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REVISION OF THE TAFT-HARTLEY ACT*

ARCHIBALD COX**

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NE difficulty in discussing the Taft-Hartley Act is the wide range and great variety of subjects which it covers—topics so unrelated as the outlawing of certain kinds of strikes and picketing, union contributions and expenditures for political purposes, the creation of a Federal Mediation and Conciliation Service, and the elimination of Communist control of labor organizations. A second obstacle is the danger of overlooking the forest in our fascination by the trees. The debates of 1947, the National Labor Relations Board decisions and the congressional hearings have produced a great number of issues hotly contested by the protagonists, highly interesting to the observer, yet withal a mass of detail. In a conference such as this it is important to back far enough away to get a whole view with the hot little contests in proper perspective. I propose to begin my discussion of Revision of the Taft-Hartley Act by asking where we are and how we got here. We shall then be in a position to examine a second question: How large is the area of agreement on a national labor policy? How does it compare to the areas of dispute? In my judgment the great bulk of the American people, including the responsible leaders of management and labor, are agreed on the fundamental elements of a national labor policy; the disputes go to technical questions and to matters of judgment or detail. If this opinion is correct—and I hope to persuade you that it is correct—should not the administration abandon its plan of revising the Taft-Hartley Act at this session of Congress and establish a commission drawn from the House and Senate labor committees, responsible yet moderate spokesmen of labor and industry and informed members of the public who have no commitment to management or union? I am confident that such a body, given time and a competent staff, could lift the issues out of the atmosphere of political rivalry and reach an informed consensus of opinion. Legislation written in this manner would have more permanent value than a law which either business or labor felt has been imposed upon it without real consideration of all sides of the question.

* Address delivered at the Third Annual Labor Relations Conference held at West Virginia University, April 11, 1953.
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During the latter part of the nineteenth century labor organizations began to achieve sufficient coherence and economic strength to be vital forces in the community. As the unions' ability to conduct successful strikes increased, as the ranks of organized labor swelled from 250,000 members in 1886 to 2,000,000 in 1914 and 5,000,000 in 1920, the differences between employers and employees intruded upon the public consciousness. It became necessary to develop a public labor policy.

Initially the national labor policy was formulated by the judiciary. There is no need to relate in detail the familiar story of the growth of the labor injunction. The courts enjoined the unions from pursuing “unlawful objectives” or lawful objectives by “unlawful means.” The formula is plausible enough; the catch is that “unlawful” was used in an entirely Pickwickian sense. When the Supreme Judicial Court of Massachusetts ruled that a union which struck to compel United Shoe Machinery Company to bargain collectively was pursuing an unlawful objective, the court did not mean that the union was committing a crime or trying to induce the employer to commit a crime; the objective was unlawful only in the sense that the judges believed that the desire to secure from United Shoe an agreement to bargain collectively was not a sufficient reason for injuring the company's business by a strike. Similarly peaceful picketing was held to be an unlawful means of carrying on a labor dispute, not because picketing violated any statute or ordinance but because the judges disapproved of it. These are extreme examples but if time permitted recounting the cases I am sure that you would all be persuaded that the courts showed little comprehension of labor's needs or the ways of industrial life. Moreover, the first step in each case was likely to be the issuance of a preliminary order based upon papers submitted by the employer's attorney without hearing the union's side of the case.

In strikes large enough to affect the national economy, these legal principles were supplemented by the decision in the Debs case which permitted the government to enjoin such a strike.

regardless of the merits of the underlying dispute.

For our purposes the important point to observe is that the struggle against the labor injunction culminated in pretty general acceptance of the first of four major principles on which our labor policy is founded. The principle was that law has only a peripheral role to play in adjusting the conflicting interests of business and labor. The Norris-LaGuardia Act of 1932\(^5\) is the highwater mark of this development for it immunized in the federal courts all peaceful labor activities.

"So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit ... are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means."\(^6\)

Later the Supreme Court seemed to be about to write at least some of this philosophy into constitutional law.\(^7\) There even developed considerable tolerance for violence and other activities unhesitatingly punished in the absence of a labor dispute.

"A strike is essentially a battle waged with economic weapons. Engaged in it are human beings whose feelings are stirred to the depths. Rising passions call forth hot words. Hot words lead to blows on the picket line. The transformation from economic to physical combat by those engaged in the contest is difficult to prevent even when cool heads direct the fight. Violence of this nature, however much it is to be regretted, must have been in the contemplation of Congress when it provided in Section 13 of the [Wagner] Act that nothing therein should be construed so as to interfere with or impede or diminish in any way the right to strike. If this were not so, the rights afforded to employees by the Act would be indeed illusory."\(^8\)

The philosophy behind the labor legislation of the nineteen thirties was deeply rooted in the disappointing experience of half a century of legal intervention into industrial conflicts. In a democracy sanctions can be invoked only against the occasional wrongdoer. The effectiveness of law depends upon its acceptance


\(^7\) Thornhill v. Alabama, 310 U.S. 88 (1940); AFL v. Swing, 312 U.S. 321 (1941).

\(^8\) Republic Steel Corp. v. NLRB, 107 F.2d 472, 479 (3d Cir. 1939).
by the governed, either because they approve the policy which it expresses or because it is the law. To enforce a judicial edict against large numbers of employees is out of the question. There was, and is, no consensus of opinion about the propriety of labor's various objectives or of the weapons with which they are pursued. In each instance the decision, whether statutory or judge-made, too obviously involves policy judgments, and feelings run too high, for it to command acquiescence merely because it is law. Hence Congress turned the policy of relying for the adjustment of industrial conflicts upon negotiation between employers and labor organizations strong enough to bargain effectively on behalf of employees. Judicial intervention into strikes, boycotts or picketing was prohibited partly because it did nothing to resolve the underlying problems and partly because the injunction was traditionally a weapon for weakening employee organization. As a result of the Norris-LaGuardia Act, unions enjoyed virtual immunity from regulation during the decade and a half prior to the Taft-Hartley legislation.

The second major development in labor law in response to the emergence of labor unions was the recognition of legally protected rights to organize and bargain collectively. They can be traced back to the 1895 report of the United States Strike Commission¹⁰ and the enactment of the Erdman Act¹⁰ through the principles declared by the first National War Labor Board in 1918¹¹ to the NRA¹² and ultimately to Section 7 of the National Labor Relations Act of 1935.¹³ The NLRA embodied three principles:

(1) Employees should be protected by the government against any form of employer coercion or interference with their forming, joining or assisting labor organizations.

(2) The bargaining representatives designated by the majority of the employees in an appropriate unit should be the exclusive representative of all the employees in the unit.

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¹¹ Act of June 1, 1898, 30 STAT. 424.
¹² Secretary of Labor, Annual Report for 1918, p. 192: "The right of workers to organize in trade-unions and to bargain collectively through chosen representatives is recognized and affirmed. This right shall not be denied, abridged or interfered with by the employers in any manner whatsoever. . . ."
¹³ Section 7(a) of the National Industrial Recovery Act, 48 STAT. 198, provided that every code of fair competition should include the following provision: That employees shall have the right to organize and bargain collectively through representatives of their own choosing.
¹⁴ 49 STAT. 449 (1935).
(3) The employer must bargain with the representative designated by a majority of the employees and, at least until an impasse is reached, wages, hours and conditions of employment should be established only by joint determination.

Nothing in the Wagner Act curtails the virtual immunity from regulation that the Norris-LaGuardia Act conferred upon labor unions.

The third great principle of our national labor policy as it developed prior to 1947 was that the government should not concern itself with the way in which collective bargaining was conducted or with the terms negotiated between company and union, except in times of national emergency. We staked our welfare on the belief that the conflicting interests of management and labor should be adjusted only by private negotiations, backed where necessary by resort to economic weapons, without the intervention of law.

III

When the Taft-Hartley Act is appraised against this background, one reaches the rather startling conclusion that what some regarded as a panacea and others labeled a "slave labor law" did not in fact make any major departure from the national labor policy we had been developing a period of years. Some exceptions to the first principle were created. Sections 206-210 revive the labor injunction in national emergency disputes—a problem I shall discuss at the end of my remarks if time permits. Section 8 (b) outlaws the following concerted activities:

(1) violence and intimidation;

(2) secondary boycotts; i.e. the refusal to work for employer A unless he ceases to do business with employer B, with whom the union has its real dispute;

(3) strikes to compel an employer to commit some unfair labor practice such as discharging an employee for belonging (or not belonging) to a particular union, or bargaining with the striking union after the NLRB has certified a different representative;

(4) jurisdictional strikes over work assignments.

The weapons thus withheld, especially the secondary boycott, have been important to certain unions in the past. A strong case can be made for the proposition that Section 8 (b) (4) (A) and (B) goes too far in some respects, as when it compels employees to
work on goods farmed out from a struck establishment\textsuperscript{14} or requires union mechanics and laborers in the construction industry to work on the same building with nonunion men.\textsuperscript{15} It is easy to show the futility, even the harmfulness, of the procedures for handling jurisdictional disputes for they undermine instead of supporting the private, non-governmental machinery established by employers and unions. On the other hand, two contrary points seem infinitely more significant. The points at which the Taft-Hartley Act revives legal intervention into every-day disputes are trivial in comparison to those it leaves untouched. Also, the law intrudes only in areas where the overwhelming consensus of opinion condemns the unlawful conduct. This is clearly true of violence and strikes to compel the commission of unfair labor practices. While the jurisdictional dispute provisions are faulty, there is almost unanimous agreement upon the wisdom of outlawing the jurisdictional strike. Even in the field of secondary boycotts, there is quite general agreement that some secondary boycotts should be forbidden by law; the debate is over where to draw the line.

Nor has there been any serious departure from the second major postulate of labor policy—the recognition and protection of the rights of self-organization and collective bargaining. Proof of the law's adherence to the essential thesis of the Wagner Act is found in the fact that the five substantive unfair labor practices created by the original Act remain unchanged save only in two respects: (a) the amendments guaranteed employers a measure of free speech which the NLRB had denied\textsuperscript{16} and (b) employers were relieved of the duty to bargain about changes in an existing agreement to take effect before the agreement expired.\textsuperscript{17} I do not mean to imply that the Taft-Hartley Act made no significant changes nor to suggest that the changes made were improvements. In borderline cases the scope of the Act was reduced. Technical legal doctrines were introduced that might have hindered enforcement of the Act if the NLRB and courts had not simply ignored the changes.\textsuperscript{18} The separation of the General Counsel from the Board

\textsuperscript{14} It has been held that the statute does not reach such a situation [Douds v. Metropolitan Federation of Architects, 75 F. Supp. 672 (S.D.N.Y. 1948)]. Senator Taft has introduced a bill making the exception plain. S. 655, 83d Cong., 1st Sess., Section (f).
\textsuperscript{16} Section 8 (c).
\textsuperscript{17} Section 8 (d).
\textsuperscript{18} These changes are discussed in Cox, Some Aspects of the Labor-Management Relations Act, 61 HARV. L. REV. 1, 14-15 (1947).
divided authority, gave rise to unseemly rows and must have reduced the efficiency of the entire organization. Such errors should be corrected. Debate concerning the remedies is inevitable. Nevertheless, the differences are inconsequential in comparison with the wide area of agreement. Except to grant employers freedom of expression, no responsible person has yet suggested repealing or modifying any of the unfair labor practices forbidden under the Wagner Act in order to protect the organization of labor unions.

In the view of some observers the most important development portended by the Taft-Hartley law is the extension of government regulation into new areas theretofore left to private adjustment. The internal affairs of labor unions became matters of public concern at least to the point of requiring unions seeking NLRB assistance to eliminate any avowed Communist officers and to file financial reports with the Secretary of Labor. The statute manifested public concern with the administration of collective agreements by facilitating actions to recover damages for breach of a collective bargaining agreement. It deals with the procedure of collective bargaining by prescribing a series of notice periods to be observed before a strike. Most important, the provisions relating to welfare funds and union security regulate the terms that may be included in collective bargaining agreements. The Taft-Hartley Act is the first instance in which our government has undertaken to settle by law, for the benefit of one side or the other, issues of labor relations previously resolved by collective bargaining. I fully share the deep concern that others feel about crossing this line, yet we are bound to confess that our chief concern is with what may follow once the line is crossed. Thus far the statute remains substantially faithful to the principle that the wages, hours and other terms and conditions of employment should be fixed by private adjustment not government decree.

In summary, I submit to you that the enactment of the Taft-Hartley Act made no essential, major change in the three fundamental principles of our national labor policy.

19 Section 9 (f), (g), (h).
20 Section 301.
21 Section 8 (d).
Why then did consideration of the Taft-Hartley law produce a major political debate and arouse such strong emotions? In my judgment there were two reasons:

First, organized labor, repeating the mistakes of business in the mid-thirties, sought to retain the virtual immunity from government regulation that it enjoyed under the Norris-LaGuardia and Wagner Acts. Congress and the bulk of the American people rejected this view, believing that on some occasions labor had abused its power. The outcome established a fourth basic principle of labor policy which should never have been challenged—that the activities of labor unions, like those of other groups, are subject to regulation in the public interest.

Second, the Taft-Hartley debates aroused strong emotions because those who believe in labor unions and collective bargaining feared that the need for the prevention of abuses was being used as a cover for an attempt to weaken and destroy the unions, and to undermine collective bargaining. In my judgment the fear was justified. The original Hartley bill contained numerous provisions aimed at weakening unions, confining the area of collective bargaining and restricting use of traditional weapons of self-help. The Senate amendments improved the bill measurably, but some of the labor-baiting gimmicks survived. For example, in the case of a strike before a 60-day notice period has expired, employees lose the protection of the National Labor Relations Act, opening the way to such vicious tactics as industrial espionage, discriminatory discharges and employer sponsored back-to-work movements. The Section 9 (c) (8) prohibition against permitting replaced strikers to vote could easily be used to destroy a local union.

Other provisions in the law seemed to me then as now to threaten to prolong and intensify the struggle for union recognition and collective bargaining. Several sections encourage employers to drive a wedge between employees and the union. They express the mistaken philosophy that unions are outsiders having no legitimate interest in a plant instead of the employees' own organizations formed because group action is their only effective method of self-protection, self-advancement and self-expression. Too often, as in the case of union security, health and welfare funds and

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22 See e.g., Sections 8 (c), 8 (d), 9 (a) and 209 (b) .
23 Section 8 (a) (3).
24 Section 802 .
the adjustment of grievances, the Taft-Hartley law recognized a serious problem but adopted the solution which would encourage the employer to take a position antagonistic to the union.

V

The enactment of wise labor legislation depends upon the abandonment of extreme positions. Organized labor must concede that its activities are not above public control; it must recognize the existence of problems. Responsible business leaders must deny the extreme reactionary's desire for a labor law which preserves his hope for a collapse of unions and the end of collective bargaining. Moreover, just as I believe that the responsible leaders of organized labor have in truth abandoned their extreme position, so am I convinced that the great body of opinion among American businessmen accepts labor unions and institution of collective bargaining as vital forces in the community.

Among those who have abandoned the extreme positions, the area of agreement is large and more important than the points of dispute. I make this assertion because it seems to me that even today there is overwhelming agreement upon the underlying principles. The dispute is about their technical application or matters of detail. Let us consider several as examples.

1. Employees shall be guaranteed full freedom to form, join and assist labor unions of their own choosing.

The principle implies the prohibition of all forms of employer interference and the prevention of violence or coercion by labor organizations. There is no serious controversy on either point although there is real need for competent analysis of the statutory and administrative doctrines implementing the guarantees. The hottest debate is over the degree of self-expression permitted employers. In some sections of the country the most vicious kinds of propaganda have been used to destroy labor unions.\(^{25}\) Perhaps the unions are right in saying that the Board has granted employers too much freedom to abuse the right of appeal to reason, although I would rather risk erring on the side of freedom rather than curtailment of expression. On the other hand it may be argued that the Board has thwarted the intent of Congress in setting aside elections because employers have exercised their constitutional and

statutory privilege; or in forbidding employers to require employees to listen to speeches on company property unless the union is accorded a similar opportunity. Granting the importance of the topic, I submit that it is a measure of our fundamental agreement that this is the only open, substantive issue of any consequence in the whole field of protecting employee organization.

2. There is a recognizable public interest in the prohibition of wasteful strikes and picketing.

This too is a principle which no one would seriously challenge. I discussed it earlier in tracing the development of our national labor policy and sought to show not only that the points at which the Taft-Hartley Act revives legal intervention into everyday disputes are trivial in comparison to those it leaves untouched but also that the law has intruded only where the overwhelming consensus of opinion condemns the unlawful conduct. The point must be conceded in the case of violence, strikes to compel the commission of unfair labor practices, and jurisdictional disputes. Nor is there much controversy over the basic purpose of the remaining provisions outlawing concerted activities—to protect neutral employers and the community against spreading the economic losses of a labor dispute by secondary boycotts. Sections 8(b)(4)(A) and (B) have given rise to more difficulty in the administration than any other provision. Nearly everyone who has studied the subject wants changes in one direction or another. For example, it is my personal opinion that a secondary employer surrenders his neutrality by undertaking to do work which would ordinarily be done in an establishment where the employees are on strike, hence I approve Senator Taft's amendment relaxing this aspect of the present prohibition. I would also make it plain that employees in the construction industry may picket a job where non-union men are employed without having the NLRB brand their picket lines unfair secondary boycotts because the practice is to erect buildings through a series of subcontracts instead of a single large corporation with different departments to do the work. On the other hand, I would tighten up the present law by making it plain that it is an unfair labor practice to threaten to strike a

26 General Shoe Corp., 77 NLRB 124 (1948).
27 Bonwit Teller Co., 96 NLRB 608 (1951) enforced 197 F.2d 640 (2d Cir. 1952); Metropolitan Auto Parts, Inc., 101 NLRB No. 171 (1953).
secondary employer if he continues to handle hot goods\textsuperscript{30} and by providing that a refusal to work on hot goods does not cease to be an unfair labor practice merely because the employer has signed a collective agreement consenting to the refusal.\textsuperscript{31} The point which I would emphasize, however, is not the correctness of my opinions. It is that the differences of opinion deal with essentially minor matters on which reasonable men may differ. No one with a sense of tolerance or a grain of humor can dogmatically assert that on this kind of question only his view is correct. Moreover, the issues are detailed. They are technical. They involve matters of degree. We should not allow such differences to prevent reaching a consensus of opinion upon major issues.

3. \textit{Wages, hours and other terms and conditions of employment should be fixed by free collective bargaining. Except in periods of national emergency the government should not regulate directly or indirectly the terms of collective bargaining agreements.}

There are few who will quarrel with this proposition stated in general form, and not many who seek exceptions. Yet the Taft-Hartley law was the first occasion on which the Congress regulated the terms that might be included in collective agreements for the purpose of settling in favor of one side or the other specific issues which had heretofore been left to discussion and the interplay of economic forces.

One illustration is Section 302, which prescribes the conditions on which employers and labor unions may establish trust funds for the benefit of employees and their families. Since health, welfare and pension funds represent large accumulations of money held for the benefit of employees by union officials, there could be little question of the wisdom of some form of government supervision similar to state regulation of mutual savings banks and mutual insurance companies. No one should complain of public scrutiny who holds other people's money. But when the regulation is cast in terms of what a collective agreement may provide instead of supervising the administration of whatever fund it may establish, when the law sets up the employer as the watch dog for the protection of beneficiaries, it becomes a legislative attempt to resolve collective bargaining issues. The bill introduced by Senator Taft

\textsuperscript{30} Conway's Express Inc. v. NLRB, F.2d \textit{(2d Cir.)}, \textit{affirming} 87 NLRB 972 (1949); Local 878, International Brotherhood of Teamsters, 92 NLRB 253 (1950).

\textsuperscript{31} Authorities cited note 30 \textit{supra}. 
to amend Section 302 would interject the government still further by prohibiting the payment of moneys into a fund until its provisions had been reviewed and approved by the Secretary of Labor.\textsuperscript{32}

Similar doubts arise concerning the Taft-Hartley prohibition of the closed shop and its limitation reducing the union shop to a device for securing financial support from all the employees in a bargaining unit.\textsuperscript{33} The 1947 hearings produced overwhelming evidence of the need for some legislation upon the subject. Union security agreements put enormous power in the hands of officials chosen by a majority of the employees that may be used to oppress individuals and minorities within the group. A few unions used this power to establish job monopolies, to suppress fair competition or to punish individuals with divergent political views. Although the abuses are rare and most unions can be relied upon to correct them, it is inconsistent with our democratic ideals to deny minorities protection on the ground that the majority will not abuse its power very often. But the union security question is not simply a problem of minority rights. It has been fought out over the conference table and on the picket line because the union desired security against internal disintegration and interunion rating, while the employer wished to preserve his relative bargaining power by denying this added strength to the employees' representative. Moreover, not every company opposes closed or union shop agreements. Several weeks ago I was present at a meeting of personnel men who were roundly scolding the government for not outlawing all forms of union security. My rather mild objection served to arouse only stronger feelings until one man in the back of the room arose and said this,

"You don't really understand the problem. I was Personnel Manager for a big western contractor. Any device by which a union delivers the number of workers you want with the skills you require 500 miles out in the sage brush where there just wasn't anybody before you got there, all without cost to you, is a damned good arrangement."

It is not my purpose to argue that union security is good or bad. It is to ask you whether it is really desirable to have the issue between employers and employees resolved by legislation instead

\textsuperscript{32} S. 658, 83d Cong., 1st Sess.
of bargaining. The uniformity inherent in any statutory rule is not suited to an economy made up of an infinite variety of businesses with all sorts of needs and customs. The closed shop has been abused in some industries; it serves no useful purpose in others; but I cannot help thinking of my friend who wanted to hire through the union because it relieved his construction company of the need for recruiting labor. What is the objection to such an arrangement provided that there are safeguards which prevent it from being an instrument of oppression?

Another important aspect of the problem, perhaps, is embraced in the old aphorism, "What the government gives, the government can take away." When unions went to a sympathetic NLRB to expand the scope of collective bargaining, they themselves created the risk that industrialists would go to a sympathetic Congress to curtail it. When industrialists lift the problem of union security from the bargaining table into the Capitol, do they not create the risk that the Congress may some day resolve the issue, but in the opposite manner? In New Zealand and Saskatchewan a certified or registered union is entitled to maintenance of membership or compulsory union membership by statute.

Let us leave the matter there. While the issue of union security will undoubtedly continue to perplex our labor relations, it need not be an insuperable obstacle to solving other questions.

4. Individuals and minorities should be protected in their civil liberties against the risk of arbitrary or oppressive action by a labor union.

This fourth proposition is the corollary of what I said on the issue of union security. Massachusetts grants an individual employee a right of administrative and judicial review of the action of a labor organization which seeks his discharge under a closed or a union shop contract because of his exclusion or expulsion from the union. Unions are free to choose between foregoing union security clauses and submitting to this degree of governmental review of their internal affairs. The American Civil Liberties Union and other organizations would press the protection further and have the government review all exclusions and expulsions. Balancing the freedom of a voluntary association to select its members against the individual worker's interest in participating in the government of his industrial life through the only available institution—by collective bargaining through the
union — presents a difficult choice. Here again the point which I would make is not that one conclusion is wiser than the other; it is that the need of some protection is quite generally conceded.

5. Instead of prescribing uniform rules for all industries, the Act should be amended to take account of the needs of industries affected by special conditions.

I mention this point to re-emphasize the careful analysis of particular problems which must precede any worthwhile revision. The present law as interpreted by the NLRB invalidates most of the collective bargaining agreements in the building and construction industry. Since employment is sporadic and employers and employees migrate from job site to job site, contracts must be negotiated before the jobs are manned; nevertheless the NLRB has decided that no contract is valid unless representative number of men are on the job. Similarly, although thousands of dollars and hours of effort were expended, no method of conducting elections has been found applicable to the generality of construction workers. It would be surprising if there were not similar problems in other industries. Their discovery, devising methods of correction and drafting of statutory language requires detailed, careful and time-consuming study.

The principles outlined do not cover the whole field of labor relations legislation. There are some glaring omissions. For example, I have said nothing about the so-called "states rights" amendment which would open strikes and picketing to state regulation even in industries otherwise subject to NLRB jurisdiction. More detailed discussion, however, would serve only to multiply the illustrations. "States rights" — to pursue this one example — is an appealing political slogan but a rational judgment cannot be passed upon the proposal until after careful study of forty-eight state laws regulating strikes and picketing to discover just what state regulation would involve, followed by an effort to appraise the interplay between such laws and other federal policies. But enough has already been said, I hope, to demonstrate the truth of two propositions:

First, there is sufficient likelihood of reaching a real consensus of opinion on the fundamentals of labor relations legislation to justify a major effort to work out an agreement.

Second, the troublesome issues concern subordinate details. They relate to matters of technique. They turn on questions of
degree. Most of all they require closer analysis of present NLRB doctrines and better draftsmanship than went into the present statute.

VI

If these conclusions are sound, they lead to a final suggestion: Congress should abandon the plan to amend the Taft-Hartley Act at this session. It should refer the issues to a commission with the time and facilities for working out proposed legislation. The commission should be made up of members of the Senate and House labor committees, leaders of organized labor and prominent industrialists who have participated for their own companies in collective negotiations. The commission should also include a few so-called "public members" drawn from men of experience in labor relations. It should be adequately staffed by men of its own selection. Above all else it should be given time for calm deliberation and private discussion. Rome was not built in a day. The Constitutional Convention admitted no reporters and, to the best of my knowledge, no leaks appeared in gossip columns.

It may be objected that the millenium is not in sight, that management and labor have made plain their disagreement, and that the failure of the tripartite advisory body appointed by Secretary Durkin proves the futility of such an effort. Two answers seem appropriate:

First, the failure of Secretary Durkin's group seems attributable to inept management rather than the impossibility of working out agreement. Two indispensable conditions were lacking—time and privacy. Prolonged consideration and delicate negotiation must precede abandonment of positions which were publicly announced for the purposes of leaving room for political maneuver.

Second, too much can be gained by achieving a measure of agreement, to permit accepting less. A hundred years ago George Bancroft wrote:

"The feud between the capitalist and laborer, the house of Have and the house of Want, is as old as social union, but those who can act with moderation, prefer fact to theory, and remember that everything in this world is relative and not absolute, will see that the violence of the contest may be stilled."

The War Labor Board and Wage Stabilization Board, despite their mistakes and inadequacies, bear witness to what can be accomplished when men of good will attempt to resolve their differences.
When our reason tells us that in the field of labor relations legislation there is fundamental and widespread agreement, should we not seek first to develop and build upon that foundation? If we succeed, the structure will be lasting. If we fail, nothing but effort will have been expended.

VII

Discussion of the Taft-Hartley Act would be incomplete without a word about national emergency disputes. Section 206 empowers the President to appoint a Board of Inquiry whenever he is of the opinion that a strike affecting a substantial part of an interstate industry will "imperil the national health or safety." The board is directed to make a factual report without recommendations for the settlement of the dispute. Thereafter the President may direct the Attorney-General to secure an injunction against the strike. Sixty days later the Board of Inquiry is to make another report describing the parties' efforts to settle the dispute including "a statement by each party of its position and a statement of the employer's last offer of settlement. Fifteen days thereafter employees are to ballot on the question whether they wish to accept this final offer of settlement. Regardless of the result, the injunction must be dissolved; and if the dispute is not settled, the President must report to Congress.

It is my opinion that this scheme is unwise and is also unfair to employees and labor unions. I would repeal it and substitute a new law giving the President the widest possible discretion in deciding (1) whether to intervene in a dispute and (2) what method of intervention to follow. The soundness of these propositions is demonstrated by both experience and analysis.

Certainly experience shows that the Taft-Hartley provisions have contributed nothing to the settlement of emergency disputes. They have been invoked on ten occasions since 1947. Work stoppages were averted in four disputes but since one involved the atomic energy workers at Oak Ridge who have never gone on strike, one can scarcely give the Act credit for preventing a stoppage. In seven cases injunctions were obtained and in four of the seven the injunction did nothing to halt the stoppage. In the West Coast Maritime and East Coast Dock disputes the stoppage was delayed for the 80-day period but was resumed thereafter when the Taft-Hartley machinery was exhausted. In the 1948 and 1950 coal
strikes the United Mine Workers ignored the injunctions. There is little reason to suppose that the Taft-Hartley procedures played any important part in the settlements reached in the three cases in which the President did not seek an injunction. In the Meat Packing case a protracted strike took place but no injunction was sought because only part of the industry was affected. In a telephone case a settlement was reached by collective bargaining during suspension of the sittings of the Board of Inquiry, but there is no reason to suppose that its members would have been less effective mediators in other positions. One can fairly summarize the data by saying that in four out of ten cases the Taft-Hartley Act has demonstrated its futility. In a fifth case its machinery was found inapplicable and in the others, so far as the eye can see, the Act did not seriously affect the outcome.

It may be argued that these facts do no more than show that the Taft-Hartley Act has done no good—that they fail to prove that it is a positive evil. There are two answers to this contention. First, before labor is deprived of its only effective bargaining weapon by reviving the labor injunction even for an 80-day period, we should expect something better of the law than that it not make the settlement of disputes more difficult. Second, there is some affirmative evidence that the Taft-Hartley Act prolonged several disputes and made their settlement more difficult. In the West Coast Maritime strike there were indications that both parties quickly provoked an impasse so that an injunction would issue, then delayed any real bargaining during the 80-day period, and finally settled their differences under the pressure of a strike. It is also noteworthy that no real progress was made in settling the 1950 coal strike until Judge Keech's dismissal of a contempt citation demonstrated the ineffectiveness of the Taft-Hartley injunction.\footnote{United States v. United Mine Workers, 89 F. Supp. 179 (1950).}

Analysis of the forces at work in national emergency disputes also demonstrates the unsoundness of the Taft-Hartley provisions. Negotiations between the management of a company and the union representing its employees differ in one important respect from buying and selling commodities in a competitive market. The company must eventually hire back the employees, and the workers must eventually work for this particular employer. Neither has a practical alternative. Unlike the buyer of shoes or whiskey the employer cannot go to another dealer if he does not like the price
the union offers. Equally, if the great mass of workers in a steel mill do not like the employer's proposals, they cannot turn to someone else who has a plant for them to work in who will pay higher wages. Hence, while management and labor must eventually agree, the terms of the agreement are scarcely the result of ordinary competitive forces.

What is it then that brings management and labor together? Negotiation tends to produce agreement or at least to narrow the area of disagreement. Weariness often plays a part. The negotiators on both sides reach a stage where they would rather compromise than continue their diet of aspirin, cigarettes and coffee. In the final analysis, however, what makes collective bargaining work is the risks inherent in a strike. Where the stakes are high, the bargain is never struck until there is no place else to go, nothing left to do, no possible escape from choosing between compromise and battle. Experience has shown over and over again that when government supplies a procedure, management and labor rarely trade out an agreement. Each side hopes that it may get more favorable terms by following the procedure than by settlement. To put it in a phrase, the strike or the fear of a strike is the motive power that makes collective bargaining operate.

In most industries we are ready enough to accept this way of fixing wages. It works pretty well on the whole and such economic waste as results from strikes is more than offset by the advantages of leaving business and labor free to work out their own agreements. The trouble comes in those industries where a strike becomes intolerable to the public long before it serves its function of making the parties'—management and labor—agreement on a voluntary resolution of their differences—the railroads, electric light and power utilities and the steel industry are ready examples.

It is this characteristic of the strike in critical industries that creates almost insoluble difficulty in working out a method for settling national emergency disputes, for we are now in this dilemma: On the one hand collective bargaining can work only if there are present the risks of a strike—and occasionally the cost of an actual strike to bring the parties to an agreement. On the other hand in certain industries a strike does so much harm that we cannot permit it. We cannot wholly eliminate the risks of strikes and at the same time preserve collective bargaining. Equally we cannot discard collective bargaining without substituting a large
degree of government regulation. We must pay for our freedom.

Under these conditions perhaps the best we can do is to create uncertainties, pregnant with risks, as to the nature of any government intervention for the standard procedure laid down by the Taft-Hartley law. There should be substituted executive power to choose between a wide range of alternatives. Give the President discretion as to when to intervene; let him decide whether to appoint a fact-finding board with power to make recommendations or to take more drastic action; let him choose between seizure which industry finds distasteful and the injunction which is so much disliked by labor; leave it uncertain whether the government will change terms and conditions of employment or require continued operation under existing conditions. A law which left the parties so far in doubt would create pressures for settlement not present in the existing statute.