

## LABOR LAW REFORM: LESSONS FROM HISTORY

*Charles W. Baird*

### Introduction

In 1988 labor union membership in the United States declined to 16.8 percent of the labor force. In the private sector the figure was 13 percent, and in government employment it was 37 percent (BNA, 130 LRR 143). By comparison, the corresponding figures in 1970 were 29.6 percent, 29.1 percent, and 32 percent; in 1980, they were 23.2 percent, 20.6 percent, and 35.1 percent (Troy and Sheflin 1985, pp. 3-15, 3-20). The defeat on July 27, 1989, of the United Auto Workers in the certification election at Nissan Motor Manufacturing Corporation's plant in Smyrna, Tennessee, was a widely publicized example of unionism's loss of market share to nonunion labor.

According to unionists, this decline is due to hostile management that has learned to exploit loopholes in the National Labor Relations Act (NLRA). The Labor Reform Bill of 1977-78 was an unsuccessful attempt by politicians who are sympathetic to unionism to plug those alleged loopholes. But the defeat of that measure has not stopped unionist demands for labor law reform. In his 1989 Labor Day speech, Lane Kirkland, the president of the AFL-CIO, said that he would prefer "no law" to the NLRA as it currently exists (BNA, 132 LRR 13). In November 1989, at its 18th biennial convention in Washington, D.C., the AFL-CIO adopted a resolution calling for a major labor law reform that, like the failed 1977-78 bill, would make it more difficult for employers to compete against unions during certification elections and would significantly increase the penalties imposed on employers found in violation of the law.

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The author is Professor of Economics at the California State University at Hayward. He thanks Kurt Leube, Sudah Shenoy, Steve Shmanske, Shyam Kamath, and Nan Maxwell, as well as an anonymous referee, for helpful comments on earlier drafts.

I agree that it is time for the Congress to enact and the President to sign significant legislation for labor law reform. But the sort of labor law reform I have in mind is rather different from that envisioned by Lane Kirkland. What I have in mind is reform that will actually protect, in the words of Section 1 of the NLRA, “the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing.” The NLRA never has done this, nor was it ever intended to do so. The AFL-CIO wants changes in labor law that will benefit unions; I want changes in labor law that will benefit workers.

The view that what is good for unions must also be good for workers is based on what I consider to be erroneous, but widespread, beliefs concerning the history of the American union movement. According to the conventional view, employers and courts, with the acquiescence of legislators, systematically abrogated the rights of workers and suppressed the development of labor unions, which were formed to defend those rights. It was not until the second third of the 20th century, with the passage of the Norris-LaGuardia Act (1932) and the Wagner Act (the original NLRA of 1935) that, according to this view, the federal government secured workers’ rights by promoting, rather than impeding, unionism.

In this paper I will offer a revisionist view of some major events in the history of American unions. This view supports the assertion of W. H. Hutt (1973, p. 23) that the Norris-LaGuardia and Wagner acts were “economic blunders of the first magnitude. They were worked for and acquiesced to under motivations of almost unparalleled sordidness and cynicism combined with the highest, misguided idealism.” The paper also provides a model for legislators to follow in the design of legislation to replace those two infamous acts.

First, I will explain the philosophical and theoretical perspectives from which I interpret labor union history and I will compare them with more conventional views. Second, I will analyze three major 19th-century milestones in union history—the Haymarket affair of May 1886, the Homestead lockout and strike of July 1892, and the Pullman strike and boycott of June-July 1894—from those perspectives. Third, I will reexamine two famous union-related Supreme Court cases of 1921—*Duplex Printing* and *Tri-City*—and will argue that the decisions therein are consistent with my revisionist perspectives and ought to be codified in labor reform legislation in the 1990s. Fourth, I will discuss the main features of the Norris-LaGuardia and Wagner acts, pointing out how they deviate from the concept of “the rule of law” exemplified in the two 1921 decisions and explaining why I think certain provisions of those laws ought to be repealed.

Finally, I will discuss a particularly outrageous proposal for labor law reform made by Paul Weiler of the Harvard Law School, and I will summarize my own recommendations for such reform.

### Revisionist and Conventional Perspectives

In history and social science, there is no such thing as a simple fact. All facts, beyond mere physical description, are theory laden. An historian tells stories of human actions and events that are really interpretations of those actions and events, and the interpretations depend, to a large extent, on the writer's philosophical and theoretical perspectives. This varying perspective is surely the case with the history of American trade unionism. While a group of historians may agree that on a specific day, at a specific place, a specific person threw a rock through a specific window, different historians in the group will interpret the action differently.

The philosophical perspective from which I will evaluate the labor market and labor unions in this paper is based on the concept of human rights held by the American Founders, especially James Madison and Thomas Jefferson. They subscribed to John Locke's theory of natural rights (Locke [1689] 1924). In order for *X* to be a legitimate human right in the Lockean sense, *X* must be generalizable to all humans all the time. If Person A asserts right *X* for himself or herself, *X* must apply to all other people in exactly the same way that it applies to A. If the generalized application of *X* to all people gives rise to a logical contradiction, then *X* is not a legitimate right of A or anyone else.

What, then, are the legitimate job-related rights of all people in the labor market? For example, does any worker have a legitimate right to a job, in the sense of an entitlement to employment in general, or any specific employment, irrespective of his or her own actions, without the consent of those providing the employment? If person A has a right to a job in that sense, there must be some other Person B who has the duty to provide the job to A. But if so, A and B have different job-related rights. An entitlement to receive is different from an obligation to provide. Since the right to a job in this sense is not generalizable without contradiction, it is not a legitimate right. The only legitimate job-related right that A and B (and everyone else) has is the right to *make offers* to provide or to employ labor on whatever terms they wish. Notwithstanding the legal rights created by the NLRA, no one has a legitimate right either to compel another to accept any specific offer or to restrict the offers that others may make (Baird 1988).

Consider the so-called right to strike. If a strike is simply a collective withholding of labor services in the face of unacceptable terms of trade offered by an employer, and in the absence of a prior agreement that such an action would not be undertaken, then there is a legitimate right to strike. Each individual owns his or her labor services and thus can refuse to accept offers to hire those services. If individuals have the right, so, too, does a group of like-minded individuals. But strikes are actually more than this. They are collective withholdings of labor services coupled with attempts to deny the employer access to replacement workers, other suppliers, and willing customers. They are coercive attempts by individuals who wish to withhold their own labor services, to deny, often through violence or threats of violence, the voluntary exchange rights of other people.

The theoretical perspective from which I will evaluate the labor market and labor unions in this paper is based on the complementarity of capital and labor as factors of production and on market process theory. Most economists readily accept the idea that labor and capital are both complementary and substitute factors of production. But, because of the process of entrepreneurial discovery and competition, complementarity between labor and capital is far more significant than substitution. When labor-saving substitutions of capital for labor are made, the displaced labor becomes a profit opportunity for an entrepreneur who notices, or imagines, alternative ways to employ it (Kirzner 1973). In pursuit of such profit opportunities, entrepreneurs assemble new complementary packages of capital, labor, and other inputs. This is, of course, the principal reason why technological unemployment is merely a short-run, disequilibrium phenomenon rather than the long-run, inherent contradiction within capitalism that Marx thought it was.

The significance, for the interpretation of labor union history, of the fact that labor and capital are chiefly complements is most clearly spelled out by W. H. Hutt (1973). Because of that complementarity, the only way that owners of capital can exploit sellers of labor is for the former to "shut in" the latter. Capitalists need labor to work with their capital, and the only way they can obtain it is by entering hiring agreements with those who seek employment. But sellers of labor will not consent to employment with Capitalist A if they have better offers of employment with Capitalist B. Capitalist A shuts in sellers of labor by blocking their access to alternative employments, that is, by creating and sustaining monopsony.

Similarly, providers of labor can exploit providers of capital by shutting the capital in. Labor shuts in capital by making it difficult,

dangerous, or illegal for capitalists to withdraw their capital from current employments and redeploy it in alternative employments. The recent union success in pushing the adoption of the Worker's Adjustment and Retraining Notification Act (the 60-day plant closing notification law) of 1987 illustrates the phenomenon.

Nonunion labor of a particular type is a substitute for, not a complement of, union labor of the same type. The only way an owner of an input can exploit the owner of a substitute input is for the former to shut out the latter. An employer will not voluntarily hire union labor if equally capable nonunion labor is available at a lower price. Unionized labor exploits nonunion labor by eliminating the lower-price offers of nonunion labor.

Since the employer is denied access to these alternative wage offers, the employer's capital is incidentally shut in with the unionized labor. However, if the capital is nonspecific, and if there are no legal impediments to the mobility of capital, this shutting in is only temporary. The nonunion labor that is permanently shut out of the unionized employment can find nonunionized employment, some of which is newly created through the redirection of capital out of the unionized sector. Nevertheless, shutting out by unions has permanent negative economic consequences.

Strike threat duress affects the composition of capital. Capitalists try to avoid investments in specific capital that is subject to strike threat. Some profitable investment opportunities are foregone in favor of less profitable, but safer, ones. This misallocation of capital implies a diminished flow of aggregate wages (and other incomes).

According to Hutt (1973, chaps. 8–11), history offers no examples of capitalists shutting in labor except for very brief episodes, and fewer examples of nonunion labor shutting out union labor. But there are several examples of attempts by unionized labor, successful only in the short-run, to shut in capital. Examples of unionized labor shutting out nonunion labor, through such devices as the standard rate, strike threat, and violence, are commonplace.

Lest one think the acts of coercive and violent shutting out are the occasional exception to a peaceful rule, the Wharton School recently published a detailed account of union violence throughout the 20th century up to the early 1980s (Thieblot and Haggard 1983). Even more recently, the Pittston Coal Co. had to spend approximately \$20 million to defend itself and nonunion workers against picket-line violence during the nine-month strike by the United Mine Workers in 1989 (*Wall Street Journal*, 2 January 1990, p. 3). Not only were violence and threats of violence common in union history, they are still common today.

If, as I hope to illustrate with several examples below, labor union history is primarily a story of exploitation of some labor by some other labor, rather than a story of labor's reaction to its exploitation by capitalists, labor unions do not deserve the sympathy of would-be reformers. Labor law reform in the 1990s ought to attempt to protect all workers from coercion from *any* source, including from unions.

The perspective upon which the conventional view of union history is based is the doctrine that employers, especially large corporate employers, have a natural bargaining power advantage over unorganized workers. Because trade unions help to rectify labor's bargaining power disadvantage, in this conventional view, they are able to secure gains for labor at the expense of capital. But a worker's bargaining power with an employer depends on the worker's employment alternatives. The claim that unorganized workers have no bargaining power is simply a claim that such workers typically confront monopsonistic or conspiratorial employers.

There is substantial evidence that monopsony was not a pervasive problem in the 19th century. For example, real wages were on a strong upward trend throughout the 19th century, long before trade unions could have redressed the imbalance of bargaining power. Moreover, employee-initiated job switching was frequent and became increasingly common throughout the century. Large firms typically paid higher real wages than small firms. Employers' bargaining associations that were set up to administer a uniform labor policy were usually established specifically in self-defense against the already formed trade unions (Hutt 1973, chap. 5; Reynolds 1984, chap. 3). But if monopsony was a problem for labor in the 19th century, it was Henry Ford, not Samuel Gompers or Eugene V. Debs, who deserves the credit for ameliorating the situation. The mass-produced, inexpensive automobile increased the area of effective job search for most workers and thus eventually made it impossible for any employer to maintain monopsony power.

In the conventional view, little, if any, attention is paid to the obvious conflict between union and nonunion labor. Labor is treated as a homogeneous class with interests necessarily at odds with capitalists. Nonunion workers are dupes of employers and, according to some writers, traitors to their class. They have no legitimate rights to be put in the balance against the rights of unionists. They are just "scabs," "yellow dogs," or, in Britain and South Africa, "blacklegs." In the words of Jack London, "After God had finished the rattlesnake, the toad, the vampire, He had some awful substance left with which He made the scab" (quoted in Reynolds 1984, p. 31). With the moral

merit of nonunion labor a non-issue, the pro-union view of trade union history reduces to oft-repeated fictional stories about the long and bitter battle between labor—the deserving underdog—and capital—the greedy oppressor (Hutt 1973, chap. 3).

### Three 19th-Century Milestones

In 1989, Representative Michael McNulty (D-NY) submitted H.R. 2949, "Study of Nationally Significant Places in American Labor History, Authorization," for consideration in the 101st Congress. (As of this writing the fate of the bill is yet to be determined.) There is no doubt that Haymarket Square in Chicago, Illinois; the Carnegie Steel Works in Homestead, Pennsylvania; and the railroad yards of Chicago (the center of the storm during the Pullman strike of 1894) are significant places in American labor history. They will be on McNulty's list. Every conventional labor history text cites these places as scenes of heroic battles of workers against capitalists that, although labor lost each battle, made significant contributions to the process by which justice for working people was eventually achieved. In my view, these famous conflicts are not anything in which unionists can justly take pride. If monuments are to be constructed at these sites, they would more appropriately commemorate the brave nonunion workers who fought bitter battles in defense of individual rights against forced cartelization.

#### *Haymarket*

The commonly accepted definitive treatment of the Haymarket affair is Paul Avrich's *The Haymarket Tragedy* (1984). In his preface, Avrich (p. xi) writes:

The Haymarket affair, a pivotal event in the history of both the anarchist and labor movements, began on May 3, 1886, when the Chicago police fired into a crowd of strikers at the McCormick Reaper Works, killing and wounding several men. The following evening, May 4, the anarchists held a protest meeting near Haymarket Square. . . . The last speaker, Samuel Fielden, was concluding his address when a contingent of policemen marched in and ordered the meeting to be closed. Fielden objected that the gathering was peaceful. . . . The police captain insisted. At that moment a bomb was thrown into the ranks of the police, inflicting serious injury. The officers responded by opening fire on the crowd, killing and wounding a number of civilians, as well as some of their own men. Sixty-seven policemen were hurt, eight of whom afterwards died.

This description is, in a sense, accurate, but it is also terribly misleading. It suggests that the strikers were employees of McCor-

mick; most were not. It suggests that the police were unprovoked on May 3; they were not. It suggests that the strike at McCormick was the labor issue of chief concern to the May 4 protesters; it was not. It suggests that the police had no grounds for ordering the May 4 protest meeting to disperse; they did.

It is not until chapter 13 that Avrich gives his interpretation of the detailed events on May 3 and May 4. It is clear from how he tells the story that in his view the terse summary of events in the preface is how they properly could be remembered.

Avrich's chief concern is with the anarchist movement and the seven self-proclaimed anarchists who were arrested, tried, convicted, and sentenced to hang as accessories to murder before the fact because of the deaths that emerged from the bomb and riot. In the end, four were executed, one committed suicide, and the sentences of the other two were commuted. These two were later pardoned. The identity of the actual bomb thrower has never been established. In Avrich's view, and in the view of most tellers of the story, the anarchists were unjustly treated.

My chief concern is not with the anarchists or with whether they were justly treated. What intrigues me is how the Haymarket affair could ever be considered a milestone in the history of the American union movement. The chief players, the anarchists, had nothing directly to do with the trade union movement. To be sure, they preached the Marxist doctrine of capitalist exploitation of labor, but they were not unionists. It is simply not true that labor leaders called the May 4 protest meeting. The anarchists were eager to use union-management disputes for their own purposes, but they were decried by major labor union leaders such as Samuel Gompers of the American Federation of Labor and Terence Powderly of the Knights of Labor. And yet today the monument in Chicago's Waldheim Cemetery to the seven anarchists is considered by many as a labor movement shrine.

My interpretation of the events begins on February 16, 1886, when the McCormick Reaper Company was shut down by a lockout that was undertaken in anticipation of a strike that was scheduled to begin the following day. According to the *New York Times* (hereinafter, NYT) 17 February 1886, p. 1), "There has been some trouble between the men and their employers for a week past, mainly over the question of wages. The company has conceded every point but one, and that is that five non-union men at work in the foundry be discharged."

McCormick expressed willingness to end the lockout and pay the union workers wages they had already agreed to accept. All the union had to do was drop its demand that the nonunion men be fired and

drop its strike threat. Who was exploiting whom? McCormick was not refusing to recognize the union and employ its members on agreed terms. He was insisting only that he had a right also to hire willing nonunion workers.

On February 25 the first reported acts of violence took place. A foreman on his way to work was stopped by union men and threatened with a gun. Later the same day, an engineer and a group of gas fitters were accosted in an attempt to keep them out of the plant. The engineer went in, and the gas fitters went home (NYT 26 February 1886, p. 1). On February 28, McCormick and a committee of union men agreed that work would be resumed on March 1. A group of other union men who wanted to stay out "intimated very strongly that they will make trouble for those who do attempt to resume labor" (NYT 1 March 1886, p. 1).

On March 1, at first only 150 out of 1,000 men who had expressed a desire to return to work did so. "Great crowds of strikers lined Blue Island Avenue, facing the works with the evident intention of intimidating any men expecting to go to work" (NYT 2 March 1886, p. 4). The police ordered the crowd to disperse, and when it did so, 200 additional men entered the plant to work. McCormick took back all the union men who agreed, and had sufficient courage, to resume work (about one-third of the strikers). By May 1 McCormick had replaced all the other strikers with nonunion men. Thus far, there had been very little violence.

Saturday, May 1, 1886, was designated by the leaders of the eight-hour movement as the start of massive nationwide strikes in favor of legislation declaring an eight-hour work day with 10 hours of pay. The movement was made up of several different groups including socialists, anarchists, and unionists. In Chicago the main participants in the May 1 strike were railroad freight handlers and lumber shovers. The eight-hour strike, just like the earlier McCormick strike, illustrates the exploitation of nonunion labor by union labor. The character of the May 1 activities is illuminated by the following account (NYT 2 May 1886, p. 2) of what happened after a rally of striking freight handlers:

After the meeting adjourned, the strikers made a tour of the railroad freight depots. Wherever men were found at work, they were induced, either by arguments or threats, to quit. At the Lake Shore station the doors and windows were closed, but a striker with a sharp eye discovered that freight handlers were at work inside. The doors were broken down and a crowd 1,000 strong forced its way into the building. A couple of policemen tried to drive the intruders out, but, of course, could not. Captain Buckley and a squad of men had better luck, and the crowd tumbled out into the street.

The following day, Sunday, passed quietly. Then came Monday, May 3. The day began with parades, rallies, speeches, and picketing. August Spies, one of the anarchists who later would be executed because of the May 4 bomb and riot, was invited by the Central Labor Union (an organization that was attempting to coordinate the general strike) to address a rally sponsored by the Lumber Shover's Union. Most of the strikers at the rally had not ever been McCormick employees. They were strikers, as Avrich says, but most were not McCormick strikers. In chapter 13 Avrich acknowledges that the rally itself had nothing to do with the earlier McCormick strike and that the rally was attended by several thousand demonstrators who had nothing to do with McCormick, but the point is lost because of his choice of focus.

The Lumber Shover's rally was held within three or four blocks of the McCormick plant. Before Spies spoke, a representative of the Central Labor Union, Fritz Schmidt, harangued the audience from the top of a car.

On to McCormicks and let us run every one of the damned scabs out of the city. It is they who are taking the bread from you, your wives, and your children. On to them, blow up the factory, strike for your freedom, and if the armed murderers of the law interfere, shoot them down as you would the scabs [NYT 4 May 1886, p. 1].

Spies' speech was, according to a 1936 account by historian Henry David, "free from revolutionary propaganda and inflammatory utterances" (David 1936, p. 190). He merely exhorted the demonstrators to maintain class solidarity against employers lest their cause be lost. Before he had finished, the McCormick bell sounded, indicating the end of the working shift. Spies tried to get the demonstrators to ignore the bell, but a large group (the NYT reported thousands) of them broke away, armed themselves with stones, and charged off to the McCormick plant. In David's account:

They at once attacked the strike-breakers, and pitching in to them with sticks and stones, they drove the "scabs" to the factory for safety. The few police stationed there fired their revolvers in a vain attempt to disperse the crowd, which was smashing the windows of the factory. Some shots were also fired by the strikers in answer to those of the police. A telephone call for aid brought first a patrol-wagon with eleven officers, and then a police detail of almost two hundred men. . . . The police reinforcement, making good use of club and revolver, charged the workers, whose resistance crumbled immediately [David 1936, p. 190].

David's philosophical and theoretical proclivities, like Avrich's, led him to render the story in a way that blurs the distinction between

"strikers" and McCormick workers, and between demonstrators and "workers." In keeping with long unionist practice, he directs attention away from the issue of the rights of nonstriking workers by using the epithets "scabs" and "strike-breakers." In my view, attention should be focused on the issue of trespasses of the rioters against McCormick's willing workers and McCormick's property. Therein lies the egregious harm that was done.

Then came May 4. Appalled by what he perceived to be an unjust act of bloody capitalist oppression against innocent workers, August Spies composed a "revenge circular" of which 2,500 copies were printed by the anarchist newspaper, *Arbeiter-Zeitung*. The circular was distributed at labor rallies held during the morning and afternoon of May 4. It read, in part,

**REVENGE! WORKINGMEN! TO ARMS!**

Your masters sent out their bloodhounds—the police—they killed six of your brothers at McCormick's this afternoon. They killed the poor wretches, because they, like you, had courage to disobey the supreme will of your bosses. . . .

If you are men, if you are the sons of your grandsires, who have shed their blood to free you, then you will rise in your might Hercules, and destroy the hideous monster that seeks to destroy you.

To arms, we call you, to arms!

YOUR BROTHERS [David 1936, pp. 191–192].

A colleague of Spies, Adolph Fischer, who was to share his fate, composed and printed a handbill announcing the protest meeting that had been scheduled for Haymarket Square on the evening of May 4. It read, in part,

**ATTENTION WORKINGMEN**

Great mass meeting tonight at 7 o'clock at the Haymarket. . . . Good speakers will be present to denounce the latest atrocious act of the police, the shooting of our fellow-workmen yesterday afternoon.

**WORKINGMEN ARM YOURSELVES AND APPEAR IN FULL FORCE:**

The Executive Committee [David 1936, p. 194].

Given the events of the preceding day, and the tone of the circular and handbill, it was not inappropriate for the police to be very concerned about what might occur at the announced meeting. It is not unreasonable to assume that the police would be alert to even the faintest danger of riot and bloodshed and would be eager to intervene before things got out of hand.

The last speaker at the May 4 meeting was Samuel Fielden, another anarchist, one of the two who were eventually pardoned by Illinois

Governor Altgeld. Among many other less-inflammatory things, he told the crowd,

You have nothing more to do with the law except to lay hands on it and throttle it until it makes its last kick. . . . Keep your eye upon it, throttle it, kill it, stab it, do everything you can to wound it—to impede its progress. . . .

The socialists are not going to declare war; but I tell you war has been declared on us; and I ask you to get hold of anything that will help to resist the onslaught of the enemy and the usurper. The skirmish lines have met. People have been shot. Men, women, and children have not been spared by the capitalists and the minions of private capital. It has no mercy—so ought you [David 1936, pp. 202–3].

It was a few sentences later when the squad of police under the command of Captain Bonfield approached the speaker and ordered the meeting to end. Then the police were hit by the infamous bomb.

It is true, as Henry David and Paul Avrich argue in their books, that the anarchists were not proven to have done anything more than give inflammatory speeches. But, as Justice Oliver Wendell Holmes said in the famous *Schenck* case (249 U.S. 47 [1919]), “The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing panic.” Whether the anarchists ought to be vindicated or not, there is nothing in these events about which unionists can be justly proud.

#### *Homestead*

Homestead, Pennsylvania, is located seven miles east of Pittsburgh on the banks of the Monongahela River. On July 6, 1892, a full-scale battle—complete with dynamite, cannon, fire, and guns—took place there. On one side were locked out and striking workers from the Carnegie Steel Works; on the other were private guards hired by Carnegie to protect plant property and ensure the safety of plant staff members who were still working. Today, a 10-foot-high gray slab monument commemorates the battle. Its inscription reads, “Erected by the members of the Steel Workers Organization Committee Local Unions in memory of the iron and steel workers who were killed in Homestead, Pennsylvania, on July 6, 1892, while striking against the Carnegie Steel Company in defense of their American rights” (Wolff 1965, p. 264).

*Lockout: The Story of the Homestead Strike of 1892* by Leon Wolff is widely accepted as an authoritative account of what happened. Wolff, although careful to be even-handed in his coverage, is sympathetic to the union point of view. He agrees with the inscription that

the strikers were defending their American rights. To the contrary, I would say the strikers were violently denying the American rights of others. Of course, that depends on what one supposes the relevant American rights to be. Let us see what happened.

The story began three years earlier, in July 1889. There was then a strike at the Carnegie Steel Works in Homestead during which the strikers assaulted both people and property. The incumbent sheriff of Allegheny County was unable to control the rioters because he could not find sufficient people who were willing to be sworn as deputies. They were afraid for their lives (NYT 13 July 1889, p. 1). At one point threatening strikers drove a posse of about 100 deputies off company property (Bemis 1894, p. 371). That strike ended in a victory for the strikers. The company agreed to a three-year contract that specified a sliding wage scale on the basis of the price of steel. Wages would rise and fall with the price of steel, but a \$25 per ton minimum price set a floor to wages.

This agreement was due to expire on July 1, 1892. By that time the economy was sliding into a recession that was to become a depression, and the price of steel was falling. The passage of the Sherman Silver Purchase Act in 1890 raised widespread fear that the United States would abandon the gold standard. This Act, together with the McKinley Tariff Act of the same year, triggered large capital outflows and contracted the monetary base, setting the economy off into what became the worst depression of the 19th century (Friedman and Schwartz 1963, p. 106).

By June 10 the price of steel was \$22.50 per ton (Bemis 1894, p. 376). In May the company offered a new contract that specified a minimum steel price of \$22 per ton and that would expire on December 31, 1893, instead of June 30. The Amalgamated Iron and Steel Association, representing 800 skilled steel workers out of a total work force of 3,800, turned down the company's proposal. Only 330 skilled workers were affected by the proposed cuts (Taussig 1893, p. 311). According to Taussig, "Judged by the scale of the market rate of wages for work of similar difficulty elsewhere, some of the men were largely overpaid. Some of the leading workmen received very large earnings indeed,—\$6.00, \$8.00, even \$10.00 per working day" (p. 309).

At first the union insisted that the minimum steel price remain at \$25. During negotiations in June, the company raised its offer to \$23, and the union lowered its to \$24. All other classes of skilled workers such as engineers, blacksmiths, and carpenters had reached agreement with the company on pay scales for the 1892–95 period. The Amalgamated, however, was adamant. It refused to accept anything

less than the \$24 price, and it insisted that the contract expire in June, not December. Mid-year was the busy period for the firm; the winter months were slack. Henry Clay Frick, Carnegie's man in charge, was equally adamant on the other side.

Frick had set June 24 as a deadline for the Amalgamated to accept his last offer. Failing that, on July 1, the Amalgamated workers would be locked out. In the meantime, with the lessons of the 1889 strike in mind, Frick had a sturdy, nine-foot board fence, topped with barbed wire, constructed around the company property. He also arranged for 300 private Pinkerton guards to be brought in, should the need arise, to protect plant property and other workers. After all, in the 1889 strike the county sheriff proved incapable of doing his job.

When July 1, 1892, came, the promised lockout was undertaken. The Amalgamated workers convinced most other workers to break their existing agreements with the company and to strike in support of the locked-out workers. Company officials alleged that this support was obtained through intimidation, and the Amalgamated alleged that it was a spontaneous act of labor solidarity. In any event, almost all of the 3,800 workers ceased work. The strikers formed an Advisory Committee that was headed by Hugh O'Donnell and that proceeded to usurp the powers of government in Homestead (NYT 2 July 1892, p. 1). Sheriff McCleary, the incumbent police authority in Allegheny County, was unable to deter the strikers. They surrounded the Carnegie works and refused to allow anyone other than company officers to enter for any purpose. From the beginning they made it clear that their chief concern was to deny nonunion men access to the plant. All strangers were stopped and interrogated. If any seemed at all suspicious, they were ordered to leave the town or face physical violence, or worse. Sheriff deputies who had been sent to restore order were driven out of town (NYT 6 July 1892, p. 1). According to Wolff (1965, p. 93):

Every road leading into the borough was blockaded. No person was allowed to enter without a satisfactory explanation. Newspapermen were issued badges for entry and departure, and those whose reports were derogatory were debadged and hustled out of town. Telegraph communications were set up at union headquarters. Railway depots were surrounded by armed guards. As days passed, the picket line along the waterfront was increased to a thousand men who patrolled the river on both sides, five miles upstream, five miles down. . . . Vigilantes, some of whom were mounted, were placed on the surrounding hills.

In the early morning of July 6, 300 hired Pinkerton guards set out on two towed barges along the Monongahela River for the Carnegie

works at Homestead. The plant property bordered the river, and Mr. Frick's fence had been constructed with two large extensions into the river, making a secure docking site on company property. The barges were en route when sighted by Amalgated sentries. As dawn was breaking, alarm bells were sounded in the town. By the time the barges approached their destination, a mob of several thousand people, many of whom were armed, had gathered at the docking site.

Wolff (1965, p. 106) tells us:

The strikers opened up with a rifle, pistol, and shotgun fusillade which did no damage, except for one bullet which shattered windows in the tugboat's pilothouse. As the three vessels continued on their way, swarms of men followed them by running along the shore, firing from close range.

When the boats reached their destination, the mob crashed through the fence, charged into company property, and told the people aboard the boats they were forbidden to come ashore. Some Pinkerton guards, along with their leader, Captain Heinde, tried to disembark. Wolff (1965, p. 110) paints a vivid picture of what happened next:

Three strikers ran forward; two grabbed the end of the gangplank while the third deliberately lay down upon it, as if to dare the enemy to cross his body. . . . As Heinde was trying to shove the prone man aside, the latter pulled a revolver and shot him through the thigh. The heavy cartridge knocked him over backward. A torrent of gunfire swept the men on the plank. Heinde was hit again . . . another guard named Klein was killed instantly . . . four of the others were wounded.

Thus far the Pinkertons had not fired a shot, but now they began to return fire. Two strikers were killed and several more were injured. The mob retreated behind protective barricades, and the boats were fired upon. The tug escaped with several wounded Pinkertons aboard and headed for Pittsburgh. The remaining guards aboard the two barges were left behind and fell under siege.

All day long the barges were fired upon. Two cannons were used to try to sink them and drown the passengers. When that failed, there was an attempt to set the barges on fire. At one point dynamite was used in an attempt to destroy the barges and their passengers. In the late afternoon the Pinkertons waved the white flag of surrender. The mob wanted to kill them on the spot, but O'Donnell and other Advisory Committee members got the strikers to agree to accept the surrender. The Pinkertons were assured that they would not be harmed, and they came ashore. They were forced to run a gauntlet and were "inhumanly" beaten. As Taussig (1893, p. 315) recounts, "Beaten, bruised, half dead with hunger, wounds, and fright, they

were kept in a large rink, or theatre, until midnight, when they were marched under guard of the Amalgamated Association to the railway station, and thence carried by special train back to Pittsburgh."

The Advisory Committee was now in full command of the town. And it ran the town with a heavy hand reminiscent of Robespierre's Committee of Public Safety almost 100 years before. Monitors and sentries were posted all over town. All movement was policed. People, especially strangers and members of the press, were shadowed and interrogated. The press was censored. Some people were arrested and incarcerated simply because of what they had to say (Burgoyne [1893] 1971, chap. 8). The only thing missing was the guillotine.

Although the strikers had possession and control of the company property, they did no damage. In fact, they even repaired the fence they had torn down earlier. The strikers and their leaders were not socialists or anarchists. They were well aware of the complementarity of capital and labor. They were interested in securing that relationship exclusively for themselves. They wanted to shut in the capital and shut out nonunion labor. In this regard, the workers stated:

We are naturally interested in the plant, for there is where we make our bread and butter, and, besides it is not our policy to injure the property of the company. . . .

There is one thing certain; even should the authorities take charge of affairs, we are not going to let new men come in under any circumstances. That is what we are going to direct our attention to, whether we or the authorities have charge of the plant [NYT 10 July 1892, p. 5].

The nation's press reported several resolutions of support for the strikers. Other labor unions and politicians had formally adopted these resolutions in which the Pinkertons were condemned as beneath contempt and as an invading force. The strikers were only protecting their homes. The Pinkerton guard was singled out as the "most hated enemy of organized labor." Some state legislatures even passed anti-Pinkerton legislation (NYT 11 July 1892, p. 1). It is easy to understand the loathing that unions had for the Pinkertons. The Pinkertons were the chief force available to employers to bridle the unions' shutting out activities.

On July 10 Governor Pattison activated the National Guard and sent it to Homestead to wrest control of the town and company property from the Amalgamated Advisory Committee. By July 15 enough nonunion men had been hired to begin some operations in preparation for reopening. On July 16 all the striking workers, except the leaders and individuals who were known to have behaved vio-

lently, were invited back to work on terms equal to Frick's last offer before the strike. Almost none of them did so. The company gradually added to its work force by hiring nonunion workers. On July 27 the plant reopened with about 700 newly hired, nonunion men working. The militia ensured that as many willing workers as could be found would not be molested by the strikers. Through August and September, more and more nonunion men were added to the work force. By September 19 all of the militia except for one regiment had been withdrawn, and the civil government had been restored.

In October, however, a fresh wave of violence broke out against the nonunion workers. It was becoming more and more obvious to the Advisory Committee that they had lost the strike. Some of their own people were quietly returning to work. In a last desperate attempt to stave off the inevitable, a bomb was set off in a boarding house in which many nonunion workers lived. One nonunion worker's own house was burned down. Individual nonunion workers caught alone in town were beaten (NYT 7 October to 4 November 1892).

But it was all for nought. On November 18 a large group of strikers openly went back to work, and on November 20 the Amalgamated officially called off the strike. Thereafter, the firm operated on a nonunion basis. Most of the strikers eventually were rehired, but the Amalgamated was finished at Homestead. Each worker signed his own individual hiring agreement with the firm. The company did not require the workers to agree to refrain from union activity, but the company refused to bargain with any union.

On December 12, 1892, an astonishing story of poisoning of non-union men broke into the headlines. Patrick Gallagher, one of the cooks responsible for the in-plant feeding of Carnegie nonunion workers beginning in August, charged that he and his fellow cook, Robert Beatty, were hired by Hugh F. Dempsey, an official of the Knights of Labor, to poison the workers' food. There had been a mysterious outbreak of illness and death among the new workers in September and October, but no one suspected foul play. Although the Knights of Labor were not directly involved in the strike, several officials of the union, including Terence Powderly, its head, had voiced support for the Amalgamated. Dempsey, Beatty, and Gallagher were all tried and convicted for the alleged act. They all received prison sentences. No evidence was ever presented to prove that the Amalgamated was involved in the conspiracy (Burgoyne [1893] 1971, chap. 19). In any case, the conspiracy was a case of union solidarity run amok.

On October 10, 1892, Chief Justice Edward H. Paxson of the Pennsylvania Supreme Court charged the Grand Jury in the trial of the strike leaders for treason against the state. In the end none of the defendants were convicted of that serious charge. But, as the following statement reveals, Justice Paxson understood the true nature of the employment relationship and the legitimate rights and obligations thereof:

The relation of employer and employee is one of contract merely. Neither party has a right to coerce the other into the making of a contract to which the mind does not assent. The employer cannot compel his employee to work a day longer than he sees fit nor his contract calls for, nor for a wage that is unsatisfactory to him. It follows that the employee cannot compel his employer to give him work or to enter into a contract of hire, much less can he dictate the terms of employment. When the negotiations between the parties came to an end, the contract relations between them ceased. The men had no further demand upon the company, and they had no more interest or claim upon its property. . . . [N]or does it make any difference that a large number were discharged at one time; their aggregate rights rise no higher than their rights as individuals. The mutual right of the parties to contracts in regard to wages . . . is as fixed and clear as any other right which we enjoy under the constitution and laws of this state. It is a right which belongs to every citizen, laborer or capitalist, and is the plain duty of the state to protect them in the enjoyment of it [Burgoyne (1893) 1971, pp. 203–4].

Burgoyne interprets these words of the Chief Justice as evidence that he did not understand the true nature of the dispute. I interpret them to imply exactly the opposite.

### *Pullman*

On May 11, 1894, the production workers at Pullman Palace Car Company in Pullman, Illinois, went on strike. They were protesting wage cuts, which Pullman had unilaterally imposed, as well as the failure of the company to reduce rents in company-owned housing. The depression of the 1890s had emerged full blown in the previous year. Although the leasing and operating divisions of the Pullman Company were still operating profitably, its production facilities were not. The company intentionally continued to manufacture cars at a loss to avoid having to lay off its production workers, but by the spring of 1894 this continued employment practice was becoming untenable at the old wage scales. Even at the new scales, losses would continue (Lindsey 1942, pp. 95–100). Many of the workers lived in housing they rented from the company. These workers

requested that Pullman lower the rents at the same time that it lowered wages. Pullman refused.

The American Railway Union (ARU) had been formed in 1893 by Eugene V. Debs and others. The union was organized along industrial, rather than craft, lines. That is, it purported to be an organization of all railroad employees. Several craft unions, called "Brotherhoods," had been in existence for several years and were now competing with the ARU for members. Although many of the striking Pullman workers were ARU members, the ARU did not call the strike. In fact, Debs was initially opposed to the strike because he did not think that the strike could be successful under existing economic circumstances (U.S. Strike Commission Report [1895] 1972, p. XXVII).

The strike at Pullman was peaceful in the sense that no overt violence took place. It was, nevertheless, coercive. The strikers surrounded the works, preventing any entry. Pullman had to lay off the 600 workers who did not strike. A sympathetic teller (Lindsey 1942, p. 123) of the tale put it this way:

As precaution against violence, three hundred strikers were immediately thrown around the Pullman works for the announced purpose of guarding the property against hoodlums, and this protection was furnished night and day until July 6, when the union was relieved of this duty by the military.

The U.S. Strike Commission ([1895] 1972, p. xxxviii) took a more realistic view of this picketing:

This guarding of property in strikes is, as a rule, mere pretense. Too often the real object of guards is to prevent newcomers from taking strikers' places, by persuasion, often to be followed, if ineffectual, by intimidation and violence.

Still, no violence or intimidation was reported, and the Commission praised the Pullman picketers for their "conduct and forbearance."

Nothing much happened until June 15. Pullman was not eager to settle the strike because it amounted to a cutoff of an unprofitable undertaking. Pullman refused to enter arbitration. On June 15 the frustrated Pullman strikers appealed for support from the delegates at the ARU convention then under way in Chicago. On June 22 the delegates voted to undertake a boycott of Pullman cars on all railroads unless the Pullman company settled the strike on acceptable terms before June 26. George Pullman, the founder and chief executive officer of the company, refused to relent, and the boycott was undertaken.

The ARU instructed its members to refuse to handle any trains that included Pullman cars. Such trains were to be stopped and the Pullman cars were to be detached before trains were permitted to proceed. If the railroads refused to stop using Pullman cars, they would be struck. On June 26 Debs telegraphed the four railroad Brotherhoods, the Benevolent Order of Switchmen, the American Federation of Labor (AFL), and the United Mine Workers for support. Only the latter responded affirmatively (Lindsey 1942, p. 135). The ARU was essentially on its own.

The General Managers' Association (GMA), an organization of the 24 railroad companies that operated through Chicago, refused to honor the boycott. The GMA's position was that since the ARU had no labor dispute with any of the railroads, and since the railroads had contracts with Pullman to carry Pullman cars, if the railroads honored the boycott they would be in breach of valid contracts.

The GMA had been formed in 1886 by the Chicago railroads to handle problems of mutual concern. It was, in a word, a cartel. But, prior to 1893, the GMA had very little to do with labor matters. It focused on coordination of switching, car service, loading and unloading cars, length and gauge of rails, and so on. (Manning 1960, p. 31). The formation of the ARU in 1893 caught the attention of the GMA, which then began to coordinate labor policies. The first coordinated labor policy was to set the "Chicago scale" for switchmen in 1893. When the boycott began, the GMA coordinated the railroads' response. Under GMA policy, any railroad worker who refused to do his job was to be immediately fired and replaced with a nonunion worker. The GMA set up recruiting offices across the country to find willing nonunion workers. And because of the depression, workers were plentiful. Between June 27 and the end of the boycott (mid-July), the GMA provided 2,500 replacement workers to the Chicago railroads (U.S. Strike Commission Report [1895] 1972, p. 251).

No one disagrees that the boycott and strike were the scene of much violence, much destruction of railroad property, and many injuries to people. In Chicago 12 people were killed (Winston 1901, p. 541). The battle centered in Chicago but it extended from the Mississippi to the Pacific. The unionist position was that the violence was perpetrated by mobs of people who were not strikers, and, in any case, would not have occurred at all if President Cleveland had not sent federal troops to Chicago on July 4.

Violence and property destruction, along with interruption of the U.S. mail and blockades of trains in interstate commerce, occurred from the beginning. On July 2, the federal Circuit Court for the

Northern District of Illinois issued an injunction against Debs and the ARU. They were ordered to stop all violent activity and to refrain from interfering in any way with the normal operations of the railroads (Manning 1960, pp. 54-55). When the injunction was read to strikers and their companions at Blue Island, Illinois, on July 2, the crowd roared its disapproval. "To hell with the Government! To hell with the President! To hell with the Court and injunctions!" (U.S. Strike Commission Report [1895] 1972, p. 362). On July 3, U.S. Marshal J. W. Arnold sent the following telegram from Chicago to Attorney General Richard Olney:

When the injunction was granted yesterday, a mob of from two to three thousand held possession of a point in the city . . . where they had already ditched a mail train, and prevented the passing of any trains, whether mail or otherwise. I read the injunction writ to this mob and commanded them to disperse. The reading of the writ met with no response except jeers and hoots. Shortly after, the mob threw a number of baggage cars across the track, since when [sic] no mail train has been able to move. I am unable to disperse the mob, clear the tracks, or arrest the men who were engaged in the acts named, and believe that no force less than the regular troops of the United States can procure the passage of the mail-trains, or enforce the orders of the courts. . . . An emergency has arisen for their presence in this city [Cleveland (1904) 1913, pp. 25-26].

The city was relatively calm on July 4 when the first troops arrived, but on July 5, 6, and 7 violence and property destruction were widespread (NYT 6-8 July 1894, p. 1). When it became clear that the federal troops would do whatever they had to do to restore and maintain order, including shooting rioters, the violence diminished. On July 8 it appeared that order had been restored and many trains were running unimpaired. To avoid defeat, Debs requested that the AFL and other unions join the fight in the form of a general strike. On July 12, Samuel Gompers, president of the AFL, formally turned down the request. The strike was lost. Men began returning to work in droves. On July 18 the federal troops were removed. The ARU boycott and railroad strike were over. The Pullman strike itself was ended on August 2. "By August 24 there were twenty-three hundred employees at work in Pullman, of whom five hundred and fifty were new men" (Lindsey 1942, p. 270).

Conventional accounts of the "Pullman strike," as the entire incident became known, focus on three issues: (1) the dispute between President Cleveland and Governor Altgeld as to whether Cleveland acted within his authority when he sent in the troops without first getting clearance from the governor, (2) the legitimacy of the injunction issued against the ARU, and (3) whether the ARU was responsi-

ble for the violence. The U.S. Supreme Court (as we will see below) decided the first two issues at the time by supporting President Cleveland's actions and upholding the penalties assessed against Debs for violating the July 2 injunction. Today, of course, historians who are sympathetic to unionism are critical of the Supreme Court's actions. Post-New Deal Supreme Courts would, most likely, have decided differently.

The consensus among historians is that very little of the violence against railroad property can be attributed to strikers and the ARU. The U.S. Strike Commission ([1895] 1972) has assigned the blame for most property destruction and rioting to unruly mobs made up mostly of "hoodlums, women, a low class of foreigners, and recruits from the criminal classes. Few strikers were recognized in these mobs, which were without leadership, and seemed simply bent upon plunder and destruction" (pp. XLV–XLVI).

The Commission did ascribe some property-related violence to the strikers. The strikers were guilty of "spiking and misplacing of switches, removing rails, crippling of interlocking systems, the detaching, side tracking and derailing of cars and engines, placing of coupling pins in engine machinery, blockading tracks with cars, and attempts to detach and run in mail cars" (p. XLV). But they were not responsible for the large-scale burning and destruction that took place.

There remains an essential question: How did the strikers deal with nonunion replacements and dissenting unionists? It is in the interests of strikers to refrain from too much destruction of capital, but it is also in their interest to shut out substitute labor. This strike, like Haymarket and Homestead, was primarily a contest between some labor and other labor. The union was not defending the rights of labor, it was asserting and defending privileges of some union labor against some other union labor and nonunion labor.

The U.S. Strike Commission ([1895] 1972) itself had very little to say about the battle between some labor and other labor. It simply acknowledges that "considerable threatening and intimidation of those taking strikers' places were committed or instigated by strikers" (p. XLV). Appendix A of the Commission's Report (in the recorded statements of individuals testifying on behalf of the railroads) gives details of the struggle between union and nonunion labor. There one reads stories of whipping, beating, white-washing (covering the victim with white-wash), and intimidating people. A. P. Winston (1901, p. 546) explained the strikers' attitude toward nonunion labor with these words: "The trade union movement partakes essentially of the revolutionary character when 'scabs' are to

be dealt with. This class of enemies strikes at the very existence of the union and the union, therefore, looks upon them as outlaws."

The attitude of Debs toward nonunion workers was not in doubt. In one telegram Debs warned a union official in Indiana that "the Baltimore and Ohio officials are . . . looking for scabs in the eastern cities. By all means have them shut off." Another telegram bearing Debs' name, but which he later denied he sent, says "all men continuing in the employ of the railroad departments . . . will be forever branded as scabs, and will be treated as such" (von Holst 1894, p. 507).

The attacks against non-ARU labor were sufficiently numerous and serious that the July 2 injunction specifically singled them out. Items 7 and 8 in the injunction enjoined:

- (7) Compelling or inducing, or attempting to compel or induce by threats, intimidation, persuasion, force, or violence, any of the employees of any of said railroads to refuse or fail to perform any of their duties as employees. . . .
- (8) Compelling or inducing, or attempting to compel or induce, by threats, intimidation, force, or violence, any of the employees of any of said railroads, who are employed by such railroads . . . to leave the service of such railroad [Manning 1960, pp. 54-55].

The enjoining of "persuasion" in item 7 is especially interesting. While many people would agree that threats, intimidation, force, and violence against non-ARU labor were properly enjoined, many would also say that there is nothing wrong with some workers attempting to persuade other workers to join a strike. Since threats and violence were specifically enjoined, the judge's objection to persuasion could not merely be that "persuasion" often takes the form of threats and violence. His concern could well have been that even friendly persuasion to join a strike amounts to encouraging the breach of valid contracts. If nonstriking workers were under written or verbal contract to continue working, strikers attempting to get the nonstrikers to join the walkout were guilty of subornation. Subornation of contracts was also the claim of the railroads when they refused to boycott Pullman cars: Extant contracts between Pullman and the railroads precluded the boycott. Only someone who believes that the rights of ARU labor overrode the rights of all the other people involved could justify such subornation. As we will see below, the use of "peaceful persuasion" by unionists was taken up by the Supreme Court in 1921.

Union sympathizers should not forget that other labor unions, especially the railroad Brotherhoods, did not support the ARU. For exam-

ple, Winston (1901, p. 557) reports that on July 3, H. E. Wilkinson, leader of the Brotherhood of Trainmen, made a public statement regarding the ARU strike in which he claimed that the strike was called by delegates

who did not represent one thirtieth of the employees in train service in the United States, but every man, woman, and child employed in any capacity on a railway is expected to bow to this imperious command regardless of any rights of their own, obligations to other organizations, or contracts with their employers.

Debs condemned the Brotherhoods as “active allies of the railroads in the great strike” (Winston 1901, p. 557), and today Debs is accepted as the spokesman for “labor” in the strike. Dreams of class solidarity notwithstanding, there was no labor point of view. Rather, competing points of view were held by many different sellers of labor services.

In *In Re Debs* (158 U.S. 564 [1895]), the U.S. Supreme Court upheld the penalties imposed by the lower court on Debs on the grounds of the interstate commerce clause of the Constitution. Thus began, according to unionist history, a long period of “government by injunction,” a period of oppression of unions through anti-strike injunctions. The period was brought to a just end only by the Norris-LaGuardia Act of 1932.

## Two Key Supreme Court Decisions

There were many anti-union federal and state court decisions from 1895 through 1921. But all of the decisions were based on unions’ specific actions that, under the ordinary rule of law, were deemed impermissible. None of the decisions were based on the formation of unions *per se* or on actions of unions that did not trespass against the voluntary exchange rights of others. Freedom of association was defended for all. That freedom of association includes the right of any individual, as a matter of individual choice, not majority vote, to decline to associate with private groups of which he or she disapproves or with which he or she shares no values. The right to form, join, and participate in labor unions and the right to refrain from doing so received genuine equal protection under the law. Two U.S. Supreme Court decisions—*Duplex Printing Press Co. v. Deering* (254 U.S. 443 [1921]) and *American Steel Foundries v. Tri-City Central Trades Council* (66 L.ed. 189 [1921])—illustrate the thinking of the Court during this period particularly well.

In 1908 the Supreme Court applied the Sherman Antitrust Act against union actions that the Court held were in restraint of trade. The AFL was so incensed at the Court’s decision that it mounted an

effective special-interest campaign aimed principally at Democratic politicians. The intent of the campaign was to get the AFL exempted from antitrust laws (Gould 1987, pp. 15–16). In 1912 the Democratic Party officially promised to enact such legislation if its candidate for president, Woodrow Wilson, was elected. He was, and in 1914 the Clayton Antitrust Act became law. Section 20 of the law states

that no restraining order or injunction shall be granted by any court of the United States . . . in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application. . . .

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do.

Samuel Gompers, president of the AFL, hailed the Clayton Act as “Labor’s Magna Carta,” but his joy was short-lived.

In the *Duplex* case, the Supreme Court upheld an anti-union injunction on the grounds that the Clayton Act protected unions only when they were “lawfully carrying out their legitimate objectives” (Gould 1987, p. 18). The union called a strike because the company operated on an open-shop basis. That is, the company refused to discriminate against any workers whether they were unionists or not. The union wanted the employer to discriminate against nonunion workers. Duplex continued to operate successfully in spite of the strike, so the union turned to secondary activity to try to get its way. The union threatened commercial customers of Duplex with sympathetic strikes unless they boycotted the company. The union also ordered all repair shops to stop doing business with Duplex on pain of sympathetic strikes. Union employees of the repair shops were threatened with loss of union membership if they did any work on Duplex presses. The Supreme Court held such secondary activity to be actionable under the antitrust laws because the Clayton Act protected only union strike action directed against the specific employer involved in the primary strike. It was not a “legitimate objective” for the union to impair the voluntary exchange rights of third parties. There was no question of the Court intervening in attempts of a group of employees of a firm attempting peacefully to obtain better terms of trade from their employer. The Court was

exercising its responsibility to prevent aggression by strangers attempting to spread their empire.

In the *Tri-City* case, the Supreme Court spelled out detailed rules to be applied during labor disputes. I think these rules should be incorporated in any reform of American labor law in the 1990s. In November 1913 the company closed its doors because of bad business conditions, and it laid off about 1,600 men. Some of these men were members of unions affiliated with the Tri-City Council, but the company had always operated on a nondiscriminatory open-shop basis. In April 1914 the company reopened and resumed operations on a reduced scale. Three hundred and fifty former employees, some of them union members, were hired back. The pay scales paid to all workers were reduced by two cents to ten cents an hour compared to the scales paid before the shutdown. The Tri-City Council, made up almost entirely of people who had never been employed by the company, called a strike in protest of the wage cut. Only two of the rehired employees joined the strike. The remaining 348 workers wanted to continue to work, but the Tri-City Council set up large numbers of stranger pickets at every entrance to the firm. Between April 22 and May 18 these stranger pickets repeatedly assaulted and beat workers who tried to continue working. Several employees ended up sleeping in the plant because they were afraid of what might happen if the pickets caught them out in the open. On May 18 a restraining order was issued by a federal court, and the violence stopped. The union argued that Section 20 of the Clayton Act precluded the restraining order against the picketing. The Supreme Court disagreed.

The Court reaffirmed its ruling in *Duplex* that the Clayton Act protected unions when they were lawfully pursuing their legitimate objectives and went on to say that the law protected only "peaceable persuasion by employees, discharged or expectant" (at 197). Strangers had no standing at all to participate in the strike. Strangers could be enjoined even when using peaceable persuasion of workers who wished to work. All violent acts and threats by employees could be enjoined. Only nonthreatening discussion between nonstrikers and striking employees was immune to injunction. Since even peaceful picketing in large numbers is inherently threatening, the Court held, only one picket per entrance could be allowed. Moreover, the Court declared that the right to carry on a business is a property right. An employer is, therefore, entitled to the same protection from people who trespass against that right as the employer is from trespass against any other property right. The *Tri-City* decision is worth quoting at some length:

The irreparable injury to property or to a property right, in the first paragraph of Section 20, includes injury to the business of an employer, and . . . the second paragraph applies only in cases growing out of a dispute concerning terms and conditions of employment between an employer and employee[s] . . . and not to such dispute between an employer and persons who are neither ex-employees nor seeking employment [at 196].

The object and problem of Congress in Section 20, and indeed, of courts of equity before its enactment, was to reconcile the rights of the employer in his business and in the access of his employees to his place of business and egress therefrom without intimidation or obstruction, on the one hand, and the right of the employees, recent or expectant, to use peaceable and lawful means to induce present employees and would-be employees to join their ranks, on the other . . . [at 197].

How far may men go in persuasion and communication, and still not violate the right of those whom they would influence? In going to and from work, men have a right to as free a passage without obstruction as the streets afford, consistent with the right of others to enjoy the same privilege. We are a social people, and the accosting by one of another in an inoffensive way, and an offer by one to communicate and discuss information with a view toward influencing the other's action, are not regarded as aggression or a violation of that other's rights. If, however, the offer is declined, as it may rightfully be, then persistence, importunity, following and dogging, become unjustifiable annoyance and obstruction which is likely soon to savor of intimidation. From all of this the person sought to be influened has a right to be free, and his employer has a right to have him free [at 197].

Tri-City Central Trades Council and the other defendants, being neither employees nor strikers, were intruders into the controversy, and were engaged without excuse in an unlawful conspiracy to injure the American Foundries by enticing its employees, and, therefore, should be enjoined [at 199].

The Court said that its *Tri-City* ruling did not create any new law or new perspective on existing law. It was "merely declaratory of what was the best practice always" (at 197). The basic idea is that every person, whether a union worker, a nonunion worker, an employer, a customer, or a supplier, has equal rights under the law. Each person has a right to make voluntary exchange offers to anyone else, but no person has a right to coerce another to accept his or her offers. Voluntary exchange requires mutual consent. Each person must be able to say "no" to an unacceptable offer from another and to walk away without being molested. In the absence of an explicit agreement to the contrary, the employment relationship gives the employee a right to seek, in nonviolent ways, better terms from the

employer. An individual employee may, acting alone or in concert with other employees, withhold labor services in the face of unacceptable terms of employment offered by the employer. If this is what a strike is, then there is a right to strike. But no person has a right to prevent willing workers from working, willing customers from buying, and willing suppliers from delivering during a strike. Moreover, perfect strangers have no standing with the employer. The employer has a right to refuse to deal with them and to prevent them from trespassing against his property. In 1921 the Court thought all this was common sense. I still think it is.

## The Triumph of Interests over Rights

The evolution of the majority opinion of the Supreme Court away from support of individual voluntary exchange rights and toward the approval of governmental and union abrogation of those rights has been well reported and analyzed (e.g., Siegan 1987 and Dickman 1987), but space does not permit a discussion of that sad story here. Suffice it to say that the Norris-LaGuardia Act and the NLRA constitute significant departures from the ordinary rule of law as it was understood by the U.S. Supreme Court before the mid-1930s. Even the present Court considers these acts to be consistent with the U.S. Constitution, notwithstanding the fact that they constitute a body of legislated rules that grant special privileges to some at the expense of many. The unique characteristics of labor law, set aside from ordinary principles of fair play, have been aptly called “the apartheid of labor law” (Vieira 1986, p. 35).

### *Norris-LaGuardia Act*

The Norris-LaGuardia Act did four things: It gave legal standing to unions in labor disputes even when they have no members who are employees of the firms involved in the disputes (Section 13), it banned all federal injunctions in all labor disputes under all circumstances (Sections 1, 7–12), it granted labor unions blanket immunity to all antitrust laws (Sections 4–5), and it made union-free contracts between employees and employers unenforceable in federal courts.

As subsequent U.S. Supreme Court cases—e.g., *U.S. v. Hutcheson* (321 U.S. 219 [1941]) and *Apex Hosiery v. Leader* (310 U.S. 409 [1940])—revealed, the Norris-LaGuardia Act effectively insulated labor unions from any, including criminal, prosecution for activities during labor disputes. Unions became unique organizations with very special privileges that no other organizations could ever hope to receive. And according to my reading of history, there was absolutely no justification for the granting of such special privileges.

For example, the concern over the misuse of injunctions in labor disputes was unfounded. According to Sylvester Petro (1978), in the period from 1880 to 1932 federal injunctions were issued in less than 1 percent of all work stoppages. State injunctions were issued in less than 2 percent of all work stoppages. Moreover, no peaceful primary strike was *ever* enjoined during that period. All court interventions in labor disputes were to enjoin acts of violence including physical harm to persons and property. The few injunctions that were issued were intended to ensure that the same rules of just conduct apply to all parties in labor disputes.

The issue of union-free (or, as unionists like to call them, "yellow dog") contracts raises significant questions. These contracts were agreements between employers and employees that both groups would avoid involvement with outsider unions. According to Reynolds (1984, chap. 5), such contracts were often initiated by *employees* who were seeking protection from the attempts of hostile strangers to interfere with their rights to sell their own labor services on terms they found satisfactory. Of course, union-free contracts were also often initiated by employers who were seeking to avoid having to deal with organizations of hostile strangers.

No matter who initiates such contracts, under the principle of freedom of contract, and in the absence of fraud, there is nothing unjust about them. Under freedom of contract, employers may offer whatever terms and conditions of employment they wish to prospective employees. The prospective employee may accept or reject the offered terms. Similarly, employees may ask any terms and conditions of employment they wish from prospective employers. For example, a prospective employee may ask that the employer hire only union members or that the employer refrain from hiring any union members. The prospective employer may accept or reject the offered terms. No worker has a right to be employed by any specific employer, and no employer has a right to the labor services of any specific employee. The only right anyone has is to make offers to others and to see if the offers are accepted.

But this view of the question is based on the idea that the same rules ought to apply to everyone irrespective of station or status. According to Section 2 of the Norris-LaGuardia Act,

the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment.

Therefore, special rules ought to apply. What counts is the result, not the process. Section 2 implies that one does not have freedom of

contract unless one is “free” to get the terms one wants to get. But, then, how about workers who want to be free of union involvement? Does not the impairment of union-free contracts make them less free because they cannot get the terms they want? Such conflicts of freedom are inevitable when freedom is redefined as it is in the Norris-LaGuardia Act.

This idea, that workers without unions will inherently have a disadvantage in bargaining power relative to employers, is the basis for most individuals’ support of unionism and is picked up again in the Wagner Act. But that disadvantage is a hoary myth. A worker’s bargaining power depends on the worker’s alternatives. If a worker either works for Employer A or does not work (i.e., if Employer A is a monopsonist), the worker has little bargaining power. If the worker has several employment alternatives, he has strong bargaining power. There may have been instances of monopsony or oligopsony in the 19th century, but, as we saw above, they were short-lived. Monopsony has not been a significant factor in the American labor market since the introduction and widespread use of the automobile.

### *The National Labor Relations Act*

Section 1 of the National Labor Relations Act (NLRA) begins with an often-repeated fiction that amounts to the identification of employers as an enemy class:

The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife. . . .

In fact, employers rarely denied workers the right to organize before 1935. Most often, they simply refused to recognize outsider unions as exclusive bargaining agents (Baird 1984, chap. 2). Many employers recognized outsider unions on a proportional representation basis even before Section 7(a) of the National Industrial Recovery Act required them to do so. In cases involving union-free hiring contracts, employers refused to deal with any outsider unions, but that refusal was often at the behest of workers who wished to maintain a union-free environment. The industrial strife that was alluded to occurred mainly during recognition strikes as outsider unions attempted to extend their empire over unwilling workers.

Section 1 of the NLRA ends with Orwellian doublespeak in order to justify creating adversarial relations between worker majorities and worker minorities. The NLRA asserts that its intent is to protect “the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing” for

collective bargaining purposes. But Section 9(a) of the NLRA destroys freedom of association by making it possible for outsider unions to compel unwilling individual workers to accept their representation services, and Section 8(a)3 compels workers to join outside unions and to support them financially. As such, the NLRA abolishes self-organization and free choice of representatives by forcing all individual workers to submit to the will of the majority, notwithstanding the long-standing common law principle that the sale of one's labor services is in the private, not governmental, sphere of human action.

When a worker decides whether to employ an attorney to represent him or her in a court action, the selection is not made by majority vote, it is made by individual choice. In contrast, under the apartheid of labor law constructed by Section 9(a)'s principle of exclusive representation, when a worker decides whether to be represented by a union in the sale of his or her labor services, individual free choice is overridden by majority vote. Since unions are private organizations, not governments, mandatory submission by an individual to the will of a majority is unjustifiable. It is the triumph of interests over rights.

When the bill that became the NLRA was debated in Congress, Senator Miller Tydings offered an amendment that would have outlawed employee coercion from *any* source, whether from employers or from unions. Senator Tydings said:

My theory is that there may be men who do not want to join the union who will be coerced under the Senator's bill into joining a union where really they are happy and contented as they are and do not want to be forced to join a union [Dickman 1987, p. 268].

But Senator Wagner assured the Senate that representation elections precluded coercion from unions even in the case of the closed shop (where a worker must be a union member to be hired), and the Tydings amendment was defeated.

The intent of the NLRA was not to ensure employee free choice at all; the intent was to make it possible for unions to draft members and to force employers to deal with hostile outsiders (Petro 1957, chap. 8). The law promotes an adversarial relationship not only between unions and management but also between workers who are union sympathizers and workers who wish to remain union free. Of course, before the 1930s there was strife between union and non-union workers. But the law was on the side of individual free choice. The law gave special privilege to neither group. When Section 1 states, "experience has proven that protection by law of the right of

employees to organize and bargain collectively . . . remov[es] certain recognized sources of industrial strife" and promises that the NLRA will achieve that end, it is merely promising the peace that comes from surrender. And it is workers who wish to remain union free who are forced to surrender.

Exclusive representation gives rise to another injustice in American unionism—the incessant effort of unions to force all the workers they represent to either join them or pay dues to them as a condition for continuing employment. Section 7 of the NLRA states that all employees have a right to affiliate with unions "of their own choosing" and to "refrain from any or all such activities *except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)3*" (emphasis added).

Section 8(a)3 spells out the details of such compulsory unionism arrangements. The unionist argument in favor of such union security compulsion is that since Section 9(a) compels a certified bargaining agent to represent all the workers in a bargaining unit, all such workers should be forced to pay their fair share of the cost of union services. Otherwise, some workers would get the benefits of union services for free—they would be "free riders." The obvious reply is that Section 9(a) should be repealed. If there were no exclusive representation, there could be no free riders. Unions would bargain for their members only.

The Norris-LaGuardia Act made union-free (yellow dog) contracts between employers and employees unenforceable in federal courts. The NLRA goes even further and outlaws such agreements. In contrast, the NLRA permits forced unionism agreements between employers and unions at the expense of dissenting workers. And, hypocritically, it does so in the name of employee's free choice. Consistency requires that both union-free and forced unionism agreements be permitted, or both be outlawed. In the absence of an exclusive representation, where an individual employee's free choice of whether to affiliate with a union was guaranteed with no exceptions, I would prefer to see both types of arrangements permitted. If employees and employers could self-select the environments within which they work together, labor-management cooperation would be much easier to achieve and entrepreneurial discovery of superior modes of labor-management relations would be facilitated (Baird 1987).

## Conclusion

Paul Weiler, of Harvard Law School, a prominent advocate of labor law reform, argues that certification elections ought to be "instant"

(Weiler 1983, pp. 1811-16). That is, the employer ought to have no opportunity to make a case in favor of a nonunion vote. Weiler's reasoning is astonishing. He says that an employer's participation in a representation election campaign is as inappropriate as a foreign government's participation in an American election. "Only the employees' interests are supposed to count in the certification decision," argues Weiler; thus, "the employer can claim no positive right to influence the employees' vote" (p. 1814).

Weiler's view, apparently, is that a job is a property right of the employee who holds it. Employers who express their own views regarding the collectivization of bargaining trespass against that property right. The more common and, I think, more defensible position is that a job is a contractual relationship between an employee and an employer. Both have a legitimate stake in the outcome of the collectivization issue. Both are properly free to participate in the process by which that outcome is determined.

Weiler tells us that, under the NLRA, labor has "group rights" that supersede the rights of individuals (p. 1788). Ironically, this is exactly how P. W. Botha, the erstwhile president of South Africa, defends apartheid. Each racial group is assigned group rights by the South African constitution. Individual rights, such as freedom of speech and contract, are overridden by these group rights.

Labor law reform ought to be directed at ensuring equal treatment under the law for independent workers, unionized workers, and employers. It should not favor union workers over everyone else. The certification election reform that ought to be adopted is to abolish certification elections altogether. Let individual workers choose on an individual, not a majority vote, basis whether to be represented by a union. Let unions represent their voluntary members and no one else.

At the very least, Section 9 of the NLRA ought to be amended to provide for regularly scheduled, periodic recertification elections of exclusive bargaining agents. As it is now, once a union is certified, it is presumed to continue to have majority support forever unless the contrary is proven by a decertification election. The latter is held only if 30 percent or more of the workers who are represented by an exclusive bargaining agent sign cards requesting that it be held. It is as if once President Bush is elected, he remains president indefinitely unless enough citizens sign a petition requesting an election to determine whether to depose him.

Even with the special privileges they enjoy under present labor law, unions are losing their market share to nonunion labor. If labor law were reformed to eliminate all those special privileges—most

importantly, if individual workers were free to decide on an individual basis whether to be represented by a union, and if strikers could withhold only their own labor services and be effectively prohibited from interfering in any way with the voluntary exchange rights of nonstriking employees, suppliers, and customers of struck firms—then unions would lose even more of their market share. But the loss of unions' market share is no excuse to propose, like Weiler, even more drastic special privileges to attempt to reverse the unions' falling market share. After all, why should unions be considered so worthwhile that they should be given special privileges? Their history does not support such a sentiment.

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