

1957

## The Right to Work, A Decade of Development

William F. Swindler  
*University of Nebraska*

Follow this and additional works at: <https://digitalcommons.unl.edu/nlr>

---

### Recommended Citation

William F. Swindler, *The Right to Work, A Decade of Development*, 36 Neb. L. Rev. 276 (1957)  
Available at: <https://digitalcommons.unl.edu/nlr/vol36/iss2/4>

This Article is brought to you for free and open access by the Law, College of at DigitalCommons@University of Nebraska - Lincoln. It has been accepted for inclusion in Nebraska Law Review by an authorized administrator of DigitalCommons@University of Nebraska - Lincoln.

# The Right to Work, A Decade of Development†

William F. Swindler\*

## I. INTRODUCTION

When the United States Supreme Court on May 21, 1956, held<sup>1</sup> the "right to work" statutes of Nebraska<sup>2</sup> and North Carolina<sup>3</sup> to be inapplicable to labor organizations covered by the Railway Labor Act as amended 1951,<sup>4</sup> it marked the first judicial limitation of significance to be imposed upon a legislative movement which, even antedating the Taft-Hartley Act<sup>5</sup> in several instances, had enjoyed a steady growth in a number of states since 1947. Generally condemned by labor spokesmen with the same vigor with which they attacked Taft-Hartley—the latter, indeed, being charged with nurturing the state legislation<sup>6</sup>—the "right to work" laws have been fervently defended by other groups, both public and private, and have provided a political issue of some significance in several primaries and election campaigns.<sup>7</sup> The striking uniformity in the provisions

† The author wishes to express his thanks to Robert L. Howard, Professor of Law, University of Missouri, for his helpful advice in the preparation of this paper.

\* A.B., B.Sc. in Journalism 1935, Washington University; M.A. 1936, Ph.D. 1942, University of Missouri; presently Professor of Journalism, University of Nebraska.

<sup>1</sup> *Railway Employee's Dept. v. Hanson*, 351 U.S. 225 (1956).

<sup>2</sup> Neb. Rev. Stat. §§ 48-217 -19 (Reissue 1952). The statute is based on Neb. Const. art. 15, §§ 13-15, adopted Nov. 5, 1946.

<sup>3</sup> Gen. Stat. N. C. §§ 95-78 to -80 (Supp. 1955).

<sup>4</sup> 64 Stat. 1238 (1951), 29 U.S.C. § 152 (1952), amending 48 Stat. § 1185 (1934).

<sup>5</sup> 61 Stat. 136 (1947), 29 U.S.C. §§ 141-166 (1952).

<sup>6</sup> Cf. § 14 (b) of the Labor-Management Relations Act: "Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law." 61 Stat. 151 (1947), 29 U.S.C. § 164 (b) (1952). See Finley & Thatcher, *Respect for Picket Lines*, 32 Neb. L. Rev. 25 (1952).

<sup>7</sup> The defeat of incumbent Governor Hall of Kansas in the Republican gubernatorial primary in that state was attributed by Associated Press dispatches of Aug. 8, 1956, in large measure to his veto of a proposed "right to work" law in 1955. See also N.Y. Times, Dec. 9, 1955, p. 26, col. 5; St. Louis Post-Dispatch, June 24, 1956.

of the seventeen<sup>8</sup> state constitutional amendments or statutory enactments on the subject since 1943 attests to the keen interest in the issue in various jurisdictions and suggests that neighboring legislatures have been unusually alert to the steps taken by sister states in defining authority in this area.<sup>9</sup> It is safe to say that the "right to work" movement has been one of the major issues in American labor policy since Congress undertook to restate that policy a decade ago in the Labor Management Relations Act.<sup>10</sup>

In the *Hanson* case<sup>11</sup> itself, the United States Supreme Court was at pains to distinguish between the questions on which its unanimous opinion was based and the general question of the scope of state authority expressed in legislation under the specific protection of section 14 (b) of Taft-Hartley. Basically, the case revolved about the attempt of certain non-union employees of the Union Pacific Railroad to prevent the company from entering into a union shop agreement with sixteen different labor organizations representing various phases of railroad operation. The Labor Management Relations Act as such was not involved; the central issue was the clause

<sup>8</sup> Ala. Code tit. 26, §§ 376 and 383 (Supp. 1955); Ark. Stat. Ann. §§ 81-201 to -205 (1947); Ariz. Code Ann. §§ 56-1302 to -1308 (Supp. 1955); Ga. Code Ann. §§ 54-901 and -908 (Supp. 1955); Iowa Code Ann. §§ 736A.1 to A.8 (Supp. 1956); Miss. Code Ann. § 6984.5 (Supp. 1954); Nev. Sess. Laws 1953, c. 1; N.D. Rev. Code §§ 34-0901 and -0906 to -0908 (Supp. 1953); S.C. Code §§ 40-46 to -46.11 (Supp. 1955); S.D. Code §§ 17.1101 to .1104 and .1112 (Supp. 1955); Tenn. Code Ann. §§ 50-208 to 212 (Supp. 1953); Tex. Stat., Rev. Civ. art. 5154g(1) to (6) and art. 5207a(1) to (5) (Supp. 1956); Utah Code Ann. §§ 34-16-1 to -16-18 (Supp. 1955); Va. Code §§ 40-68 to -74.5 (Supp. 1956). For Nebraska and North Carolina, see notes 2 and 3 *supra*. For Florida, see note 98 *infra*.

Four states—Delaware, Louisiana, Maine and New Hampshire—have repealed "right to work" statutes. Twelve other states have considered and rejected bills on this subject. (See Tables 2 and 4 *infra*.) Thus to date at least 33 states have considered "right to work" proposals. Four other states have enacted related statutes, e. g. prohibiting union shop and other union security plans unless approved by a secret vote of a stipulated majority of the workers in a given enterprise. Cf. Colo. Rev. Stat. c. 80, art. 5-1 (Supp. 1955); Kan. Gen. Stat. § 44-809 (Supp. 1955); Mass. Ann. Laws, c. 150A § 4 (6) (Supp. 1955); Wis. Stat. § 111.06 (Supp. 1955).

<sup>9</sup> A comparative analysis of the various state "right to work" laws appears in Part IV *infra*.

<sup>10</sup> Cf. Hartley, *Our New National Labor Policy* (N.Y. 1948), cc. 2, 9-12; Handler, *Impact of the Labor Management Relations Act of 1947 Upon Jurisdiction of State Courts Over Union Activities*, 26 Temple L.Q. 111 (1952); Cox, *Federalism in the Law of Labor Relations*, 67 Harv. L. Rev. 1297 (1954); Hays, *Federalism and Labor Relations in the United States*, 102 P. Pa. L. Rev. 959 (1954).

<sup>11</sup> *Railway Employees' Dept. v. Hanson*, 351 U.S. 225 (1956).

in the Railway Labor Act as amended in 1951, permitting union shop agreements in the railroad industry<sup>12</sup>—in contradistinction to section 7 of Taft-Hartley.<sup>13</sup> However, as the Nebraska Supreme Court chose to define the issue,<sup>14</sup> the constitutionality of the union shop clause in the Railway Labor Act was fundamentally bound up with the general validity of “right to work” legislation—for, as Justice Wenke said:

. . . [T]he history of the Amendment [to the Railway Labor Act] leaves no doubt of the fact that Congress intended to strike down all state constitutional and statutory restrictions relating to union shop agreements insofar as they applied to carriers in interstate commerce and the labor organizations representing their employees.<sup>15</sup>

If Congress was within its constitutional prerogative in authorizing railroad labor and management to execute union shop agreements which affected “employees of railroads in Nebraska, contrary to our constitution and statutory provisions,” it appeared to many advocates (and some critics) of “right to work” legislation that the fundamental basis of all these laws would be seriously, and perhaps fatally, impaired.<sup>16</sup>

Facing the constitutional issue either thus defined or thus implied, the Nebraska Supreme Court declared:

We think the freedom of association, the freedom to join or not to join in association with others for whatever purposes such association is lawfully organized, is a freedom guaranteed by the First Amendment.

We also think that the right to work is one of the most precious liberties that man possesses. . . . It is a fundamental human right which the due process clause of the Fifth Amendment protects from improper infringement by the federal government. To work for a living in the occupations available in a community is the very essence of personal freedom and opportunity that it was one of the purposes of these amendments to make secure. Liberty means more

<sup>12</sup> § 2(11) of 64 Stat. 1238 (1951), makes permissive union-employer agreements embodying any or all of these: (1) a union shop in all phases of the interstate transportation industry; (2) a checkoff on written authorization of individual members; (3) a provision against overlapping memberships in cases of individuals already holding memberships in a union “national in scope.”

<sup>13</sup> 61 Stat. 136 (1947), 29 U.S.C. §§ 158(a)(3), 164(b) supplements and revises the Wagner Act provision guaranteeing employees the right to organize by adding a guarantee of “the right to refrain from any and all of such activities” except as this may be affected by the protection against employer interference covered by sections 8(a)(3) and 14(b).

<sup>14</sup> *Hanson v. Union Pac. R. Co.*, 160 Neb. 669, 71 N.W.2d 526 (1955).

<sup>15</sup> *Id.* at 690, 71 N.W.2d at 537.

than freedom from servitude. The constitutional guarantees are our assurance that the citizen will be protected in the right to use his powers of mind and body in any lawful calling. *Smith v. State of Texas*, 233 U. S. 630, 34 S. Ct. 681, 58 L. Ed. 1129, L. R. A. 1915D, 677, Ann. Cas. 1915D, 420; *Truax v. Raich*, *supra*. . . .

We find no condition to have existed at the time the amendment [to the Railway Labor Act] was adopted to authorize any restriction of these rights. Consequently, we think Congress was without authority to impose upon employees of railroads in Nebraska, contrary to our constitution and statutory provisions, the requirement that they must become members of a union representing their craft or class as a condition for their continued employment. It improperly burdens their right to work and infringes upon their freedoms. This is particularly true as to the latter because it is apparent that some of these labor organizations advocate political ideas, support political candidates, and advance national economic concepts which may or may not be of an employee's choice.<sup>17</sup>

The court then added that if the constitutional question is to be defined in terms of "the general power of Congress to regulate interstate commerce rather than . . . the freedoms guaranteed by the First and Fifth Amendments," the validity of the Railway Labor Act amendment "depends upon whether or not it is reasonable and whether or not the means selected have a real and substantial relation to the objects sought to be obtained." *Held*, they did not.<sup>18</sup>

Such insistence by the lower court that the integrity of the "right to work" concept as a whole was fundamentally affected by the *Hanson* case compelled the United States Supreme Court to deal with this question, even within the carefully defined limits within which it sought to confine its reversal. Mr. Justice Douglas, speak-

<sup>16</sup> For a concurring evaluation of the Supreme Court opinion and its effect on "right to work" laws generally, see the comments by the National Right to Work Committee and the AFL-CIO respectively, in notes 30 and 31 *infra*. As a matter of fact, two states (Iowa and Mississippi) had clearly recognized in their "right to work" laws that workers covered by the Railway Labor Act were exempt from the state statute, and one federal and three state courts in Florida, North Carolina, Texas and Virginia had handed down rulings on similar questions which had anticipated the final holding in the *Hanson* case. See Table 5 and note 173 *infra*.

<sup>17</sup> 160 Neb. at 696, 71 N.W.2d at 546. Congress did not by its legislation "impose" upon the railroads any "requirement," but merely provided that the railroads and their employees could legally enter into such agreements if they so desired.

<sup>18</sup> *Id.* at 701, 71 N.W.2d at 548. In a concurring opinion, Carter, J., and Simmons, C. J., added that if the objective of the amendment is to promote union security, "compulsory union membership exceeds the necessities of the case and compels an employee to join and support an association of persons with whose purposes and concepts he may be in total disagreement. The Constitution protects an individual against legislation having this effect."

ing for a unanimous bench, first assured the "right to work" advocates that the court still adhered to the doctrines of the *Lincoln Federal Union*<sup>19</sup> and *American Sash Co.*<sup>20</sup> cases: "In the absence of conflicting federal legislation, there can be no doubt that it is within the police power of a State to prohibit the union or closed shop."<sup>21</sup> He then added that "the power of Congress to regulate labor relations in interstate industries is likewise well-established."<sup>22</sup>—i. e., the question is not one of constitutionality but of legislative policy. Having thus disposed of the lower court's legal proposition, Mr. Douglas then addressed himself to the philosophical one:

It is said that the right to work, which the Court has frequently included in the concept of "liberty" within the meaning of the Due Process Clauses (See *Traux v. Raich*, 239 U.S. 33; *Takahashi v. Fish & Game Commission*, 334 U.S. 410) may not be denied by the Congress. The question remains, however, whether the long-range interests of the workers would be better served by one type of union agreement or another. That question is germane to the exercise of power under the Commerce Clause—a power that often has the quality of police regulations. See *Cleveland v. United States*, 329 U.S. 14, 19. One would have to be blind to history to assert that trade unionism did not enhance and strengthen the right to work. See Webb, *History of Trade Unionism*; Gregory, *Labor and the Law*. To require, rather than to induce, the beneficiaries of trade unionism to contribute to its costs may not be the wisest course. But Congress might well believe that it would ensure the right to work in and along the arteries of interstate commerce. No more has been attempted here.<sup>23</sup>

The *Hanson* ruling thus answered the basic question relating to the "right to work" movement in general—it is within the constitutional authority of Congress to legislate on the union shop, and where Congress *does* legislate its will overrides contrary state statutes. The circumstances which may lead Congress to exercise its power in such manner as to reverse prevailing policy were strikingly illustrated in the 1934 and 1951 amendments to the Railway Labor Act, and accordingly pointed out by the Supreme Court in its opinion: At the time of the 1934 amendment,<sup>24</sup> labor representatives wished to prohibit the union shop because it tended to encourage company unions, thus "effectively depriving a substantial

<sup>19</sup> *Lincoln Federal Labor Union v. Northwest Iron & Metal Co.*, 335 U.S. 525 (1949).

<sup>20</sup> *AFL v. American Sash & Door Co.*, 335 U.S. 538 (1949).

<sup>21</sup> 351 U.S. at 233.

<sup>22</sup> *Ibid.*

<sup>23</sup> *Id.* at 234.

<sup>24</sup> See note 4 *supra*. For a Nebraska case on this general issue, see *Brisbin v. E. L. Oliver Lodge 335, Brotherhood of Railway Clerks*, 134 Neb. 517, 279 N.W. 277 (1938).

number of employees of their right to bargain collectively.”<sup>25</sup> By 1950 the situation in the railroad industries had practically reversed itself—company unions had all but disappeared, more than 75 per cent. of all railroad employees were members of labor organizations, and the unions considered their chief problem to be the “free rider” or non-member who reaped benefits of collective bargaining with no share of the responsibilities of the collectivity. If this problem appeared to Congress to be important enough to warrant a redefinition of public policy in the Railway Labor Act making possible a union shop after seventeen years of prohibiting it, the Supreme Court held, this was within the permissible limits of the commerce power.<sup>26</sup>

Friends, foes and neutral commentators on the labor scene were in general agreement as to the importance of the *Hanson* ruling. Writing in the *New York Times*, Washington correspondent Arthur Krock observed that with this opinion the court had come “full circle” from the *Adair*<sup>27</sup> case of 1908: “In that case the Supreme Court struck down as a constitutional [*sic*] invasion of individual rights an act of Congress that forbade employer dismissal of a worker merely for belonging to a union. It is ‘full circle’ indeed when the sanction of Congress is held sufficient by the same court to make valid an employer-employee contract for compulsory unionism.”<sup>28</sup> The National Right to Work Committee<sup>29</sup> quoted its board chairman—Nathan Thorington, president of a construction company in Richmond, Va.—as declaring that the opinion “served warning that one simple amendment to the Taft-Hartley Act, knocking out the clause that specifically permits states to pass laws banning compulsion, would destroy such protection for all other American workers.”<sup>30</sup> Union spokesmen, on the other hand, applauded the opinion

<sup>25</sup> 351 U.S. at 231, citing Sen. Rep. No. 2262, 81st Cong. 2d Sess. (1950), and H. Rep. No. 2811, 81st Cong. 2d Sess. (1950).

<sup>26</sup> 351 U.S. at 233. See Levison, *The Railway Labor Act—Record of a Decade*, 3 Lab. L.J. 13 (1952).

<sup>27</sup> *Adair v. United States*, 208 U.S. 161 (1908).

<sup>28</sup> *N.Y. Times*, May 22, 1956, p. 32, col. 5. See also, editorial, *Union v. Individual*, *Chicago Daily News*, May 25, 1956, p. 12.

<sup>29</sup> See note 81 *infra*.

<sup>30</sup> *Right to Work Committee National Newsletter* May-June, 1956, p. 1. The committee observed: “The relatively few leaders of the big national unions who are fighting so bitterly to force all workers into their folds freely boast that their efforts and vast financial resources are being devoted to making compulsory unionism nation-wide in all labor fields. It is now well past time for the vast majority of Americans, including millions of the members of these very leaders’ unions, to take a stand in favor of individual rights which were once the most important foundation stone in the American system.” *Ibid.* p. 2.

and proceeded to point out that the case had resulted in "a lack of uniformity in federal policy that discriminates against workers outside the railroad industry. These non-transport workers should have the right to negotiate union shop contracts, too, without interference from the states."<sup>31</sup>

Meanwhile, the states having "right to work" legislation have been left to weigh the effects of the *Hanson* ruling on their statutes.<sup>32</sup> For Nebraska the *Hanson* case held a particular irony because this state had been one of the first in the movement and had provided the first major test case upholding the constitutionality of these laws. Immediately after the enactment of the Nebraska statute in 1947,<sup>33</sup> Lincoln Federal Labor Union No. 19229 (AFL) sought a declaratory judgment to determine the validity of the legislation and of the constitutional amendment on which it was based.<sup>34</sup> In affirming the validity of both, the state Supreme Court had said:

. . . The amendment prohibits no one from joining a union, but undertakes to lawfully assert that neither membership nor non-membership in a union shall be a condition precedent to the right to work. It is inclusive of all employers and employees in this state. It does not deny the union member the equal protection of the law, but gives the non-union employee a protection of the law which he had not theretofore enjoyed. . . .

The people of this state initiated the amendment by original action, without legislative intervention, by filing petitions with the Secretary of State, which were signed by ten percent or more of the electors of the state, so distributed as to include five percent or more of the electors of each of two-fifths or more of the counties of the state. At the election the amendment was adopted by a vote of 212,443 FOR and 142,702 AGAINST. It is common knowledge that its provisions and purposes, as well as the reasons for its adoption or rejection, were widely publicized and ably presented to the electorate of this state prior to the election. It was adopted after considerate and deliberate action. Thus it was decided that its provisions were reasonable and necessary to preserve the integrity of government . . . With that decision, courts have no right to interfere.<sup>35</sup>

On appeal, the United States Supreme Court unanimously af-

<sup>31</sup> AFL-CIO News, May 26, 1956, p. 6.

<sup>32</sup> See Lincoln (Neb.) Star, May 22, 1956, p. 8, col. 1; Lincoln Journal, May 23, 1956, p. 4, col. 1.

<sup>33</sup> See note 2 *supra*.

<sup>34</sup> Lincoln Federal Labor Union v. Northwest Iron & Metal Co., 149 Neb. 507, 31 N.W.2d 477 (1948), *aff'd* 335 U.S. 525 (1949).

<sup>35</sup> 149 Neb. at 521, 531, 31 N.W.2d at 488, 491. The Nebraska Small Businessmen's Association, which had been a moving factor in the original petition to place the constitutional amendment on the ballot in 1946, was an intervenor in this suit. See notes 131-34 *infra*.



firmed the Nebraska judgment. In his opinion Mr. Justice Black emphasized that the due process clause was not to be conceived as putting the states into a "strait jacket" with respect to the power to suppress industrial practices they considered offensive to public welfare:

This court, beginning at least as early at 1934, when the *Nebbia* case was decided, has steadily rejected the due process philosophy enunciated in the *Adair-Coppage* line of cases. In doing so it has consciously returned closer and closer to the earlier constitutional principle that states have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or some valid federal law . . .<sup>36</sup>

A companion opinion by the Supreme Court ruled on the Arizona "right to work" constitutional amendment, where the question was presented whether the provisions of the amendment prohibiting discrimination against nonunion members in employment situations was a denial of equal protection where the same prohibition had not been provided for union members, *Held*: [L]egislative authority, exerted within its proper field, need not embrace all the evils within its reach, "[and] the existence of evils against which the law should afford protection and the relative need of different groups for that protection 'is a matter for the legislative judgment.'"<sup>37</sup>

With the sweeping affirmations in the *Lincoln Union* and *American Sash Co.* cases, other states which had theretofore not taken action on the subject now proceeded, relying on the constitu-

<sup>36</sup> 335 U.S. at 536. The concurring opinion of Frankfurter, J., was adopted as the opinion of the court in the companion case of *AFL v. American Sash & Door Co.*, 335 U.S. 538 (1949). In this opinion, Mr. Justice Frankfurter said: "The right of association, like any other right carried to its extreme, encounters limiting principles . . . . At the point where the natural advantage of association demand too much individual disadvantage, a compromise must be struck . . . . When that point has been reached—where the intersection should fall—is plainly a question within the special province of the legislature . . . . The rationale of the Arizona, Nebraska and North Carolina legislation prohibiting union-security agreements is founded on a similar resolution of conflicting interests. Unless we are to treat as unconstitutional what goes against the grain because it offends what we may strongly believe to be socially desirable, that resolution must be given respect." 335 U.S. at 546.

<sup>37</sup> 335 U.S. at 541, where the court added that ". . . [W]e are unable to find any indication that Arizona's amendment and statutes are weighted on the side of non-union as against union workers. We are satisfied that Arizona has attempted both in the anti-yellow-dog-contract law and in the anti-discrimination constitutional amendment to strike at what were considered evils, where those evils were most felt, and to strike in a manner that would effectively suppress the evils."

tionality of these early state enactments, to add "right to work" laws of their own.<sup>38</sup> A subsequent United States Supreme Court ruling, upholding a Virginia contractor's suit to enjoin picketing for purposes held to be in conflict with that state's "right to work" law,<sup>39</sup> further enhanced the movement. By 1954 state enactments on the subject appeared to be, if not at a zenith, at least at an impressive pinnacle of success.<sup>40</sup>

The *Hanson* ruling, coming thus after more than a decade of successive legislative and judicial victories for the "right to work" forces has assumed—perhaps unwarrantably but also perhaps inevitably—the proportions of a major bar and a potential precedent for reversal of a trend.<sup>41</sup> In this case the United States Supreme Court has, at least, made clear what it mentioned almost parenthetically in the *Lincoln Union* ruling—that state legislative prerogative in this field is limited and limitable by "valid federal law." The latter as exemplified in the Railway Labor Act is an assertion of exclusive federal jurisdiction in a particular area—interstate transportation—in which Congress had long asserted preeminence. But this is scarcely to be compared with the broad areas of industrial relations left open to state action by section 14 (b) of the Labor Management Relations Act. It is, at present, a matter of relative points of view how profoundly the *Hanson* ruling has affected the "right to work" movement: in the eyes of the National Right to Work Committee, 14 (b) now appears to be a last ditch of defense before the breach left by *Hanson*; while in the eyes of organized labor *Hanson* is but an outpost whose reduction has not materially lessened the task of the onslaught on the 14 (b) fortress.

In any case, there is now a more clearly defined limit to the

<sup>38</sup> For the three stages in the development of "right to work" legislation, see Part II C *infra*. Cf. the comment of the CIO legislative committee: "There has never been in the past fifteen years a session of state legislatures which has produced so much anti-labor legislation" as 1947. Final Proc. of 9th Const. Conv. (Boston, 1947), 88; and see AFL Proc. 66th Conv. (San Francisco, 1946), 256. See also Sutherland, *The Constitutionality of the Taft-Hartley Law*, 1 Ind. & Lab. Rel. Rev. 177, 196 (1948).

<sup>39</sup> Local 10, United Ass'n of Journeymen Plumbers, AFL v. Graham, 345 U.S. 192 (1952). In his dissent, Mr. Justice Douglas said: "A purpose to deprive nonunion men of employment would make the picketing unlawful; a purpose to keep union men away from the job would give the picketing constitutional protection." *Id.* at 202. On the Virginia statute generally, see *Finney v. Hawkins*, 189 Va. 878, 54 S.E.2d 872 (1949); *Local 1018, Painters Union, AFL v. Rountree Corp.*, 194 Va. 148, 72 S.E.2d 402 (1952).

<sup>40</sup> Cf. 179 Com. & Fin. Chron. 2106 (1954), and, generally, U.S. Chamber of Commerce, *The Case for Voluntary Unionism* (1956).

<sup>41</sup> See notes 30 and 31 *supra*.

area covered by section 14 (b); or, to be more specific, it should be clearer since the *Hanson* case that the limit is flexible according as federal preemption is broadened as it was in the 1930s<sup>42</sup> or relatively narrowed as it was in the '40s and '50s.<sup>43</sup> The ultimate initiative in either event lies with Congress, which by the Taft-Hartley Act of 1947 and the 1951 amendment to the Railway Labor Act decreed a definite shift in legislative emphasis from the Wagner Act of 1935 and the 1934 amendment to the Railway Labor Act. Even the question of consistency, or the desirability of consistency, between the transport and the general labor statutes is the concern of Congress; and it is worth noting that in 1951, when the Railway Labor Act was revised, Congress made certain amendments to Taft-Hartley but saw no need at that time to alter 14 (b) in the interest of correlating with the new policy being defined in the transport act.<sup>44</sup>

At the least, the *Hanson* case provides a convenient milestone at which to assess the progress of the "right to work" movement in the decade in which the Labor Management Relations Act has given it its manifest support. This assessment includes (within the obvious limitations of time and space for such an exposition) the historical evolution of the concept itself; the relation between "right to work" legislation and the general pattern of state labor law; the local conditions which have proved most hospitable to the movement; the comparative details of the extant statutes and the sum of state and federal adjudication on these laws to date.

## II. GENESIS OF THE "RIGHT TO WORK" CONCEPT

### A. HISTORICAL BACKGROUND

Until the Industrial Revolution of the nineteenth century vastly enlarged upon the practical threat of technological unemployment and the supplanting of individual workers by mechanical processes, western economic society had, since the Statute of Labourers, stressed the "duty to work" rather than the right.<sup>45</sup> Particularly in

<sup>42</sup> *NRLB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

<sup>43</sup> *United Constr. Workers v. Laburnum Constr. Corp.*, 347 U.S. 656 (1954); *Garner v. Teamsters Local 776*, AFL, 346 U.S. 485 (1953); *International Union of United Automobile Workers, CIO v. O'Brien*, 339 U.S. 454 (1950); *Allen-Bradley Local 1111, United Electrical Workers v. Wisconsin Employment Relations Board*, 315 U.S. 740 (1942); *NLRB v. Fainblatt*, 306 U.S. 601 (1939).

<sup>44</sup> See H. Rep. 1082, 82d Cong. 1st Sess. (1951); Sen. Rep. 646, 82d Cong. 1st Sess. (1951).

<sup>45</sup> 35 Edw. III, c. 1 (1351); and see the Elizabethan code of 1562 in 5 Eliz., c. 4.

colonial America, as in Elizabethan England, a chronic manpower shortage made work a moral obligation as much as a rule of law: Indolence was the curse of the working man, wrote John Winthrop in 1633, and much the same theme was expressed in 1847 in a tract by the Association for Improving the Condition of the Poor.<sup>46</sup> But by this latter date the machine age was clearly discernible, and, faced with its impersonal forces, political philosophers were already seeking to define the shifting economic values in basic human terms and particularly to demonstrate the responsibility of the state to safeguard the interests of the individual against the various jeopardies of industrialism.

Louis Blanc, one of the early French socialists, thus identified liberty in the new economic society as "not only the right, but the power given to man to develop his faculties under the reign of justice and the protection of law."<sup>47</sup> Proudhon was even more specific: "The right to work is the right which each citizen has, whatever his trade or profession, to be continually employed in his calling, deriving a salary fixed not arbitrarily and by chance, but according to the natural and normal trend of [business] income"<sup>48</sup>—this last sounding strikingly like the arguments for cost-of-living adjustments in collective bargaining of the mid-twentieth century.

Horace Greeley, at once one of the most ardent social reformers and the most widely-read journalist of his day, translated the phrase into the practical necessities of the emerging American industrialism as he saw them: "Labor, essential to all, . . . must be fully guaranteed to all, so that each may know he can never starve nor be forced to beg while able and willing to work." Conceding that "the Right to Labor—that is, to constant Employment with a just and full Recompense—cannot be guaranteed to all without a radical change in our Social Economy," Greeley concluded that the "ultimate and thorough remedy . . . is found in Association" (i. e., collective action).<sup>49</sup>

Even more eloquent on the principle was John R. Commons, who defined the right as "the right of access to the land, the machinery,

<sup>46</sup> Cf. 1 Winthrop's Journal 112 (1908); *The Way to Wealth* (1847) reprinted in 1 Hacker, *Shaping the American Tradition* 536 (1947). See, generally, Introduction to 3 Commons & Associates, *Documentary History of American Industrial Society* 19-58 (1910); 2 Dorfman, *The Economic Mind in American Civilization* c. 24 (1946); 1 Lyon et al., *Government and Economic Life* cc. 12-17 (1939); Morris, *Government and Labor in Early America* 3 (1946).

<sup>47</sup> Blanc, *Droit au travail* 13 (2d ed. 1848).

<sup>48</sup> Proudhon, *La revolution sociale* 198 (1868).

<sup>49</sup> Greeley, *Hints Toward Reform* 320 (1850).

the capital, whose products support life and liberty."<sup>50</sup> Articulating what had been a moving principle of such disparate groups as the early Working Men's parties, the Socialist Laborites, the Greenbackers, and the Populists, Commons argued:

[The right to work] is a new right under new industrial conditions, which the popular conscience is beginning to believe morally right. But it must inevitably meet with hostility. It is clearly and plainly an encroachment upon property rights, and those whose interests are mainly propertied will . . . array themselves in opposition.<sup>51</sup>

The author then distinguished the "right to work" from the "right to free industry and the right to free employment," viz.:

. . . Free industry is the right to leave the ranks of wage earners, without let or hindrance from one's employer, . . . and to enter the ranks of capitalists and employers, if *one is able*. Monopoly now has antiquated this right, since the small capitalist, to say nothing of the *quondam* laborer, cannot compete with the large and established industry. Instead of starting anew as a capitalist, the laborer can only hope to get promotion or to invest his savings within the industrial organizations where he finds himself. Likewise, with the right to free employment, which is the right freely to leave one employer, and to hire out to another. This right, also, now is meaningless, where there is but one incorporated employer . . . . The successor and substitute for the rights of free industry and free employment, must, under new conditions, be the right to a definite and *right standing*, within the existing industrial enterprise. This is the Right to Work.<sup>52</sup>

Commons concluded with a definition of three practical issues revolving about the "right to work"—(1) questions of arbitrary discharge by employers, to be met by "legal, or so-called compulsory, arbitration;" (2) technological unemployment, which created an ethical claim to compensation; and (3) depression-induced unem-

<sup>50</sup> Commons, *The Right to Work*, 21 *Arena* 131 (1899).

<sup>51</sup> *Id.* at 134. The basic American devotion to private property has meant that "under no circumstances can labor here afford to arouse the fears of the great middle class for the safety of private property as a basic institution. Labor needs the support of public opinion, meaning the middle class, both rural and urban, in order to make headway with its program of curtailing, by legislation and by trade unionism, the abuses which attend the employer's unrestricted exercise of his property rights. But any suspicion that labor might harbor a design to do away altogether with private property, instead of merely regulating its use, immediately throws the public into an alliance with anti-union employers." Perlman, *A Theory of the Labor Movement* 160 (1949). And see Lenhoff, *The Right to Work: Here and Abroad*, 46 *Ill. L. Rev.* 669 (1951).

<sup>52</sup> Commons, *supra* note 50 at 138.

ployment, where the right must be preserved by government action.<sup>53</sup>

These inchoate propositions—essentially idealistic at the end of the nineteenth century<sup>54</sup>—made precarious headway during the first quarter of the twentieth. Indeed, from the *Philadelphia Cordwainers' Case* in 1806 until the ultimate change in judicial attitude in the *Jones & Laughlin* opinion in 1937, the hard facts of legal precedent made almost any right of labor subordinate to almost any interest of management.<sup>55</sup> And exactly ninety years extended between *Commonwealth v. Hunt* and the Norris-LaGuardia Act, with few other court opinions or valid acts of legislation hospitable to labor appearing in between.<sup>56</sup> Such labor legislation as there was in the early period of United States history was protective of individual rights and restrictive of collective action. The statutory definition of the mechanic's lien and the later body of statutes on industrial safety are examples of the one group, while consistently more stringent laws on self-help and unlawful combinations illustrate the other.<sup>57</sup> In each instance, a solicitous concern for the rights of the individual is the avowed basis of public policy—something

<sup>53</sup> *Id.* at 139-41. See also Bascom, *Right to Labor*, 18 Q. J. Econ. 492 (1904).

<sup>54</sup> Cf. the following statement by a court in 1897: "Public policy and the interests of society demand the utmost freedom in the citizen to pursue his lawful trade or calling, and if the purpose of an organization . . . be to hamper or restrict that freedom, and, through contracts or arrangements with employers, to coerce other workmen to become members of the organization and to come under its rules and conditions, under the penalty of the loss of their positions and of deprivation of employment, then that purpose seems clearly unlawful . . . It would tend to deprive the public of the service of men in useful employments and capacities." *Curren v. Galen*, 152 N.Y. 33, 37, 46 N.E. 297, 298 (1897), cited in *Martin, Labor Unions*, c. 12 (1910).

<sup>55</sup> "Prior to the 1930's, labor sought its objectives of organization and collective bargaining mainly through self-help. Employer resistance, where it occurred, took the form first, of counter-self-help, and second, resort to governmental assistance . . . The executive authorities . . . often enforced the employer's position through the use of the police, the state militia, or Federal troops." Feinsinger & Witte, *Labor, Legislation and the Role of Government*, 71 *Monthly Lab. Rev.* 48, 51 (1950).

<sup>56</sup> 4 Metc. 111 (Mass. 1842); 47 Stat. 70 (1932); 29 U.S.C. §§ 101-51 (1952). The long history of labor litigation is too familiar to warrant repetition here. See generally, Gregory, *Labor and the Law* c. 3 (1949); Sufrin & Sedgwick, *Labor Law* cc. 2, 3, 6, 7 (1954); Smith, *Significant Developments in Labor Law During the Last Half-Century*, 50 *Mich. L. Rev.* 1265 (1952).

<sup>57</sup> Farnam, *Chapters in the History of Social Legislation in the United States* c. 17 (1938); Willoughby, *State Activities in Relation to Labor in the United States* c. 6 (1901).

which undoubtedly accounts in large measure for the logical progression in the "right to work" concept from the slogan of the closed shop to that of the open shop, as the following section (B) demonstrates.

The theme of individualism *versus* the mass consistently appears in American labor enactments from the Massachusetts Body of Liberties in 1641 to the holding in *Commonwealth v. Pullis* that a combination to raise wages is a criminal conspiracy, for "what one may do with[out] offense, many combined may not do with impunity."<sup>58</sup> In the accelerated political pace of the twentieth century this polarity of concepts has continued—in the Supreme Court's denial of Congress' claimed power to protect union membership in the railroad industry and in its complementary decision against state claims to the same power,<sup>59</sup> the paramount right of the individual is the primary test; and so it is when the same court in the 1930s has changed its thinking.<sup>60</sup> With the economic cataclysm of the depression, Congress and court ultimately came to accept the proposition of a right to employment which government was under obligation to preserve—by public works where private industry could not provide jobs,<sup>61</sup> and by legal sanctions where management would not treat with employees as a collective entity.<sup>62</sup>

Once the public policy of jobs for the jobless was effectuated it was an easy and logical step—given the frame of mind of the first Roosevelt administration<sup>63</sup>—to the pronouncement of the workers' "constitutional right to organize themselves for collective bargaining."<sup>64</sup> Thus the National Industrial Recovery Act declared it "to be the policy of Congress . . . to provide for the general welfare by promoting the organization of industry . . . [and] to induce and maintain united action of labor and management under adequate

<sup>58</sup> Commons et. al., *supra* note 46 at 59.

<sup>59</sup> Cf. *Bedford Cut Stone Co. v. Journeymen Stone Cutters*, 274 U.S. 37 (1927); *Traux v. Corrigan*, 257 U.S. 312 (1921); *Coppage v. Kansas*, 236 U.S. 1 (1915); *Adair v. United States*, 208 U.S. 161 (1908).

<sup>60</sup> *Thornhill v. Alabama*, 310 U.S. 88 (1940); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *Texas & N. O. R. Co. v. Brotherhood of Railway Clerks*, 281 U.S. 548 (1930).

<sup>61</sup> See Bachrach, *The Right to Work: Emergence of the Idea in the United States*, 26 *Social Service Rev.* 153 (1952).

<sup>62</sup> Cf. Bernstein, *The New Deal Collective Bargaining Policy passim* (1950).

<sup>63</sup> Cf. Roosevelt, *Looking Forward* pt. III (1934); Perkins, *The Roosevelt I Knew passim* (1946).

<sup>64</sup> 3 Roosevelt, *Public Papers & Addresses* 418 (1934).

governmental sanctions and supervision."<sup>65</sup> Two years later in the National Labor Relations Act Congress condemned the "denial by employers of the right of employees to organize."<sup>66</sup> The President in signing the bill stated that it "defines, as a part of our substantive law, the right of self-organization of employees in industry for the purposes of collective bargaining, and provides methods by which the Government can safeguard that legal right."<sup>67</sup> When Chief Justice Hughes, speaking for the court in upholding the Wagner Act, acknowledged that Congress had constitutional authority to safeguard the privilege,<sup>68</sup> the right to work free from employer pressures had received a threefold endorsement.

#### B. TRANSITION OF THE CONCEPT

That the right to work should also be free from other pressures was the burden of the arguments which began almost as soon as the Wagner Act became law.<sup>69</sup> Ultimately this was to lead to the current connotation which is almost diametrically opposite to the term as it was understood in the century and more of labor's struggle to win legal equality. The factors in the shift of economic and social thought which led in 1947 to the Taft-Hartley Act have been effectively documented elsewhere,<sup>70</sup> and it needs only to be mentioned here that the campaign of persuasion which ultimately brought about the revision of the National Labor Relations Act had to be couched in terms of public rights deserving protection equal to that granted by "labor's Magna Charta." These apposite rights were identified with various groups allegedly discriminated against by the operation of the newly-created National Labor Relations Board—AFL unions which insisted that the act

<sup>65</sup> National Industrial Recovery Act of June 16, 1933, c. 90, 48 Stat. 195.

<sup>66</sup> National Labor Relations Act of July 5, 1935, 49 Stat. 499, 29 U.S.C. §§ 151-68 (1952).

<sup>67</sup> 4 Roosevelt, Public Papers & Addresses 294 (1935).

<sup>68</sup> *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

<sup>69</sup> Cf. Phelps & Jenck, *Criticisms of NLRA*, 12 *Journ. Bus.* 30 (1939); Catton & Stoneborough, *What's Wrong with the Wagner Act*, *Barron's*, July 31, 1939, p. 8. See, generally, Gellhorn & Linfield, *Politics and Labor Relations: An Appraisal of NLRB Procedure*, 39 *Colum. L. Rev.* 339 (1939). For criticisms of the Wagner Act by the AFL, United States Chamber of Commerce and National Association of Manufacturers respectively, see: *Bus. Week*, July 13, 1940, p. 24; *id.*, Nov. 4, 1939, p. 36; 148 *Com. & Finan. Chron.* 1895 (1939).

<sup>70</sup> Cf. Brown, *Union Security*, *Proc. N.Y. Univ. 2d Annual Conf. on Labor* 73 (1949).



inordinately aided the industrial unionism of the CIO; employer associations insisting that the act be defined so as to cover unfair labor practices of employees as well as of management; and the sizeable body of workers who claimed (or for whom it was claimed by various interests) that they did not wish to affiliate with any union organization.<sup>71</sup>

In addition to the systematic advocacy of these several viewpoints the decade following the *Jones & Laughlin* decision witnessed a general legislative reaction in the various states. While the Supreme Court's affirmation of the Wagner Act's constitutionality touched off a brief movement among the states to create "little Wagner Acts," it was very quickly counterbalanced by a drive for "equalizing" statutes imposing upon unions restraints which, it was successfully argued in several states, were unreasonable omissions from the national law.<sup>72</sup> The state legislative campaigns were publicized in terms of public "rights," the need for imposing "responsibility" and combatting union policies of violence in strikes, boycotts and picketing, and—in a steadily increasing number of instances—the closed shop and other forms of union security.<sup>73</sup>

Because of the primacy which the courts were now inclined to give to the federal government in the field of labor law,<sup>74</sup> however, these state legislative movements held out only limited benefits for those seeking a restatement of national labor policy, and emphasized in their minds that the federal law itself required change—first, to effectuate the balancing of interests of union, non-union and management groups held by the revisionists to be essential for an equitable law; second, to narrow the area of federal jurisdiction and correspondingly to widen the field of labor relations to be covered by state law. Thus, when the first session of the Eightieth Congress took up the latest in a long line of bills<sup>75</sup> proposing amendments to the Wagner Act, the "right to work" slogan had been converted into the coin of the opponents of union security. Representative Hartley, reporting on H.R. 3020 for the House Committee on Education and Labor, emphasized that his bill "prohibits what is commonly known as the closed shop, or any form of compulsory unionism . . . that deprives deserving men of the right to

<sup>71</sup> Cf. statements against the union shop by the United States Chamber of Commerce, National Association of Manufacturers, note 69 supra.

<sup>72</sup> Millis, *From the Wagner Act to Taft-Hartley* c. 8 (1950).

<sup>73</sup> *Id.* c. 9.

<sup>74</sup> Cf. *NLRB v. Fainblatt*, 306 U.S. 601 (1939).

<sup>75</sup> Millis, *supra* note 72, at 333.

work . . .”<sup>76</sup> In the debate in the House of Representatives, Congressman Fisher (Texas) advocated the proposed section 14 (b) of the bill by declaring: “In a completely unionized society, failure to join a union or expulsion from a union, would mean the absolute loss of the right to work.”<sup>77</sup> The testimony of witnesses at the extensive hearings on the bill was copiously documented with illustrations of the “right to work” in its new context.<sup>78</sup>

The phrase was now becoming current in state legislation and legislative debate.<sup>79</sup> Ten states enacted “right to work” statutes in the eighteen months immediately following Congress’ approval of the Taft-Hartley Act over President Truman’s veto; and, after a pause while the validity of the state legislation was reviewed favorably by the Supreme Court,<sup>80</sup> eight more states passed similar laws between 1951 and 1955. In January, 1955, a National Right to Work Committee was created, with retired Congressman Hartley as chairman of the advisory board, “to coordinate and work with the various groups in many states who were then actively opposing the principle of compulsion.”<sup>81</sup> The United States Chamber of Commerce prepared a pamphlet endorsing “voluntary unionism,” while both the American Federation of Labor and the CIO published rebuttals.<sup>82</sup>

The heated eloquence of both sides in the contemporary debate has probably insured the phrase’s permanent identification with the issue of union security, whatever the previous meanings.<sup>83</sup> Yet many of the arguments, at least on the union side, are reminiscent of the

<sup>76</sup> 1 National Labor Relations Board, *Legislative History of the Labor Management Relations Act 324* (1948).

<sup>77</sup> 2 National Labor Relations Board, *op. cit. supra* note 76, at 734.

<sup>78</sup> Cf. *Hearings Before the House Committee on Education and Labor on Amendments to the National Labor Relations Act, 80th Cong. 1st Sess.* (1947).

<sup>79</sup> See note 146 *infra*.

<sup>80</sup> Cf. notes 36, 37 and 39 *supra*.

<sup>81</sup> Letter from National Right to Work Committee to William Swindler, July 18, 1956.

<sup>82</sup> U.S. Chamber of Commerce, *Case for Voluntary Unionism*, (1955); AFL, *The Right to Wreck!* (1955); CIO, *The Case Against the Right to Work Laws* (1955); and see pamphlet issued by National Association of Manufacturers, *20 Questions About the Right to Work* (1956).

<sup>83</sup> Even opponents of the current “right to work” laws have accepted the phrase in their arguments against the laws; Cf. Thomas E. Harris (Associate Gen. Counsel, CIO), *Legislative Restrictions Upon Union-Security Agreements*, *Proceedings of A.B.A. Sect. of Labor Relations Law*, 44,45 (1955).

basic theory expounded by Commons<sup>84</sup> or rekindle the fiery assertion of labor's rights expressed in the high tide of the New Deal. Thus an early statement by Clarence Darrow is cited approvingly:

There can be no inalienable right to work without a place to work, and neither the government nor those who declaim the loudest or insist the most, have ever furnished the laborer a place to toil. To this class the inalienable right to work means simply the inalienable right of the employer, without let or hindrance, to go out in the open market and bid for laborers on the hardest terms, or rather, to so order that industrial world that men and women and children must bid against each other for a right to toil. No organized government and no powerful body of men ever really made any demand or enforced any means that would give to every working man an inalienable right to work. All the rights a laborer has under the law, or under present industrial methods, is the right to go from employer to employer in search of work.<sup>85</sup>

More bluntly, the CIO itself put the attitude of organized labor toward the statutory movement:

The use of the phrase "right to work" by reactionary employers is in fact as fraudulent as their use of the phrase "States' rights." For "right to work" sounds as if it is concerned with the right of every man to a job, that is with full employment. Yet there is nothing that the users of this phrase are less interested in than jobs for all who want them: their interest is only in weakening the unions of their workers. "Right to work," like "States' rights," is a dishonest semantic trick devised by the employers' advertising agencies.<sup>86</sup>

The case for the advocates of the legislation has been put with equal vigor; the term itself has been defined in these words:

. . . In its American sense the term signifies the inherent right of every man to an opportunity to seek and retain the gainful employment which he desires, for which he may be fitted, and which is available in our economy. The right to work demands that this opportunity be unfettered by artificial and unnecessary restrictions or the imposition of unreasonable or arbitrary conditions, such as a requirement of union membership . . .

There is no right to work in the sense of a right to march into an employer and demand a particular job, as, say, a machinist or a pattern maker, and there is no right to work which can prevent an employer from discharging a man for cause, or because there is just no more work for him to do. Right-to-work laws do not purport to create new rights but only to protect fundamental rights from invasion through imposition of compulsory unionism as a condition of employment. They do not create any jobs, but by helping to keep the economy free and by keeping opportunities open,

<sup>84</sup> Cf. note 50 supra.

<sup>85</sup> CIO, *The Case Against the Right to Work Laws* 77 (1955).

<sup>86</sup> *Id.* at 27.

they inevitably in the long run lead to more and more chances for employment . . . .

The second fundamental right guaranteed by the Constitution and protected by right-to-work laws is the freedom of association. This freedom necessarily has both an affirmative and a negative side—it guarantees the right not only to join but to refrain from joining any private organization or association. The freedom of association springs from the liberty of the individual to order his life as he sees fit, to choose where he will work, and what, if any, church, political party, fraternity, lodge, society, league, club or other private organization he will join.

Some working men and women want to join a union. Others do not. In either event their choice should be respected, whether the reasons are good or bad or indifferent. A union, after all, is seldom merely a collective-bargaining representative. It is always partly that, but it is often also partly a political organization, partly a fraternal order, partly a social club, and partly an insurance concern. Even more often it aspires to be a state within a state and to exercise a high degree of discipline and control over its members. All of these things may not be objectionable where membership is on a voluntary basis, but it violates fundamental American principles to force a man into a private organization against his will. It is bad enough to force him into a good union. But what about forcing him into some of the minority unions we have in this country run by communists or dominated by racketeers? Monstrous as this may seem, it is being done today in the United States of America and done in name of democratic principles.<sup>87</sup>

In all the semantic vacillations in the slogan during the past century, there has been the one consistent and significant element already suggested in the preceding sub-section of this paper. That is the primary emphasis, placed upon the term by whatever interests have exploited it, upon the elemental rights of the individual as against the mass. Even collective bargaining security as defined by the Wagner Act was expressed in terms of the individual's right to join with his fellows in concerted bargaining efforts; historically the rights of labor organizations have been expressed in terms of the needs of their individual members when confronted with the monolithic dimensions of management or capitalism; while the contemporary thesis of the "right to work" advocates is the constitutional prerogative of each person to decide for himself whether he will or will not join a union.

This fundamental principle goes a long way to explain the effectiveness of the term, "right to work," as an appeal to the particular groups to which it may be addressed at a particular time.

<sup>87</sup> Jonathan C. Gibson (Gen. Counsel, Atchison, T. & S.F. Ry. Co.). Legislative Restrictions Upon Union-Security Agreements, Proceedings of A.B.A. Sect. of Labor Relations Law, 50, 52-3 (1955).

For it is a logical extension of a familiar American idiom, the ideal of individualism in contrast to the uniformity and conformity of the group. Emerson and Thoreau gave this idea its philosophical articulation, but courts and legislatures have equally insisted upon protecting the individual from the mass, whether the mass has been, in succeeding generations, government, capitalism or unionism.<sup>88</sup> Viewed from this prospect, there is, despite the extremes in time and temperament between Proudhon and Greeley and Commons, on the one hand, and Messrs. Taft and Hartley and The National Right to Work Committee on the other, a basic similarity of approach without which the phrase, "right to work," would probably never have generated a significant response from the public. Certainly, in the succession of cases since *Allen-Bradley* in 1942 which have marked a pendulum-swing back from the high judicial favor of the labor movement, the villain has been the group (union) and its abuse of the rights of individual members for whom the National Labor Relations Act had made it trustee.<sup>89</sup> Whether it is the CIO excoriating the opponents of union security as predatory chauvinists of the *laissez-faire* era, or the "right to work" factions inveighing against the monopolistic objectives of labor leaders, the concern of both sides is purportedly the rights of the individual.

### C. STAGES IN THE "RIGHT TO WORK" MOVEMENT

The state "right to work" movement falls naturally into three distinct stages—the period prior to the revision of the National Labor Relations Act by the Taft-Hartley law; the period immediately following Congressional enactment of Taft-Hartley; and the period since 1951, after the Supreme Court had upheld the constitutionality of the first state actions and Congress had revised the Labor Management Relations Act in certain respects but had left section 14 (b) untouched. Each of these periods, in its own way, has reflected both national labor policy and local legislative traditions with respect to labor activities.

Local characteristics of the movement are considered further in this paper, but in the main the labor legislation of the states has been consistent with the historical pattern—that is, the laws have been either protective of individual rights or restrictive of union activities. Possibly standing in a neutral position have been the statutes dealing with arbitration; these are certainly by far the most numerous—forty-five states have at least one arbitration

<sup>88</sup> Cf. Hoover, *American Ideals v. the New Deal* (1936).

<sup>89</sup> *Giboney v. Empire Ice & Storage Co.*, 336 U.S. 490 (1949).

law, although most of them are nineteenth-century provisions for commercial arbitration poorly suited to labor questions.<sup>90</sup> Next in number are the anti-injunction acts (twenty-two states)—certain of them patterned literally after the Norris-LaGuardia law but others subject to the charge of lacking the key provisions to make them effective.<sup>91</sup> Third in number among state labor statutes are the seventeen "right to work" laws, followed closely by prohibitions against boycotts and picketing (fourteen states). Laws on fair employment practices in eleven states, and the "little NLRB" acts of ten states should be cited, but thereafter the labor statutes lose any particular pattern and instead show a wide variety of special objectives.<sup>92</sup>

As Tables 3 and 4, *infra*, indicate, the "right to work" states tend to have, as companion statutes, other labor laws which may generally be characterized as restrictive. In most cases, the converse is true of those states<sup>93</sup> which have rejected the "right to work" proposals up to the present, although for various reasons it is more difficult to make a generalization for this group.

The first of the three stages in the "right to work" movement, mentioned above, may properly be called a stage of constitutional amendment, since four of the five states which took any action prior to the Labor Management Relations Act chose this course.<sup>94</sup> It was logical enough; in an area in which the federal government has been delegated authority and had exercised it broadly and/or exclusively—and this was the general argument with reference to labor relations after the Wagner Act and prior to Taft-Hartley<sup>95</sup>—state powers were unavailing. Until the *Algoma* case affirmed that the states were not prevented from legislating on matters of union security even under the original National Labor Relations Act,<sup>96</sup> it appears to have been the general belief that the states could do little more than pronounce a strong public policy on the subject. The strongest pronouncement of public policy being a constitutional one, the amendments were the result.

<sup>90</sup> Updegraff & McCoy, *Arbitration of Labor Disputes* cc. 1, 6 (1946).

<sup>91</sup> Cf. Summary of State Court Injunctions, 73 Month. Lab. Rev. 59 (1951).

<sup>92</sup> For details of individual state statutes, see Labor Relations Reporter, *State Labor Laws* (1956).

<sup>93</sup> For these states, see Tables 2 and 4 *infra*.

<sup>94</sup> In Arizona, Arkansas, Florida and Nebraska.

<sup>95</sup> *NLRB v. Fainblatt*, 306 U.S. 601 (1939).

<sup>96</sup> *Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board*, 336 U.S. 301 (1949).

Of the four, only Nebraska's proclaimed itself to be self-executing (though it was in fact implemented by statute), although Florida's amendment apparently is regarded as such since it has had no supporting legislation. In any case, Arkansas and Florida, by adopting their amendments in the elections of November, 1944 enunciated the first constitutional claim of a state voice in labor policy. The Florida amendment provided:

The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union, or labor organization; provided, that this clause shall not be construed to deny or abridge the right of employees by and through a labor organization or labor union to bargain collectively with their employer.<sup>97</sup>

The amendment was placed under a federal constitutional test when a union sued to restrain enforcement.<sup>98</sup> A temporary restraining order was dismissed by a special three-judge federal court after a consideration of the merits of the constitutional question. Holding that there was no conflict between the federal constitution and the Florida amendment, the court said:

There is no vested right to have the police power of a state remain static. Every contract, involving subject matter that affects the public interest, into which a citizen may enter, is subject to the right of a state to regulate or to prohibit whenever it is deemed by the state to be essential in the public interest. . . .<sup>99</sup>

Adding that "a state law is superseded by a congressional law only to such an extent as the two are inconsistent," the court ruled:

In view of the fact that no labor legislation by Congress has required an employee to belong to a labor union or has made the closed shop mandatory, but on the contrary the Federal public policy in regard to compulsory membership in labor unions is [opposed to the ideal]. . . and in view of the provisions of the Florida amendment that it shall not be construed to deny or abridge the right of employees by and through a labor union to bargain collectively with an employer, there does not appear to be any provision of the Federal labor regulatory statutes with which the constitutional amendment collides.<sup>100</sup>

Because of the negative ending to the *Watson* case—the Supreme Court reversing it on other grounds<sup>101</sup>—and because the Arkansas

<sup>97</sup> Fla. Const. § XII, adopted Nov. 7, 1944.

<sup>98</sup> AFL v. *Watson*, 60 F.Supp. 1010 (1945).

<sup>99</sup> Id. at 1015.

<sup>100</sup> Id. at 1017.

<sup>101</sup> AFL v. *Watson*, 327 U.S. 582 (1946). The case was remanded with directions to retain the bill pending interpretations by the Florida courts of the right to work amendment. The Supreme Court stated that the decision by the special three-judge court on the merits of the federal constitutional questions was premature.

amendment was not subjected to any direct constitutional test,<sup>102</sup> it remained for the Arizona<sup>103</sup> and Nebraska<sup>104</sup> constitutional amendments, adopted in 1946, to provide the definitive adjudication.<sup>105</sup> The Arizona Supreme Court, in considering the issue, conceded at the outset that a state constitutional amendment "has no greater validity and stands on no higher plane than a legislative enactment insofar as being subject to attack for failure to square with the Federal Constitution, . . ."<sup>106</sup> and added that any valid basis for the state amendment must be found in the police power, "one of the powers impliedly reserved to the states by the Tenth Amendment."

Observing that if it is "proper to legislate to the effect that no employee shall be forced, as a condition of employment, to be a non-

<sup>102</sup> Ark. Const. Amendment 34: "No person shall be denied employment because of membership or affiliation with or resignation from a labor union, or because of refusal to join or affiliate with a labor union; nor shall any corporation or individual or association of any kind enter into any contract, written or oral, to exclude from employment members of a labor union or persons who refuse to join a labor union, or because of resignation from a labor union; nor shall any person against his will be required to pay dues to any labor organization as a prerequisite to or condition of employment." Although it did not deal directly with the constitutionality of this amendment, see *International Ass'n of Machinists, AFL v. Goff-McNair Motor Co.*, 223 Ark. 30, 264 S.W.2d 48 (1954), relying on the *Allen-Bradley* and *Garner v. Teamsters* rulings.

<sup>103</sup> Ariz. Const. art. II § 35:

No person shall be denied the opportunity to obtain or retain employment because of non-membership in a labor organization; nor shall the state or any subdivision thereof, or any corporation, individual or association of any kind enter into any agreement, written or oral, which excludes any persons from employment or continuation of employment because of non-membership in a labor organization.

<sup>104</sup> Neb. Const. art. XV, §§ 13-15:

13. No person shall be denied employment because of membership in or affiliation with, or resignation or expulsion from a labor organization; nor shall any individual or corporation or association of any kind enter into any contract, written or oral, to exclude persons from employment because of membership in or nonmembership in a labor organization.

14. The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

15. This article is self-executing, and shall supersede all provisions in conflict therewith; legislation may be enacted to facilitate its operation, but no law shall limit or restrict the provisions hereof.

<sup>105</sup> *AFL v. American Sash & Door Co.*, 335 U.S. 538 (1949); *Lincoln Federal Labor Union v. Northwest Iron & Metal Co.*, 335 U.S. 525 (1949).

<sup>106</sup> *AFL v. American Sash & Door Co.*, 67 Ariz. 20, 189 P.2d 912, 916 (1948).



union man, it would seem that legislation providing that no employee shall be forced, as a condition of employment, to be a union man, would be but a logical counterpart," the court then cited, as did the Nebraska Supreme Court in the *Lincoln Federal Union* case, the particular weight to be given to the sovereign will of the public as expressed at the polls:

The people of the State of Arizona evidently had some deep-seated convictions upon these matters for it required the signatures of fifteen percent of the qualified electors of the entire state to even propose [sic] an amendment to the Constitution . . . and it is a matter of common knowledge that the arguments for and against the proposed amendment were fully and completely presented to the people in the pre-election campaign. In adopting the amendments by a very substantial majority (61,875 votes cast for and 49,557 cast against the measure) the people have in the most solemn manner evidenced their conviction that the matters prohibited by it were detrimental to the public welfare. We are not called upon here to determine either the wisdom of the people's action or who is right and who is wrong in the opposing arguments here summarized. Possibly only time can give a correct answer to this highly controversial question. Our sole concern is whether the amendment is in violation of the federal organic law. The test one must apply is simply to discover whether the law "has a rational basis" and "could on any reasonable theory contribute to the public welfare." The considered and deliberate action of the people of Arizona has determined this in the affirmative; rule by the majority is the essence of democracy . . .

In view of the great number of states which have seen fit to consider such legislation an appropriate and necessary exercise of the police power, and in view of the recognition given by the federal government both to the principles contained in such legislation and the right of states to adopt such, it might well be presumptuous of this court, in applying the test for such legislation laid down by the Supreme Court of the United States, to find our amendment "palpably in excess of legislative power," "without rational basis," and to hold that "on no reasonable theory would it contribute to the public health, safety or welfare."<sup>107</sup>

While the Arizona and Nebraska test cases were being prosecuted, the legislatures of nine states in 1947, sensing the impending success of the Taft-Hartley bill in Congress, proceeded to enact "right to work" statutes. A tenth—North Dakota—passed a statute in 1947 which was submitted to a referendum vote in 1948, at which time it was ratified by a two-to-one majority. The statutes of this period, distributed about equally between the farm belt (Iowa, Nebraska, North and South Dakota) and the Southern states (Arkansas, Georgia, North Carolina, Tennessee, Texas and Virginia), did not have the pronounced similarity which characterizes those enacted in the third period (1951-55) when, it appears, the remain-

<sup>107</sup> Id. at 34, 37, 189 P.2d at 921, 923.

ing states copied some of the earlier statutes almost verbatim. The comparative analysis of the "right to work" statutes is given in detail in Part IV, *infra*.

### III. LOCAL CHARACTERISTICS OF THE MOVEMENT

#### A. CASE STUDY: NEBRASKA

Nebraska labor legislation, dating from the first mechanic's lien statute of 1855,<sup>108</sup> may be divided into four broad categories, generally following the legislative trends prevalent elsewhere for each period. Thus the laws regulating hours and working conditions for women,<sup>109</sup> child labor,<sup>110</sup> industrial safety<sup>111</sup> and maximum hours in general<sup>112</sup> reflect the movement for humanitarian legislation from the late 1880's to the first World War.<sup>113</sup> The next step was represented by regulations which might be termed more economic than social in objective—the 1913 workmen's compensation law<sup>114</sup> and the statutes of 1919 and 1921 regulating employment agencies.<sup>115</sup> There is then no state legislative activity of significance until the depression of the 1930's; the 1937 statute on unemployment compensation<sup>116</sup> was Nebraska's specific response to the national labor policies enunciated by the New Deal.<sup>117</sup> The fourth period is represented by the

<sup>108</sup> Neb. Rev. Stat. § 52-101 (Reissue 1952).

<sup>109</sup> Neb. Rev. Stat. §§ 48-201 to -219 (Reissue 1952).

<sup>110</sup> Neb. Rev. Stat. §§ 48-301 to -313 (Reissue 1952).

<sup>111</sup> Neb. Rev. Stat. §§ 48-401 to -435 (Reissue 1952); statute upheld in *Butera v. Mardis*, 99 Neb. 815, 157 N.W. 1024 (1915).

<sup>112</sup> The maximum hour law for women was held constitutional in *Wenham v. State*, 65 Neb. 394, 91 N. W. 421 (1902); but see note 119 *infra*. On the regulation of hours of employment generally, see Fellman, *Due Process of Law in Nebraska: Police Power—I*, 9 Neb. L. Bull. 357, 394 (1931).

<sup>113</sup> Cf. Brandeis, *Labor Legislation*, cc. 1-3, in 3 *Commons & Associates, History of Labor in the United States* (1935).

<sup>114</sup> Neb. Rev. Stat. §§ 48-101 to -190 (Reissue 1952).

<sup>115</sup> Neb. Rev. Stat. § 48-501 to -513 (Reissue 1952). Cf. *Olson v. State ex rel. Western Reference & Bond Ass'n*, 313 U.S. 236 (1941).

<sup>116</sup> Neb. Stat. § 48-601 to -669 (Reissue 1952). Cf. *Orfield, The Nebraska Unemployment Compensation Law*, 16 Neb. L. Bull. 148 (1937).

<sup>117</sup> The general law against racial discrimination in collective bargaining [Neb. Rev. Stat. § 48-214 (Reissue 1952)] should be mentioned. An effort to enact a "little Wagner Law" in 1939 got as far as the select file before it was killed, Neb. Legis. J. 261, 1387 (1939). In 1937 a wage-hour bill died in committee, Neb. Legis. J. 259, 1100 (1941). On Nebraska labor issues as generally affected by federal legislation, see, *inter alia*, *Walling v. McKay*, 70 F. Supp. 160 (D.Neb. 1946); *aff'd*, 164 F.2d 40 (8th Cir. 1947); *Culkin v. Glenn L. Martin Nebraska Co.*, 197 F.2d 981 (8th Cir. 1952), cert. denied, 344 U.S. 866 (1952); *Byrne v. Metcalfe Constr. Co.* 99 F. Supp. 635 (D.Neb. 1951). See also Foster, *Written Trade Agreements Under the Wagner Act*, 19 Neb. L. Bull. 322 (1940).

1947 statute on the "right to work" and the companion law aimed at controlling strikes in public utilities.<sup>118</sup>

Case law, particularly for the earlier periods, has tended to follow the general common law principles militating against collective union activity. Thus the 1891 statute establishing the eight-hour working day was held unconstitutional in 1894,<sup>119</sup> although a provision in an 1897 law exempting labor unions from the general coverage of the state anti-trust statutes was upheld in dictum.<sup>120</sup> The notorious "civil conspiracy" doctrine espoused by eastern jurisdictions in industrial areas was applied in a Nebraska case in 1879,<sup>121</sup> while, in one of the most celebrated pieces of state litigation in the industrial unrest following the first World War, the Nebraska Supreme Court, while rejecting the attorney general's claim of the court's power to enjoin both employers for lockouts and unions for striking, did sustain one injunction against a leading union charged with fomenting public disturbance and impeding the execution of the laws.<sup>122</sup> In an early case involving railroad unions, the federal court applied the doctrine of freedom of contract to strike down attempts at collective bargaining.<sup>123</sup>

The "right to work" movement in Nebraska took the form of a bill introduced into the 1943 session of the legislature, which sought among other things to make it "unlawful to interfere with any person's right to work."<sup>124</sup> Undoubtedly influenced by the successful movement in South Dakota to pass a similar law that same year,<sup>125</sup> the Nebraska bill was reported unfavorably by the Committee on Labor and Welfare in the light of supposed federal constitutional bars to such action.<sup>126</sup> A similar legislative attempt in 1945 came to

<sup>118</sup> Neb. Rev. Stat. § 48-801 to -823 (Reissue 1952).

<sup>119</sup> *Low v. Rees Prtg. Co.* 41 Neb. 127, 59 N.W. 362 (1894).

<sup>120</sup> *Cleland v. Anderson*, 66 Neb. 252, 92 N.W. 306 (1902); *aff'd*, 66 Neb. 273, 96 N.W. 212 (1902); *rev'd on other grounds* 66 Neb. 276, 98 N.W. 1075 (1902).

<sup>121</sup> *Mapstick v. Ramge*, 9 Neb. 390, 2 N.W. 739 (1879).

<sup>122</sup> *State v. Employers of Labor*, 102 Neb. 768, 169 N.W. 717 (1918).

<sup>123</sup> *Union Pac. R.R. Co. v. Ruef*, 120 F. 102 (C.C.Neb. 1902). Railroad labor questions have, for obvious reasons, provided a great proportion of Nebraska labor litigation; see, *inter alia*, *Gaskill v. Roth*, 151 F.2d 366 (8th Cir. 1945), *cert. denied*, 327 U.S. 798 (1945); *Hurley v. Brotherhood R.R. Trainmen*, 147 Neb. 781, 25 N.W. 2d 29 (1946); *Rentschler v. Missouri Pac. R.R. Co.*, 126 Neb. 493, 253 N.W. 694 (1934).

<sup>124</sup> Neb. Legis. J. 276, 296 (1943).

<sup>125</sup> See note 8 *supra*.

<sup>126</sup> Report, Committee on Labor & Public Welfare (1943). The committee cited the Supreme Court holding in *Thornhill v. Alabama*, 310 U.S. 88 (1940), as casting doubt on the state's capacity to act.

nought, the bill being transferred from the labor committee to the Committee on Judiciary in an obvious effort to find an answer to what seemed to be a constitutional problem.<sup>127</sup>

Thus in 1946, two legislative attempts at enactment having failed and Florida having now adopted its "right to work" constitutional amendment,<sup>128</sup> a movement developed to place the proposal on the general ballot at the November elections.<sup>129</sup> Although the sponsors of the proposal did not at first reveal themselves,<sup>130</sup> an advertisement endorsing the initiative canvass appeared in the *Omaha World-Herald* in May over the signature of the Nebraska Small Business Men's Association.<sup>131</sup> A vigorous campaign by advertisement, pamphlet and public meeting then ensued,<sup>132</sup> until the sponsors announced that they had secured the necessary number of signatures to the petitions and had deposited them with the Secretary of State early in July. After an unsuccessful attempt at enjoining the placing of the proposal on the ballot,<sup>133</sup> labor representatives turned to their own advertising campaign, competing with advertisements now signed by a group calling itself the "Right to Work Committee"—made up, as a comparison of names shows, of substantially the same persons in the Nebraska Small Business Men's Association.<sup>134</sup>

Following the approval of the initiative measure by a substantial majority in November, 1946, Senator Weborg introduced L. B. 344 at the opening of the 1947 session of the legislature, stating that his bill was "to put into effect the constitutional amendment prohibiting the closed shop."<sup>135</sup> Faced with the same questions as to the state's power to act in the light of federal policy which had troubled the two previous sessions, the 1947 legislature directed an inquiry to the attorney general and received the following assurance:

This act is an exercise of the police power of the state and facilitates the constitutional amendment adopted by the people of Nebraska at the last general election.

The police power is not limited to regulations in the interest of

<sup>127</sup> Neb. Legis. J. 216, 433 (1945).

<sup>128</sup> See note 98 supra.

<sup>129</sup> Neb. Const. art. III, § 1 ". . . The people reserve for themselves, however, the power to propose laws, and amendments to the constitution, and to enact or reject the same at the polls independent of the Legislature."

<sup>130</sup> *Omaha Unionist*, March 15, 1946, p. 1.

<sup>131</sup> *Omaha World-Herald*, May 15, 1946, p. 11.

<sup>132</sup> Cf. *Unionist*, May 10, 1946, p. 6; May 17, 1946, p. 1; June 21, 1946, p. 1; July 12, 1946, p. 1.

<sup>133</sup> *ib.*, Aug. 2, 1946, p. 1.

<sup>134</sup> Cf. *Omaha World-Herald*, Nov. 3, 1946, pp. 8A, 10A.

public health, safety and morals. . . . The rights of employers and employees to conduct their economic affairs are subject to modification or qualification in the interest of society. *Thornhill v. Alabama*, 310 U. S. 88. . . .<sup>136</sup>

The attorney general added that L. B. 344 was not vulnerable under the doctrine of non-impairment of contract, citing the rule pronounced in *AFL v. Watson*,<sup>137</sup> and concluding: "If any other rule were adopted it would be possible to defeat the police regulations by entering into long-term contracts prior to the adoption of such regulations."<sup>138</sup>

Thus emboldened, the Committee on Labor and Public Welfare invited the *pro* and *con* forces to the public hearing on March 21, 1947, which reviewed in essence the arguments which had been put forth by advertisement and speech during the 1946 campaign. Lloyd Skinner, representing the Nebraska Small Business Men's Association keynoted the spokesmen in favor of the bill by declaring that "L. B. 344 will force unscrupulous labor leaders to think things over before coercing an employer into signing a closed shop contract. The unions cannot be hurt by the enactment if they want to and do enforce the law." Decrying the post-election announcement of certain state labor representatives that they would have to consult their international officers as to the next move, Mr. Skinner added: "This is Nebraska law . . . it is for Nebraskans . . . and we ought to see to it that it is respected and obeyed—notwithstanding advice from any international union officials sitting in Chicago or New York."<sup>139</sup>

Joining the small businessmen in support of L. B. 344 were representatives of the State Grange, the Farmers' Union and the Farm Bureau Federation. Representatives of various union organizations were the only ones reported opposing the bill at the hearing, but they were eloquent. Hubert Lockhart, representing the Iowa-Nebraska council of the CIO, reviewed the general history of the struggle for union and closed shops in the United States, and summarized the case against the pending measure in terms of private rights:

Those who oppose the closed shop frequently quote phrases about compulsion; yet the same individuals ignore the fact that a

<sup>136</sup> Report, Committee on Labor & Public Welfare (1947).

<sup>137</sup> Report of Atty. Gen. for Nebraska 1947-48, 113 (1948).

<sup>138</sup> See note 99 supra.

<sup>139</sup> Report of Atty. Gen. for Nebraska 1947-48, 114 (1948).

<sup>140</sup> Supra note 135. Compare with comment of the Arkansas Supreme Court in *Self v. Taylor*, 217 Ark. 953, 235 S.W.2d 45 (1950).

union security clause in a contract between an employer and a labor organization is the result of free collective bargaining. To empower the federal or state government to step in and actually prohibit real collective bargaining is compulsion and regulation at its worst. In the American free enterprise economy there is nothing more basic than the freedom to contract. To deprive a labor organization and an employer of the freedom to make a contract for union security is an . . . attack upon a basic right.<sup>140</sup>

Having heard the arguments for both sides, the committee duly reported back the bill and the legislature passed it by a vote of 28 to 10.<sup>141</sup> Thus by constitutional and legislative action Nebraska placed itself in the vanguard of the "right to work" movement.

#### B. GENERAL: THE STATES ENACTING THE LAWS

Table 1 reveals some fundamental economic characteristics of the states enacting the "right to work" statutes; whether these necessarily confirm the labor charge that the states are frequently those in the lowest economic levels of the country is certainly to be qualified by the fact that the states themselves fall into three definite groups—those of the South, those of the "middle border" farm belt, and those of the Far West. What is more clearly true of their general economic character is that they are states with a high proportion of agricultural to industrial activity. This fact, indeed, is more discernible by comparing the states which have passed such legislation with those which have rejected it, shown in Table 2. In comparing these two groups of states, it is also demonstrable that a high proportion of the "right to work" states are below the national average in hourly income and per capita income, and that most of them have a sizable percentage of their population in the lowest of the three income categories of the Bureau of the Census.<sup>142</sup> Because of the high ratio of agricultural to industrial activity in these states, it is obvious that they would have a small percentage of their total employed population in industrial activity.

Tables 3 and 4 reveal more details as to the labor legislation in these two groups of states, and it is of some significance to note that the "right to work" states not only tend to have more detailed statutes but are more inclined to enact that type of law held by labor organizations to be most inimical to their interests. In this category are the prohibitions against enticing employees (whatever

<sup>140</sup> Supra note 135.

<sup>141</sup> Neb. Legis. J. 1706 (1947).

<sup>142</sup> The Bureau of the Census divided income groups as follows: Less than \$2499; \$2500 to \$4999; above \$5000.

that may mean in the present day<sup>143</sup>), regulation or outright prohibition of boycotts (usually secondary boycotts) and picketing (usually mass picketing), injunctions in labor disputes (even in states having anti-injunction statutes of a sort), prohibitions of "interference with employment," general regulation of union activity, and laws requiring incorporation of labor organizations.<sup>144</sup> Both groups of states, it will be noted, tend to favor statutes against unlawful assembly, statutes providing for suability of unions or im-

**TABLE 1**  
Economic Characteristics of 17 States  
Enacting "Right to Work" Statutes

State	Income per Capita <sup>1</sup>	Pct. of Incomes Under \$2499 <sup>3</sup>	Pct. of Pop. in Industry <sup>4</sup>	Average Annual Hourly Wage <sup>5</sup>
Alabama	\$1,043 <sup>2</sup>	68.6	37.3	\$1.45 <sup>6</sup>
Arizona	1,473	52.4	35.0	1.95
Arkansas	939	69.3	29.7	1.25
Florida	1,368	61.3	34.5	1.36
Georgia	1,184	67.4	37.5	1.27
Iowa	1,518	47.9	29.2	1.76
Mississippi	834	67.7	26.0	1.18
Nebraska	1,533	52.6	27.5	1.62
Nevada	2,175	42.3	33.3	2.15
North Carolina	1,097	64.2	40.2	1.25
North Dakota	1,295	51.2	18.4	1.52
South Carolina	1,095	66.8	39.4	1.26
South Dakota	1,362	53.5	21.2	1.54
Tennessee	1,186	65.9	36.8	1.45
Texas	1,480	54.6	35.5	1.74
Utah	1,510	38.0	37.9	1.84
Virginia	1,361	56.8	40.3	1.42

Sources and notes:

<sup>1</sup> Department of Commerce, Statistical Abstract of United States, 1956, p. 291.

<sup>2</sup> National average, \$1,709; *ib.*, p. 291.

<sup>3</sup> Department of Commerce, Bureau of Census, 1950 Census of Population, Vol. II, Table 32.

<sup>4</sup> *Id.*, Table 28, percentage of laborers, operatives and craftsmen in total employed wage earners in state's labor force.

<sup>5</sup> Statistical Abstract, 1956, p. 216; figures are for 1954.

<sup>6</sup> National average, \$1.81; *ib.*, p. 216.

<sup>143</sup> For the original statute, cf. 39 Geo. III, c. 81 § 3 (1799); for constitutional and policy questions arising under American state statutes, cf. *State v. Nix*, 165 Ala. 126, 51 So. 754 (1910); for the policy against enticing employees in wartime, see Gay, Freezing of Labor in Wartime, 18 Wash. L. Rev. 137 (1943).

<sup>144</sup> Cf. *United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344 (1922).

posing liability upon unions for actions by their members, and statutes outlawing "yellow dog" contracts and blacklists. This is to say that there is no such preponderance of labor statutes inimical to unions in the one group of states or the other as to demonstrate that one group consists of politically conservative and the other of more liberal persuasion; but it would seem that the "right to work" states prefer their labor statutes to be more detailed and inclusive.<sup>145</sup>

Another perspective in which to view the "right to work" movement is against the background of general labor adjudication in these states. Alabama's first use of the term itself, in fact, is found in the Strike Regulations (Bradford) Act of 1943:

The right to live involves the right to work. The public and working men and women must be protected. The activities of labor organizations affect the social and economic conditions of the state and the welfare of its citizens. It is declared to be the public policy of this state, in the exercise of its police power and in the protection of the public interest, to promote voluntary and peaceful settlement and adjustment of labor disputes and to regulate the activities and affairs of labor organizations, their officers, agents and other representatives. . . .<sup>146</sup>

**TABLE 2**  
**Economic Characteristics of 16 States**  
**Rejecting "Right to Work" Statutes**

State	Income per Capita	Pct. of Incomes Under \$2499	Pct. of Pop. in Industry	Average Annual Hourly Wage
California	\$2,039	41.7	36.1	\$2.03
Colorado	1,675	49.7	32.3	1.81
Delaware*	2,304	46.6	41.7	1.78
Idaho	1,411	46.3	31.1	1.90
Kansas	1,550	52.5	31.7	1.88
Kentucky	1,167	65.5	36.9	1.66
Louisiana*	1,249	63.3	36.1	1.58
Maine*	1,369	56.9	48.7	1.42
Maryland	1,857	44.3	41.4	1.72
Massachusetts	1,812	41.6	46.2	1.67
Missouri	1,652	56.0	35.0	1.73
New Hampshire*	1,620	52.1	51.1	1.44
Oklahoma	1,327	56.5	31.6	1.74
Oregon	1,724	42.5	39.0	2.16
Pennsylvania	1,822	42.9	50.2	1.82
Wyoming	1,650	42.8	35.0	2.08

Sources and Notes: same as for Table 1.

\* Repealed former "right to work" statutes.

<sup>145</sup> See note 149 *infra*.

<sup>146</sup> Ala. Code. tit. 26 § 376 (Cum. Supp. 1955).



**TABLE 3**  
**Details of Labor Legislation**  
**in 17 "Right to Work" States**

State	1	2	3	4	5	6	7	8	9	10	11	12	13	14*
Alabama	x	x	x	x	x	x	x	x	x	x	x			
Arizona	x		x	x		x	x	x		x				
Arkansas	x	x		x	x	x		x	x	x				
Florida	x	x		x		x			x	x	x		x	x
Georgia		x	x	x	x	x		x	x	x				x
Iowa	x		x	x		x		x	x				x	x
Mississippi		x		x	x	x		x	x			x		
Nebraska			x	x		x			x	x				x
Nevada	x			x	x			x	x	x		x		
North Carolina	x	x		x		x		x	x	x		x		x
North Dakota	x		x		x	x		x	x	x	x	x		x
South Carolina		x		x		x		x	x	x	x	x		x
South Dakota			x	x	x	x	x	x	x	x	x	x		
Tennessee		x	x	x				x	x			x		x
Texas	x		x	x	x	x	x	x	x	x	x	x	x	x
Utah	x				x	x		x	x	x	x	x		x
Virginia	x		x	x	x	x		x	x					x

Source: Labor Relations Reporter, State Labor Laws (1956).

- \* Key to column headings:
- |                                 |                                   |
|---------------------------------|-----------------------------------|
| 1 Anti-blacklisting             | 8 Suability of unions             |
| 2 Enticing employees            | 9 Union liability for acts        |
| 3 Boycotting and/or picketing   | 10 Registration of unions         |
| 4 Injunctions in labor disputes | 11 Financial statements of unions |
| 5 Interference with employment  | 12 Anti-yellow dog contracts      |
| 6 Unlawful assembly             | 13 Incorporation of unions        |
| 7 Regulation of union activity  | 14 Anti-trust liability           |

**TABLE 4**  
**Details of Labor Legislation in States Rejecting Such Law**

State	1	2	3	4	5	6	7	8	9	10	11	12	13	14
California	x		x	x		x	x	x	x	x	x	x		x
Colorado	x		x	x		x		x		x	x	x		x
Delaware				x		x		x						
Idaho			x			x		x	x	x		x		x
Kansas	x					x		x	x	x	x			
Louisiana		x						x	x			x		x
Maine	x					x		x						x
Maryland								x	x	x	x	x		
Massachusetts			x		x	x		x	x	x	x	x	x	x
Kentucky			x	x	x	x		x	x					x
Missouri	x			x	x	x		x	x					x
New Hampshire				x	x	x		x	x	x	x	x		x
Oklahoma	x			x		x		x	x	x	x			
Oregon	x				x	x		x	x	x	x	x		x
Pennsylvania					x			x	x	x	x	x		
Wyoming						x		x	x					

Source and key same as for Table 3.

**TABLE 5**  
**Chief Provisions of "Right to Work" Legislation**

Provision in Statute	State Laws Containing
Declaration of public policy	Ala., Ark., Ga., Ia., Miss., N. C., S. C., Utah, Va.
Definition: Labor union	Ariz., Ga., Neb., Nev., Tex.
Definition: "Person" or "Employer"	Ariz., Ga., Nev., Utah
Prohibition of closed shop or union shop agreement	Ala., Ariz., Ark., Ga., Ia., Miss., Neb., Nev., N. D., S. C., S. D., Tenn., Tex., Utah, Va.
Employer forbidden to require union membership*	Ala., Ia., Miss., N. C., Utah, Va.
Employer forbidden to prohibit union membership*	Ala., Ia., Miss., N. C., Utah, Va.
Compulsory dues payment and/or checkoff forbidden*	Ala., Ga., Ia., Miss., N. C., S. C., Tenn., Utah, Va.
Fee as requirement of employment prohibited	Ga.
Right to recover damages for violation of act	Ala., Ariz., Miss., Nev., S. C., Utah, Va.
Contracts in violation of act held void	Ariz., Nev., S. C., Tenn., Utah, Va.
Contract in force at time of act valid until renewal, if contrary to law	Ala., Ark., Ga., Miss., N. C., S. C., Tenn., Tex., Utah, Va.
Union forbidden to compel employees to join	Ariz., Nev., Utah
Conspiracy to violate act punishable	Ariz., Nev., S. C., S. D., Utah
Injunction	Ariz., Ga., Ia., Nev., Utah
Fine or other penalty	Ark., Ia., Neb., S. C., S. D., Tenn., Utah, Va.
Designation of agent in state for service of process	Va.
Collective bargaining permitted	Utah
Employees under Railway Labor Act exempted	Ia., Miss.
Severability clause	Ala., Ark., Nev., S.C., Tenn., Utah
Enforcement provision	Utah

Source: Labor Relations Reporter, State Labor Laws (1956).

\*Ark. and S. C. cover these provisions in one clause.

This act, although ruled unconstitutional in part,<sup>147</sup> and construed not to make a closed shop illegal,<sup>148</sup> laid the groundwork for the eventual "right to work" statute of 1953.

State laws regulating picketing have been the most prominent types of control legislation to appear prior to the "right to work" enactments. Although courts in some of these states have been inclined to limit the constitutional validity of these statutes to non-peaceful picketing,<sup>149</sup> others have held the police power of the state broad enough to cover almost any picketing activity.<sup>150</sup> These broad-constructionist jurisdictions, as might be expected, have also had no difficulty in finding that unincorporated unions may be sued even at common law, provided that the state in question has a union registration statute which is general enough to permit representation actions to be brought under it.<sup>151</sup>

Probably the most controversial control measures have had to do with public utility anti-strike laws; and these, of course, have been cast under a general shadow of doubt by the United States Supreme Court ruling on the Wisconsin law.<sup>152</sup> The recognition, too, that the Railway Labor Act precludes state action in certain areas of labor relations<sup>153</sup> has inhibited some state legislation. Beyond these two subjects—public utilities and railway labor—there are,

<sup>147</sup> *Alabama State Federation of Labor v. McAdory*, 246 Ala. 1, 18 So.2d 810 (1944) *cert. dismissed* 325 U.S. 450 (1945) held certain key sections of this statute unconstitutional. But see *Walter v. State*, 34 Ala. App. 268, 38 So.2d 609 (1949), holding it to be within the state's general constitutional authority to enact such a statute.

<sup>148</sup> *Greenwood v. Hotel & Restaurant Employees*, 249 Ala. 265, 30 So.2d 696 (1947).

<sup>149</sup> Cf. *Culinary Workers Local 631, AFL v. Busy Bee Cafe*, 57 Ariz. 514, 115 P.2d 246 (1941).

<sup>150</sup> *Erwin Mills Inc. v. Textile Workers Union, CIO*, 234 N.C. 321, 67 S.E.2d 372 (1951); *Royal Cotton Mill Co. v. Textile Workers Union, CIO*, 234 N.C. 545, 67 S.E.2d 755 (1951); *Cole v. Arkansas*, 211 Ark. 836, 202 S.W.2d 770 (1947); *Smith v. Arkansas*, 207 Ark. 104, 179 S.W.2d 185 (1944). Texas courts have defined three types of enjoined picketing: *Carter v. Bradshaw*, 138 S.W.2d 187 (Tex. Civ. App. 1940) (libelous placard displays); *Texas Motion Picture Operators Union No. 56,880 v. Galveston Motion Picture Operators, Local 305, AFL*, 132 S.W.2d 299 (Tex. Civ. App. 1939) (picketing to induce breach of contract); *Culinary Workers Local 331 v. Fuller*, 105 S.W.2d 295 (Tex. Civ. App. 1937) ("stranger" picketing).

<sup>151</sup> Cf. *Hall v. Walters*, 226 S.C. 430, 85 S.E.2d 729 (1955); *Bunch v. Launius*, 222 Ark. 760, 262 S.W.2d 461 (1953); *Smith v. Arkansas Motor Freight Lines*, 214 Ark. 553, 217 S.W.2d 249 (1949).

<sup>152</sup> *Amalgamated Ass'n of Street Ry. Employees, Div. 998 v. Wisconsin Employment Relations Board*, 340 U.S. 383 (1951).

<sup>153</sup> *Infra* note 173.

however, no clear-cut indications of what might be "out of bounds" for the states, and those which have been disposed to legislate extensively on labor issues have not hesitated to proceed on the assumption that, since the Taft-Hartley Act at any rate, they have enjoyed a substantial degree of freedom of action.<sup>154</sup> This has been the general situation preparatory to the enactment of "right to work" laws in those states which now have them.

In most instances the "right to work" bills have, as in Nebraska, appeared once or twice in the biennial legislative sessions before they have attracted enough support to pass.<sup>155</sup> In at least two instances the governors of the states where such bills have been introduced have come out firmly against them,<sup>156</sup> while in Alabama Governor Folsom urged the legislature (in vain) to repeal the "right to work" law on the grounds that strikes had noticeably increased since its enactment.<sup>157</sup> As would be expected, there has been an immediate effort by labor representatives, following enactment, to undertake a repeal campaign, but this has been successful in only four states to date (Delaware, Louisiana, Maine, New Hampshire).<sup>158</sup> Meantime, the groups favoring the legislation have extended their plans to other states, or to new efforts in the states where previous bills have been defeated in the past.<sup>159</sup> All of which indicates that the "right to work" movement continues to be one of the most active (and volatile) elements in contemporary labor legislation.

Motives behind legislation are always subtle, varied and very difficult to assess objectively—particularly when the subject-matter is as passionately debated as this has been. It is safe to say, however, that the primary considerations behind the "right to work" movement in the Southern states have not necessarily been the same as those of the North Central farm belt states, and that the latter have not necessarily been the same as those in the Far Western states. Thus, it has been continuously alleged by labor representatives, and

<sup>154</sup> In several bills (cf. Goldwater bill of 1953) Congress has been asked to turn back all labor jurisdiction to the states. See AFL Proc. 73d Conv. 90 (1954).

<sup>155</sup> The annual reports of the legislative committee of the American Federation of Labor, as well as occasional issues of the Monthly Labor Review, are the most convenient summaries of pending state legislation on this subject.

<sup>156</sup> Governors Hall of Kansas and Herter of Massachusetts; see N.Y. Times, Mar. 1, 1955, p. 53, col. 8; Mar. 29, 1955, p. 25, col. 6; Nov. 21, 1955, p. 20, col. 3.

<sup>157</sup> N.Y. Times, May 4, 1955, p. 25, col. 5.

<sup>158</sup> Supra note 8.

<sup>159</sup> Infra note 182.

not very loudly denied by "right to work" advocates in the South, that the objective of these and other restrictive statutes has been to attract industries from high-cost labor areas into these states.<sup>160</sup> While this has certainly been a consideration in the other two geographic groups—witness Nebraska's "white spot" advertising campaign for industry in the 1930's<sup>161</sup>—it seems more likely that the primary objective here was more political than economic: a reaction against the national labor policies of the New Deal and a general alienation between labor and agriculture which particularly manifested itself in a predominantly agricultural area.<sup>162</sup> In the Far Western states, there may have been some disposition to maintain a low-cost labor market to divert some industry from the coast—at least this has been labor's strong argument<sup>163</sup>—while there has also apparently been a strong sentiment in favor of a general balancing of rights and restraints with respect to unions.<sup>164</sup>

#### IV. COMPARATIVE ANALYSIS OF "RIGHT TO WORK" STATUTES

Table 5 indicates the range of subject-matter in the "right to work" statutes of the seventeen states, and the number of states which have covered substantially the same material in their respective enactments. Broadly speaking, the laws fall into two groups—those apparently placing primary emphasis on civil liability and those putting penal sanctions in the forefront of their policy—although, as at least one state has indicated, the absence of a criminal penalty does not necessarily prevent the state from imposing one.<sup>165</sup>

<sup>160</sup> "Runaway plants of companies notably in New England and the North Central states have become increasingly noticeable, coincidental with the passage of so-called Right-to-Work laws in states in the southwestern and southeastern sections, where wage rates have not been brought to the level of other parts of the United States." AFL Proc. 73d Convention 121 (1954). And see Hearings Before the Subcommittee on Labor-Management Relations of the Senate on Labor-Management Relations in the Southern Textile Industry, Pts. I and II, *passim* (1951).

<sup>161</sup> Cf. Miller, Comparative Analysis of Nebraska's "White Spot," 25 Nat. Tax. Ass'n Bull. 135 (1940); Crowder, Tattle-Tale Grey on America's White Spot, 27 Survey Graphic 497 (1938).

<sup>162</sup> U.S. News & World Report, Dec. 13, 1946, p. 22; Bertrand, Selected Farmer Attitudes, 7 Rural Sociol. 294 (1942); Naftalin, Failure of the Farmer-Labor Party to Capture Control of the Minnesota Legislature, 38 Am. Pol. Sci. Rev. 71 (1944).

<sup>163</sup> *Supra* note 160.

<sup>164</sup> See notes 20, 37, 106, 107, *supra*.

<sup>165</sup> Cf. note 176 *infra*.

Since public policy is the major argument in justification of "right to work" laws and against any great degree of union security, it is logical enough that a separate statement of policy should appear in a number of these statutes. North Carolina's is typical:

The right to live includes the right to work. The exercise of the right to work must be protected and maintained free from undue restraints and coercion. It is hereby declared to be the public policy of North Carolina that the right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union or labor organization or association.<sup>166</sup>

Whether there is a separate policy preamble or not, all but two<sup>167</sup> states embody the primary objective of the law in a specific clause prohibiting the closed shop as such, and limiting the other varieties of union preference which tend to promote union security. Alabama's prohibitory clause is as follows:

Any agreement or combination between any employer and any labor union or labor organization whereby persons not members of such union or organization shall be denied the right to work for such employer, or whereby such membership is made a condition of employment or continuation of employment by such employer, or whereby any such union or organization acquires an employment monopoly in any enterprise, is hereby declared to be against public policy and an illegal combination or conspiracy.<sup>168</sup>

It is such a clause which reveals most clearly the objective of the whole "right to work" movement—in its most extreme form, to outlaw the closed shop, union shop and preferential shop, and to revive the doctrine of criminal and/or civil conspiracy with reference to labor activity aimed at the promotion of these security devices. That the courts in several of these states have recognized and accepted this as a valid legislative objective is indicated in the review of adjudication in the following part of this paper.

Several states seek further to implement this prohibition—and in some instances to strike somewhat of a balance at the same time—by adding one or more clauses forbidding employers either to require or to prohibit union membership, and to prevent automatic or compulsory dues deductions or checkoffs. The Arkansas law, which covers these in a single clause, illustrates the general tenor of the provisions:

No person shall be denied employment because of membership in, or affiliation with, a labor union; nor shall any person be denied employment because of failure or refusal to join a labor union;

<sup>166</sup> Cf. note 8 *supra*.

<sup>167</sup> Florida and North Carolina.

<sup>168</sup> Cf. note 8 *supra*.

nor shall any person, unless he shall voluntarily consent in writing to so do, be compelled to pay dues, or any other monetary consideration to any labor organization as a prerequisite to, or condition of, or continuance of, employment.<sup>169</sup>

The next series of clauses are divided generally between the states which appear to have placed a primary emphasis upon the civil liability (Alabama, Arizona, Mississippi, Nevada, South Carolina, Utah, Virginia) and those which have primarily emphasized the criminal liability (Arkansas, Iowa, Nebraska, South Dakota) to be incurred by violation of the law. Four states (South Carolina, Tennessee, Utah, Virginia) have provided both civil and criminal remedies, and three others (Georgia, North Carolina, Texas) appear to give primary emphasis to civil liability,<sup>170</sup> while one (North Dakota) has no specific preference. (Florida, the remaining state of the group, has no enabling act to supplement its constitutional provision on the "right to work.")

Of the civil liability statutes, Alabama's clause on damages is typical:

Any person who may be denied employment or be deprived of continuation of his employment in violation of [the prohibitory section of the act] shall be entitled to recover from such employer and from any other person, firm, corporation or association acting in concert with him by appropriate actions in the courts of this state such damages as he may have sustained by reason of such denial or deprivation of employment.<sup>171</sup>

How effective this provision may prove is at present only speculative; no direct reliance on this clause has been had in any of the cases arising under these laws to date. It seems unlikely, given the present temper of the courts of these states as demonstrated in cases already considered adjudicating other labor statutes of the said states, that they will be inclined to find the clause faulty for vagueness—a criticism which might suggest itself to an impartial or hostile observer. Particularly those states which have affirmed, by case law or statute or both, the suability of unincorporated labor unions seem likely to find this clause enforceable.

Adding force to this clause is a supplementary clause in certain of the statutes, invalidating contracts which violate the law. Thus Utah provides:

Any express or implied agreement, understanding or practice which is designed to cause or require, or has the effect of causing or requiring, any employer or labor union, labor organization or

<sup>169</sup> Cf. note 8 supra.

<sup>170</sup> Cf. N.C. Code § 95-83 (Recompiled 1950).

<sup>171</sup> Cf. note 8 supra.

any other type of association, whether or not a party thereto, to violate any provision of this Act is hereby declared an illegal agreement, understanding or practice and contrary to public policy.<sup>172</sup>

Most of the states have either this type of a prohibition or a related clause providing that union security contracts in force at the time of the law's adoption, which might be found to be in conflict with it, are to contain no such conflicting provisions after the expiration of their current terms.

The eight states placing primary emphasis on criminal liability under the statute provide either for charging the parties with a misdemeanor (Iowa, Utah) or a fine which varies in amount, viz.: Nebraska and Tennessee, \$100 to \$500; Virginia, any amount up to \$500; South Dakota, any amount up to \$300; South Carolina, \$10 to \$1000; Arkansas, \$100 to \$5000.

Other provisions are peculiar to individual states, or are designed to supplement the major provisions set forth in the foregoing paragraphs.

## V. ADJUDICATION OF THE "RIGHT TO WORK" STATUTES

Because of the relative recency of the "right to work" statutes, as well as the fact that in the *Lincoln Federal Union, American Sash Co.* and *Hanson* cases the major questions of constitutionality have already been carried to the highest court and there definitively reviewed, there is as yet no extensive body of case law footnoting these statutes. Their constitutionality, with the exception of the field reserved to the Railway Labor Act, has been consistently upheld,<sup>173</sup> and the state courts have been particularly fervent in the exposition of the essentially humanistic principles they believed the laws sought to effectuate. Thus Justice Seawell of the North Carolina Supreme Court was as eloquent in his affirmation of the law as the high courts of Arizona and Nebraska had been: where the latter had emphasized the weight to be given to the sovereign action of the electorate in ratifying the respective constitutional amendments in those states, the North Carolina jurist pointed to the fact that so many states had legislated on this subject as a sign of the "wave of the future." After an extensive review of

<sup>172</sup> Cf. note 8 supra.

<sup>173</sup> *Hudson v. Atlantic Coast Lines*, 36 L.R.R.M. 2761 (1955); *International Ass'n of Machinists v. Sandsberry*, 277 S.W.2d 776 (Tex. Civ. App. 1954); *In re Florida East Coast R.R. Co.*, 201 F.2d 325 (5th Cir. 1953); *Finney v. Hawkins*, 189 Va. 878, 54 S.E.2d 872 (1949).



English and American legislative history in the field of labor law, Justice Seawell observed:

. . . Great weight must be attached to the fact that so many separate jurisdictions have, within so short a space of time, seen fit to exercise their police power in the same manner and for the same purposes. The composite will of such a broad cross section of our country cannot be lightly discarded as unreasonable, arbitrary or capricious or lacking in substantial relationship to its objective.<sup>174</sup>

Without pausing to consider whether this was actually reasoning in a circle, the court hastened to endorse what it held to be the innate power of the state to act in this area:

The General Assembly of North Carolina has attempted to draw upon the residual power of the state in an effort to remedy a situation of economic instability which has alarmed thinking people throughout the country. Those efforts have culminated in a prohibition upon the use of union membership or the absence of union membership as a condition of employment or continued employment. Substantially the same result has been reached in many other state forums which have considered the problem and also to a limited degree by the Congress of the United States . . .

. . . If the State may say to the employer, "you cannot deny work to anyone because of his membership in a union," we think it follows, a fortiori, that the state may say to the parties, "you cannot deny work to anyone because he is not a member of a union."<sup>175</sup>

It was North Carolina, in a case decided the same day as the *Whitaker* case, which held that the "right to work" law, being an expression of public policy, was enforceable by punishment for a misdemeanor at common law where no statutory penalty was provided, and added the observation:

There can be no question that the statute under review has for its main purpose the promotion of the public interest, deals with public policy, and is intended to promote the welfare of the whole public rather than sow the seeds of private litigation. The fact that it incidentally provides for the redress of private injuries does not deprive it of that character.<sup>176</sup>

The courts also have generally held that the "right to work" laws prohibit strikes, boycotts and picketing which have as their ultimate purpose or effect the circumvention of the statute itself.<sup>177</sup> "The state is not excluded from exercising its police power if the

<sup>174</sup> *Whitaker v. State*, 228 N.C. 352, 367, 45 S.E.2d 860, 871 (1947).

<sup>175</sup> *Id.* at 369, 45 S.E.2d at 872.

<sup>176</sup> *State v. Bishop*, 228 N.C. 371, 375, 45 S.E.2d 858, 860 (1947); cf. *Mascari v. Teamsters Union, AFL*, 187 Tenn. 345, 215 S.W.2d 779 (1948).

<sup>177</sup> *Lewis v. Jackson & Squire, Inc.*, 86 F.Supp. 354 (W.D. Ark. 1949); *Building Trades Council v. Bonito*, 280 P.2d 295 (Nev. 1955).

unfair labor practice is attended by illegal conduct coercive in nature," observed the North Dakota Supreme Court,<sup>178</sup> while another court has observed that if "no labor dispute existed between employer and non-union employees or members of the union picketing . . . for the sole purpose of compelling employer to enter into a closed shop agreement was for an unlawful object and was properly enjoined, though the picketing was peaceful."<sup>179</sup> The ultimate pronouncement upon this subject seems to be that of the Tennessee Supreme Court:

The right of the members of the union . . . to refuse to work upon a contract with non-union workers is fully recognized, but in so doing there is no right to employ it as a means of consummating the union's unlawful purpose. We also recognize the right of union employees, as well as any and all other workers to quit work at any time, to strike, so long as it is conducted in a lawful and peaceable manner.<sup>180</sup>

It is significant, too, that the revival of certain propositions as to labor law which have been in some degree of abeyance since the Wagner Act, the courts have also revived a concept of the state's injunctive power which seemed to have gone out of vogue with the Norris-LaGuardia Act. The Arkansas Supreme Court has sounded the keynote of this theme, viz.:

We hold that the injunction was properly granted. To hold otherwise would subject appellee to endless picketing which could only be terminated by granting a closed shop by practice, if not by contract. Suppose, for example, appellee signed the demanded contract, and did not discharge his non-union employees. The union would, as the testimony shows, immediately give the sixty-day notice and terminate the contract. They would then begin picketing appellee's business as unfair. Why? Because he insisted upon obeying the laws of Arkansas instead of abiding by the policy of the international union.<sup>181</sup>

With such a unanimity of opinion on the key points of these statutes, it appears that, unless the plaintiffs develop some new line of attack upon them, the continual litigation which is indicated as the present union strategy is likely to produce a continual note of denial by the courts.

<sup>178</sup> *Minor v. Building & Constr. Trades Council*, 75 N.W.2d 139 (N.D. 1956).

<sup>179</sup> *Local 519, United Ass'n of Journeymen and Apprentices of the Plumbing Industry v. Robertson*, 44 So.2d 899 (Fla. 1950); *Stonaris v. Certain Picketers*, 46 So.2d 387 (Fla. 1950).

<sup>180</sup> *Howard v. Haven*, 281 S.W.2d 480 (Tenn. 1955).

<sup>181</sup> *Self v. Taylor*, 217 Ark. 953, 235 S.W.2d 45 (1950).

## VI. SUMMARY AND CONCLUSIONS

Since the early 1940's, and particularly in the decade since passage of the Taft-Hartley Act, proposals and enactments of "right to work" and other anti-union security measures have predominated in state labor legislation. In part this has been a reflection of the general shift in national labor policy which set in during the waning years of the New Deal, but in even larger part it has been consistent with the tradition of state labor legislation in general, which has been most liberal in respect of individual workers' rights and most conservative in matters of collective activity of labor groups. The "right to work" movement to date has found its greatest success in the states which have been predominantly agricultural, or have experienced a very recent industrial development. Almost three-fourths of the states of the Union, however, have considered such legislation at one time or another, and there is every indication that the sponsors of such bills will continue their activities.<sup>182</sup>

Where the counter-move to repeal such statutes has been successful, it appears to have been the result of a promotional campaign equal in intensity to the all-out effort which originally pushed the bill to enactment. The situation in Louisiana—the most recent of the four states to date which have repealed the "right to work" law and the only one on which any data on this point are available—demonstrates the political adroitness required. Having rejected previous efforts at enactment of such a measure during the general Southern legislative movement of 1947, Louisiana pushed its statute through in 1954 with the combined support of small businessmen and agricultural groups.<sup>183</sup> Two years later, when labor interests began the repeal effort, they showed that they had learned their political lesson well. As a companion to the repeal bill there was introduced a bill exempting agricultural workers from compulsory union membership. Thus the repeal advocates gave a *quid pro quo*, divided the "right to work" forces and appropriated the necessary support to themselves to give them the votes to erase the statute.<sup>184</sup> To have worked out this strategy indicates a degree of political sophistication which state labor leaders in the "right to work" states have usually lacked; for in Louisiana the high proportions of farm labor susceptible of a union drive made it appear to the union shop faction in 1954 too costly a sacrifice to acquiesce in a measure which would have preserved the union shop for industrial workers

<sup>182</sup> Cf. Right to Work National Newsletter, Feb., 1956, p. 1.

<sup>183</sup> Cf. La. Laws 1954, No. 16.

<sup>184</sup> Cf. New Orleans Times-Picayune, May 22, 1956.

but closed it to agricultural employees.<sup>185</sup> The result was the complete loss of the union shop issue; conversely, in 1956 the labor forces were willing to take half a loaf rather than none.

In the interim between 1954 and 1956, the joint AFL-CIO state council made a systematic canvass of the state representatives who had voted for the "right to work" bill, and pinpointed key opponents to be defeated at the polls. As a result, the floor leaders for the "right to work" bill in both houses of the Louisiana legislature were defeated—and replaced by men committed to repeal.<sup>186</sup> Having thus replaced the political leadership and won over such 1954 proponents of the "right to work" bill as the Louisiana Farm Bureau Federation and the American Sugar Cane League by virtue of their concession on agricultural employees, the repeal party put through its measures by substantial majorities.<sup>187</sup>

The specific strategy in Louisiana may not apply elsewhere, or at least may be tempered by local conditions. It does point to the primary reason why the "right to work" movement in the states got such a long head start before labor began its counter-offensive, however: nationally labor groups have concentrated most of their attacks upon section 14 (b) of the Labor Management Relations Act, which they regarded as the lifeline of the state statutes. Only after the major amendments of 1951 had been enacted, without any successful curtailment of 14 (b),<sup>188</sup> did national leadership turn its attention to the state level.<sup>189</sup>

It has been recognized by both sides to the dispute that the "right to work" movement has been conducted in terms of individual rights as opposed to those of an organized interest (the open shop advocates identifying this interest as the union, the unions identifying it as the labor exploiter). Thus the legislation generally is in democratic language which is psychologically difficult to criticize: it stresses the freedom of the individual to affiliate or to refrain from affiliating with a union, and usually provides that the employer shall be neutral with respect to the wishes of his several employees. Although this in itself may be described as an enlightened restatement of *laissez-faire* economic philosophy, it is clearly and conclusively confirmed as an anti-security policy by the key clause in the statutes ruling out union membership as a considera-

<sup>185</sup> New Orleans Times-Picayune, June 6, 1956.

<sup>186</sup> New Orleans Times-Picayune, May 17, 1956.

<sup>187</sup> New Orleans Times-Picayune, June 6, 1956; June 22, 1956.

<sup>188</sup> Cf. note 44 supra.

<sup>189</sup> Cf. note 82 supra.

tion of employment, present or future. Thus, in the final analysis, the "right to work" movement stands revealed as a revival of classical economics and politically the antithesis of the concept of labor relations epitomized in the Norris-LaGuardia and Wagner Acts.

In the states where they have been enacted, the "right to work" laws have usually been part of a general system of restrictive legislation which, besides prohibiting union affiliation as a factor in employment, has restricted strikes, picketing and boycotts, has held unions accountable for the acts of their members and frequently has compelled their officers to register and render financial accounting. It is evident that the "right to work" statutes have thus found their most fertile soil in regions already prepared by restrictive legislation; in most instances, although no state-by state breakdown is available, the states which have passed such laws are states with relatively low union membership in proportion to the total employed population in industry. Certainly these states have had a lower percentage of their employed population in industry than have, say, such states as Illinois, Massachusetts, Michigan, New York, Ohio and Pennsylvania.<sup>190</sup> It is perhaps of some significance that, of these six highly industrialized states taken at random, only two (Massachusetts and Pennsylvania) have even considered "right to work" proposals; such bills never reached a significant stage of legislative debate, apparently, in the others.

The "right to work" movement, as the Supreme Court in the *Hanson* case clearly indicated, rests squarely upon national labor policy and must adjust to whatever changes of posture that policy may assume with shifting public opinion. The prevailing policy is one of sharing responsibility and authority with the states, and this in turn makes the "right to work" argument depend upon the local social and economic determinants of political action in each state. This being the case, and given a continued national policy of sharing the field, it is likely that the "right to work" movement will continue to flourish in those states where industrialization is relatively low or relatively new, and where the legislative tradition has favored a high degree of restraint upon collective labor activity.

<sup>190</sup> Compare the following data with those for the states listed in Tables 1 and 3: Illinois, income per capita—\$2,088; percentage of population in lowest of income groups—37.9; percentage of population employed in industry—41.8; average annual hourly wage—\$1.91. For Michigan these data are: \$2,003; 36.1% 47.6%; \$2.15. For New York: \$2,158; 39.7%; 39.4%; \$1.84. For Ohio: \$2,012; 39.7%; 45.6%; \$1.99. For Massachusetts and Pennsylvania see Table 2.