Book Review of Compulsory Unionism, the NLRB, and the Courts: A Legal Analysis of Union Security Agreements by Thomas R. Haggard

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BOOK REVIEW


Reviewed by Edwin Vieira, Jr.**

Compulsory Unionism, the NLRB, and the Courts is a timely book. American society has suffered compulsory unionism as an openly state-sponsored system of labor relations at least since the enactment in 1932 of the Norris-LaGuardia Anti-Injunction Act.¹ But except for Sylvester Petro for many years,² and a handful of others more recently,³ few legally trained scholars have given serious attention to the many juristic, economic, social, political, and philosophical issues this peculiar institution poses. Events, however, are forcing an end to the silence. Gone are the days when intellectuals could blithely ignore or disparage as mere economic theory the warnings of writers such as von Mises, von Hayek,⁴ Simons,⁵ and Lindblom.⁶ The sick chickens of fascist-syndicalist interventionism that took wing in this country between the World Wars are coming home to roost, as informed people always knew

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Published by Scholar Commons, 1978
they would, and as even the uninformed are now learning. The workings of economic law are, after all, inexorable, the demurrers of apologists for special interest groups and their political lackeys notwithstanding. And no amount of propaganda can indefinitely distort the thoughtful citizen's perceptions of economic, political, and social reality. Therefore, it is hardly surprising that more and more people are openly questioning the existence of any public interest in the maintenance of bastions of extraordinary economic and political power that trade unions, specially privileged by law, exercise and enjoy at the expense of everyone else in society.

To a great extent, this critical inquiry focuses on what has historically been a highly controversial and confusing subject: compulsory unionism. In its broadest sense, compulsory unionism connotes the use of private or public violence to coerce wage earners to participate, directly or indirectly, in concerted activities aimed at achieving any of the goals traditionally associated with the trade-union movement. Thus, at the most primitive level, compulsory unionism means the license enjoyed by union partisans to inflict physical damage on the persons and property of those wage earners temerarious enough to defy the strike orders of union leaders and to cross union picket lines. Deceptively labeled the "right to strike," it actually constitutes a denial of the right of any wage earner to work except where and when a union

7. On the philosophy, pathology, and prognosis of interventionism, see L. von Mises, Human Action 716-861 (3d rev. ed. 1966). The terms "fasism" and "syndicalism" are defined as follows:

Facism — It is only when viewed as a peculiarly Italian phenomenon that the essence of Fascism becomes clearly delineated. . . . The duty of the individual is to elevate himself to the heights of the national consciousness and to lose completely his own identity in it. He has individual rights only insofar as they do not conflict with the needs of the sovereign state.

6 Encyclopaedia of the Social Sciences 134 (1931).

Syndicalism — It accepts the Marxian premise that in modern society the wage earners, the proletariat, are pitted against the owners of property, the bourgeoisie, in a class struggle which must end in a social revolution and in the establishment of a collectivist society. . . . Its distinctive features are the special and predominate role which it ascribes in the revolutionary struggle to the labor union and the emphasis which it places upon the struggle against the state. The trade union is viewed not only as the chief instrument for improving the condition of the worker under capitalism but as the primary means of achieving the revolution through the general strike (q.v.) and as the cell of the future society.

8. The notion, in short, that "[n]o one has a right to scab despite the law." Hearings of the Select Comm. on Improper Activities in the Labor and Management Field, 85th Cong., 1st Sess. 354 (1958) (remarks of Emil Mazey, Vice President, United Auto Workers).
permits him to do so. At a more institutionally advanced but less visible level, compulsory unionism means the statutory privilege enjoyed by unions to require employers to bargain collectively over terms and conditions of employment for all employees in a so-called appropriate unit. Deceptively labeled “exclusive representation,” it actually constitutes a badge and incident of slavery for every wage earner who would otherwise choose to deal autonomously and independently with his employer. And finally, to the great majority of observers, compulsory unionism means any agreement negotiated between a union and employer (usually under color of law) that makes either financial support of the union or membership in it a condition of employment. Appropriately labeled “union security,” it forges the last, and to the popular mind the most galling, link in the chain of devices through which American labor relations have assumed collectivistic traps in inappropriate in a nation that began its existence by unequivocally declaring a commitment to the inalienable rights of individuals.

Professor Haggard’s book deals with this last form of compulsory unionism, the union security agreement, in the most comprehensive and scholarly fashion yet seen by this reviewer. The design of the book attests to its all-inclusive nature. In Part I Professor Haggard carefully defines the problem and places it in perspective. He devotes Part II to a review of the law as it is, recounting the legal history of the union security issue, analyzing the most important aspects of contemporary statutes dealing with union security arrangements in private and public employ-

9. As von Mises points out, note 7 supra, at 779:

The treatment of the problems involved by public opinion and the vast number of pseudo-economic writings is utterly misleading. The issue is not the right to form associations. It is whether or not any association of private citizens should be granted the privilege of resorting with impunity to violent action. It is the same problem that relates to the activities of the Ku Klux Klan.

Neither is it correct to look upon the matter from the point of view of a “right to strike.” The problem is not the right to strike, but the right — by intimidation or violence — to force other people to strike, and the further right to prevent anybody from working in a shop in which a union has called a strike. When the unions invoke the right to strike in justification of such intimidation and deeds of violence, they are on no better ground than a religious group would be in invoking the right of freedom of conscience as a justification of persecuting dissenters.

11. Vieira, note 3 supra.
ment, and explaining the major constitutional conundrums still surrounding compulsory unionism. Finally, in Part III, Professor Haggard investigates some of the broad economic, social, and philosophical questions underlying the whole state-sponsored union movement. Throughout, the discussion proceeds on a level at once understandable to the neophyte yet challenging to those adept in labor law. The text is well-documented, reflecting a thorough study of both case law and commentary. And Professor Haggard’s style skillfully avoids jargon while still maintaining a precision and clarity of language, which commends the book as a sound analytical tool to student and practitioner alike.

More specifically, in Part I Professor Haggard emphasizes the significance of compulsory unionism by considering five broad points. First, union security arrangements impinge on the free choice of tens of millions of wage earners in private and public employment. Second, the success of the trade-union movement in securing federal support for exclusive representation, compulsory collective bargaining, and some forms of union security has created serious and perhaps insoluble jurisdictional conflicts between the federal and state governments over the regulation of union and employer activities. Third, if experience is any guide, continued exercise of the extraordinary rights, powers, privileges, and immunities that unions have enjoyed for more than four decades now can lead only to economic collapse, followed by political and social chaos. Fourth, in the public sector, compulsory unionism poses a direct threat to sovereign, representative, republican government, if not merely to functioning government of any kind. And fifth, the doctrinaire collectivism underlying state-sponsored unionism challenges the individualistic premises of our governmental and social systems. All of these points, of course, raise complicated problems easily meriting separate volumes of analysis. For this reason Professor Haggard touches on them but briefly, with the exception of the last, which he discusses in more detail in Part III.

To this reviewer, however, the book slights the central importance of the struggle between collectivism and individualism as the dynamic force underlying the development of contemporary labor law. Many of the otherwise inexplicable anomalies, contradictions, and confusions in the statutes, the decisions of the National Labor Relations Board and the courts, and the writings of commentators arise precisely from the failure of draftsmen, judges, and lawyers generally to realize that their thinking in this
area attempts simultaneously to harmonize the unharmonizable. The common law individualism around which the Framers designed American legal institutions, and the fascist-syndicalist collectivism in the image of which self-appointed twentieth-century planners have sought to remake those institutions are simply incompatible. Labor law, in short, is an exercise in Orwellian "double-think," the ability to hold two mutually contradictory ideas in mind at the same time and believe both of them to be true. For example, some would agree that wage earners need the fullest freedom of association, and that forcing unwilling workers to associate in trade-union activities serves this freedom. Moreover, because of this dualistic nature, the history of labor law cannot be understood, nor its future predicted, without constant thoughtful reference to the underlying philosophical struggle between the libertarian vision of wage earners as individual, dignified human beings entitled to self-determination and the totalitarian nightmare of workers as mere "faggots in a large bundle" fit only to be heaped up indiscriminately on the fires of "progress."  

This arguable underemphasis, however, is one of the few flaws carrying over into Part II of the book. Beginning with an incisive explication of the nineteenth-century doctrine of criminal conspiracy, Professor Haggard reviews the early debate over the legality of compulsory unionism (especially the closed shop), the turn-of-the-century legislative movement to promote unionism, and the constitutional furor such legislation occasioned. He then discusses the contemporary interpretations of those provisions of federal and state law that "authorize" compulsory unionism, particularly sections 8(a)(3) of the National Labor Relations Act and 2, eleventh of the Railway Labor Act. The exposition is richly detailed, covering the types of compulsory-unionism arrangements permitted under the federal statutes, union hiring-hall agreements as an all-too-infrequently-recognized form of compulsory unionism, the use of compulsory union dues and fees for purposes other than collective bargaining, compulsory unionism

13. See 29 U.S.C. §§ 151, 157 (1970); Railway Employees' Dep't v. Hanson, 351 U.S. 225, 234-35 (1956) (compulsory unionism "enhance[s] and strengthen[s] the right to work").

14. For the latter view as the basis of administrative action, see Port Umpqua Educ. Ass'n Request for "Fair-Share" Determination, Recommendation by Board Agent J.B. Daniels, Oregon PERB No. C-275 (Jan. 17, 1975), at 6.

in the context of labor arbitration, and union-security policy in public employment.

Although Professor Haggard’s analyses of hiring halls, the use of union dues, and labor arbitration are important (if only for their unified treatment of subjects too often disregarded entirely), the central focus of Part II is his view, expanded from an earlier article, that sections 8(a)(3) and 2, eleventh permit unions and employers to condition employment only upon payment of monies to an exclusive representative (the agency shop) and not upon any other badge or incident of union membership (the union shop). With respect to section 8(a)(3), for example, he notes that the statutory law is ambiguous, and that the case law has developed two interpretations: one favoring the union shop at the union’s option, and the other favoring the agency shop. However, he concludes that although the agency shop interpretation depends upon an unorthodox mode of construction, it finds greater support in Board and court decisions and in the legislative history than does its union shop competitor.

Unfortunately, this reviewer cannot agree, for one can read section 8(a)(3), unambiguously, and without recourse to obscure legislative pronouncements and even more vague court opinions, to allow a certain type of union shop arrangement. Section 8(a)(3) evolved from section 8(3) of the original Wagner Act, which allowed every form of compulsory unionism, including the closed shop. The paternity and the effect of section 8(a)(3) are obvious from comparison of its language to that of its precursor. In their


17. Section 8(3) of the Wagner Act provided:

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in the National Industrial Recovery Act (U.S.C., Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employee as provided in section 9(a), in the appropriate collective bargaining unit covered by such agreement when made.


Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3) (1970) provides:

(3) By discrimination in regard to hire or tenure of employment or any term
principal clauses, both sections declare employer discrimination on the basis of membership or nonmembership in a labor organization to be an unfair labor practice. Standing alone, these clauses would outlaw all forms of compulsory unionism. But each section then provides an exception for agreements negotiated by employers and exclusive representatives that condition employment on union membership, the only difference between them being when this condition becomes operative. The significant addition to section 8(a)(3) is the second proviso, which defines the two circumstances under which an employer may not rely upon a compulsory unionism agreement to defeat an unfair labor practice charge of discrimination: if the employer has reasonable grounds for believing (i) that union membership is not available to an employee on nondiscriminatory grounds; or (ii) that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and fees uniformly required as a condition of acquiring or retaining membership. Therefore, if a union offers membership to all employees on the sole condition that they pay dues and fees, the union apparently can combine with the employer to condition employment on such

or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

18. The 30-day grace period in § 8(a)(3) eliminates the closed shop; i.e., the situation in which a union, by control over who is eligible for membership, can effectively dictate whom the employer may hire. A basic purpose of § 8(a)(3) was to return a meaningful hiring authority to the employer by eliminating the closed shop.
payment and itself treat them as members for all other purposes, including union discipline. So the statute reads.

The paradigmatic test case would present the following facts:

1. A union establishes by-laws that explicitly make payment of dues the sole condition to the full rights and duties of membership.
2. The union then negotiates a compulsory-unionism agreement, otherwise valid under section 8(a)(3), requiring membership as a condition of employment.
3. During a strike, the union membership passes a resolution imposing a financial penalty on strikebreakers.
4. E, an employee who has regularly paid union dues but never participated in any internal organizational activities, becomes a strikebreaker.
5. In a proceeding characterized by complete due process, but in which E refuses to participate, the union fines him for strikebreaking. Later, instead of attempting to enforce this penalty by threatening to seek his discharge, the union institutes suit in state court to collect the fine. E defends on the theory that section 8(a)(3) precludes the imposition of such an incident of membership.

The proper holding, it may be argued, would be that section 8(a)(3) allows unions (and employers) to condition employment on full union membership, that unions cannot use the threat of discharge from employment to enforce any badge or incident of membership other than the payment of dues and fees, but that they may invoke any other remedy for breaches of union discipline so long as it does not involve employer discrimination. To avoid union discipline, employees subject to such compulsory unionism arrangement must refuse to tender dues and fees; but if they do so, they may be discharged. Professor Haggard, of course, admits the possibility of this result, although he denies its propriety. Only time, and the Supreme Court, will tell.

Professor Haggard's discussion of the use of compulsory union dues and fees is also arguably deficient in that it fails to emphasize sufficiently the unsatisfactory state of the law on this subject. The prevailing wisdom, to which the Supreme Court apparently subscribed in Railway Employees Department v.

Hanson,20 International Association of Machinists v. Street,21 Brotherhood of Railway Clerks v. Allen,22 and most recently Abood v. Board of Education,23 is that unions may expend dues and fees coerced from private and public sector employees under color of law as a condition of employment only for purposes directly related to the organizations’ collective bargaining activities. Expenditures for any other purposes, and especially for partisan political activism, lobbying, or agitation and propaganda, violate the applicable statutes, the first amendment, or both. Difficulties arise, however, in defining collective bargaining activities in some principled way, and in developing a means of excluding unions from violating employees’ rights by spending dues and fees for prohibited ends.

These problems are present in both the private and public sectors, but they are particularly acute in the latter, where almost all of the activities of such militant unions as the National Education Association, the American Federation of Teachers, or the American Federation of State, County, and Municipal Employees are part and parcel of pervasive campaigns of political and ideological activism. Justice Powell recognized this point in Abood, when he judicially noticed that public employee unions such as the AFT are essentially political parties in fact, if not in name.24 This reviewer would identify them as the very factions against the depredations of which Madison warned us in The Federalist No. 10.25 But, whatever formal characterization is more appropriate, the substantial reality remains the same: for public employee unions, collective bargaining is merely one aspect of a larger program of political activism, one means (albeit an extraordinary one) of exercising political influence at the immediate expense of nonunion public employees and the ultimate detriment of society as a whole.

24. Id. at 1811.
25. Madison gave the following definition of “faction”:
By a faction, I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens or to the permanent and aggregate interests of the community.
The Federalist No. 10 (J. Madison) (Washington 1842) 43.
If, however, consistently with the first amendment, government cannot require its public employees to pay "compulsory financial tribute"26 to unions for the purpose of subsidizing such traditional partisan political activities as electioneering, on what principled basis can it require them to underwrite the novel, but equally obnoxious, device of collective bargaining? Is forced monetary support for the election of candidates somehow more repugnant to the Constitution than forced monetary support for political wire-pulling after the candidates have safely ensconced themselves in office? But these questions answer themselves, especially in light of the amazingly craven performance of the plurality in Abood, which, although squarely confronted with Justice Powell's challenge, did not even attempt to distinguish the situation presented there from that which mandated the contrary result in Elrod v. Burns.27

The remedial problem is equally difficult. In Abood, the plurality indicated that a proportional restitution or rebate of dues and fees coerced from nonunion public employees would be a suitable remedy for a union's unconstitutional expenditure of monies on partisan political activism. Obviously, however, such a remedy cannot be sufficient to vindicate first amendment liberties. As a matter of fact, most statutes authorizing compulsory unionism implicitly permit unions to expend fees coerced from nonmembers on partisan political (or any other kind of) activity. And, as a matter of law, almost everyone concedes that such spending amounts to a form of coerced ideological conformity, which is unconstitutional per se under the first amendment. But what the plurality refused to explain in Abood was why, given this state of fact and law, typical compulsory unionism agreements do not irremediably violate the so-called least restrictive alternative test consistently applied in first amendment cases not involving unions.28


On its face, the typical compulsory unionism arrangement is the most, not the least, restrictive means to achieve whatever public purpose (if any) forced unionism serves, since it requires the aggrieved employees, rather than the union or the employer to take expensive and time-consuming action to protect rights that everyone admits no union has any privilege to disregard. For that reason alone, the typical statute sanctioning such a result (albeit sub silentio) should be absolutely invalid and incapable of judicial rehabilitation.28 Yet the _Abood_ plurality concluded otherwise, putting forward a purported remedy of restitution in the face of the contrary teaching of every modern first amendment decision known to this reviewer.

The remedy, however, is illusory. For it is the spending of dissenting employees' coerced financial contributions on partisan political activism, not their mere retention by the union, that affronts the Bill of Rights. The spending is the constitutional violation. But it is precisely the spending that the _Abood_ plurality sanctioned. In essence, then, the plurality's remedy is no remedy at all. Rather, it is an indirect holding that nonunion employees have no first amendment right to be free from admittedly unconstitutional coerced political and ideological conformity, only a dubious privilege to struggle at their own great expense to secure restitution of the monies through the spending of which unions have shackled them to a scheme of political activism. This is not relief; it is judicial protection and encouragement of a con-

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stitutional wrong, an abdication of judicial responsibility, which even those outside the legal field have already recognized and decried.\textsuperscript{30}

The first amendment makes no exceptions for coerced political and ideological conformity in the interest of labor unions.\textsuperscript{31} Neither does the fourteenth amendment accord them any special treatment.\textsuperscript{32} Nor is there a peculiar category of labor law immune to the strictures of those amendments.\textsuperscript{33} Nonetheless, the \textit{Abood} plurality ruled, in essence, that the private interests of unions in imposing "compulsory financial tribute" upon dissenting employees and in expending those monies unconstitutionally on partisan political activism are of such moment that government must aid and abet the unions by overriding and nullifying heretofore unchallenged axioms of first amendment jurisprudence. What is one to make of this shocking result, except to surmise that Justices Stewart, Brennan, Marshall, and White (and perhaps Stevens) believe that unions are above the law, specially privileged in the pursuit of their own political designs to limit first amendment freedoms in a way denied even to government in the pursuit of our national defense?\textsuperscript{34} What else is one to say, except that finally, after more than forty years, American fascist-syndicalism seems to have found its true champions?\textsuperscript{35}

Since this is the significance of \textit{Abood}, Professor Haggard should have expanded his discussion, if only to pose the question of constitutional law, which the Court failed to address, and the question of judicial partiality, which the plurality opinion unavoidably raised. Both of these questions the Justices must soon resolve if the judiciary is not to suffer the same well-deserved loss of public confidence that the executive and legislative branches


\textsuperscript{32} City of Charlotte v. Local 660, Int'l Ass'n of Firefighters, 426 U.S. 283, 286 (1976).


\textsuperscript{34} See United States v. Robel, 389 U.S. 258, 263-68 & n.20 (1967) (national defense no justification for denying communist freedom of association where less restrictive means available).

of government have suffered.

Professor Haggard’s coverage of the scope and application of state right-to-work laws, however, is as complete as any reader could wish. His exposition examines every significant violation of the right-to-work principle, and the variety of remedies available under state law. Moreover, he makes two provocative suggestions about the nature and ambit of right-to-work laws. First, since section 14(b) of the National Labor Relations Act recognizes the continuing power of the states to enforce their laws proscribing compulsory unionism, and since state common law judicial decisions are among the laws of the several states, it should follow that state common law policies embodying the right-to-work principle are enforceable absent state statutes explicitly authorizing compulsory unionism for wage earners in interstate commerce. Since common law in most states is historically quite libertarian insofar as the law of labor relations is concerned, its enforcement under contemporary conditions could provide some highly interesting litigation. Second, the right-to-work laws of some states proscribe compulsory union representation, as well as compulsory union membership or payment of dues. Section 14(b) of the National Labor Relations Act allows the states to outlaw union membership arrangements negotiated with employers under color of section 8(a)(3). But the latter section applies only to unions acting as exclusive representatives pursuant to section 9(a). Therefore, it should follow that the states retain plenary power to ban compulsory union representation that goes beyond the authorization of section 9(a), whether or not such representation may be said to impose a membership requirement on dissenting employees.

Logically, then, the question that follows is: What does section 9(a) permit? In its 1937 decision in NLRB v. Jones & Laughlin Steel Corp., the Supreme Court upheld the National Labor Relations Act against an employer’s due process challenge. The explicit basis for the Court’s holding was that the exclusive-representation scheme of section 9(a) required only that the em-

36. 29 U.S.C. 164(b) (1970), provides: “Nothing in this subchapter 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.”
38. 301 U.S. 1, 44 (1937).
ployer negotiate with a certified union for a collective agreement covering all employees, not that it cease contracting on an individual basis with those employees if it and the latter chose to do so. Only in its 1944 decision in J.I. Case Co. v. NLRB, a case involving no constitutional issues, did the Court reconstrue section 9(a) to preclude individual contracts between employers and their employees. Given this history, it would seem that a state court would be correct in holding that: (i) the only form of exclusive representation that has received any constitutional sanction is one that permits individual employment contracts; (ii) since any scheme of exclusive representation going beyond this is arguably unconstitutional under Jones & Laughlin, J.I. Case need not be followed; and therefore (iii) the state has inherent authority to proscribe any form of compulsory union representation more stringent than that described in Jones & Laughlin. Again, litigation in this area would be quite interesting.

One point in his discussion of right-to-work laws that Professor Haggard does not elucidate, however, is the cryptic language of Retail Clerks International Local 1625 v. Schermerhorn that state power over compulsory unionism "begins only with actual negotiation and execution of the type of agreement described by § 14(b)." In context, this dictum undoubtedly refers to the inapplicability of right-to-work laws to union coercion, such as strikes or boycotts, aimed at compelling an employer to accede to a compulsory unionism agreement in the first instance. Yet union advocates have argued that the dictum means no less than that right-to-work laws apply only to written collective bargaining agreements incorporating compulsory unionism provisions. If this were true, of course, it would effectively do away with right-to-work laws, since potential violators could avoid all liability by adopting unwritten policies or practices of compulsory unionism separate from any formal collective bargaining agreement. The best explanation of the Schermerhorn language is that it is typical Supreme Court doubletalk. The "type of agreement described by § 14(b)" is whatever type of agreement a state has chosen to proscribe, and that may be a provision in a written collective bargaining agreement, an oral understanding, or something else.

41. Id. at 105.
In short, the state decides what formality is necessary to bring a compulsory unionism arrangement under the scrutiny of her laws; and once the parties satisfy that formality, whatever it may be, section 14(b) sanctions the invocation of state power. Since doubt remains on this point, however, Professor Haggard should have dealt with it more fully.

Enough has already been said about Professor Haggard’s discussion of the constitutional issues surrounding compulsory unionism. But perhaps one more comment is in order. In his conclusion to Chapter XI, he states that “the courts have been reluctant to apply constitutional law doctrines in any way as to offend the prevailing popular and legislative views on this subject.” Actual, the popular view disfavors compulsory unionism by a wide margin, and if the legislative view is sympathetic to the demands of unions, it is despite and not because of the Constitution and the popular will. A courageous judiciary, moreover, would have conceded nothing to either the lawmakers or the people if to do so would have offended fundamental principles of individual liberty in so rank a manner as does compulsory unionism.

But such is not the judiciary America has lived with during the last four decades. The Supreme Court especially has worked with indefatigable zeal to promote state-sponsored unionism beyond anything even Congress ordained, specifically, by eviscerating the reform provisions of the Taft-Hartley Act, expanding the preemption doctrine, emptying the so-called duty of fair representation of any meaningful content, and evading the strictures of the first amendment whenever they threatened to limit union dictation over individual employees. The proper historical picture, then, is not one of a reluctant Court dragged deeper and deeper into the morass by a frenetic populace or a fanatic legislature, but rather one of an activist bench itself promoting fascist-syndicalism in the teeth of popular and legislative demands for restraint.

Professor Haggard is probably correct, though, to suggest that change in this area will not come through constitutional

42. HAGGARD at 267.
44. In particular, the union unfair labor practices in § 8(b) of the National Labor Relations Act, as amended by the Taft-Hartley Act, 29 U.S.C. § 158(b) (1970), have been made ineffectual.
litigation. The courts, after all, are to a great extent merely mouthpieces for prevailing economic, social, political, and philosophical teachings, which, for years now, leading intellectuals and their epigoni have heavily biased in favor of fascist-syndicalism. Only by investigating, exposing, and ultimately overthrowing these ideas can reform be effected. In Part III, Professor Haggard begins this work with a careful analysis of the traditional apologies for compulsory unionism.

His direction is, of course, beyond reproach. Collectivism is not inevitable; it is not the irresistible product of omnipotent, inexplicable social forces beyond men's control. Rather, it is the entirely predictable result of the actions of two kinds of men: on the one hand, well-meaning men who sought to ameliorate what appeared to them as social evils by promoting what they perceived as collective institutions capable of bringing about social justice; on the other hand, men who looked no further than to the satiation of their own avarice and ambition. The failure of the former group was preordained by a profound ignorance of the fundamentals of human action, social organization, and the limits of law; but at least they can be held responsible only for stupidity and negligence. The failure of the latter group is yet to come; for, unlike erstwhile reformers whose condemnation inheres in the economic, social, and political crises that their policies engendered, power-seekers never concede defeat until an outraged citizenry strips them of their extraordinary emoluments, perquisites, and special privileges. However, whether these men will ever be held accountable for their actions, which merit the description of social crimes, if any actions do, is problematical. The collectivist myth, after all, pervades this society, and it is that myth, in the final analysis, which people must reject. Thus, Professor Haggard's repeated references to society's policies and society's decisions merely perpetuate the problem. Society is a set of relationships among individuals, not an entity.\textsuperscript{45} It has no policies, makes no decisions, and, most importantly, enjoys no legal rights, powers, privileges, and immunities. Only individuals exist and act; only they can make law and be subject to it. Until the vast majority of thinking people accepts and acts on these insights, no significant progress in the promotion of human liberty can ever be made.

\textsuperscript{45} F. von Hayek, \textit{The Counter-Revolution of Science} ch. III (1955).
This criticism aside, Professor Haggard's summary analyses of the standard arguments for compulsory unionism are excellent. The best known of these is the so-called free rider argument: that employees who receive the benefits of union representation should be required to pay their fair share of its costs. As Professor Haggard explains, the free rider thesis is subject to criticism on three grounds. First, it is not true that union restrictionism, through the exclusive representation device, provides wage earners generally with monetary or other returns superior to those they would have achieved through market determination of wage rates. Some may gain, but only to the detriment of others, and it is not obvious, in any particular case, who (if anyone) benefits. Economists have long contended that proof of any benefit from union representation is epistemologically foreclosed in the individual case, and there is no judicial or administrative decision known to this reviewer that holds that any union has demonstrated, according to the rules of evidence, that its restrictionist activities benefit anyone.

Second, if particular nonunion wage earners in a bargaining unit benefit from forced representation, so do their union member co-workers and the organization. Exclusive representation, after all, is not an onerous duty imposed on unions, but a special privilege that they must fulfill and struggle violently against one another to secure. Exclusivity in bargaining is what allows unions to drive wage rates above the marginal productivity of employees, thereby exploiting other wage earners, consumers (most of whom are also wage earners), and (in increasingly rare cases) investors. How, then, are nonunion employees free riders? In return for whatever unproven benefits they receive, they are forced to acquiesce in the unions' preemption and usurpation of their common law and constitutional liberty to contract autonomously with their employers. Assuming arguendo that unproven material benefits may serve to compensate for the denial of constitutional freedoms, what theory of equity or fairness condones the further

46. See Vieira, note 3 supra, at 543-51 and authorities cited therein.
48. See, e.g., U.S. News & World Report, Apr. 5, 1976, at 90, which reports on the competition between the National Education Association and the American Federation of Teachers to organize teachers in order to acquire exclusive-representative status.
49. See Vieira, note 3 supra, at 543-51 and authorities cited therein.
burden that nonunion employees financially subsidize the very organization that deprives them of those freedoms? Is it not more plausible to conclude that the union is the true free rider?

Third, the free rider argument is fundamentally question begging in nature, because it assumes that union members have some unique claim to decide for nonunion wage earners what employment relations are to the latter's benefit. It assumes, in short, that union members have a privilege to politicize other workers' employment and force them to act collectively. As Professor Haggard points out, a claim of this kind implies that unions enjoy some quasi-governmental authority over unwilling wage earners. But whence do they derive this purported authority? Professor Haggard does not say, but the answer is simple enough. The essence of compulsory unionism is to be found in the ragtag philosophy "syndicalism," particularly the notion that wage earners belong to a class apart from all others in society, a class that must act with monolithic solidarity in a continuing struggle for control of industry, a class to which individual employees owe uncompromising duties of obedience and support. The free rider argument, then, is merely a circuitous apology for collectivism, a cautious way of demanding that individual freedom be subordinated to group control.

So, once again, arises the fundamental issue inherent in the debate on compulsory unionism: individualism or collectivism? As Professor Haggard points out, Americans will no doubt consider other issues in the continuing controversy surrounding compulsory unionism: the desirability of compulsory collective bargaining through exclusive representation in terms of its effect on productivity, inflation, and so on; the legal immunities of labor unions, and their inconsistency with the rule of law and the principle of equal protection; and the extraordinary economic and political power of state-sponsored unions, to name but a few. Yet, after all is said and done, the basic questions remain: What philosophical goals do Americans wish to achieve? Do they seek a system of institutionalized gangsterism that perverts government into a tool for exploiting society on behalf of various special-interest groups? Or do they seek something else?

Professor Haggard outlines some of the philosophical alternatives, developing a modern natural law argument that he then applies to the compulsory-unionism problem. Perhaps surprisingly to some, he concludes that right-to-work laws are in many ways as inimical to individual liberty as compulsory unionism,
because both deny liberty of contract. They may be justified insofar as they nullify or limit the reach of federal laws such as section 8(a)(3); otherwise, they are symptomatic of the disease they were intended to cure.

For that disease, it is not the passage of new laws, but the repeal of old ones, and the recognition that any such laws are beyond the authority of any constitutional government to enact, which alone can effect a cure. This can be achieved only when the people desire freedom enough to demand it of their political institutions. Perhaps Professor Haggard’s book is a harbinger of just such a consummation.