason; nothing in the language or legislative history of section 701(a) supports this position. A more likely development is that state courts will be permitted to apply state law, federal law, or perhaps a combination of both.

See also Coid, *Notes on a "G-String": A Study of the "No-Man's Land" of Labor Law*, 44 MINN. L. REV. 230-56 (1959), and note, 37 U. DET. L.J. 400-10 (1960).

194 See generally BRADLEY, *THE PUBLIC STAKE IN UNION POWER* 5 (1959).

195 *Id.* at 6-13.

196 Business unionism is perhaps best summed up in Dave Beck's famous statement, "I am a businessman. I sell labor." *Id.* at 6.

197 Feinsinger, *Private Mediation—Its Potential*, 7 LAB. L.J. 493-96 (1956).

198 The late Senator Robert Taft remarked:

The committee bill [the Taft-Hartley Act] is predicated upon our belief that a fair and equitable labor policy can best be achieved by equalizing existing laws in a manner which will encourage free collective bargaining. Government decisions should not be substituted for free agreement. S. REP. No. 105, 80th Cong., 1st Sess. (1947).

gaining enunciated in Section 1 of the Taft-Hartley Act,¹⁹⁹ a policy emulated in most of the states.²⁰⁰

Although there is no requirement that the parties agree,²⁰¹ in keeping with this spirit of voluntary action, an employer and the union certified as the majority representative of a particular bargaining unit are required to bargain in good faith.²⁰² The refusal to do so is an unfair labor practice, subject to the sanctions of the National Labor Relations Act.²⁰³ A difficult question remains, however: What constitutes a lack of "good faith," and what standards are used to measure it?

The NLRB has listed ten elements indicating bad faith on the part of the employer,²⁰⁴ but the extent of the application of Section 8(b)(3) to the union has been somewhat limited.²⁰⁵ Bargaining has been required on certain subjects,²⁰⁶ but a genuine impasse releases the parties from a duty to bargain.²⁰⁷ Generally, in appraising the course of the negotiations, the Board has looked for attitudes which

199 61 Stat. 136 (1947), 29 U.S.C. §§ 141-197 (1952):

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

200 See, e.g., N.Y. LAB. LAWS § 700.

201 LMRA, § 8(d): "... to bargain collectively is the performance of the mutual obligation . . . to meet at reasonable times and confer in good faith with respect to . . . the negotiation of an agreement . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession."

202 LMRA §§ 8(a)(5), 9(a). The union is under a similar duty. LMRA §§ 8(b)(3), 9(a).

203 LMRA §§ 8(a)(5), 8(b)(3).

204 (1) Refusal to respond to a union request for a bargaining conference; *NLRB v. Montgomery Ward & Co.*, 133 F.2d 676 (9th Cir. 1943).

(2) Refusal to send representatives to the bargaining conference; *Great Southern Trucking Co. v. NLRB*, 127 F.2d 180 (4th Cir. 1942).

(3) Constant shifting of position on contract terms; *Twin City Milk Producers Assn.*, 61 NLRB 69 (1945).

(4) Determination not to enter into a bargaining agreement; *NLRB v. Griswold Mfg. Co.*, 106 F.2d 713 (3d Cir. 1939).

(5) Deliberately delaying the progress of negotiations; *Na-Mac Product Corp.*, 70 NLRB 298 (1946).

(6) Unilaterally granting concessions to employees while negotiations are pending; *Aluminum Ore Co. v. NLRB*, 131 F.2d 485 (7th Cir. 1942).

(7) Engaging in campaigns to undermine the union; *NLRB v. Century Oxford Mfg. Corp.*, 140 F.2d 541 (2d Cir. 1944).

(8) Insisting upon contracting with employees rather than with the union; *American Numbering Machine Co.*, 10 NLRB, 536 (1938).

(9) Rejection of demands without counter-proposals; *Globe Cotton Mills v. NLRB*, 103 F.2d 91 (5th Cir. 1939).

(10) Refusal to embody the agreement into a written contract; *NLRB v. American Nat'l. Ins. Co.*, 343 U.S. 395 (1952).

205 Slowdowns and extensions of rest periods, walkouts, partial strikes for shifts or portions of shifts, refusal to work special hours or overtime, and inducing employees of another concern not to perform work for the employer were held not to be indications of bad faith in bargaining. *Textile Workers Union v. NLRB*, 227 F.2d 409 (D.C. Cir. 1955).

206 Section 8(d) requires that the employer and the representative of the employee meet at reasonable times and confer in good faith on "wages, hours, and other terms and conditions of employment." Such has been held to include: (1) group insurance plans, (2) low-rental company-owned housing, (3) merit pay increases, (4) wage incentive plans, (5) pension and retirement plans, (6) subcontracting of work, (7) disciplinary matters, (8) seniority, (9) price of meals, (10) holiday and vacation pay, (11) bonuses, (12) profit sharing, (13) work loads and work standards, (14) union security, (15) shop rules, (16) work schedules, (17) rest periods, (18) down grading of employees, and (19) dues checkoff. *McNAUGHTON & LAZAR, INDUSTRIAL RELATIONS AND THE GOVERNMENT* 455 (1954).

207 *NLRB v. Sands Mfg. Co.*, 306 U.S. 332 (1939).

indicate that the parties are dealing with one another as equals, and that they are not only willing but anxious to reach agreement.²⁰⁸

The standard in determining good faith is necessarily a subjective evaluation of the intent of the parties,²⁰⁹ and, since this intent can only be evidenced by outward actions, it is possible for the Board to be deceived. But two principles seem to emerge: (1) the entire conduct of the parties must be examined,²¹⁰ and (2) they must enter the discussion with fair and open minds, with a sincere purpose to find a basis for agreement.²¹¹

By requiring good faith bargaining the government is, in effect, requiring that the parties settle their disputes themselves. The "good faith" provision is as far as government can go and still leave the decision-making completely up to the parties involved. In theory, at least, good faith bargaining should substantially narrow the scope of insoluble industrial conflicts; and, in practice, the requirement appears to have had an influence in encouraging sincere bargaining to the extent of avoiding an unfair labor practice charge. At best the provision appears to be but a weak attempt to channel and control the effect of the power conflicts of labor and management upon the national economy.

2. *Mediation and Conciliation*

Mediation or conciliation — the words are used interchangeably in the field of labor relations — is the act of assisting disputing parties to achieve an agreement.²¹² Free collective bargaining aims at the reaching of a voluntary agreement based on reason and persuasion. There would seem to be little room for a voteless mediator, but where reason and persuasion are the basic ingredients of the decision, psychological factors cannot be ignored,²¹³ and this is the mediator's forte. He diagnoses the psychology of the situation and makes suggestions at the proper time; he simultaneously represents a legitimate public interest and symbolizes the moral responsibility of the parties to the community at large. The power of persuasion which is at his disposal can be an important weapon.

Mediation practice presently includes both private mediators and state and federal mediation agencies. When a private mediator is selected, even from a government list of competent persons, there is possibly a tendency to be more relaxed. Since the mediator and the procedural set-up are selected by the parties involved, there may be more incentive to be successful in the negotiations because the failure of the mediator is, in a sense, the failure of his selectors. Private mediation has generally worked well when the parties have resorted to it.²¹⁴ Private mediation, however, presupposes a willingness in the parties to resort to it. Often a demand for mediation comes not from the parties but from public impatience with industrial discord; the public wants peace "and a plague on both your houses."²¹⁵ It is this type of situation that statutory provisions for mediation and conciliation are designed to meet.

a) *federal*

The chief instrument of mediation under the federal system is the Federal Mediation and Conciliation Service (FMCS), set up under Section 202 of the

208 Note, 61 HARV. L. REV. 1224 (1948).

209 See *NLRB v. George P. Pilling & Son Co.*, 119 F.2d 32 (3d Cir. 1941).

210 See *NLRB v. Algoma Plywood & Veneer Co.*, 121 F.2d 602 (7th Cir. 1941).

211 *Globe Cotton Mills v. NLRB*, 103 F.2d 91 (5th Cir. 1939).

212 The mediation process has been further classified by Professor Kerr into tactical and strategical mediation. Kerr, *Industrial Conflict and Its Mediation*, 60 AM. J. SOC. 230-45 (1954).

213 For an interesting insight into the psychological role of the Mediator, see Mills, *The Role of Mediation in Collective Bargaining*, 23 TENN. L. REV. 146-58 (1954).

214 Feinsinger, *Private Mediation — Its Potential*, 7 LAB. L.J. 493-96 (1956).

215 For a discussion of the use of private mediators by Allis-Chalmers, International Harvester, and Westinghouse, see Feinsinger, *supra* note 214, at 493-96.

Taft-Hartley Act.²¹⁶ It is an independent agency; its main function is the peaceful settlement of labor disputes. Under FMCS rules, either party to a dispute may request the agency to make its services available; the service can also offer help on its own initiative.²¹⁷ The FMCS is limited; the dispute must threaten a substantial interruption of interstate commerce; and, when local agencies are available, the service is expected to allow them to handle the dispute.²¹⁸ A check against over-mediation is theoretically provided. The services of the agency are not to be made available except as a last resort, that is, when the collective bargaining process has broken down. The burden of settlement is to remain on the parties. The service, however, must be notified within 30 days of the end of an agreement if any issues connected with a new agreement have not been settled.²¹⁹ The purpose of the agency, in short, is "to facilitate and promote the settlement of labor-management disputes through collective bargaining by encouraging labor and management to resolve differences through their own resources."²²⁰

Under the Railway Labor Act²²¹ two other federal boards were set up with mediation powers, the National Mediation Board and the National Railroad Adjustment Board. The latter is more arbitrator than mediator. A distinction is drawn in the Act between disputes about rights and disputes about interests. The former, generally speaking, concern the interpretation of existing agreements and are handled by the NRAB. The latter concern controversies over new contract terms and are referred to the National Mediation Board.²²² The FMCS, however, is the only federal mediation service with general jurisdiction to handle labor disputes.

b) state

While there has been some labor relations mediation on the municipal level,²²³ most mediation, apart from that done by the FMCS, is on a state level pursuant to various state mediation statutes. Although they contain many departures, the various acts set up state agencies or boards which are basically similar to the FMCS.

Presently 43 states and the District of Columbia have some kind of mediation facility.²²⁴ Most of the states have set up permanent agencies.²²⁵ A few provide for *ad hoc* boards to be set up by the governor or allow the governor to handle the dispute himself.²²⁶ Several states make no specific mediation provisions but provide that agreements to arbitrate may be enforced.²²⁷ Some of the more industrialized states in addition to the agency provide for permanent boards of mediation and arbitration.²²⁸ Normally such a board will be tripartite, *i.e.*, it will consist of representatives of labor, industry, and the general public.²²⁹

216 LMRA § 202.

217 LMRA § 203(b).

218 *Ibid.*

219 LMRA § 8(d)(3).

220 22 Fed. Reg. 162 § 1403.2(a) (1957).

221 49 Stat. 1189 (1936), 45 U.S.C. §§ 151-88 (1952).

222 BRAUN, LABOR DISPUTES AND THEIR SETTLEMENT 108 (1955).

223 Notable in this area are the cities of New York, Newark, and Toledo. See, *e.g.*, Hard, "Toledo Proves That No Town Need Have Labor Troubles," 38 *Reader's Digest* 18, (1941).

224 The states which do not have specific mediation agencies are Delaware, Mississippi, New Mexico, Tennessee, Virginia, West Virginia, and Wyoming. 4 CCH LAB. L. REP. para. 40, 355 (1959).

225 BRAUN, *op. cit. supra* note 222, at 117. Braun lists 34 states plus Puerto Rico as having agency mediation provisions. However, Montana has a mediation agency and in Kansas the Labor Commissioner handles the mediation. Hence, there are now actually 36 states in which mediation is handled through some agency.

226 See, *e.g.*, NEV. REV. STAT. § 614.010 (1955).

227 See, *e.g.*, WYO. COMP. STAT. ANN. § 1-1048.3 (Supp. 1959).

228 See BRAUN, *op. cit. supra* note 222, at 120. Braun lists the states of Connecticut, Louisiana, Maine, Massachusetts, Michigan, Missouri, Montana, New Jersey, New York, Oklahoma, and Oregon. The District of Columbia has no board of its own, but uses the facilities of the FMCS.

229 For a typical example of a three-member board, see MONT. REV. CODES ANN. § 41-

The Colorado statute,²³⁰ patterned after the Canadian Industrial Disputes Investigation Act,²³¹ is perhaps typical of most. Strikes and lockouts in industries "affected with a public interest" are prohibited pending an investigation by the Industrial Commission.²³² Written notice of an intended change affecting conditions of employment or with respect to wages or hours must be given to the Commission 30 days prior to such intended change.²³³ Although the Commission's report is to contain findings and recommendations, the parties are not bound by them.²³⁴ They carry only the force of public opinion. The basic constitutionality of the act was upheld in *Keyes v. UMW*²³⁵ against arguments of involuntary servitude. The act also provides that injunctions may be issued to restrain violations of the 30-day period of grace.²³⁶

Most of the statutes also provide that either some public official—usually a local mayor—or the parties themselves may notify the governor or mediation board of the existing or threatened strike.²³⁷ Some states limit mediation to industries where a specified number of workers are employed.²³⁸ But most of the statutes, like Colorado's, permit the board to intervene anywhere on its own motion, investigate, fix responsibilities, and make public its findings.²³⁹

c) foreign

There has been, perhaps, more activity in the field of mediation abroad than in this country.²⁴⁰ So that a better understanding of the whole mediation process and its underlying philosophy can be obtained, there will be considered here the basic outlines of the various programs followed in several foreign countries, particularly Great Britain and Canada.

Generally, labor-management representatives play a larger role in the mediation process than in the United States. This is exemplified in the Netherlands Labor Foundation. This organization started as a clandestine group of labor-management representatives meeting "underground" during the occupation of World War II. It was agreed that the organization should continue to exist after the war. Both parties have a high degree of respect and confidence in each other and a strong desire to settle their own disputes with full consideration for the national welfare. Government measures, while available in the Netherlands, are largely unused.²⁴¹

There is, in general, no effort to mobilize public opinion in Europe. The goal of "social self-management" dictates that the parties should settle their differences themselves, with help, when necessary, from their own colleagues, through voluntarily established methods.²⁴² The absence of any effort to arouse public opinion in European mediation may stem from the basic concern for the public interest shared by all parties in the conference, or it may merely mean that the sole responsibility of determining, rather than representing, the public interest is placed on the mediating parties.

902 (1947).

230 COLO. REV. STAT. ANN. 80-1-1 to 80-1-49 (1953).

231 1907 6 & 7 Ed VIII Dom. c. 20.

232 COLO. REV. STAT. ANN. § 80-1-30 (1953).

233 COLO. REV. STAT. ANN. § 80-1-29 (1953).

234 COLO. REV. STAT. ANN. § 80-1-31 (1953).

235 70 Colo. 269, 201 Pac. 54 (1921).

236 COLO. REV. STAT. ANN. § 80-1-32 (1953).

237 OHIO REV. CODE ANN. § 4129.11 (Page 1954).

238 The minimum number of persons who must be employed is quite small. Only ten are required in New Hampshire, but more often the figure is 25, as in Illinois. N.H. REV. STAT. ANN. § 273:15 (1955), ILL. ANN. STAT. ch. 10, § 20 (Smith-Hurd. Supp. 1959).

239 See, e.g., MASS. GEN. LAWS ANN. ch. 150, § 3 (1959).

240 See generally McPherson, *European Variations on the Mediation Theme*, 6 LAB. L.J. 525-36 (1955).

241 *Id.* at 527-29.

242 *Id.* at 535.

Britain has a public policy much like that in the United States. Collective bargaining is deemed the best method, with a minimum amount of government interference.²⁴³ The parties formulate their own codes of conduct and enforcing machinery; while arbitration agreements are not legally binding, both parties agree to be bound when submitting an issue to arbitration. The government provides arbitration and conciliation facilities, but these are not to be used until the parties have exhausted their own settlement methods.²⁴⁴ This priority of voluntary over statutory machinery in mediation is evidenced by the Industrial Court Act of 1919, which provides:

If there are existing in any trade or industry any arrangements for settlement by conciliation or arbitration of disputes in such trade or industry, or any branch thereof, made in pursuance of an agreement between organizations of employers and organizations of workmen representative respectively of substantial proportions of employers and workmen engaged in that trade or industry, the Minister shall not, unless with the consent of both parties to the dispute, and unless and until there has been a failure to obtain settlement by means of those arrangements, refer the matter for settlement or advice in accordance with the foregoing provisions of this section.²⁴⁵

Canada provides a system of compulsory mediation,²⁴⁶ based on stated principles.²⁴⁷ The procedural requirements for compulsory conciliation are simple. The parties must give 20 days' notice of a desire to enter collective bargaining negotiations. If they fail to reach an agreement within 20 days, either may request conciliation; and if this fails, the Minister can set up a conciliation board consisting of three members.²⁴⁸ If the conciliation board fails to bring the parties to agreement, the board's recommendation is published, and no strike or lockout is permitted within the next seven days. This seven-day period gives public opinion time to make itself heard, and it often happens that the parties will reopen negotiations starting from the basis of the board's recommendation.

The Canadian Cabinet has entered the mediation field on occasion, and in the 1950 Rail Strike, the government resorted to the last means at its disposal.²⁴⁹ Parliament was called into session and terminated the strike by *ad hoc* legislation.²⁵⁰ Thus, the factor of the force of public opinion in Canadian mediation seems to be paramount. Delays, however, may be dangerous, whether as a cooling-off period, or to give public opinion an opportunity to exert pressure. If there is too much delay, cooling-off periods can become heating-up periods; delays generally help the employer psychologically, and the worker may become impatient with "legal" procrastination. A solution to needless delay tactics may be to make agreements retroactive to the old contract termination date. Despite some of its weaknesses, an adoption of a system similar to Canada's was recently advocated in Great Britain.²⁵¹

d) conclusion

A consideration of the mediation systems employed both in this country and abroad reveals one main underlying principle: Mediation is most successful where the disputants are allowed an active part in determining both who their mediators

243 For an excellent description of the present British scene see *A Giant's Strength: Some Thoughts on the Constitutional and Legal Position of Trade Unions in England*, reprinted in 7 J. PUB. L. 223 (1958).

244 *How Industrial Disputes are Settled in Britain*, 13 LAB. AND INDUS. IN BRIT. 113-18 (1955).

245 Industrial Court Act of 1919.

246 For a comprehensive discussion of the Canadian system see Kovacs, *Compulsory Conciliation in Canada*, 10 LAB. L.J. 110 (1959).

247 Stenger, *Industrial Conciliation in Canada*, 74 INT. LAB. REV. 259-78 (1956).

248 *Ibid.*

249 *Ibid.*

250 For a discussion of some of the constitutional implications of ad hoc labor legislation in the United States, see *Wilson v. New*, 243 U.S. 332 (1917).

251 See, Stenger, *supra* note 247, at 260.

will be and what procedures will be employed.²⁵² Government is allowed to intervene in the public interest, to aid the parties at their request, or, when required, in response to public demand. However, the decision process is kept primarily the responsibility of the disputants, and this responsibility is not shifted by mediation.²⁵³ Mediation is thought to be cheapened if too readily available, and continuous intervention of mediators, it is felt, weakens the collective bargaining process; the parties begin with the notion that government will enter before a settlement is reached.²⁵⁴ Governmental intervention theoretically can occur at least five possible points: (1) during negotiations (this is known as preventative mediation and seems to be the direction the FMCS is taking), (2) when the process appears to be breaking down, (3) when negotiations have temporarily collapsed, (4) after collective bargaining has finally failed, but before a strike or lockout, (5) after the strike or lockout.²⁵⁵ If the government enters before negotiations have collapsed, there is danger of weakening the bargaining process.²⁵⁶ On the other hand, if the government enters too late in the bargaining, the important psychological role of the mediator will be lost; the parties will, at this point, be too antagonistic.

3. Arbitration

The arbitration process differs from mediation in that the third party, rather than assisting the disputants to arrive at a solution, sits as a judge, hears both sides of the dispute, and resolves it himself; solution is outside the control of the parties. It does not follow that all types of arbitration are incompatible with the collective bargaining ideal, but the decision to arbitrate is certainly a more far-reaching step than the decision to call in a mediator.

The field of arbitration can be divided into two main classes, voluntary and compulsory. Further, under voluntary arbitration, there is a choice between arbitration of disputes arising under a previous contract and those met in negotiating a new contract. The decision to arbitrate may be made a part of the collective bargaining contract, or it may be made after the dispute arises. The choice between having a permanent or an *ad hoc* arbitrator must also be made. On the other hand, if the decision is made in favor of compulsory arbitration, the procedures must be carefully worked out in advance and the limitations of the arbitrator's function must be clearly defined. With the above distinctions in mind, it is possible to proceed to a more detailed analysis of arbitration methods.

a) voluntary

The use of arbitration to settle disputes has not always enjoyed great favor. For some centuries it was held to be against public policy as derogating from the jurisdiction of the courts.²⁵⁷ Even though not binding, private arbitration was—and still is—used, mainly because it lacks the formality of the judicial process. Many still fear that courts are too stiff or abstract to give the parties “justice.”

Arbitration, being a middle ground between the violence of the strike and the interference of the court, has been looked upon with favor in some instances by the parties, if not by the courts.²⁵⁸ While agreements to arbitrate future disputes

252 See generally, Feinsinger, *Private Mediation — Its Potential*, 7 LAB. L.J. 493 (1956).

253 Mills, *The Role of Mediation in Collective Bargaining*, 23 TENN. L. REV. 146-58 (1954).

254 Enarson, *Mediation and Education*, 7 LAB. L.J. 466-71 (1956).

255 *Id.* at 468.

256 McPherson maintains that the United States sometimes has a tendency to enter before mediation is proper, and questions the worth of preventive mediation. If preventive mediation is just a means of giving mediators something to do during the slack season, there is more harm done than good. McPherson, *European Variations on the Mediation Theme*, 6 LAB. L.J. 525-36 (1955).

257 *Vynior's Case*, 4 Co. 81 b, Trin. Term, 7 Jac. 1 (1609).

258 See generally Bennett, *The General Legal Status of Labor Arbitration*, 1 So. TEX. L.J. 26 (1954).

have been considered void at common law,²⁵⁹ this deficiency has been overcome by statute in most states.²⁶⁰ The present judicial disposition toward arbitration was expressed by the court in *Campbell v. Campbell*²⁶¹ over forty years ago.

It is the policy of the law, as expressed by both English and American courts, to uphold the peaceful, swift, and inexpensive method of terminating litigation by arbitration, and such amicable actions, so far from being objects of censure, are always approved and encouraged because they facilitate greatly the administration of justice between the parties.

Under modern statutes, contracts providing for resort arbitration are valid.²⁶²

The Taft-Hartley Act encourages voluntary arbitration. Section 203(c)²⁶³ provides that if the FMCS fails to bring about an agreement by conciliation, it "shall seek to induce the parties voluntarily to seek other means of settling the dispute." The "other means" encouraged is voluntary arbitration. Arbitration is also encouraged indirectly by section 301(a) of the Act²⁶⁴ which makes possible damage suits for breach of union-management agreements. To avoid the expense and delay of numerous law suits, the parties often turn to private arbitration.

Voluntary arbitration agreements are of two types: (1) permissive—those which call for arbitration only if both parties so agree; and (2) mandatory—those which call for arbitration at the request of either party. The second type is sometimes described as compulsory, but, more accurately, it is "voluntarily adopted compulsory arbitration."²⁶⁵ Both types fit into the general policy of collective bargaining. Each ultimately rests on the free consent of the parties.²⁶⁶ Typically, however collective bargaining is carried on over a period of years with little or no resort to arbitration; this may be one indication of the maturity of modern labor relations. Whether the parties resort to arbitration frequently or seldom, as a matter of desperation or of policy, voluntary arbitration, where it has been successful, is usually fashioned by collective bargaining rather than by legislation.

Not all of the governing statutes are unlimited in what they permit to be the subject of arbitration. General arbitration statutes usually fall into one of the following classes:²⁶⁷

259 *Gates v. Arizona Brewing Co.*, 54 Ariz. 266, 95 P.2d 49 (1939).

260 *White Eagle Laundry Co. v. Slawek*, 296 Ill. 240, 129 N.E. 753 (1921), held that a statute which provided that a submission to arbitration should, in the absence of an express contrary intention be irrevocable, was not unconstitutional.

261 44 D.C. App. 142 (1915).

262 Recent authority for this general proposition is also found in *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957), where the Supreme Court held that arbitration agreements contained in collective bargaining contracts were specifically enforceable. The decision was based on section 301 of the LMRA rather than the Arbitration Act, 38 Stat. 103 (1913), 9 U.S.C. §§ 1-14 (1952). Section 301(a) provides:

Suits for violation of contracts between an employer and a labor organization . . . may be brought in any district court of the United States

263 LMRA § 203(c).

264 LMRA § 301(a).

265 Bennett, *supra* note 258, at 29.

266 Witte, *The Future of Labor Arbitration — A Challenge* 1-19, National Academy of Arbitrators, Proceedings of the 12th Annual Meeting (McKelvey, ed. 1957).

267 This classification is taken from Bennett, *supra* note 258, at 34-36. Without regard to classification, 46 of the 50 states have some form of arbitration statutes. These are embodied in: ALA. CODE tit. 26, § 338-42 (1940); ALASKA COMP. LAWS ANN. § 43-4-1 to 6 (1949); ARIZ. REV. STAT. ANN. § 23-107 (1956); ARK. STAT. ANN. § 81-107 (1947); CAL. LAB. LAWS § 65 (West 1956); COLO. REV. STAT. ANN. § 80-2-5 (1953); CONN. GEN. STAT. REV. § 31-117 (1958); FLA. STAT. ANN. § 57.01-57.09 (1952); GA. CODE ANN. § 7-101-224 (1935); HAWAII REV. LAWS § 88-16 (1955); IDAHO CODE ANN. § 7-901-910 (1947); ILL. ANN. STAT. ch. 10, § 20-30 (Smith-Hurd 1941); IND. ANN. STAT. § 40-2404-2415 (Burns 1952); IOWA CODE ANN. § 90.1-90.14 (1946); KAN. GEN. STAT. ANN. § 44-817 (Supp. 1957); KY. REV. STAT. ANN. § 336.140, 336.150 (1955); LA. REV. STAT. ANN. § 23:861-76 (West 1952); ME. REV. STAT. ANN. ch. 30, § 15-21 (1954); MD. ANN. CODE art. 89, § 4-22 (1957); MASS. GEN. LAWS ANN. ch. 150, § 1-10 (1959); MICH. STAT. ANN. § 17.454 (1950); MINN. STAT. ANN. § 179.09 (1947); MO. REV. STAT. § 295.080

- (a) any controversy which may arise between the parties,²⁶⁸
- (b) any controversy which might be the subject of a civil action,²⁶⁹
- (c) controversies arising out of written contracts,²⁷⁰ and
- (d) any existing controversy.²⁷¹

Statutes specifically dealing with labor arbitration are normally more limited in scope, governing one or another of the following situations:

- (a) a strike or lockout is threatened or has already occurred,²⁷²
- (b) disputes which result in strikes, lockouts, boycotts, blacklists, discrimination, or legal proceedings,²⁷³
- (c) disputes which are confined to certain industries,²⁷⁴
- (d) those not involving questions which are the subjects of civil actions.²⁷⁵

A number of states not only permit arbitration, but make definite legal machinery available, in the form of either a state agency or *ad hoc* board; most voluntary arbitration in this country is conducted on an *ad hoc* basis. This is unfortunate because it has been demonstrated that a provision in the labor contract appointing a permanent arbitrator is both beneficial and workable.²⁷⁶ *Ad hoc* arbitration should, at best, be looked on as a transition stage before the establishment of some form of permanent arbitration.

Voluntary arbitration of industrial disputes growing out of the collective bargaining process necessarily involves a wide range of situations, but basically the disputes may be grouped into two classifications. Ninety per cent of collective bargaining contracts today provide for arbitration as the terminal step in the grievance procedure. On the other hand, only two per cent of the requests for arbitration panels coming to the FMCS involve disputes over future contract terms.²⁷⁷ The low percentage of arbitration provisions concerning future terms would indicate a distrust of the ability of arbitrators to handle subjects such as wages and hours. This caution may be justified if the arbitrator is given powers which are too broad. In

(1949); MONT. REV. CODES ANN. § 41-901-909 (1947); NEB. REV. STAT. § 48-801-823 (1952); NEV. REV. STAT. § 614.010-614.080 (1957); N.H. REV. STAT. ANN. § 273:12-27 (1955); N.J. REV. STAT. § 34:13-1-9 (1940); N.Y. LAB. LAWS §§ 1452-54 (McKinney 1948); N.C. GEN. STAT. § 95-36.5 (1955); N.D. REV. CODE § 34-1004 (Supp. 1957); OHIO REV. CODE ANN. § 4129.01-09 (Pages 1954); OKLA. STAT. ANN. tit. 40, § 4 (1954); ORE. REV. STAT. § 662.405 (1953); PA. STAT. ANN. tit. 5, § 1 (1958); S.C. CODE § 40-301 (1952); TENN. CODE ANN. § 23-502 (1956); TEX. REV. CIV. STAT. art. 239-49 (1959); UTAH CODE ANN. § 35-1-16 (1953); VT. STAT. ANN. tit. 21, § 501-13 (1959); VA. CODE ANN. § 8-503-07 (1957); WASH. REV. CODE § 49.08-12 (1956); W. VA. CODE ANN. § 5499 (1955); WISC. STAT. ANN. § 111.11 (1947); WYO. COMP. STAT. ANN. § 37-12 (1945).

268 Alabama, Arizona, California, Colorado, Connecticut, Idaho, Louisiana, Maine, Massachusetts, Michigan, New Hampshire, New Jersey, North Carolina, Nevada, Pennsylvania, South Carolina, Texas, Utah, Washington, and Wisconsin. Bennett, *supra* note 258.

269 Colorado, Connecticut, Florida, Idaho, Indiana, Iowa, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, and Tennessee. *Ibid.*

270 California, Louisiana, New Jersey, and Pennsylvania provide for both existing and future disputes, while Connecticut, Massachusetts, and New York provide only for future disputes. *Ibid.*

271 Alabama, Connecticut, Florida, Georgia, Illinois, Kansas, Louisiana, Nevada, North Carolina, Pennsylvania, South Carolina, Texas, Utah, Virginia, West Virginia, and Wyoming. *Ibid.*

272 Connecticut, Illinois, Iowa, Kentucky, Maine, Maryland, Massachusetts, Oklahoma, and Vermont. *Ibid.*

273 Alabama, Arkansas, Colorado, Georgia, Indiana, Louisiana, Maryland, Ohio, and Wisconsin. *Ibid.*

274 Arizona, Kansas, New Jersey, Pennsylvania, Nebraska, and Oklahoma.

275 Illinois, Montana, Ohio, and Oregon. *Ibid.*

276 For a discussion of one system, see Davey, *The John Deere-UAW Permanent Arbitration System*, National Academy of Arbitrators, Proceedings of Tenth Annual Meeting 161-92 (1957).

277 Personal communication from J. F. Finnegan, Director, FMCS, in Davey, *Labor Arbitration: A Current Appraisal*, 9 IND. & LAB. REL. REV. 85-94 (1955).

the grievance proceedings, there is a genuine desire by both parties to avoid strikes over relatively small matters. Therefore, arbitration is used as a substitute for the strike and generally operates under a no-strike clause;²⁷⁸ in most cases the arbitrator is able to find in the contract terms adequate standards for his award. However, in disputes over future contract terms the arbitrator usually has no agreed-upon standards; to make the procedure effective the disputants must plainly set out what is to be decided. If the parties exercise care in canalizing the arbitrator's discretion through a submission agreement, thus articulating workable standards, and if the presentation is factually thorough and accurate, wage arbitration can conceivably be supported as an alternative to a test of economic power.²⁷⁹ Professor Bernstein concludes on the basis of a 1945-1950 study of 209 disputes that "in general and in the long run there tends to be little difference in effect if wages are arbitrated rather than negotiated."²⁸⁰

The basic essentials of a labor arbitration policy which will perform an ancillary function to the collective bargaining process might be stated as follows:²⁸¹

- (1) The arbitration award must be swiftly enforceable.
- (2) Present agreements and agreements to arbitrate in the future must be enforced, overriding the common law.
- (3) A means must be provided for naming the impartial arbitrator if one cannot be agreed upon.
- (4) The stability and finality of the award must be assured.
- (5) The subject matter which may be arbitrated and procedures for deciding same must be clearly set out.
- (6) There must be provisions for judicial review, but the judge should in no case re-arbitrate the issue.

b) *compulsory*

The second basic alternative in this field is compulsory arbitration. It is perhaps the last step in the final rejection of the philosophy of a competitive economy with industrial disputes resolved through a system of free collective bargaining. There has been no federal legislation on the subject, other than wartime emergency provisions, and the measures taken by the states have been uniformly abortive. Since the Australian system of compulsory arbitration is recognized as the leader in the field, it is necessary to examine it briefly so that a more intelligent appraisal of our own attempts may be made.

The commerce powers of the Australian constitution have not been as broadly construed as those in the United States Constitution;²⁸² the adoption of compulsory arbitration had to be made under an enabling amendment.²⁸³ The provision itself was not self-executing so the legislature established a Commonwealth Conciliation and Arbitration Court.²⁸⁴ The court has complete authority to settle industrial disputes and will override conflicting state law.²⁸⁵

Only unions or trade organizations are recognized before the court. Employees, who have no recourse individually, are bound by the union decision. No employee can "cease work in service of his employer" merely because the employer is a mem-

278 Taylor, *The Effectuation of Arbitration By Collective Bargaining*, National Academy of Arbitrators, Proceedings of the 10th Annual Meeting 20-41 (1957).

279 Davey, *supra* note 277.

280 BERNSTEIN, *THE ARBITRATION OF WAGES*, 112 (1954).

281 Syme, *The Essentials of a Labor Arbitration Law*, 39 A.B.A.J. 832 (1953).

282 See generally Ross, *Industrial Arbitration in Australia — The Constitutional History*, 30 MINN. L. REV. 1 (1945). For a comprehensive history of the English and Australian background and a basic outline of the present system of Australian compulsory arbitration, see PORTUS, *THE DEVELOPMENT OF AUSTRALIAN TRADE UNION LAW* (1958).

283 AUSTRALIAN CONST. § 51.

284 Ross, *supra* note 282.

285 *Ibid.*

ber of an employers' organization or has testified in an arbitration proceeding.²⁸⁶ Tight control of the unions is provided by requiring the union to submit its constitution and by-laws to the court for approval. The court may disallow the registration on the grounds that it is illegal, oppressive, has unreasonable admission requirements, or for failure of the union to disclose its true financial position.²⁸⁷

The positive benefits resulting from the system are hard to single out. While statistics cannot give the whole picture, the Australian man-days lost due to industrial conflicts is slightly higher than in a majority of the nations following a free collective bargaining philosophy but substantially less than in the United States.²⁸⁸ From a statistical point of view it is questionable that anything positive in the way of reduction in industrial conflict can be attributed to compulsory arbitration. The Australian worker's standard of living appears to compare favorably with that of the worker in this country, but this is not necessarily to be attributed to compulsory arbitration. It is now safe to say that recourse to compulsory arbitration in Australia is, in effect, available as a complete substitute for collective bargaining, not merely a supplement.²⁸⁹

In the United States, resort to compulsory arbitration has been sporadic and unsuccessful. The present extent of federal arbitration legislation is limited to the FMCS, and is not compulsory. Considerable state activity in this area has occurred from time to time.²⁹⁰ The Kansas Court of Industrial Relations Act²⁹¹ of 1920 was the first peacetime attempt at compulsory arbitration. The act created an industrial court with power on its own initiative, or on request, to hear disputes involving the public interest in the industries pertaining to food, clothing, fuel, transportation, public utilities, or common carriers. The plan was declared unconstitutional in *Charles Wolff Packing Co. v. Court of Industrial Relations*,²⁹² as violative of the due process clause of the 14th Amendment. If wages can be set so high that the employer is forced to operate at a loss, the award then becomes confiscatory. The portions of the act not invalidated have remained in effect²⁹³ but have not been in operation because of union opposition and lack of appropriations.²⁹⁴

A general provision in the Oklahoma constitution requires that every license given to mining or public service corporations contain an arbitration of labor disputes stipulation, but there has been no implementing legislation.²⁹⁵ Following the major postwar strikes, there was a rash of public utility compulsory arbitration legislation brought about by adverse public opinion. New Jersey, Florida, Indiana, Massachusetts, Michigan, Missouri, Nebraska, Pennsylvania, and Wisconsin all passed such legislation in 1947.²⁹⁶ The New Jersey act was declared unconstitutional for failure to provide sufficient standards for an administrative agency.²⁹⁷ The Wisconsin act ran afoul of the federal pre-emption doctrine,²⁹⁸ and there has been no further state activity in the field of compulsory arbitration. The recent

286 Commonwealth Conciliation and Arbitration Act, § 9(2)(4) (1904-34).

287 *Id.* at §§ 58D, 60.

288 Foenander, *The Achievement and Significance of Industrial Regulation in Australia*, 75 INT'L LAB. REV. 104-18 (1957). Table at 107.

289 *Ibid.* However, to say that the granting of government subsidies would be a desirable solution is to reveal a mode of thinking contrary to the general sentiment in the United States.

290 Legislation to compel arbitration has been proposed from time to time, but has never been enacted. See, e.g., Ball, Burton, Hatch Bill, S. 1171, 79th Cong., 1st Sess. (1945), and the LMRA discussion of the proposal, 93 CONG. REC. 3835 (1947).

291 KAN. GEN. STAT. ANN. §§ 44-601, 603, 606-28, 635 (1949).

292 262 U.S. 522 (1923).

293 *Dorchy v. Kansas*, 272 U.S. 306 (1926).

294 Bennett, *supra* note 258, at 39.

295 OKLA. CONST. art. IX, § 42.

296 Bennett, *supra* note 258, at 39-40.

297 *State v. Traffic Tel. Workers Fed.* 2 N.J. 235, 66 A.2d 616 (1949).

298 *Bus Employees v. Wisconsin Employee Relations Board*, 340 U.S. 383 (1951).

Taft-Hartley amendments dealing with pre-emption may change the situation in this regard.²⁹⁹

c) *conclusion*

The ultimate future of compulsory arbitration in the United States is not clear. Senator Taft has summed up the case for the opposition:

Basically the solution of our labor problems must rest on a free economy and on free collective bargaining. . . . The right to strike can be modified in cases which do not involve the basic questions of wages, prices, and working conditions. But if we impose compulsory arbitration . . . I do not see how in the end we can escape a collective economy.³⁰⁰

The Senator then went on to note that possibly compulsory arbitration could be limited to public utilities, but even here there would be a problem of where to draw the line. Coal and steel are just as important to the public interest as are those industries usually categorized as public utilities. The recent amendments to the Taft-Hartley Act, as we have seen, could result in compulsory arbitration being tried on a state level. Statutes presently exist which provide for it. Yet there is little likelihood that any comprehensive legislation embodying a commitment to compulsory arbitration will be adopted on the national level in the foreseeable future.

B. *Methods of Maintaining Production*

Having considered measures aimed at facilitating or achieving settlement, we may now turn to governmental activity basically designed to mitigate the effects of industrial disputes, or to protect some public interest by maintaining production. Analytically, these may be divided into those aimed at both the employer and the employee, those primarily aimed at the employer, and those primarily aimed at the employee.

1. *Emergency Strike Injunction*

The injunction has not been adopted on a state level as a method of dealing with labor disputes giving rise to emergency situations. Since 1947, under the Taft-Hartley Act, such an approach has been followed on the national level. It seeks to maintain the status quo for a period of 80 days. Senator Taft believed that "in most instances the force of public opinion would make itself sufficiently felt in this 80-day period to bring about a peaceful termination of the controversy."³⁰¹ After the 80-day period, he felt that Congress could

enact legislation on the spot to cope with the particular situation. It might provide for seizure, another injunction, or arbitration — or Congress might decide not to do anything. But whatever it did would be tailored to the needs of the case; and the possibly enormous government power would be off the books as soon as the strike had ended.³⁰²

When a threatened or actual strike or lockout gives rise to a national emergency, the Taft-Hartley Act prescribes specific procedures.³⁰³ The President must first decide that the situation imperils national health or safety; he may then appoint a board of inquiry to make a report on the facts and the issues.³⁰⁴ Following the report, he may direct the attorney general to seek an injunction to prevent or end the strike or lockout in any Federal district court.³⁰⁵

Before the injunction can be issued the district court must find that the situation substantially affects commerce, and that if the strike or lockout occurs or con-

299 See generally Bennett, *supra* note 258.

300 93 CONG. REC. 3835-36 (1947).

301 S. REP. NO. 105, 80th Cong., 1st Sess. 15 (1947).

302 "Mr. Taft Proposes," *Fortune*, Jan., 1953, p. 63.

303 LMRA §§ 206-10.

304 LMRA § 206.

305 LMRA § 208.

tinues, it will imperil national health or safety.³⁰⁶ The emergency need not involve a nation-wide or industry-wide strike,³⁰⁷ nor imperil both the national safety and health.³⁰⁸ The injunction, when granted, may extend to all participants in the dispute, not merely those directly involved in the strike or lockout³⁰⁹ and it may be granted without regard to the Norris-LaGuardia Act.³¹⁰ The injunction may, as well, be granted broad enough to cover a possible slowdown.³¹¹ The district court's order is, of course, subject to appellate review.³¹² The President, at the end of 60 days, must reconvene the board of inquiry to report to him on the situation. Then, within 15 days, the NLRB must take a secret ballot of the employees to see if they wish to accept the employer's last offer.³¹³ Upon certification of the result within five days, or settlement of the dispute, whichever occurs first, the injunction must be discharged. When the motion to discharge the injunction has been granted, as it must be, the President must make a full report with his recommendation to Congress.³¹⁴

Between 1947 and 1952 President Truman invoked these provisions on 10 occasions, seven of which were in 1948.³¹⁵ Four of the seven times that the President felt that it was necessary to request an injunction after the board of inquiry's report, a stoppage was not prevented. Twice, 80-day delays were achieved, but the strikes were quickly resumed after the injunction was discharged. The United Mine Workers ignored the injunction in both 1948³¹⁶ and 1950.³¹⁷ One authority has summarized the data by saying

that in four out of ten cases the futility of the Taft-Hartley Act was demonstrated. In a fifth case its machinery was found inapplicable and in others, so far as the eye can see, the Act did not seriously affect the outcome.³¹⁸

The latest instance of its use was by President Eisenhower in the recent steel strike; a settlement was reached there before the end of the 80-day period.³¹⁹

The provisions themselves have been attacked as too vague,³²⁰ although it might be noted that if they were too specific, the flexibility required to deal with the full range of possible emergency situations would be lacking. The cooling-off period has been termed "at best meaningless, and at worst harmful in relation to the collective

306 LMRA § 208(a) (i). The power of the court to hear these cases has been attacked on the grounds that a "case or controversy" was lacking. U.S. CONST. art. III, § 2. The argument, however, was rejected in *United States v. United Steelworkers of America*, 202 F.2d 132 (2d Cir.), *cert. denied before judgment*, 344 U.S. 915 (1953), reported in the District Court *sub nom.*, *United States v. American Locomotive Co.*, 109 F. Supp. 78 (W.D.N.Y. 1952). See 66 HARV. L. REV. 1531 (1953).

307 *United States v. United Steelworkers of America*, 202 F.2d 132 (2d Cir. 1953) (involved atomic energy program).

308 *United Steelworkers of America v. United States*, 361 U.S. 39 (1959).

309 *United States v. International Longshoremen's Ass'n*, 116 F. Supp. 262 (S.D.N.Y. 1953).

310 Anti-Injunction Act, 47 Stat. 70 (1932), 29 U.S.C. § 101 (1958). See *United States v. UMW*, 330 U.S. 258 (1947).

311 *United States v. International Longshoremen's Ass'n*, 147 F. Supp. 425 (S.D.N.Y. 1956).

312 LMRA, § 208(c).

313 LMRA, § 209(b).

314 LMRA, § 210.

315 See generally, Warren, *National Emergency Provisions*, 4 LAB. L.J. 130 (1953); Rehms, *The Operation of the National Emergency Provisions of the Labor Management Relations Act of 1947*, 62 YALE L.J. 1047 (1953); Cullen, *The Taft-Hartley Act in National Emergency Disputes*, 7 IND. & LAB. REL. REV. 15 (1953).

316 When the UMW went out on strike in March 1948 over pensions, President Truman obtained an injunction. Before the strike was finally settled both John L. Lewis and the union were fined a total of \$710,000 for contempt.

317 The coal strike of 1950 again prompted President Truman to ask for an injunction. This time Lewis ostensibly ordered the miners to return to work. Both he and the union were found not guilty in subsequent contempt proceedings. *United States v. UMW*, 89 F. Supp. 179 (D.D.C. 1950), *dismissed as moot*, 190 F.2d 865 (D.C. Cir. 1951).

318 Cox, *The Taft-Hartley Act: An Evaluation of Experience*, reprinted in SHISTER, READINGS IN LABOR ECONOMICS AND INDUSTRIAL RELATIONS 501 (1956).

319 See N.Y. Times, Jan. 5, 1960, p. 1, col. 8.

320 Warren, *National Emergency Provisions*, 4 LAB. L.J. 130 (1953).

bargaining process.³²¹ The inherent necessity for haste has also been decried, pointing out that the "board of inquiry is nothing but a whistle-stop on the road to an injunction."³²² It may also be noted that the board is denied the first prerequisite for marshalling public opinion to force a settlement—the power to make recommendations.³²³ Senator Taft himself felt the last-offer vote was a meaningless formality.³²⁴

Few have had praise for the present national emergency provisions. Such criticism should perhaps be tempered by noting the observation that they have not been used enough to justify any conclusive evaluation. As one critic puts it:

The present emergency procedures are much better than the prevailing weight of critical opinion holds, simply because . . . many critics . . . when evaluating the Taft-Hartley Act . . . measure it against the ideal and abstract standard of a law that would prevent all emergency strikes, while simultaneously exerting only a beneficial effect upon bargaining practices and relationships.³²⁵

2. Plant Seizure

Plant seizure, like the emergency injunction, is not primarily a device to settle the dispute. Its purpose, instead, is to resume production under government auspices.³²⁶ Seizure has been employed on both the federal and state level, although its peacetime use has been restricted almost exclusively to the states.

a) federal

No federal statute presently authorizes seizure as a general procedure in industrial conflict.³²⁷ Such authorization was specifically rejected when the Taft-Hartley Act was under consideration.³²⁸ Congress apparently felt that such a procedure would unduly interfere with the collective bargaining process.³²⁹ The Constitution, however, grants to Congress the power to take private property for public use,³³⁰ subject only to the limitation that just compensation must be afforded.³³¹ Despite some historical practice to the contrary,³³² it is clear today that the President is powerless, without statutory authority, to seize private property during a strike under the guise of a national emergency.³³³

Our national experience with seizure where industrial conflict is involved, thus, is of limited value. When it has occurred, it was usually during a period of war;³³⁴ consequently, any evaluation of its peacetime effectiveness is practically impossible.

321 Rehms, *supra* note 315, at 1059.

322 *Id.* at 1055.

323 LMRA, § 206.

324 "Mr. Taft Proposes," *Fortune*, Jan., 1953, p. 63.

325 Cullen, *supra* note 315, at 29.

326 This alone presents interesting incidental problems. After seizure, is the state liable, where general immunity no longer obtains, for the torts of its "new employees"? *Rider v. Julian*, 365 Mo. 313, 282 S.W.2d 484 (1955), held that it was not. The decision was based on a construction of the Missouri Statute, Mo. ANN. STAT., §§ 295.010 — 295.210 (1947), that seizure was not meant to raise the employer-employee relation. A similar result, therefore, would not necessarily obtain elsewhere.

327 See the appendix of *Mr. Justice Frankfurter in Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 615 (1952), for a comprehensive listing of Congressional statutes which do provide for presidential seizure.

328 93 CONG. REC. 3637-45 (1947).

329 93 CONG. REC. 3835-36 (1947).

330 U.S. CONST. art I, § 8(18).

331 U.S. CONST. amend V.

332 Mr. Chief Justice Vinson notes in dissent in *Youngstown Sheet & Tube Co. v. Sawyer*,

343 U.S. 579, 667 (1952), that President Lincoln's action in seizing the rail and telegraph lines leading to Washington was without statutory authority, and that later when a bill was passed "ratifying the seizure," its sponsors declared its purpose was merely to confirm a power already possessed.

333 *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

334 Since 1917 there have been 68 instances of executive seizure; 49 were during World War II, three in World War I, three in 1941, three during the Korean War, and 10 be-

b) *state*

Five states presently have seizure statutes designed as methods of intervention in industrial disputes.³³⁵ Most of these were passed during the period of industrial strife around 1947. Some, however, like Maryland's, were passed to deal with specific strikes.³³⁶ Almost uniformly seizure is at the discretion of the governor.³³⁷ Virginia uniquely provides that the company may refuse to turn over its facilities; the governor then must apply to the court for a rule requiring the company to show cause why they should not be surrendered.³³⁸ Most of the acts apply only to public utilities, although, as in New Jersey, the definition of "public utility" may be quite broad.³³⁹

Several of the statutes also forbid strikes during seizure.³⁴⁰ Missouri goes one step further and provides for a loss of seniority for those refusing to work.³⁴¹ It should be noted here, however, that it is generally thought that a state may not abridge the right to strike.³⁴² Justification for the no-strike provision is usually sought in the exclusion of the government from the definition of employer in the Taft-Hartley Act.³⁴³ Although it has been asserted, the constitutional character of the right has not been adjudicated.³⁴⁴ Possible federal pre-emption has also been avoided on an inherent police power argument.³⁴⁵ The stigma of involuntary servitude has been skirted by providing that individuals may quit, but not as a concerted body.³⁴⁶

That seizure is a constitutional "regulation" and not a "taking" was once undoubtedly an interesting contention.³⁴⁷ Today, however, there is little question that it constitutes a taking which, under the 14th Amendment, requires that just compensation be paid.³⁴⁸ Most of the statutes so provide, although there is little uniformity in the schemes employed to determine the proper compensation.³⁴⁹

tween VJ Day and the Korean War, nine of which were within 10 months of VJ Day. Forty-four of the occasions involved non-compliance with action of a government board during war or emergency, and the War Department or the Army was charged with carrying out the orders 32 times. *Federal Seizures in Labor Management Disputes, 1917-1952*, 76 MONTHLY LABOR REV. 611 (1953).

335 These states are Maryland, Massachusetts, Missouri, New Jersey, and Virginia. See notes 336-41, *infra*.

336 After everything else had failed to end a 37-day strike at the Baltimore Transit company, the General Assembly held a Grand Inquest, a device which, although provided for, had not previously been used. It gives the legislature broad powers to demand records and summon witnesses. See generally Seff, *Legality of the Maryland Public Utilities Disputes Act*, 16 MD. L. REV. 304 (1956). Maryland's statute, MD. ANN. CODE art. 89, §§ 14-24 (1957), was the end product of the Inquest.

337 See, e.g., MASS. GEN. LAWS ANN. ch. 150B, § 4(B) (1957).

338 VA. CODE ANN. § 56-516 (1959).

339 VA. CODE ANN. § 56-523 (1959). N.J. STAT. ANN. § 34-13B-16 (Supp. 1959) includes autobuses, bridge companies, canal companies, electric light, heat, and power companies, ferries and steamboats, gas companies, pipe line companies, railroads, sewer companies, steam and water power companies, street railways, telegraph and telephone companies, tunnel companies, water companies. In short, any concern that is directly regulated by the state is subject to seizure.

340 MASS. GEN. LAWS ANN. ch. 150B, § 4(B)(3)(6) (1957).

341 MO. ANN. STAT. § 295-200 (1949). See Shute, *A Survey of Missouri Labor Law*, 18 Mo. L.R. 93, 160-72 (1953).

342 *Amalgamated Ass'n of Street Employees of America v. WERB*, 340 U.S. 383 (1951).

343 LMRA, § 2(2).

344 A recent Missouri case which the Supreme Court dismissed after holding it about 12 months clearly presented the issue. But see the language of Mr. Justice Brandeis in *Dorchy v. Kansas*, 272 U.S. 306, 311 (1926).

345 See Lehrer, *The Maryland Public Utilities Disputes Act*, 7 LAB. L.J. 607 (1956); Seff, *Legality of Maryland Public Utilities Disputes Act*, 16 MD. L.R. 304 (1956).

346 N.J. STAT. ANN. § 34-13B-15 (Supp. 1959).

347 See generally, 19 GEO. WASH. L. REV. 184 (1950).

348 *Pewee Coal Co. v. United States*, 88 F. Supp. 426 (Ct. Cl. 1950), *aff'd*, 341 U.S. 114 (1951).

349 See, e.g., *Pewee Coal Co. v. United States*, 88 F. Supp. 426 (Ct. Cl. 1950), *aff'd*, 341 U.S. 114 (1951).

Massachusetts, as one example, equates just compensation with profits, but provides that the existence of the labor dispute may be considered in determining profits.³⁵⁰ A more complex problem, compensation to the employee, is also not treated with uniformity.³⁵¹

Some of the statutes incidentally provide inducements to settle. Virginia relies on collective bargaining, but specifies that wages are to remain the same during the seizure.³⁵² New Jersey provides for compulsory arbitration within 10 days after seizure.³⁵³ With the exception of Hawaii's,³⁵⁴ all of the statutes specifically provide for return to private owners at the end of the dispute.³⁵⁵

Experience under seizure has been uneven.³⁵⁶ In a Hawaiian dock strike there was a 176-day stoppage of all shipping; non-union men had to be hired when most of the union men refused to obey an injunction issued along with the seizure order. The government was able to maintain only about one-half the previous rate of work.³⁵⁷ New Jersey³⁵⁸ and Virginia³⁵⁹ have not had better results. And, since 1952, after the Supreme Court declared a Wisconsin labor relations act providing for representation proceedings invalid on the grounds of federal pre-emption,³⁶⁰ the states have apparently been reluctant to employ seizure, and have instead attempted to foster voluntary conciliation.³⁶¹

Generally, then, we may conclude that the record of the various seizure statutes shows no pattern of uniformity. "The figures . . . are sporadic. The inconsistent pattern and indefinite trends . . . suggest that the state laws have not been effective in reducing strikes substantially or consistently."³⁶²

3. *Employee Draft*

Similar to plant seizure, employee draft aims at preventing a production stoppage by inducting the work force into the armed forces. It represents, perhaps, the ultimate breakdown of the collective bargaining process. Neither the federal government nor any of the states has adopted so drastic a solution as a permanent policy in dealing with industrial conflict. It remains, however, at least a theoretical possibility, and in two situations, one federal and one state, it almost became a reality.

a) *federal*

On May 25, 1946, President Truman addressed a joint session of Congress. The railroads, then under government control, were experiencing a crippling strike. Mr. Truman requested

the Congress immediately to authorize . . . [him] to draft into the armed forces of the United States all workers who . . . strike against their government.³⁶³

350 MASS. GEN. LAWS ANN. ch. 150B, § 4(B)(1) (1957).

351 See, e.g., VA. CODE ANN. § 56-519 (1959) (same as prior to seizure).

352 *Ibid.* See also *Anderson v. Chesapeake Ferry Co.*, 186 Va. 481, 43 S.E.2d 10 (1947).

353 N.J. STAT. ANN. § 34-13B-20 (Supp. 1959).

354 HAWAII REV. CODE § 92-7 (1955). Termination of seizure is exclusively at the discretion of the governor.

355 See, e.g., MASS. GEN. LAWS ANN. ch. 150B, § 4(B)(3)(C) (1957).

356 See generally Sussna, *State Intervention in Public Utility Labor Management Relations*, 9 LAB. L.J. 35 (1958).

357 See generally Goldberg, *Settlement of Hawaiian Longshoremen's Strike*, 69 MONTHLY LAB. R. 653 (1949). It is interesting to note that Hawaiian trade with the mainland which was almost entirely with West Coast ports was diverted to East and Gulf ports because of an agreement by the shippers and union on the West coast that the dockworkers did not have to unload non-union cargoes.

358 Kennedy, *The Handling of Emergency Disputes*, reprinted in SHISTER, *supra* note 318, at 521-28 (1956).

359 See France, *Seizure in Emergency Disputes in Virginia*, 7 IND. LAB. REL. REV. 347 (1954); Lowuden, *Public Utility Seizure in Virginia*, 41 VA. L.R. 397 (1955).

360 *Amalgamated Ass'n of Street Employees v. WERB*, 340 U.S. 383 (1951).

361 Sussna, *supra* note 356, at 35.

362 *Id.* at 36.

363 92 CONG. REC. 5753 (1946).

That afternoon, under suspended rules, the House passed³⁶⁴ a bill authorizing the President, when in any plant in possession of the United States there was a strike, lockout, or slowdown, to declare by proclamation the existence of a national emergency. The heart of the bill, Section 7, provided that any employee who refused to work within 24 hours of the effective date of the proclamation

shall be inducted into the Army of the United States at such time, in such manner (with or without an oath) and on such terms and conditions as may be prescribed by the President as being necessary in his judgment to provide for the emergency.³⁶⁵

The Senate, however, referred the bill to committee before considering it on the floor. Senator Taft's query of Senator Barkley, the speaker for the bill — Would the strikers, if they refused to work, be shot as traitors? — resulted in sober second thoughts.³⁶⁶ Senator Wagner's motion to strike Section 7 then carried.³⁶⁷ The bill was finally passed,³⁶⁸ but it was never reported back from the Senate-House conference committee.

b) *state*

In early 1946, a dispute developed between the Virginia Electric Power Company and a local union.³⁶⁹ The union gave notice of intention to strike, and refused to attend a conference suggested by Governor Tuck. On March 22, the Governor declared a state of emergency; relying on his power as commander-in-chief of the land and naval forces of the Commonwealth,³⁷⁰ he ordered out a part of the "unorganized militia," which consisted of all able-bodied male citizens between 16 and 55.³⁷¹ The unit, which was composed of the employees of the power company, was designated as the "emergency laws executing unit."³⁷² The order, however, was suspended until the strike became effective, and then it commanded the unit to seize the facilities of the power company and perform the same services each individual had performed prior to induction. On March 30, before the strike began, negotiations were resumed and settlement reached. Governor Tuck then declared the emergency at an end, and issued an order specifying that

all persons who were drafted into the emergency are forthwith discharged honorably and returned to their former status in the unorganized militia of the commonwealth. . . .³⁷⁴

The traditional test of a governor's power to call out the militia is the existence of a serious emergency.³⁷⁵ Although his judgment is controlling, the power may not be exercised in an arbitrary or capricious manner.³⁷⁶ It is possible that the exercise of the power in labor disputes might run afoul of the ban of the 13th Amendment on involuntary servitude.³⁷⁷ Yet public service has to date not been considered within the prohibition of the amendment.³⁷⁸ Objections to general military service,³⁷⁹ jury

364 The vote was 306 to 13, 112 not voting. *Id.* at 5754.

365 *Ibid.*

366 92 CONG. REC. 5780 *et seq.* (1946).

367 The motion was carried 70 to 13, 12 not voting. *Id.* at 5918.

368 *Ibid.*

369 For a general account of the whole strike and draft situation, see 33 VA. L. REV. 100 (1947).

370 VA. CONST. art. V, § 73. See VA. CODE ANN. § 56-528 (1959).

371 Exec. Order of March 29, 1946 as reprinted in 92 CONG. REC. 5791 (1946).

372 *Ibid.* The Record also contains here a copy of the individual notice of draft and order to report.

373 92 CONG. REC. 5794 (1946).

374 *Ibid.*

375 *Sterling v. Constantin*, 287 U.S. 378 (1932); *Ex parte McDonald*, 49 Mont. 454, 143 Pac. 947 (1914). *Accord*, opinion of Attorney General of Virginia reprinted in 92 CONG. REC. 5794-98 (1946).

376 *Ibid.*

377 33 VA. L. REV. 100, 106 (1947).

378 *Butler v. Perry*, 240 U.S. 328, 333 (1916).

379 *Wolfe v. United States*, 149 F.2d 391 (6th Cir. 1945).

service,³⁸⁰ work on public roads,³⁸¹ and service by seamen³⁸² have all been overruled. The issue would turn on the public character of the service, although "the total effect of the order might well spell out involuntary servitude."³⁸³ One authority, as well, has advanced the proposition that the decision to provide public services is legislative, not executive; consequently a draft order might not survive a separation of powers argument.³⁸⁴

Conclusion

To attempt to offer a detailed discussion of the problems raised by the recent steel strike is clearly beyond the scope of this survey. Yet certain principles may be noted, and factors pointed out, which should be considered in any re-evaluation of America's national commitment to collective bargaining. Initially, it should be recognized, of course, that our national policy in industrial relations involves questions which go to the very heart of the present distribution of social, economic, and political power.³⁸⁵ Industrialization radically transformed an older social order;³⁸⁶ it also gave rise to a series of crucial problems which society has not yet learned to cope with.

Industrialization placed the machine between man and man and destroyed a social order in which it was possible to exercise a measure of personal responsibility. The trade union movement itself is, perhaps, best understood as an unconscious attempt to regain this ability by the introduction of the bilateral decision where early industrialization had placed the unilateral decision.³⁸⁷ The right to organize, moreover, flows ultimately from "the institutional characteristics of a technically advanced society which threaten the right of the individual to cry out aloud against that which he feels to be oppressive . . ."³⁸⁸ The progressive growth in legal attitudes toward the labor movement is, at least, an implicit recognition of this fact.

Implicit in our present approach is the recognition that unionization is not a problem which can be solved. Rather it is a movement which has to date resisted imprisonment in any ideological strait jacket, keyed only to a particular factual situation.³⁸⁹ The quest for a final solution to the "labor problem," therefore, ought

380 *State v. Scott*, 36 W. Va. 704, 15 S.E. 405 (1892).

381 *Butler v. Perry*, 240 U.S. 328 (1916).

382 *Robertson v. Baldwin*, 165 U.S. 275 (1897).

383 *Supra* note 377.

384 *Supra* note 377, at 108.

385 Professor Edwin E. Witte has recognized an unfortunate tendency, particularly in view of the character of industrial relations, for parties

to align themselves on every issue from a class conflict point of view.

What labor is for, management opposes; and vice versa They do

not grasp the opposing position and make little attempt to understand

it [E]ach side professes great concern for the general public inter-

est but always identifies its position with that of the general public.

Quoted in YODER & HENEMAN, *LABOR ECONOMICS AND INDUSTRIAL RELATIONS* 236 (1959).

386 For a succinct but penetrating description of this transformation, see TANNENBAUM, *A PHILOSOPHY OF LABOR* 32-48 (1950).

387 See generally, TANNENBAUM, *supra* note 386.

388 Roberts, *Industrial Relations*, in *LAW AND OPINION IN ENGLAND IN THE 20TH CENTURY* 389 (1959).

389 The issue of "managerial prerogatives" is illustrative. Neil W. Chamberlain has observed that they are

something which changes over time, reflecting changing economic and social relationships [J]ust as the bargaining process itself has

undergone modification . . . so the issues to which that process is di-

rected are not a fixed category, but, rather, are reflective of the perpetually

changing complexion of economic society. Quoted in McNAUGHTON &

LAZAR, *INDUSTRIAL RELATIONS AND THE GOVERNMENT*, 456 (1954).

to be recognized as essentially fruitless.³⁹⁰ For all that, as a restless power flux in our rapidly changing society, the trade union movement may be channeled, and, perhaps, given positive direction. But to this end, procedural rather than substantive rules should be preferred.³⁹¹ The inadequacy of any substantive legal formalization today will surely be demonstrated tomorrow.³⁹² Any proposed procedural changes to channel the dynamic development of the labor movement within our society must, as well, if they are to possess survival value, take into consideration the total character of man.

Modern investigation in industrial psychology has shown the great importance of human relations in industry. Out of many surveys on the causes of strikes that have been undertaken in recent years, none put down wage difficulties as the chief cause.³⁹³

Too often today the trade union movement is viewed in terms of a philosophical heritage which assumed, "that the economic interest is the governing, perhaps even the exclusive, concern of the human being."³⁹⁴ Ricardo, Smith, and even Marx, each left conceptual tools inadequate to explain the phenomenon of man in an industrial society.

If, also, the rise of the union movement is best understood as a quest to re-establish personal fulfillment, which ultimately requires the exercise of personal responsibility, reforms in the present legal structure of industrial relations must create a situation where there is a maximum opportunity for the exercise of personal — therefore decentralized — decision. And, in the process, the twin evils of pluralistic anarchy and state authoritarianism must be avoided.³⁹⁵

The simple proposal which ignores big differences in industries³⁹⁶ and stages

390 John T. Dunlap has made the following pertinent observation about the so-called emergency dispute. There is no convincing way to still the

insistent question: then what? If mediation fails, then what? If fact-finding and recommendations do not produce settlement, then what? If seizure and injunction fail, then what? If the use of the armed forces or putting workers in the militia fail, then what? If you put the leaders in jail and there is still no settlement, then what? The quest for the end of this road is a dangerous illusion. . . . There can be no . . . guarantees. Dunlap, *Emergency Disputes: Some Basic Guideposts*, in READINGS IN LABOR ECONOMICS AND INDUSTRIAL RELATIONS 513-14 (1956).

391 One authority has compared the institution of collective bargaining to the tradition of the common law, and pointed out that its genius for success lies in a "very firm procedural framework for a very flexible corpus of substantive rules . . ." Kahn-Freund, *Labor Law*, in LAW AND OPINION IN ENGLAND IN THE 20TH CENTURY 262-63 (1959).

392 The inadequacy of legal definitions in a rapidly changing industry is today being brought out by automation. New occupations, such as programmer and machine supervisors, resist the easy cataloging of "management-supervisors" or "labor-employee" of the LMRA, § 2(3) and (11). See Aronson, *Automation: Challenge to Collective Bargaining?* in NEW DIMENSIONS IN COLLECTIVE BARGAINING, 52 (1959). The German experience with co-determination is also illustrative. Perhaps the most radical change it has introduced has been the trial and error method. The traditional German penchant for theory and social engineering has had to give way to the pressure of a new, not yet fully understood, institution. See generally, SPIRO, *THE POLITICS OF GERMAN CO-DETERMINATION* (1958).

393 NEWMAN, *CO-RESPONSIBILITY IN INDUSTRY* 113 (1955).

394 Tannenbaum, *supra* note 387, at 52.

395 The Industrial Organization Act passed by the Netherlands in 1950 recognizes this principle:

It is impossible to draw a natural line between that which can be regulated on the one hand by Government and on the other by the industrial bodies. The definition of the two tasks in concrete form is a matter of efficiency. The first rule which applies to achieve an efficient organization of society is that the state must not assume tasks which can be fulfilled as well or better by inferior bodies in society. Quoted in Newman, *supra* note 393, at 133-34.

396 The advocacy of the abolition of industry-wide bargaining, for example, ignores the lack of product competition in the steel industry, while the reverse is true in the auto industry. See generally, Goldfinger and Kassalow, *Trade Union Behavior in Wage Bargaining*, in NEW CONCEPTS IN WAGE DETERMINATION 51-82 (1957).

of industrialization must also be rejected.³⁹⁷ Too often one plan is seen as the solution to all the labor problems, however vastly different, of the nation. Finally, the inherent limitation of any legal approach ought to be recognized.

It is clear . . . that the question of the legal status, and hence legal obligations, of unions must be recognized as occupying but one sector of the broad front along which a realistic approach to the problem of union responsibility can alone be made. New legal solutions may provide part of the answer; in a political democracy they cannot provide anything like a complete answer.³⁹⁸

Dynamic social forces are not easily contained in the judicial process. The labor movement today is too often an issue of partisan politics. The political consensus that would admit of workable standards, under which significant labor problems could be submitted to impartial tribunals, does not exist. The transferring of our more crucial labor issues "into one of those spheres which are supposed to be outside partisan politics would merely result in politicizing that sphere as well."³⁹⁹ The result, at best, would be a more sophisticated level of collective bargaining, and, at the extreme, possibly the beginning of a planned economy.⁴⁰⁰ Finally, it should be noted that the first prerequisite for a sound, legal approach — the ascertainable fact situation — is almost by definition lacking in our present stage of industrialization.⁴⁰¹

Labor disputes are disputes largely about principles, about social and economic theory, about business prospects at home and abroad next year and five years hence, and cannot be resolved by any finding of fact.⁴⁰²

The role of law in the settlement of industrial disputes is basically peripheral.⁴⁰³ It can set and maintain conditions under which a collective bargaining process can operate; it cannot make the agreement for the parties.⁴⁰⁴

397 The Taft-Hartley Act, for example, was passed to readjust the power equilibrium of union-management relation. Yet, although there is an almost total lack of empirical data, objective observers feel that its operational effect, with some minor exceptions, has not been substantial on established collective bargaining relations. It has had, however, substantial impact in impeding the unionization of the South, an effect possibly not intended. See, generally, Davey, *The Operational Impact of the Taft-Hartley Act Upon Collective Bargaining Relations*, in *NEW DIMENSIONS IN COLLECTIVE BARGAINING* 179-96 (1959).

398 Martin, *Legal Personality and the Trade Union*, in *LEGAL PERSONALITY AND POLITICAL PLURALISM* 42 (1958). The record of Australian compulsory arbitration clearly demonstrates the inadequacy of a purely legal approach. The system has tended to become an end in itself. Attention is concentrated on the legal prerequisites to making the present system workable rather than being directed toward determining the proper place of the union in the total structure of a political democracy. *Id.* at 41.

399 SPIRO, *supra* note 392, at 7, commenting on the German experience.

400 See generally, Kerr, *Labor's Income Share and the Labor Movement*, in *NEW CONCEPTS IN WAGE DETERMINATION* 260-98 (1957).

401 Dr. Kerr makes this point quite graphically in regard to merely ascertaining what labor's share of our national income is. He feels that possibly the whole concept "labor share" is outmoded today. *Id.* at 297.

402 Stewart & Couper, *The Limitations of Fact Findings in Industrial Disputes* in *SHISTER, READINGS IN LABOR ECONOMICS AND INDUSTRIAL RELATIONS* 518 (1956).

403 One author has suggested a solution similar to that which resulted in the Railway Labor Act. He suggested that Congress formally request the parties concerned in those basic industries, which could, if struck, give rise to a national emergency, to submit within a year their suggestions for mitigating such disputes. He would make the subject of emergency disputes itself an issue for collective bargaining. Dunlap, *Emergency Disputes: Some Basic Guideposts*, in *READINGS IN LABOR ECONOMICS AND INDUSTRIAL RELATIONS* 517 (1956).

404 This survey was prepared by G. R. Blakey, A.B., LL.B., and Matthew T. Hogan, A.B., LL.B., both of the class of 1960, and John J. Coffey, Thomas A. McNish and Edward O'Toole of THE LAWYER'S Senior Staff. (Ed.)