Uses and Abuses of Union Power

Archibald Cox
THE USES AND ABUSES OF UNION POWER

by Archibald Cox*

The American heritage embraces a strong distrust of power. The antitrust laws are supposed to break up concentrations of economic power. Political thought is strongly influenced by Lord Acton's aphorism — "Power corrupts and absolute power corrupts absolutely." Nevertheless, men need and have therefore created many institutions which exercise much greater power than a single individual. We preserve freedom by multiplying the institutions, distributing functions, and then preserving a balance of power among them.

The growth of union power was encouraged as a matter of national policy because free collective bargaining through strong unions, which includes wide freedom to strike, appeared to be the only system of industrial relations consistent with a private enterprise economy in which wage earners could secure not only the economic opportunities necessary for self-advancement but also industrial justice and a democratic voice in the industrial decisions affecting them. The power of some unions has become very great, although others are still struggling to survive. The power of some unions creates national problems such as the so-called emergency disputes. Their power is also susceptible of serious abuses such as the brutality and corruption of the International Brotherhood of Teamsters and the contracts which advance the selfish interests of labor and management at public expense.

Since union power has uses as well as abuses, the challenge to public policy lies in the need for measures which will reduce the dangers of excessive power without injuring weaker labor unions or impairing the capacity of any union to fulfill its beneficent functions. In the first part of this paper I shall try to emphasize these beneficent functions in order to put the problem in perspective. I shall then examine some of the measures which have been proposed, and conclude with a few suggestions for strengthening collective bargaining which should better protect the public interest without imposing detailed government regulation.

I

Every labor organization restrains competition among workers offering services in a labor market. Each local union of bricklayers seeks to control the supply of bricklayers' services available to contractors within its geographical jurisdiction. The United Steelworkers of America controls the supply of labor available to the United States Steel Corporation. If by the term "monopoly power" we mean the ability to influence access to the market or market price in ways which would be impossible in a model free market, then every labor organization is an avowed monopolist. Furthermore, unless the officers have been deceiving the members, every union is a more or less successful monopolist. The chief purpose of a union is to obtain terms and conditions of employment — a "price" for labor — more favorable than employees could otherwise command in a free market.

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Some labor unions also exercise a power akin to that of monopoly in the product market in which employers sell goods or services. The United Mine Workers has power to shut off the supply of bituminous coal; the United Automobile Workers, of automobiles. Within rather narrow limits both also appear to have power to influence the prices at which coal and automobiles are sold, for their industry-wide jurisdiction takes wages out of competition; and although labor costs remain competitive to the extent that machinery may be substituted for labor, the competition is greatly reduced.

II

The possession of "monopoly power" in this technical sense is not necessarily against the public interest. The reason was stated by Chief Justice Taft, one of a family never noted for economic radicalism, in a classic exposition of the need for labor organizations:

They were organized out of the necessity of the situation. A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers an opportunity to deal in equality with their employer.¹

An amateur economist might express the same thought by saying that combinations of capital, the lack of knowledge or mobility on the part of employees, and the staying power of the corporation in contrast with the wage earner's desperate need for immediate work, create short term conditions of monopsony in the labor market which only monopoly can counterbalance.

The view that labor organizations with monopoly power are necessary to counterbalance the economic power of employers in the labor market became the premise of the national labor policy. The Clayton Act of 1914,² the Norris-LaGuardia Act³ and the National Labor Relations Act⁴ seek to achieve more nearly equal bargaining power between employers and employees by protecting the growth of labor unions and encouraging the use of the employees' collective (i.e., monopoly) power in negotiating wages, hours and other conditions of employment. The statutes were not accidents. They rest upon the belief that the wage earners in an industrial society have needs and aspirations which the community must recognize either by detailed social and economic regulation or by allowing the wage earners to form associations with sufficient economic power to protect themselves within an open economy. Union power, in short, has important uses even though it also offers opportunities for abuse. We must be careful not to equate the public welfare with the results achieved by the model free market of the classical economist.

One aspiration of industrial workers and great accomplishment of the

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¹ American Steel Foundries Co. v. Tri-City Metal Trades Council, 257 U.S. 184, 204 (1921).
labor unions is the introduction of the rule of law into industrial establishments. Gathering thousands of employees into integrated factories concentrated vast power in the hands of managers and their subordinates — a power too easily and too often exercised in arbitrary fashion. A collective bargaining agreement creates enforceable rights, thus freeing the worker from dependence upon the good will of a foreman or superintendent. The administration of discipline has been regularized. Layoffs and promotions are made according to rule. The creation of grievance procedures terminating in arbitration has been as important to workingmen in the administration of justice as the judicial reforms of Henry II in medieval England. And although non-union establishments have also felt the impact of these developments because of their fear of unionization, it was union power which brought about the reforms and it is probably only power which will maintain them.

Job insecurity was a second force impelling the formation of labor unions. Under collective bargaining some gains have been made through the systematization of layoffs and the impartial review of discipline and by stabilizing employment. The chief accomplishment, however, is the provision of continuing income. In large scale industry supplemental unemployment benefits are provided. Retired employees receive pensions. Health and welfare benefits mitigate the hardship of sickness and accidents. The impetus necessary for these accomplishments came in collective bargaining through the pressure of strong labor unions.

Third, labor unions have given employees an opportunity to participate through elected representatives in the decisions vitally affecting their daily lives in the industrial community much as all of us are enabled to participate vicariously in political decisions. The roles of shop steward, local union officer, business agent and international representative open up new outlets for the useful exercise of energy and talent. The indifference of the electorate and the corruption of elected officials sometimes taint industrial self-government just as they infect political entities but the fault does not destroy the value of government by the consent of the governed.

Finally, and perhaps most important, under collective bargaining wage earners have achieved extraordinary gains in real wages. Between 1941 and December 1958 straight-time hourly earnings, adjusted to reflect changes in the consumers' price index, rose 53.5 percent. Between the enactment of the Wagner Act and December 1958 real wages very nearly doubled. The rate of increase was more rapid under collective bargaining than in earlier periods. In the private sector of the economy the productivity of labor per man hour appears to have increased at a substantially faster rate under collective bargaining than in earlier periods. One cannot prove that labor unions were a cause of this progress, but obviously they did not prevent it. It is quite likely that the pressure of unions upon wage costs increased the efficiency of management and that the addition to purchasing power accelerated economic growth.

Although the immediate benefits of collective bargaining go to union members, it will hardly be argued that these accomplishments do not inure to the
public interest. The extension of the rule of law and industrial democracy represents a fulfillment of community ideals. Judged by any material standard the twenty-five years since the enactment of the Wagner Act have been a period of extraordinary bounty for almost all segments of the community.

Yet the benefits which the community enjoys because of the power of labor unions are not without cost. Union power is capable of dangerous abuse. A year ago we would have placed corruption in union office and cynical disregard for the democratic rights of members high upon the debit side of the ledger, even though the vice appears to have infected only a small minority of the national and international unions. But last summer Congress enacted legislation which promises reform in the conduct of internal union affairs.⁶

The most dramatic of the problems created by the power of labor unions is the national emergency dispute. The recent steel strike is a sharp reminder of the power of the officials of a few corporations and a single international union to bring a basic industry to a virtual standstill.

Another cost of collective bargaining through powerful unions is the risk that contracts may be negotiated between labor and management contrary to the long run interests of the community. For a number of years government officials and students of collective bargaining treated the negotiation of an agreement — any agreement — as the sole desideratum. Today we realize that agreement may come at too high a cost.

The clearest examples are the contract clauses providing an employer with a sheltered market in which to sell his products. Some years ago Local 3 of the International Brotherhood of Electrical Workers induced the electrical contractors in New York City to agree not to install electrical equipment manufactured outside the Local's jurisdiction. Thus the New York manufacturers were enabled to raise wages and prices unhampered by competition from other areas.⁷ The Sheet Metal Workers and Plumbers have often negotiated similar agreements.

More important is the risk that union power will be used to negotiate contracts which unduly impede industrial progress by perpetuating unnecessary jobs or preventing technological change. One need not associate himself with the outcry against "featherbedding" to recognize that the use of union power to prevent technological and economic change endangers the public interest, including the welfare of union members.

The wage bargains struck by labor and management may also injure the public. In recent years the primary risk has been one of inflation but in an academic discussion we should not overlook the risk that under some conditions wages might not always be held at levels sufficient to maintain purchasing power for consumer goods. In either case the point is the same. Free collective bargaining through strong unions carries a heavy cost if it pushes wages and prices to inflationary levels.

A complete list of the costs of permitting labor unions to acquire monopoly power would include additional items — violence and mass picketing, the

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corruption of local police officials, jurisdictional strikes, etc. The list of the accomplishments of the labor unions could also be lengthened. My purpose is only to emphasize that union power has both uses and abuses. The challenge of public policy, as I have said, is to find methods of preventing the abuses without weakening labor organizations in the performance of their beneficent functions.

III

Before turning to proposals for meeting the challenge it is important to observe the great disparities in the strength of labor unions. The available figures are old and far from accurate but five conclusions seem warranted.8

(1) Despite the power of some unions there remain masses of unorganized workers who would benefit by collective bargaining. In the United States about half the employees engaged in manufacturing belong to labor organizations; in Sweden, Denmark and Norway, more than 90 per cent. In the United States roughly 15.8 million, 25 per cent, out of the 64.8 million employed workers belong to unions affiliated with the American Federation of Labor and Congress of Industrial Organizations. In Great Britain 42 per cent of the employed persons are union members.

(2) Collective bargaining is not spreading. In the twelve-year period 1935-1947 union membership increased fivefold; for the past twelve years there has been no increase.

(3) The geographical distribution of union strength is very uneven. The latest figures available show that in North Carolina only 8.3 per cent are members compared with 30.1 per cent in Massachusetts and 35.7 per cent in California.

(4) The wide variations in the extent of union organization between different industries are exemplified by the contrast between the automobile and textile industries. There are also great differences in the power of individual unions. No one expects the United Steelworkers suddenly to lose its bargaining power but many locals of the Amalgamated Clothing Workers are struggling for existence.

(5) Although part of American industry has accepted collective bargaining as a system of industrial relations, there remains an organized and bitter opposition. Recently, in Henderson, North Carolina, a textile manufacturer forced a bitter, unsuccessful strike over a question as fundamental to collective bargaining as whether the grievance arbitration clause should be stripped from the Textile Workers' contract.

Even this hasty sketch should make plain the danger of formulating public policy upon an image of "labor monopoly" resulting from the steel strike, or of "labor bosses" created by newspaper publicity concerning James Hoffa or John L. Lewis. Legislation enacted with the United Steelworkers or International Brotherhood of Teamsters in mind will also apply to the International Ladies Garment Workers and the Textile Workers Union. A federal statute applicable to Pittsburgh and Detroit will also govern Alabama and Texas.

8 The figures came from estimates prepared by the AFL-CIO Director of Organization and Statistical Abstract of the United States 283 (1959).
Bearing in mind the present pattern of union organization, and also the uses as well as the abuses of union power, let us turn to the resulting problems of public policy.

IV

One school of thought advocates attacking the problem through control of the structure of the labor market. All power, it contends, is dangerous. By regulating market structure so as to eliminate the monopoly power of labor unions and then allowing the market to operate freely, we may secure socially and economically desirable results without resorting to direct regulation. Collective bargaining, it is said, was desirable when wages were low and hours were long but today it lacks this justification. According to some exponents of this view, the best remedy is to deprive labor unions of their present immunity from the antitrust laws.

The only pertinent antitrust law, the Sherman Act,9 has been applied in the past to combinations of businessmen and labor unions which fix prices, limit production or otherwise control a commodity or product market to the detriment of consumers.10 Labor unions are currently free to engage in such activities by themselves without risk of prosecution.11 The Sherman Act could usefully be extended to activities carried on by unions alone for the purpose of providing favored employers with a sheltered market for their goods and services, but the solution of this limited problem would hardly touch the fundamental issues.12

Apart from these special cases history offers little evidence that the Sherman Act can be usefully applied to labor unions. From 1890 until 1940, when unions gained their present immunity, the act was a vehicle for the judicial formulation of labor policies governing the legality of strikes, picketing and other economic weapons without regard to the size of the union, the extent of its jurisdiction, its bargaining power, or the effect of its activities upon the market. Even in the late 1930’s, when the Department of Justice opened a brief campaign against alleged restraints of trade by labor unions, the courts were not concerned with the size of unions or monopolistic power but only with practices alleged to be undesirable from the standpoint of labor-management relations such as jurisdictional strikes and secondary boycotts.

The techniques and concepts used in the administration of the antitrust laws are inapplicable to labor unions. The antitrust laws are designed to ensure free markets by preserving and enforcing competition among a sufficient number of buyers and sellers of goods and services who have sufficiently equal power to prevent any of them from controlling prices, supply or quality to the detriment of consumers. Labor unions do not compete against each other in the sale of labor. Can anyone imagine three or four unions of automobile workers competing against each other for the privilege of supplying labor to Studebaker, Ford or General Motors? The only way in which competition can

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12 For a more detailed analysis of this problem and the past use of the Sherman Act in labor cases, see Cox, Labor and the Anti-Trust Laws, 104 U. Pa. L. Rev. 252 (1955).
be restored among the sellers of labor is to destroy the labor unions so that individual workers will underbid each other, or at least to create a pool of non-union labor large enough to eliminate the bargaining power of unions.

Phrased somewhat differently, the critical question in applying the Sherman Act to a projected business combination is whether sufficient competition will remain to prevent the combination from affecting the market price. The parallel test, if applied to a labor union in the labor market, would be whether the union had the power to raise the wages or affect the conditions of employment which would prevail in the absence of a union. The union would be illegal if it could achieve its purpose.

The Hartley bill and Ball amendment of 1947 sought to limit the size and power of unions by reference to the product market. They proposed to eliminate "industry-wide bargaining" (a misnomer for industry-wide unionization) by confining the bargaining rights of each union to the employees of a single employer, and then forbidding the several company-wide unions to coordinate their negotiations either directly or through an international union. In the automobile industry there would be one union for Ford, one for General Motors, one for Chrysler and one for each of the smaller companies. The same pattern would be enforced throughout the economy with a possible exception for very small firms in a single industrial area such as the garment shops in New York City. These proposals are occasionally revived with minor modifications.13

It is difficult to appraise the impact of this proposal upon the major problems raised for the community by the power of the great international unions. Obviously it would provide no safeguard against some national emergency disputes. In 1952-53 a strike at one plant of American Locomotive Company cut off the entire supply of a nickel alloy pipe used in the gaseous diffusion plants of the Atomic Energy Commission. In 1952 only the personal intervention of President Truman avoided a strike against North American Aviation Co., the sole producer of jet airplanes needed in the Korean conflict. Other emergency disputes would be prevented. It is hard to imagine a bituminous coal strike which would seriously injure the public if the United Mine Workers were broken into fragments. A strike against the United States Steel Corporation or the Southern Pacific Railroad, however, might create much the same pressures for government intervention as a nationwide steel or railway strike.

Proposals to ban industry-wide bargaining offer little protection against whatever risk there may be that too strong unions will impose upon management terms of settlement which are contrary to the public interest. Breaking up the international unions would hardly affect the course of negotiations in the industries dominated by a few large firms such as produce steel, automobiles and copper. One could not expect each company-wide union to negotiate without an eye upon the others; the companies do not make prices in that fashion. Not long ago the International Association of Machinists permitted the local unions representing employees on each of several major airlines to conduct decentralized negotiations, company by company, each group making its own

decisions upon wage policy. The result was a succession of strikes. Each company-wide group sought to leap-frog to a higher wage over the preceding settlement. The aluminum, aircraft and lumber industries, where there were rival unions for years, felt the same wage pressures as if their employees had been organized by a single union.

Indeed, one wonders whether industry-wide bargaining is not greatly to the advantage of employers, and possibly consumers, in industries dominated by a few major firms. If the United Steelworkers were to strike the Bethlehem mills and allow other basic producers to continue in operation, would not Bethlehem be inclined to settle the dispute much more quickly than when all the steel mills were closed by a strike? The embarrassment a union feels in asking one group of employees rather than another to assume the burden of a strike may be an offsetting factor, but it seems quite likely that the chief result of banning industry-wide strikes would be to weaken the bargaining power of employers.

In industries where the firms are smaller, breaking an international labor organization into company-wide fragments, each forbidden to bargain in consultation with another fragment or a parent international, would undoubtedly affect the course of collective bargaining. It would weaken some unions and destroy a great many. The employees of a single company are too small a unit to support the experienced officials and professional staff required to negotiate and administer contracts effectively. But these are not the industries in which inflationary wage pressures are serious and settlements are negotiated which may injure the public. Nor, except for coal mining, do they experience national emergency disputes.

Thus the two principal methods which have been brought forward for regulating market structure in such a way as to curtail union power are hopelessly defective. Attacking the problem through the labor market would destroy labor unions. Approaching it through the product market seems likely to injure comparatively small and ineffective unions without contributing a solution to the problems of power. Perhaps some imaginative but realistic person will come forward with an administrable plan for limiting union power at the point where its consequences may be deleterious without sapping the vitality of other organizations; but I deem it unlikely. It seems impossible to formulate a standard by which a disinterested observer can judge when a union has too much power. One measures a labor union’s power not by comparison with the number and size of other unions selling in the same market, as one does in the case of business firms, but in relation to the countervailing power of the employers with whom it deals. Is the United Steelworkers more powerful than the United States Steel Corporation? Has the United Automobile Workers greater bargaining power than General Motors? If the answer is affirmative in either case at what point would they be equal?

Of course there are many other devices for lessening the power of labor unions. They range from Professor Petro’s radical demand for repeal of the duty to bargain collectively to such familiar proposals as additional restrictions upon picketing, right to work laws, etc. These measures, like all previous proposals to reorganize the structure of the labor market, have two basic vices:
First, they would prevent the beneficent use of union power. Measures weakening labor unions in order to lessen their power to damage the public interest inevitably limit the unions' power to bargain effectively. If the power is destroyed, it is destroyed for all purposes. An attack upon the monopoly power of unions is an attack upon collective bargaining.

Second, such measures would bear more heavily upon weak unions than strong, and upon employees in unorganized industries and areas rather than upon the beneficiaries of the greatest union power. Many of the Taft-Hartley provisions ostensibly directed at redressing the balance of power between management and labor injured weak unions still struggling for effective organization while they left untouched the establishments where unions were strong and collective bargaining was well established. The error apparently resulted from the failure to take into account the disparities in the extent and strength of unionization. It is important not to repeat the error.

For all these reasons I submit that efforts to resolve the problems by weakening or destroying union power are against the public interest. To destroy effective unionism would take away the wage earner's chief protection and hope of advancement. Deprived of the right to economic self-help he would be forced to turn to increased social and economic legislation. The end result would be not the idyllic model of the classical economist. The United States, being a political democracy, will never tolerate the destruction of unions as a counterpoise to the power of management without substituting a detailed system of government regulation adequate to safeguard the interests of employees. Let us consider therefore whether the problems cannot be solved without destroying collective bargaining, on the one hand, or turning to compulsory arbitration or direct wage and price regulation on the other.

The most dramatic of these problems are the strikes which cause or threaten to cause public emergencies because the interruption of the flow of goods and services injures the public before the strike forces an agreement between labor and management. It is difficult to form a balanced judgment about their importance. A major strike seems catastrophic until it is settled. The newspapers are filled with dramatic accounts of the millions of dollars lost in wages and production. In retrospect the event usually looks tamer. The rash of major disputes in 1946 and 1947 in the steel, automobile, maritime, coal and meat packing industries seemed to threaten the structure of society, but today we think that they marked chiefly a release from wartime restrictions. Recently figures were published showing the tonnage of steel produced during each of the three years ending March 31, 1958, 1959 and 1960:

<table>
<thead>
<tr>
<th>Year</th>
<th>Tonnage</th>
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<tbody>
<tr>
<td>1958</td>
<td>99,920,811</td>
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<tr>
<td>1959</td>
<td>96,952,096</td>
</tr>
<tr>
<td>1960</td>
<td>97,697,274</td>
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Steel production is currently declining. Thus, over a twelve-month period the great steel strike caused the country no losses whatsoever in steel production, and it seems probable that even if there had been no strike the employees
would have suffered losses in earnings as a result of layoffs or shortened work weeks. There were undoubtedly expensive dislocations and foreign steel may have gained a bigger share of the domestic market, but it seems apparent that all of us exaggerated the losses suffered by the companies and employees.

I mention these facts because they are pertinent in deciding how drastic a remedy would be warranted in formulating a public policy for national emergency disputes. Collective bargaining through strong unions, which implies freedom to strike, is the only system of industrial relations consistent with a private enterprise economy in which wage earners can deal upon relatively equal terms with their employers. In dealing with national emergency disputes we confront a critical dilemma. The community desires both the elimination of strikes and the preservation of free collective bargaining. Unhappily there is no way in which to realize both wishes. Strikes and collective bargaining are inseparable. Theoretically we can eliminate strikes and safeguard the interests of both employers and employees by substituting compulsory arbitration, which would lead at once, I think, to government regulation of prices as well as wages. Or we can have free collective bargaining and suffer the interruptions that threaten the national welfare. Until we are ready to make a clear-cut choice, which is not the way of democracy, the task of the legislator is to find the workable accommodation which will bring the largest measure of satisfaction in terms of both desiderata, even though a bit of each must be sacrificed in order to obtain enough of the other.

There are a number of important steps which can be taken to improve both collective bargaining and government participation without the necessity for resorting to compulsory settlements, but all rest upon the need for recognition of the simple truth that the primary responsibility for making collective bargaining work rests upon management and labor. The government can assist and should hold them to an accounting, but private enterprise presupposes private responsibility. The failure of management and labor to cooperate in protecting the public interest voluntarily will inevitably lead not to the victory of one over the other but in loss of the economic freedom which both of them need and cherish.

In the past collective bargaining has proved extraordinarily creative in meeting industrial needs and providing industrial justice. Progress has been slower in recent years but I see no reason to suppose that the creative capacities of collective bargaining have degenerated. At least four avenues of constructive development are open.

First, there must be wider recognition that the vital problems of industrial relations cannot be resolved in periodic negotiations under the threat of a strike. Automation is an obvious example, and for this reason the most far-sighted employers and labor unions have taken the subject out of their contract negotiations by setting up standing bipartite committees to study continuously the means of readjustment. The work rules issue in the steel strike, whatever its merits, involved thousands of jobs in steel mills scattered throughout the country. Since the pertinent facts about specific jobs could not be discussed by the negotiators, they were forced to deal with vague abstractions.
It is always easy to disagree about abstract dogmas. Facts have a way of compelling agreement. Secretary Mitchell is clearly right in pointing out that only a long period of concentrated study of the rules and the internal wage structure will produce a viable solution of the problems resulting from the anachronistic rules governing employment and compensation on the railroads. We can no longer be content with cycles of drift and crisis.

A second promising avenue of development lies in placing upon each industry the responsibility for making collective bargaining work in the industry by the establishment of its own standing industry procedure. The Railway Labor Act of 1926 operated successfully for many years because it was worked out jointly by the carriers and the representatives of their employees. The Atomic Energy Labor Relations Panel has been highly successful. More than a decade ago the construction industry voluntarily set up its own special procedure for reducing the jurisdictional disputes which plagued the industry and public. This year contractors and labor unions are establishing national machinery for preventing strikes and lockouts.

If these steps are not taken voluntarily in other major industries, Congress should seriously consider the enactment of legislation admonishing each industry in which a labor dispute might affect the national health or safety or seriously impair the national economy to create a standing procedure for resolving disputes which do not yield to the ordinary processes of negotiation. The government cannot compel an industry to take this step, but it can demand an accounting and offer assistance. The statute should authorize the Secretary of Labor, upon finding that an industry had failed to establish a suitable procedure, to appoint a Board of Public Responsibility chosen from men of experience and high standing in the field of industrial relations who would remain private citizens but would serve as the occasion required. Such a board could serve two purposes: (1) to assist the industry in setting up its own procedure and (2) to serve the functions of an industry procedure if none were established.

Third, the government could do more to establish a storehouse of experience for solving industrial problems. Many firms, large and small, have developed ingenious solutions which could be adapted by others if the knowledge were more readily available. The Department of Agriculture furnishes technical assistance to farmers. The Bureau of Mines conducts research and renders advice for the benefit of the mining industry. The Department of Labor or the Federal Mediation and Conciliation Service should be equipped to give similar advice to management and labor organizations.

Fourth, we should substitute more flexible machinery for the Taft-Hartley procedure for handling national emergency disputes. Even in management circles, there is wide agreement upon the inadequacy of the existing procedure. In the usual case the injunction simply postpones the show-down at the price of relieving both employer and employees of the pressures which might have caused a settlement. All the disputes handled under the Taft-Hartley procedure, except three, have been settled either at the outset or after the passage of time and prospects for renewal of the strike increased the pressure to compromise. In my judgment the Taft-Hartley procedure should be replaced by new
legislation giving the President statutory authority to follow five courses of action, singly, consecutively or concurrently:

(1) He might appoint a fact-finding board with power to mediate and also to make public recommendations for the settlement of the dispute.

(2) A Board of Inquiry might be appointed for the purpose of arranging voluntary arbitration, or, if this fails, reporting to the public the blame for imperiling the national health or safety by forcing a strike instead of accepting an impartial decision. Fear of public indignation, properly focused, would probably lead to more acceptance of voluntary arbitration.

(3) Since an injunction may be the only way to stop a strike, the statute should authorize the President to obtain an injunction for as long as he deems appropriate but not more than twelve months. The public health and safety are more important than the rights of either party.

(4) The President should also have power to seize and operate the industrial property affected by the dispute with only the guaranty of “just compensation.” Such a step would be as distasteful to employers as injunctions to unions, but the aim is to make Presidential intervention objectionable to both. Since strikes would be forbidden during the period of government operation, the President should be authorized, but not required, to appoint a Wage Adjustment Board to recommend any changes in wages and conditions of employment for the period of government operation. The parties would be under heavy pressure to adopt these interim conditions as the terms of the final settlement in order to terminate the seizure, but the appearance of voluntarism — and some of the reality — would be preserved. The pressure is less than under compulsory arbitration, which I reject even as an available procedure upon the ground that it would too easily become the normal course.

(5) Finally, the President should be given his most important power in explicit terms — the power to do nothing. Sometimes the parties negotiate agreements very promptly after they are convinced that no one else will carry the burden.

The flexibility of the choice of procedure approach is an important asset, but the chief advantage over other remedies lies in its capacity for preserving uncertainty as to the form and extent of government intervention. Any set course of procedure enters into the parties’ calculations with the result that their negotiations tend to run the full course before they buckle down to business. This weakness has frequently developed under the Railway Labor and Taft-Hartley Acts; the 1950 coal strike is one illustration, the 1959 steel strike is another. In ordinary labor negotiations the risks and costs of a strike are among the most powerful factors in bringing about an agreement. Since these forces are largely inoperative when the cessation of operations would endanger the public, the choice of procedures approach substitutes new uncertainties. Some alternatives would be objectionable to employers, others to unions. The stage would be set for active mediation, going far beyond exhortations and expressions of good will, in which the President neither hesitated to influence the substance of the bargaining nor allowed the parties to forget that the choice of his procedure, in the event of continued disagreement, might be influenced by his judg-
ment as to who was to blame for the want of a settlement. Thus armed with a variety of weapons, the Chief Executive would probably be spared the use of any.

This proposal contemplates greater governmental influence upon labor-management negotiations than has characterized the Eisenhower administration. In my judgment this is not a disadvantage. The reasons are intertwined with the final aspect of our inquiry — whether there are ways consistent with voluntarism of meeting the danger that unions will use their bargaining power to negotiate conditions of employment inconsistent with the public interest.

VI

One danger is the potential use of union power to preserve existing jobs even at the cost of delaying economic progress. The accelerating pace of scientific discovery carries promise of extraordinary technological advances but it has also created fears in the minds of employees and generated charges of "feather-bedding" and interference with management prerogative. We speak of "the problem of automation."

The ways of dealing with automation exemplify the approaches to the entire subject of this symposium. Society might deprive unions of power to influence the rate of technological change by destroying their bargaining power. In theory, society might give management unrestricted freedom to introduce new machinery or new methods by forbidding unions to strike against their introduction. Either of these alternatives would seem to toss the men and women whose jobs were eliminated upon the scrap heap of unemployment along with obsolete machinery. The third course available is for labor, management and the community to address themselves to the needs of the men and women whose jobs are threatened by automation and other forms of economic or technological change.

I submit that the third course is the most constructive. Automation is not a problem. No worker wants an unnecessary job. No one wants to work the old-fashioned, back-breaking way if there is a quicker and easier method for getting the job done. Labor unions are not opposed to industrial progress. The source of resistance to change is the brooding fear of unemployment. A man with a wife and children to support does not rush to finish the only work he knows, if he fears that his employer and the community will turn their backs upon him when the work is done. This has been a normal human instinct since the beginning of time. In 1579 the hapless inventor of a weaving machine was ordered to be strangled because his device reduced men to beggary. The history of the Luddite riots reads like the story of a Civil War. The only way to remove resistance to technological change is to give assurance that the community, which gains from the change, will take strong measures to mitigate the inevitable hardships of the dislocation. This is also the only solution consistent with social justice.

Much can be done by collective bargaining between management and vigorous unions. With good will they can often work out methods of installing new devices at times and in ways which reduce the impact upon employees with accumulated seniority. Severance pay and supplemental unemployment
benefits can be provided. Farseeing management and union officials are already working together upon such problems. The Armour Packing Company and United Packinghouse Workers have set up a special committee. Kaiser Steel and the United Steelworkers are following a similar course.

There are also governmental measures which would assist management and labor in finding wise solutions.

First, the government should make it plain that the installation of new machines and new methods of manufacture is properly a subject of collective bargaining upon which decisions should be made through the cooperation of management and labor. The time has passed when employers could assert the prerogative of unilateral action in an area of such vital significance to their employees.\(^{14}\)

Second, the government can facilitate the negotiation of progressive solutions by rendering greater technical assistance to companies and unions seeking the best way of installing new machines and new methods without injustice to the employees. Many companies and unions have found ways of going through periods of radical readjustment with a minimum of hardship to their employees. Here is a specific illustration of the need for the kind of storehouse of information which I mentioned earlier.

Third, automation and efficient use of manpower should be a major topic at a national conference of industrialists and labor union officials called under the auspices of the Department of Labor. Such a conference should affirm the determination of both labor and management upon two points — (1) their intention to make full industrial use of automation and other scientific discoveries and (2) their determination to protect the human interests of employees in accomplishing the conversion.

Fourth, the government should assist men displaced by new machines in finding equal or better jobs in other industries. Industrial changes cause the migration of industry. Our employment services should be organized to give wage earners equal opportunities to move to locations where there is a more promising future.

Fifth, the federal government should increase its support for training programs which will fit men for the new jobs created by technological development. The Bureau of Apprenticeship Training does excellent work. Such activities should be expanded into retraining displaced workers. There are few expenditures which yield as high a return upon the investment.

Finally, the unemployment compensation laws should be revised in such a way that a man who has accumulated substantial seniority could secure retraining in new skills without losing the right to unemployment compensation. Under the present law a man who seeks retraining because his old job has disappeared is not entitled to employment compensation because he is not technically available for employment. Both the individual and the community would benefit from this revision, the individual worker by obtaining a more interesting

\(^{14}\) In saying this, I assume that the National Labor Relations Board will continue to prescribe the statutory subjects of collective bargaining. If this rule of law were changed, as I think it should be, the government should simply eliminate any legal obstacles to bargaining and strikes upon such issues. See Cox, *Decisions of the Supreme Court at the October Term, 1957*, 44 Va. L. Rev. 1057, 1074-1086 (1958).
and productive position and the community by increasing its supply of skilled workers.

Such reforms would be no panacea. Industrial change produces dislocations which carry inescapable hardship for some, even though there is net gain to the community. I submit, however, that they hold much greater promise than other solutions.

VII

In the world of the 1960's it may not be enough to direct collective bargaining into channels which produce voluntary agreements upon bargains acceptable to management and labor. The wage contracts negotiated by management and labor in key industries and any price changes which follow the negotiations will have an even more important impact upon the economy than today. Since the public has a vital interest in key wage and price agreements, has it not the right to make its voice heard during the negotiations so that due attention will be focussed upon the public consequences?

I suggest that the answer is "yes," and that one of the next developments in both collective bargaining and government practice will be the evolution of ways of making the public interest felt without resorting to wage and price controls. Professor Dunlop proposes that a beginning be made by holding annual or biennial conferences of senior government, labor and management officials for the specific purposes of discussing the forthcoming private contract negotiations. The discussion should go far beyond general exhortation into detailed facts and figures. Although not a negotiation session and not aimed at formal agreements, there should be a genuine interchange of views upon key issues. President Kerr of the University of California suggests that an independent fact-finding board review key bargains and report to the public, thus subjecting the negotiators to the pressure of knowledge that although they have freedom of contract, they will be held to a public accounting. Possibly the government will some day occupy a third chair at the bargaining table.

Please understand that in making these suggestions I am not advocating, but seeking to avoid, government regulation. The better the parties, labor and management, safeguard the public interest, the less will be the need for public intervention.

Between participation and regulation there is a world of difference. The vice in government determination is that it carries the force of law. Compulsion is efficient in theory but by making the job too easy, it reduces the challenge to creative imagination. We progress not by giving orders but by finding new accommodations. William H. Davis, the wise philosopher of collective bargaining, expressed my thought so eloquently that I beg your leave to read a short passage.

The establishment of conditions of employment by agreement . . . is the manifestation in industrialized societies of the pregnant fact that in the life of mankind creation is the victory of persuasion over force. . . .

Compulsion can have a benign effect insofar as it establishes behavior essential to social welfare, yet it is always accompanied by the baneful effect that it stops the *progress* of civilization. . . .

We grow in character and dignity not by compulsion in our relations with one another, but by reasoned agreement. The knowledge of good and evil and the freedom to choose the better and reject the worse, with which we are uniquely endowed, here come into play. . . . It is upon them that we rely for the liberty of thought and action through which we visualize the upward adventure of life on earth.

This is the basic reason why we must preserve collective bargaining.