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## THE ADMINISTRATIVE STATE: COMPULSIVES IN LABOR RELATIONS\*

JOSEPH ROSENFARB\*\*

### I

It is no secret that organized labor is eager to cast off wartime governmental controls in the field of labor relations. At least the observer is justified in arriving at this conclusion from the loud protestations of labor leaders in convention addresses and in post-prandial dissertations. Such expressions of labor's attitude are usually accompanied by attacks on the particular government official responsible for the latest frustration of labor's demands.<sup>1</sup> To some extent such assertions by labor are consciously or not make-weights to maintain the pressure calculated to cause the erring "poobah" to mend his ways. But there is abundant reason to believe that great clusters of labor leaders genuinely look forward to the end of the war as the time for liberation from wartime restraints on the collective bargaining process.

The chief wartime restrictions from which deliverance is sought are the strike taboos<sup>2</sup> and wage ceilings.<sup>3</sup>

\* This article constitutes a portion of a forthcoming book on the nature and functions of the modern state. It will bear the title of this article: "The Administrative State."

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<sup>1</sup> There is, of course, nothing new in this. Contrary to popular belief every annual convention of the AF of L and CIO has resounded with complaints and threats against one or another member of the National Labor Relations Board.

<sup>2</sup> Wartime strike prohibitions include criminal sanctions and plant seizure under the War Labor Disputes Act, 57 STAT. 163, 50 U. S. C. A. §1501 (Supp. 1943); sanctions against strikers and union officials by Director of Economic Stabilization under authority of *Executive Order No. 9370*, Paragraphs B and C, 8 FED. REG. 11463 (1943), 54 STAT. 1191, 50 U. S. C. A. §583 (Supp. 1940); sanctions against strikers and unions by the National War Labor Board by denial or conditional grant of union security, *Monsanto Chemical Co.*, WLB Case No. 292, Aug. 18, 1942, and *Semet-Solvay Co.*, WLB Case No. 347, Mar. 19, 1943; denial of reinstatement by WLB to employees who strike in violation of "no-strike" contract clause, *Borg-Warner Corp.*, WLB Case No. 111-5665-D, May 16, 1944; denial of reinstatement by National Labor Relations Board to employees who strike to force employer to violate Economic Stabilization Act, *In re American News Co., Inc.*, 55 N. L. R. B. 1302 (1944). Labor's no-strike pledge is not vitiated by strike vote under War Labor Disputes Act, *Anson v. Gilkey*, WLB Case No. 111-2356-D, rel. Nov. 12, 1944.

<sup>3</sup> *Executive Order No. 9017* (Jan. 12, 1942); 56 STAT. 765 (1942), 50 U. S. C. A. §§961, 962 (Supp. 1943) as amended by 57 STAT. 63 (1943), 50 U. S. C. A. §§964, 964(a) (Supp. 1943) and Pub. L. No. 383, 78th Cong. 2d Sess. (June 20, 1944); *Executive Order No. 9328* (Apr. 8, 1943); Pub. L. No. 89, 78 Cong. 1st Sess. (June 25, 1943).

It is quite obvious that this desire of organized labor to return to the status quo ante in collective bargaining parallels an even more articulated nostalgia of business for the golden age of laissez-faire "free enterprise."

One can sympathize with this prevailing mood as an expression of war fatigue, of a deep yearning for surcease from the stresses and uncertainties of wartime living which breed neuroses. But nostalgia is a mood suitable at best only to the arts, particularly the drama. Nostalgia does not become statesmanship. It is most important to determine whether the drive of both business and labor to turn the clock back in regard to governmental intervention in our economy is in accord with the compulsive forces of our society. If it is, then it deserves support and will fructify the postwar era. If it isn't, then even its realization should be considered at best as transitory as the last fling in the twilight of life before darkness stills the faint whisperings of the blood.

Of course the war has been the occasion for the wide ramification of governmental controls of our economy. Similarly, these controls—over prices, production, wage stabilization, manpower and labor relations—have been conditioned by the needs and purposes of war. But it is an error fatal to correct analysis to assume that their existence is entirely coterminous with the war and is an atypical social phenomenon irrelevant to our peacetime economy. The trend toward the interpenetration of the economic and political processes is one of the chief characteristics of at least the last half century, and has manifested itself virtually in every economy in the world. It has varied in its pace of development and form of manifestation, but it has become the common denominator of modern socio-economic evolution. It would not do to explain away this trend by the claim that it is due to the advocacy and belief of man. One may reply that what man thinks is as much a datum of our environment demanding adjustment to it as any other factor. More significant, it is the policies and parties which have advocated government intervention in our economic affairs which have triumphed everywhere against the greatest opposition, whether through orderly procedures or by revolution. There must be some vital need in our economy which this phenomenon fulfills for it to survive in the process of historical selection.

Obviously such universality must be in response to a condition rather than a theory. We need not genuflect to the doctrine of inevitability in social relations to realize that we are dealing here with a fundamental condition of present-day society.

If government intervention in our economy were not indigenous to our culture, its tempo of development would not have been increased by the war—the classic accelerator of historical processes. Feudalism was

progressively weakened and nascent capitalism emerged triumphant in the wars of the period. This ought not to occasion surprise. War, involving the use of mass armies, particularly modern total war, is largely a function of the economy. Since success in war is the ultimate acid test of survival, it tends to bring to the surface the elements in our socio-political relationships best suited for the utilization of our technology. The mechanism for this is the tendency for the disappearance of opposition to wartime measures which in peacetime would be politically inconceivable short of some catastrophic event bordering on political and economic collapse. It is therefore a valid generalization to make that war is the laboratory of the future peace, that wartime controls of our economy reveal a prescient glimpse of what the comparable peacetime techniques will ultimately be after an understandable time lag. World War Part I was a crucible for much of the labor legislation of the last quarter of a century.

The irreversible trend towards monopolization of industry on a national scale and its cartellization in the international field has been conditioned by the fissiparous division of labor in our technology, by mass production, and by the drive for power in the economic realm. These factors pyramiding up to monopoly render necessary the positive participation of government in the economic process if our industrial machine is to be run at anywhere full capacity.

Is the same trend manifest in the actualities of labor relations?

## II

Any analysis of the labor situation must begin with the size and growth of labor organization as a point of departure. When Roosevelt took the oath of office in 1933, the membership of organized labor was down to about three million and the curve was still pointing downward.<sup>4</sup> Organized labor as a factor in our society, both economic and political, was approaching the vanishing point. Towards the end of 1944 organized labor has approximated the unprecedented total of fourteen million members. Of these, the AF of L has reported at the 1944 convention a paid-up membership of nearly seven million. The CIO at its 1944 convention claimed six million members. A conservative estimate of John L. Lewis' United Mine Workers including District 50, as well as the Railroad Brotherhoods and the various independents such as Smith's M.E.S.A., would furnish the total of over one million workers. If we compare these figures with the total working population of the country engaged in industry and commerce, about forty-three millions,<sup>5</sup> organized labor blankets about thirty-three per-

<sup>4</sup>LEO WOLMAN, *EBB AND FLOW IN TRADE UNIONISM* (National Bureau of Economic Research, 1936) 16.

<sup>5</sup>*The Labor Force*, Dept. of Commerce (Dec. 18, 1941).

cent of these. Though these figures mount up to a very impressive picture of labor strength, even when viewed in and by themselves, they do not convey sufficiently the full dynamic contours. The details of the silhouette are even more imposing. Railroads, bus lines, telephone, telegraph, radio, steel, autos, aircraft, mining, shipbuilding, and many other industries are all operating under collective bargaining agreements with unions. Stated differently, the operation of our basic industries and of our communication system is necessarily conditioned and greatly influenced by the economic and ultimately political policies of organized labor. Hence the nuclear character of organized labor's position in our economy. This is not indicated as a sinister phenomenon which bodes ill for our society. Not at all. But whether we view it with alarm or with hope it remains a fact.

Nor is it realistic to look toward the postwar period for a substantial and permanent diminution in labor strength and influence. Reconversion will bring about the elimination of many women and older workers from industry with consequent loss in union membership. The shift in production from war to peace will tend to produce a similar result. It is true, of course, that unemployment, which may accompany the reconversion period, will be a factor as it has in the past, to reduce union membership.<sup>6</sup> In a period of widespread unemployment the returning veterans are now looked upon as a fertile source for anti-union mobilization by certain unreconstructed elements in industrial circles who have not yet reconciled themselves to the reality that collective bargaining is here to stay. Similarly, the turgescence of union membership during the war is not due altogether to intensive honest-to-goodness organizing campaigns. Much of labor's mushrooming has been due to the blanketing character of union security contracts that labor has been able to obtain under the pressure of wartime production.<sup>7</sup> It would be surprising indeed if multitudes of union members did not look upon their union only as an agency for the collection of dues. And it must be pointed out that union officials have for the most part done very little in the direction of educating their members as to the reason for existence and benefits of unions. It is the path of least resistance to invest union funds against the day when reduced union membership might not be adequate to pay union salaries than to spend money to increase solidarity in the membership by making it union conscious. When the winds of conflict will sweep the industrial front, lost educational opportunities might show up in lost strikes, for in a prolonged struggle it is only the convinced union member that can be relied upon

<sup>6</sup> Strikes in 1943, *B. L. S. BULLETIN* No. 782, p. 2.

<sup>7</sup> As of Jan., 1944, closed shop contracts covered about thirty percent and union shop agreements almost twenty percent of all workers under union agreements, or together, a total of about six and a half million workers.

not to break the ranks and leave the picket line for the assembly line. The internecine conflict in labor chiefly between the CIO and AF of L with or without the accouplement of John L. Lewis will tend to reduce the influence of labor because of the inversion of its energies. It will also not add to the public euphoria in regard to labor by sharpening and spreading jurisdictional disputes.

Despite these factors, whose potency is not being minimized, union strength viewed over a period of several years rather than for the immediate postwar interval, will undergo accretion. For the following reasons: The great corporate reserves and tax rebates which will be available to business after the war will enable many industries to cushion the impact of idle plants, as far that is as the financial position of business is concerned. But unemployment will not accomplish the elimination of organized labor. It will accelerate however the process of that which the irreconcilables fear most—government intervention. If there is one assertion worthy of generalization into a maxim of modern politics it is that no government irrespective of party affiliation or ideological fidelity will be suffered by the people to stand by for long and permit unemployment to “run its course.” Any government confronted with grave unemployment will be expected not only to provide relief but also employment, or lose not only its right but its power to govern. The doctrine of states’ rights does not fill the bread basket, and it is only on full stomachs that democratic liberties have a chance to survive in modern society.

The returning veteran out of a job will be told that his salvation lies in taking a job away from a member of the union. But with widespread unemployment and shut-down plants this will hardly sound convincing. The returning veteran might, of course, fall victim of at least para-fascist propaganda, but it is more likely that, returning to the civilian environment, the veteran will be grafted to the same social roots which are responsible for the growth of unions. It has been noted that veterans who have returned to the factories are frequently found among the leaders or at least participants of strikes.

The veterans like the rest of industrial America will find that it is organized labor which can be most relied upon to exert even political pressure to have the government provide jobs or create the conditions for jobs. Curiously, in the conviction that organized labor is an effective pressure group which can deliver the goods, the masses of workers have been substantially assisted by the daily press. It is true of course that wage ceilings apply to organized labor as well as to the unorganized worker. But only a union can process a case effectively before the National War Labor Board or the other wartime agencies. Whether in steel, coal, or the railroads the average reader of the press cannot

help but observe that, though the Little Steel formula is still not even bent, as Chairman Davis assures him,<sup>8</sup> it has not prevented the organized workers involved from getting a bigger "take home" as the result of union representation before government agencies and pressure which bordered on or passed over into strikes. The effect is not lost. This is not a criticism of the action of the boards and officials in the cases involved. But every time one reads a tirade against John L. Lewis or some union for striking to bring pressure on the government to raise wages, there is, of course, a resentment against this action which interferes with the war effort. But there is also a residue of sentiment hardly articulate because it is patriotically taboo, that a union is effective in getting a raise.

That the example of organized labor is not without its effect on the minds of the unorganized is indicated by the fact that organization is permeating the middle class and aristocracy of industrial and white collar workers and the professions. Although a majority of the National Labor Relations Board had reversed its policy in 1943 and denied protection of the Wagner Act to supervisory employees except in certain industries such as printing and maritime,<sup>9</sup> the organization of foremen has not abated. The result of this reversal of policy has been frequent strikes which have interfered with the war effort, but the river of foremen's organization refused to stay away from the door. So much so that the NLRB is soon to reverse its policy and recognize the inevitable.<sup>10</sup> Even the engineering fraternity, which traditionally is as far removed from unionism as the American Medical Association is from socialized medicine, is changing its antipathies in regard to unionism. Engineering associations all over the country are reorganizing to act as collective bargaining agencies.<sup>11</sup> Organization is the spirit of our times.

There is no reason to believe that in the postwar period organized labor will cease to exert its pressure, direct or indirect, on the consciousness of the unorganized. Of course the energies and aspirations of labor leadership are an exceedingly important factor. Thus the tendency of labor leaders is in time to lose the drive and push characteristic of their youth, particularly when there are enough honors and emoluments to go around. This, of course, is a trait not peculiar to labor

<sup>8</sup> His statement on Nov. 25, 1944, when the Steel decisions were issued, *Carnegie-Illinois Steel Corp. et al.*, WLB Case No. 111-6230-D.

<sup>9</sup> *In re Maryland Drydock Co.*, 49 N. L. R. B. 733 (1943); *In re Soss Mfg. Co.*, 56 N. L. R. B. No. 70 (1944).

<sup>10</sup> As this is being written the Board is reconsidering its policy in the *Packard Motor Car Co.* case heard in Detroit.

<sup>11</sup> See in this connection the appendices of McIver, Wagner and McGirr's "Technologists' Stake in the Wagner Act" published in 1944 by the American Association of Engineers.

leaders. Businessmen and government officials are not immune from the germ.

· But there is a factor in labor which would tend to counteract the lethargies of union organizers. Labor's house divided against itself is adding wings. The rivalry of the AF of L and the CIO for supremacy serves as an impetus to organizing campaigns on both sides. The contest for jurisdiction is a fillip to stake out and to work claims. Imperialism is a power phenomenon and therefore has its counterpart in labor's competitive milieu. If labor is to heal its breach, it will have to find the moral equivalent of labor's war. The need to organize the unorganized in order to avoid their undermining the standards of the unionized will continue to operate as a stimulant to organizing drives.

Given a continuation of a democratic postwar America, a not too hazardous assumption which underlies this analysis throughout, the socio-economic forces point to a long range increase in labor's organizational strength.

What are the implications and consequences of this strength in regard to government regulation of our economy?

### III

Labor's cumulative power will have a decisive influence on labor's exercise of its right to strike in the postwar period.

Despite newspaper headlines, labor's strike record during the war has been remarkably good, much better in fact than what it was in the last war, and compares favorably with that in England even though American labor has not worked under the psychological imperatives operating in the midst of a war theatre.<sup>12</sup> But strikes are on the increase.<sup>13</sup> Labor is restless and the restiveness wells from the rank and file and communicates itself to the leaders. Though the AF of L and CIO annual conventions in 1944 renewed the no-strike pledge, it is to be expected that strikes, particularly of the wildcat variety, should continue to be on the increase. The accumulating tensions and resentments of steady and continuous working long overtime hours takes its toll in explosive quickies. More important, the drive of the rank and file for higher wages is transmitted into work stoppages, directed equally against employers, union leaders, and the government officials, as a means of blowing off wage ceilings. If the immediate postwar period will give free reign to inflationary forces, it will be characterized by strikes of epidemic proportions as soon as, or perhaps even before, wartime strike

<sup>12</sup> Man days lost because of strikes during the war hover on the average around one-tenth of one percent of available working time: *Strikes in 1943*, B. L. S. BULLETIN No. 782, p. 2.

<sup>13</sup> *Strikes in September, 1944* (1944) 59 MONTHLY LABOR REV. 1017.



inhibitions are lifted. The experience of 1919 will be recapitulated.<sup>14</sup> Such a strike situation may well result in permanent legislation curbing labor's right to strike.

But entirely independent of anti-strike legislation and unconditioned by strike figures in the immediate postwar period, the strike is becoming obsolescent as labor's economic weapon even in time of peace. Labor's power operating against the background of modern technology is responsible for this. The validity of this paradox is in no measure diminished because it is surprising. The reasons are endemic in labor's strength.

It is now recognized that the general strike is no longer to be found in labor's arsenal. It is not a weapon calculated to achieve economic results and directed against the employer class. Even if its avowed purposes are economic and the objectives limited to the usual trade union variety and though it addresses its conscious pressure against employer groups, the general strike is a political and indeed a revolutionary weapon aimed in fact if not in intent against the government. The reason lies in the very impact of the general strike upon society—and that impact is paralyzing. The effective general strike stops the services and functions necessary for the maintenance of the life of the community whether this is on a local or a national scale. This is particularly true of modern urban society whose life is so dependent on a continuous maintenance of services. Since the elementary and primary function of government is to sustain and protect the life of the community or state, no government can expect to remain in power unless it causes the immediate discontinuance of the general strike. It can encompass this purpose by granting the demands of the strikers, by effecting a compromise on the issues involved, or by refusing all demands and breaking the strike. But whatever method the government uses it cannot, whatever its sympathies in regard to the contestants may be, sit idly by and twiddle its collective thumbs, thus permitting the strike to run its course. It must intervene promptly and effectively to stop the strike. The life of the community must go on. This is the reason why general strikes have traditionally been avowedly of a political or revolutionary character. And even where this has not been the case, it was treated as such, as in the general strike in England in 1926, which was unsuccessful and resulted in anti-labor legislation in 1927.<sup>15</sup>

The general strike is not an economic weapon which can be used by labor to attain economic ends without government intervention because of the colossal effect of the weapon on the community. The conclusion is warranted then that whenever any other type of strike will approxi-

<sup>14</sup> The greatest incidence of strikes in the history of the country occurred in that year: *Strikes in 1943*, B. L. S. BULLETIN No. 782, p. 2.

<sup>15</sup> Trade Disputes and Trade Unions Act of 1927, 17 and 18 Geo. V, c. 22.

mate in effect the proportions of a general strike, it too will in time cease to be wielded by labor, for it too will bring about government action for its discontinuance and ultimately prevention.

And because of the organization of modern industry and the growth of labor organization, strategic industrial and communication strikes will tend to approximate the effect of general strikes on the community. Corporate organization of industry in large units increases the range of the employer's voice in the determination of labor policy. Employer associations along industrial and inter-industry lines further accentuate the trend toward uniformity and extensiveness of employer influence.

A similar development is paralleled in the labor movement. The radius of the union's reach in the making of labor policy is lengthening with the unionization of the workers. The industrial form of labor organization as contrasted with the craft type is a contributing factor of development in the same direction. Industry-wide collective bargaining, such as is found in coal and the needle trades, is the ultimate development thus far in the direction of extending the direct effect of employer-union decision. But even without the formalization of industry-wide bargaining a substantially similar result is obtained, due to the already indicated large scale employer organization characteristic of our basic industries and the industrial form of labor organization. The association of labor unions into large federations such as the AF of L and CIO further enhances the impact of a decision in labor relations by increasing the incidence of sympathetic strikes, a phenomenon which has already given rise to the contagion doctrine of strikes as a basis of WLB jurisdiction.

The factors of employer and labor organization on industry-wide basis tend to prolong any deadlock which may result in a strike. The effectiveness of any strike threat against a single employer resides in his fear that he might lose his trade to his competitors during the threatened strike. But when a strike envelops a whole industry, the fear of competition is removed from the brow of employer negotiators. Likewise, in large scale corporate organization, loss of immediate profits due to idle plants does not loom as large in consideration as with the small individual entrepreneur. With the individual employer and the representative of the local unions, the mediator may ply the tricks of his trade with greater success than is the case when industry-wide impasses develop where the decisions to be made are great in their effect.

An industry-wide strike immediately withdraws the purchasing power in the communities directly effected, thus increasing the social and political tensions of the mercantile, professional and farm groups of the population whose livelihood is dependent on the factory payroll.<sup>16</sup>

<sup>16</sup> See ROSENFARB, *THE NATIONAL LABOR POLICY* (1940) 92-97.

But the effect of such strikes transcends the immediate communities involved. Other industries which utilize the products of the industry affected may have to shut down where the strike is of any substantial duration. The effects of a coal, steel or railroad strike cannot be insulated. An industry-wide strike in any of the basic production or communication industries is of national import in its consequences.

Such a strike would equate in catastrophic effect a general strike in peacetime or an extensive strike in wartime. In an economy, such as ours is, which places so great a premium on full and continuous employment, large-scale strikes are not a phenomenon which government will be able to observe without positive intervention to do away with and render unnecessary.

The future in regard to strikes has already cast its shadow on at least one of our basic industries—the railroads—and the reference is not to wartime conditions. With more praise than understanding the Railway Labor Act<sup>17</sup> applicable to the railroad industry is pointed to as a model for industry generally to avoid strikes by means of mediation and voluntary arbitration. Particularly endearing has become the so-called “cooling-off” period provided for in the statute during which no strike or lockout may occur while the healing poultices are being applied to the collective bargaining process.

The pronouncements of some persons who have had close contact with the railroad situation, betray very little insight into the realities of collective bargaining on the railroads.

For one, the “cooling-off” period has really proved to be under the War Labor Disputes Act which provides for it in regard to war contractors,<sup>18</sup> a “heating-up” period. Even where no strike is intended the machinery provided for has been utilized to demonstrate that a strike is in preparation. Of course this is resorted to frequently as a ceremonial ritual for the effect it may have on the public, employers and government officials. But it may well be that the war dance develops psychological drives for release in actual war in the participants themselves. The history of dictatorships is replete with instances that propagandists become the victims of their own propaganda. The James-Lange theory is not without its application in mass movements.

More significant, it may be surprising but even in peacetime there has not been any independent, private, collective bargaining on the railroads on the vital issues which can and have caused impasses. The reason for that is that even in peacetime the government could not

<sup>17</sup> 44 STAT., pt. 2, 577 (1926) as amended in 1934, 48 STAT. 1185 (1934), 45 U. S. C. A. §§151-164 (1943).

<sup>18</sup> Strikes have been on the increase since the Act was adopted in 1943. There have also been credible reports that the leaders of the Railroad Unions never intended to go through with the railroad strike by the end of 1943 though all the preparations were made for that eventuality.

tolerate the exercise of the right to strike on a large scale on the railroads whose continuous operation is so vital to the nation. Consequently, great railroad strikes have been averted not because of the surplus of good will and restraint peculiar to the parties in the railroad industry which caused agreements to be concluded by collective bargaining. Great strikes have failed to occur not because the "cooling-off" period afforded opportunity to wiser heads to work the miracles of voluntarism and that blessed word mediation. Great strikes have been prevented<sup>19</sup> because on the vital issues on which the parties would really be expected to lock horns, *ad hoc* Emergency Boards have been appointed by the government which decided them for the parties. That the awards of these boards are only recommendations in form which the parties are free to ignore after a "cooling-off" interval does not in any way alter their actual mandatory character backed by the power of the government. The parties have understood that and have acted accordingly. There have been no great railroad strikes since this system has been established. But this has not been due to voluntarism of private collective bargaining but in the clinches to compulsory government arbitration of the vital contractual terms.

What has been said is not an argument to outlaw strikes. This has been proven rather futile, particularly as a means of avoiding the explosive wildcat variety.<sup>20</sup> The analysis, however, points strongly in the direction of increasing intervention by the government in peacetime also to decide the terms of the labor contract as a means of avoiding strikes in the organized basic industries. It is not unlikely that the strike weapon which was suitable as a labor counterpoise in a small scale capitalistic economy is becoming obsolescent in a modern economy in which institutional continuity of operation is of the essence. In the fullness of time it may take its place with the barricades among other memorabilia of the capitalistic class struggle. Of course it will continue to receive the kudos of the pious as among the sacred inalienable rights, but it will have as much relevance to the actualities of the situation as the eighteenth century formulated right of revolution which is found in our politico-legal heritage.

It is elementary that if the government is impelled to avoid strikes it must intervene to determine at least the vital issues, such as wages, of the employer-employee relationship. In its ultimate essentials collective bargaining is a contest between the economic power of labor and that of management. Labor's economic weapon is the strike: that of the employer is to refuse to accede to the union's demands, to replace economic strikers, and the lockout. Even where the strike is not re-

<sup>19</sup> See annual reports of the National Mediation Board.

<sup>20</sup> The experience in this country has been paralleled by that in Great Britain.

sorted to, the possibility of such an occurrence is the unexorcisable spirit of the conference room. The ultimate agreement is an estimate by both sides of the conference table of what the result would be if an actual trial of strength took place.

When labor is without its right to strike genuine private collective bargaining is no longer possible, for the agreement is then a product of unilateral voluntary decision—that of the employer. Unless labor then is to become completely impotent *vis a vis* the employer decision must be left to a third party. That is why even in peacetime whenever labor consents to a no-strike provision in a contract, the logic of the situation calls for the appointment of an impartial arbitrator to administer the contract and decide disputes arising during the contract. That is why when labor gave its no-strike pledge for the duration the government, through the National War Labor Board, has had to decide in dispute cases not only wages but other issues of the collective agreement such as union security. Whenever NWLB has refused to rule on certain so-called "fringe" issues in dispute cases and sent them back to the parties for collective bargaining, it in essence left them to be decided unilaterally by the employer uninfluenced by labor's exercise of economic pressure.<sup>21</sup> Hence, NWLB is being forced to rule on more and more issues<sup>22</sup> of the collective agreement despite recurrent pleas of its members that labor and management learn to settle their own differences without invoking government intervention. As long as labor is without the right to strike, such pleas are futile however well intentioned they may be.

Of course some quarters might be in favor of depriving labor of its right to strike and leave the employer the complete freedom to determine the terms of the contract, but obviously no government with any pretense to democratic principles could afford to do that. More significant, not even under fascism, where labor has no right to strike, have employers been left with a free hand in the employer-employee relationship. The reason lies in the nature of our economy which calls for coordination. Employers should bear in mind that to the extent that labor loses its power to strike will government intervention to determine the terms and conditions of employment become imperative.

#### IV

Government compulsory arbitration to decide issues between employers and unions is indicated not solely or even primarily by the necessity of avoiding crippling strikes. That objective aside, increasing

<sup>21</sup> For instance, insurance, hospitalization, health: Continental Can Co., WLB Case No. 2860-D (732), June, 1943; sick leave benefits, Van Norman Machine Tool Co., WLB Case No. 111-3956-D, Feb. 18, 1944.

<sup>22</sup> For instance, severance pay, Carnegie-Illinois Steel Corp. et al., WLB Case No. 111-6230-D, Nov. 25, 1944.

government regulation of the employer-employee relationship even in regard to the terms and conditions of employment will be brought about by the need to resolve conflicting social interests and to maintain economic equilibrium.

To the evolution of this need as to the imperative of preventing strikes the growth and structure of organized labor as well as the large scale organization of employers are prime contributors.

It is elementary that wages in any industry do have a relationship to the price structure of that industry. Wages are frequently the chief factor affecting costs, but in any case they are among the most important components of production costs. Thus, a wage award of the National War Labor Board becomes effective when the Office of Price Administration decides that no price increase will result, but if price ceiling revisions become necessary, wage increases are subject to the approval of the Stabilization Director.<sup>23</sup> A numerically small labor movement organized along craft lines does not influence substantially the costs of the industry where it is only a small part of the total labor force, however militant the craft union is in behalf of its own members. Raises in wages obtained by the few craft members can in ordinary times be absorbed without causing a rise in costs, through a speed up of production, an increase in the time worked, or through a wage reduction of the unorganized many. Craft unionism tends therefore to become exclusive, conservative and opposed to mass organization of labor, particularly on industrial lines. These characteristics have been associated with the history of labor's aristocracy in the United States.

When labor becomes numerous and organized along industrial lines,<sup>24</sup> when a union blankets all or even most of the workers in an industry any upward revision of wages tends to have a constantly more pronounced and immediate effect on costs. There are few, if any, unorganized to absorb the wage increases. Neither can profits be depended upon to be adequate for the absorption even if employer opposition can be overcome. While the few can profit at the expense of the many, the converse is not true. Prices, too, cannot always be relied on to absorb the rise in labor costs. A price rise may result in the reduction of the number of purchases, thus causing reduction of force. Frequently, moreover, no price rise is possible without affecting adversely the competitive position of the industry. Thus, ordinarily the price of coal cannot be indefinitely raised without causing more widespread use of oil and other fuels.

<sup>23</sup> Carnegie-Illinois Steel Corp. et al., WLB Case No. 111-6230-D, Nov. 25, 1944.

<sup>24</sup> For an extensive analysis of the craft-industrial controversy insofar as it is reflected in the determination of the appropriate unit under the National Labor Relations Act see ROSENFARB, *THE NATIONAL LABOR POLICY* (1940) 316-385.

But even where the organized industry is not limited by the prices of competitive products, its price level cannot be freely raised without effecting severe dislocation in the economy and causing social conflicts. A prime characteristic and dislocating factor in a great and prolonged depression is not the deflationary nature of the price level, though that in itself is significant, because it increases the debt burden of society and thereby improves the position of the creditor class *vis a vis* the rest of the population. Even of greater import is that even within the movement of prices there are great variations. While some prices, in monopolistic industries such as steel, for instance, remain rigid, others, more subject to competition as in agriculture, show a more precipitate and deeper decline.

If labor through mass industrial organization would continuously succeed in raising labor costs and thereby the price level, is there any doubt that this would arouse the opposition of the farm population and of the unorganized urban groups? But even within labor's organized family conflict will become hydra-headed. A rise in steel prices due to raises in wages may prevent an increase in wages of other industries in whose products steel is an important ingredient. The Marxist dichotomy of social conflict between the proletariat and the capitalistic classes is a simplistic explanation applicable, if at all, to an economy dominated by the small entrepreneur. It is at variance with the realities of contemporary society where socio-economic conflict is not only horizontal but perpendicular and assumes many forms, such as urban vs. rural, regional, and inter-industry. In many of these it is not surprising to find, as in the anti-trust cases, that unions and employers are not only aligned on the same side but are actively cooperating to achieve their common, if not identical purposes.

In the light of these conflicts is it not reasonable to assume that the cry for "parity" will become more persistent and widespread and will emanate from many quarters including groups within labor? Where labor is unorganized, it is possible to maintain so-called traditional inter-industry differentials in wages even in the same locality, but not in the face of spreading labor organization. Despite government reluctance, the trend has been during the war in the direction of eliminating intra- and inter-industry inequalities, particularly in the sub-standard level.<sup>25</sup> Of course the chief operative forces have been manpower requirements and union pressure, but what may be termed the politico-moral factor should not be ignored: that in a democracy it is difficult indefinitely to defend with success the maintenance of particularly severe mass inequalities, once public opinion is persistently focused upon

<sup>25</sup> Carnegie-Illinois Steel Corp. et al., WLB Case No. 111-6230-D, Nov. 25, 1944; Chairman Davis' statement in regard to "tentative" proposals about Textile cases, WLB Release, B-1892 (Dec. 22, 1944).

them and social forces are favorable for their elimination. The effect of still more widespread organization of labor will be to accentuate the drive, already advanced during the war, toward the equalization of the wage structure of industry, at least on the lower and middle levels.

The wage structure of the country will then be determined by the trial of strength among gigantic combinations of industry and labor in each industry and as between industries. The situation in regard to wages will parallel that obtaining in prices in many basic industries where monopoly is the determining agent. Indeed the effect of wages so determined will be to reinforce the monopoly influence on price, by removing competition in labor costs.

An economy so constituted where wages and prices are monopolistically determined could hardly be referred to as a market economy where prices and wages are fixed in response to "automatic" economic forces operating through competition. Where the economic units are so small that no one unit or moderate combination of them is powerful enough to influence prices or wages, it is perhaps understandable why the competitive interplay of forces can be called automatic, but to call decisions reached in a conference room automatic is inexcusable even though one is blinded by the smoke on the premises.

When the market was effective, it served as the regulator of the economy; but since it is rapidly losing its effectiveness in the basic industries, it can no longer perform that function. But integration is indispensable to the maintenance of any part or function of society; otherwise chaos ensues. Even if unions and employers in each industry would be actuated by the best of good will and public spirit as well as wisdom, they could not avoid the necessity of coordinating their decisions in regard to wages and perhaps prices with those made in other industries. It is this lack of provision for coordination which is one of the chief fallacies of anarcho-syndicalism or any other socio-economic doctrine from the right or left which seeks to avoid government intervention. To argue that management and labor should organize to treat of the problems of their particular industries under the supervision but not the domination of government is to indulge in semantic juggling. Even where there were no disputes between labor and management, government would have to hold the power of decision both as a means of protecting the "parity" claims of interests other than the immediate producing interest, and to coordinate and interrelate the various industrial plans and decisions. Such coordination or planning is rendered necessary by a program for full employment which accentuates requirements for inter-dependence and equilibrium as between various parts of our economy.

The cry for self-government for industry involves a conceptual fallacy. Even if society could be prevailed upon to leave capital and



labor outside the pale of government intervention, their decisions would not be effective if they depended solely on voluntarism. But if councils composed of representatives of capital and labor were granted enforcement powers, they would be part of the government, having the properties of a rose in regard to nomenclature, for government is ultimately that agency of society which possesses the power of enforcement. Nor is it feasible to exclude the political agencies of the government from the industrial field. When the cries for "parity" are made, they are addressed to the government.

Since the first function of the state was of a purely police nature, that state was called a police state. In that sphere was its first integrative operation performed. Since now the economic life of the country will have to be integrated even in times of peace, it is the political agency of the state—the government which will perform that vital function. It will not be in the police sphere; it will be in the realm of public administration that the main emphasis will be placed. Hence we are on the threshold of what should be called the administrative state.<sup>26</sup>

Labor itself in its most progressive sectors is already indicating an awareness of the impact of the developments indicated on collective bargaining. While the leaders of craft unionism can afford to concentrate on wages and conditions of employment of their membership, the leaders of mass industrial unions cannot remain indifferent to any aspect of industry including price structure, efficiency measures, finance, production controls and the competitive position of the industry. The trend in the evolution of collective bargaining is towards an expanding range of subjects considered within the proper sphere of the negotiators and not as management prerogatives. In severely competitive industries, such as the needle trades and coal, the unions have been the greatest stabilizing force—even to the extent in coal of obtaining a governmental agency to regulate in industry. It is no accident that the CIO is demanding the establishment of industry councils for each of the basic and mass production industries to be composed of representatives of management, unions and government. The function of these councils will be to plan for the industries during reconversion. It is also other than fortuitous that the CIO as well as industrial unionism generally has made greater strides in the direction of political action than have the craft unions.<sup>27</sup> The logic of industrial organization leads to government participation in industry and labor interest in politics.

<sup>26</sup> Assertions in this article on marginal problems of the administrative state which appear to be *ex cathedra* will be treated at length in the rest of the book of which this analysis is a portion.

<sup>27</sup> For an analysis of labor's political activities see Rosenfarb, *Labor's Role in the Election* (1944) 8 PUBLIC OPINION QUARTERLY 376.

## V

In the provenance of the administrative state is not to be found necessarily the mausoleum of the idea of freedom despite the lamentations of those who assume to equate economic laissez faire with democracy.<sup>28</sup> Democracy need not fear that fascism or communism has preempted a monopoly on planned economy. Both in the objectives to be attained and in the methods of achieving them the administrative state will admit at least of as great a variety of forms as its predecessors. The war has demonstrated that a planned economy is not incompatible with privately-owned and operated industry as well as with an independent labor movement. The same can and should be true under the peacetime controls of the administrative state. This will be the American form molded in the tradition of our culture.

Even though it is true that the government will have the decisive voice in determining the vital sectors of the employer-employee relationship, labor need not fear that without the weapon of the strike it will lose its character as a free labor movement. It merely means that collective bargaining in the main will not be autonomous and private, but will be carried on on the administrative level in a form similar to the NWLB with tripartite representation of management, labor and the government. In place of the strike other weapons more suitable to the new economic and political environment will be forged.<sup>29</sup> It is true, of course, that labor unions will not be immune to public regulation but that need not be a death sentence, rather a condition of life. Power demands responsibility if it is not to deteriorate into tyranny. And organized labor as a human institution is not immune to the corruptive influence of power. Already the Supreme Court unanimously held that organized labor having accepted the benefits of federal protective legislation must not reject the responsibilities flowing therefrom.<sup>30</sup>

<sup>28</sup> Compare, Friedrich A. Hayek, *THE ROAD TO SERFDOM*, University of Chicago Press, 1944.

<sup>29</sup> In other parts of the book the labor relations policies of the administrative state will be set forth in detail.

<sup>30</sup> In one of the most important decisions which in effect reopens the Civil Rights cases, the Supreme Court ruled that unions and employers may not enter into arrangements which discriminate against members of the unit, union or non-union, on the basis of race or any other consideration irrelevant to the employment relationship. Chief Justice Stone speaking for a unanimous court declared:

"We think that the Railway Labor Act imposes upon the statutory representative of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates. Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents, cf. *J. I. Case Co. v. Labor Board*, *supra*, 335, but it has also imposed on the representative a corresponding duty. We hold that the language of the Act to which we have referred, read in the light of the

How soon are we to witness the full emergence of the events here considered? It is always a most hazardous undertaking to take the variable pulse of history. As already indicated, the temper of labor, industry and government is to do away with governmental war regulations of the labor contracts as soon as possible after victory. There may, of course, be an interlude in which this might succeed, but it will only be an interlude. A politician can afford to be ahead of his time. A statesman is one who keeps abreast of the times. A politician tries to catch up with the times. A reactionary is one who would bid the sun turn from west to east. It may be that even during the period of reconversion it will become evident that government regulations treated in this analysis are dictated by a condition not a theory. If so, then those who will hold the power of decision and who act upon similar convictions will be considered not academicians but statesmen.

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purposes of the Act, expresses the aim of Congress to impose on the bargaining representative of a craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them." *Steele v. Louisville & Nashville Railroad Co. et al.* See 13 U. S. LAW WEEK 4075, 4077 (Dec. 18, 1944). —U. S. —, —Sup. Ct. —, —L. ed. — (1944).