

LABOUR UNIONS AND ANTI-COMBINES POLICY

By CONSTANCE BACKHOUSE*

A. CONFLICTING THEORIES

1. *Policies and Goals of Competition Legislation*

Anti-combines legislation has been thought to have both economic and socio-political aims. The economic aim of anti-combines legislation is to assist in maintaining effective competition as a prime stimulus in encouraging the lowest possible prices for goods and services, the highest degree of quality possible, the most efficient and rapid introduction of technological improvements, and corresponding reductions in prices as productivity rises. The theory holds that competition assists these goals through the operation of the law of market supply and demand. Consumers will purchase from the supplier who can provide the best product at the lowest price, and consequently all firms compete with each other for consumer purchasing.

So long as firms compete individually, consumer demand reigns supreme. Once firms combine to regulate prices, quality, amount of production, and introduction of technological change, they become able to dictate to consumers rather than *vice versa*. Anti-combines laws are designed to ensure free markets by preserving and enforcing competition among a sufficient number of buyers and sellers of goods and services who have sufficiently equal power to prevent any of them from controlling prices, supply or quality to the detriment of consumers.¹

Charles Gregory has recognized that competition, however, ultimately ends in monopoly capitalism:

Competition, of course, is a question-begging term. A state of unlimited competition in a free enterprise society logically leads to the centralizing of control in the hands of the strongest, usually through combinations and mergers of formerly separated units which had carried on independently of each other. Thus, competition carried to its logical extreme, paradoxically results in the antithesis of competition — or no competition.²

It is this tendency of competitors to combine that makes anti-combines legislation necessary.

In discussing the economic goals of anti-combines legislation, the Eco-

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¹ *Symposium, Labour Union Power and the Public Interest* (1960), 35 *Notre Dame Lawyer* 591 at 629.

² Charles Gregory, *Labor and the Law* (2nd rev. ed. W. W. Norton & Co. Inc.: New York, 1961) at 203.

conomic Council of Canada has stated that, in general, a policy that strives to maintain an adequate degree of competition in the domestic market helps to maintain a pattern of output more closely related to consumer needs, and "will tend to harden the economy's muscles and render it better able to meet the tests of international competition".³ In the conclusions to its *Interim Report on Competition Policy*, the Economic Council stated:

In the first place, we have taken the view that the general set of competition policy should be one that aims at the achievement of efficient resource use in the Canadian economy. Second, we believe that some form of social control should be exerted over all commercial activities, and that over the greater part of the Canadian economy, efficient resource use will be more readily brought about through policies that maximize the opportunities for the free play of competitive market forces. The use of other forms of social control, namely government regulation and government ownership, should be brought to bear only on those activities where monopolistic tendencies have all but eliminated competitive market responses, or where the protection of the consumer interest in matters such as health, safety, fraud, disclosure, and standardization, among others, requires the implementation of explicit government regulations.⁴

Thus, anti-combines legislation seeks to keep the free enterprise market functioning as efficiently as possible, and is a reflection that over the greater part of the economy, competitive market forces continue to provide a better means of organizing economic activities and stimulating dynamic change than any alternate system.⁵

The second aim of anti-combines legislation is socio-political. It has been argued that anti-combines legislation should provide an environment conducive to the preservation of democratic political and social institutions.⁶ A. D. Neale has stated that American distrust of all sources of unchecked power — as expressed in the theories of 'checks and balances' and of 'separation of powers' — is a more deep-rooted and persistent motive behind the anti-combines policy than any economic belief.⁷ Large areas of uncontrolled private power are inconsistent with a democratic, egalitarian society. Further, Kaysen and Turner have expressed as a persistent American belief the idea that business units are politically irresponsible and, consequently, that large powerful business units are dangerous.⁸ An economy made up of independent, competing business units provides for dispersed economic decision-making and renders the holders of economic power liable to mutual encroachment.

In fact, it has been maintained that the socio-political aims of combines legislation should override the economic goals where contradictions occur.

³ R. M. Davidson, Department of Consumer and Corporate Affairs, Government of Canada, *Canadian Competition Policy: Proceedings of a Conference held at Queen's University, Kingston, Ontario, January 20-21, 1972* at 66.

⁴ Economic Council of Canada, *Interim Report on Competition Policy* (Queen's Printer: Ottawa, July, 1969) at 195.

⁵ *Supra*, note 3 at 66.

⁶ *Northern Pacific Railway Co. v. U.S.*, 356 U.S. 1 at 4-5, per Black, J.

⁷ A. D. Neale, *The Anti-trust Laws of the United States of America* (Cambridge: Cambridge U. Press, 1960) at 29-30, 421-24.

⁸ Kaysen & Turner, *Anti-trust Policy* (Harvard: Harvard U. Press, 1959) at 3-18.

Justice Learned Hand stated in *U.S. v. Aluminum Co. of America* that one of the purposes of anti-trust statutes is to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other. If the economic goal alone were considered, combines legislation would condone 'good trusts' which could prove that they had exercised the highest possible ingenuity, had adopted every possible economy, had anticipated every conceivable improvement, and had stimulated every possible demand. However, all trusts were condemned because Congress desired "to put an end to great aggregations of capital because of the helplessness of the individual before them". This desire was based on the belief that great industrial consolidations were inherently undesirable, regardless of their economic results, because of their indirect social and moral effect.⁹ A system of small producers, each dependent for his success upon his own skill and character was preferred over a system in which the great mass of those engaged must accept the direction of a few. Even where the maintenance of fragmented industries and markets create occasional higher costs and prices, decentralization was to be preserved.¹⁰

2. *Policies and Goals of Labour Relations Legislation*

Elementary economics texts describe the operation of a competitive labour market and the results it might be expected to yield. The broad argument is that, given free and informed competition among workers and employers, each worker must be paid the value of his contribution to production. He cannot be paid more, because the employer could not continue to operate. He will not be paid less, because the employer would be making abnormal profits, and some other alert businessman would enter the industry and bid up the price of labour. Thus, there is, supposedly, little scope for controversy or bargaining over the price of labour. However, this is a very simplified and idealized picture. It assumes many small employers competing for labour, no collusion among employers or workers and adequate channels of information.¹¹ In most industries, in modern times, none of these factors exist.

The employment relationship is typically one of inferiority. Symptomatic of this belief is the deeply-engrained notion that unorganized labour markets are not competitive and somehow 'load the dice' against the employee.¹² Adam Smith has recognized that labour markets invite collusion among employers to control and depress working conditions.¹³ Employer collusion is very likely to be a large factor creating an imbalance against the worker in free labour markets, particularly since, in the absence of organization, workers

⁹ 148 F. 2d 416 at 427 (U.S. Court of Appeals, 2nd Circuit, 1945).

¹⁰ *Brown Shoe Co. v. U.S.*, 370 U.S. 294 at 344. See, contra, Robert H. Bork & Ward S. Bowman, Jr., *The Crisis in Antitrust* (1965), 65 Col. Law Rev. 363 at 369-70.

¹¹ Harry Wellington, *Labor and the Legal Process* (Yale: Yale U. Press, 1968) at 30.

¹² Ralph K. Winter, *Collective Bargaining and Competition: The Application of Anti-trust Standards to Union Activity* (1963), 73 Yale Law J. 14 at 24.

¹³ *Id.* at 26.

have little or no staying power and cannot offer even token resistance to such employer arrangements.¹⁴

In our economic system, anti-combines principles are relied upon to prevent activities that restrain competition in the product market, thereby allowing competition, not the government, to regulate that part of the system in its task of apportioning resources among claimants. But in the labour market, where employers seek a share of the labour resources, free competition is inadequate to regulate the allocation of these resources. Thus, the concept of collective bargaining is used to regulate and allocate resources acceptably in the labour market. Labour union power, based on group solidarity, is necessary in the labour market to redress the inequality of position and power of employer and employee.¹⁵

The existence of a union tends to correct imbalances in the economic sphere. The imbalance between the economic power of a corporation and a single worker is normally so great that, absent unions, the government might well have to step in to equalize any bargaining or contracting between corporate employers and individual employees.¹⁶ Indeed, W. Wallace Kirkpatrick has argued that the union's existence is essential to the operation of a free economic system and is the only alternative to massive governmental intervention and regulation in this sector of the economy.¹⁷ Kirkpatrick has postulated that anti-trust and collective bargaining concepts serve similar functions in different markets: "Each permits decisions in the market place to be made by the parties in the market without continuous governmental interference and control."¹⁸

Collective bargaining performs the function of blunting the impact of the unorganized labour market's imperfections by providing a rough balance of power. The growth of union power, with wide freedom to strike in the hands of strong unions was intended to permit wage earners to secure economic self-advancement, industrial justice, and a democratic voice in industrial decisions affecting them.

3. *Conflicts Between the Theories*

Anti-combines legislation prohibits combinations tending to restrain trade in goods and services. Labour relations legislation encourages combinations of employees to bargain collectively in the areas of terms and conditions of employment. Anti-combines legislation attempts to prevent concentration of economic power. The very existence of labour unions premised upon the need for acquisition of power to use for their members' benefit. Consequently, interaction between anti-combines and labour relations policies is inevitable.

¹⁴ *Id.* at 27.

¹⁵ Wallace Kirkpatrick, *Crossroads of Anti-trust and Union Power* (1965), 34 *Geo. Wash. Law Rev.* 288 at 292.

¹⁶ *Id.* at 294.

¹⁷ *Id.*

¹⁸ *Id.* at 292.

If the purpose of anti-combines laws is to maintain free enterprise and prevent monopolies, then it must be decided to what extent unions are monopolies. In strict economic terms, competition results in a price set by the market and any single entity which can affect the price of the product it sells has some degree of monopoly power. If unions cannot at least affect the price of labour services, they are failing significantly in one of their self-defined goals, to raise the wages of their members. According to the economic definition then, a union must have a degree of monopoly power to be even minimally effective.¹⁹

Although many of the earliest trade unionists espoused Marxist and other radical political ideologies, the American Federation of Labor (AFL), ultimately one of the most successful federations of trade unions, separated itself from politics and radicalism and was made by Samuel Gompers into an economic organization of wage-earners engaged in the opportunistic business of collective bargaining. Accepting the capitalistic business system, the AFL sought within that system to represent one interest group — labour.²⁰

The Christian Labour Association of Canada puts forth this viewpoint in the following comments:

One of the most outstanding characteristics of the labour movement's struggle to improve the lot of the workers has been its struggle for higher incomes. Samuel Gompers' words, 'we want more and more and more', are but an echo of what labour has stood for during the past 100 years. This cry of Gompers coupled with the individualistic creeds of Locke, Smith and Spencer have led corporations and traditional unions down a restricted one-issue path that only stresses profits and wages, the official gods of the industrialized world.²¹

With this viewpoint in mind, it is easy to see that whatever conflict there may be between labour and management is over the division of the spoils and not their creation.

Of course, there is no competition between employers and employees — in so far as *competition* is concerned, their interests are *identical*. This is, in fact, the basis of the theory of collaboration between capital and labour — that while an employer and employee may strive to obtain a larger share of the *intake* of the business, they are united in interest as against all those who are in competition with the particular enterprise in which they are both engaged.²²

Yet labour policy has always been regarded as a matter of class war and a struggle for power between competing groups. Legislation has been largely directed to increasing or decreasing the economic power which one side may exercise against the other. Labour legislation relies upon a conflict of interest and a rough balance of power between labour and management to protect the public from market power created by collective bargaining. However, as was

¹⁹ James M. Murray, *Anti-trust and Organized Labor: Lessons from the Past and Thoughts on the Future* (1967), N. Dakota Law Rev. 279 at 287.

²⁰ *Supra*, note 15 at 291.

²¹ Organ of the Christian Labour Association of Canada, *The Guide*, Vol. 22, No. 5, May, 1974 at 5.

²² Louis B. Boudin, *The Sherman Act and Labor Disputes: I* (1939), 39 Col. Law Rev. 1283 at 1327.

noted above, reliance upon this conflict of interest to protect the public is ludicrous since the conflict is non-existent.

The problems inherent in this situation were increased with the formation and growth of industrial unions. The trade union philosophy, as first expounded by Sidney and Beatrice Webb, had consistently held that a union could not be effective unless organization was coextensive with the market and eliminated price competition based on differences in labour standards.²³

Ralph K. Winter sets forth a detailed theory to explain why unions attempt to organize along product market lines and the implications of this for anti-trust violations. His thesis is that collective bargaining based on employee organization along product lines creates significant anti-competitive incentives in both labour and management.

[Unions] aim to control the behavior of employers directly by organizing the employees of particular firms and compelling favourable contract settlements by strikes and other means. Since unions operate through firms, their bargaining power and ease with which their goals may be achieved become largely dependent not only upon the discipline and loyalty of the union membership but also upon the position of the employer in the product market and the character of that market itself.²⁴

When a union has not gained full control of the labour force in a product market, the existence of the unorganized sector has a retarding effect on the union's power to elicit wage increases.²⁵ Since unionized firms' products must compete with non-union products, Winter argues that any wage increase in response to union demands, however moderate, would make union-made goods non-competitive. Under these circumstances, the union has little or no bargaining power. To prevent this, the union must either organize along product market lines, or exclude, by one means or another, the non-union product from the market.²⁶

The union has a direct interest in the employer's position in the product market, since this position puts a ceiling on wage goals. The employer "cannot give what he hasn't got to begin with, regardless of how disciplined or loyal the union members are".²⁷ Winter recognizes that a union will inevitably be interested in increasing the revenue a firm receives,²⁸ and argues that this is one reason why unions need to organize the employees of all the employers within the particular product market. Industry-wide organization encourages the maximization of labour costs since all the competing employers share in the greater burden. When each employer knows that all his competitors in the

²³ Sidney Webb and Beatrice Webb, *Industrial Democracy* (1902).

²⁴ *Supra*, note 12 at 18.

²⁵ In some cases, the opposite phenomenon occurs. Instead of the presence of unorganized labour retarding union power to effect wage increases, the existence of a unionized sector can have an uplifting effect on wages in the unorganized sector. Obviously, which of these effects is predominant depends upon the degree of union leverage within the product market.

²⁶ *Supra*, note 12 at 19.

²⁷ *Id.* at 18.

²⁸ *Id.* at 21.

product market will grant similar increases in wages and fringe benefits, each may lose incentive to resist the union's demands, because it will be easier for all to make the same price increase at the same time.

In fact, once industry-wide organization has been accomplished, unions can act directly to maximize the revenue of the group through such monopolistic devices as price-fixing. Winter points out that a union is admirably suited for the policing of an anti-competitive scheme:

It formulates policy, has access to information in the product market as a whole, and acts in that market. Moreover, the power it can exercise is at once swift, drastic, and selective. The price-cutter faced with a union determined to restrain competition does not choose between maintaining price and initiating a price war but between maintaining price and having serious labour trouble. A union, therefore, by using any one of the many economic weapons available to it, is able to impose a very direct and effective sanction on any firm which attempts to disrupt an anti-competitive scheme.²⁹

Winter also argues that severe product competition will inevitably increase employer resistance to union demands and even unionization itself, so that it is actually in the union's best interests to discourage competition. If the employers in the industry have less bargaining power in the product market than the consumers of the product — a result of greater competition — they will be less able to pass on higher production costs resulting from union demands for better labour conditions. Since such costs cannot be passed on, they will have a direct impact on the profit levels of the firm, and the temptation to resist union demands will increase.

In industries into which new firms find entry easy, and in which small firms predominate, a union may find it nearly impossible to maintain perfect organization and discipline among the employees. The continuing flow of newcomers, with their non-union workers, will force organized firms to fight harder to resist union demands. If an organized firm is driven out of business, the union must deal with the needs of its unemployed members and must also endeavour to organize the employees of any newcomer who may take the old firm's place. Thus, in most instances, the union would prefer to protect the first employer and exclude the newcomer.³⁰

There is yet another reason why unions are interested in decreasing competition. Studies of wages during the Depression indicate that they fell first in the most competitive industries, particularly when the consumers of the product had sufficient bargaining power to force price concessions from the sellers. Where the sellers had greater bargaining power, price declines were slower in coming, and wages did not fall as quickly.³¹ Unions desire to lessen the impact of cyclical swings of the economy in order to protect their wage levels in times of recession by lessening the degree of bargaining power of consumers.

The advantages to unions of industry-wide organization are not dependent upon bargaining with a single multi-employer unit. When a union has or-

²⁹ *Id.*

³⁰ *Id.* at 21.

³¹ *Id.* at 20.

ganized the major firms in the relevant market, labour standards increase almost as uniformly as when the bargaining takes place in a single formalized unit.³²

With the growth of formalized multi-employer bargaining, different variations have emerged. Bruce F. Kennedy itemizes four different types of multi-employer bargaining: 1) association bargaining, 2) joint bargaining, 3) form contract bargaining, and 4) pattern bargaining.³³ Association bargaining consists of a formal employer association negotiating an agreement with a single union representing all of the employees of the employers. Joint bargaining consists of a number of employers engaging in common bargaining negotiations, but not as members of a formal association. Form contract bargaining occurs when a single union simultaneously presents identical contract terms to separate employers. Kennedy says this is prevalent in metropolitan areas and in industries composed of a large number of small competing businesses such as the retail food industry. Pattern bargaining occurs when a union consecutively presents similar or identical contract terms to separate employers who independently negotiate through a single-employer unit. This is prevalent in industries with an oligopolistic structure (*e.g.*, the automobile industry) in which an agreement struck by a union with a 'key' or 'target' employer provides the pattern for later agreements with other firms in the market.

Multi-employer bargaining has the potential of encouraging combination and monopoly practices. Horizontal business arrangements have always been suspect under anti-combines laws because of their amenability to agreements in restraint of trade. Yet labour relations policy recognizes horizontal business arrangements as legitimate instruments in the collective bargaining process. Multi-employer bargaining requires collective judgments by employers as to future wage levels. Winter has commented that it is by no means clear how these can be reached without collective consideration of future prices.

The economic analysis of Alfred Marshall³⁴ and Segal³⁵ helps to clarify Winter's argument. Initially it is assumed that a union is concerned both with raising wages and with the employment of its members. The ability of a union to achieve its objectives depends on the demand for union labour. In general, the more 'wage inelastic' the demand for union labour, the smaller will be the loss of employment after a given wage increase, and the greater will be the union's ability to meet both its goals — to raise wages and to keep its members employed.

Alfred Marshall suggests that the demand for union labour will be more inelastic: 1) the more essential the union labour is to production of the final

³² Archibald Cox, *Labor and the Anti-Trust Laws, A Preliminary Analysis* (1955), 104 U. Pa. Law Rev. 252 at 276.

³³ Bruce F. Kennedy, *Labor-Antitrust: Collective Bargaining and the Competitive Economy* (1968), 20 Stan. Law Rev. 684 at 687.

³⁴ Alfred Marshall, *Principles of Economics* (8th ed., 1920).

³⁵ Segal, *The Relation Between Union Wage Impact and Market Structure* (1964), 78 Q. J. Econ. 96.

product, 2) the more inelastic the demand is for the final product, 3) the smaller the ratio of the cost of union labour is to the total cost of the product, and 4) the more inelastic is the supply of other factors of production.³⁶

More recently, Segal has urged that there is a fifth significant variable influencing the ability of unions to achieve their goals: the "market structure proposition". He argues that the competitive structure of a product market sets limits on the ability of unions to achieve their goals. The ability of the union to increase its members' wages while still keeping them employed is greater: 1) the smaller the geographic boundaries of the markets in which the industry's firms compete, 2) the smaller the number and the greater the output capacity of the firms in the industry, 3) the greater the barriers to new entry and the greater the capacity for expansion for existing firms, 4) the greater the product differentiation, 5) the smaller the degree of independence among the firms in the industry, and 6) the more inelastic the demand for the final product. In conclusion, Segal postulates that the less competitive the industry, the greater the ability of unions to achieve their objectives.³⁷

Richard G. Chrisman describes how and under what circumstances unions can control the prices of products.³⁸ Labour costs comprise a large component of the total production costs in most industries, *e.g.*, 30 per cent manufacturing, 50 per cent or more in the service sectors.³⁹ If a union controls the labour supply in a particular industry, and if the good or service produced by the industry has no close substitutes and is a necessity of life or an intense need for most consumers, its power over wages, and hence over prices, will be very great.⁴⁰

Factors increasing the elasticity of demand for the product, such as substitute products, competition from other industries, technological innovations, and foreign competition all reduce the union's power. Chrisman notes that organized labour realizes these limitations on its power and attempts to minimize them:

The union can broaden its net by attempting to organize any other industries that compete with the one it operates in (steel and aluminum for example), or by seeking the cooperation of fellow unions in those competing industries. It can also lobby for tariff protection from the products of competing foreign producers or offer its aid in the organization of labour in those competing foreign industries. And of course it can attempt to shut down the rate of innovation in an effort to prevent technology-induced reductions in the amount of labour needed and thus in its own power.⁴¹

On the other hand, Archibald Cox has pointed out that industry-wide unionization does not automatically eliminate labour costs from competition.⁴²

³⁶ *Supra*, note 34 at 382-87.

³⁷ *Supra*, note 33 at 696.

³⁸ *Anti-trust, Price Structures and Labor Union Power in the Oligopoly Industries* (Summer, 1971), 4 *Antitrust Law and Econ. Rev.* 47.

³⁹ *Id.* at 49.

⁴⁰ *Id.*

⁴¹ *Id.* at 52.

⁴² *Supra*, note 34 at 278.

Uniform changes in wage rates do not have a uniform effect on final prices since different firms have different variations in the ratio of labour costs to final prices due to differences in the efficiency of the plant, equipment, management and the productivity of labour. "Furthermore, management has shown amazing skill in reducing the cost of wage increases through new machinery, improved engineering and like economies."⁴³

While agreeing with Cox's statements on the differing levels of productivity and the resulting differences in final prices even when based upon uniform labour costs, one must not ignore the trend toward an expansion of the scope of collective bargaining beyond matters such as wages and hours of work, and into subjects such as technological change and job protection. Collective bargaining may have a definite impact on the productivity of a firm.⁴⁴ Labour unions have sometimes sought to prohibit the introduction of new machines and processes, with a resulting decrease in productivity.⁴⁵

John Kenneth Galbraith would argue not only that it is possible for unions to assist in the erosion of competition, but that it is necessary. Galbraith's thesis in *The New Industrial State*⁴⁶ is that the large-scale business organization is necessitated by the elements of modern economic life — machines, sophisticated technology, heavy investment of capital, technically-sophisticated labour, and a great lapse of time between the decision to produce and the emergence of a saleable product.⁴⁷ Within the modern economic framework, the need for planning, organization and predictability becomes paramount. The large-scale business organization alone can deploy the requisite capital and mobilize the requisite skills.⁴⁸ The large firm can plan more effectively through its ability to accept market uncertainty where it cannot be eliminated, to eliminate markets on which it would otherwise be excessively dependent, and to control the markets in which it buys and sells.⁴⁹ In fact, Galbraith argues that anti-combines laws are an anachronism.

Galbraith believes that unions can play a positive role in assisting firms to facilitate their planning. Unions tend to standardize wage costs between different firms and to ensure that wage changes occur at approximately the same time — when contract negotiations are entered into. This greatly assists price setting and maintenance. All firms will have a common signal to adjust wages, removing any threat to minimum price setting. Further, the period during which the collective agreement has effect gives the firms time to investigate the level of productivity and what wage increases can be afforded

⁴³ *Id.*

⁴⁴ Derek Bok and John Dunlop, *Labor and the American Community* (New York: Simon and Schuster, 1970).

⁴⁵ *Id.* at 261.

⁴⁶ John K. Galbraith, *The New Industrial State* (Boston: Houghton Mifflin Co., 1967).

⁴⁷ *Id.* at 4.

⁴⁸ *Id.*

⁴⁹ *Id.* at 74.

without prejudice to price stability. When a union bargains for an industry-wide membership, the wage increases settled for will be an average of what all the firms can afford. Galbraith sees this as an invaluable simplification.⁵⁰

Based on this analysis of the character of the modern large corporation, Galbraith has stated that union interests are no longer opposed to those of their employers:

The first goal of the technostructure is its own security. Profits, provided that they are above the minimum necessary for security, are secondary to growth. Labour relations, naturally enough, are conducted in accordance with the goals of the technostructure.

This means that the technostructure may readily trade profits for protection against such an undirected event with such an unpredictable outcome as a strike. Once again, there is the important fact that those who make the decision during union negotiations do not themselves have to pay.

But no reduction in profits may be required from yielding to the union. Since the mature firm does not maximize profits, it can maintain income by increasing its prices. The wage settlement, since it affects all or most firms in the industry, provides all with a common signal to consider such action. Its effect on growth will, of course, be considered. But since this will be the same for all firms in the industry, and since the regulation of aggregate demand keeps the latter at a high level, price increases will often seem allowable.⁵¹

The thesis that anti-combines laws are an anachronism and that large-scale organization is necessary leads Galbraith to the conclusion that unions should be encouraged to aid corporations in long-range planning and, hence, in the elimination of competition. However, the premise that modern technology keeps the small corporation from being efficient or innovative has been challenged by others.⁵² It would seem that the validity of Galbraith's thesis should be carefully examined, since it has many implications for the policies behind anti-combines legislation, and further, for the acceptability of the role in which unions may act in relation to anti-combines practices.

Aside from the theoretical considerations of the conflict between the legislative policies of competition and collective bargaining, actual instances of union involvement in anti-competitive schemes have been discovered. Winter alleges that there have been many instances of direct or indirect price-fixing by unions:

The photoengravers . . . , for instance, . . . have had clauses in collective agreements which barred sales by employers at a price less than the cost of production. [The International Ladies Garment Workers Union] ILGWU contracts provide that the price paid by the jobber or manufacturer to the contractor be sufficient to cover the labour costs involved plus a reasonable amount for overhead. In the construction industry, there have been many instances of union involvement in price-fixing or bid-rigging schemes. Other union-inspired devices have been designed to exclude competitors and thereby provide certain employers with

⁵⁰ *Id.* at 280.

⁵¹ *Id.* at 265.

⁵² Morton Mintz and Jerry S. Cohen, *America, Inc.* (New York: Dial Press, 1971).

sheltered markets. A familiar example is the refusal by unions in the construction industry to install or work on material not manufactured by members of the local union.⁵³

Archibald Cox has attempted to elaborate upon the kinds and types of restrictions that unions acting alone or in conjunction with employers can impose upon competition.⁵⁴ He has divided such actions into three categories. First, "[U]nions may strike for, and negotiate, contracts fixing compensation, the length of the workday or workweek and other conditions of employment whose direct impact is confined to the labour market and which only consequentially affect competition in the product markets in which employers sell their goods or services." Cox gives as the best example of this, the imposition of a uniform industry-wide wage scale.⁵⁵ Such a scale, he states, eliminates price competition based upon differences in wage rates, but does not deal directly with the product market.

Secondly, "[U]nions may impose or negotiate restrictions upon hours, work schedules, work assignments, and other employment practices so as to obtain direct benefits for employees in the labour market, but the restriction may also directly regulate entry into or competitive practices within a product market."⁵⁶ He gives, as an example of this, instances where a union may restrict the use of new machinery or the letting of sub-contracts in order to preserve job opportunities, or the restriction of the employers' hours of business in order to eliminate night or weekend work.

Thirdly, unions may impose "direct restrictions upon competition among employers in the product market, thus benefitting employees indirectly by

⁵³ *Supra*, note 12 at 22. Another clear example of a collective agreement providing an employer with a sheltered market in which to sell his product was the instance where Local 3 of the International Brotherhood of Electrical Workers induced the electrical contractors of New York City not to install electrical equipment manufactured outside the Local's jurisdiction. Thus, New York manufacturers were enabled to raise wages and prices unhampered by competition from other areas. The Sheet Metal Workers and Plumbers have often negotiated similar agreements (see, *supra*, note 1 at 627).

One union-inspired device designed to lessen competitive pressures was the United Mine Workers 'willing and able' clause, which allowed the union to withdraw all labour when it pleased. It was designed to limit production and spread the available market among the various firms and workers, thereby preventing an 'oversupply' when demand faltered. (See, *supra*, note 12 at 20.) This type of device is used in industries prone to cyclical economic variations, and was also used by the ILGWU to control jobbers' hiring and assignment of work to contractors, in order to attempt to 'stabilize' production in bad times. (See *id.* at 22.)

In the coal industry, the big mines had little to gain from resisting the UMW's 1950 demands for higher wages, since they were tailored to the larger firms' ability to automate and were a deliberate attempt on the union's part to wipe out the smaller operators. Strikes may also be used as a device to add stability to the market structure, when they are timed to coincide with variations in demand for a product so as to keep prices at a high level.

⁵⁴ Archibald Cox, *Labor and the Anti-Trust Laws: Pennington and Jewel Tea* (1966), 46 BUL Rev. 317 at 317.

⁵⁵ *Id.*

⁵⁶ *Id.*