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Sources and Extent of Union Power

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THE SOURCES AND EXTENT OF UNION POWER

*By Sylvester Petro**

The most pressing need in labor relations today is a policy which will meet the social threats posed by union power without increasing the even more critical threats posed by big government. Many unions have abused working men and businessmen, exploited consumers, and demonstrated again and again their power to disrupt the economy. The abuses of big government are different, but they are even more deadly and more irrevocable. Unchecked they mean an end to the personal freedom and private property rights which have been the most significant features of western civilization.

A policy which will remove the union threat without increasing the role of government is available and can be expressed in very simple terms. Although that policy is at present politically unacceptable, politics can be trusted to follow public opinion. The job, therefore, is one of establishing that the gravest threats can be effectively removed without increasing the role and power of government. Nothing is more important in this project than an understanding of the sources and extent of union power, for in understanding these sources or causes we shall immediately discover the surest cures.

I

Union power physically manifests itself in hindrances to or complete stoppages of production. Strikes, picketing, and boycotts are the overt methods of interference with production. But these stoppages or hindrances are always effectuated by working men. Union leaders have no direct relationship to production. If they stop doing what they have been doing, production is not hampered — it may in fact be increased. Thus union power rests fundamentally on the ideas of working men and upon the kinds of action working men take pursuant to their ideas. If working men feel that they are better off with unions than without them, and if they have faith in their leaders' judgment, then unions have significant power over the production process. As we shall see, this power may be qualified and limited in several ways and at different levels. But the essential point here is that union power must trace ultimately to the ideas and decisions of working men. Samuel Gompers was undoubtedly thinking along these lines when he declared in 1924 that an American trade union movement united by the principles of voluntarism would be "invincible."

The concept "voluntarism" directs attention in a paradoxical way to the second ultimate source of union power as we know it. During the past generation trade unions have been the beneficiaries of extremely favorable public policies, policies which have accorded them privileges and immunities denied to most, if not all, other private associations. These policies were the product of the opinion that unions, unlike other private associations, were public service agencies rather than self-interest groups. Working men, and more particularly union members, were in this view identified with the whole of society, and

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their well-being was held to be of so pre-eminent a quality that the sacrifice of the rights of others was warranted. Impressed by the Marxian surplus-value theory, many have thought that employers and investors were able to wrest from free markets more than their "fair share" of production. In the circumstances it seemed only fair to give worker organizations special aid and comfort.

More recently leading scholars have brought attention to the error of confusing union members, or even all wage workers, with the whole of society. Thoroughgoing refutations of the Marxian and Keynesian doctrines are available in print.[1] Economists have repeatedly demonstrated both historically and analytically the falseness of the charge that in the free market economy the rich get richer and the poor get poorer.[2] And it is now clear that unions are unable, no matter how many special privileges they are afforded, to increase the well-being of the whole of society or even of all wage workers.[3] In spite of all this, however, the present structure of law and policy is still oriented around the view that unions are public service agencies entitled to special privileges and immunities available to no other private groups.

These special privileges and immunities — all condoning or authorizing compulsion — make up the most significant of the immediate sources of union power. This is not to say that unions enjoy no power at all based upon voluntarism and upon the free choices of workers. Quite the contrary is true. Union membership is voluntary to a substantial degree; many strikes and other forms of concerted action are expressions of the free choices of working men.

Yet, I propose to demonstrate that union power constitutes no social menace to the extent that it rests upon the voluntary choices of workers. Unions constitute a social threat, I maintain, only to the degree that they enjoy privileges of compulsion.

II

The point might be made by reference to the relationship between growth in union membership and favorable laws.[4] Until law and derelict law enforcement gave unions special privileges of compulsion and coercion, union membership in the United States was small, averaging perhaps 3,500,000 men. Not until the policies of the Railway Labor Act, the Norris-LaGuardia Act, and the Wagner Act took hold; not until the Supreme Court of the United States accorded unions immunity to the antitrust laws and held picketing a constitutionally privileged form of freedom of speech; and not until local and state governments during the 1930's were willing to countenance outrageously violent union action — not until this concurrence of special privileges for compulsion did unions manage significantly to increase their membership. Union membership grew from 3,728,000 in 1935 to 8,944,000 in 1940. Significantly, the rate of union growth slowed considerably between 1940 and 1942. By the

1 See HAZLITT, THE FAILURE OF THE NEW ECONOMICS: AN ANALYSIS OF THE KEYNESIAN FALLACIES (1959); MISES, HUMAN ACTION (1959), and SOCIALISM (1951).

2 *Ibid.* And see the essays collected in WRIGHT, THE IMPACT OF THE UNION (1951); AMERICAN ENTERPRISES ASSN., LABOR UNIONS AND PUBLIC POLICY (1958); and BRADLEY, THE PUBLIC STAKE IN UNION POWER (1959).

3 *Ibid.*

4 Statistics of union membership in this paragraph and succeeding parts of this paper are from BUREAU OF LABOR STATISTICS, HANDBOOK OF LABOR STATISTICS (1950).

latter date it had reached only 10,762,000. But then a new and even more favorable kind of government intervention accelerated union growth again. The wartime agencies sprang into action; the war emergency itself provided union leaders with favorable organizing conditions.[5] And union growth took a great leap between 1942 and 1943, from 10,762,000 to 13,642,000, one of the greatest one-year leaps in history.

Although statistics may stimulate a working hypothesis, they can never be conclusive in human affairs, since those affairs are always confused by the phenomenon of multiple causation and by such capacity of indeterminate choice as human beings possess. Hence logic and common sense must be resorted to in order to demonstrate that the abusive powers of trade unions trace to special privileges and immunities rather than to the simple fidelity of working men to union goals and tactics.

The framework of the analysis should be exposed as clearly as possible. If experience has shown unions guilty of exceptional abuses — abuses which have gone unchecked — the implication is that government has somehow failed. In order to refine the analysis and to make observation more precise, it is necessary to examine in detail what government has done — and what it has failed to do — in labor relations over the past generation.

The place to start is with the common law. It seems safe to say that had the common law governed labor relations continuously to date, unions could not have amassed the power they now wield. Unions could and would exist, even under a pure common-law scheme of things. There can be little doubt of this, for under the common law all persons have the right voluntarily to form and join associations, provided that in such associations they do not seek unlawful objectives or act in an unlawful manner. But they would prosper only if and to the degree that they proved socially beneficial. The key idea in the common-law system is expressed in the term "voluntary." A union might not force anyone to join; it might not force anyone to participate in concerted activities such as strikes. Perhaps more important, unions could not secure a monopolistic bargaining position; for employers, like all other members of society, had a right at common law to refuse to bargain with any person or group of persons whose demands they considered unacceptable.

This permeating voluntarism, actually a critical instrument in promoting social productivity, harmony, and stability, has been much misunderstood, and the current unsatisfactory state of affairs is the consequence of measures produced by that misunderstanding. The point is best made by removing the analysis to another field, where the emotions aroused by "labor issues" do not becloud understanding.

Consider the general area of producer-consumer relations, where the common-law system does still basically prevail. We believe that consumers are best served when all are free to offer goods and services. No one has a right to prevent anyone else from offering his services or his products; all are free to compete. We should consider it most strange, and most unacceptable, if we were prevented from shifting our patronage from one producer to another. We

5 See generally MILLIS AND MONTGOMERY, ORGANIZED LABOR 762 *et seq.* (1945).

rightly conclude that as consumers we should not be at the mercy of anyone who enjoyed the special monopolistic privilege of excluding all others. And as potential producers, we should consider our freedom unduly limited if we could not offer our services in any area where we thought them desired.

We should not tolerate it for a moment if the storekeeper who sold us groceries attempted by force and coercion to compel us to patronize his store, or if he barred our access to other stores by mass picketing or other means. We should consider such tactics more appropriate to a jungle than to civilized society. We should expect higher prices, poorer service, and deterioration of quality as necessary consequences. We should not be surprised to find grocery stores owned and operated by thugs and bullies rather than by merchants anxious to please us — merchants who conceived that characteristic maxim of the market economy: "The customer is always right."

Some may feel that, even though they were denied powers of compulsion, worker organizations might achieve the kind of power which they now possess — as a result of the sheer willingness of all wage earners to join together in concerted refusals to work. This opinion suffers from a lack of appreciation of the tough checks and balances built into a free-market, common-law system. Left to themselves, in complete possession of all property and contract rights, the more intelligent employers would handle employee relations so effectively that union representation would seem unnecessary to significant numbers of their employees. With no powers of compulsion, unions would have difficulty organizing such employers. Such pressure devices as the common law would permit unions, it may be ventured, to be counteracted by pressure devices equally available to employers. Efforts by aggressive unions to impose the closed shop would undoubtedly be balanced by employment contracts under which employees would engage not to become members of any union ("yellow dog" contracts).[6]

Even if a union did succeed in enlisting substantial membership among the employees of a fair-minded and progressive employer, it would still, without special privileges of compulsion, find it practically impossible to call out the workers, and to keep them out, in pursuit of any socially abusive objective. Without the license to use violence and intimidation, unions cannot make workers strike — or remain long on strike — against an employer who has won their loyalty by his fair and humane personnel policies.

Two circumstances must exist before a strike may be considered a sound move. First, the employer must be insisting upon substandard wages and working conditions; second, his employees at least must be definitely dissatisfied with those wages and working conditions. When these circumstances obtain, a simple work stoppage, unaccompanied by picketing, violence, or threats of violence, will make the employer see the light. But when these two conditions do not exist — and they will usually not exist among intelligently conducted businesses — a strike cannot be successful unless the union uses the violence

6 This paragraph is not mere speculation. Events in labor relations between roughly 1890 and 1930 followed much the course described here. *Cf.* Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229 (1917).

or the monopolistic methods which were such marked features of, say, the Kohler strike.[7]

For if the employer is not insisting upon substandard conditions, some of his employees will not be in sympathy with the strike, and other workers, currently employed at less attractive terms or perhaps completely unemployed, will seek the jobs vacated by the strikers. Here a critically important point is reached, in terms of understanding the checks and balances of free markets. When nonstrikers and striker-replacements start working, the strikers themselves will reconsider their decision to participate in the strike. And they will — unless forcibly restrained — go back to their jobs. Mass picketing, personal assaults, vandalism, threatening telephone calls — and all the rest of the intimidatory apparatus used so commonly by some unions — are designed to coerce not only nonstrikers and striker-replacements, but the strikers as well. It seems clear that if government prevents such unlawful compulsion, as it should, unions will either not be able to organize intelligently operated businesses at all, or, if they do succeed in organizing them, will not be in any position to abuse either the employer or the public.

These considerations lead me to the conclusion that we should never have experienced anything like the steel strike of 1959-1960 but for the powers of compulsion which law and government have conceded to the large unions. I find it impossible to believe that the United Steelworkers of America could have kept 500,000 men from working had there been no massed picket lines at all the struck steel plants. Some workers would undoubtedly have stayed out indefinitely. But surely not all. And had the strike been on a smaller scale, there would have been no occasion for politicians to intervene in the "collective bargaining" in order to compel concessions which most disinterested economists, including Professor David M. Wright in this Symposium, consider damaging to the public interest.

III

While the steel strike was an extremely important event, it will not do to focus too much attention upon it. The power displayed by the union in that strike was the end product of a process which can be traced back to the early 1930's when law and government began taking a positive hand in encouraging the growth of large unions.

Although traces of the process extend back at least to World War I, the starting point of serious government intervention in behalf of unions may be fixed at 1932, when the federal government passed the Norris-LaGuardia Act, giving unions immunity to injunction against any kind of strikes, picketing, and boycotts in "labor disputes," regardless of objectives and regardless of their status at common law. The Norris-LaGuardia Act even made it extremely difficult for employers to secure injunctive relief in the federal courts against violent union action, and a large number of states adopted similar laws during the 1930's.

Although the Norris Act was extremely significant in the power process,

7 *Cf.* PETRO, POWER UNLIMITED: THE CORRUPTION OF UNION LEADERSHIP 47 *et seq.* (1959).

unions were to gain many more special privileges in ensuing years. Indeed between 1935 and 1947 unions achieved the goal of every special interest group: a full complement of legal rights with no corresponding legal duties. As already noted, union membership grew from 3,728,000 in 1935 to over 15,000,000 in 1947. The dramatic character of this twelve-year increment can be appreciated only when it is set against a background of a near-stable membership of under four million for the preceding thirty-five years.

Every branch of government came to the assistance of the unions during this period. Legislatures, state and federal, gave them favorable laws. Administrative agencies, especially those of the national government, enforced these favorable laws well beyond the hilt, while state and local authorities were being unwholesomely reluctant to apply the basic laws of the land to violent trade-union aggression. Meanwhile, the Supreme Court of the United States not only went along with distorted interpretations of already unduly favorable laws, but also established constitutional privileges for such coercive union action as picketing. The favoritism did not diminish during the emergency years of World War II. On the contrary, it tended to expand. Unions did little to hide their intentions to profit from the emergency. I do not think it a distortion to say that, although union leaders talked a great deal about patriotism, they did not act the part of patriots.[8]

Fundamentally, what happened in the years 1935-1947 is that most of the effective free market checks to forced union growth were destroyed at the same time that the most effective legal restraints upon aggressive and compulsory unionism were removed. To put it another way, peaceful and lawful resistance to unionization were prohibited in one way or another, while violent and unlawful action by unions went substantially unchecked.

Free-market checks to expansive unionism can come from two sources: (a) employees who prefer not to join unions, and (b) employers who find that dealing with unions is neither an effective nor economically feasible method of solving their personnel problems. The Wagner Act did not completely abolish either of these checks, but it impaired them considerably. If a majority of employees in an appropriate bargaining unit voted in favor of union representation, the minority was left with no choice other than to accept the union as exclusive bargaining representative. When one realizes that the selection of the appropriate bargaining unit was left to the almost unhampered discretion of the National Labor Relations Board — and that the Board felt duty-bound to carve out the bargaining unit which was most likely to result in the election of a union — one is likely to conclude that a great deal of gerrymandering went on. And that conclusion is affirmed by examination of the cases.

After a union was certified as exclusive bargaining representative the employer was under a duty to bargain with that union — and with no other — on all matters relating to wages, hours, and other terms and conditions of employment. The employer did not have the choice which a free market makes available to all other purchasers; he could not shop around; he had to bargain

8 See MILLIS AND MONTGOMERY, *op. cit. supra* note 5, at 762 *et seq.* (1945).

with that one agency. Thus it is proper to refer to the union's position as a monopolistic one. And the results to be expected from all such monopolies were forthcoming in labor relations. Unions abused their position.

It might not have been so bad had the monopolistic privileges of unions ended there. But they did not. Legally an employer could refuse to make the concessions sought by the exclusive bargaining agent. Moreover, if the bargaining agent called a strike in order to reinforce its demands, the employer had a legal right to attempt to keep his plant operating by hiring replacements for the strikers. The law has always provided, too, that a union could not use violence during strikes as a means of blocking the access of struck employers to the labor market. As a practical matter, however, owing to faulty and inadequate enforcement of the laws, unions had a virtual privilege to commit violence. The sitdown strikes are a memorial to sad days for law enforcement, and the tenor of the period is nowhere more clearly symbolized, in my opinion, than in the history of Frank Murphy's career. As Governor of Michigan it was his sworn duty to prevent the violence and the sitdown strikes of the UAW. He flouted that duty. He was rewarded, not punished, for that dereliction. Franklin Delano Roosevelt appointed him a justice of the highest court of law in the nation after he had been guilty of cynically abusing the law of the land. As a justice of the Supreme Court, one of Mr. Murphy's most notable opinions was *Thornhill v. Alabama,*[9] where he held in effect that a coercive union act, picketing, was entitled to the protection of the Constitution of the United States as a form of freedom of speech.

The favorable legal climate did not extend only to the removal of the checks which employers and nonunion employees might pose to expansive and aggressive unionism. The Norris Act had been on the federal statute books since 1932, preventing federal courts from granting injunctive relief to beleaguered employers and employees. There were similar statutes in most of the states, especially the more industrialized states. Toward the end of the 1930's and early in the 1940's the Supreme Court interpreted the Norris Act as in effect cancelling the application of the antitrust laws to economically coercive union activities.[10] The picketing-free speech doctrine in a rough sort of way extended the same immunity to state laws prohibiting picketing and boycotts. Thus, at the same time that the Wagner Act preached in terms of majority rule, the absence of all checks upon picketing and secondary boycotts operated to give unions an unimpeded right to force themselves upon unwilling employers and employees even where none of the employees desired representation. The same immunity made it possible for unions to have their way more often than not in disputes with employers over substantive terms and conditions of employment.

If the strong unions were in a position to extend their organizations to the limit, nobody should have been surprised. And if they had the strength to impose almost any terms and conditions they pleased, nobody should have been surprised, either. They had acquired a privileged monopoly and they did

9 310 U.S. 88 (1940).
10 U.S. v. Hutcheson, 312 U.S. 219 (1941).

not let it go unused. Union membership grew from 3,728,000 in 1935 to 10,489,000 in 1941. The surprising thing is that these highly privileged organizations did not manage to unionize every single employee in the period. Perhaps the only thing that stopped them was the sheer physical job of enrolling any more than they did.

Enrolling union members is one thing; keeping them on the membership rolls is another. Apparently this was the great problem of the union leaders during the war years. Their efforts during 1942-1945 seemed to be directed most vigorously toward inducing the National War Board to help them organize employees and then, by way of the maintenance of membership device which the War Labor Board evolved, to keep them paying dues. Professors Millis and Montgomery report in *Organized Labor* that as time wore on the WLB granted "union security" to all unions which requested it, except where the "requesting union failed to demonstrate its responsibility in adhering to the no-strike pledge."[11] In blunter language, the government bought the loyalty of the union leaders by compelling employees to maintain their union membership.

It seems permissible to infer that the WLB proved exceedingly serviceable to the unions during the war, for there is a remarkable jump in union membership from 1942 to 1943. In the years preceding as well as in those following 1942-1943, the growth is nothing like what occurred in those years. From 10,489,000 in 1941, unions grew to only 10,762,000 in 1942. But by 1943 the figure jumped to 13,642,000. Then the growth rate, while still significant, slipped a little from 1943 to 1944, when the total membership has been counted at 14,621,000.

IV

Enacted in response to wide-spread concern over the union power evident in the great strikes of 1946, the Taft-Hartley Act of 1947 was designed to correct the situation. Perhaps its most notable feature was the attempt to apply the same rules against union coercion of employees that the Wagner Act had applied to employer coercion. The attempt should have been successful, for Congress used exactly the same words to prohibit union coercion in Section 8(b)(1) that had been used in the Wagner Act in the section which was to become Section 8(a)(1) of Taft-Hartley. But in spite of the identical language, the NLRB held for the ten years between 1947 and 1957 that the words did not mean the same thing when applied to union conduct as they did when applied to employer conduct. Although the Board held that the term "coercion" applied to economic as well as physical — or peaceful as well as violent — coercion by employers, *when it came to unions,* according to the Board, only physical or violent coercion was prohibited, not peaceful economic coercion.[12] And especially, said the Board, did the prohibition of union coercion *not* apply to the purely economic pressures created by peaceful stranger picketing.[13]

Thus, for ten years, one of the most widely used techniques of forcing

11 MILLIS AND MONTGOMERY, *op. cit. supra* note 5, at 764.
12 National Maritime Union, 78 N.L.R.B. 971, 985 (1948).
13 *Cf.* Perry Norvell Co., 80 N.L.R.B. 225 (1948).

unionization and collective bargaining upon unwilling employees was considered an entirely privileged form of action under federal law. Unions such as the Teamsters made wide use of this privilege. Thousands, perhaps hundreds of thousands, of employees found themselves forced to accept unionization if they wished to continue working. Every time a union secured bargaining status through stranger picketing, one of the first concessions it demanded was the closed shop or the union shop — an arrangement which in either case forced the employees to pay dues to the union which took from them their right to bargain for themselves. There cannot be the slightest doubt that this coercive privilege led to much of the racketeering and abuses of power by union leaders which fill the pages of the McClellan Committee record.

The story goes on, and gets no better. In 1957 a new majority of the NLRB, rejecting its predecessor's conclusion, held in the *Curtis* case[14] that stranger picketing by a Teamsters local which had been defeated 28-1 in an employee election *plainly* violated the Act's prohibition of union restraint or coercion of free employee choice. This was progress of a kind — but it was not allowed to stand. The United States Court of Appeals for the District of Columbia, over a dissent by Judge Wilbur K. Miller, reversed the Board.[15] The majority held that the stranger picketing did not violate the Act's prohibition of union restraint or coercion. In his dissent, Judge Miller had this to say about the majority's opinion:

> In effect, the majority hold it lawful for the Hoffa labor organization, after it had been repudiated almost unanimously by the employees, to put a picket line around the place of business in an effort to force the employer to tell the employees to join the union or be discharged — i.e., in an attempt to force the employees into the union they had just emphatically rejected. Such an interpretation of the Act, which I think is clearly wrong, is an invitation to labor racketeers and hoodlums to use its processes for unlawful purposes.

The *Curtis* case went to the Supreme Court, and there the interpretation which Judge Miller thought "plainly wrong" was affirmed, in an opinion by Justice Brennan which will no more stand serious examination than the majority decision in the court below.[16] Justice Brennan in fact refused to deal with or even to recognize the fundamental issue raised by the Teamsters' stranger picketing. He did not ask the obvious questions: (1) if the employer recognized a union defeated 28-1 as exclusive bargaining representative would he be guilty of coercing employees in the exercise of their right to refuse to bargain collectively? and (2) does a nonrepresentative union coerce employees when it takes action designed to induce an employer to coerce his employees in the exercise of their right to choose their own representatives?

Instead of stating and analyzing these, the basic issues, Justice Brennan engaged in an equivocal pursuit of irrelevant issues. He proclaimed that stranger picketing could not be prohibited without impeding the *right to strike* — and

14 119 N.L.R.B., No. 33 (1957).
15 Local 639 v. N.L.R.B., 36 C.C.H. Lab. Cas. ¶ 65030 (D.C. Cir. 1958).
16 N.L.R.B. v. Local 639, 39 C.C.H. Lab. Cas. ¶ 66351 (U.S.S. Ct. 1960). For an extended critique of the opinion below, see Petro, *Labor Relations Law,* 35 N.Y.U.L. REV. 733, 749-51 (1960).

this without even nodding to the possibility that striking and stranger picketing have nothing to do with each other. He also insisted that because picketing for recognition is prohibited by one section of the Act when another union has been certified, it could not be prohibited under the general rule of Section 8(b)(1) against union coercion when no other union had been certified — although there is plainly no legal or rational basis for this contention, either. Finally, Justice Brennan said, it would be incorrect, under all the circumstances, to hold stranger picketing prohibited under the general ban against union coercion, without the "clearest indication in the legislative history" of such a congressional intent.

This resort to legislative history was highly questionable. There is no ambiguity in the statutory language, no real problem concerning its meaning; twelve years of decisions under the Wagner Act, on the meaning of the prohibition of employer restraint or coercion of free employee choice, settled those questions. Thus the normal legal basis for resort to legislative history did not exist in this case. But no real harm would have been done had Justice Brennan actually consulted the whole legislative history, reported it fairly, and based his decision on what is really to be found there. For the legislative history of Taft-Hartley, fairly and comprehensively considered, establishes that the 80th Congress understood the Act to prohibit stranger picketing. I have demonstrated this fact in an extended study,[17] and I urge the reader to examine that monograph if he has any doubt. Here I can do no more than to quote my summary of what the legislative history of the Taft-Hartley Act reveals concerning the legality of stranger picketing under Section 8(b)(1):

> The committee reports, the debates, the analyses by proponents and opponents of the bill . . . join in establishing that stranger picketing for organizational purposes was understood to come within the prohibition of union "restraint or coercion." The evidence on this . . . is detailed and specific. In the Senate, few other types of union action were more frequently cited as establishing the need for a prohibition of union restraint or coercion, or as examples of the kind of conduct which such a prohibition would reach. In explaining the prohibitions, its principal sponsors, Senators Taft and Ball, both cited organizational picketing cases. . . . Direct inference from statements made in the Conference Report establishes . . . that the express prohibition of organizational picketing in the House bill was covered by the Senate bill's prohibition of restraint or coercion by unions. . . . There is, in summary, not the slightest doubt . . . that Congress understood organizational picketing to be one of the forms of economic coercion by unions which fell within the prohibition. . . .[18]

The career of stranger picketing under the Taft-Hartley Act, while perhaps the most interesting, is certainly not the only example of abortion of that legislation by the administration and interpretation it has had. The full story need not be recounted here,[19] but at least a summary is necessary if one is to understand why it is that in spite of the Taft-Hartley Act, union abuses

17 How the N.L.R.B. Repealed Taft-Hartley 11-34 (1958).
18 *Id.* at 33-34.
19 *Ibid.*

have grown so much since 1947. Union violence, the single most egregiously antisocial union abuse, went virtually unaffected by the 1947 Act because the National Labor Relations Board held itself powerless to fashion any effective deterrent, such as money damages or injunctive relief. The comprehensive outlawing of certain strikes and boycotts in Section 8(b)(4) of Taft-Hartley was rendered largely ineffective by a series of exculpatory doctrines fashioned out of whole cloth. Unions were given carte blanche to oppress small employers and their employees when the Board erected jurisdictional standards which removed small business from the protection of the Act. And when state courts began extending protection to such employers, the Supreme Court conceived the pre-emption doctrine, which holds that no business subject to federal jurisdiction can also be subject to state jurisdiction in labor disputes — even though the NLRB has refused to exercise federal jurisdiction.[20]

V

The evidence establishes, in my opinion, that there is no need to fear union power so long as it rests upon a voluntary base. The checks and balances built into free labor and product markets are adequate to contain union power within socially acceptable bounds. Union power has gotten out of hand because unwise laws have been made worse by the administration and interpretation they have had, while socially beneficial laws have been reduced to impotency by reluctant administration, on the one hand, and dubious interpretation, on the other.

If we desire to eliminate the grave threats which unions pose without increasing the even greater threats which big government poses, the way is clear.

We must in the first place restore to the constitutional courts of the land full jurisdiction over labor cases, with both legal and equitable remedies as widely available there as in all other fields of litigation. This means repeal of all anti-injunction legislation and abolition of all labor relations boards. The next most important requirement is the elimination of all compulsion in labor relations. If economic coercion in every form is to be denied to employers, it must be denied to unions as well. If the antiunion, "yellow-dog" contract is held socially undesirable, then every form of compulsory unionism contract must be likewise outlawed. The exclusive bargaining authority which unions presently acquire with mere majority status must be abolished; unions must be confined to representation of only those employees who voluntarily select them as agents for bargaining purposes, and compulsory bargaining must be rejected. Finally, and most important, we must devote whatever resources and energies are necessary in order to eliminate the use of violence in labor relations. This is basic.

These measures will establish in labor relations the juridical structure indispensable to securing there the benefits of free competition and free markets. It can never be stressed too much that the free-market, free-enterprise economy,

20 Garner v. Teamsters, 346 U.S. 485 (1953); Weber v. Anheuser Busch, Inc., 348 U.S. 468 (1955); Garmon v. San Diego Bldg. Trades Council, 353 U.S. 26 (1957), 359 U.S. 236 (1959).

indeed the free society itself, is fundamentally and essentially a juridical institution based upon the theory that each person has a right to make his own decisions without fear of compulsion or assault by another. If we wish to have a free society, we are compelled to adopt the policies appropriate to such a society.

And we are compelled to reject the policies which are inimical to such a society. We hear often today the complaint that "collective bargaining has failed," with the accompanying proposal that government must sit at the bargaining table to insure that unions and managements come to agreements which do not endanger the public welfare. This position misconceives and distorts the problems and the events of labor relations history in this country. The fact is that collective bargaining has not failed. What has failed has been the system of special privileges accorded by government, privileges which have led to compulsion and coercion in labor relations. The only failure is the one which was bound to result from bad laws and untoward administration of good laws. Policy and government, not collective bargaining, have experienced failure. Indeed it seems accurate to say that free collective bargaining has not been given an opportunity to prove its viability and social utility. The need is to take government out of collective bargaining completely — not to give it a greater role. The premise underlying Western civilization and the free society is that free men will build a better community than men who must bow to the tutelage of government personnel or to the oppression of bullies and thugs. Experience in labor relations over the last generation reaffirms the validity of this seminal and germinal premise.