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STABILITY VERSUS EMPLOYEE FREE CHOICE

George W. Brooks†

The collective bargaining system in private industry[1] in the United States, currently marked by a great deal of "responsibility" and "maturity" on both sides of the table, enjoys a deserved prestige. In many respects we have the best of all possible worlds; we have very little governmental intervention in labor-management relations and at the same time a surprisingly low incidence of strikes.

These developments have been illustrated dramatically in the Experimental Negotiating Agreement (ENA) entered into in March 1973 between the United Steelworkers of America and the Coordinating Committee Steel Companies.[2] Ten major steel companies are signatory to the agreement which committed the parties not to strike under any circumstances. The accomplishment is even more impressive because the final agreement was concluded without use of the arbitration machinery set up as an alternative. This agreement has encouraged people to believe that the same kind of arrangement might be extended to other industries.

It should be noted that the Steelworkers have a relatively centralized bargaining structure and process—highly centralized for the basic steel industry where ENA was negotiated. Under the terms of the union constitution, all collective bargaining agreements are between the international union and employer. ENA was signed by the national president and other members of the executive board. Some 600 local union delegates from the basic steel industry approved the agreement by a voice vote. The Steelworkers' constitution does not require membership ratification of agreements.

This steel agreement is the latest step in a well-defined trend. Dating roughly from the two or three years following World War II there has been a diminution of strikes; an enlargement of

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[1] This paper deals exclusively with the law of labor relations in private industry. Transferring the basic concepts of this law and the practice of bargaining to the public sector raises a host of complications not considered here, although much of what is said would apply in specialized ways to public sector experience.

[2] For a description of the agreement, see United Steelworkers of America, Report of Officers to the Seventeenth Constitutional Convention 18-25 (1974).

bargaining units, which tends to increase the stability and predictability of the bargaining process; changes in bargaining structure, which tend in the same direction; and a lengthening of the term of most agreements.

I

THE CHANGE FROM 1935 TO 1976

This pattern of collective bargaining evolution is well known. Not so well known is that the changes have been accompanied by a systematic and substantial withdrawal of the right of free choice from employees.[3] And in the long run this change may be the most important one that has occurred.

The role of free choice was central in the minds of the authors of the National Labor Relations Act (NLRA).[4] It was decided in 1935, contrary to the inclinations of President Roosevelt, that self-help, not regulation, would be relied upon to improve the lot of working people.[5] Self-help was to be achieved through labor organizations:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.[6]

Free choice was strengthened further in the Taft-Hartley Act amendments in 1947 by the addition of the words:

> [A]nd shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3).[7]

Section 8(a)(3) restricted enforcement of union shop provisions to the payment of "periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."[8]

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[3] A more accurate statement might be that withdrawal of free choice is the essence of the change.

[4] National Labor Relations Act, ch. 372, 49 Stat. 449 (1935), *as amended,* 29 U.S.C. §§ 151-68 (1970).

[5] 79 CONG. REC. 7565-74, 7648-61, 7668-81, 9676-711, 9713-31 (1935).

[6] National Labor Relations Act § 7, ch. 372, § 7, 49 Stat. 452, *as amended,* 29 U.S.C. § 157 (1970).

[7] Labor Management Relations Act, 1947, ch. 120, § 7, 61 Stat. 136, *as amended,* 29 U.S.C. § 157 (1970).

[8] 29 U.S.C. § 158(a)(3) (1970).

The Landrum-Griffin Act of 1959[9] is an expression and extension of the same policy:

> The Congress further finds, from recent investigations in the labor and management fields, that there have been a number of instances of breach of trust, corruption, disregard of the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct which require further and supplementary legislation that will afford necessary protection of the rights and interests of employees and the public generally.[10]

The text of the law does not regulate or limit the scope of union activity. Congress again asserted its belief that unions can and ought to be democratic, responsible, and representative, and enacted its remedies accordingly.

Thus, the legislation is clear. Wages and other conditions of employment were, for the most part, not established through congressional enactment, but were to be accomplished through negotiations between voluntary organizations of workers and their employers. Implicit is that the right to self-organization should be protected, and that employees should have the right to choose the organization they think serves them best or to reject organization altogether. Unions, when chosen by workers through a democratic election, should be democratic and responsive to their membership.

Even if it were not specifically stated in the NLRA, it would have to be clear that democratic and responsive organizations can be achieved only where workers have a wide range of free choices. But the parties to the collective bargaining arrangement normally find that a limitation on the free choice of employees is very much in their institutional interests. The term "party" (or "parties") refers to the formal institutional structures of the unions and employers which are committed to the carrying out of the collective bargaining arrangements. These are bureaucracies or oligarchies whose interests should under no circumstances be equated with the interests of the members of the union. This is an obvious and nonpejorative statement; it is not meant to imply, for example, that unions as institutions do not serve the interests of their members, nor that the goals of both may not be in many cases identical. But the primary goals of the union—wages and other conditions of

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[9] Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, 73 Stat. 519 (codified in scattered sections of 29 U.S.C.).

[10] 29 U.S.C. § 401(b) (1970).

employment—will never be the only goals of the union as an institution, however well such goals may be served by that institution.[11]

There are few, if any, full-time union personnel who wish to maximize the opportunities for employees to change unions, reject unions, or withdraw individually or collectively from the union of which they are members.[12] Although the American trade union movement had its largest and most dramatic advances during the period of intense rivalry between the AFL and CIO,[13] the leadership was virtually unanimous in wanting to put an end to what they called "raiding."

This position was never stated more baldly than by the Report and Recommendations of the Joint AFL-CIO Committee on Labor Unity.[14] The Report reviewed the statistics of rival unionism and found that during the years 1951 and 1952 there were 1,245 cases of raiding—the CIO the petitioner in 700, the AFL in about 500. In all, 366,470 workers were involved, of whom only 62,000 changed their affiliation from one federation to another. Of these, 35,000 were taken by an AFL union from a CIO union, and the CIO took 27,000 from the AFL. The net change in membership totals was only 8,000 workers, or less than two percent of the total number of workers involved.

This condition was apparently regarded by the members of the joint committee as conclusive proof that raiding was a waste of time and money. Nothing could dramatize more clearly the contrast

[11] For a discussion of this subject, see A. ROSS, TRADE UNION WAGE POLICY 22-24 (1948).

[12] Perhaps the best evidence is the attitude of union officers and staff toward the Taft-Hartley and Landrum-Griffin attempts to protect individual free choice. The union position was uniformly that these statutes were repugnant. The Taft-Hartley Act was described as a "slave labor law." Both laws were labeled "anti-union" and "anti-labor," and the limitations on compulsory unionism received special mention. Concerning the Taft-Hartley amendments, see AMERICAN FEDERATION OF LABOR, REPORT OF THE PROCEEDINGS OF THE SIXTY-SIXTH CONVENTION 260-62 (1947); AMERICAN FEDERATION OF LABOR, REPORT OF THE EXECUTIVE COUNCIL TO THE SIXTY-SIXTH CONVENTION 405-07 (1947). *See also,* CONGRESS OF INDUSTRIAL ORGANIZATIONS, FINAL PROCEEDINGS OF THE NINTH CONSTITUTIONAL CONVENTION 86-89, 93-94 (1947). On Landrum-Griffin, see 1 AFL-CIO PROCEEDINGS OF THE THIRD CONSTITUTIONAL CONVENTION 613-16 (1959); 2 PROCEEDINGS OF THE THIRD CONSTITUTIONAL CONVENTION, *supra,* at 371.

[13] For a detailed account of rival unionism in various industries before 1941, see W. GALENSON, THE CIO CHALLENGE TO THE AFL (1960), and for characterization of effects, see *id.* at 615.

[14] *See* AMERICAN FEDERATION OF LABOR, REPORT OF THE PROCEEDINGS OF THE SEVENTY-SECOND CONVENTION 82-85 (1953). The Joint Committee included top officers of the two federations. The study of raiding effects was made by a subcommittee including George Meany, Walter Reuther, William Schnitzler, James Carey, Matthew Woll, and David McDonald.

between the interests of the unions as institutions and the interests of the members thereof. Is it not possible that every one of the 366,470 workers was better off as a result of the raids or attempted raids? The majority of workers that changed affiliations certainly thought they were better off. It is more than a possibility that the unions which retained their membership in the face of a raid did so after promising, and possibly achieving, a better record of representation in the eyes of their own membership. It is even more likely that millions of workers whose representation was not challenged were more conscientiously represented than they would have been if the possibility of the raid had not been present.

By the early 1950's, the union leadership had become thoroughly tired of rival unionism. A number of bilateral pacts were written to limit rivalry, and both the AFL and the CIO established within their own ranks some limitations upon raiding. It was unmistakably the major goal of the merger to put an end to raiding altogether. The effort was successful even beyond the fondest expectations of its principal advocates. "Established collective bargaining relationships" are now protected by the AFL-CIO constitution[15] against raiding by any other affiliate, and the Internal Disputes Plan provides the enforcement machinery. In the last ten years, the annual case load of complaints has been well under 150. The procedure includes mediation, impartial umpires, and appeal to the Executive Council.[16] A union found in violation is placed under sanctions, deprived of any protection against raiding, and ultimately subjected to expulsion.

The disenchantment with raiding extends beyond the AFL-CIO. The United Automobile Workers did not engage in raiding after they left the AFL-CIO, and were not in turn raided by the affiliates.[17] After the Teamsters were expelled from the AFL-CIO, there was a small amount of raiding in both directions, but this has fallen off to virtually nothing.[18] Another example of

[15] The integrity of each such affiliate of this Federation shall be maintained and preserved. Each such affiliate shall respect the established collective bargaining relationship of every other affiliate and no affiliate shall raid the established collective bargaining relationship of any other affiliate.

AFL-CIO CONST. art. III, § 4 (1973). *See* I DECISIONS AND RECOMMENDATIONS OF THE AFL-CIO IMPARTIAL UMPIRE 1954-1958, at 3 (1958).

[16] AFL-CIO, REPORT OF THE AFL-CIO EXECUTIVE COUNCIL TO THE TENTH CONSTITUTIONAL CONVENTION 54-55 (1973).

[17] An exception was a three-way contest at McDonnell Douglas in St. Louis in 1968 in which the Machinists, the Teamsters, and the Automobile Workers were involved. Briel, *Rebel Union Battles 2 Giants to Represent 21,500 Workers at McDonnell St. Louis Plant,* Wall St. J., Sept. 12, 1968, at 32, col. 1.

[18] On Nov. 5, 1975 the Teamsters union cancelled its no-raid pacts with all AFL-CIO

significant organized rival union activity was that conducted by District 50 of the United Mine Workers; this organization, after a short period of independent status, has now been obliterated, having been absorbed by the United Steelworkers of America. Thus, one of the principal opportunities for freedom of choice among workers has been eliminated by the action of the unions in committing themselves not to interfere with the established representation of any other affiliate for any reason whatever.

No one can quarrel with the right of unions to refuse to raid each other. Many trade union leaders hold that it is an affront to the whole movement for one union to attempt to take over the members of another union; the AFL principle, "one organization in the trade," was a firm assertion of this conviction.[19] But the fact of "no raiding" should be noted as a major change in our labor relations climate.

In 1976 the employer in large parts of industry, especially mass production industry, has the same interest as the union in promoting stability, and thus desires no changes of representation and nothing to disturb the predictability that comes with a long and close association between employer and union representatives. By this time the background circumstances of labor relations in this country stand in sharp contrast to 1935. Although most employers would probably prefer no union at all, and in some industries employers continue to fight organization of their employees vigorously and successfully, there are large areas of industry, especially in mass production, where employers have made peace with the union.[20] The typical employer in steel, autos, rubber, paper, and many other industries is no longer trying to get rid of the union. He has accommodated to it in the interest of stable industrial relations at the work place.

The industrial relations director is the pivot of the new relationship. His task is to get along with the union representative, usually at intermediate and top levels of the organization, *i.e.*, to make settlements and administer them systematically, peacefully, and without work stoppage.

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unions because of a dispute over organizing California farm workers. *See* Wall St. J., Nov. 6, 1975, at 8, col. 2.

[19] The union concept of jurisdiction refers to the exclusive right of an organization to organize and bring into its membership all the workers of a clearly defined trade or industry group, so that only one organization represents the employees involved. *See* P. TAFT, THE A.F. OF L. IN THE TIME OF GOMPERS 185-87, 210 (1957).

[20] For a discussion of this development, see R. LESTER, AS UNIONS MATURE (1958), and especially *id.* at 373-455.

The most important evidence of this change is the employer's willingness to write into the collective bargaining agreement a provision for compulsory union membership.[21] He thus requires that every employee in the bargaining unit shall become and remain a member of the union with which he has signed a contract. He regards this as essential to stable industrial relations in his plant. On this matter he and the union representative share a common perspective.

II

The Erosion of Employee Free Choice

Thus the union and the unionized employer were committed to the same stability and predictability, and they joined forces to that end. There remained only the problem of the law, which clearly protected the rights of employees. The process by which the free choice provisions of the statute have been subverted is a mixture of law and its administration, employer institutional interests, union institutional interests, and their imposition upon the administrative machinery of the government at various levels.

A. *Compulsory Unionism and Exclusive Representation*

Section 7 of the NLRA, as amended, is the starting point.[22] It legalizes compulsory unionism, with the employer enforcing the compulsion through the bargaining agreement. It should be noted that compulsory unionism has an honorable history. In the days of aggressive, successful anti-unionism by employers, it was the price of survival to have some form of compulsory union membership. Without it, the anti-union employer "picked off" the union members, hired new employees who were committed against unionism, and thus gradually or quickly eroded the union's membership. Under these circumstances, the union shop was a legitimate and essential weapon against an anti-union employer; it also served to hide the union's strengths and weaknesses. But no such argument can be made for the union shop today, certainly not in the many industries in which the union has been adopted as a permanent feature of the employer-employee relationship. It is not conceivable, for example, that the Automobile Workers need a union shop to protect themselves against the four major automobile companies.

[21] There are exceptions, of course, of which the most important is the General Electric Company.

[22] *See* text at note 6 *supra*.

What began as a weapon of the union against an anti-union employer has become a weapon wielded by the employer on the union's behalf against employees who, for one reason or another, wish to sever their relation with the union and stop paying dues. To many employees, and for some problems, there seems to be no other remedy. If the possibility of changing representatives or decertifying is nil or nearly so, ceasing to pay dues is virtually the only recourse available to dissatisfied employees.

Union dogma has it, of course, that there will be a very large number of "free riders" in the absence of the union shop. Of course there will be. All voluntary organizations have the problem of free riders, and coping with that problem is at the very heart of the democratic process. The rest of union dogma is that the union will therefore become "weak," as if this matter were relevant. Why should a union be any stronger than is desired by the people it represents? The only persuasive case for withdrawing freedom of choice about union membership is that the employer is demonstrably trying to destroy the union. This is the historical justification for the union shop. There are still such employers, but very few of them in unionized mass production industries.[23]

The union shop, operating in conjunction with various aspects of labor law, withdraws free choice in ways that are less than apparent to persons unfamiliar with the internal life of unions. Ironically, administration of the Landrum-Griffin Act has had an effect contrary to what might have been expected of a statute designed to protect individual member's rights. When the courts ruled that the law was satisfied if local dues were increased by majority vote at the national convention, many unions proceeded to use the convention to raise minimum dues, thus depriving local unions of their traditional right and practice of fixing dues by vote of the local membership.[24] The union delegate often is a local officer who would prefer to say to his members, "I'm sorry but the convention voted the increase, and we have no choice," than to try to get dues increased by action of the local union.

The union shop and compulsory unionism are buttressed by the principle of exclusive representation, written into the original NLRA in 1935. The issue had been controversial in prior years, with some support on the side of non-exclusive representation.[25]

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[23] The issue of union security poses a problem which may be soluble only through some device that permits unions to negotiate a union shop clause only during the initial seven- or eight-year period of an established collective bargaining relationship.

[24] Ranes v. Office Employees Local 28, 317 F.2d 915 (7th Cir. 1963).

[25] See the discussion of this issue in relation to the National Labor Board, in L. LORWIN

Adoption of the principle of exclusive representation has eliminated from discussion and consideration the alternative and its advantages. Instead, everyone in a "unit" determined by the Board to be appropriate is represented by the union which wins a majority—those who vote for the union, those who vote against the union, and those who do not vote at all. This idea now has almost total acceptance, and is being adopted in state labor legislation, including public employment,[26] with few exceptions. Exclusive representation imposes a significant limitation on free choice.

B. *Multiplant Bargaining Units*

After compulsory unionism and exclusive representation, the NLRB's rulings on multiplant units have probably done more to destroy employee free choice than any other aspect of labor relations law. The union leadership and the employer have a common interest in promoting multiplant agreements which the NLRB then finds a bar to an election in any one plant of the group. The employer prefers the stability, the absence of change, and the predictability that a successful multiplant agreement provides. The union's institutional interest is obvious.

The text of the law says little on this subject, providing simply:

> The Board shall decide in each case whether, *in order to assure to employees the fullest freedom* in exercising the rights guaranteed . . . the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.[27]

In the earliest days of the NLRA, the rivalry between the AFL and CIO unions served to preserve some of this freedom as the two federations vied for the same workers and espoused single plant or multiplant units as their interests of the moment seemed to require.[28] However, with time and the development of operating relationships between employer and union, both parties acquired a

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& A. Wubnig, Labor Relations Boards—The Regulation of Collective Bargaining under the National Industrial Recovery Act 191-95 (1935), and see especially the dissenting view of Mr. de Pont, *id.* at 193.

[26] *See, e.g.*, Minn. Stat. Ann. §§ 179.61-.76 (Supp. 1975), and specifically § 179.63(6); N.Y. Civ. Serv. §§ 200-14 (McKinney 1973), 18 NYCRR 201.9 (1974); Pa. Stat. Ann. tit. 43, §§ 1101.101-.230 (Supp. 1975) ("Representatives selected by public employees in a unit appropriate for collective bargaining purposes shall be the exclusive representative of all the employees in such unit to bargain on wages, hours, terms and conditions of employment," *id.* § 1101.606).

[27] 29 U.S.C. § 159(b) (1970) (emphasis added).

[28] *See* Brooks & Thompson, *Multiplant Units: The NLRB's Withdrawal of Free Choice*, 20 Ind. & Lab. Rel. Rev. 363, 364-68 (1967).

preference for the larger unit, which they were able to persuade the NLRB was in the interests of stable industrial relations. Long before the merger of the AFL and CIO and the no-raid pact, the institutional advantages of the multiplant agreement, solidified and protected by the NLRB, became clear to both employer and union.

After a number of years in which the position of the NLRB with respect to multiplant units fluctuated widely, it adopted the policy of finding a single plant unit appropriate in new organizing—a policy that has for many years been a bastion of free choice for employees.[29] But a change during World War II affecting existing multiplant units led to a permanent locking in of thousands of employees in multiplant and multiemployer agreements. When the International Woodworkers of America (IWA) filed a petition for the Hoquiam, Washington plant of Rayonier, Inc., the NLRB refused to hold an election in the one plant because of the history of bargaining on a multiplant, multiemployer basis.

> The record indicates that during the period covered by uniform labor agreements and joint collective bargaining on the part of both unions and employers, the pulp and paper industry in the Pacific Coast area has been singularly free from major industrial strife.[30]

The petition was dismissed despite the fact that the IWA had almost unanimous support from the Hoquiam employees.

Subsequent events suggest that the members of the NLRB were premature, to put it mildly, in their assessment of industrial relations in the West Coast paper industry. About twenty-five years later, the famed Uniform Labor Agreement blew up, following a long period of smoldering local grievances and resentments against the international unions which dominated the collective bargaining relationships. In 1964, some 20,000 West Coast members succeeded in the difficult task of forming an independent union which wrested representation rights away from the two international unions that had secured a region-wide bargaining agreement in 1934.[31] The independent union continued for a few years to bargain for changes in the coast-wide agreement, but the old dissatisfactions persisted and led the union to propose that bargain-

[29] *See* Cluett, Peabody & Co., 31 N.L.R.B. 505 (1941); Libby-Owens-Ford Glass Co., 31 N.L.R.B. 243 (1941); Allied Laboratories, Inc., Pitman-Moore Division, 23 N.L.R.B. 184 (1940); Hood Rubber Co., 20 N.L.R.B. 485 (1940); United States Rubber Co., 20 N.L.R.B. 473 (1940); Chrysler Corp., 13 N.L.R.B. 1303 (1939).

[30] Rayonier, Inc., Grays Harbor Division, 52 N.L.R.B. 1269, 1273-74 (1943).

[31] *See* H. GRAHAM, THE PAPER REBELLION (1970).

ing be at two levels, with certain issues bargained region-wide, others locally.[32] The employers, through their Association of Pulp and Paper Manufacturers, informed the union that each employer would withdraw from the Uniform Labor Agreement if two-level bargaining were demanded. The withdrawal was completed, and bargaining went back to local plants that year.[33] In the next few years, a combination of company-wide and local bargaining arrangements were developed company by company. Although the employers and union attempted to reinstate multi-employer bargaining, at the initiative of the companies, the local unions rejected the plan.[34]

The West Coast paper industry experience is the only case in which a multiplant unit of such size and magnitude has been taken apart by action of the employees; the difficult task of forming a competing independent union was necessary for this purpose. Although it was the employers who decided to dismantle the agreement, their action was based upon the decision of the local unions to demand a division of bargaining subjects between central and plant level with a possibility of a local strike if no agreement were reached. There have been problems of plant closings, as well as strikes, but the local unions apparently are unwilling to return to the region-wide agreement.[35]

The 1941 Rayonier case demonstrates how the law has been interpreted—one might better say misinterpreted—to cause employees to lose their freedom of choice and their "representation," in favor of representation for unions. The parties to the proceedings before the NLRB were the company, the incumbent union of which the Hoquiam local union was a part, and the raiding union, IWA. The company preferred to retain the existing union, with which it had a "good relationship" in a multiplant unit. The incumbent union naturally wanted to retain its right to represent employees at the plant. The local union, ostensibly representing

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[32] The Rebel, Nov. 13, 1968, at 2; *id.* Oct. 30, 1968, at 3; *id.* Oct. 16, 1968, at 3. These articles are a series by Hugh Bannister, then president of the Association of Western Pulp & Paper Workers.

[33] *See* The Rebel, Jan. 29, 1969, at 1; *id.* Jan. 15, 1969, at 1, and subsequent issues. In Mar. 1971 a union bargaining board representing ten local unions opened company-wide negotiations with Crown Zellerbach, and during the same period negotiations were begun with Weyerhaeuser for four mills at different locations. In May both sets of mills were on strike. *See* The Rebel, Mar. 24, 1971, at 1.

[34] The Rebel, Aug. 9, 1972, at 4-5; *id.*, Sept. 6, 1972, at I.

[35] This case has a number of unique aspects. One is that no other parent union in any of the mass production industries would likely permit the local unions to make the decision about the unit.

the majority of its members, was attached to the international by constitutional provision. The local officers would have to support the international's position or run the risk of being disciplined. The raiding union desired to represent the employees, but was prevented by NLRB policy. Today, with the no-raid pact, there would be no one to make the challenge.

Since the Rayonier case, there have been a number of others in which the same issue has arisen. The Board considers the history of bargaining as a controlling factor in all the cases.[36] Where employer and union have bargained for two or more plants as a single unit, employees in a single plant are not given a choice of having separate representation, or of having no representation at all. Although in some more recent cases, the union has been permitted to withdraw from a multiemployer agreement, just as an employer may, "union" here means the certified representative and not the spokesman for the dissatisfied employees.[37]

Free choice of representatives is totally obliterated in major segments of some industries by the presence of multiplant bargaining contracts. Supported by NLRB policy, hundreds of thousands of workers in such industries as autos, steel, rubber, men's clothing, ladies' clothing, hotels and restaurants, and others, are effectively and permanently denied any choice of bargaining representative. A worker who hires into the automobile industry will pay dues to the UAW for as long as he remains in the bargaining unit; there is not the slightest possibility that he or his fellow workers can ever make a change.[38]

A few capital-intensive industries have held out against multiplant bargaining, most notably nonferrous metals, chemicals, oil, and food. This position has always been taken over the objections of the unions, which systematically seek to enlarge the bargaining unit—in part precisely because it does withdraw free choice, and thus makes easier the running of the union.[39]

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[36] Brooks & Thompson, *supra* note 28, at 370-73.

[37] *Cf.* Retail Associates Inc., 120 N.L.R.B. 388, 393 (1958). Although this decision does not deal exclusively with the issue of a union right to withdraw from a multiplant agreement, it clearly implies that the employer and union have an equal right to withdraw under prescribed conditions.

[38] References of this type to the United Automobile Workers should not be interpreted as indicating that the UAW is the worst of unions. On the contrary, it is the best or one of the best in the way it has preserved democratic processes.

[39] It is perhaps gratuitous to note that no objection is being raised here to multiplant bargaining. Workers in two or more plants ought to be able to join together in a single bargain if the employer is willing or can be persuaded to consent. But they ought equally to have the right to withdraw from such an arrangement.

C. *Ban on Skilled Craft Units*

A special and crucial application of the NLRB's multiplant policy is reflected in a series of decisions involving skilled workers in the auto industry. The Board's decision not to permit any elections for auto industry skilled tradesmen was based on the multiplant rule,[40] but it is also part of the policy which has evolved to eliminate separate units for skilled craftsmen in manufacturing industries. This position has been taken by the Board in the face of an apparently specific congressional instruction to the contrary.[41]

From *Globe Machine and Stamping Co.*,[42] to *National Tube Company*,[43] to *American Potash and Chemical Corporation*,[44] and finally to *Mallinckrodt Chemical Works*,[45] the Board has virtually made it impossible for skilled workers to establish a unit of their own in the face of competition from an industrial union that petitions for the whole plant. The NLRB has also eliminated the prospect of severance from an established plant-wide unit. For skilled workers, this decision has meant a significant withdrawal of free choice.

In applying *Mallinckrodt* to subsequent cases, the NLRB engages in circular reasoning to deny skilled craftsmen any right to a change of representation. The following is from the Board's 1974 Annual Report, referring to a craft severance case at Union Carbide Corporation:

> The Board majority specifically observed that the machinists had their own elected stewards; they had in the past participated, and continued to participate, in various of the committees of the intervenor, which represented the production and maintenance employees including them; they had made frequent use of the

[40] *See* notes 27-39 and accompanying text *supra*.

[41] *Provided*, That the Board shall not . . .

> . . . .
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> (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation . . . .

29 U.S.C. § 159(b)(2) (1970).

[42] 3 N.L.R.B. 294 (1937) (elections ordered held to determine whether or not majority of workers in craft groups preferred to be represented by industrial unions or to be represented separately by craft unions).

[43] 76 N.L.R.B. 1199 (1948) (craft group's petition to sever from industrial union denied).

[44] 107 N.L.R.B. 1418 (1954) (craft group appropriate for severance when it qualifies as genuine craft group and when union seeking to represent it traditionally represents that craft).

[45] 162 N.L.R.B. 387 (1966) (instrument mechanics' petition for severance from plant-wide unit denied where unit seen as homogeneous, established, and stable bargaining unit).

> grievance procedures and had seen their grievances processed; they had the opportunity to voice their concerns to the officers of intervenor's local and international; and finally the intervenor had repeatedly represented their interest at the bargaining table. Thus, in the opinion of the majority, both in form and substance, the intervenor had not been shown to have inadequately represented the machinists and instrument makers. Relying on the foregoing factors, the majority, under the *Mallinckrodt* tests, refused to allow the petitioner to carve out the machinists and instrument makers from the established and stable bargaining relationship in the overall unit.[46]

"Foregoing factors" refers to the Board's emphasis on petitioning workers use of common working conditions and facilities with other production workers.

To both Board arguments, one can only ask how the conditions could possibly have been different under a production and maintenance unit agreement. So long as the workers were covered by the agreement (including a union shop), one would expect them to take part in the union's affairs. When the workers reached the point of being able to petition for separate representation, it was hardly reasonable to use their record of participation against them.

Dissatisfaction among skilled tradesmen who do maintenance work in manufacturing plants under industrial union agreements is widespread and well known. Even were it not for the comparisons made with wages and other conditions in the construction trades, there would be a problem because the maintenance man has almost universally suffered a narrowing of the wage differential between skilled and unskilled rates under industrial union agreements.

The NLRB decision on skilled workers in the automobile industry was made before *Mallinckrodt* and was based on the multiplant issue rather than on the real issue—craft severance.

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[46] 39 NLRB ANN. REP. 62 (1974). The dissenting voice is also quoted, as a footnote, thus:

> Dissenting, Chairman Miller and Member Fanning viewed the application of *Mallinckrodt* to the facts in *Union Carbide* as supporting craft severance. In their view, the machinists, skilled journeymen craftsmen, had exercised an unusually sustained effort to maintain their identity as a separate craft group. Citing the group's many efforts to secure other representation, Chairman Miller and Member Fanning observed that the machinists had never had an opportunity to vote on the question of separate representation. While conceding that 26 years of bargaining history is a factor to be considered, Chairman Miller and Member Fanning believed that it should not outweigh the persistent effort of this craft group to maintain its separate identity and at long last to achieve an opportunity to vote on separate representation.

Id. at 62 n.52.

Subsequent events within the union add further evidence of the underlying problem and the significance of the Board's position.

The auto industry cases cannot be understood independently of what was happening within the United Automobile Workers (UAW) during and after the pendency of the cases. Dissatisfaction among skilled tradesmen in the automobile industry had moved the international union by 1957 to propose constitutional changes which would increase the representation given to skilled craftsmen in bargaining arrangements and also give them procedures for negotiating matters of special interest to them. At this time cases were pending before the NLRB, filed by a group of independent unions of skilled craftsmen, the leader of which was the International Society of Skilled Trades (ISST), organized in the auto industry especially in and around Detroit. The threat of NLRB elections and the possibility of losing significant numbers of skilled workers persuaded the leadership of the union to offer the skilled workers some autonomy. The union convention in the spring of 1957 debated a proposal to provide relief, and the nature of the debate makes clear that the task was most difficult.[47]

The committees which reviewed the proposed changes in the constitution presented a majority report, recommending language that would permit the International Executive Board to give the skilled workers the right to vote separately on contractual matters related exclusively to them. There was a minority report representing the views of the production workers. With the support of the national officers, the majority report was adopted by the convention.

The next year, the NLRB made its decision in a key group of cases, dismissing the petitions because they were not "coextensive with the existing bargaining unit."[48] The independent skilled trades unions had filed petitions at seventy or eighty locations in different parts of the country, and they were all dismissed in consonance with this decision. The Board was suggesting, in effect, that the craftsmen had to petition for separation from a unit composed of more than 120 plants across the country, where more

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[47] *See* UNITED AUTOMOBILE WORKERS OF AMERICA (UAW), PROCEEDINGS, SIXTEENTH CONSTITUTIONAL CONVENTION 272-88 (1957).

[48] General Motors, Cadillac Motor Car Division, Pontiac Motor Division, Fisher Body Division, and The Ford Motor Company, 120 N.L.R.B. 1215, 1221 (1958). These cases involved seven different petitions filed with the Board and consolidated during the hearings for purposes of both hearing and decision. In addition to the petitions on which these hearings were held, others had been filed in various Regional Offices presenting essentially the same issues.

than 300,000 workers were employed under a union shop agreement. The logistics of such an organizing task, even confined to skilled workers, would be difficult for the largest unions, and certainly impossible for the ISST.

The NLRB's decision might have been expected to dispose of the problem, but the dissatisfactions of the skilled tradesmen persisted, as did their organizing efforts. Again in 1966 at the UAW convention efforts were underway to deal with this stubborn problem.[49] The constitution was further amended, changing the ratification procedure so that each group granted separate voting rights by the International Executive Board would vote on the total contract separately and not merely the part having special reference to the group. Although the convention would seem to have given the skilled workers ample protection, their efforts to secure separate representation were continuing through the ISST. In August of the following year, another set of petitions for representation elections were dismissed by the NLRB regional director. Petitions filed for eighty-four plants of General Motors, Ford, and Chrysler, were dismissed for the same reason as in 1958—"insufficient showing of interest."[50] The ISST had not been able to produce signatures for thirty percent of the skilled trades employees in the scattered plants of each of the three major companies. The regional director defended the industrial unit, found the UAW responsive to the problems of the skilled men, and said: "[T]he overall interest to be served through maintaining the stability of the existing bargaining unit outweighs such special interests as the skilled trades . . . might have."[51] In short, employee free choice was again sacrificed to bigness and stability.

For the skilled workers in the auto industry there is a sad epilogue to this tale. In the 1973 negotiations at Ford Motor Company, the skilled trades workers voted overwhelmingly against acceptance of the new proposed agreement, 20,089 to 5,943. However, the production workers accepted the terms by the vote of 112,154 to 38,684. The international union signed the agreement despite the skilled trades vote. A group of skilled tradesmen appealed to the Public Review Board of the UAW on the ground that the signing of the agreement was contrary to the constitutional provision giving the skilled workers a right to "veto" the

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[49] *See* UNITED AUTOMOBILE WORKERS OF AMERICA (UAW), PROCEEDINGS, TWENTIETH CONSTITUTIONAL CONVENTION 404-13 (1966).

[50] Wall St. J., Aug. 2, 1967, at 24, col. 2.

[51] *Id.* at col. 3.

agreement.[52] The majority of the Public Review Board supported the international executive board members who had signed the agreement. The Review Board members based their decision on the legislative history of the constitutional changes affecting skilled workers, its interpretation of the current language of the constitution, and the fact that a similar circumstance at a Budd plant had given rise to an unsuccessful challenge by the skilled workers, later rejected by the 1970 convention.

The reasoning of the majority was rejected by Board Members Arthurs and St. Antoine, both attorneys, who prepared a minority opinion dissenting in part. Since the collective bargaining agreement had been signed by the international union and the company, the minority members acknowledged that the agreement could not be set aside. However, they disagreed with their colleagues about the legislative history and the implementation of the constitutional provision under question. They concluded that the constitution did provide for a skilled worker veto of national agreements and made it clear to what extent the pressure of NLRB cases pending at the time of both conventions (1957 and 1966) exerted influence on behalf of the skilled group.[53]

The minority opinion traced the development of the disputed constitutional provisions from 1957 to 1966. The majority of the Board, they said, had converted "what was clearly intended to be a democratic process into an autocratic one,"[54] attributing to the constitutional convention the decision to give skilled tradesmen and other specialized employees "the right of separate ratification so that their minority interest might be better protected."[55]

Acknowledging that the convention discussions should be considered in the light of existing circumstances, the two dissenters said:

> The International Society of Skilled Trades, not yet defanged by the NLRB ruling requiring that craft severance be accomplished company-wide rather than plant-by-plant, claimed significant membership among UAW skilled tradesmen. Viewed in this context, what occurred at the 1957 and 1966 Conventions becomes, we feel, very understandable. Far from being ambiguous, the proceedings plainly bespeak an intention to find a solution to the problem posed by the threat of massive skilled

[52] The following pages are drawn from Poszich v. UAW Local 316 (Pub. Rev. Bd., Int'l Union, UAW, Ap. 10, 1974), BNA Daily Labor Report No. 75, at E-10, Ap. 17, 1974.

[53] The dissent deserves to be widely read by persons interested in this subject. *Id.* at E-8 to -10.

[54] *Id.* at E-8.

[55] *Id.*

> trades defection by granting to skilled tradesmen a certain amount of autonomy within the industrial union structure.[56]

The minority opinion continued, tracing events at the 1966 convention when the constitution was amended to its present form. "Delegate after delegate" spoke in favor of the change, referring to the threat posed by the Society of Skilled Trades as justification for the amendment. Had there been any doubt in the minds of the delegates about what they were doing, this was dispelled by an explanation offered by "then Vice-President Woodcock," quoted as follows:

> But there was one question we did not clearly answer in 1957. There was one question we have not clearly answered to this day. What happens when one group rejects and the other accepts? . . . what happens when production accepts and skilled trade rejects?
>
> We never clearly answered that question. But we want to say here and now that separate ratification is an empty process, and it cannot trigger necessary action to solve problems that have led to the rejection if it does not lead to pressure on the companies.
>
> So we want to say very clearly, if either group rejects, then there is no agreement.
>
> (Applause.)[57]

Why did the officers in 1973 reject a position which one of their number had so unequivocally stated in 1966? One can only guess. So long as the NLRB offered an avenue of escape from unsatisfactory representation for skilled workers, the officers had no choice but to respond to those workers. Absent the avenue of escape, the officers respond to the majority of the members, demonstrating again that an industrial union finds it politically difficult to accommodate legitimate special interests within its membership, such as those of skilled tradesmen, technical employees, or others with specialized qualifications.

D. *Contract Bar Rule Limits Free Choice*

Another administrative decision of the NLRB that thwarts employee free choice is the contract bar rule—the period of a contract's duration that the Board is willing to use as a bar to the filing of a petition for a change in representation. The law provides that no election may be held in a bargaining unit in which there has been a previous election within the preceding twelve months.[58] At

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[56] *Id.*

[57] *Id.* at E-9 (emphasis omitted).

[58] 29 U.S.C. § 159(c)(3) (1970).

first, the one-year rule prevailed in all cases. Under pressure from the parties, employer and union, the contract bar rule was changed to extend the period during which a contract would be protected from one year to two, and now three years.[59] A three-year agreement may now operate without any challenges to the incumbent representative.

The administrative problem here is admittedly not simple. Employers are anxious to have long-term agreements so that labor costs are fixed and predictable and the possibilities of work stoppages are reduced to infrequent intervals. Union officers and paid staff find the same objectives attractive for themselves. In view of the no-raid pact, it is not likely that the reassertion of employee free choice by reversion to the one-year rule set forth in the act would have any deleterious effects on industrial stability. Although the choice is not easy, the resolution of the issue has been strongly on the side of the employer and incumbent union hierarchy at the price of still further limitations on employees.

Thus, once again the employer has joined with the union leadership in minimizing, wherever possible, freedom of choice on the part of the employees. One could hardly argue with an employer who deliberately sought to minimize freedom of choice or union democracy by any legal means available to him, but the consequences to the employees are disastrous. The employee who is dissatisfied with his union because it is corrupt, negligent, careless, or insufficiently attentive to his personal views, will find that the obstacles within the union to organizing an opposition will always be formidable. Perhaps they ought to be; perhaps dissent ought never to be easy. But in the United States, the dissident employee can sometimes, given sufficient reason and support, overcome the opposition and unseat the incumbent leadership or reject the offending union. At least he could do so in a fair fight. Unfortunately, the fight is not fair, because the employer has been enlisted on the side of the incumbent union through the devices of compulsory unionism, multiplant units, and long-term contracts.

E. *Court Enforcement of Union Fines*

When the Supreme Court ruled in the *NLRB v. Allis-Chalmers*[60] case, and a succession of other cases,[61] that union fines could be collected through the courts, another blow was struck against

[59] *See Survey of Basic Patterns in Union Contracts, reported in* BNA Daily Labor Report, No. 252, at 10, Dec. 31, 1974.

[60] 388 U.S. 175 (1967).

[61] *Cf.* NLRB v. Boeing, 412 U.S. 67 (1973); Scofield v. NLRB, 394 U.S. 423 (1969).

employee free choice. Some of the implications of this line of reasoning are so complex and obscure that one cannot readily predict where it will lead.[62]

Unions have always been able to use their internal processes to assess fines against members or take lesser measures to deal with offenses against the organization. These offenses might include the crossing of authorized picket lines, acting as stool pigeons, failing to attend meetings, violating the constitution, or engaging in "conduct unbecoming a member." But the only method of enforcement was the threat of expulsion from the union.[63] Before 1947, expulsion under a union shop agreement was equivalent to being fired, since union membership was required. Since the Taft-Hartley revisions, expulsion would not have such effect; it would merely deprive the union of dues payment.

Under these circumstances, unions want very much to be able to collect fines through the courts. Court enforcement greatly strengthens the union's capacity to bring pressure on its members. Most of the court cases have involved the crossing of picket lines and working during an authorized strike. In *Allis-Chalmers,* a number of men who had crossed picket lines and worked during a strike were charged, found guilty by the UAW of having violated the international constitution, and fined from $20 to $100 per man. The men refused to pay, the union went to court, and the company filed unfair labor practice charges against the union under section 8(b)(1)(A).[64] A 5-4 majority of the Supreme Court ruled that there was no unfair labor practice and that the fines could be collected through the courts.[65] Both the majority and dissenting opinions referred to the legislative history and federal labor policy, but reached opposite conclusions. The majority

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[62] For a full treatment of the cases cited here as well as related cases, see Wellington, *Mr. Buckley and the Unions: Of Union Discipline and Member Dissidence,* in UNION POWER AND PUBLIC POLICY 25-49 (Conf. at Cornell Univ. 1975).

[63] There is a fundamental difference between unions which have some control over hiring (construction trades, for example) and those where all the hiring is done by the employer. In the former case the threat of expulsion is real and effective, since it may mean deprivation of employment. No other sanction is necessary. In manufacturing industries, on the contrary, expulsion might be greeted with joy since it would have the additional advantage of relieving the dissenter of the burden of paying dues.

[64] 388 U.S. at 176-77. Section 8(b)(1)(A) of the NLRA provides:

> [I]t shall be an unfair labor practice for a labor organization or its agents—
> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section [157]: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . . .

29 U.S.C. § 158(b)(1)(A) (1970).

[65] 388 U.S. at 195-97.

construed the fine as a matter of internal union affairs, not covered by the prohibition against union coercion.[66] The minority opinion found evidence of a much broader application.[67]

Since *Allis-Chalmers,* the issue has become complicated by questions concerning the "reasonableness" of the union fine, the contractual relationship between union member and union based on the union constitution, and the union member's right to resign legally from the union.[68] Enforcement of union fines through the courts may turn upon the ultimate answers to these questions.

Leaving aside all the doubts one may have about the degree of democracy in internal union decisions (especially those involving strikes), the effect upon employee free choice is sobering. Is a decision to support a strike irrevocable? Is the employer somehow to be excluded from participating in a decision which affects him so nearly, except by agreeing with the union? Above all, can individual employees no longer vote (as union men used to say in 1935) "with their feet?"

Allis-Chalmers added an unexpected and highly welcome weapon to the arsenal available to union leadership. It permits the union to levy fines for a wide variety of causes and to collect them in the courts. But even more importantly, it established a new atmosphere within the union, an atmosphere unfriendly to union dissidents, critics, and nonconformists. It undoubtedly inhibits the membership of the union in their efforts to seek new representation or decertification, even though the NLRB tries systematically to protect the principle that employees may not be inhibited in their right to choose a different union. It is altogether

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[66] *Id.* at 195.

[67] The minority found the fines to be indicative of the coercion and restraint that the NLRA was specifically designed to prevent. 388 U.S. at 208-10.

[68] Those who think of resignation as a reasonable protection for employees should consult union constitutions more carefully. Note the following provision in the constitution of the democratic UAW:

> A member may resign or terminate his membership only if he is in good standing. . . . Such resignation or termination shall be effective only if by written communication, signed by the member, and sent by registered or certified mail, return receipt requested, to the Financial Secretary of the Local Union within the ten (10) day period prior to the end of the fiscal year of the Local Union as fixed by this Constitution, whereupon it shall be effective sixty (60) days after the end of such fiscal year; provided; that if the employer of such member has been authorized either by such member individually or by the Collective Bargaining Agreement between the employer and the Union to check off the membership dues of such member, then such resignation shall become effective upon the effective termination of such authorization, or upon the expiration of such sixty (60) day period, whichever is later.

UAW CONST., art. VI, § 17 (adopted at Atlantic City, N.J., Ap. 1972). Note that the fiscal year ends on the 31st day of December.

too much to expect that the ordinary employee, even the dissident employee, will always know what the law provides. It is equally unlikely that a harassed leadership will explain to each dissatisfied employee his rights under the law and the union constitution.

Conclusion

The above is not intended to be a catalogue of horrors. Quite the contrary. For many of the limitations on free choice there is historical and sometimes current justification. The exceptions are the multiplant rule and court enforcement of union fines. Leaving these aside, it is not the separate limitations on freedom of choice which are so devastating, but their collective effect. The union shop or any other form of compulsory unionism would not seem unbearable if it were possible to challenge the incumbent union on a single-plant basis in any year. Nor would a three-year contract be objectionable if the affected employees could belong to any one of the several unions—or none—during the life of that contract. But the choices available to workers have been withdrawn remorselessly.

Consider the plight of a young man or woman who goes to work in a bargaining unit job at the U.S. Steel Corporation. The personnel director tells him that as a condition of employment he must join the United Steelworkers of America. As long as he is employed by the company, he will pay whatever dues have been set at the USA convention and will have seen them climb to their present level of twice his hourly rate. If he becomes dissatisfied with USA representation, he can form an opposition, but the chances of success in replacing the USA or decertifying it will depend upon his being able to muster a petition signed by thirty percent of all the employees in the entire corporation! No one could possibly take on this task except, conceivably, another well-heeled union. But this action is forbidden to affiliates by section 20 of the AFL-CIO Constitution. If, in his frustration, he goes through a picket line or does one of a number of other things the union does not like, the employee can be fined and taken to court if he refuses to pay.

In the final analysis, freedom of choice requires that union leaders not be relieved of the ordinary pressures which are brought to bear in a democratic organization. If the multiplant rule, the union shop, and the long-term contract were eliminated in the steel industry, for example, there might be some individual or group

defections, but not many. The Steelworkers are capable of responding to such a situation. The leadership might resent the need for more assiduous attention to the members, lower dues (and therefore, less political and other spending), and the altogether different officer-member relationship than now prevails. Bargaining might become more difficult for both management and union leadership. A first effect might be an increase in instability and unpredictability in the labor-management relationship, imposing burdens on the leadership on both sides. Why not? In those industries which have the fewest restrictions on free choice (*e.g.*, electrical manufacturing and chemicals) no catastrophes have occurred.

The withdrawal of free choice raises two questions. The first is whether the price of stability and predictability has not become too high, for the labor movement as well as for the future of industrial relations. The defenders of these arrangements seem to be saying inconsistent and contradictory things. Starting with the premise that unions are necessary to protect the interests of workers, they end by saying that the system works best when the democratic process is denied or at least severely limited. However attractive to employers, this view certainly strikes at the vitals of unionism. How else are worker interests defined except by the democratic process?

From the point of view of society as a whole, the question is automatically raised, "why unions?" If the function of unions is to represent workers, and unions end up freeing themselves with the help of employers and government from the necessities of representation, why should the law provide them with any special protection? If the terms of employment are going to be defined by bureaucrats, without undergoing the difficulties and pains of the ordinary political representation process, why do we need two sets of bureaucrats? It could be argued that, even in the absence of any genuine representational process, the mere ritual of collective bargaining may result in a "bargain" which ensures a wider acceptance of the results than otherwise. This is no doubt true. But this is to live on borrowed time; ultimately, it would be worse than useless—it would be dangerous.

A second, related question is whether the process is ultimately self-destructive. To say it somewhat differently, the effectiveness of a system of representation depends upon the constant use and the availability of the essential machinery of representation—that is, the process of consent, dissent, repudiation of ineffectual representation, the constant search for good leaders, and all the

rest. And these, in turn, are meaningless without a wide range of choices available to the represented. To suggest that the formalities of the collective bargaining process, the huge union convention, and the uncontested election are adequate to the purpose is to engage in dangerous dreams. For a while, yes, the change wrought by the unions between 1935 and 1955 was so far-reaching that their prestige as representatives of working people is still high. During that formative period, there was a high degree of membership participation and leader responsiveness, but the increasing, persistent restrictions on free choice will erode membership consent, which, after all, is the essential function of union organization and collective bargaining.

There is still one important area in which free choice has been carefully protected. For nonunion employees, when a union seeks to organize, elections are normally held at a single location, under carefully controlled arrangements, and with abundant opportunity to hear all the arguments made by the employer as well as by competing unions. This is enormously important. But to anyone who believes in the value of unionism as a process of representation, it is a long way from being enough. We need, in addition, more democratic unions and a public policy which carefully protects individual freedom of choice against the inroads of the union and the employer or, more frequently, the two acting together. From this vantage point, a change in public policy seems both more urgent and more likely.