

# THE HISTORICAL MISCONCEPTION OF RIGHT TO WORK LAWS IN THE UNITED STATES: SENATOR ROBERT WAGNER, LEGAL POLICY, AND THE DECLINE OF AMERICAN UNIONS

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*All I am trying to do, and I think, you believe me when I say that, is to make the worker a free man to join any organization that he wishes to join and, at the same time, to have genuine collective bargaining.*

Statement made by Senator Robert Wagner to John Collins,  
a gasoline station attendant, April 1934<sup>1</sup>

## INTRODUCTION

In the mid-1950s, union membership density in the United States stood at approximately one-third of the nonagricultural work force.<sup>2</sup> By 2004, that number had dropped to 12.5 percent, with only 7.9 percent in the

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1. NATIONAL LABOR RELATIONS BOARD, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 1935, at 505 (1985) [hereinafter NLRA LEG. HIST.]. Collins worked for Sobol Bros., Inc., in New York City, which had an internal representation plan for its employees. Collins and several others testified favorably about the plan at the hearings on the Labor Disputes Bill, which Senator Wagner introduced on Mar. 1, 1934. *Reprinted id.* at 1-14. Collins had been elected as one of the representatives, and he told the committee that Sobol employees voted by a ratio of more than 10 to 1 to support the representation scheme. After questioning Collins, Wagner reassured him, "I agree with you absolutely that if this is the kind of an organization that the employees want, that is what I am for 100 percent." *Id.* Wagner then added the caveat that free choice also entailed "genuine collective bargaining." The incompatibility of workers' preferences for a company union and the institutional demands of a collective bargaining system explain why right to work legislation is an anomaly in labor law.

2. Richard B. Freeman, *Spurts in Union Growth: Defining Moments and Social Processes in THE DEFINING MOMENT: THE GREAT DEPRESSION AND THE AMERICAN ECONOMY IN THE TWENTIETH CENTURY* 292 (Michael D. Bordo et al. eds., 1998).

private sector.<sup>3</sup> As organizational levels fell, many American workers experienced a deterioration of employment conditions characterized by lower real earnings and the loss of traditional fringe benefits such as vacations and health insurance coverage.<sup>4</sup> Industrial relations scholars offered various reasons for union decline.<sup>5</sup> One influential theory attributed membership losses to the aggressive, and sometimes unlawful, employer opposition to organizing drives.<sup>6</sup> From a broader perspective, scholars have described long-term strategies undertaken by American firms to eliminate or resist collective bargaining, and those strategies are best understood in an evolving context that takes into account the political and cultural forces affecting unions.<sup>7</sup> A recent study found that American workers have more positive attitudes toward unions than Canadian workers, but face significantly greater obstacles in forming unions because the American legal environment gives "more weight" to individual, as opposed to collective, rights.<sup>8</sup> Without major regulatory change, or massive economic shock, experts predict that membership density will "continue a slow but cumulatively significant decline."<sup>9</sup> The disaffiliation of several major unions in July 2005 from the American Federation of Labor – Con-

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3. Press Release, Bureau of Labor Statistics, *Union Members Summary, Union Members in 2004*, (Jan. 27, 2005) available at <http://stats.bls.gov/news76/lease/union2.nr0.htm>.

4. A leading study of workers' economic conditions in the U.S. describes the effects of union decline on wages, total compensation, and inequality. LAWRENCE MISHEL ET AL., THE STATE OF WORKING AMERICA, 2004/2005, 189-98 (2005).

5. For a collection of essays developing different perspectives on union membership, see THE FUTURE OF PRIVATE SECTOR UNIONISM IN THE UNITED STATES (James T. Bennett & Bruce E. Kaufman, eds., 2002).

6. For an early and influential exposition of the "union opposition" thesis, see generally, Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization under the NLRA*, 96 HARV. L. REV. 1769 (1983). In contrast, Leo Troy argues that structural economic changes, over which labor has little control, leads to indifference to collective organization among workers in the "new economy," and unions have merely become irrelevant. See, e.g., LEO TROY, BEYOND UNIONS AND COLLECTIVE BARGAINING (1999); LEO TROY, THE NEW UNIONISM IN THE NEW SOCIETY: PUBLIC SECTOR UNIONS IN THE REDISTRIBUTIVE STATE (1994); LEO TROY, THE TWILIGHT OF THE OLD UNIONISM (2004).

7. For varying perspectives on the long-term strategies undertaken by American firms in opposition to collective bargaining see generally MICHAEL GOLDFIELD, THE DECLINE OF ORGANIZED LABOR IN THE UNITED STATES (1987); SANFORD M. JACOBY, MODERN MANORS: WELFARE CAPITALISM SINCE THE NEW DEAL (1997); THOMAS A. KOCHAN ET AL., THE TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS (1986).

8. See, SEYMOUR MARTIN LIPSET & NOAH M. MELTZ, THE PARADOX OF AMERICAN UNIONISM: WHY AMERICANS LIKE UNIONS MORE THAN CANADIANS DO BUT JOIN MUCH LESS 6 (2004).

9. Bennett & Kaufman, *supra* note 5, at 359.

gress of Industrial Organizations (AFL-CIO) indicated the severity of the crisis in the labor movement.<sup>10</sup>

The National Labor Relations Act of 1935 ("NLRA" or "Wagner Act") established the basic law regulating collective bargaining activities between unions and employers in the United States.<sup>11</sup> As an exercise of federal power, the NLRA displaced a complex body of state common law governing labor relations which emanated from judicial doctrines of conspiracy and tortious combinations.<sup>12</sup> Senator Robert Wagner, the bill's architect, based his legislation on federal control over interstate commerce and its instrumentalities, thereby invoking supremacy in the field. Constitutionally, the application of that power to employment contracts appeared so novel that most legal experts of the time dismissed the NLRA and advised employers to ignore it.<sup>13</sup> But Leon Keyserling, Wagner's chief aide in drafting the statute, defended its constitutional predicate by emphasizing that the NLRA aimed to promote the macroeconomic goals of growth and stability of commerce through workers' increased bargaining power. Keyserling wrote that the "tendency of modern industry toward integration and centralized control has long since overturned the balance of bargaining power between the individual employer and the individual employee," thereby preventing workers from obtaining a "just reward" from their labor.<sup>14</sup> As a result, inadequate purchasing power led to economic depression and its attendant burdens

10. The dissident unions formed the "Change to Win Coalition," headed by Andrew Stern of the Service Employees International Union (SEIU). The coalition included the International Brotherhood of Teamsters and the United Food and Commercial Workers (UFCW). Altogether, the coalition represented about six million members. For information on the new organization and its vision, *see generally*, Change to Win Coalition, at <http://www.changetowin.org/> (last visited Sept. 29, 2005).

11. National Labor Relations Act, 49 Stat. 449 (1935).

12. For a general discussion of labor relations law prior to the Wagner Act, *see generally*, CHARLES O. GREGORY & HAROLD A. KATZ, LABOR LAW: CASES, MATERIALS AND COMMENTS 1-146 (1948); for historical treatments *see generally*, IRVING BERNSTEIN, THE LEAN YEARS: A HISTORY OF THE AMERICAN WORKER, 1920-1933, at 190-243 (1960); MELVYN DUBOFSKY, THE STATE & LABOR IN MODERN AMERICA 1-135 (1994); WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT (1991); CHRISTOPHER L. TOMLINS, THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880 - 1960, at 3-95 (1985).

13. A number of prominent corporate attorneys drafted a report publicizing the constitutional defects of the NLRA. They concluded that the law exceeded the powers of the federal government and contradicted the constitutional rights of employers and employees. *See generally*, RICHARD C. CORTNER, THE WAGNER ACT CASES 93-95 (1964) (noting that the constitutional implications played an important role in Wagner's thinking about right to work, as explained *infra*, text accompanying note 130.

14. Kenneth M. Casebeer, *Holder of the Pen: An Interview with Leon Keyserling on Drafting the Wagner Act*, 42 U. MIAMI L. REV. 285, 311 n.73 (1987).

on interstate commerce.<sup>15</sup> Collective bargaining offered workers a means of equalizing imbalances of power, which in turn would restore purchasing demand and economic activity. Regardless of merit for economic theory, the stated objectives of Wagner, Keyserling, and their supporters formed the cornerstone of the NLRA.<sup>16</sup>

Even though the NLRA aimed at national uniformity, Wagner conceded a crucial dimension of labor relations to state regulation. Section 8(3) of the NLRA prohibited employers from discriminating against individuals with regard to the terms and conditions of employment either to encourage or discourage unionism.<sup>17</sup> Wagner inserted a proviso into §8(3) to protect unions' interests in organizational solidarity through the closed shop.<sup>18</sup> This proviso stated in part that "nothing in this Act . . . or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein."<sup>19</sup> When he introduced the bill into the Senate, however, Wagner assured his colleagues that no state laws regulating union security would be affected. Wagner made this assurance despite the implication that states could not prohibit anything permitted by the NLRA. Speaking to that point, Wagner said: "Equally erroneous is the belief that the bill creates a closed shop for all industry. It does not force any employer to make a closed-shop agreement. It does not even state that Congress favors the closed shop."<sup>20</sup> Wagner went on to explain that the NLRA simply preserved the "status quo" regarding the law of union security. Because labor law at the time consisted of judicial doctrine, Wagner did not anticipate that state legislatures, rather than state courts, would become the dominant source of law regarding union security. Twenty-two states now have legislation in effect that prohibits compulsory union membership,<sup>21</sup> including, as of

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15. Labor Disputes Act S. 2926, 73d Cong. § 2 (1934), reprinted in 1 NLRA LEG. HIST., *supra* note 1, at 1. The drafts of this bill and of the Wagner Act (S. 1958) are analyzed in Kenneth M. Casebeer, *Drafting Wagner's Act: Leon Keyserling and the Precommittee Drafts of the Labor Disputes Act and the National Labor Relations Act*, 11 IND. REL. L. J. 73 (1989).

16. See Casebeer, *supra* note 14, at 319; see also Bruce E. Kaufman, *Why the Wagner Act?: Reestablishing Contact with its Original Purpose*, in 7 ADVANCES IN IND. & LAB. REL. 15 (David Lewin et. al., eds. 1996).

17. National Labor Relations Act, 49 Stat. 452 (1935).

18. *Id.*

19. *Id.*

20. 1 NLRA LEG. HIST. *supra* note 1, at 1313.

21. Although debates over right to work are typically phrased in terms of "compulsory" or "forced" unionism, the Supreme Court has held that union security is only a core financial obligation and does not compel membership or any other form of support for the union representative. *E.g.*, NLRB v. General Motors Corp., 373 U.S. 734, 741 (1967) ("It is permissible to condition em-

September 2001, the state of Oklahoma.<sup>22</sup> Presently, the Congressional legislative agenda includes proposals to federalize right to work and impose a uniform standard abolishing union security provisions.<sup>23</sup>

Wagner's failure to insist on a clear national rule protecting unions' right to bargain for and enforce mandatory membership appears to be inconsistent with the basic purposes of the NLRA. The plain language of the statute declares that it is the policy of the United States to facilitate commerce "by encouraging the practice and procedure of collective bargaining," including workers' protected rights of organization and concerted activity.<sup>24</sup> Wagner's decision to defer to state authority on the matter of union security had important ramifications. In the immediate post-war period, labor mounted a massive offensive, known as Operation Dixie, to unionize southern workers. The offensive failed in its mission and set the stage for ongoing union decline by establishing regional economic conditions which "represented both a source of cheap labor and an area of lower-than-union wages."<sup>25</sup> A body of empirical research confirms that right to work laws create a competitive environment based on labor costs and redistribute profits to the owners of firms, contrary to the NLRA's purposes.<sup>26</sup> Moreover, as a matter of administrative efficiency and political uniformity, a definitive federal rule protecting the parties' contractual freedom to voluntarily enter into such agreements

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ployment upon membership, but membership, insofar as it has significance to employment rights, may in turn be conditioned only upon payment of fees and dues. 'Membership' as a condition of employment is whittled down to its financial core"). *Id.* at 742.

22. ALA. CODE §§25-7-32-736 (1986); ARIZ. REV. STAT. §§23-1301-23-1307 (1983); ARK. CODE. ANN. §§11-3-303-11-3-394 (1987); FLA. STAT. ANN. §§447.03 (1981); GA. CODE ANN. §§34-6-21 (2002); IDAHO CODE ANN. §44-2003 (2003); IOWA CODE ANN. §731.2 (1979); KAN. STAT. ANN. §§44-831 (2000); LA. REV. STAT. ANN. §983 (1998); MISS. CODE ANN. §71-1-47 (1999); NEB. REV. STAT. §48-217 (2002); NEV. REV. STAT. §613.250 (2000); NC. GEN. STAT. §95-78 (1985); N.D. CENT. CODE §34-01-14 (2004); S.C. CODE ANN. §41-7-10 (1976); S.D. CODIFIED LAWS §60-8-3 (2004); TENN. CODE ANN. §50-1-201 (1999); TEX. REV. CIV. STAT. ANN. arts. 5154a, §5207a (1987); UTAH CODE ANN. §34-34-2 (1988); VA. CODE ANN. §40.1-59 (1990); WYO. STAT ANN. §27-7-109 (2005). For the text of the bill submitted to referendum in Oklahoma, see S. J. Res. 8, 48th Leg., 1st Sess. (2001).

23. H.R. 500; S. 370, 109th Cong. (2005). Both bills were introduced in February 2005.

24. 29 U.S.C. § 151 (1994).

25. GOLDFIELD, *supra* note 7, at 238-39; *see also*, Michael Goldfield, *The Failure of Operation Dixie: A Critical Turning Point in American Political Development?* in RACE, CLASS, AND COMMUNITY IN SOUTHERN LABOR HISTORY 167 (Gary M. Fink & Merl E. Reed, eds., 1994).

26. See William Moore, *The Determinants and Effects of Right-to-Work Laws: A Review of the Recent Literature*, 19 J. LAB. RES. 445 (1998) (providing a survey of the literature on the effects of right to work); *see also* Steven Abraham & Paula Voos, *Right-to-Work Laws: New Evidence from the Stock Market*, 67 S. ECON. J. 345 (2000) (providing an econometric analysis of the passage of Louisiana's right to work law showing that the owners of firms anticipated an increase in their share of profits following adoption of the law).

has obvious advantages over a patchwork of state legislation. Given the arguments for federal preemption over union security, why did Wagner abdicate such a crucial decision to the vagaries of state politics?

Briefly, Wagner's handling of the issue turned on three closely related aspects of the labor relations environment in 1934-35. The first aspect had to do with administrative interpretations of Section 7(a) of the National Industrial Recovery Act ("NIRA") and its guaranteed rights for workers to "bargain collectively through representatives of their own choosing."<sup>27</sup> Second, Wagner's main legislative concern was to deal with employers' rapid deployment of company unions as a countermeasure to outside union organizing and the imminent threat which those entities posed to his statutory scheme.<sup>28</sup> Third, Wagner calculated that state law governing union security, which then existed as a complex and dynamic body of common law doctrine, might actually offer advantages to unions beyond those available at the federal level.<sup>29</sup> Together, those considerations led Wagner to construct a new industrial system which remained unstable with respect to an essential component of its design. Historical contingency, and America's unique set of legal and economic institutions, dictated Wagner's treatment of compulsory unionism and created the opportunity for future mischaracterization in the Taft-Hartley debates.

Wagner's ambivalence reflected an underlying philosophical tension inherent in the statute itself. The NLRA promoted an economic agenda which, as critics pointed out, would logically lead to the presence of powerful and independent labor organizations in every workplace.<sup>30</sup>

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27. NIRA, 48 Stat. 198 (1933).

28. See Robert Wagner, *Company Unions, A Vast Industrial Issue; Senator Wagner Sets Forth the Growth of 'Employer Dominated' Organizations, Tells Their Effect on Collective Bargaining and Discusses His Bill Which is Designed to Prevent Economic Warfare*, N.Y. TIMES, Dec. 11, 1934 at XXI, reprinted in 1 NLRA LEG. HIST., *supra* note 1, at 22-26. From the outset, Wagner identified company unions as the primary evil to be addressed by labor legislation. Shortly after he introduced S. 2926, Wagner published a speech in the *New York Times* (March 11, 1934) explaining the bill. In its preface to the article, the *Times* noted, "The company union has become a focal point in the industrial-relations problem that confronts the Nation." *Id.*

29. See, e.g., *Coppage v. Kansas*, 236 U.S. 1 (1915) (broadly holding state legislation attempting to interfere with "freedom of contract" in employment was unconstitutional). Right to work laws are now legislative or state constitutional enactments, but in 1935, regulation of closed shops fell exclusively within the province of the judicial system. See *supra* text accompanying notes 20-21.

30. 1 NLRA LEG. HIST., *supra* note 1, at 428. James Emery, general counsel for the National Association of Manufacturers, testified at length on the failings of the Labor Disputes Act. He summed up the business community's position on the legislation with the following argument:

The issue the [bill] presents is plain. It is no mere dispute over policy between employers and labor unions. It is a deliberate step toward a Nation unionized by the act of Government. It would block the pathways of opportunity to all but members of a privileged or-

The ubiquitous company unions offered workers an alternative to bureaucratic unions, and in many cases, workers expressed their free and uncoerced preference for the internal form of representation.<sup>31</sup> Politically, Wagner could neither ignore those entities nor accept them as a legitimate option under his statute. For that reason, the NLRA lent itself to conflicting policy aims; on the one hand, the ends of wealth redistribution and increased consumer demand required worker solidarity, while on the other hand, the goal of individual liberty respected the workers' decision to join a company union or no union. Right to work laws are an iteration of the enduring American theme of individual interests versus state compulsion.<sup>32</sup>

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ganization. It would ultimately result in permitting the transportation and marketing of goods produced by unions only. It would destroy the elementary rights to remain unorganized, to select individual or collective bargaining, and to determine its form.

*Id.*

31. See, e.g., Daniel Nelson, *The Company Union Movement, 1900-1937: A Reexamination*, 54 BUS. HIST. REV. 335, 343 (1982) (finding that some scholars contend that employee representation plans provide real benefits to workers). But cf. Bruce E. Kaufman, *The Case for the Company Union*, 41 LAB. HIST. 321 (2000) (finding whether in fact they represented the preferences of employees in a given firm, the company unions necessarily failed as part of a national program of economic stability).

32. See Duncan Kennedy, *The Structure of Blackstone's Commentary*, 28 BUFF. L.REV. 205, 211 (1979). Duncan Kennedy asserted that our system of law rests on a contradiction, which he explained in the following way: "Here is an initial statement of the fundamental contradiction: Most participants in American legal culture believe that the goal of individual freedom is at the same time dependent on and incompatible with the communal coercive action that is necessary to achieve it." *Id.* That is, the attainment of individual fulfillment paradoxically demands participation in communal actions which support, sustain, and make possible our social institutions. The "fundamental contradiction" of our social life insinuates itself into legal regimes because law operates as forms of relations between juridical persons, and any given legal issue turns on the availability of collective sanctions to enforce "rights" and "duties." *Id. Cf.* Wesley Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L. J. 16 (1913). In his famous article on legal categories, Wesley Hohfeld described a set of juridical opposites and correlatives. He particularly distinguished between rights, which placed legal duties on others, and privileges, which deprived others of rights to interfere with a privilege. *Id.* Hohfeld's article represented an important transformation in legal theory by repudiating the proposition that legal rules can be deduced from the existence of rights. See Joseph W. Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS.L. REV., 975, 1058-59. As a contemporary analysis makes the point:

The Hohfeldian critique of the classical system demonstrates that legal rights are justified by a fundamentally contradictory political and legal theory. Legal decisions are not determined, compelled, or rationally justified by the inherent logic of rights, since rights encompass the contradictory principles of freedom of action and security. Since every legal decision reverts to the fundamental contradiction, we have no alternative but to decide each case in the light of competing goals and interests.

*Id.* Consequently, describing the legal opportunity to opt out of communal commitments as a "right to work" explains nothing about the rule itself or the legal calculus which determines the appropriate policies for maintaining the right.

This article analyzes the conception of “right to work” as presented in the Wagner Act and its evolution from the Taft-Hartley amendments in 1947 through the Oklahoma right to work initiative in 2001 and up to pending Congressional bills to create federal legislation prohibiting union security. It begins with the influence of company unions on the shape of the NLRA and the reasons for Wagner’s strategic choice of incorporating the state law regulating closed shops into the federal statute. When the Supreme Court upheld the NLRA in the 1937 case of *Jones & Laughlin Steel Corp.*, the legal landscape shifted from judicial to legislative control over union security.<sup>33</sup> The drafters of Taft-Hartley formalized that principle with the insertion of §14(b) into the NLRA.<sup>34</sup> Senator Taft described §14(b) as an affirmation of Wagner’s original legislative intent, but Taft’s view is misleading.<sup>35</sup> Right to work, with its narrow focus on individual interests, produces outcomes that are incompatible with the basic meaning of the Wagner Act, economic justice and political emancipation for American workers.<sup>36</sup>

### THE PROBLEM OF REPRESENTATION

During the first decade of the twentieth century, trade union membership surged to unprecedented levels.<sup>37</sup> That trend accelerated during World War I as the federal government extended its presence into major industrial sectors and fueled an economic boom with an attendant expansion of labor markets.<sup>38</sup> Simultaneously, citizens’ burgeoning aspirations

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33. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (holding that the NLRA was a constitutional regulation of interstate commerce).

34. 29 U.S.C. § 164(b) (1994) (proscribing “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”).

35. For two perspectives on this point, see Raymond L. Hogler & Robert LaJeunesse, *Labor Policy and Civic Values: The Curious Contradictions of Right to Work*, 54 LAB. L. J. 152, 220; Stan Greer & Charles W. Baird, *The Phony Case against Taft-Hartley—and the Real One*, 55 LAB. L. J. 1, 25 (2004).

36. Cf. DAVID HACKETT FISCHER, *LIBERTY AND FREEDOM* 4-5 (2005). Wagner’s repeated emphasis on “freedom” for workers echoes a meaning of the word that can be traced to this country’s origins. Because “liberty” and “freedom” have different etymological roots, the terms can have distinctive connotations. One recent work explains that “the original meanings of freedom and liberty were not merely different but opposed. Liberty meant separation. Freedom implied connection.” *Id.* at 5.

37. According to Richard Freeman’s calculations, membership density increased from 8.94 percent in 1909 to 17.4 percent in 1921. FREEMAN, *supra* note 2, at 291.

38. President Wilson created the War Labor Board to stabilize industrial production. It exercised substantial control over important sectors of the economy and developed the foundations of federal labor policy. U.S. DEP’T. OF LABOR, BUREAU OF LABOR STATISTICS, BULLETIN NO. 287,

toward meaningful participation in democracy led to greater involvement in unionism.<sup>39</sup> Employers reacted to those developments in the post-war era with an antiunion offensive that cut membership density by nearly one-third in the 1920s, the largest decline in our history.<sup>40</sup> One form of anti-unionism was the conventional technique of overt repression, exemplified in such labor conflicts as the Great Steel Strike of 1919<sup>41</sup> and the Matewan Coal Strike of 1922. The lynchpin of the “personnel management” movement, and its union substitution technique, was an internal program of representation which featured the trappings of unionism without its potency.<sup>42</sup> Labeled as “company unions” by their detractors, they offered an attractive managerial technique for employers.<sup>43</sup> They also created a political dilemma for Senator Wagner because they had a respectable genesis in American workplaces that demanded a more circumspect and nuanced treatment.<sup>44</sup>

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NATIONAL WAR LABOR BOARD: A HISTORY OF ITS FORMATION AND ACTIVITIES, TOGETHER WITH ITS AWARDS AND THE DOCUMENTS OF IMPORTANCE IN THE RECORD OF ITS DEVELOPMENT (1922) (describing the Board’s activities).

39. JOSEPH A. MCCARTIN, LABOR’S GREAT WAR: THE STRUGGLE FOR INDUSTRIAL DEMOCRACY AND THE ORIGINS OF MODERN AMERICAN LABOR RELATIONS, 1912-1921 *passim* (1997).

40. MARICK F. MASTERS, UNIONS AT THE CROSSROADS: STRATEGIC MEMBERSHIP, FINANCIAL, AND POLITICAL PERSPECTIVES 44 (1997).

41. See generally DAVID BRODY, LABOR IN CRISIS: THE STEEL STRIKE OF 1919 (1964); MATEWAN (John Sayles 1984).

42. NEIL J. MITCHELL, THE GENEROUS CORPORATION: A POLITICAL ANALYSIS OF ECONOMIC POWER (1989) (describing a more subtle form of opposition emerging from the early applications of “welfare capitalism,” which sought to deflect growing antipathy to corporations during the Progressive Era).

43. ROBERT W. DUNN, COMPANY UNIONS, EMPLOYERS’ “INDUSTRIAL DEMOCRACY” 15-23 (1927). For a comprehensive recent treatment, see Daniel Nelson, *The AFL and the Challenge of Company Unionism, 1915-1937*, in NONUNION EMPLOYEE REPRESENTATION: HISTORY, CONTEMPORARY PRACTICE, AND POLICY 61-73 (Bruce E. Kaufman & Daphne Gottlieb Taras, eds. 2000).

44. 2 NLRA LEG. HIST., *supra* note 1, at 2282-84. Wagner defended his legislation as a means of freedom for American workers, but his political opponents advocated the employee representation plans as an alternative means of industrial liberty. In a contentious exchange with Sen. Tydings of Maryland, Wagner argued that membership in a company union rarely involved actual freedom of choice. Repudiating the charge that his law would allow trade unions to “coerce” workers into membership, Wagner said:

There is nothing in the bill that coerces or permits coercion. It merely gives the worker the right to select an organization instead of an individual, if he wants to do that. That is an American right that he ought to enjoy, because what does it profit a man to have so-called “political freedom” if he is made an economic slave?

Wagner again alludes to a distinction between “liberty” as a negative prohibition and a form of emancipation based on positive action. *Id.*

*Company Unions from Ludlow to the New Deal*

Employee representation plans (“ERPs”) followed a notable trajectory across the American labor relations landscape. By the late 1870s, workplace participation schemes received considerable public attention, as leading American industrialists had recognized the advantages of the internal schemes, including their tendency to reduce labor conflict.<sup>45</sup> The direct inspiration for the company unions of the NIRA period originated with the 1914 Ludlow Massacre in Colorado, as well as John D. Rockefeller Jr.’s subsequent attempts to placate the Wilson Administration and rescue his family name from public opprobrium.<sup>46</sup> In the aftermath of Ludlow, Rockefeller and Mackenzie King implemented a system at Colorado Fuel and Iron in September 1915 that served as the future model of the company union for American managers.<sup>47</sup> While personally promoting his plan, Rockefeller recognized that the plan granted the workers collective bargaining rights, it did not “provide for recognition of the United Mine Workers Association of America.”<sup>48</sup> In essence, while conceding collective bargaining, Rockefeller still refused to budge on the key demand for union recognition.

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45. 2 REPORT OF THE COMMITTEE OF THE SENATE UPON THE RELATIONS BETWEEN LABOR AND CAPITAL 803 (1885). On September 22, 1883, George Storm testified before the Senate Committee investigating the relations between labor and capital. Storm was a principal in the cigarmaking firm of Straiton & Storm, the largest cigar manufacturer in the United States. He described a system of employee representation which included the election of delegates, a formal system of handling grievances, and an impartial board of arbitration to resolve disputes. The justification for that system, Storm testified, was a cooperative understanding in a country “where the Government rests so directly on the will of the people, and where those coming under the head of wage-workers have the same political rights that are accorded to people who are supposed to be capitalists.” *Id.*

46. See RAYMOND FOSDICK, JOHN D. ROCKEFELLER, JR.: A PORTRAIT 151 (1953). See generally HOWARD GITELMAN, LEGACY OF THE LUDLOW MASSACRE: A CHAPTER IN AMERICAN INDUSTRIAL RELATIONS (1988) (providing a detailed analysis of the Ludlow Massacre and its effects on American labor relations).

47. An excellent recent treatment of the field of industrial relations attributes its founding to John D. Rockefeller, Jr., and John Commons. BRUCE KAUFMAN, THE GLOBAL EVOLUTION OF INDUSTRIAL RELATIONS: EVENTS, IDEAS, AND THE IIRA 85 (2005). Kaufmann observes, “Then there is the greatest surprise of all. More than any other person, it was John D. Rockefeller, Jr.—the son of the world’s richest capitalist—who in this early period did the most to institutionalize industrial relations in both American industry and American universities.” *Id.*

48. On October 3, 1915, the *New York Times* reported that Rockefeller had instituted a representation system which included elected representatives and a grievance and arbitration procedure. He remained adamant that there would be no union recognition at the time. Managers would not discriminate against union members, but they retained the right to hire non-union miners as well. For details of the plan, see *Delegates Adopt Rockefeller Plan*, N.Y. TIMES, Oct. 3, 1915, at 20, available at ProQuest Historical Newspapers, N.Y. TIMES (1851-2001).

ERPs made their way from Rockefeller's Colorado Fuel and Iron Company into smaller steel firms, such as the Midvale Steel Company.<sup>49</sup> Certain steel industry executives, especially William Dickson at Midvale, urged their adoption as a valuable tool in personnel management and enlightened corporate behavior.<sup>50</sup> In contrast, other steel companies saw the ERPs as a means of avoiding collective bargaining with trade unions and forestalling the intervention of the War Labor Board into their management activities. Accordingly, at the end of the war, major employers across the country viewed the ERPs as a useful device for retrenching union gains made during the 1910s.<sup>51</sup> Representatives of leading American firms would promote company unions as an antiunion technique in a meeting in New York in April 1919.<sup>52</sup> The postwar attack on trade unionism led to a fall in nonagricultural union density over the decade from 17.6 percent to 11.6 percent.<sup>53</sup>

#### *Legislation, Interpretation, and Doctrinal Development*

Following the economic collapse of 1929 and Franklin Delano Roosevelt's election in 1932, the new administration immediately undertook sweeping legislative initiatives. On June 16, 1933, Roosevelt signed into law the NIRA, a comprehensive plan of economic regulation which he envisioned as the centerpiece of his New Deal program.<sup>54</sup> Among other provisions, the NIRA included protections for labor at the insistence of William Green, President of the American Federation of

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49. See generally, Raymond L. Hogler, *Worker Participation, Employer Anti-Unionism, and Labor Law: The Case of the Steel Industry, 1918-1937*, 7 HOFSTRA LAB. L. J. 1, 15-20 (1989); David Brody, *Why No Shop Committees in America: A Narrative History*, 40 INDUS. REL. 356, 367 (2001).

50. On Dickson's career, see GERALD G. EGGERT, *STEELMASTERS AND LABOR REFORM, 1886-1923* (1981). Dickson set out his own views of employee representation in an unpublished autobiographical manuscript. William B. Dickson Papers, Box 5, Folder 5, Chapter X, Labor Archives, The Pennsylvania State University.

51. See Hogler, *supra* note 49, at 22-25.

52. The proceedings at this meeting of the "New York Conference," later the Special Conference Committee, are described in Memorandum from H.F. Brown to Irénée du Pont (May 16, 1919). (Records of E.I. du Pont de Nemours & Co., Administrative Papers, Acc. 1662, Box 27, "Employee Representation," Hagley Museum and Library, Wilmington, Delaware).

53. See MASTERS, *supra* note 40, at 44. For detailed accounts of the managerial project, see ROBERT W. DUNN, *THE AMERICANIZATION OF LABOR: THE EMPLOYERS' OFFENSIVE AGAINST THE TRADE UNIONS* (1927); DAVID MONTGOMERY, *THE FALL OF THE HOUSE OF LABOR: THE WORKPLACE, THE STATE, AND AMERICAN LABOR ACTIVISM, 1865-1925* at 409-10 (1987).

54. See CHARLES L. DEARING ET AL., *THE ABC OF THE NRA* 1 (1934). When he signed the bill, Roosevelt declared: "History probably will record the National Industrial Recovery Act as the most important and far-reaching legislation ever enacted by the American Congress." *Id.*

Labor. Section 7(a) of the NIRA contained three separate clauses dealing with workers. First, it gave employees "the right to organize and bargain collectively through representatives of their own choosing." Second, it stated that no one should be "required as a condition of employment to join a company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing." Third, the statute required employers to comply with any applicable minimum wage and hour laws.<sup>55</sup>

The initial draft of the NIRA prohibited an employer from requiring an employee's membership in "any organization," but Green and other AFL leaders argued that the language would prevent unions from entering into closed shop agreements.<sup>56</sup> To avoid that outcome, they persuaded Congress to substitute "company union" for the words "any organization." With that pejorative term, labor advocates identified organizations dominated by, and subject to the control of, the employer.<sup>57</sup> In opposition to the proposed change, employer representatives testified before the Senate Finance Committee that Section 7(a) deprived workers of their freedom to deal with employers through organizations other than outside trade unions. After extensive Senate debate, Green and the AFL prevailed.<sup>58</sup> Consequently, the issue of union security, arose in the earliest debates on federal collective bargaining policy and was inextricably linked with the question of representation.<sup>59</sup>

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55. 48 Stat. 199 (1933).

56. IRVING BERNSTEIN, NEW DEAL COLLECTIVE BARGAINING POLICY 32-37 (1950).

57. *Id.* at 33-34.

58. *Id.* at 32-37.

59. See CHARLES J. MORRIS, THE BLUE EAGLE AT WORK: RECLAIMING DEMOCRATIC RIGHTS IN THE AMERICAN WORKPLACE (2005) (providing a detailed argument that the law under the NIRA permitted a minority group to bargain with employers). Morris's thesis aims toward reviving a scheme of members-only collective bargaining which would enable contemporary unions to gain an entry into workplaces and thereby create an interest in majority, and exclusive, bargaining procedures. While the historical events of the NIRA-NLRA period reflect some ambiguity about employee representation schemes, Wagner's concern for union security suggests he neither wanted nor intended to sanction competing representatives in a work group. Indeed, when the AFL-CIO attempted to repeal §14(b) in 1965, opponents of the repeal raised the precise argument made by Morris. Economist Edward Keller submitted written testimony describing right to work as a fundamental principle of human liberty and emphasized that company unions offered a legitimate alternative to the "compulsory unionism" associated with the closed shop. In this connection, he cited Congress' decision to authorize company unions in the railroad industry and forbid mandatory union membership between 1934 and 1951. *Repeal of Section 14(b) of the Labor-Management Relations Act: Hearings on H.R. 77, H.R. 4350 and Similar Bills Before the Special Subcomm. of Labor, Committee on Education and Labor*, 89th Cong. 1033-1305 (1965). A short explanation for the difference in the two statutes is that the Railway Labor Act provided dispute procedures for one industry, while the Wagner Act intended to be a foundation of macroeconomic policy for the nation. The

Green's fears about company unions during the NIRA period were justified. Employers had resurrected the earlier representation plans and advocated them as a legitimate option for satisfying the goals of the NIRA. Membership in company unions increased from 40.1 percent of the trade union membership in 1932 to 59.5 percent in 1935,<sup>60</sup> and powerful employer associations pushed for their implementation. The Iron and Steel Institute led the drive for internal representation by publishing an informational pamphlet asserting that the steel industry favored collective bargaining for its employees, but not in the form advocated by the American Federation of Labor.<sup>61</sup> The Institute claimed that in 3,314 companies with 2.5 million employees, over 45 percent of workers bargained under internal representation plans and only 9.3 percent desired trade union representation.<sup>62</sup> A Bureau of Labor Statistics study found that 41.6 percent of the firms surveyed had created a representation plan in response to union organizing threats, thus indicating employers' actual motives for creating company unions.<sup>63</sup> Moreover, as an NIRA administrator, Senator Wagner gained direct personal knowledge about the operation of company unions, and his experience is reflected in the NLRA.

The task of enforcing Section 7(a)'s rights of organization and bargaining fell initially to the National Labor Board ("NLB"), which was made up of three employer members, three labor members, and Senator Wagner as impartial chair.<sup>64</sup> In July 1934, the NLB's successor, the "old" NLRB, took over administration of Section 7(a).<sup>65</sup> The NLRB continued to develop a body of federal labor law building on the work of the NLB and added new principles that subsequently appeared in the Wagner Act. The administrative bodies, guided by the sparse generalities of Section 7(a), articulated a system of collective bargaining that provided

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point is further discussed in connection with the *Houde Engineering Co.* decision, *infra*, text accompanying notes 94, 101 at 35-44.

60. HARRY A. MILLIS & ROYAL E. MONTGOMERY, ORGANIZED LABOR 841 (1945).

61. IRON & STEEL INSTITUTE, COLLECTIVE BARGAINING IN THE STEEL INDUSTRY: WHY STEEL FAVORS EMPLOYEE REPRESENTATION PLANS AND IS OPPOSED TO PROFESSIONAL LABOR UNIONS 4 (1934).

62. *Id.* at 5.

63. U.S. DEP'T. OF LABOR, BUREAU OF LABOR STATISTICS, (BILL NO. 634) CHARACTERISTICS OF COMPANY UNIONS, at 81 (1935).

64. IRVING BERNSTEIN, TURBULENT YEARS: A HISTORY OF THE AMERICAN WORKER, 1933-1941 173. (1970).

65. National Labor Relations Board, The Story of the National Labor Relations Board: 1935-1995 at 7, *at* [http://www.nlrb.gov/nlrb/shared\\_files/brochures/60yrs\\_06-08.pdf](http://www.nlrb.gov/nlrb/shared_files/brochures/60yrs_06-08.pdf) (last visited Sept. 29, 2005).

the groundwork for the NLRA.<sup>66</sup> Many of the key industrial relations principles developed through case adjudication made their way into Wagner's legislative drafts and eventually formed the mechanisms for union recognition and labor-management negotiations.

From the beginning, Wagner aimed his administrative and legislative efforts against the company unions.<sup>67</sup> Those efforts arose in two important contexts: a union's right to enforce compulsory membership and the employer's duty to deal only with a legitimate union as the exclusive representative of employees. In both cases, the existence of the company unions had implications for the political debate about the rights of individuals as against the rights of organizations. Wagner carefully maneuvered around the problem of free choice with respect to compulsory union membership because that matter had a high degree of political volatility.<sup>68</sup> When addressing the matter of exclusive representation, however, Wagner abandoned any notion that labor policy should be subservient to abstract conceptions of individual liberties and made clear that economic necessity required definitive rules about a union's role in collective bargaining.

Regarding union security, Section 7(a)'s language lent itself to extended debate about the limits of employee free choice as opposed to the traditional union prerogatives. Even though the AFL had clarified its in-

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66. *See generally*, JAMES A. GROSS, THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD: A STUDY IN ECONOMICS, POLITICS, AND THE LAW (1974) (discussing the historical significance of Wagner and other important figures in the history of labor relations in the 1930s and 1940s).

67. Wagner encountered the difficulties of dealing with company unions and recalcitrant employers when he ordered Ernst Weir, of Weirton Steel, to conduct an election over Weir's objection that his employees were already represented by their own union. Wagner lost that battle when Weir personally rejected Wagner's demand and then successfully challenged the constitutionality of Section 7(a) and the NLB. Among other rulings, Judge Nields said:

By a clear preponderance of evidence this court finds that the plan of employee representation in effect among the employees of the defendant affords a lawful and effective organization of the employees for collective bargaining through representatives of their own choosing; that in all respects it complies with the provisions of section 7(a) of the National Industrial Recovery Act . . . .

United States v. Weirton Steel Co., 10 F. Supp. 55, 86 (D. Del. 1935).

68. Wagner's African-American constituents insisted that he drop the closed shop language from his initial bill on the ground that it would allow unions greater power to discriminate against them. For example, Dr. D. Witherspoon Dodge, Chairman of the Board of the Atlanta Urban League, wrote Wagner on April 20, 1934, to criticize Wagner's Labor Disputes Act for sanctioning racial discrimination. Most objectionable, Dodge said, was that the closed shop gave labor unions the power to control access to employment. Dodge proposed an amendment to the bill outlawing closed shops if the union denied an eligible applicant membership "on account of race, color or creed." Letter from D. Witherspoon Dodge to Robert Wagner (Apr. 20, 1934), in Robert F. Wagner Papers: Labor Files, Box 2, Folder 8, Georgetown University Library.

tent to protect closed shops by modifying the first draft of the NIRA with a reference to "company unions," it made no attempt to define what "representatives of their own choosing" meant with regard to the internal representation plans.<sup>69</sup> In its decisions, the NLB never adopted a *per se* prohibition of such entities as an acceptable form of collective dealing. Rather, it developed guidelines to determine whether an employer's plan genuinely reflected the wishes of the employees and had been "freely chosen" by them. Among other criteria, the NLB considered the extent of the employer's control over the organization, the employees' opportunity to reject the plan, and the available choice of outside representation. If the NLB concluded that employees exercised genuine free choice in the matter of representation, they would be permitted to bargain collectively through an inside organization.<sup>70</sup> Given that principle, the possibility followed that employees could choose such an entity as their bargaining agent, and the organization then legitimately could negotiate for a closed shop.

The NLB and the first NLRB failed to issue a clear ruling on union security and commentators offered differing opinions about the validity of contract clauses requiring compulsory membership under the NIRA. One analysis noted, for example, that while Section 7(a) strengthened labor organizations by prohibiting "yellow dog" agreements, contractual arrangements whereby the employee agrees not to join a union, its language could "be construed to have outlawed likewise the union shop contract."<sup>71</sup> That conclusion followed from the fact that an employer having a closed shop agreement with one union effectively foreclosed his employees from joining any other union. One means of circumventing the apparent proscription of Section 7(a) involved looking to the legislative intent underlying the provision.<sup>72</sup> Thus, given the long history of closed shops and their prevalence in industrial relations, if "Congress

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69. Thus, employers' advocates argued that employee representation was consistent with Section 7(a). Walter C. Teagle, Chairman of the Industrial Relations Committee in the Department of Commerce, sent Wagner a memorandum stating, "Some critics have relied upon the Recovery Act to outlaw employee representation and were disappointed that it did nothing of the kind." Memorandum from Walter C. Teagle, Chairman, Indus. Relations Comm., to Senator Robert Wagner, Employee Representation and Collective Bargaining, at 6 (1933-1934) (on file with the National Labor Relations Board, Record Group 25, Box 84, Sen. Wagner's Correspondence, 1933-34).

70. See LEWIS L. LORWIN & ARTHUR WUBNIG, *LABOR RELATIONS BOARDS: THE REGULATION OF COLLECTIVE BARGAINING UNDER THE NATIONAL INDUSTRIAL RECOVERY ACT* 143 (1935).

71. Comment, *Effect of Section 7(a) of NIRA on the Validity of a Closed Union-Shop Contract*, 44 YALE L.J. 1067, 1069 (1935).

72. "'Closed shops' had not been outlawed by NIRA because, it was said, Congress never had that intention." *Id.* at 1071.

had intended their outlawry, the intention would have been phrased in no uncertain terms.”<sup>73</sup>

Likewise, some public statements of the NLB officials suggested that it would approve union security agreements. Milton Handler, the NLB’s General Counsel, concluded that the statute expanded the protections afforded labor and that closed shops were consistent with Congressional intent.<sup>74</sup> Regardless of legal commentary, neither the NLB nor the “old” NLRB came to grips with the issue of union security in their case law. The most comprehensive assessment of the question summarized the doctrine as follows: “In all of its true decisions which touched upon the closed shop, directly or indirectly, the Board was cautious and obscure; and it is easy to draw conflicting conclusions from the results.”<sup>75</sup> Administrative case files help to clarify the causes of doctrinal obscurity, and not surprisingly, company unions were at the heart of the matter.

#### *Defending Security under the NIRA: Two Cases*

The most important NIRA decision dealing with the closed shop involved an in-house union at the Tamaqua Underwear Company in Tamaqua, Pennsylvania. It illustrated the interplay between the considerations of a “freely chosen representative” and the imperatives of collective bargaining policy. In May 1934, the Amalgamated Clothing Workers (“ACW”), an independent entity, mounted an organizing campaign at the firm. The ACW engaged in strikes and picketing to force recognition, but the company’s owner, J.E. Auchmuty, refused to bargain with the AFL-sponsored organization. The NLB assumed jurisdiction over the labor dispute, and the Philadelphia Regional Labor Board conducted a secret ballot election. The in-house Tamaqua Employees’ Union (“TEU”) won that election by a substantial margin. The TEU’s first and only contract demand was for a closed shop, which the company agreed to implement.<sup>76</sup>

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73. *Id.*

74. In an address to the Legal Division of the National Recovery Administration in April 1934, Handler said Section 7(a)’s guarantee for workers to join organizations of their own choosing did not prohibit a closed shop. “Clause two [of Section 7(a)] prevents the imposition of the condition that a worker join a company union. It does not expressly invalidate the requirement that he join a bona fide union.” Consequently, union security clauses were legal, and, by implication, would preclude proportional representation. Milton Handler, Address to the Legal Division of the National Recovery Administration (Apr. 1934) *quoted in* LORWIN & WUBNIG, *supra* note 70, at 198 n.39.

75. LORWIN & WUBNIG, *supra* note 70, at 198-99.

76. Tamaqua Underwear Co., 1 NLRB 10 (1934).

Those circumstances squarely raised the issue of whether an organization chosen by employees through board auspices, could lawfully negotiate for a compulsory membership provision. The labor boards chose to dodge that legal conundrum by characterizing the TEU as a dominated, illegal company union under Section 7(a). The NLRB eventually ruled that the organization's leadership consisted of employees in "an executive or supervisory capacity."<sup>77</sup> Even if Auchmuty did not create the TEU, "he ha[d] at least fostered its growth with considerable enthusiasm, by advising his employees to affiliate therewith, and by permitting [the TEU] to use the plant for meetings and his office equipment for certain typing."<sup>78</sup> Consequently, the NLRB declared that it was not required to decide "the validity of a closed shop agreement with a bona fide labor union resulting in the discharge of employees not joining the union."<sup>79</sup> The NLRB went on to describe TEU's labor agreement, which consisted only of the closed shop provision, as "an oddity in the annals of labor relations."<sup>80</sup> But the NLRB's assessment was factually inaccurate on the issue of compulsory membership in an internal representation plan. The Board's case files portray a different set of circumstances than those described in the formal opinion, and as a practical matter, the TEU's proposal for a closed shop was a routine bargaining demand.

In a letter to Lloyd Garrison, Chairman of the NLB, Auchmuty emphasized that the TEU had received a majority of the votes cast for representation in a secret ballot election and had been awarded NLB certification as a legitimate bargaining entity.<sup>81</sup> Auchmuty asserted that when the TEU presented him with its demand for a closed shop, he had declined the request until the Regional Board advised him on the question. According to Auchmuty, the TEU informed him "that unless the [Company] agreed to recognize the 'closed shop' that the Tamaqua Underwear Employees Union would strike."<sup>82</sup> Because the ACW supporters were already on strike, Auchmuty faced a difficult choice between the competing factions. Auchmuty stated that the two groups refused to work with each other and added that the problem was exacerbated by a

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77. *Id.* at 11.

78. *Id.*

79. *Id.*

80. *Id.*

81. See Letter from J.E. Auchmuty, owner of Tamaqua Underwear Co. to Lloyd Garrison, Chairman of the Nat'l Labor Bd., (July 27, 1934) (on file with the National Archives).

82. *Id.*

“marked racial division.”<sup>83</sup> A docile company union, of course, would hardly present a demand backed by a strike threat.

Stanley Root, Executive Secretary of the Philadelphia NLB, confirmed Auchmuty’s statements. According to Root, the TEU committee met with the Board on June 22, 1934, for information about the closed shop. Root recalled that workers wanted “to know whether they [could] compel every employee to join their union,”<sup>84</sup> to which the Board responded:

[T]he question of the legality of the closed shop is one which will require a court ruling to determine. There have been no decisions so far as we know on the exact interpretation and application of that portion of Section 7-A, and we are not prepared at this time, nor authorized to answer whether it is legal or not.<sup>85</sup>

The TEU’s bargaining position was therefore a lawful one under existing administrative rules as Root understood them. That is, the company union might legitimately have been the “representative of the [employees’] own choosing,” and if it was, then it would be entitled to the same privilege, a closed shop, as the outside union.

Further, contrary to the NLRB’s characterization of the TEU as a “dominated organization” that Auchmuty intimidated and coerced, the independent trade union had itself tried to influence the election with threats of violence against TEU supporters. According to contemporary accounts, the United Mine Workers held a mass meeting of 2,000 protesters, and union groups visited the homes of TEU members to convince them to join the outside union.<sup>86</sup> The NLB field investigator’s report contains a vivid assessment of the conditions that led him to delay the election for several days. In his words:

I learned from very responsible sources that if the election had been held and the company union had won, as it undoubtedly would have done whether as a result of the intimidation and coercion by the management or not, in that event the United Mine Workers would have turned out en masse, as it is said they had threatened to do, together

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83. *Id.*

84. Letter from Stanley W. Root, Executive Secretary, Philadelphia Reg. Labor Bd., Nat'l Labor Bd., to J.E. Auchmuty, owner of Tamaqua Underwear Co. (June 22, 1934) (on file with the National Archives).

85. *Id.*

86. *Employees Vote Company Union*, THE EVENING COURIER, (Tamaqua, PA.), June 21, 1934, at 1.

with sympathizers from other areas, and there would have been trouble, turbulence and violence such as Tamaqua probably never knew before.<sup>87</sup>

Auchmuthy's consent to allow TEU members to use typing facilities hardly ranks on the same intimidation level as when the United Mine Workers threatened that its members would riot. A more reasonable conclusion is that the company's workers organized themselves into two antagonistic factions, and the organization having majority support sought the eradication of the independent union through the closed shop agreement. Far from being anomalous, their demand was a rational response to a perceived threat.

The *Tamaqua* case illustrates how the conception of individual free choice became enmeshed with, and subordinated to, administrative interpretations of the NIRA's objectives. In an election overseen by federal authorities, employees voted in favor of representation through an ERP.<sup>88</sup> Given the situation, it is unlikely that Auchmuthy in fact had sufficient influence over his work force to manipulate the outcome of the vote. A better explanation is that the NLRB's condemnation of the TEU as an illegitimate entity arose out of institutional necessity. Had the NLRB recognized the TEU as the bargaining agent, it would have reached the question of how the federal policy should deal with the closed shop and ERPs, but it was unprepared to rule on that issue. In a different context, however, the boards were more willing to aggressively promote the substantive labor agenda that furthered the economic objectives later identified so clearly by Wagner.

The second aspect of the interplay between free choice and internal organizations also arose in 1934. The problem was whether an outside union's representation of a majority of workers would nevertheless preclude an inside organization from representing the minority in dealings with the employer. Wagner and the NLB had already conceded that if workers were given an uncoerced opportunity to select an in-house organization over a trade union, their choices would be respected.<sup>89</sup> Build-

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87. Nathan Shefferman, Supplemental Report to that of June 5, 1934 (June 14, 1934) (unpublished report on file with the National Archives).

88. In his letter of June 22, 1934, NLB Secretary Root informed Auchmuthy that in the election at Tamaqua, 132 employees voted in favor of the Employees Association and 66 voted in favor of the Amalgamated Clothing Workers. Therefore, Auchmuthy was instructed to deal with the Association for one year from the date of the election over "matters of hours, wages, and working conditions." ROOT, *supra* note 84, at 2.

89. Such was the law under the NLB, the old NLRB, and the early interpretations of the NLRA. The doctrinal shift came in 1939 in the case of *Newport News Shipbuilding & Drydock Co. v. NLRB*, 308 U.S. 241 (1939). After the Board announced that it would disestablish the employer's

ing on that idea, employers devised a sophisticated alternative position concerning company unions under the NIRA. They insisted that even if a majority of affected employees voted for an outside representative, the employer should also be permitted to deal with those who preferred the employer's plan. Rather than *exclusive* representation, employers argued for the concept of *proportional* representation.

The argument had powerful support because President Franklin Roosevelt accepted the principle and relied on that interpretation of the NIRA to resolve a critical labor dispute in the automobile industry. In March 1934, union organizers requested that the NLB conduct elections at General Motors, but the company rejected the NLB's authority to do so.<sup>90</sup> The NLB appealed to Roosevelt for assistance. Attempting to avoid a costly work stoppage, Roosevelt compromised on the issue of exclusive representation. His settlement of the strike recognized pro rata representation based on the total membership of competing organizations, including company unions.<sup>91</sup> The implications of Roosevelt's decision were straightforward: "If some workers voted for the company union and others for the trade union, the employer must deal with both under a system of plural unionism or proportional representation. In defiance of his National Labor Board, the President had junked majority rule and exclusive representation."<sup>92</sup> In addition to the majority rule, Roosevelt had also destroyed the conceptual foundations of union security. Repudiating the administration's position, however, the NLRB refused to ac-

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longstanding company union, workers organized their own referendum and voted by a substantial margin to keep it. The Fourth Circuit Court of Appeals said this was a proper exercise of free choice, commenting,

On June 7, 1938, after the employees had been notified of the recommendation made by the trial examiner on March 9, 1938, that the Employees' Representative Committee be disestablished, a referendum with reference to the continuance of the plan was held. 3455 workers voted to continue the plan, 562 voted to discontinue the plan, and 51 ballots were void.

Newport News Shipbldg. & Dry Dock Co. v. NLRB, 101 F.2d 841, 846 (4th Cir. 1939). A week later, in the regular election, "4233 out of 4889 men present at work elected 43 representatives to serve from July 1, 1938, to June 30, 1939." *Id.* Despite this evidence, the Supreme Court reversed. As a result, company unions became *per se* illegal, regardless of employee sentiment. That rule is consistent with the main economic purpose of the NIRA, and it flatly ignores any concern for individual liberty as the animating policy objective of the law.

90. See SIDNEY FINE, SIT-DOWN: THE GENERAL MOTORS STRIKE OF 1936-1937 30 (1969).

91. In his public statement, Roosevelt said that the NIRA would allow employees to have a right to choose their own representatives and to be free from discrimination on the basis of labor affiliation. He then enumerated principles of settlement in the automobile industry: "If there be more than one group, each bargaining committee shall have total membership pro rata to the number of men each member represents." WASH. POST, Mar. 26, 1934, *reprinted* in 1 NLRA LEG. HIST., at 1067.

92. BERNSTEIN, *supra* note 64, at 185.

cept proportional representation in board case law, and the principle of exclusive representation was explicitly stated in Section 9 of the NLRA.<sup>93</sup>

The most emphatic declaration of federal policy prior to the Wagner Act came in August 1934 in the *Houde Engineering* case.<sup>94</sup> The opinion sets forth in plain terms the economic rationale of collective bargaining. In November 1933, The United Automobile Workers Federal Labor Union No. 18839 ("UAW") demanded representation at Houde. Upon receiving this demand, the company immediately resuscitated an entity called the Houde Welfare and Athletic Association ("HWAA"), claiming that it served as the bargaining agent for employees. After board intervention, the company agreed to an election in which the UAW and the HWAA appeared on the ballot, and workers voted 1,105 to 647 in favor of the UAW, with some 400 abstentions. Thereafter, Houde agreed to meet with the outside union for purposes of discussing terms and conditions of employment. However, management insisted that it would also deal with the HWAA and its members.<sup>95</sup>

The NLRB's opinion in *Houde* started with the principle that Section 7(a) intended to promote collective bargaining not simply as an industrial process but as the means to obtaining an important policy goal.<sup>96</sup> The Board said that the end product of collective bargaining was an agreement that stabilized wages, hours and working conditions for a fixed period of time.<sup>97</sup> Toward that goal, the employer's duty was to negotiate in good faith with the employee's representative and "to make every reasonable effort to reach an agreement."<sup>98</sup> Explaining the policy dimensions of Section 7(a), the NLRB stated:

The fundamental aim of the Act was to restore prosperity by increasing purchasing power. Industry was to be stabilized by permitting employers to combine together, immune, to a large extent, from the restrictions of the anti-trust laws, for the purpose of eliminating cut-throat competition, waste, and the grosser evils of unplanned production.<sup>99</sup>

Labor's contribution to recovery was to ensure that "the gains which industry might derive from its new powers to control production

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93. National Labor Relations Act, PUB. L. NO. 198, 49 Stat. 453 (1935).

94. MORRIS, *supra* note 59, at 48-69.

95. *Houde Eng'g. Corp. and United Auto. Workers Fed.*, 1 NLRB 35 (1934).

96. *Id.* at 35.

97. *Id.* at 39.

98. *Id.* at 44.

99. *Id.* at 36.

and prices would be equitably shared with the wage-earners, and thus serve to increase purchasing power.”<sup>100</sup> Those economic gains formed the basis of the collective agreement, in turn playing “an important, if not indispensable, part” in the macroeconomic agenda.<sup>101</sup>

Consistent with that reasoning, the company’s proposed plan of dealing with both majority and minority representatives effectively thwarted the goal of the NIRA.<sup>102</sup> The company’s nonchalant approach to bargaining created an environment in which neither competing organization could successfully negotiate an agreement. In the NLRB’s assessment, the company perceived its obligation to be merely “that the company should periodically receive each committee, listen to its suggestions, discuss them politely and then act upon them or not, as it might see fit.”<sup>103</sup> However, the opinion emphasizes that the NIRA “was not enacted to promote discussions. Such an anemic purpose was foreign to the Recovery Act.”<sup>104</sup> Since it would be impractical to accommodate both minority and majority representatives in bargaining, dual representation conflicted with the intent and purposes of the NIRA.

Thus, regardless of the views of Roosevelt and NRA administrators, the NLRB ruled that “the only interpretation of Section 7(a) which can effect to its purposes is that the representatives of the majority should constitute the exclusive agency for collective bargaining with the employer.”<sup>105</sup> The logic behind the NLRB’s firm stance on exclusive

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100. *Id.*

101. *Id.* at 37.

102. Cf. MORRIS, *supra* note 59, at 49 (interpreting *Houde* to leave open the question of minority representation in certain circumstances, such as the situation where only a plurality of voters in the unit vote for a specific representative). Advocates of the company unions, including NRA General Counsel Donald Richberg, favored the proportional representation scheme announced by President Roosevelt in the automobile settlement. Rather than reading *Houde* for what it might have left open and implied about free choice, the decision makes more sense as an affirmation of the economic dimension of the NLRA. That view is supported by the *Houde* case files. In an early draft of the opinion (unpublished and marked “Confidential”), the NLRB conceded important ground to the administration. The draft allowed employees to remain members of either the UAW or the HWAA—thereby eliminating the closed shop—and to present grievances through either entity. In explicit terms, “This ruling does not require any employee to join the Federal Labor Union or to abandon his membership in the Houde Welfare and Athletic Association or any other organization of his own choosing, nor does it prevent his presenting grievances individually or through the Welfare Association or any other representative.” The document has a handwritten caption, “Proposed Draft of Old N.L.B. decision in *Houde* case (never issued).” NLRB Case Files, Case No. 12, Box 6. Accordingly, the document suggests that the NLB did in fact consider, but rejected, any form of minority or proportional representation.

103. *Houde*, 1 NLRB at 39.

104. *Id.*

105. *Id.* at 40.

representation explains Wagner's unremitting attacks on the company unions, which began with the earliest versions of the NLRA.<sup>106</sup>

#### *Wagner's Drafts*

Senator Wagner began work on a labor bill in January 1934 when he met with William Green, John L. Lewis, Leon Keyserling, and others to launch the drafting process. Between that meeting and the signing of the NLRA in June 1935, Keyserling and Wagner produced many versions of the legislation which eventually culminated in the NLRA.<sup>107</sup>

The first public version of the statute was the Labor Disputes Bill, which Wagner introduced as an amendment to the NIRA to "clarify and fortify" the provisions of section 7(a).<sup>108</sup> Wagner laid out the essential themes of his industrial relations system in his introductory remarks. He stated that the "greatest obstacles to collective bargaining are employer-dominated unions," which undermined the notion of equal bargaining power between employers and employees. "[The company union] deprives workers of the wider cooperation which is necessary, not only to uphold their own end of the labor bargain but to stabilize and standardize wage levels, to cope with the sweatshop and the exploiter, and to exercise their proper voice in economic affairs."<sup>109</sup> Wagner's bill would forbid an employer from fostering or influencing any organization that dealt with wages, hours, and working conditions.<sup>110</sup>

The second weakness of Section 7(a) was its failure to mandate exclusive bargaining representation, which Wagner regarded as a necessary condition of union security and thus of union power. He acknowledged that some interpretations of Section 7(a) authorized employees to select alternative representation or to deal with the employer on an individual basis.<sup>111</sup> Wagner firmly rejected that principle, and he explained his rationale in a statement which tied together the themes of exclusive representation, closed shops, and the appropriate legal standards to govern union security. In his critique of the pro rata principle, Wagner stated:

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106. In his study of the legislative evolution, Casebeer notes: "The focus of the first draft is telling. Draft 1 consists entirely of one section which prohibits company unions and specifies five illegal circumventions of the prohibition." Casebeer, *supra* note 15, at 78.

107. *Id.* at 75. The different versions of the drafts are discussed in MORRIS, *supra* note 59, at 299 n. 19.

108. 1 NLRA LEG. HIST. 15.

109. *Id.* at 15.

110. *Id.* at 16.

111. *Id.*

Such an interpretation, which illegalizes the closed union shop, strikes a death blow at the practice and theory of collective bargaining. It allows the unscrupulous employer to divide the workers against themselves . . . . The new legislation which I am proposing does not dictate any policy as to the closed union shop. That is a problem which labor must work out for itself. But the bill does make it clear that section 7(a) was not intended to ban the closed union shop, and that Congress never intended to place employees in a worse position than they were before the Recovery Act was passed.<sup>112</sup>

As a necessary component to industrial order, Wagner envisioned outside bargaining agents, representing all employees covered by the agreement and having the capacity to contract for union membership as a condition of employment under the rights they enjoyed prior to Section 7(a). Importantly, he understood the bill to protect unions' legal rights with respect to the closed shop as they then existed, and not as a concession to some overriding state or individual interest.<sup>113</sup>

Wagner was forced to withdraw his Labor Disputes Act as a consequence of President Roosevelt's foray into the national labor arena to settle the threatened automobile strike.<sup>114</sup> The ongoing occurrences of labor strife persuaded Roosevelt to take action in overhauling administrative procedures under Section 7(a), and he submitted his Public Resolution No. 44 to Congress in June 1934. The resolution, which had support from labor and industry, readily passed both the House and

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112. *Id.*

113. This view conforms to the structure of the NLRA, which nowhere other than § 14 (b) expressly yields to an overriding state concern in regulating labor law. The uncertainty about the federal rulings dealing with Section 7(a) led Wagner to repudiate them altogether and return to the pre-NIRA common law. In fact, legal doctrine at the time offered no support for the proposition that states were somehow the superior repository of individual rights. *See Slaughter House Cases*, 83 U.S. 36 (1872) (Fields, J., dissenting), stating in a dissenting opinion that laid the jurisprudential foundations for our federal system of civil liberties:

The question presented is, therefore, one of the gravest importance, not merely to the parties here, but to the whole country. It is nothing less than the question whether the recent amendments to the Federal Constitution protect the citizens of the United States against the deprivation of their common rights by State legislation.

*Id.* at 89. *See also* Butchers' Union Slaughter-House and Live-Stock Landing Co. v. Crescent City Live-Stock Landing and Slaughter-House Co., 111 U.S. 746 (1884) (Fields, J., concurring) (demonstrating how Field's view soon prevailed). Justice Field held that as a federal matter, the right to pursue an occupation or calling "is a distinguishing privilege of citizens of the United States, and an essential element of that freedom which they claim as their birthright." *Id.* at 757. As a result, the argument that right to work laws are the legitimate progeny of some supremacist vision of states' rights is constitutionally untenable. It follows that if Wagner intended to preempt state legislation interfering with union security, he had the constitutional authority to do so unless union security interfered with some federal constitutional right.

114. *See* BERNSTEIN, *supra* note 56, at 76-83.

Senate.<sup>115</sup> Under the law, Roosevelt created the old National Labor Relations Board by executive order. The NLRB enjoyed greater formal authority than the NLB, and it assumed jurisdiction over the existing NLB caseload.<sup>116</sup>

Despite that setback, Wagner brought another version of his legislation to the Senate in February 1935, and this bill marked as S.1958, with minor revisions, became the NLRA.<sup>117</sup> Wagner's introductory remarks on the NLRA clarify his policy agenda and the labor relations context. First, Wagner emphasized that the earlier failure to adequately protect employees' rights to collective action deprived them of participation in "our national endeavor to coordinate production and purchasing power. The consequences are already visible in the widening gap between wages and profits."<sup>118</sup> He then responded to the "wide-spread propaganda to the effect that this bill would tend to create a so-called 'labor dictatorship.'"<sup>119</sup> To the contrary, Wagner insisted, the law did not prefer any union or form of organization but "seeks merely to make the worker a free man in the economic as well as the political field."<sup>120</sup> Although the bill outlawed company unions, Wagner emphasized that "nothing in the measure discourages employees from uniting on an independent or company-union basis, if by those terms we mean simply an organization confined to the limits of one plant or employer."<sup>121</sup>

Turning to the closed shop issue, Wagner insisted that he did not advocate compulsory union membership for all industry. "[S.1958] does not force any employer to make a closed-shop agreement. It does not even state that Congress favors the policy of the closed shop."<sup>122</sup> Rather, in states where closed shops were legal at common law, unions would be permitted to bargain for them. "Far from suggesting a change," Wagner insisted, "it merely preserves the status quo."<sup>123</sup> In a national radio address on April 21, 1935, Wagner made the point more forcefully: "The malicious falsehood has been widely circulated that the measure was designed to force men into unions, although the text provides in simple English prose that workers shall be absolutely free to belong or to refrain

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115. 1 NLRA LEG. HIST., *supra* note 1, at 1255A.

116. See BERNSTEIN, *supra* note 56, at 84. (The new board consisted of Lloyd K. Garrison, Harry A. Millis, Edwin A. Smith, and after Garrison's resignation, Francis Biddle). *Id.*

117. See 2 NLRA LEG. HIST. *supra* note 1, at 3270.

118. 1 NLRA LEG. HIST. *supra* note 1, at 1312.

119. *Id.*

120. *Id.*

121. *Id.* at 1312.

122. 79 CONG. REC. 2372 (1935), reprinted in 1 NLRA LEG. HIST., *supra* note 1, at 1313.

123. *Id.*

from belonging to any organization.”<sup>124</sup> A year earlier, Wagner had explained to John Collins, a New York City service station attendant who testified about the company unions, the NLRA was designed to ensure that a worker would both be “a free man” and have “genuine collective bargaining.”<sup>125</sup> Wagner believed that American workers would attain freedom through meaningful communal action and not by expressing individual self-interest, divorced from class solidarity.<sup>126</sup>

Most importantly for the scope of state authority, when Wagner assured the public and his colleagues in Congress that no “existing law in regard to the closed shop”<sup>127</sup> would be changed, his statement had a very precise context. The Senate comparison of the Labor Disputes Act and S. 1958 makes clear exactly why state law was afforded a degree of deference as an exception to federal supremacy. According to the legislative history:

The provisos [to Section 8(3)] in the two drafts are similar in purpose. They are intended merely to preserve the status quo as to the legality of closed-shop agreements under the common law in the different States, and to make clear that neither section 7(a) nor any other statute of the United States precludes such agreements, provided that the labor organization represents a majority and is not established, maintained, etc., by action constituting an unfair labor practice. The proviso does not make closed-shop agreements legal; it merely says that nothing herein should legalize them. The operation of State common law on the subject is left unaffected.<sup>128</sup>

Wagner’s understanding of “existing law” was based upon a body of common law principles governing unions’ rights to demand a closed shop, and he had no reasonably foreseeable expectation of future legislative action to restrict closed shops.

To begin with, common law at the time was moving in a direction favorable to the unions. It was unnecessary for Wagner to risk intensified political opposition by proposing a federal rule of union security. In any event, the NLRA boards never developed any doctrine on closed shops, and state laws incorporated a complex and evolving set of judicial principles affecting various aspects of union security. A leading treatise

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124. 2 NLRA LEG. HIST., *supra* note 1, at 2284.

125. MILLIS & MONTGOMERY, *supra* note 60, at 563.

126. For a convincing elaboration of this idea, see Mark Bahrenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379 (1993).

127. MILLIS & MONTGOMERY, *supra* note 60, at 563.

128. 1 NLRA LEG. HIST., *supra* note 1, at 1353 (emphasis added).

of the time summarized the law with the following assessment: “[t]hough there have been recent decisions in which the closed or all-union shop has been held to be illegal and strikes to secure it have been enjoined, there is now apparent a tendency for most of the courts to accept a different view.”<sup>129</sup> Wagner most likely believed that state courts would continue to formulate principles advantageous to unions in attaining closed shops, and that state governments would not pass legislative prohibitions on closed shops.<sup>130</sup> Had Wagner been more prescient, he might have corrected any misinterpretation by writing the § 8(3) proviso as follows: that nothing “in any other statute of the United States *or statute of any state* would preclude a closed shop agreement.” As the law stood at the time, the italicized language would have been redundant because states lacked the power to legislate against closed shops.

Wagner’s understanding of the current legal environment was supported by a line of Supreme Court doctrine holding any legislative restrictions on employment contracts to be unconstitutional. Prior to 1935, the U.S. Supreme Court had ruled in a number of cases that states could not enact laws which interfered with “freedom of contract.” When the Kansas legislature passed a statute forbidding use of “yellow dog” contracts by which employers required employees to agree as a condition of employment that they would not join a union, the U.S. Supreme Court held that the Kansas legislation interfered with rights protected under the 5th and 14th amendments to the federal constitution.<sup>131</sup> The terms “liberty” and “property” meant that parties were free to enter into labor contracts on any conditions they wished, and legislatures could not restrict that freedom.<sup>132</sup> Logically, if states lacked power to forbid agreements to

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129. MILLIS & MONTGOMERY, *supra* note 60, at 563.

130. After 1935, judges began to confer greater legal powers on unions to enforce compulsory membership. In a landmark 1938 decision, the New York Court of Appeals reversed an earlier case limiting the use of the closed shop. *Williams v. Quill*, 12 N.E.2d 547 (N.Y. 1938). A commentator concluded, “The two opposing views signalize the fundamental changes that have take place in judicial treatment of these [closed shop] agreements during the intervening period. *The All-Union Shop in the Courts*, 6 NAT. JURIDICAL ASS’N MONTHLY BULLETIN, 147, 154-58 (June 1938).

131. See *Coppage v. Kansas*, 236 U.S. 1 (1915), *overruled in part* by *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177 (1941). The Court summarized the point as follows: “Under constitutional freedom of contract, whatever either party has the right to treat as sufficient ground for terminating the employment, where there is no stipulation on the subject, he has the right to provide against by insisting that a stipulation respecting it shall be a *sine qua non* of the inception of the employment, or of its continuance if it be terminable at will” *Id.* at 13.

132. Subsequently, in *Texas & New Orleans R.R. Co. v. Brotherhood of Ry. & S.S. Clerks*, 218 U.S 548 (1930), the Court distinguished the *Coppage* precedent with the statement that:

The Railway Labor Act of 1926 does not interfere with the normal exercise of the right of the carrier to select its employees or to discharge them. The statute is not aimed at this

refrain from membership, they likewise lacked power to forbid agreements requiring membership. Wagner can hardly be faulted for failing to anticipate the transformation of constitutional doctrine dealing with “freedom of contract” and the rise of state legislation.<sup>133</sup>

### WORKINGMAN’S LIBERTY: THE GENESIS OF TAFT-HARTLEY’S § 14(B)

In May 1937, the U.S. Supreme Court upheld the power of the federal government to regulate labor relations as a matter of interstate commerce.<sup>134</sup> Antiunion factions immediately mobilized to change the NLRA. One historical analyst observed, “[s]carcely had the ink dried on the President’s signature establishing the National Labor Relations Act as part of our national policy when bills to repeal or amend the Act began pouring into the congressional mill, and some 230 bills were introduced during the decade 1936-46.”<sup>135</sup> Developments in the states provided the political momentum for changes in the federal law, including restrictions on compulsory union membership.<sup>136</sup> The array of legislative attacks on organized labor offered a broad range of tactics to destabilize union solidarity, all of which fit neatly under the ideological rubric of rights of liberty. By focusing on individual rights to evade collective responsibility to the bargaining agent, Congress emasculated the economic

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right of the employers but at the interference with the right of employees to have representatives of their own choosing.

*Id.* at 571.

133. Wagner’s legal theory about the NLRA was that the commerce clause supported a collective bargaining law, which would be consistent with “freedom of contract” under the *Texas & New Orleans R.R. Co.* reasoning. *Id.* Even if the Supreme Court upheld the NLRA, however, it might still strike down state laws attempting to prohibit contractual agreements for a closed shop. The two strands of constitutional doctrine are independent and unrelated. As the Court stated the principle that delimited state interference with contracts in *Coppedge*:

[I]n our opinion, the Fourteenth Amendment debars the States from striking down personal liberty or property rights, or materially restricting their normal exercise, excepting so far as may be incidentally necessary for the accomplishment of some other and paramount object, and one that concerns the public welfare. The mere restriction of liberty or of property rights cannot of itself be denominated “public welfare,” and treated as a legitimate object of the police power; for such restriction is the very thing that is inhibited by the Amendment.

236 U.S. 1, at 18-19.

134. See *NLRB. v. Jones & Laughlin Steel Co.*, 301 U.S. 1 (1937).

135. HARRY A. MILLIS & EMILY CLARK BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY: A STUDY OF NATIONAL LABOR POLICY AND LABOR RELATIONS 332 (1950).

136. See CHARLES C. KILLINGSWORTH, STATE LABOR RELATIONS ACTS: A STUDY OF PUBLIC POLICY 16-23 (1948).

underpinnings of collective bargaining law. State legislation provides the clearest evidence of lawmakers' intent to corrode union power.

### *Rising Anti-unionism*

During World War II, a number of states enacted their own labor laws in reaction to labor's growing power and influence. Those laws typically attempted to limit or curtail the rights granted to unions under the NLRA and were expressly antiunion in content.<sup>137</sup> As part of the general movement, five states passed right to work laws between 1944 and 1946, and another seven joined that list by 1947.<sup>138</sup> The Supreme Court's new constitutional views permitted greater latitude for employment regulation, including a decision specifically upholding the concept of statutory right to work.<sup>139</sup> Several bellwether states set the tenor and terms of the antiunion agenda, making no effort to disguise their antipathy toward compulsory membership. That political strategy culminated in Section 14(b) of Taft-Hartley.

Colorado's Labor Peace Act exemplified the invidious influence of decentralized regulation of labor policy. Enacted in 1943, the Peace Act was supported by rural agriculturalists and political conservatives and was generally promoted as necessary to maintain labor productivity for the war effort.<sup>140</sup> The Peace Act's provisions on union security, however, had nothing to do with labor stability and everything to do with punitive measures against unions.<sup>141</sup> First, the law allowed for the negotiation of compulsory membership, but only on the condition that members of the specific bargaining unit had approved the provision by secret ballot.<sup>142</sup> Second, the statute required a bargaining agent to obtain written authorization from each member before dues would be deducted from an em-

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137. *Id.*

138. See GILBERT GALL, THE POLITICS OF RIGHT TO WORK: THE LABOR FEDERATIONS AS SPECIAL INTERESTS, 1943-1976 18-20 (1988).

139. *Lincoln Fed. Labor Union v. N.W. Iron & Metal Co.*, 335 U.S. 525 (1949). The Court said that in rejecting the *Coppage* line of cases it was returning "to the earlier constitutional principle that states have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law."

*Id.* at 536.

140. HARRY SELIGSON & GEORGE BARDWELL, LABOR RELATIONS IN COLORADO 140-41 (1961).

141. See generally Raymond Hogler & Steven Shulman, *The Law, Economics, and Politics of Right to Work: Colorado's Labor Peace Act and Its Implications for Public Policy*, 70 U. COLO. L. REV. 871, 884-85 (1999).

142. Labor Peace Act, 1943 Colo. Sess. Laws 392, 396.

ployee's paycheck.<sup>143</sup> Organized labor protested those and other measures of the Peace Act as characteristic of "fascism," and the AFL successfully litigated against the more extreme parts of the law.<sup>144</sup> The election provisions, however, remained intact, and Colorado is now the only state to have a "modified" right to work law.<sup>145</sup> This historical example continues to inspire political diversions in the form of attacks on union resources.<sup>146</sup>

The 1946 elections produced sizeable Republican majorities in the House and Senate. The shift in the political environment, along with high levels of strike activity, generated strong public support for modifications to the Wagner Act.<sup>147</sup> In the Taft-Hartley scheme, unions served no beneficial economic purpose. Instead, they were instruments of obstruction to commerce and catalysts of oppression to workers. The Act's declaration of policy notes that industrial strife "which interferes with the normal flow of commerce" can be minimized by mutual recognition of the "legitimate rights" of all parties to the labor agreement.<sup>148</sup> It follows then that the asserted purpose of Taft-Hartley was to define the rights of employers and employees, to establish procedures to prevent

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143. *Id.* at 401.

144. *Am. Fed'n. of Labor v. Reilly*, 155 P.2d 145 (Colo. 1944). The Court noted, for example, that the Peace Act went beyond laws in other states:

In recent years several other states, notably Minnesota, Michigan, Florida, Texas, Idaho, South Dakota, Wisconsin, Kansas, and Alabama have passed laws designed to comprehensively cover labor relations between employers and employees in such commonwealths. Although the common trend of these statutes is to impose regulations, including in some instances the requirement of registration, upon unions, as well as their representatives, and to place restrictions and limitations upon striking, picketing, boycotting and associated labor activities, not one of the enactments, save those of Colorado, require the incorporation of a union as a prerequisite to its operation as such.

*Id.* at 149 [citations omitted].

145. See Hogler & Shulman, *supra* note 140, at 873-75.

146. In 1998, using the Peace Act model, Rep. Bob Schaeffer (R - Colo.) introduced a "paycheck protection" bill in the House which would have required individuals to approve any payroll deductions for union dues, but the legislation was defeated in a floor vote. See Raymond L. Hogler, *Unions, Politics, and Power: The Ideology of Paycheck Protection Proposals*, 49 LAB. L.J. 1195 (1998). In 2005, California governor Arnold Schwarzenegger supported an initiative requiring public employees to approve in writing any use of union dues for political purposes. See California Secretary of State - Elections and Voter Information - Initiative Update, at [http://www.ss.ca.gov/elections/elections\\_j.htm](http://www.ss.ca.gov/elections/elections_j.htm) (visited June 8, 2005). The initiative was defeated. See Proposition 75, Public Employee Union Dues Restriction on Political Contributions Employee Consent Requirement Initiative Statute, available at [http://www.ss.ca.gov/elections/sov/2005\\_special/sov\\_pref\\_pgxxii\\_official\\_result\\_props.pdf](http://www.ss.ca.gov/elections/sov/2005_special/sov_pref_pgxxii_official_result_props.pdf) (visited Dec. 20, 2005).

147. The background to Taft-Hartley is described in MILLIS & BROWN, *supra*, note 134, at 271-362.

148. 61 Stat. 136 (1947).

interference with those rights, and “to protect the rights of individual employees in their relations with labor organizations” that affected commerce.<sup>149</sup> One of the key dimensions was the regulation of union membership.

*Why Section 14(b)?*

As the Taft-Hartley bill moved through Congress, legislators made clear that the balance of the new law favored individuals rather than unions. In the House, the Committee on Education and Labor reported favorably on H.R. 3020, its draft version of the bill.<sup>150</sup> The Committee began by castigating unions as oppressive, illegitimate organizations that exercised undue power over workers. The American workingman, the report claimed, in a fit of ideological hyperbole, “has been cajoled, coerced, intimidated, and on many occasions beaten up, in the name of the splendid aims set forth in Section 1 of the National Labor Relations Act. His whole economic life has been subject to the complete domination and control of unregulated monopolists.” As a result, “his mind, his soul, and his very life have been subject to a tyranny more despotic than one could think possible in a free country.”<sup>151</sup> The proposed legislation, the Committee said, “has been formulated as a bill of rights both for American workingmen and for their employers.”<sup>152</sup> The project of liberation called for the recruitment of states as guarantors of liberty.

Regarding union security, H.R. 3020 recognized unions’ rights to bargain for contractual safeguards, subjected to the limitations of payroll authorization and approval of the clause in a secret ballot election.<sup>153</sup> Section 13 of H.R. 3020 took a straightforward approach to right to work laws by adding new language acknowledging the state’s activism in dealing with union security. First, the section clarified that nothing in the bill should “be construed to invalidate any State law or constitutional provision which restricts the right of an employer to make agreements

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149. *Id.*

150. House Rep. No. 245 on H.R. 3020 reprinted in COMMITTEE ON LABOR AND PUBLIC WELFARE, 80TH CONGRESS, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, 292 (1974) [hereafter cited as LEG. HIST. LMRA].

151. *Id.* at 295.

152. *Id.*

153. Section 7 (a) authorized security clauses generally. *Id.* at 176. However, section 8(a)(2) (C)(i) required written consent to a dues deduction which would be revocable “by the employee at any time upon thirty days’ notice to the employer.” *Id.* at 177-78. Section 8(d)(4) provided a 30-day period of employment before the security clause became effective. *Id.* at 184. Section 9(g) mandated a secret ballot election as a condition of union security. *Id.* at 191-93.

with labor organizations,” requiring union membership as a condition of employment.<sup>154</sup> Second, the language excised any basis for challenging right to work under a theory of federal preemption. Any contractual provisions contrary to state law were “divested of their character as a subject of regulation by Congress under its power to regulate commerce among the several States . . . .”<sup>155</sup> The Committee mischaracterized the NLRA with the following statement: “In reporting the bill that became the National Labor Relations Act, the Senate committee to which the bill had been referred declared that the Act would not invalidate any such State law or constitutional provision. The new Section 13 is consistent with this view.”<sup>156</sup> In fact, neither state statutes, nor constitutional enactments, were at issue in 1935. As noted above, Wagner’s only concern was with state common law, and his intent was to protect unions’ rights to enforce those agreements.<sup>157</sup>

The Senate version of the LRMA incorporated the House modifications in union security by providing for a 30-day period of employment prior to compulsory support and a limitation of the membership obligation to payment of dues.<sup>158</sup> However, other than referencing the history of the NLRA, the Senate bill contained no express provisions regarding state jurisdiction.<sup>159</sup> The House Conference Report corrected that omission and explained the genesis of §14(b).<sup>160</sup> First, the Report clarified that H.R. 3020 inserted language to spell out that federal law did not protect union security where prohibited by state law, noting that “[m]any states have enacted laws or adopted constitutional provisions to make all

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154. *Id.* at 207.

155. *Id.*

156. *Id.* at 335.

157. Wagner said that S. 1958 protected unions’ right to strike for a closed shop which would include current employees, a point that was ambiguous in the Labor Disputes Bill. He added: “The law on the question is in great confusion in the State courts, and any uniform rule as a Federal statute would work hardship and injustice in many areas. This is accentuated by the fact that the law in many States is in a state of change.” 1 NLRA LEG. HIST., *supra* note 1, at 1354.

158. S. REP. NO. 105 on S. 1126, *reprinted* in LEG. HIST. LMRA., *supra* note 149, at 413. The waiting period has no necessary connection to the issue of state jurisdiction. Congress might have approved the thirty-day provision as a satisfactory policy adjustment to any perceived abuse of union membership as a condition of employment without giving states the option of prohibiting security altogether.

159. LEG. HIST. LMRA., *supra* note 150, at 412. According to Senator Taft, the NLRA “did nothing to facilitate closed-shop agreements or to make them legal in any State where they may be illegal.” The Wagner Act proviso dealing with closed shops, according to Taft, simply meant that the NLRA did not abolish closed shops but made clear that they could be prohibited under controlling state law. Thus, Taft said, “It was the law of the Senate bill; and in putting in [Section 14(b)] we in no way change the bill as passed by the Senate of the United States.” *Id.*

160. H.R. REP. NO. 510, at 60 (1947).

forms of compulsory unionism in those States illegal.”<sup>161</sup> It then recites the standard assertion that consistent with its legislative history, the NLRA never intended “to deprive the States of their power to prevent compulsory unionism”<sup>162</sup> and concludes, “[t]o make certain that there should be no question about this, Section 13 was included in the House bill. The conference agreement, in Section 14 (b), contains a provision having the same effect.”<sup>163</sup>

The revisionist affirmation of individual rights over collective welfare not only ignored the economic agenda of the Wagner Act, but it also instigated a course of “individual bargaining and employer resistance to unionization and collective bargaining,” made possible because the inherently contradictory positions have enabled the National Labor Relations Board to interpret the NLRA as “radical changes that swing labor policy from one purpose to its direct opposite.”<sup>164</sup> Because Section 14(b) made its way into the LMRA after Senate debate, Wagner had no opportunity to comment specifically on that provision.<sup>165</sup> However, in April 1947, he submitted into the Congressional Record a written statement addressing Taft-Hartley.<sup>166</sup> Wagner presciently noted that the Taft-Hartley Act constituted a “grand assault” on labor. In his words, “[t]his bill would turn the clock back in labor relations, not to conditions that existed before the National Labor Relations Act was adopted, but in many instances to those that obtained more than a hundred years ago when labor had to fight for its right to organize.” Wagner went on to point out some of the most extreme defects of the law, characterizing it as “a confused hodgepodge of wholesale rewriting of our labor law” that would invite “another decade of extensive, costly, and exasperating court litigation to determine the full meaning and impact of the legislation.”<sup>167</sup> Right to work might well have been the greatest abomination of all.

The presence of union-free enclaves fed into the dynamic of union opposition that undermined the presumed “labor accord” of the 1950s

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161. *Id.*

162. *Id.*

163. *Id.*

164. JAMES A. GROSS, BROKEN PROMISE: THE SUBVERSION OF U.S. LABOR RELATIONS POLICY, 1947-1994 272 (1995).

165. See J. JOSEPH HUTHMACHER, SENATOR ROBERT F. WAGNER AND THE RISE OF URBAN LIBERALISM 335-338 (1968) for a record of Wagner’s activities during the events culminating in the final bill presented to (and vetoed by) President Truman.

166. LEG. HIST. LMRA., *supra* note 149, at 998-99.

167. *Id.*

and 1960s.<sup>168</sup> Historians note the “exceptionalist” nature of the American labor movement, a term that describes labor’s political failure to establish a national system of social welfare with mandated levels of employment benefits, as is the case in many industrialized nations.<sup>169</sup> Instead, American unions exist in a low-density, decentralized environment where labor costs are open for negotiation and few unions have the power to “take wages out of competition” in a given industry.<sup>170</sup> Managers thus have powerful financial incentives to resist unionization, and organizing becomes more costly to unions and workers alike.<sup>171</sup> Right to work laws contribute to the process of union decline by facilitating anti-union agendas and creating financial incentives for firms to engage in low-wage strategies as a basis for competitive advantage.<sup>172</sup> Supporters of right to work laws, nevertheless, argue that countervailing policy concerns justify passage of the laws.<sup>173</sup>

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168. For different historical perspectives on this period in the history of the American labor movement, see generally THOMAS A. KOCHAN ET AL., *THE TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS* (2d. ed. 1994); Richard Edwards & Michael Podgursky, *The Unraveling Accord: American Unions in Crisis*, in *UNIONS IN CRISIS AND BEYOND: PERSPECTIVES FROM SIX COUNTRIES* (Richard Edwards, Paolo Garonna, & Franz Tödtling, eds., 1986).

169. See Nelson Lichtenstein, *Taft-Hartley: A Slave-Labor Law?* 47 CATH. U. L. REV. 763, 769 (1998).

170. Joel Rogers, *Divide and Conquer: Further “Reflections on the Distinctive Character of American Labor Laws,”* 1990 WIS. L. REV. 1, 85; see also BRUCE WESTERN, *BETWEEN CLASS AND MARKET: POSTWAR UNIONIZATION IN THE CAPITALIST DEMOCRACIES* (1997). Western states his argument as follows: “*Labor movements grow where they are institutionally insulated from the market forces that drive up competition among workers.*” *Id.* at 3 (emphasis in original). The converse proposition is that labor movements fail where they are subjected to market forces driving up competition among workers. A recent example occurred in the grocery industry, when the major chains demanded, and in most cases, received, cost reductions in health care coverage. United Food & Commercial Workers Local No. 7, which represents workers in Denver and the surrounding region, made concessions on health care for the first time in its history of collective bargaining. According to one report shortly after the event, Local President Ernie Duran “looks like a fighter who has gone too many rounds with no hope of winning.” The contract freezes wages and requires insurance co-payments. Kristi Arellano, *Union Leader Ponders His First Defeat*, DENV. POST, Mar. 13, 2005 at K1.

171. For an econometric analysis of union opposition, see Morris Kleiner, *Intensity of Management Resistance: Understanding the Decline of Unionization in the Private Sector*, 22 J. LAB. RES. 519, 522-26 (2001).

172. On the economic development policies of right-to-work states in the South, see STEPHEN D. CUMMINGS, *THE DIXIFICATION OF AMERICA: THE AMERICAN ODYSSEY INTO THE CONSERVATIVE ECONOMIC TRAP* 14-15 (1998).

173. The National Institute for Labor Research maintains a website promoting right to work laws. For various writings on the topic, see <http://www.nilrr.org/>.

### THE EFFECTS OF ANTI-UNION LEGAL POLICY

The debate about right to work reprises the inherent tension in the Wagner Act between collective prosperity and individual choice. Proponents of union security argue that unions promote higher wages and greater equality in distribution of wealth. While some degree of individual liberty may be sacrificed, unionists contend, the beneficial outcomes for the group outweigh any burdens on idiosyncratic preferences.<sup>174</sup> Conversely, supporters of right to work laws equate unregulated markets with both liberty and prosperity. Thus, they argue, the right to choose whether or not to belong to a union is both an economic and a normative choice, and states which protect against union coercion are making a sound strategic choice.<sup>175</sup> That is, economic development in turn promotes communal interests in stable employment and domestic relations.<sup>176</sup> Commentators favoring right to work laws therefore assert that the laws are good for families and communities and are consistent with fundamental American values of free market individualism.<sup>177</sup>

The major themes associated with compulsory union membership are enduring ones in the American polity. In *Commonwealth v. Pullis* (1806), the first labor case in the nation, prosecutors in Philadelphia charged workers with criminal conspiracy when they acted collectively to enforce membership obligations on all journeymen.<sup>178</sup> The indictment stated that the shoemakers' society injured the community by boycotting any employer who hired a non-member journeyman, and a jury found the shoemakers guilty of an unlawful combination. Arguments in the case revolved around the heritage of the American Revolution and the meaning of such crucial words as "freedom," "liberty," "democracy," and "community."<sup>179</sup> The successful 2001 right to work initiative in

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174. See generally Richard Freeman, *How Labor Fares in Advanced Economies*, in WORKING UNDER DIFFERENT RULES 1 (Richard Freeman Ed., 1994) (providing an illustration of unionists' arguments in favor of greater union security).

175. The South Carolina Department of Commerce makes the point by proclaiming on its web page that the state is right to work and boasts "the lowest unionization rate in the US (1.8 %)." See <http://www.callsouthcarolina.com/workforceandtraining.html>.

176. E.g., David Averill, *For Right to Work; A Matter of Fairness and Economic Promise*, TULSA WORLD, Sept. 23, 2001, available at <http://web.lexis-nexis.com/universe>.

177. For a discussion of markets, freedom, democracy, and extent to which these ideas dominate our culture, see generally THOMAS FRANK, ONE MARKET UNDER GOD: EXTREME CAPITALISM, MARKET POPULISM, AND THE END OF ECONOMIC DEMOCRACY (2000).

178. *Commonwealth v. Pullis* (Mayor's Court Phila. 1806), reprinted in 3 DOCUMENTARY HIST. OF AM. INDUS. SOC. 59 (John Commons & Eugene Gilmore, eds., 1910).

179. The debate continues as part of our national discourse. One historian argues that the founding fathers' conception of freedom has been perverted from its original intention. In his words:

Oklahoma reflected the ongoing political discourse associated with labor policy. A starting point of policy analysis is the effect of right to work on unions as organizations.

### *Union Density: What Right to Work Does*

As previously noted, 22 states now have laws prohibiting compulsory membership, 27 states permit union security clauses, and Colorado has a "modified" right to work law which requires members of a bargaining unit to approve union security in a state election.<sup>180</sup> The outcomes of right to work laws have been studied extensively, and that research provides some well-documented conclusions. For example, a comprehensive survey of the literature found that passage of a right to work law "significantly reduces unions' organizing efforts and successes in NLRB certification elections for at least a decade. These negative effects also are consistent with a long-run decline in unionization of five to eight" and an increase in the incidence of free riding in the range of six to ten percent.<sup>181</sup> A more recent econometric study using a different set of control variables found that right to work laws reduced density by eight and eight tenths percent.<sup>182</sup>

While reduced union density may seem to be an incidental consequence of electoral decision-making, the implications of union decline go to the heart of the national collective bargaining policy. Membership levels and financial stability provide the linchpin for maintenance of successful organizing activity.<sup>183</sup> Declining resources lead to less in-

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The particular idea of freedom that has come to prevail in our country today has taken us down a terribly mistaken road. Although dominant our thinking, it is an idea of freedom that we cannot find meaningful in the end, that we cannot even admire, and that stands opposed to much that we actually do collectively as a people, here at home. So it sets us at odds with our own actions and history. I call it free-market liberty, or free-market freedom.

JOHN E. SCHWARZ, *FREEDOM RECLAIMED: REDISCOVERING THE AMERICAN VISION* 3 (2005).

180. The Taft-Hartley Act included a requirement that members of the bargaining unit had to vote in a separate election to authorize negotiations for union security, but the federal requirement was dropped in 1951 because unions overwhelmingly won the elections. Hogler & Shulman, *supra* note 141, at 888.

181. William Moore, *The Determinants and Effects of Right-to-Work Laws: A Review of the Recent Literature*, 19 J. LAB. RES. 445, 463 (1998).

182. Raymond Hogler et al., *Right-to-Work Legislation, Social Capital, and Variations in State Union Density*, 34 REV. OF REGIONAL STUDIES 95, 96 (2004).

183. MASTERS, *supra* note 40 at 157-71. Another study on organizing observes, "To organize a few thousand workers can take years, cost millions of dollars, and exhaust the capacity of already-stretched union staffers. Can the modest benefits of any single campaign really justify such enor-

vestment in recruiting and attracting new members, thereby enhancing the effectiveness of managerial antiunion efforts.<sup>184</sup> Since supporters of right to work laws regard unions as monopolistic forces, their decline is seen as a positive contribution to efficient market functioning.<sup>185</sup> From that premise, it logically follows that right to work laws promote economic growth and further policy discussion is moot.<sup>186</sup> Unionists, however, dispute that “free markets” always lead to distributive outcomes consistent with our general notions of social fairness. That point has particular relevance to trends in wealth acquisition in the United States.

### *Wages and Inequality*

Senator Wagner said his legislation was intended to reduce economic inequality in this country. Laws which weaken unions frustrate that policy objective.<sup>187</sup> Some commentators argue that the macroeconomic policies embodied in collective bargaining are no longer particularly appropriate to the “new economy” labor markets where competitive conditions reward individual merit and skills, and inequality is an outcome of such human capital factors.<sup>188</sup> Other studies suggest that the

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mous costs?” Ruth Milkman & Kim Voss, *Introduction*, in REBUILDING LABOR: ORGANIZING AND ORGANIZERS IN THE NEW UNION MOVEMENT 1, 4 (Ruth Milkman & Kim Voss, eds. 2004).

184. Prior to the July 2005 split in the labor movement, its leadership undertook a series of steps to shift more money into organizing, including a one-third reduction in its headquarters staff. Harold Meyerson, *Labor’s Civil War*, THE AM. PROSPECT, June 2005, at 45. The move failed to produce a compromise between the factions.

185. E.g., MORGAN O. REYNOLDS, MAKING AMERICA POORER: THE COST OF LABOR LAW 80 (1987).

186. For a recent illustration of the point, see Emin M. Dinlersoz & Rubén Hernández-Murillo, *Did Right –To-Work Work for Idaho?*, FED. RES. BANK OF ST. LOUIS REV. 29 (May/June 2002). The authors treat right to work legislation as a means of reducing unionism, which in theory generates growth in manufacturing employment. However, their careful empirical analysis leads to a qualified conclusion:

Overall, our findings indicate that the increase in Idaho’s industrial growth rate is strongly related to the decline in unionization. While we are tempted to associate the patterns observed with the passage of the law itself, the timing of the decline in the unionization rate prevents such a definitive conclusion. The large decline in unionization started about four years prior to the almost two-year-long bureaucratic process that eventually led to the passage of the law. This prompts us to consider the hypothesis that the passage of the law might actually have been a consequence of the decline in unionization and growing anti-unionism in Idaho, rather than a cause.

*Id.* at 30.

187. On federal labor law as a mechanism of wealth redistribution, see JOSEPH ROSENFARB, THE NATIONAL LABOR POLICY AND HOW IT WORKS 30-35 (1940).

188. For a statement and critique of the thesis, see James K. Galbraith, *Dangerous Metaphor: The Fiction of the Labor Market*, JEROME LEVY ECONOMICS INSTITUTE, PUBLIC POLICY BRIEF, NO. 36 (1997).

general deterioration of workers' wages over the past two decades is not primarily attributable to technology-driven demand for more highly skilled workers.<sup>189</sup> Rather, the factors identified in the NLRA still contribute to high levels of inequality in this country. "Significant shifts in the labor market, such as the severe drop in the minimum wage and de-unionization, can explain one-third of the wage inequality in the 1980s."<sup>190</sup> Such economic conditions pose threats to the stability of our social and political system.<sup>191</sup> Despite that, the regulatory environment for labor, and specifically protection for union security, is subject to ongoing political attack.<sup>192</sup>

The evidence linking lower union density and lower wages is extensive and convincing.<sup>193</sup> As an illustration of the re-distributive effects of such legislation, a recent article empirically analyzed the effect of adoption of a right to work law in Louisiana on shareholder wealth. Using an event study methodology, the authors found that investors anticipated increased profits from firms in states adopting a right to work law; the magnitude of the effect was about two to four percent. Their conclusion is that such legislation positively affects future profits because it negatively affects union power.<sup>194</sup> Supporting that finding, an analysis of Census Bureau data shows that per capita income and union density are negatively correlated with right to work laws at statistically significant levels.<sup>195</sup> Accordingly, the evidence suggests that right to work laws generate both lower rates of union density and a shift in wealth from la-

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189. For an extended treatment of markets, wages, and public policy, see JAMES K. GALBRAITH, *CREATED UNEQUAL: THE CRISIS IN AMERICAN PAY* (1999).

190. LAWRENCE MISHEL ET AL., *THE STATE OF WORKING AMERICA 2000/2001* 112 (2001).

191. *See, e.g.*, JOHN SCHWARZ, *ILLUSIONS OF OPPORTUNITY: THE AMERICAN DREAM IN QUESTION* 104-05 (1997); KEVIN PHILLIPS, *WEALTH AND DEMOCRACY: HOW GREAT FORTUNES AND GOVERNMENT CREATED AMERICA'S ARISTOCRACY* xii (2002).

192. *See, e.g.*, *Abuse of Workers Rights and H.R. 1625, Worker Paycheck Fairness Act: Hearing before the Subcomm. on Employer-Employee Relations of the Comm. on Education and the Workforce*, 105th Cong. (1998); *Open Shops in the 21st Century Workplace, Subcomm. on Oversight and Investigations of the Comm. on Education and the Workforce, House of Representatives*, 106th Cong. (2000).

193. Analyzing wage inequality in the 1980s, two leading labor economists concluded: "The major institutional factor that affected the U.S. wage structure was the decline of unionism." Richard B. Freeman & Lawrence F. Katz, *Rising Wage Inequality: The United States vs. Other Advanced Countries*, in *WORKING UNDER DIFFERENT RULES* (Richard Freeman ed., 1994).

194. Abraham & Voos, *supra* note 26, at 346.

195. Raymond Hogler & Steven Shulman, *The Law, Economics, and Politics of Right to Work: Colorado's Labor Peace Act and Its Implications for Public Policy*, 70 U. COLO. L. REV. 871, 927-28 (1999).

bor to capital.<sup>196</sup> Still, even if low unionization contributes to inequality, that policy outcome might be offset by a corresponding increase in jobs created by union free environments. The issue of job growth offers another talking point in the right to work debate.

#### *Economic Development and Right to Work*

During the Oklahoma right to work campaign, supporters of the initiative argued that right to work laws were associated with increases in manufacturing jobs. They based their claims on data from the state of Idaho, which enacted a right to work law in 1985, and which they claimed had enjoyed employment growth above national rates since that time. "Right-to-work states are doing better in terms of growth and development than Oklahoma. Right-to-work states are creating new jobs at a faster rate than Oklahoma and the jobs they are creating are better paying."<sup>197</sup> Academic evidence supporting the proposition, however, is mixed at best.

The most recent and comprehensive empirical work on job growth in Idaho begins with the question, "Was the passage of the law merely a gesture that simply reflected a trend of decline in unionization, or did it have a significant influence in making Idaho a more attractive location for business in the years following the adoption?"<sup>198</sup> The issue of causation is a central one to the debate about economic performance and legislation. It involves scrutiny of the relevant factors in a historical context to determine whether enactment of right to work merely reflects the evolutionary processes of political environments or whether law, in fact, enhances business conditions. After rigorous econometric analysis, the authors conclude:

In summary, while we are tempted to associate the growth patterns and the decline in unionization with the passage of the law, we cannot rule out the possibility that the RTW law was a result of growing anti-

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196. Moreover, inequality in wealth distribution during the 1990s was skewed more toward the top than at any time since 1929. The percent change in after-tax household income between 1979 and 1997 of the top one percent was 175 percent; however, for the lowest one percent, that figure is negative one percent. Kevin Phillips, *The New Face of Another Gilded Age*, WASH. POST, May 26, 2002, at B2.

197. Averill, *supra* note 175.

198. Dinlersoz & Hernández-Murillo, *supra* note 186, at 29.

unionism in Idaho and may not have been the cause of growth, per se.<sup>199</sup>

In another widely cited attempt to differentiate the causal forces associated with right to work and job levels, Thomas Holmes measured manufacturing growth at the boundaries of right to work jurisdictions and found that state policies, including right to work laws, affect economic growth.<sup>200</sup> But as Holmes emphasized in a follow-up discussion of his findings:

Right-to-Work states historically have pursued a number of other smokestack-chasing policies, such as low taxes, aggressive subsidies, and even, in some cases, lax environmental regulations. Thus, my results do not say that it is right-to-work laws that matter, but rather that the 'pro-business package' offered by right-to-work states seems to matter.<sup>201</sup>

That is, other factors such as the shift away from agriculture, the advent of air conditioning, and truck transportation as an alternative to railroads, may account for much of the development of manufacturing. In short, it is erroneous to broadly attribute economic development to right to work legislation.

Changes in rates of both per capita income and job growth do not follow a consistent pattern based on states' approach to union security. The largest increase in per capita income growth in 2004 occurred in North Dakota, followed by Iowa, South Dakota, Washington, and Vermont, while Michigan, Georgia, Alaska, Nebraska, and Missouri had the lowest increases.<sup>202</sup> The economic factors associated with those changes were not related to the labor law policies, but rather to unique conditions in those states.<sup>203</sup> Historical investigation of changes in state-level per

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199. *Id.* at 40.

200. Thomas J. Holmes, *The Effect of State Policies on the Location of Manufacturing: Evidence from State Borders*, 106 J. POL. ECON. 667, 702-04 (1998).

201. Thomas J. Holmes, *The Location of Industry: Do States' Policies Matter?*, 23 REG. 47, 50 (2000).

202. Bureau of Economic Analysis, *Per Capita Income Growth Accelerated in 2004*, at 2 (Mar. 28, 2005), available at <http://bea.gov/bea/newsrel/SPINewsRelease.htm>. Right to work states include North Dakota, Iowa, South Dakota, Georgia, and Nebraska.

203. According to the news release:

Three special factors played a prominent role in determining how states ranked in per capita personal income growth last year: the Microsoft dividend paid in December 2004, the payment automakers made in 2003 to reduce their unfunded pension liabilities, and the unusual coincidence of high crop production with high crop prices.

capita income indicates that education, urbanization, and employment in the service sector are significant correlates of income.<sup>204</sup> Moreover, the increases in income took place in states with relatively low per capita income.<sup>205</sup>

A similar situation exists with regard to growth in employment. According to BLS data for May 2005, "Over the year, non-farm employment increased in 48 states and the District of Columbia and decreased in 2 states (Michigan and South Carolina). The largest percentage gains were reported in Nevada (+6.7 percent), Arizona (+4.0 percent), Utah (+3.4 percent), Oregon (+3.1 percent), and Florida (+3.0 percent)."<sup>206</sup> Of the states reported as having greater increases, four are right to work jurisdictions, but they are located either in the West or in Florida, all states with high levels of construction activity. One of the two declining states is right to work, and the job losses in the auto industry account for much of Michigan's decline. One probable explanation is that job growth in the respective states is contingent on the specific time and circumstances and cannot be linked to state labor laws.<sup>207</sup> In closing, given the variation in the development of jobs, no firm conclusions can be drawn about the economic benefits of right to work legislation as an engine of growth; historically, the nonunion low-wage model did not produce particularly beneficial results.<sup>208</sup>

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204. John E. Connaughton & Ronald A. Madsen, *Explaining Per Capita Personal Income Differences between States*, 34 REV. OF REGIONAL STUDIES 206 (2004).

205. Bureau of Economic Analysis, *2001 State Per Capita Personal Income and State Personal Income—Fourth Quarter 2001*, at 1 (Apr. 23, 2002), available at <http://www.bea.gov/bea/newsrel/spi0402.htm#table1>.

206. *Regional and Statement Employment: May 2005*, at 2 (June 17, 2005), available at <http://www.bls.gov/news.release/laus.nr0.htm>.

207. Indeed, since South Carolina cites its low union density and right to work status as elements of its business development policies, it could be argued that those factors contributed to its abysmal employment growth. *See supra* note 175.

208. In a summary of the state of the South after three decades of its economic strategies, Cummings observes:

In 1980, only the peripheral Southern state of Texas had a per capita income above the national average; Southern families were still earning under 90 percent of that average. The South still had over 44 percent of America's poor, with only Virginia below the national average. In the twenty years ending in 1980, constant dollar per capita income in Mississippi and Kentucky had fallen another \$200 further behind the nation, while Arkansas, the Carolinas, and Georgia lost ground to a smaller degree. Low-wage industries continued to be an integral part of the Southern economy, representing 42 percent of all Southern jobs compared to the national average of 29 percent.

CUMMINGS, *supra* note 172, at 113-14. A recent analysis of state work environments conducted by the Political Economy Research Institution at the University of Massachusetts at Amherst lists three right to work states in the top 10 list of best business locations, while 10 of 11 of the worst states are right to work. *See* JAMES HEINTZ ET AL., DECENT WORK IN AMERICA: THE STATE-BY-STATE

*Union Revival and Civic Welfare*

Confronted with the prospect of ongoing union decline, some commentators propose that unions undertake a process of change leading to a new strategy of “social movement unionism.”<sup>209</sup> One essay regarding the movement’s core mission provided, “[t]he current hope and strategic orientation of many American labor leaders and activists is for the organizing energy of a new social movement unionism to build the broad power necessary for institutional reform and even transformation, to revitalize the labor movement, and to combat economic and social inequality.”<sup>210</sup> The project’s preferred mode of operation is “to reform labor laws with new protections for workers and unions and to reform the institutions of industrial relations.”<sup>211</sup> Right to work laws have particular relevance to the agenda of social movement unionism because they are associated with such conditions as lower union density, lower per capita income, and political conservatism.<sup>212</sup> Right to work is also related to the effectiveness of social institutions in general.

In his influential treatment of social capital in America, Robert Putnam argued that Americans now participate less frequently than they previously did in those civic activities which make up communal solidarity. For example, although more people take part in the sport of bowling, there has been a decline in the number of teams because individuals prefer to bowl by themselves.<sup>213</sup> Putnam developed a measure of state-specific levels of social capital consisting of fourteen different factors, such as voting behavior, volunteering, taking part in social activities, and other forms of civic involvement.<sup>214</sup> Putnam’s data captures a meaningful dimension of a state’s social environment. It follows that his state in-

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WORK ENVIRONMENT INDEX (2005), available at <http://www.umass.edu/peri/resources/wei/pressrelease.htm> (using three factors of job opportunity, job quality, and workplace fairness to construct index of environment).

209. For a theoretical statement of the concept formulated in broad political terms, see Paul Johnston, *Citizenship Movement Unionism: For the Defense of Local Communities in the Global Age*, in *UNIONS IN A GLOBALIZED ENVIRONMENT: CHANGING BORDERS, ORGANIZATIONAL BOUNDARIES, AND SOCIAL ROLES* 236 (Bruce Nissen ed., 2002).

210. Lowell Turner & Richard W. Hurd, *Building Social Movement Unionism: The Transformation of the American Labor Movement*, in *REKINDLING THE MOVEMENT: LABOR'S QUEST FOR RELEVANCE IN THE TWENTY-FIRST CENTURY* 21 (Lowell Turner, Harry C. Katz, & Richard W. Hurd, eds., 2001)

211. *Id.* at 23.

212. Hogler et al., *supra* note 182, at 96, 101-02, 109.

213. ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 287 (2000).

214. Data are available online at <http://www.bowlingalone.com/StateMeasures.xls>.

dex can provide further insights into the relationship between labor unions and the social consequences of right to work laws.

One econometric model uses Putnam's index of state social capital to test for correlates between social capital and the various characteristics of unionism.<sup>215</sup> The findings indicate that social capital is not statistically correlated with union density, income, political preference, or right to work legislation. Some states, such as North and South Dakota, are both right to work and high in social capital.<sup>216</sup> Other states, such as West Virginia, are low in social capital, are not right to work, and have higher than average union density.<sup>217</sup> There is, however, a significant negative correlation between states' social capital and the degree of state anti-unionism, based on the ratio of employer unfair labor practices to certification petitions.<sup>218</sup> The correlation suggests that social capital acts as a moderating influence on employers' illegal resistance toward organizing activity. That is, the extent to which social capital is lacking within a state correlates with the overall level of opposition toward unions.<sup>219</sup> Although the cross-sectional correlation between social capital and union density is not significant, Putnam speculates that declining social capital has affected membership levels over a period of time.<sup>220</sup>

The use of social capital as a factor in assessing right to work laws adds new perspectives on the public benefits of union membership and contributes to a fuller understanding of how social unionism can be grounded as a "citizenship movement."<sup>221</sup> Further analysis of the com-

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215. Hogler et al., *supra* note 182, at 101.

216. The social capital rankings are 1.71 and 1.69, respectively, which are high for the nation. *Supra* note 189. Union membership in both states in 2004 was 7.7 percent. The Bureau of Labor Statistics provides the most recent membership figures for states. United States Dep't of Labor, Bureau of Labor Statistics, *Tbl5 Union Affiliation of Employed Wage and Salary Workers by State*, at <http://stats.bls.gov/news.release/union2.+05.htm>.

217. West Virginia's social capital ranking is -0.83 and its union density in 2004 was 14.2 percent. See *Bowling Alone*, <http://www.bowlingalone.com/data/php3> (last visited Nov. 26, 2005).

218. Hogler & Shulman, *supra* note 141, at 947-48, (constructing an index of state hostility to unions using N.L.R.B. data for the period 1980-1990).

219. It might be that higher levels of union density positively influence levels of social capital within the state. More generally, the causes of variations in social capital can be traced to historical factors antedating a significant labor presence in this country, especially race. According to a comparative study of inequality in the U.S. and Europe, "[t]his importance of ethnic fractionalization cannot be over-emphasized. The ethnic and racial fragmentation of the United States' working class interfered with the formation of a unified and powerful labor movement and Socialist Party." It also helped to explain the less redistributive political environment in this country. ALBERTO ALESINA & EDWARD L. GLAESER, *FIGHTING POVERTY IN THE US AND EUROPE: A WORLD OF DIFFERENCE* 218 (2004).

220. See PUTNAM, *supra* note 213, at 287.

221. See, e.g., Paul Johnston, *Organize for What? The Resurgence of Labor as a Citizenship Movement*, in *REKINDLING THE MOVEMENT: LABOR'S QUEST FOR RELEVANCE IN THE TWENTY-*

ponents of social capital offers insights on the point. Social capital is inversely related to inequality; more inequality means less social capital.<sup>222</sup> Lower social capital indicates higher levels of antiunion activity and thus lower union density since right to work laws are also correlated with lower union density.<sup>223</sup>

From the data, it follows that unions may enhance the development of social capital in several ways. First, unions reduce income inequality by reducing wage differentials in the workplace.<sup>224</sup> More equality means more social capital. Second, the interplay between anti-unionism, lower membership density, and social capital suggests that workplaces in anti-union states lack cooperative employment relationships characterized by trust and respect. Unions therefore may be viewed as a means of extending networks of cooperation and collective action in the workplace when social capital is lacking in civic life. That reasoning fits with the general dynamic of collective action. As one expert notes, “Union formation, collective bargaining and strikes all depend for their success on a high degree of cooperation among the workers. Too many free riders will condemn an action to defeat.”<sup>225</sup> Consequently, strong unions and worker solidarity may provide a “defense” against labor-management hostility where communal institutions fail to check managerial anti-unionism.<sup>226</sup> Adding to the value of unions as facilitators of social capital, Putnam finds that lower social capital in a state is associated with lower rates of spending on education, more time spent watching television, higher crime rates, and general antisocialism.<sup>227</sup> “Social” unionism

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FIRST CENTURY 21 (Lowell Turner, Harry C. Katz, & Richard W. Hurd eds., 2001). One problem with broadly defining unionism as an exercise in citizenship or civic participation is that it loses its distinguishing characteristics as a workplace institution. Citizenship might be equally well manifested by joining the National Rifle Association or the American Association of Retired People. Historically, labor organizations with a political orientation have failed to establish themselves as a national force. *See, e.g.*, KIM VOSS, THE MAKING OF AMERICAN EXCEPTIONALISM: THE KNIGHTS OF LABOR AND CLASS FORMATION IN THE NINETEENTH CENTURY (1993).

222. *See* Hogler et al., *supra* note 182, at 107-09.

223. *See id.*

224. RICHARD FREEMAN & JAMES MEDOFF, WHAT DO UNIONS DO? 46-48 (1984)

225. Margaret Levi, *When Good Defenses Make Good Neighbors: A Transaction Cost Approach to Trust, the Absences of Trust and Distrust*, in INSTITUTIONS, CONTRACTS AND ORGANIZATIONS: PERSPECTIVES FROM NEW INSTITUTIONAL ECONOMICS 137, 146 (Claude Menard ed., 2000).

226. West Virginia provides an instructive example. Intense anti-unionism, extremely low social capital, and militant unions have historically characterized the labor environment. Arguably, unions were the substitute for other forms of social cohesion. For a good treatment of labor-management in that state, see TOM JURAVICH & KATE BRONFENBRENNER, RAVENSWOOD: THE STEELWORKERS’ VICTORY AND THE REVIVAL OF AMERICAN LABOR x-xi (1999).

227. PUTNAM, *supra* note 213, at 298-311.

therefore may have a positive effect on the stock of desirable communal values. Antiunion legislation, conversely, may have a negative social effect for the reasons discussed below.

### THE RIGHT TRIUMPHANT?

To sum up the argument so far, the historical pedigree of right to work laws is suspect at best, and the legislation shows no demonstrable benefits in terms of economic or social outcomes. Such laws cannot be defended as a necessary element of federal collective bargaining policy because they run counter to the basic purposes and intent of the NLRA. Aside from the baneful consequences for American workers and malignant presence as part of a national statutory scheme, these laws potentially constitute the final assault on the American labor movement. As the AFL-CIO slides toward apparent desuetude,<sup>228</sup> powerful forces are mobilizing to ensure that the ideology of individual liberties becomes the tool to extirpate unions from the workplace. The success in Oklahoma demonstrated the extent of political mobilization underlying the right to work movement and the relative ineffectiveness of pro-labor groups.<sup>229</sup> The 2004 national elections marked a turning point in labor's fortunes at the federal level and opened a real prospect for Congressional legislation that would permanently eviscerate unions. Some brief context of labor's political fortunes will provide a useful background.

Following the election of Lyndon Johnson in 1964, the AFL-CIO mounted an all-out offensive to repeal the odious Section 14(b).<sup>230</sup> The policy debates over the proposed legislation reprised the same arguments made in 1935 and 1947 about the proper ambit of collective action in exceptionalist America, but, in the end, only political tactics mattered. The repeal bill passed the House by a margin of 221 to 203 votes.<sup>231</sup> Johnson supported the legislation and promised to sign it. Unfortunately for labor, Senate Republicans, led by the conservative stalwart Everett Dirksen, initiated a successful filibuster against the legislation.<sup>232</sup> In October 1965, a cloture vote to end debate fell short of the necessary two-

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228. The July 2005 departure of seven major unions and seven million members from the AFL-CIO substantially diminishes the prospects for political action. Indeed, the dissenting coalition's stated objective is more organizing and less politics.

229. See generally, Hogler & LaJeunesse, *Oklahoma's Right to Work Initiative*, 53 LAB. L.J. 109 (discussing the right to work movement in Oklahoma).

230. See H.R. 77, 89th Cong. (1st Sess. 1965).

231. See GALL, *supra* note 138, at 169.

232. See MICHAEL S. WADE, THE BITTER ISSUE: THE RIGHT TO WORK LAW IN ARIZONA 117-22 (1976).

thirds majority, and George Meany eventually conceded defeat on the attempt to repeal Section 14(b).<sup>233</sup> Labor settled for the status quo, which, at that point, seemed to offer ample opportunity for further union growth and continued bargaining success.

As the country entered a period of economic stagnation in the 1970s, employers began to openly challenge unions and monopoly wage bargaining. High levels of inflation, coupled with declining productivity, generated resistance against bargaining demands, organization efforts, and work actions.<sup>234</sup> When the employer offensive noticeably began to erode membership density during the Carter administration, labor responded with another attempt to improve its prospects for organizing. This time, labor opted for a series of changes intended to be "procedural" in nature and designed to facilitate organizing. The proposals included adding new members to the Board, shortening campaign periods, authorizing the board to draft initial collective bargaining contracts, and providing for increased back pay awards for unlawfully discharged workers during a campaign.<sup>235</sup> Democrats controlled both the House and the Senate, and the labor law bill overwhelmingly passed in the House. As with the Section 14(b) repeal, however, the legislation failed under intense pressures from the business community and procedural tactics in the Senate, where opponents mounted a five-week filibuster.<sup>236</sup> The defeat marked the intensification of an employer campaign against unions that reduced union membership by 34 percent from 1980 to 1990.<sup>237</sup> Even with a Democratic administration in 1994, unions failed to enact a limited measure to protect strikers from permanent replacement.<sup>238</sup>

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233. See GALL, *supra* note 138, at 165-79.

234. For a good account of the end of the labor détente, see Edwards & Podgursky, *supra* note 168.

235. S. 2467, 95th Cong. (2nd Sess. 1978).

236. The bill faced seven cloture attempts and eventually failed by two votes. The advocates of right to work view the event as a milestone on their path to conservative dominance of labor law. In an essay posted on the National Institute for Labor Relations Research's website, the author describes the political payback levied against liberal Democrats for the attempted reform:

That November [1978], freedom-loving citizens confirmed that they had seen through the 'reform' smoke screen. Sixteen congressmen who had voted for forced unionism lost their reelection bids. Only two congressmen who had voted for Right to Work, including one who had recently been arrested in the parking lot of a nightclub that featured nude dancers, were defeated.

National Institute for Labor Relations Research, *History 101—Right to Work: A Winning Issue*, at <http://www.nilrr.org/RTWwinningissue.htm>.

237. MASTERS, *supra* note 40, at 45.

238. Sen. Howard Metzenbaum (D - Ohio) introduced the "striker replacement bill" (S. 55) to prohibit the hiring of replacement workers to permanently take the jobs of strikers. Again, opponents filibustered the bill and blocked floor consideration by a 53-46 vote. See U.S. Senate: Legisla-

Despite those defeats, labor continues to mount political efforts to re-energize its organizing capabilities.<sup>239</sup> Conservatives, however, are mobilizing their own legislative program. With the re-election of George W. Bush in 2004 and Republican majorities in Congress, labor law faces retrenchment from a powerful political bloc.<sup>240</sup> Marilyn Musgrave (R. Colorado) signaled the new attack on unions in her homage on the House floor to Reed Larson, the former head of the National Right to Work Committee.<sup>241</sup>

Musgrave increased the likelihood of a union security-free environment by sponsoring the federal National Right-to-Work Act currently pending in the House and the Senate.<sup>242</sup> The legislation would remove the protections in the NLRA and the Railway Labor Act which exempt union security clauses in labor agreements from charges of unlawful discrimination on the basis of union activity. Supporting Musgrave and her colleagues, the National Right to Work Committee stated in a January 2005 newsletter that the organization "is urging President George W. Bush and GOP majority leaders in the U.S. House and Senate to commit themselves now to fighting for a major overhaul of pro-forced unionism labor laws."<sup>243</sup> Although right to work proponents continue to identify likely state targets for legislative action, such as Kentucky,<sup>244</sup> the federal initiative abandons any pretense that right to work rests on unique state prerogatives.

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tion & Records Home, U.S. Senate Role Call Votes 103rd Congress – 2nd Session, at [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=103&session=2&vote=00189](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=103&session=2&vote=00189). Republicans then took control of Congress in November 1994 in a historic win.

239. The Employee Free Choice Act, S. 842, H.R. 1696, 109th Cong. (2005), introduced in April 2005, would require union certification by authorization cards and strengthen violations of failures to bargain and discriminatory discharges. After the failure of the 1978 reform bill, enactment of the proposed legislation is highly improbable.

240. Every right to work state cast its electoral votes for George W. Bush. Results are available at <http://www.fec.gov/pubrec/fe2004/2004presgen.shtml>.

241. 107 CONG. REC. July 18, 2003, at H7163. Musgrave summarized Larson's accomplishments with a portentous factoid:

During the 1950s, roughly 30 percent of private sector employees nationwide were forced to join and remain in a union. If they refused, they would be fired. Today it is 7 percent of private sector employees who are compelled to pay union dues or fees in order to keep their jobs.

*Id.* She continued that Larson's efforts made it "possible to envision the day when every American private sector employees [sic] enjoys the personal freedom to decide whether or not to affiliate with the union." *Id.*

242. H.R. 500; S. 370, 109th Cong. (1st Sess. 2005).

243. See Committee Unveils New 'Agenda for Freedom,' 51 NAT'L RIGHT TO WORK NEWSL. 1 (Jan. 2005), available at <http://www.right-to-work.org/newsroom.php3>.

244. Stan Greer, *The Economic Benefits of a Kentucky Right to Work Law* (July 2004) available at <http://www.nilrr.org/>.

Musgrave and like-minded politicians represent the vanguard of contemporary anti-unionism, and her tactics provide insight into the strategic nature of conservative populism.<sup>245</sup> Through her appeal to reputed “cultural values,” Musgrave simultaneously champions individual liberties in the workplace and advocates repressive laws aimed at socially unacceptable behaviors like same-sex marriages.<sup>246</sup> That strategy enabled Republicans in 2004 to successfully peel away voters on economic issues, which had historically linked working class voters with the Democrats from the “social values” underlying issues such as religion, abortion, guns, and homosexuality. As a result, Republicans gained more votes within organized labor based on appeals to social policy.<sup>247</sup> Why the “right” to work supersedes the “right” to pursue a particular ar-

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245. According to the National Right to Work Committee, supporters of a federal bill have enough political heft to arrange a floor vote. Their general objective is explained by committee president Mark Mix, who claims that four out of five American voters favor right to work laws. He continues:

That alone should be sufficient reason for Congress to hold floor votes on H.R.500 and S.370, even if it turns out that Big Labor politicians band together to kill these bills. But that's not all. History shows that, when politicians brush aside the views of the vast majority of their constituents by voting against Right to Work, they often pay the price at the ballot box the next time they run for reelection. Therefore, any Big Labor “victory” in a floor showdown over the Right to Work Bill will prove to be a costly one. Before too long, roll calls will lead to enactment of a national Right to Work law and abolition of compulsory union dues.

*Emerging House Leader Favors H.R. 500 Roll Call*, 51 NAT'L RIGHT TO WORK NEWSL. 1 (Jun. 2005), available at <http://www.nrtwc.org/nl/nl200506p8.pdf>.

246. H.J. Res. 56, 108th Cong. (2003) (proposing that “[m]arriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution or the constitution of any State, nor state or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.”). S.J. Res. 30, 108th Cong. (2004), introduced by Sen. Wayne Allard (R-Colo.), clarified that heterosexual couples can enter into civil unions other than marriage. Specifically the resolution stated: “Neither this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman.”

247. For an analysis, see generally JOHN MICKLETHWAIT AND ADRIAN WOOLDRIDGE, THE RIGHT NATION: CONSERVATIVE POWER IN AMERICA (2004). In his polemic on the politics of rage, journalist Thomas Frank offers a trenchant vignette about a schoolteacher and union member living in a small city in Kansas, who evolved from a George McGovern campaigner to a Rush Limbaugh sycophant. Frank writes:

Even as Republican economic policy laid waste to the city's industries, unions, and neighborhoods, the townsfolk responded by lashing out on cultural issues, eventually winding up with a hard-right Republican congressman, a born-again Christian who campaigned largely on an anti-abortion platform. Today the city looks like a miniature Detroit. And with every bit of economic bad news it seems to get more bitter, more cynical, and more conservative still.

THOMAS FRANK, WHAT'S THE MATTER WITH KANSAS? HOW THE CONSERVATIVES WON THE HEART OF AMERICA 4-5 (2004).

angement in domestic relations is explained by the apparent preference of one legal policy over another.<sup>248</sup>

As a jurisprudential proposition, right to work rests on the ideology of individual liberty exercised in the capitalist marketplace.<sup>249</sup> According to Nobel Laureate Milton Friedman, the doctrine construes “freedom as the ultimate goal and the individual as the ultimate entity in the society.”<sup>250</sup> Friedman sees no distinction between economic and political activity because they both are manifestations of identical impulses. “On the one hand, freedom in economic arrangements is itself a component of freedom broadly understood, so economic freedom is an end in itself.” On the other hand, it is “an indispensable means toward the achievement of political freedom.”<sup>251</sup> Friedman’s formulation reduces the world of social relations, political action, and economic exchange to an integrated and undifferentiated rationalized market transaction in which the value of any individual choice can be expressed in terms of its monetary equivalent.<sup>252</sup> In this account, right to work promotes an essential marketplace liberty.<sup>253</sup>

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248. *See generally* Kennedy, *supra* note 32 (explaining the fundamental contradiction of the law is that individual rights are exercised through the coercion of other individuals. Rights, therefore, are never detached from duties which burden the community).

249. In *Corfield v. Coryell*, 6 F. Cas. 546, (E.D. Pa. 1823), the court articulated a view of fundamental rights, and the limits on those rights, that formed the constitutional basis of liberty and property. In the court’s words:

What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole.

*Id.* at 551-52. For a subsequent iteration of the principle, see *Allegeyer v. Louisiana*, 165 U.S. 578 (1897) (holding that the term “liberty” as used in the Fourteenth Amendment “is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation” and to make contracts to that purpose). *Id.* at 589.

250. MILTON FRIEDMAN, CAPITALISM AND FREEDOM 5 (1962).

251. *Id.* at 8.

252. Coupled with religious zeal and cultural backlash, the story forms a meta-narrative that explains contemporary American politics. *See generally* FRANK, *supra* note 177, at 21.

253. Because Friedman follows freedom of contract to its logical conclusion, he opposes right to work laws as a restriction on contractualism. He thinks employers should be allowed to hire and fire based on race, color, gender, religion, union sympathies, or any other characteristic identified by the buyer of labor. After all, sellers of labor can find employment conditions which suit them, including a closed shop. He also opposes “monopoly power” as a curb on contractualism but concludes that “a right to work law will not have any great effect on the monopoly power of the unions.” FRIEDMAN, *supra* note 250, at 115-117.

Given the potency of right to work, and the impending threat to American unions, the labor movement needs a countervailing linguistic “frame” in which to present its social and political case.<sup>254</sup> To begin with, labor should flatly reject the rationalizing market model as a misleading and destructive guide to our social well-being.<sup>255</sup> Recent work combining insights from psychology, sociology, and economics persuasively argues that people are better off when they are happier, and happiness is an objective measure that consists of a number of things that have slight connection with rational maximizing.<sup>256</sup> Such important factors as family relationships, a secure financial situation, secure and rewarding work, community and friends, and health, form the core of a happy life.<sup>257</sup> Since unions add to security, equality, and stable workplace relations,<sup>258</sup> their contribution to the overall well-being of individuals and community counts as much as institutional arrangements that facilitate only individual self-interest. Stated somewhat differently, the obligations of a workplace citizen should carry equal weight with the “rights” of any individual.<sup>259</sup>

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254. The importance of “framing” political discourse is attributable to George Lakoff. For an introduction to the ideas, see the following press release posted by the University of California, Berkeley, *available at* [http://www.berkeley.edu/news/media/releases/2003/10/27\\_lakoff.html](http://www.berkeley.edu/news/media/releases/2003/10/27_lakoff.html).

255. Leading management educators now question the neoclassical microeconomic model, particularly its mutation into the “agency theory” of organizational behavior, as an appropriate tool for business education. As a recent essay points out, “[t]here is little doubt that economics has won the battle for theoretic hegemony in academia and society as a whole and that such dominance becomes stronger every year.” Fabrizio Ferraro et al., *Economics Language and Assumptions: How Theories Can Become Self-Fulfilling*, 30 ACAD. MGMT. REV. 8, 10 (2005). They then go on to describe the pernicious effects of the theory for business practices.

256. RICHARD LAYARD, *HAPPINESS: LESSONS FROM A NEW SCIENCE* 62-75 (2005).

257. *Id.* at 63.

258. FREEMAN & MEDOFF, *WHAT DO UNIONS DO*, *supra* note 224.

259. For a recent debate about the merits of a rights-oriented discourse as a labor strategy, see Joseph McCartin, *Democratizing the Demand for Workers’ Rights: Toward a Re-framing of Labor’s Argument*, DISSENT 61 (Winter 2005) and the responses by Lance Compa, *id.* at 66 and Sheldon Friedman, *id.* at 68. McCartin suggests that identifying workers’ rights as human rights lends itself to co-optation by anti-unionists such as the National Rights to Work Committee. He notes that upon visiting the Committee’s website, “[t]here, one discovers how skillfully today’s anti-unionists have updated their rights talk to argue that non-union workers’ rights are also human rights.” *Id.* at 62. McCartin proposes that unions should focus on industrial democracy as a “framing” strategy. Unfortunately, American employers historically laid claim, with more legitimacy than labor, to that term. *See, e.g.*, RAYMOND L. HOGLER & GUILIERMO J. GRENIER, *EMPLOYEE PARTICIPATION AND LABOR LAW IN THE AMERICAN WORKPLACE* 13-63 (1992), for a description of employers’ role in establishing democratic workplace procedures that evolved into the company unions. If unions re-branded themselves as vehicles of democracy, employers could respond by seeking repeal of the Section 8(a)(2) prohibition against internal representation plans so that workers could exercise full freedom of choice.

In addition, labor should devote the same focused attention to right to work legislation that its advocates have shown over the past decade. The National Right to Work Committee identifies and targets politicians who fail to support its cause. Organized labor, unfortunately, has shown little interest in a similar tactic, although it could feasibly join other groups to pick off legislators whose interests are particularly antagonistic to labor.<sup>260</sup> Instead, labor's political energies are fragmented and dispersed among an array of issues.<sup>261</sup> Many of those causes, of course, might eventually benefit working people in the country. None carries the same potential to inflict a mortal wound on the labor movement that right to work does. Moreover, the remnants of the former AFL-CIO now lack the resources to engage in indiscriminate political lobbying, and the new coalition has expressed its disinclination toward a broad political agenda.<sup>262</sup> The national right to work bills could offer a point of possible cooperation between the AFL-CIO and the coalition. In any case, a failure to engage with the pending legislation could lead to lethal consequences for labor.

## CONCLUSION

Whatever the asserted libertarian values of right to work laws, they have no place in the scheme of federal labor legislation. At best, those laws are the politics of anti-unionism dressed up as an exemplar of American wage earners' rights to liberty. Neither Wagner nor his supporters intended that the "freedom" to opt out of basic workplace responsibilities would become a vehicle for the strangulation of organized labor. The meaning of free choice in the context of union organization is situated in the historical context of the NLRA and Wagner's attempts to come to terms with the company unions. Capital's first move against labor in the formative years of the New Deal was to propose their version

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260. For example, by 2005 Musgrave had muted her vociferous campaign against gays. One report explained that Musgrave's fervent ideology had encountered the compelling political reality that she was one of the country's most vulnerable politicians. Mike Soraghan, *Musgrave Backs Off Anti-Gay-Marriage Amendment*, DENVER POST, Aug. 11, 2005, at 3A.

261. Among a list of political priorities from February 2005 to its breakup in July, the AFL-CIO identified a number of important legislative priorities, such as free trade, social security, judicial nominations, minimum wage, bankruptcy, and others. Pending right to work bills are not mentioned. *See* postings at <http://www.aflcio.org/issues/legislativealert/updates/index.cfm>.

262. The Change to Win coalition bases its political program around "a growing, independent voice for working people in politics based on economic issues, not party." It favors action to renew the Voting Rights Act in 2007 but has no other apparent political vision. Its objectives are set forth at <http://www.changetowin.org>.

of company union representation as the ideal of free choice in our society, and the nature of the policy debate about representation systems has changed little since the 1920s.<sup>263</sup> Having failed in their quest for dominated company unions, employers' next best option was to undermine union solidarity by prohibiting true freedom of contract—the right to exclude non-members from access to the benefits of collective bargaining without their financial support. When he chose to defer the issue of union security to state law, Wagner believed that he was protecting unions' rights to negotiate for closed shops, not state interests in fostering individual autonomy.

Indeed, the legislative history of the NLRA manifests Wagner's overriding vision of class emancipation through collective action and economic power. His decision to abrogate federal power in the matter of union security ultimately proved to be antithetical to the interests of the labor movement and paved the way for the retrogressive policies of Taft-Hartley. Company unions played an important role in Wagner's approach to legislative policy by forcing vital political concessions on the matter of compulsory union membership. Those concessions led to the passage of state right to work laws, creating a fragmented and decentralized environment for collective bargaining that promotes hostility to unionization and is inimical to the development of civic well-being. Given the present disrepair of our employment institutions, the role of labor unions in American society and the current threat to them deserves greater attention. Increasing public awareness of the federal right to work legislation and the vigorous opposing union campaign might open a useful debate about the paramount importance of collective bargaining institutions for our times.

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263. For an exchange about the merits of employee representation that captures the two positions, see William M. Leiserson, *Contributions of Personnel Management to Improved Labor Relations*, and Frank W. Taussig, *The Opposition of Interest between Employer and Employee: Difficulties and Remedies*, WERTHEIM LECTURES ON INDUSTRIAL RELATIONS 125, 197 (1929). The essays can be read as a discussion of "liberty" versus "freedom." Taussig, an economist at Harvard, makes clear that collective bargaining means power for workers, and personnel management means power for managers.