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The Striking Success of the National Labor Relations Act

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Research Handbook on the Economics of Labor and Employment Law

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RESEARCH HANDBOOKS IN LAW AND ECONOMICS

Edward Elgar

Cheltenham, UK • Northampton, MA, USA

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Published by
Edward Elgar Publishing Limited
The Lypiatts
15 Lansdown Road
Cheltenham
Glos GL50 2JA
UK

Edward Elgar Publishing, Inc.
William Pratt House
9 Dewey Court
Northampton
Massachusetts 01060
USA

A catalogue record for this book
is available from the British Library

Library of Congress Control Number: 2012940992

ISBN 978 1 84980 101 0 (cased)

Typeset by Servis Filmsetting Ltd, Stockport, Cheshire
Printed and bound by MPG Books Group, UK

15. The striking success of the National Labor Relations Act

*Michael L. Wachter*¹

INTRODUCTION

In the United States today, less than 10 percent of private sector employment is unionized.² After peaking at 35 percent of employment in the early 1950s, union membership has been in decline for the last 59 years. This decline represents one of the most important institutional shifts in the United States economy. Reflecting this decline, a common theme among academic legal commentators is that the law governing unionization and collective bargaining, the National Labor Relations Act (NLRA), has been a terrible failure. In this chapter I will make the counter-claim – that the NLRA has been largely successful and in one key area exceedingly successful. Its presumed failure, if the word failure needs to be maintained, is largely due to its successes.

Before judging the NLRA to be a success or failure, measures of success have to be identified. I will judge the success of the NLRA by whether the two explicit goals of the Wagner Act of 1935 have been achieved. The goals are industrial peace and a greater balance in bargaining power between employers and employees.

The first of the goals is industrial peace. The preamble of the Wagner Act starts by identifying that the “denial by some employers of the right of employees to organize” and bargain collectively had led “to strikes and other forms of industrial strife or unrest.”³ Industrial strife and unrest at the time of the passage of the Wagner Act meant more than the inconvenient strikes that we sometimes experience today. Instead, it meant violent strikes that paralyzed the national economy and frequently required the deployment of the National Guard or federal troops to restore order. Indeed, in the midst of the Great Depression the question was whether the then-prevailing political economy would survive. Critical to the stability of the political economy was adopting a legal regime for labor that would replace industrial strife with industrial peace.

A second goal is to redress “inequality of bargaining power.” In the words of the Act, “[t]he inequality of bargaining power . . . substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.”⁴ The goal was not true equality but rather giving employees meaningful bargaining power.

To evaluate the success of the NLRA, I will treat it as one of four alternative legal regimes, all of which have actually existed in the United States since the beginning of the New Deal, and will ask which of the four is most likely to achieve the two goals. In terms of terminology, I note that the NLRA has been amended several times since the original

Act – the Wagner Act – was first passed in 1935. When I use the term NLRA, I refer to the labor law as it exists today.

The first of the alternative legal regimes is the National Industrial Recovery Act (NIRA) of 1933, which was the first attempt in the United States to give workers the right to act in concert without employer interference and to encourage collective bargaining. The second is the original NLRA – the Wagner Act – as passed in 1935. The third is today's NLRA, which includes the major Taft-Hartley Amendments of 1947. The fourth legal regime is the patchwork of employment laws that regulate today's non-union sector.

It is also useful to think of these legal regimes as constituting alternative political economies. Here the four legal regimes constitute three alternative political economies since the NLRA of today and the non-union sector of today constitute a single political economy. Since both the NIRA and the Wagner Act envisioned widespread unionization, I do not discuss the non-union sectors that co-existed when those laws were in effect.

In addition, each of the four legal regimes corresponds with a distinct economic model. The economic model of the NIRA was cartelization, where both wages and prices were set collectively with government oversight. The economic model of the Wagner Act was also a cartelization model, but only of the labor market. It was envisioned that collective bargaining would become the primary vehicle for wage setting and would, in time, embrace most eligible workers. Hence, wages would be set by the dictates of the collective bargaining process and not the dictates of the marketplace. Unions would have monopoly power in the labor market, but firms would not have monopoly power in their product markets.

The third legal regime is the modern NLRA, which includes the Taft-Hartley Amendments. That legal regime envisioned that unionization would not spread throughout the economy and that non-union employers would emerge within each industry to compete with unionized employers. The resulting model has a union sector where wages are set by collective bargaining and a non-union sector where wages are set competitively.

The fourth legal regime is today's non-union sector. The economic model that fits the non-union sector is the competitive model, but with an important twist. Competition operates in the external labor market (ELM) where firms seek workers and workers seek jobs. Wages overall are set competitively in the ELM. However, after being hired, an employee works inside a firm, and the firm can be viewed as having its own internal labor market (ILM). The ILM inside non-union firms is a complex organizational structure where norms rather than legal rules prevail.⁵ Importantly, the ILM is not a textbook competitive model. In addition to the norms of the ILM, the employment relationship is regulated by statutory rules that govern the entire labor force, such as the Fair Labor Standards Act (FLSA), the Occupational Safety and Health Act (OSHA) and the Employee Retirement Income Security Act (ERISA). These statutory regulations govern both the union and the non-union labor market, but I discuss them as part of the non-union market.

The analysis below proceeds as follows: In section I, I analyze in depth the two goals of the NLRA: first, industrial peace and, second, equalization of bargaining power. Since the former emerges as the key of the two goals, section II presents a history of the major events whereby industrial strife was slowly replaced by industrial peace. The industrial

strife of this period was marked by strikes of uncertain legal standing which often turned violent. In section III, I present the four legal regimes, introduced above, describing their main features and matching each with an economic model that captures the spirit of the legal regime. In section IV, I evaluate the success of the four legal regimes in achieving the goals of industrial peace and equalization of bargaining power. Section V concludes with the claim that today's NLRA can be judged to be successful because of the sharp decline in strike activity and related violence. In addition, perhaps unexpectedly, the non-union sector has become a vibrant part of the American economy. I argue that the success of the non-union sector is partly a result of the incentives created by the NLRA, which gives an escape valve for poorly treated non-union workers and a costly penalty to non-union opportunistic employers.

I. THE BROAD GOALS OF THE NLRA

A. Industrial Peace

The preamble of the Wagner Act first lists the goal of reducing industrial strife. On one level, this goal means reducing the number of strikes or the economic effects of strikes. But that barely scratches the surface of this goal. Industrial strife in the late 19th and early 20th centuries went far deeper, raising the question of whether the employees would accept the basic rules of the game. For instance, would workers cooperate in a political economy that did not provide for a legally protected right to organize and to strike? Would workers act to change the political system itself, whether lawfully or not, if their key demands were not respected? Would the United States electorate tolerate a political economy that regularly needed to call on the National Guard or federal troops to be deployed in American cities to break strikes, often using lethal force in the process?

Not only was industrial peace given top billing by the Act itself, it was also specifically cited as the basis for declaring the Act constitutional. In *Jones & Laughlin Steel* the Supreme Court spoke of the deleterious impact of industrial strife on interstate commerce, noting especially the immediate and potentially catastrophic effects of a steel strike on the economy.⁶

Prior to 1932, there was no federal legal right to strike, even peacefully; and indeed many strikes were illegal under state law or the federal common law followed in federal courts.⁷ Employers often required that workers agree not to join a union or be involved in union activities during the term of their employment, and the federal courts held such agreements binding. Concerted activity by employees was not protected. If workers went out on strike and did not return to work when served with a state court ordered injunction, the striking workers were in contempt of court.⁸ When confronted by police or Pinkerton guards, strikes would often turn violent. The next move in many strikes was for the state governor to call out the National Guard to restore order.

In the Great Railroad Strike of 1877 federal troops were deployed in six states in major cities, including Baltimore, Pittsburgh, Chicago and St. Louis. Striking workers often resisted, resulting in considerable violence and many deaths. Certainly one could understand President Rutherford Hayes' concern that a revolution might be in the making (Brecher, 1997; Zinn, 2003).⁹ Imagine that scene today playing out on television and the

Internet. Industrial turmoil persisted well into the 20th century, as demonstrated below, further underscoring the desire to achieve industrial peace.

Hence, when I use the term “industrial peace” to describe what Congress was seeking, I am not only referring to a reduction in the number of work days lost from peaceful and lawful work stoppages. My focus is – and Congress’ focus was – on the unrest that led to riots and to the eventual use of police or military force to restore order.

A legal regime was needed to legitimize both unionization and strikes, but also to steer those activities into peaceful channels. In this chapter I will focus on this first goal of industrial peace because it was arguably the most important in terms of the workings of the economic system.

B. Equality of Bargaining Power

A second goal of unions is to redress “inequality of bargaining power.”¹⁰ Whereas the goal of industrial peace is straightforward, the same is not true of the equality of bargaining power. Indeed, the goal is not only complex, but also based on a flawed theory of economics, and, as a consequence, is internally inconsistent.

First, the goal is complex because it has both procedural and substantive elements. On the procedural element, Senator Wagner himself said that the goal was satisfied if workers were represented by unions. I will adopt Senator Wagner’s interpretation by equating the procedural element with workers’ achievement of collective bargaining status.¹¹ This provides a clear and measurable goal. The greater the percentage of workers belonging to unions and engaging in collective bargaining, the more successful is the Act. Hereafter, I use the term “union density” to denote the percentage of workers who belong to unions.

The substantive element is raising wages, which it was hoped would reduce the likelihood or severity of depressions. The traditional indicator of whether unions raise wages is the union wage premium, or the percentage difference between the union wage and the non-union wage.¹² Collective bargaining and higher wages were linked. It was always understood that the collectively bargained wage would be higher than the wage achieved in the non-union sector.

At this point in the analysis the goal, albeit complex, can be cabined in what appears to be a consistent manner. Simply stated, the procedural goal is achieved when workers join unions and engage in collective bargaining and the substantive goal is achieved when the collectively bargained wage is set above otherwise-prevailing wages in an unorganized labor market. But that understanding of the second goal of the Act brings us to a problem that is not easily resolved. The Wagner Act was passed in 1937, before the development of the neoclassical model of economics and the modern theory of business cycles. Fundamentally the second goal of the Wagner Act was based on flawed and now outdated theories of wage determination and of business cycles.

The labor market analysis at the time of the Great Depression was still rooted in the theories of Thomas Malthus and John R. Commons. Malthus claimed that population growth would always leave a pool of unemployed workers that would keep wages at the subsistence level (Malthus, 1803). John R. Commons, one of the original giants of industrial relations, extended the claim, saying that “cutthroat competition” among workers set the market wage at the wage that the “cheapest laborer” would be willing to accept

(Commons and Andrews, 1927). To remedy the problem, unions were needed to address the inequality of bargaining power.¹³

The modern concept of competitive labor markets was undeveloped at this time. It was not until 1932 that John Hicks published *The Theory of Wages* and laid the framework for the neoclassical theory of wage determination; and it was several decades later before it became widely known or accepted (Hicks, 1963). In the modern theory of wage determination, the competitive wage is the wage that equates supply and demand. Both employers and employees are “price takers;” neither exercises bargaining power. The competitive wage may be a depressed wage in terms of some norm of acceptable living conditions, but it is the market outcome. But the conventional wisdom among policy-makers when labor law was being developed in the 1930s was that of Commons and not Hicks.¹⁴

The business cycle language of the Act creates problems as well in light of modern neoclassical economic theory. The statutory language looks to unions to raise wages to counter an ongoing deflationary cycle where declining wages result in under-consumption and thus increased unemployment. The under-consumption story was a neat one but there was never any solid economic support for it,¹⁵ and it was in the course of being replaced by Keynesian economics even as the Act was passed. Keynesian economics posited that a combination of fiscal and monetary policy could reduce the severity of business cycles and maintain wages. That theory has been applied with considerable success ever since.

Today’s economics textbooks do not refer to “under-consumption” and there is no business cycle theory that utilizes it. Mark Barenberg (1993) investigated the under-consumption story and confirmed these conclusions; he referred to under-consumption as part “of the popular ‘new economics,’ but it was the new economics of the 1920s.”

C. What Do We Make of the Two Goals?

Two alternative stories can be told in putting these two goals together. The first story is the one told by the framers of the Wagner Act. Industrial peace is an important, clear, and coherent goal of the Wagner Act. Moving from a regime of violent strikes and industrial strife to one of industrial peace is an extraordinarily important goal, if it can be achieved. Replacing industrial strife and unrest with industrial peace makes both employers and employees better off, and has enormous benefits for social welfare. On the other hand, a violent regime of illegal strikes, riots and the recurring exercise of police power bears the hallmarks of a failed industrial relations system.

In this story, the goal of equalization of bargaining power seems to fit neatly with the goal of industrial peace. Workers needed the protection of a collective bargaining apparatus that could resolve labor disputes peacefully. With this interpretation of the equalization of bargaining power, the two goals are complementary and both are needed for either to be realized.

The second story reaches a very different conclusion, at least in a competitive economy. First, by the lights of neoclassical economic theory, the procedural and substantive aspects of the goal of equalizing bargaining power are inconsistent. The higher the union wage, the lower is the level of employment in the union sector. The substantive goal of a high wage thus pulls in one direction, while the procedural goal of more

workers covered by collective bargaining pulls in the other direction. Second, there is a potential inconsistency between the substantive goal of higher union wages and the goal of industrial peace. The higher the union wage level rises above the non-union wage, the greater will be the opposition of management to paying union demands (and indeed to union organizing efforts generally), thus resulting in a greater likelihood of strikes.

The inconsistency in the goals, however, depends very much on the political economy: the more competitive the economy, the greater the inconsistency. In a competitive economy there would be a strong tradeoff between higher union wages and high rates of unionization, because both cannot be maintained.¹⁶ If the political economy is less competitive, the tradeoff is less dramatic: the greater the degree of cartelization of markets, the greater the ability to achieve both goals at the same time. And that indeed was the nature of the political economy envisioned by President Roosevelt's first New Deal legislative agenda. But the U.S. economy has become increasingly competitive since the New Deal, with the shift away from a coordinated economy and toward a commitment to antitrust principles and with the rise of deregulation and liberal trade policies. In this new environment, the tradeoff between higher union wage rates and union density has become sharper. The substantive and procedural dimensions of the goal of increasing workers' bargaining power have become irreconcilable.

The complexities and potential inconsistencies inherent in this second goal of the NLRA is one reason for emphasizing the more straightforward goal of industrial peace. But another reason lies in the dramatic statutory revisions of 1947. When Congress enacted the Taft-Hartley Amendments to the NLRA, there was little question that it was seeking to promote industrial peace, and to confine the scope and conduct of labor disputes, even at the obvious cost of curbing unions' bargaining power. So it is fair to say that industrial peace was the one goal shared by the congressional majorities that passed the Wagner Act and the Taft-Hartley Amendments.

II. INDUSTRIAL STRIFE

This section focuses on the meaning of industrial peace and its opposite, industrial strife. The section develops the meaning of industrial peace through a brief historical narrative. Unlike the decades that are chronicled in this section, the United States today has little or no industrial strife. Consequently, it may be difficult for us to picture the state of industrial relations in the decades beginning with the railroad strikes of 1877 running through the passage of the Taft-Hartley Amendments of 1947.

The genius of the labor law reforms of the 1930s and 1940s lay in the fact that through trial and error they replaced a system marked by violent confrontational labor-management strife with a system where disagreements were channeled into a peaceful mechanism that avoided major disruptions to interstate commerce. Although a full survey of U.S. labor history is beyond the scope of this chapter, well-recognized and readily available scholarly references develop a good picture of the state of industrial and labor relations during this period. However, in order to assess the labor laws' objective of industrial peace, it is helpful to review what "industrial conflict" actually meant in the decades leading up to the period of major national labor legislation.

The violent strikes of the late 19th and early 20th centuries had a choreography of their

own. Companies frequently employed their own security forces to defeat strikes, whether the strikes were legal or not. In that setting, the strikes often led to violence and confrontations with local police. If the local police were unable to contain the violence and the riot conditions that sometimes developed, the governors of the affected states or the president would call out the National Guard or federal troops. The result would be a violent one, often with some deaths, before the military was able to restore order. To the authors of the Wagner Act, industrial strife did not mean orderly strikes. Instead it meant violence and, in the extreme, riots that had the potential to paralyze an entire city or region.

The meaning of industrial strife in the 1930s was informed by a 70-year period of disruptive labor-management strife. The Great Railroad Strike began in 1877 in the midst of a severe national depression that led to deflation in prices and wages (Dubofsky, 1994). After the Baltimore and Ohio Railroad cut wages and intensified workloads, workers went on strike in West Virginia and disrupted the movement of train traffic. Fighting began in West Virginia where state officers determined that they lacked sufficient police power to resume train traffic; they asked for the aid of the federal militia to end the strike (Dubofsky, 1994). Although federal troops successfully restored order in West Virginia, violence intensified as the railroad strike spread to three other states. The arrival of state militia initiated street battles between the troops and strikers. On several of these occasions, employers called in the Pinkerton Detective Agency, which supplied spies, agents, and private armed forces ready and willing to combat unruly workers. Many blame their aggressive tactics for intensifying the fighting.

The conflict soon spread beyond West Virginia. For nearly two days Pittsburgh was known as the "smoky city" as nearly 80 buildings were burned, over 2,000 railroad cars were destroyed, and 24 people were left dead (Brecher, 1997). Before the strike ended, it had spread to other cities, including Baltimore, Cincinnati, Chicago and St. Louis. The state militia failed in its efforts to retain order in almost every instance, leading state officials to request federal military intervention. President Hayes granted all of these requests and dispatched federal troops to six states.

Labor unrest was hardly limited to the railroads. As organized labor quickly grew in size, reaching nearly 3 million members shortly after the turn of the century, the incidence of strikes and violence also increased. A few other examples of the strike scene in the United States prior to the New Deal illustrate this point. From 1903–05 the Colorado mining industry was immersed in a war between management and workers over wages. Unable to control the strike, the governor declared martial law and federal troops were used to break the strike at the request of management. The period between 1910 and 1915 was commonly referred to as an "age of industrial violence" as unions struck back at anti-union employers, culminating in the 1910 bombing of the *Los Angeles Times* building. After America declared war in 1917, more than 4,000 strikes broke out involving over 1 million workers. Citywide strikes broke out in cities such as Springfield, Illinois; Kansas City, Missouri; Waco, Texas; and Billings, Montana (Brecher, 1997).

The primary legal tactic adopted by employers prior to the New Deal was the labor injunction. It was a highly effective tool to cripple or end strikes.¹⁷ If an employer whose facilities were affected by a strike could allege a danger of irreparable injury that was too imminent to risk delay, a judge could issue a temporary restraining order pending a preliminary hearing. The preliminary hearings often resulted in the issuance of a temporary injunction on the basis of employers' allegations alone (Summers, Wellington and Hyde,

1982). Judges had wide discretion in granting injunctions and employers often succeeded in their attempt to choose a pro-business judge. Once an injunction was issued, workers who continued to pursue the strike might find themselves in contempt of court, and thrown in jail without a jury trial; or they might respond with violence when the authorities sought to enforce the judicial action. But if the workers abided by the preliminary injunction and suspended their strike, the cause was often lost before the case could be heard on the merits.

Industrial strife worsened during and in the aftermath of World War I. First, the shortage of workers during World War I helped galvanize unions to push for higher wages, and, in addition, the number of workers who belonged to unions increased sharply. In this regard, the year 1919 was pivotal. There were 3,000 strikes involving 4 million workers, many involving mass riots and bombings. Even the police walked out in the dramatic Boston police strike. A major strike involving steel workers was broken up by federal troops and U.S. marshals. Widespread strike activity broke out again during the summer of 1922 among the coal miners and the railroad shop craft workers (Dubofsky, 1994). More specifically, the coal miners' strike of 1922 was considered one of the largest strikes in American history, comprising workers in both bituminous and anthracite mines. The early 1920s also saw the first national railroad strike since 1894, comprising 400,000 railroad shopmen and non-operating railroad workers.

Adding to the tension and the political stakes, two American communist parties appeared, both with some presence in the growing labor movement. Many business and political leaders feared that labor demands might become more broadly political and less narrowly tied to improving wages and working conditions (Dubofsky, 1994). Violent strikes where federal troops or National Guard units were deployed might enflame the more radical elements in the labor movement that aimed to change the political regime. To the political establishment, the need for a peaceful resolution of labor strife became more vital than ever.

The transformational decade for organized labor came with the Great Depression. As the Depression set in, public demands for federal intervention and reform brought Franklin Roosevelt to the presidency. The new Democratic administration sought substantive labor law reform that might avoid the strife that would likely accompany the severe downturn in business. The result was the National Industrial Recovery Act (NIRA) of 1933. The Act guaranteed workers minimum wages, maximum hours, and the right to form unions (Dubofsky, 1994).

Rather than bringing industrial peace, the legislative gains for unions resulted in more organizing activity, which itself became a major source of industrial strife. Worker militancy increased as unions demanded the right to bargain collectively and employers remained equally adamant in resisting labor's efforts (Dubofsky, 1994). Labor historian Irving Bernstein (1970) describes the industrial struggle during this period as including "strikes and social upheavals of extraordinary importance, drama, and violence which ripped the cloak of civilized decorum from society, leaving exposed naked class conflict."

Roosevelt attempted to calm the industrial strife with the creation of the National Labor Board (NLB). Although the NLB did have some success, it ultimately lacked the power needed to successfully resolve disputes (Dubofsky, 1994). Hopes for industrial peace ended when mass violence broke out in Toledo during the auto-parts worker strike

of 1934 (Bernstein, 1970). Demanding a wage increase and union recognition, workers took to the streets to picket in mass numbers and to block the plant. Facing a crowd of 10,000, police attempted to enforce an injunction that limited the number of picketers. Fighting erupted when police attempted to arrest five picketers (Bernstein, 1970). The struggle continued over the next few days as tear gas, gunfire, and flying bricks left numerous people seriously injured. The arrival of the National Guard initially intensified the fighting, wounding 15 and killing two, but their presence eventually calmed the situation (Bernstein, 1970).

Similar struggles broke out across the country the following year. Coal miners and truckers in Minneapolis and longshoremens in San Francisco waged bloody battles for recognition, while a cotton and textile strike spread from Maine to Alabama. With over 400,000 strikers, and crowds nearly impossible to control, battles commenced on the streets of many of the nation's cities. Strikers struggled with police, using clubs, baseball bats and pipes, while newspapers denounced strikers, running publications with the headline "Communists capturing our streets." As casualty numbers mounted, the National Guard was summoned to restore order on all three occasions (Bernstein, 1970). On May 27, 1935, the Supreme Court found the NIRA unconstitutional in *Schechter*.

The passage of the National Labor Relations Act (NLRA) in 1935 was thus President Roosevelt's second attempt. Conditions did improve in some ways – in terms of enabling employees to form unions and seek bargaining. But industrial strife continued. Unions were emboldened by the new legislative endorsement of collective bargaining, while hostile employers refused to abide by the new legislative restrictions, assuming that the NLRA, like the NIRA, would also be declared unconstitutional by the Supreme Court (Gross, 1974). Finally, in 1937, the Court upheld the constitutionality of the NLRA, based on a massive factual record detailing past industrial strife and its disastrous effect on interstate commerce (Gross, 1974).

The Supreme Court's ruling in favor of the NLRA curbed the concerted employer defiance of the Act, but it did not succeed in achieving industrial peace. In late 1937, steelworkers waged battle against the steel companies across four states. Violence broke out as police attempted to disperse a massive crowd of strikers. In Chicago, fighting turned deadly. On a day known in labor history as the "Memorial Day Massacre," police killed ten strikers and wounded dozens (Dubofsky, 1994). Also in 1937, a wave of sit-down strikes involved close to 400,000 workers (Brecher, 1997). The union victory in the General Motors sit-down of 1937 turned the sit-down into a popular strike device. The Ford Motor Company experienced mass picketing at its River Rouge plant in the spring of 1941 after it failed to enter into negotiations with the United Auto Workers (UAW) (Bernstein, 1970). As workers attempted to organize, management did everything in its power to prevent unionization. Armed with baseball bats and clubs, union picketers took on Ford's special police, who attacked their picket lines with bars and knives (Bernstein, 1970).

While workers were fighting for recognition, newly forming industrial unions were battling the traditional craft unions for members at both the workplace and federation levels. Although the leaders of the Congress of Industrial Organizations (CIO) once proclaimed themselves allies to the American Federation of Labor (AFL), their affiliation with the AFL quickly crumbled, and the AFL and the CIO began to compete over membership (Bernstein, 1970; Dubofsky, 1994). The CIO supported industrial unionism

(Bernstein, 1970); it represented the more diverse and porous ranks of industrial workers, and became known for its more militant and socially conscious labor strategies. In contrast, the AFL largely kept to its practice of craft unionism and the representation of skilled workers (Dubofsky, 1994). The internecine conflict between the AFL and the CIO only added to the level of industrial turbulence at the time.

When the United States became involved in World War II, President Roosevelt met with the nation's top labor and corporate leaders to develop a wartime labor relations system. The AFL and the CIO put their differences aside for the moment, and all parties agreed to condemn lockouts and strikes for the duration of the war (Dubofsky, 1994). Although initially a success, the wartime system quickly crumbled. By 1943 workers were engaged in a wave of unauthorized wildcat strikes that threatened production (Dubofsky, 1994). The strikes were unauthorized, but the unions often used the resulting instability to increase their contract demands (Dubofsky, 1994). After several wartime strikes that outlasted his mediation efforts, an angry Roosevelt condemned the "selfish preoccupations of civilians" and in 1944 supported a National Service Act that would require Americans to either work or fight (Blum, 1976).

The War Labor Board attempted to resolve industrial disputes without strikes or lockouts. But when dispute resolution failed, the government had a new policy option to help the parties resolve their disputes: executive orders allowing the government to seize companies.¹⁸ During the war, there were no fewer than 18 executive orders centering on labor regulation (Sparrow, 1996). President Roosevelt and President Truman conducted 71 industrial seizures (Sparrow, 1996). In fact, the number of seizures increased during each year of the war, and peaked in fiscal year 1944 and fiscal year 1945 (Sparrow, 1996).¹⁹ Of the top 100 American corporations, more than one-third were seized either in whole or in part (Sparrow, 1996). Among those seized were railroads, coalmines, and even the Montgomery Ward department store (Perrett, 1973).

Roosevelt was not the only one frustrated by union demands. By the end of the war many members of Congress and voters no longer viewed organized labor as the underdog it had once been in the 1930s. Rather, it was seen by many, including some of its erstwhile allies, as abusing its new powers (Dubofsky, 1994). Political and public frustration with labor's tactics after World War II, along with Republicans' sweep of Congress in 1946, led to the passage of the Taft-Hartley Amendments in 1947, which had the votes to overcome President Truman's veto of the legislation.

The passage of the Taft-Hartley Amendments marked a major change in the legal regime and political economy established by the Wagner Act. The Taft-Hartley Act reframed the basic policy of the NLRA from one of encouraging unionization and collective bargaining to one of neutrality, and of protecting employees' choice to unionize or not. It also matched the original set of employer unfair labor practices with a set of union unfair labor practices that arguably targeted labor's most effective and disruptive economic tactics – the very tactics that had proven most effective in enhancing unions' bargaining power.

Industrial peace would continue to be elusive for several years, but the passage of Taft-Hartley was the historical marker that represented the peak in industrial strife. Strikes thereafter were largely peaceful and more narrowly confined to the immediate parties involved in the labor disputes. Moreover, in the emerging postwar prosperity, the public attitude toward unions and the ongoing frequent strike activity turned from being

supportive to being opposed. Overall there was a political shift toward conservatism that undercut public support for unions.

Although the decline in strike activity was to take place gradually over several decades, one critical and immediate result of the Taft-Hartley Amendments was the disappearance of violent strikes. The near century of serious industrial strife ended with Taft-Hartley. The National Guard and federal troops were no longer called upon to restore order and encourage peaceful negotiations.²⁰ the employers' private police were less frequently deployed, and the president did not see the need to seize companies in order to protect the public interest. A new system of industrial relations began to take shape as employers and union leaders learned to successfully negotiate either an initial collective bargaining contract or a follow-up contract in a relationship that both sides assumed to be ongoing (Dubofsky, 1994).

In the new relationship, most disputes either centered on contract interpretation, which was often resolved in arbitration by a new cadre of labor relations arbitrators, or the development of a new contract, which was worked on by specialized labor lawyers. The result was that the parties developed a kind of day-to-day cooperation, which enabled them to resolve disputes in a more peaceful manner off the streets and usually outside of the public courts (Dubofsky, 1994).

Although the level of strikes was lower in the 1950s than before the passage of Taft-Hartley, it remained high by current standards. By the 1960s, most strikes and confrontations between employers and employees took on a ritualistic character in which neither the future of the union nor the achievement of a collective agreement was in doubt. Industrial conflict lost its association with political militancy, unruliness and violence. Yes, strikes were often still part of the ritual, but a new and more peaceful choreography had taken hold (Dubofsky, 1994).

The outright collapse in strike activity occurred in the 1980s with the election of President Reagan. The election of President Reagan and the repudiation of President Carter's attempt for a second term speak to the underlying change in the electorate. The single dramatic seismic event in the labor landscape was President Reagan's decision to replace the striking air traffic controllers in 1981. That critical decision emboldened employers to use economic weapons available to them under the NLRA, such as the replacement of striking workers when impasse was reached.

For the last 20 years, strike activity has been a fraction – and a declining fraction – of its former self. What I describe as a maturation of an employment relationship into a peaceful mode was to union activists the beginning of the end for their particular vision of labor unionism. The idea that unionization would become the spearhead of a more radical reform of the workplace or of society dropped off the mainstream political agenda. In the widespread political consensus that emerged after World War II, industrial peace and continued economic prosperity were favored over radical labor law reform or radical social change of any kind.²¹

III. THE FOUR LEGAL REGIMES

In this section, I discuss the capacity of each of the four legal regimes to achieve the goals of industrial peace and equality of bargaining power. I focus on only a few of the most

salient features of each legal regime as they affect the achievement of the statutory goals, since a comprehensive treatment of even one of the four is beyond the scope and page limits of this chapter. I also match the legal regime with the economic model that best captures the rules of the regime.

A. The National Industrial Recovery Act (NIRA): Taking Wages out of Competition

The NIRA was the centerpiece of President Roosevelt's first New Deal. Of the alternative legal regimes it had a critical feature that might have supported wide-scale unionization in the United States: a coordinated policy of reform that would affect not only labor law, but also antitrust and corporate law. The theme was to replace "free competition" with managed "fair competition."²²

The legal structure of the NIRA is known as corporatism. Corporatism emphasizes cooperation among interest groups or constituencies – especially labor and capital – and between those constituencies and the government. The role of the government is to define an objectively cognizable "public interest" that is developed through active collaboration with the relevant constituent groups. Once the public interest is expressed, firms and other associations are challenged to adapt their policies so as to support the public interest.

Within the consultative process, individual companies would be represented at the policy table by a trade association. Labor unions would also have a seat at the policy table representing employees' interests. At the national level, these constituencies are assembled hierarchically, with "peak associations" at the top holding the most influence with government policymakers. These peak associations are groups like organized industry-wide business associations or national labor federations, the broad membership of which is thought to discourage narrow conceptions of political interest. These peak groups are also expected to exert discipline among their constituent local groups so as to maintain cohesive support for national policies.

In the incipient corporatism of the early New Deal, the constituency groups had to come together at the policy table to develop industry codes of practice. To bring this about, the administration sought to convene corporate leaders and union leaders from most of the major industries to deal with economic problems. One problem with this scheme was that unions represented only a small percentage of the private labor force at that time. Without labor unions that broadly represent employees' interests, industry codes would likely be unbalanced, reflecting only the interests of business.

To provide a countervailing power to corporations, the NIRA actively encouraged unionization. The result was that union membership grew exponentially in the period following the adoption of the NIRA. In August 1932 there were 307 federal and local unions affiliated with the AFL. In July and August 1933, immediately after the passage of the NIRA, 340 new charters were issued to federal and local unions. In the following year, an additional 1,196 charters were issued.²³

Codes of practice were adopted for most industries. Businesses were not forced into associations against their will. Instead there were enormous incentives to join the process since the codes enabled firms to legally fix prices. At the level of the individual firm, participation in the process was critical since the codes were legally binding on the entire industry. For the individual firm to protect its own interests it had to join the process.

Similar incentives existed at the industry level. If the trade association in a particular industry was a reluctant player, that reluctance usually gave way because the NIRA could adopt a code for an industry that failed to adopt one (Brand, 1988).²⁴

The economic model of the NIRA legal regime, stripped to its essentials, was to cartelize industry in order to prevent price and wage competition from feeding deflation. With higher prices and no price competition, companies could pay the higher wages demanded by newly unionized workers. The term "cartel" was not used to describe the codes' agreements, but that is what they represented; and it was this feature of the NIRA that encouraged corporations to participate. The opportunity to cartelize the product market to dampen price competition under state policy is a plum that should not be underestimated.

In return for allowing businesses to fix prices, codes had to grant employees the right to participate in union activities (Hosen, 1992). At the heart of the NIRA's labor policy was section 7(a), which required that each code recognize the rights of employees "to organize and bargain collectively through representatives of their own choosing free from employer interference." Section 7(a) was breakthrough legislation for the union movement, providing labor the right to organize and to do so without interference from employers.²⁵ The exact scope of the right to be free from interference was never clarified, but it did provide the basis for limiting the employer's right to hire and fire based on an employee's interest in unionization (Brand, 1988).

Most importantly, the NIRA held out the promise of a truly cooperative relationship between labor and capital. The two constituencies needed each other. The cartelization of labor markets by unions helped employers to avoid price-cutting by competitors. The cartelization of product markets also provided the extra revenue to fund the higher wage. From a political perspective, management associations and labor unions worked together to form the codes of behavior that would guide individual actors. The national unions and even more so the federations were to be consulted on all industrial policy issues affecting their membership.

The corporatist moment was too short-lived in the United States to provide a picture of how the fully formed policies might have functioned. However, the NIRA was the most radical attempt of the Roosevelt administration to reset the political economy of the country. If the NIRA had survived, the history of the labor union movement would look very different.

With its emphasis on fair rather than free competition, the economic model of the NIRA does not fare well under the scrutiny of neoclassical economics. From a welfare perspective, an economy built around cartelized industries leads to various inefficiencies. Wages are high, but because they are high relative to equilibrium market-clearing wages, the result is unemployment. Cartelized economies can also be inefficient because they stifle change. The conflict between neoclassical economics and the NIRA is hardly surprising, however, since the goal of the NIRA was largely to replace the market mechanisms that are the cornerstone of neoclassical economics.

The policies of the NIRA would have proved much more appealing if the view of economics held by the Roosevelt administration had been correct. If the dynamics of capitalism did indeed have a tendency to regularly produce a deflationary cycle, then unions would have played a critical function. By engaging in collective bargaining they would prevent downward pressure on wages, thus sustaining purchasing power

and averting the development of a deflationary cycle that was the plague of the Great Depression.

B. The Wagner Act: Promoting the Spread of Unionization

Congress was at work on a successor statute to the NIRA well before the latter was struck down by the Supreme Court. The heart of the Wagner Act, Section 7, was largely a carryover from Section 7(a) of the NIRA.²⁶ Workers were given a right to join labor organizations, to bargain collectively and to engage in concerted activity such as strikes, without “interference, restraint or coercion” by management.²⁷ Unlike the NIRA, which was broad in scope but lacked detail, the NLRA provided a detailed set of rules for both union recognition and collective bargaining. It forbade many employer tactics that discouraged unionization, including the creation of management-dominated employee representation plans; set up machinery for determining the union designated as their representative by a majority of the employees; and directed employers “to bargain collectively” with the chosen representatives in good faith.

The intent of the Wagner Act was to foster collective bargaining, and its proponents appeared to assume that the result of the Act would be that most workers, at least in the major industries, would eventually become unionized. Unlike the predecessor NIRA, however, the Wagner Act offered no financial benefits or inducements for employers to join in this endeavor. Moreover, while Section 8 contained a list of employer practices that would constitute an unfair labor practice, there was no comparable list for unfair union practices. This represented a remarkable empowerment of unions to organize new sectors and win extensive contracts. While the employer faced many constraints in resisting union gains, the unions had few constraints in using their economic weapons.

The Wagner Act also sought to solve an endemic problem of the NIRA, namely the lack of effective enforcement powers. The National Labor Board under the NIRA was created through an executive order and only had the power to mediate disputes. The Wagner Act created a new body, the National Labor Relations Board (NLRB), to conduct secret-ballot representation elections and to remedy unfair labor practices. The NLRB was established as a quasi-judicial body, with the general counsel investigating and prosecuting unfair labor practice complaints. Cases were to be heard by an administrative law judge, whose decisions could be appealed to the NLRB and then to the U.S. Court of Appeals.

To achieve its goal of promoting industrial peace, the Wagner Act provided for a legal strike mechanism which channeled concerted activity into a peaceful form: employees were given the right to strike, but that right was required to be exercised in a peaceful fashion. It was assumed that violence would render strike activity unprotected and subject to existing state criminal and civil laws. What was not entirely clear was whether Section 7 trumped existing state laws and protected all peaceful union activity.²⁸

It was also hoped that, by granting employees the right to bargain collectively, the Act would make employers understand the fundamental changes to rules of the employment relationship. Compelled to live with unions, perhaps employers would learn to cooperate with them. The result would be a more cooperative spirit where the parties would resolve differences through negotiations.²⁹

The cooperative spirit envisioned by Senator Wagner was an impossible dream from the beginning. If unions and employers found it difficult to cooperate under the NIRA, how could they be expected to cooperate under the NLRA? Under the NIRA, higher union wages would be paid for by consumers in the form of higher profits protected by the codes of conduct. Under the NLRA, however, higher union wages were to be paid for out of corporate profits since the employers could be forestalled from increasing prices by product market competition from non-union producers or those with weaker unions.

Whereas the economic model of the NIRA was to cartelize both product and labor markets, the economic model of the NLRA was to cartelize the labor market only. The difference is critical. In the economic model of the Wagner Act, product market competition continues unabated. There is no win-win here, only win-lose. That did not provide the foundation for industrial peace. Whereas the NIRA, if successful, could take wages out of competition, the Wagner Act could only take wages out of competition if the entire industry, including all new entrants, were unionized and wages were bargained at the industry level. Under the best of circumstances that would take time to develop. But from the outset, staying non-union under the Wagner Act gave firms much lower labor costs, which provided a great inducement to stay non-union.³⁰

Under the original Wagner Act, unions had considerable bargaining power over employers. For example, since there were no union unfair labor practices, the strike weapon could be used freely under the Wagner Act in support of union recognition (subject to the uncertain force of state law). For example, when a union met resistance from an employer it hoped to unionize, it could boycott the employer, set up a "recognition" picket line, and then pressure that employer's business customers or suppliers, through strikes or boycotts, to refuse to deal with the target employer. Through the secondary boycott, unionized workers in one firm could pressure their employer to put pressure in turn on a resisting company, either to recognize a union or to sacrifice its business relationship with the initial company.³¹

The Wagner Act also allowed for "closed shop" rules which provided another powerful source of union strength. Under this system, employers committed themselves contractually to hire only union members; thus employees had to be members of the union before being hired, and had to remain members or else they would be fired. This was a very powerful organizing device. The closed shop concept fits the assumption of the Wagner Act that most workers would organize. If most workplaces were closed shops, then workers would end up being a member of a bargaining unit whose terms and conditions of employment were set in collective bargaining.³²

Importantly, the closed shop also gave the union the power to discipline its own members. Members who engaged in a wildcat strike could be expelled from the union and would thus lose their jobs. The closed shop rule made the worker a loyal union member first and a loyal employee second, as the union might control employees' access to most or all of the jobs in the trade, while the employer only controlled those jobs in its own enterprise.

In addition, the Act favored collective bargaining as the preferred form of the employment relationship and, implicitly, favored spreading collective bargaining throughout the economy. With collective bargaining, the wage that would emerge would be higher than the competitive wage. The Act imposed upon employers a duty to bargain in good

faith with “respect to wages, hours, and other terms and conditions of employment.” As a result, the union could impose costs on the employer by using its strike weapon. The competitive wage would be the floor, and the effectiveness of the strike weapon would determine the pay premium that the union could achieve.

In effect, unions were given the right to exercise monopoly power in the labor market by setting wages collectively. From an efficiency perspective, the higher union wages and benefits would be expected to cause a lower level of employment than would occur in a competitive market. The union’s bargaining effect on economic variables is similar to that of a monopolist in the product market where the firm garners higher profits by restricting supply.

C. The NLRA after Taft-Hartley: Competition between Union and Non-Union Firms

The Taft-Hartley Amendments left the preamble statement of the Act largely intact and, in that respect, did not explicitly alter the goals of the legislation.³³ There were, however, some highly significant modifications that implicitly changed the Act’s goals. Archibald Cox in his famous article from 1947 argued that Taft-Hartley changed the NLRA from actively encouraging unionization to being neutral toward it.

Nowhere is this clearer than in the revised Section 7, entitled “the rights of employees.” In the original Wagner Act, Section 7 contained the sweeping language that employees had the right to join a union, to bargain collectively, and to engage in concerted activity such as strikes. The Taft-Hartley Amendments left those rights in place, but added that workers “have the right to refrain from any or all of such activities.” Taft-Hartley thus approved the legitimacy of the non-union employment relationship and removed one of the effective tools that union organizers had used since the NIRA; namely, the claim that, by unionizing, workers were following the policy adopted by two very popular presidents, FDR and Harry Truman.

Taft-Hartley shared with the Wagner Act the goal of industrial peace. It sought to reduce the industrial strife that continued after the passage of the Wagner Act and accelerated during World War II, and it did so not by strengthening unions but by weakening them. Most of the changes brought by Taft-Hartley reduced the scope and effectiveness of the economic weapons available to the union in organizing new workers. The secondary boycott, a very powerful but disruptive and often violent tool in unionizing new establishments, was outlawed. In addition, the Taft-Hartley Amendments sharply restricted the use of strikes or picketing for recognition when another union was certified as the exclusive bargaining representative, or in the absence of majority support. As noted in the section on strike history, battles between unions to organize workplaces that were already organized were a major cause of industrial strife after World War II.

Critically, the Taft-Hartley Act also outlawed the closed shop. Under the “union shop” rules that replaced the closed shop, employees did not need to be members of a union as a condition of employment. Instead, the collective bargaining agreement could require that an employee join the union and was given at least 30 days from the date of hire to join. Under the so-called “union shop,” unions lost control of the employer’s available labor supply. The employer could hire a worker directly rather than through the union.

The union shop framework was a middle ground that loosened the control of the union while still retaining a strong union identification for employees. Although the loss of closed shop status was important to unions, it was minor compared to the effect of the "open shop," which severed the link between employment and union membership and gutted labor union control of the labor supply.³⁴ And that was precisely what the Taft-Hartley Act allowed the states to do, in what remains the Act's one explicit concession to state law.

Under § 14(b) states were permitted to pass "right to work" laws mandating the "open shop." In a right-to-work state, employees hired into a bargaining unit job did not have to join the union or pay dues. The effect of the right-to-work laws, which were especially popular in the South, was to make it much more difficult for a union to organize and sustain a bargaining unit. The open shop creates a powerful free-rider effect so that even workers who are in favor of a union have an incentive not to join the union because they can enjoy the benefits without paying dues.

Taft-Hartley also added a new Section 8(c) to clarify that employers have the right to express their views about unionization in response to a union organizing drive. Prior to Taft-Hartley, some NLRB rulings had put in doubt whether the employer could wage its own campaign against a union seeking to organize its labor force; Taft-Hartley made it clear that employers could do so. The enhanced ability and willingness of employers to fight unionization of their companies was an important factor in stopping the spread of unionization.

The main effect of Taft-Hartley was to limit the spread of unionization throughout the economy. Consequently, the economic model of the Taft-Hartley legal regime is one with both a union sector and a non-union sector. The relative difficulty of organizing, as well as the ban on the "closed shop," guarantees that there will be a vibrant non-union sector, especially in the "right-to-work" states that require an "open shop." In the right-to-work states, a non-union sector would likely develop even in industries that were heavily unionized in other states.

The economic model of the Taft-Hartley Act has a non-union sector competing actively with a union sector. The automotive industry presents an important example of the competition between union and non-union firms in the same industry. The traditional unionized automobile assembly manufacturers and parts suppliers are located in the industrial belt around Detroit and Ohio, while non-union (and foreign-owned) assembly plants and domestic automotive parts suppliers set up shop mostly in the right-to-work states. As a consequence of the lower labor costs, the non-union manufacturers can deliver a less expensive product. The result is steady erosion in the profits of the unionized plants and a concomitant reduction in union employment. The key point is that, for both parts and final products, prices are being determined at the margin, and the non-union companies are the ones at the margin and thus determining price. Union companies have little to no ability to pass through cost differences to buyers (Hirsch, 2008).³⁵

Commentators stress the importance of international trade, and competition from domestic or foreign companies' plants overseas, in promoting a non-union sector that can undercut union businesses in the United States. Globalization of markets makes the story easier to tell, and is important, but the same outcomes are likely without that story because of the persistence and cost advantages of the non-union sector in the U.S.³⁶

D. The Non-Union Sector: The Norm-Based Employment Relationship (and its Competitive Advantage)

The non-union sector has its own legal regime, one that has come to dominate the U.S. labor market in all but a few industries and regions. Obviously, the employees in this sector have not exercised their right to union representation (or have not managed to garner majority support in the face of strong management opposition) and hence are not regulated by most of the provisions of the NLRA. The employees have little to no bargaining power and must act individually. Very few of them enjoy the protections of an enforceable contract, or of "just cause"-type job security, and they do not have a bargaining agent to represent their interests before the employer. In a sense, the legal regime is marked more by the absence of rights than by the presence of rights.

This legal regime has two components. The first is the employment-at-will doctrine, which governs the norms of the workplace. The second is a set of government mandates such as the FLSA, OSHA and ERISA, as well as Title VII and other antidiscrimination laws.

The employment-at-will doctrine is often stated in the following stark form: that an employer can fire an employee for good reason, bad reason, or no reason at all (Ehrenberg, 1989). As I have argued elsewhere, the doctrine of employment-at-will is more of a jurisdictional boundary than a legal rule that is applied in its literal meaning (Rock and Wachter, 1996). By stating the employer's prerogatives as broadly as possible, the employee who believes that she was wrongfully discharged simply cannot sustain a claim. (There are exceptions, such as race or gender discrimination or whistleblowing, that complicate the picture; but let us ignore them for now.)

Take the case of a non-union employee who works in a production or non-supervisory position and is discharged for what she believes to be false or frivolous reasons.³⁷ She may be able to bolster her complaint with evidence showing that she was never told of poor performance, that her regular job reviews were good, or even that the supervisor was lying about her performance. If the employee were to sue, under the strict employment-at-will doctrine, the case would be dismissed for failure to state a claim. The reason for discharge, or the quality of the employer's evidence, would be simply irrelevant. The purpose of stating employment-at-will so broadly is thus to cut off judicial scrutiny of such claims, and to avoid enforcement through the legal system. The courts accept this jurisdictional boundary by dismissing the suit, leaving the dispute to be settled without judicial interference. The employer thus retains almost complete discretion as to when it can discharge a worker. Moreover, under employment-at-will, employers can change terms and conditions of employment at will, too.

If taken literally, this rule seems to promote rampant opportunism and unfairness. Some particular kinds of unfairness have been addressed, to be sure, by legislation and a variety of tort doctrines arising under the aegis of "public policy." Yet employment-at-will survives insofar as employers have no general duty to justify discharge decisions; they may terminate employment for any reason or for no reason at all (as long as they do not do so for a reason that violates some statute or public policy).

What then explains the almost universal fact that the non-union employment relationship works without use of an enforceable contract for most of its terms? One possible answer is that employers are able to exploit their superior bargaining power over

employees and impose this unfair arrangement. But that begs the question of why some employers have not found it worthwhile to offer job security, perhaps in exchange for lower wages, to attract employees who value job security. A more complete answer to this question takes us to the economic model of the non-union sector. Having discussed above the workings of the non-union ELM, the focus here turns to the workings of the labor market inside the firm: that is, the ILM. As a consequence, the appropriate model is the neoclassical theory of the non-union ILM, which is a component of the neoclassical theory of the firm.

We first need to consider why a firm decides to bring an activity inside the firm (the “make” decision) versus leaving the activity outside the firm and buying the services from another firm or entity (the “buy” decision). When the decision is made to bring the activity inside the firm, decision making with respect to the activity is done through the firm’s own hierarchy. The individuals involved in the activity do not contract with the employer regarding most terms and conditions; rather most decisions are made unilaterally by the employer. The theory of the firm reaches a stark conclusion on this issue: when contracting is inexpensive and the firm has no core competency in the area, the firm will “buy;” it will contract for the service or good to be provided by an outside entity. However, when contracting is expensive or when the firm has a core competency in the area, the firm will “make,” or bring the activity inside the firm.

At the heart of the contracting decision is the level of transaction costs associated with the activity. High transaction costs make contracting costly and thus favor bringing the activity inside the firm. Low transaction costs make contracting straightforward and less costly, and favor leaving the activity to the market. Transaction costs are the costs associated with negotiating, writing and enforcing contracts. High transaction costs occur when the parties interact frequently, when the interactions are connected rather than independent events, and when the environment in which the parties interact evolves over time. These conditions are all present in an ongoing relationship such as the employment relationship inside the firm. The greater the number of contingencies that affect the relationship over time, the greater is the cost of contracting. Finally, the contracting costs are higher relative to the gains when the value at stake in each individual contingency is low. When the transaction is a low-value event, the benefit of contracting to protect the transaction is low, and hence even moderate contracting costs may cut deeply into the profits generated by the transaction.

Transaction costs are typically high in the employment relationship due to a full range of factors such as whether the employee’s training is firm-specific and has little use at other firms, and if the employer has access to information, such as job risks, not available to the employee (Williamson, Wachter and Harris, 1975). When transaction costs are high and contract governance is too expensive, the relationships are brought inside the firm, where they are governed by the intra-firm hierarchical governance structure. From the perspective of transaction cost theories, the decision to bring relationships within the firm is the decision to opt for the intra-firm governance structure over contractual governance within markets.

With one important exception, the decision to bring the activity inside the firm means that the activity will not be governed in most of its particulars by contract terms: there is a contract, but it is radically incomplete, in that its terms are largely open and subject to employer discretion. The one exception is, of course, the unionized firm in which the

employees' rights and obligations are delineated in an enforceable collective contract. In the union sector, an employer's violation of the contract is prohibited by contract law – albeit a distinctive federal common law of the collective bargaining contract that is invariably enforceable through an internal grievance and arbitration system and only in rare cases through litigation in court. Moreover, the union's bargaining rights are protected by the NLRB against employer interference.

This account of the non-union employment relationship, however, raises a serious legitimacy question: is this discretion used wisely and fairly enough so as to protect the reasonable expectations of the employees? Employment-at-will seems facially to encourage opportunism by employers. At least in past decades many employers may indeed have acted in this manner; hence the outbreak of strikes and violence. Today, employment-at-will is an accepted part of the non-union employment relationship, at least to the extent that it is not a serious topic of labor law reform at either the national or state level. In addition, although many labor and employment law scholars are adamantly opposed to employment-at-will, I know of no empirical studies that claim that it facilitates employer opportunism.

What explains the relative lack of employer opportunism in today's non-union sector? The answer is to be found in the unique nature of the employment relationship. The employment relationship is distinctive because it is an intensively repeat-play game. The employer and the employees are in frequent interactions with each other over an extended period. The tasks evolve over time to meet new contingencies. Monitoring is costly and thus incomplete. It is now well known that informal norm governance works best in such situations because self-help methods are much more effective. In this situation, an employer that engages in bad play by not following prevailing norms can be sanctioned by the employees through techniques running from work slowdowns to outright sabotage at the individual or collective level. In this situation it is the firm that arguably lacks bargaining power, since the remedy – increased monitoring – can be prohibitively expensive for the same reasons that contract writing is prohibitively expensive (Rock and Wachter, 1996).

This is not the place to recount the various self-enforcing norms that operate within the workplace, although one example will be helpful. The employment relationship is typically marked by the parties investing in their match. Starting a new job typically requires the employee to acquire firm-specific skills that are useful in the current job, but not with a different employer (Wachter and Wright, 1990). Firm-specific investments create a wedge between the employee's value to her current employer versus her value to a new employer. If the employer pays all the costs associated with the firm-specific investments, then the employee's problem is obviated, but now the firm is vulnerable if the employee holds up the firm by threatening to quit. If the employee has paid all the costs, then the employee can be held up by the firm through a threat of discharge. The solution to the problem is for the costs to be split. The employee is paid a lower wage during the training period, but not a wage that reflects all of the training costs. After the training is completed and the employee now has valuable firm-specific skills, the surplus from those skills should be divided between the parties in the form of a higher wage for the employee and a more productive worker for the employer. The contract is self-enforcing because both sides then lose their investment if the relationship is terminated early.

In addition to the self-enforcing structure of norms, other factors are also at work. Reputational effects can be a strong deterrent to employer opportunism. Historically industrial strife often followed as a consequence of employers cutting pay during severe downturns in the economy. These downturns, and the resulting pay cuts, occurred at a time when the industrial economy was a fairly new development and employers were still learning how it worked. Nowadays, employers understand that opportunistic treatment of employees during the downturn will make it difficult for employers to hire during the inevitable upturn in the economy. Even during normal conditions, quit rates, or the percentage of workers who voluntarily quit a job each year, are remarkably high, with most of the turnover occurring in the early years of employment. As a consequence, the employer is constantly forced to hire in the competitive job market even to retain a given size.

The ultimate deterrent to employer opportunism is the threat effect of unionization. A non-union firm will become much less profitable if unionized (Williamson, Wachter and Harris, 1975). Wage and benefits will likely be raised above competitive levels and the firm will have the transaction costs of negotiating a collective bargaining agreement that will also impose restrictions on its ability to unilaterally manage its workforce.

The second component of the non-union legal regime is the extensive set of government mandates such as the FLSA, OSHA, and ERISA, as well as Title VII and other antidiscrimination laws. Describing these mandates is beyond the scope of this chapter. They do however serve an important function in the workings of the non-union employment relationship, particularly regulating areas of the relationship that are prone to employer opportunism. Mandates such as ERISA and OSHA serve to remedy potential problems of information asymmetries. In the context of both employee benefit programs and workplace safety, the complexity of the issues and the employer's superior knowledge of them create a potential market failure. The employer could tell its employees that the jobs are safe and that the pension plan is well invested when, in fact, the jobs are very risky and the pension plan is entirely invested in the company's own common stock. The problem is resolved by forcing the employer to disclose relevant information and imposing standards on pension plans and workplace safety.

The solution in this case is government regulations that require the companies to meet certain safety standards for both the jobs and the pensions. In addition, the regulations force the employer to disclose relevant facts to its employees. Violations of the law leave the company facing civil or criminal sanctions imposed by the relevant agency or class-action suits brought by aggrieved employees.

Mandates such as minimum wages, child labor prohibitions and discrimination-free employment serve a different function. Rather than correcting a market imperfection, these impose a public moral standard. Such regulations impose minimum standards on the theory that market-determined outcomes are unacceptable as a matter of national policy (Bennett and Taylor, 2002). In such cases, the outcomes of a \$1 wage or the employment of a child under 10 may be efficient in that they do not hamper the operation of the price mechanism. But maximizing social welfare is not coincidental with economic efficiency. Society can declare as a national policy that certain outcomes, whether economically efficient or not, are simply unacceptable outcomes. Such policies, by reflecting the social welfare function, increase overall welfare and are thus the correct actions to take.

If government regulation proves to be an acceptable policy response to major norm failures when they emerge, the non-union sector can benefit from a bifurcated enforcement mechanism. In cases where norm governance rules, such as employment-at-will, the enforcement mechanism is left to the private ordering of the parties. Where the employment relationship works poorly and employer opportunism is most likely to occur, as was the case with occupational health and safety and job discrimination, government intervention is used to resolve those specific problems with targeted regulatory solutions. This allows employers to use very inexpensive, informal contracting mechanisms in all but those identifiable areas where management opportunism is most likely to occur.

IV. WHICH LEGAL REGIME CAN BEST ACCOMPLISH THE GOALS OF THE WAGNER ACT?

In this section I will evaluate which of the four legal regimes is or was most successful in accomplishing the goals of the Wagner Act: industrial peace and equalization of bargaining power.

A. The NIRA

Analyzing the NIRA in terms of its ability to achieve the goals of the Wagner Act is arguably unfair to the NIRA because the Act's reform – the implementation of a corporatist political economy – was abandoned when the NIRA was declared unconstitutional. The time period for evaluating the success of the policy is therefore too short to get a reliable reading. In addition, the NIRA, as workable legislation, was only a start.

Even with these caveats, the NIRA receives some credit for being the first federal labor law legislation to provide for the right to engage in lawful concerted activity: both to unionize and to strike without interference from employers. The Norris-LaGuardia Act, passed in the final year of the Hoover Administration and only a year before the NIRA, had already provided for the right to concerted activity against federal court injunctions prohibiting such activities; but the NIRA recognized that employer interference was also a serious impediment to workers' right to unionize.

The NIRA was an improvement over Norris-LaGuardia from labor's perspective, but it was very much a work in progress. Its language was aspirational and hortatory, and badly lacking in specific guidance. In contract law, mandatory rules that cannot be varied by contract are rare because the relationship is entirely voluntary. But the union-employer relationship is not the product of mutual voluntary choice. To ensure the viability of the union sector, core mandatory terms such as the requirement to bargain in good faith are necessary. In addition, mounting an organizing drive and bargaining collectively are not simple matters in an adversarial relationship, especially one that is new. Consequently a more detailed legislative mandate was needed.

The goal of the NIRA was to change the political economy of the United States in a fundamental manner: free competition was to be replaced by fair competition. The new political economy would achieve industrial peace by creating a system of reciprocal benefits in the form of higher prices for employers and higher wages for employees.

The benefits would not only lead to industrial peace, but would also reduce the tendency toward deflationary cycles in wages and profits. In this system, employers might plausibly accept unionization. Although the employer might lose discretion in having to deal with the union, the cartelization of the product market would generate the higher prices necessary to pay for the higher costs of being unionized.

As a practical matter, the NIRA failed on the ground, and the problems showed up almost immediately. Price-fixing proved difficult to accomplish. No sooner had the fair price been set than cartel members started cheating on the price to gain market share (Brand, 1988).³⁸ Non-compliance begot further non-compliance, as code-abiding business executives began to feel the pinch of competition from cheating firms. The hoped-for stable higher prices were not achieved.

The NIRA was no more successful in labor relations than it was at fixing prices. In the NIRA framework, unions and business were expected to exercise self-restraint in their bargaining demands in order to support national priorities. Self-interest was to give way to the national interest. That did not happen (Brand, 1988; Wachter, 2007).³⁹ Organizational strikes became more frequent and bargaining demands grew in response to labor's perception that they had the Roosevelt administration and the law on their side, that disruptive disputes would lead to mediation, and that mediators would back up their demands (Dulles, 1960).⁴⁰ President Roosevelt's call for moderation in bargaining was ignored. Instead strikes continued to be frequent and violent, requiring the National Guard to be called out regularly to enforce the peace.

The historical record of strike activity, as brief as it is for the NIRA, illustrates the failure of the NIRA to reduce industrial strife. Instead of providing for greater labor stability, the number of workdays lost to strikes tripled over the first three years of the NIRA (Brand, 1988). Also, as shown in Table 15.1, the average annual number of strikes increased dramatically from 766 in 1930–32 to 1,831 in 1933–35.

The NIRA does much better with the goal of equalization of bargaining power. First, on the procedural element, the NIRA scores high since the percentage of workers from the private sector belonging to unions increased from 15.5 percent in 1933 to 16.3 percent in 1934, as shown in Table 15.2 below. More importantly, the NIRA was the catalyst behind the surge in union membership that occurred in the 1930s as the new unions formed during these two years provided the impetus behind organized labor in general. Early organizing efforts were just beginning to show results. As discussed above, the advocates of the Act, including Senator Wagner, viewed collective bargaining as the antidote to unequal bargaining power. Hence, I can use union density as a measure of the procedural element of the goal.

On the substantive element, the NIRA was also successful. Although it is difficult to find a time series of union premiums – that is, the union wage percentage differential with respect to the non-union sector – the data suggest a union wage premium of roughly 20 percent over the entire period covered by this chapter. Although the exact premium differs by industry and over time, the evidence uniformly supports the existence of a high union wage premium over the entire period studied here.⁴¹

Overall, the NIRA scores high as the first major legislation to grapple with the problems of industrial strife and unequal bargaining power. Much more statutory work needed to be done, but the NIRA was a good first attempt. In addition, it is worth noting that the NIRA was the most pro-union political economy of those studied in

Table 15.1 Number of strikes or lockouts, average annual, over relevant periods

Relevant Period	Years Covered	Number of Strikes, Average Annual
Pre-NIRA Period	1930–32	766
NIRA Period	1933–35	1831
Wagner Act Period	1935–48	3539
Taft-Hartley Period	1948–81	4398

Notes: The averages were calculated using data on work stoppages from 1929–81 from the U.S. Bureau of Labor Statistics (BLS): *Handbook of Labor Statistics*, 1975, Bulletin number 1865, Table 159; *Handbook of Labor Statistics*, 1983, Bulletin number 2175, Table 128; *Handbook of Labor Statistics*, 1989, Bulletin number 2340; and the BLS internet site, available at <http://hsus.cambridge.org/HSUSWeb/search/searchTable.do?id=Ba4954-4964>. This data set included all strikes and lockouts except those that involved fewer than six workers. After 1981, the data were no longer calculated in this manner and are unavailable.

this chapter. The success of unions depends heavily on their place within the overall legal and economic structure of the country. The NIRA experiment provided unions with a seat at the NIRA policy table, a high-level policy position that they would not have thereafter. The NIRA also reflected an understanding that reforming labor law meant reforming other laws that guided the manner in which employers dealt with labor unions. If unions were to bargain for higher wages, the firms needed to have a way of paying for the higher wages without facing competition from non-union firms that had a lower cost structure.

The question is whether the NIRA was a workable policy in a large and diverse economy such as the United States where competitive pressures are strong. The government would have to wield a big stick to keep companies from undercutting each other's prices and to keep unions from making immoderate demands for better wages and working conditions. In any event, corporatism ran up against constitutional objections, and apparently lacked the political support it would have needed to surmount those objections. President Roosevelt abandoned corporatism, and thus the NIRA, after it was declared unconstitutional, rather than attempting to revise the policy to meet the Court's objections.

B. The Original Wagner Act's Ability to Achieve its Goals

One would expect that the Wagner Act would be successful in achieving its own goals. The law of unintended consequences might get in the way, but otherwise the Act should have gotten off to a good start. The record is more mixed.

With respect to industrial peace, the Wagner Act created a legal strike mechanism that turned many strikes from violent ones to non-violent ones. President Roosevelt, at least prior to World War II, was reluctant to call in federal troops, although governors might still do so. The battles were still serious and disruptive, but now they were more likely to be union picketers fighting management's private police. With President Roosevelt favoring the unionization of the labor force, labor posed far less of a threat to the legitimacy of the established order. This was an important change.

Although less threatening to the established order, industrial strife, which had already increased during the years of the NIRA, increased further under the Wagner Act. As shown in Table 15.1, in the years prior to the adoption of the NLRA, 1933–35, the average number of strikes and lockouts per year was 1,831. In the period between the passage of the Wagner Act and the adoption of the Taft-Hartley Amendments, the annual number of strikes was 3,539. Rather than bringing industrial peace, the number of strikes and lockouts nearly doubled under the Wagner Act.⁴²

There are several explanations for the worsening in industrial strife under the NLRA. First, particularly in the late 1930s, many new unions were forming, undertaking their organizing drives and bargaining for their first contract. A high level of strike activity is not unexpected during this period. Second, the legal regime was particularly favorable to unions. For example, as noted above, the fact that there were no unfair labor practice standards restricting union action meant that the strike weapon could be used freely except as constrained by state law. Third, the aspirations of union leaders and workers increased along with the more favorable legal regime, and rising aspirations translated into more costly bargaining demands which were difficult to resolve without strikes.

The jump in industrial strife went along with a sharp increase in union density. As shown in Table 15.2, union density in the private sector or the percentage of workers represented by unions was 14.2 percent when the Wagner Act was passed in 1935. By 1939 it was 22.8 percent, and by 1945 it was 33.9 percent. So while the Wagner Act was unable to reduce industrial strife, it was able to increase union representation. That is, while the first goal was proving unattainable, the second goal was being achieved. This underscores one of the themes of this chapter; namely that the goals of the Wagner Act were potentially inconsistent. While a surge of initial organizing drives may worsen industrial strife, it does advance the second goal of equalization of bargaining power.

A potential inconsistency in the Act turns into an actual inconsistency once the substantive goal of equalizing bargaining power is taken into account. Concomitant with the increase in union density, the newly organized union members were able to achieve higher wages and thus gained the union wage premium. Herein lies the problem. Who would pay for the higher wages?

The NIRA had one answer: the consumers would pay. Higher prices would compensate the firms for the higher wages, reducing the likelihood that firms would take a strong stance against the wage gains. The NLRA had a different answer and that was the source of the inconsistency: firms would pay for the higher wages through reduced profits. Although firms might be able to pass on some of the wage increases to consumers, there is no reason to suppose that they could pass on the bulk of the increase.

The key question was whether all the firms in the product market could be unionized or cartelized. An aspiration of the Wagner Act was for the entire labor force to be unionized, thus eliminating competition between lower cost non-union firms and higher cost union firms. But achieving that goal would always prove elusive. As long as non-union firms could earn higher profits than union firms, firms would always have an incentive to oppose unionization and, more specifically, the higher labor cost bargaining demands of unions.

Consequently, at the heart of the inconsistency in the Wagner Act goals was the idea that the collective wage would be higher than the market wage. In other words, it is the

Table 15.2 *Private sector union density (1929–2010)*

Year	Union Density	Year	Union Density	Year	Union Density
1929	12.4	1957	34.7	1985	14.3
1930	13.3	1958	33.9	1986	13.8
1931	14.0	1959	32.3	1987	13.2
1932	15.2	1960	31.9	1988	12.7
1933	15.5	1961	31.9	1989	12.3
1934	16.3	1962	31.6	1990	11.9
1935	14.2	1963	31.2	1991	11.7
1936	15.0	1964	31.0	1992	11.4
1937	19.5	1965	30.8	1993	11.1
1938	21.9	1966	30.3	1994	10.8
1939	22.8	1967	30.5	1995	10.3
1940	24.3	1968	29.9	1996	10.0
1941	25.9	1969	29.0	1997	9.7
1942	28.1	1970	29.1	1998	9.5
1943	30.8	1971	28.2	1999	9.4
1944	32.4	1972	27.3	2000	9.0
1945	33.9	1973	*24.5	2001	9.0
1946	34.1	1974	*23.6	2002	8.6
1947	34.9	1975	*21.7	2003	8.2
1948	34.7	1976	*21.5	2004	7.9
1949	34.9	1977	21.7	2005	7.8
1950	34.6	1978	20.7	2006	7.4
1951	34.7	1979	21.2	2007	**7.5
1952	35.2	1980	20.1	2008	**7.6
1953	35.7	1981	18.7	2009	**7.2
1954	35.6	1982	17.6	2010	**6.9
1955	35.1	1983	16.5		
1956	34.7	1984	15.3		

Notes:

* Adjusted by Hirsch (2008).

** Added using data from www.unionstats.com.

The figures for 1929–72 were compiled by Troy and Sheflin (1985) from union financial reports. Figures from 1973 onward are compiled from CPS household data (Hirsch and Macpherson, 2011, updated at <http://www.unionstats.com>). The union density figure is calculated by determining the percentage of employed workers who are union members.

Source: Hirsch (2008), Figure 1.

substantive aspect of the second goal that would prove to be the problem. Would industrial strife have declined after the collective bargaining relationship matured? Again, there is no obvious reason to suppose that a mature relationship would have become less cantankerous.

In fact, the higher level of industrial strife continued throughout World War II, even in industries where unions were well established. This helped generate public support for what became Taft-Hartley, a retreat from the expansive power granted to unions by

the NLRA. However radical the goals of the original Wagner Act might have been, at least in the eyes of its most progressive supporters, much of the public was not buying the result.

In summary, the Wagner Act scores high on the goal of equalizing bargaining power. With respect to the key goal of industrial peace, however, the Wagner Act was not a success. Strikes did become less violent compared to the strikes of the late 19th century, but violence was still a frequent feature of strike activity. In addition the level of strike activity increased dramatically, and this, combined with the continuing incidence of violence, was eventually deemed to be unacceptable. Whatever its success in promoting the bargaining power of workers, it was doomed to be replaced because it failed to achieve industrial peace.

C. Did the Taft-Hartley Amendments Achieve the Goals of the NLRA?

The Taft-Hartley Amendments transformed the original Wagner Act into a very different regime. It certainly changed the Wagner Act's balance between employers and unions in favor of employers. It also supported the development of a vibrant non-union sector in almost every industry, thus raising the likelihood of direct product market competition between union and non-union companies vying to sell to the same customers.

With respect to the goal of industrial strife, the post-Taft-Hartley NLRA has been much more successful than the Wagner Act. While the Wagner Act had some success in reducing the level of violence and the political threat associated with strike activity, highly disruptive strikes continued in large numbers and the state of labor-management relations during World War II was an especially sorry story. The labor relations problems of World War II, however, were not repeated during the Korean War, which followed the passage of Taft-Hartley. Indeed, after Taft-Hartley, violent strikes and the need for federal troop intervention finally disappeared.

Table 15.3 includes two strike activity calculations. In column 2, the average annual number of strikes is presented. Although informative, focusing on the number of strikes over an extended period of time can be misleading. The United States economy boomed after World War II and the growth in the economy, both in terms of output and in the size of the labor force, continued with only brief interruptions, at least until the last few years. In terms of its economic effect, even an unchanging number of strikes meant a lessening of industrial strife and that is what the data show.

As shown in Table 15.3, which provides decade averages in the number of strikes, the absolute number of strikes declined very slowly after the passage of the Taft-Hartley Act. (Note that the data are for strikes involving over 1,000 workers. This series is presented because the Bureau of Labor Statistics stopped collecting the number of all strikes with less than 1,000 workers in 1981.) The decline in the number of strikes, adjusted for the size of the economy, is more gradual and continuous.

A factor that stands out in the unadjusted strike activity data is the apparent effect of the election of Ronald Reagan in 1981 and the subsequent firing of the air traffic controllers for engaging in an illegal strike on August 3, 1981.⁴³ Specifically, while the average number of strikes during the 1970s was roughly 289 per year, this same figure was roughly 83 during the 1980s. Since 2000, the average number of strikes per year has been around 20. But attributing the success of the Taft-Hartley Act in reducing

Table 15.3 Average number of strikes (involving 1,000 or more workers) by decade

Decade	Average Number of Strikes (Unadjusted)	Average Number of Strikes (Adjusted to 1947 Employment)
1947–59	330.3	310.2
1960–69	282.9	225.1
1970–79	288.8	191.0
1980–89	83.1	45.7
1990–99	34.7	16.0
2000–09	20.1	8.2

Notes: This table was calculated from BLS statistics (1947–2009). The data were reported as strikes involving 1,000 or more workers. The number of strikes was averaged over relevant periods in column 2. Column 3 shows average number of strikes adjusted to 1947 employment. This column was created by using 1947 employment as a base and then dividing the number of strikes by employment for the given year adjusted to the base of 1947.

industrial strife to Ronald Reagan's action some 33 years after the passage of the Act is far too simplistic. After all, there was never a question as to the authority to replace workers who were striking unlawfully. What changed were the social norms of labor relations.

The election of Ronald Reagan, like the passage of Taft-Hartley, speaks to the changing mood of the electorate toward strikes. The effect of that election and especially of the Professional Air Traffic Controllers Organization (PATCO) firings was immediate and jarring for existing unions and their strategies. The decision emboldened employers to make more use of the economic weapons available to them under the NLRA, particularly the right to permanently replace striking workers after impasse is reached in the midst of a strike.⁴⁴

What accounts for the success of Taft-Hartley in reducing industrial strife, following the failure of the Wagner Act to achieve the goal? One of the theses of this chapter is that a key underlying factor – and this is indeed attributable to Taft-Hartley – is the growth of the non-union sector. One of the distinguishing differences between the Wagner Act and the Taft-Hartley Act is that the former took an activist pro-union stance, while the latter switched to a neutral position. While the former envisioned a country where most workers would belong to unions, the latter did not. It was the Taft-Hartley vision that won out. While the United States economy was booming, with a few recessions but no depressions, virtually all of the growth occurred in the non-union sector. Even without the Reagan effect, industrial peace would have been achieved.

Non-union companies became a factor in nearly every industry. Mounting a costly strike in a unionized plant or firm carried a much higher probability that the effect of any resolution of the strike would be a loss of union employment. Higher labor costs and disruptions in the supply of any particular good or activity made it all the more likely that the buyer would switch to a non-union competitor who had lower costs and where disruptions due to strikes were extremely unlikely. The higher probability of losing a strike decreased the incidence of its use by unions.

The growth of the non-union labor force takes us back to the second goal of the

Wagner Act and my thesis that the goals are in conflict with each other. While industrial peace was finally being achieved, the gains in the equalization of bargaining power were being undone. The data on union density are shown in Table 15.2. In 1947, the year which marked the passage of the Taft-Hartley Act, union density almost reaches a peak. Union density plateaus around this level through the Korean War (1950–53). After the Korean War period, a steady decline sets in. As of 2010, union employment as a proportion of total private sector employment is 6.9 percent.

In summary, the Taft-Hartley legal regime achieved the goal of industrial peace, but not the goal of union representation. With the Wagner Act, industrial strife increased rather than declined, but union representation grew strongly as well. This is reversed under the Taft-Hartley legal regime. Industrial peace is achieved, but not the equalization of bargaining power. Instead, a vibrant union sector is replaced by a vibrant non-union sector.

D. Does the Non-Union Sector Achieve the Goals of the NLRA?

In analyzing the success of the NLRA as amended by Taft-Hartley, one needs to address the non-union sector as well as the union sector. As noted above, a key development in the passage of the Taft-Hartley Act was that the regulators moved from a one-sided goal of encouraging unionization and collective bargaining to one of neutrality, allowing the non-union sector to blossom. Consequently, we are interested not only in the effects of the legislation on the union sector; we also want to evaluate its effects on the vitality of the non-union sector.

The short answer to the question of whether the non-union sector achieves the goals of the NLRA would seem to be “no,” at least with respect to inequality of bargaining power. Certainly the non-union sector is one where employers unilaterally set pay and working conditions. There is no explicit collective action involving employers and employees. If equalization of bargaining power is equated with collective bargaining, then the answer is definitional: the non-union sector has failed in the goal of equalization of bargaining power.

Is there a longer answer that affords the non-union sector more credit for fulfilling the public policy of the Wagner Act? There is, and, perhaps ironically, it makes the non-union sector one of the great success stories of the NLRA. The longer answer starts by recognizing the importance of peace; it ends by questioning whether non-union employees truly lack bargaining power.

With respect to industrial peace, the non-union sector in the decades prior to the passage of the NLRA was frequently a dysfunctional labor market, particularly during recessions and depressions. Remember that the industrial strife and unrest that is documented above occurred in the non-union sector, largely among employers that refused to cross over into the union sector and bargain with their employees’ representatives. From a historical perspective, the episodes of violent strikes in non-union plants made that sector an incubator of industrial strife and unrest. Clearly, in those instances the so-called self-enforcing norms of the non-union sector, elaborated above, were not actually self-enforcing.

The non-union employment relationship is no longer a source of industrial strife. Employees are apparently not so frustrated by their inability to organize a union and

get employer recognition that they take to the streets, which they did in large numbers before the Wagner Act.

What has changed? One obvious answer is that the non-union worker can now trigger the union option if the employer proves untrustworthy. Employees have a legal right to organize whenever they choose to do so.⁴⁵ The threat of unionization is a powerful one. By replacing the non-judicially enforceable norms of the individual employment relationship with a collective bargaining agreement, unionization significantly increases the transaction costs of the firm. Replacing market wages with the significantly higher union wages and benefits reduces the competitiveness of the non-union firm. Consequently, the threat to unionize is a powerful deterrent that has likely caused the non-union employer to act in a more trustworthy manner, living up to the accepted norms of the workplace. However, the threat effect of unionization cannot be the entire story, especially as union density in many sectors of the labor market approaches zero.

The employment relations practices of non-union firms have also likely improved over time. Self-governing norms take time to develop and to be tested for effectiveness. In the wake of the decline in union density, a consulting industry has been established which can give employers either an off-the-shelf set of norms or norms targeted to their specific employment relationship. Those norms are embodied in employee handbooks as well as much of modern human resources (HR) practice. Since labor costs are such a large component of total costs, the efficiency of the non-union employment relationship is big business.

With respect to the equality of bargaining power, the non-union sector lacks the collective bargaining apparatus, but it can make other claims to satisfy some aspects of the second goal of the NLRA. As noted above, the language of the Wagner Act points to the “stabilization of competitive wage rates.” There is little doubt among economists that the United States labor market is highly competitive, with the exception that wages are downwardly rigid during recessions. Although this rigidity appears to be in conflict with the idea of the market being highly competitive, downward wage rigidity serves a separate competitive purpose; namely it is a component of self-enforcing norms in the non-union sector (Wachter, Chapter 2 in this volume). The United States economy has gone through a number of recessions since the Great Depression, yet no one has made the 1930s’ claim that the downturn in the economy was due to depressed wages resulting from an absence of collective bargaining. Non-union workers may not act in concert or articulate their preferences through a participatory process; but the need to act in concert – at least to achieve the goal of wage stabilization – is not needed in today’s competitive labor markets. The non-union sector does have a governance structure in the form of the self-enforcing norms that constrain management. Self-enforcing norms work silently, through the invisible hand, as it were, in terms of their adoption and retention. Although there is no formal “offer/acceptance” process, employees show constructive acceptance when they consent to employment and then do not quit with knowledge of workplace norms. Quit rates, in the form of workers voluntarily leaving an employer, are highly concentrated in the first few years of employment. This suggests that workers do search and reject jobs that they do not like. Similarly, employers show adherence to workplace norms when they respect them, even though it is costly to them in the short run. Moreover, there is evidence that the norms of the non-union workplace do change over time in a way that reflects changes in social norms.

V. CONCLUSION: THE SUCCESSES OF THE NLRA

I return to the original question raised in this chapter: has the NLRA as it now stands been successful in achieving the goals of the original Wagner Act? According to my analysis, the NLRA has been strikingly successful in achieving its explicit legislative goals. It has not been completely successful because the Wagner Act's second goal of higher union wages and higher union employment is internally inconsistent in the competitive labor market of the United States: it is not possible both to increase union employment and to increase wages in the union sector above competitive levels.

My positive assessment of the NLRA rests in part on the notion that the overriding goal of the Wagner Act was really to achieve industrial peace. It is illegitimate as a matter of national policy and deeply destabilizing to the social order to shoot striking workers as regularly occurred during the decades of industrial strife. The NLRA, as amended by Taft-Hartley, solved the problem of industrial warfare by creating a legalized regime of union representation elections and a legalized strike weapon that has been choreographed into a peaceful series of steps between the union and the employer.

Once the Taft-Hartley Act shifted the NLRA from being proactively pro-union to being neutral, however, the embedded conflict in the goals of the NLRA emerged as an insurmountable hurdle. While the Act favored higher pay, it also supported competition between the union and non-union employment alternatives. By favoring the substantive goal of above-market wages, the union sector has largely priced itself out of the competitive labor marketplace.

Critical to the success of the NLRA is the transformation of the non-union sector from a dysfunctional labor relations system that was an incubator for riots and violence into one in which employees can trust the employer most of the time to enforce the norms of the workplace. The NLRA gets a lot of the credit for the transformation of the non-union sector, however unfortunate and certainly ironic this may be. As long as employees can exercise their inalienable NLRA rights to organize and bargain collectively, the non-union employer has to play fair. The cost of employer opportunism is too high; namely that the profitable company will have to engage in inefficient bargaining, write an enforceable employment contract that introduces rigidities and, in addition, pay higher wages and benefits than the non-union competitor.

In a very real sense, the union sector is a victim of the success of the NLRA in achieving industrial peace and incentivizing the emergence of a viable non-union employment relationship. Although a goal of the NLRA was to create a vibrant union sector, it seems to have created a vibrant non-union sector instead. Whether from the threat of unionization or simply the realization that acting opportunistically toward one's workforce is unproductive, the non-union sector has emerged as a central component of the NLRA's striking success.

Could a different system have worked better in generating high union employment and industrial peace? The United States tried one of the legal regimes that would have made it all work, corporatism as developed in the NIRA. In the corporatist regime, all workers could be unionized – or at least covered by the major economic terms of union agreements. That would secure both the procedural and substantive elements of the equalization of bargaining power. The workers could bargain collectively at the firm level and their national or federation union would have a seat at the highest level of

policymaking, thus securing industrial peace. But that was not the choice that Roosevelt and the American voters made.

NOTES

1. The author gratefully acknowledges the contribution of the criticisms and suggestions made by Cynthia Estlund, Sarah Gordon, Barry Hirsch, Sophia Lee and Howard Lesnick. The author also thanks Natalie DiTomaso, Sarah Edelson, Marisa Kirio and Conor McNally for research assistance.
2. Hirsch and Macpherson (2011) report that less than 8 percent of private sector workers belong to unions.
3. This is from the preamble to the NLRA, 29 U.S.C. § 151 (2006): "The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce"
4. This is from the preamble to the NLRA, "The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries."
5. See Wachter (Chapter 2 in this volume) for a discussion of the ILM and the features that distinguish it from the ELM.
6. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) ("[T]he fact remains that the stoppage of those operations by industrial strife would have a most serious effect upon interstate commerce. In view of respondent's far-flung activities, it is idle to say that the effect would be indirect or remote. It is obvious that it would be immediate and might be catastrophic.").
7. Many states, maybe even most, recognized some right to strike. But even in those that did, the federal courts could enjoin strike activity under the "general common law" and their own version of "equity," both informed by a broad "liberty of contract."
8. See Forbath (1991) for a more detailed discussion on labor injunctions.
9. Zinn (2003, p. 251): ("When the great railroad strikes of 1877 were over, a hundred people were dead, a thousand people had gone to jail, 100,000 workers had gone on strike, and the strikes had roused into action countless unemployed in the cities. More than half the freight on the nation's 75,000 miles of track had stopped running at the height of the strikes.").
10. This is from the preamble to the National Labor Relations Act, 29 U.S.C. § 151 (2006).
11. 78 CONG. REC 3678, 3679 (1934) (statement of Senator Wagner) ("The primary requirement for cooperation is that employers and employees should possess equality of bargaining power. The only way to accomplish this is by securing for employees the full right to act collectively through representatives of their own choosing. . . . The fathers of our Nation did not regard freedom of contract as an abstract end. They valued it as a means of insuring equal opportunities, which cannot be attained where contracts are dictated by the stronger party.").
12. The union wage premium over the last 90 years has been calculated to be around 20 percent. The work of Lewis (1963) is regarded as authoritative for the first half of the 20th century up until the 1970s. Pencavel and Hartsog (1984) agreed with Lewis's findings and placed the premium somewhere between 18 and 26 percent for the period from 1920–80. More recently, Hirsch and Macpherson (2011) show the premium to hover right around 20 percent since 1973. There has, however, been a decline in the premium in recent years.
13. Commons and Andrews' support for this claim was meager, citing to Tawney's (1915) study of the tailoring industry that concluded, "as a rule, the girls work better if they are paid more." See also Ernst (1993) for an intellectual history of the Commons school and the economic theories it relied on.
14. Hicks was 28 years old when he published *The Theory of Wages*. Since he was not well established until his influential *Value and Capital*, published in 1939, his ideas spread slowly.
15. But see Estlund (1993, p. 973) (The theory of "underconsumption" or "mass purchasing power," which underlay much of the New Deal program, was featured prominently in the Act's preamble, and was repeatedly invoked by the Act's key supporters).
16. To Senator Wagner, workers' participation in collective bargaining was more important than achieving the substantive goal of higher wages. See Barenberg (1993).
17. See Summers, Wellington and Hyde (1982) (Enacted in 1932, the Norris-La Guardia Act put serious

restrictions on the federal courts' ability to grant labor injunctions, made yellow-dog contracts illegal, and acknowledged the right of workers to engage in concerted activities. Section 4 of the Act prohibits injunctions against peaceful union activities such as striking or picketing. Section 7 of the Act goes on to further limit the issuance of such injunctions to instances where for example "substantial and irreparable injury" will occur to plaintiff's property and the "complaint has no adequate remedy at law." See also Frankfurter and Greene (1930).

18. Of 85 seizures from the Civil War period to the steel seizure of 1952, inclusive, only 18 or 19 appear to have been undertaken for reasons having nothing to do with labor disputes. See Kleiler (1953) (referencing Appendix II attached to Justice Frankfurter's opinion in *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952)).
19. Court settlements, however, peaked in 1941. Perhaps this indicates a shift in tactics by the Roosevelt administration as labor-management disputes affected defense production.
20. However, the National Guard was summoned for assistance twice during the year of 1970. They were first called in during the 1970 postal strike when the president declared a national emergency and summoned both the National Guard and the U.S. Army to deliver vital pieces of mail that, if not delivered, threatened to cripple large businesses. Troops were called in again during the 1970 Teamsters wildcat strike. The unauthorized strike quickly spread across the country. Violence broke out in Ohio, forcing the governor to call in 4,100 members of the National Guard to control the rioting crowds and rock-hurling strikers. The strike continued for 12 weeks and concluded with a union victory. See Brecher (1997, pp. 273–6).
21. Economic prosperity allowed labor to tend to its already organized industrial and craft base and gain higher wages and benefits. The reduction in new organizing in the private sector meant that unions were limiting their influence to the sectors that had already been unionized. Consequently, unionization would not become a national movement.
22. The goal of "fair competition" was featured in the preamble of the National Industrial Recovery Act of 1933, ch. 90, 48 Stat. 195 ("To encourage national industrial recovery, to foster fair competition, and to provide for the construction of certain useful public works, and for other purposes."). Section 3 of the Act provides for "Codes of Fair Competition."
23. William Green, president of the AFL, credited Section 7(a) with adding 1.5 million new union members, a more than one-third increase, by the time of the October 1933 convention. See Eisner (2000).
24. Note Section 7(b) permitted the establishment of standards regarding maximum hours of labor, minimum rates of pay and working conditions in the industries covered by the codes, while Section 7(c) authorized the president to impose such standards on codes when voluntary agreement could not be reached.
25. Section 7(a) states: "[E]mployees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; [and] (2) that no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing"
26. The change from the NIRA to the NLRA and the early days of the National Labor Relations Board are described in great detail in Gross (1974). Gross's work on the NLRB remains the premier discussion of these issues.
27. National Labor Relations Act, 29 U.S.C. § 157 (2006).
28. But did Section 7 trump existing state laws and protect all peaceful union activity, including secondary activity? Almost certainly not. When challenged on the "one-sidedness" of the Wagner Act, proponents said several times that there was no need to create unfair labor practices since state law already regulated union activity. So the Board and the courts would have had to figure out just how far Section 7 protected activity that was restricted by state law. We can be quite sure that Section 7 would not have protected all non-violent concerted activity. But that interpretive process was cut short by the relatively quick enactment of Taft-Hartley, which itself regulated union activity. Subsequently, the Supreme Court concluded that Congress had occupied the field of labor relations and preempted state regulation, except for violent events. For a compelling discussion of this issue, see Estlund (2002).
29. Barenberg (1993) makes this point most strongly.
30. An alternative argument that used to be popular and is still included in textbook treatments of the labor market is the monopsony model. The claim is that firms have monopsony power in labor markets. If firms can exercise market power in setting wages, they can set the wage below competitive levels. The result is higher profits but at the cost of below competitive wages and employment levels. In this setting, the union arrives as a rescuer of both the employee and society. The union can raise the wage to competitive levels, thereby offsetting the firm's monopsony power. Moreover, in doing so, the union leads the parties to the competitive result where employment increases as well as wages. Unfortunately, I am not aware of any

- literature that makes a serious claim that the labor market, outside of a few isolated pockets, is marked by monopsony power that can be exercised by firms.
31. For a discussion of a secondary boycott, see Frankfurter and Greene (1930).
 32. Closed shop is different from what became known as the "union shop." Under the "union shop," which was permitted by Taft-Hartley as long as state law allowed it, an employee once hired by the employer was required to join the union.
 33. But see Gross (1995) ("Taft and his supporters in the Senate argued that the conference committee bill left undisturbed the act's essential theory that [in Taft's words] 'The solution of the labor problem in the United States is free, collective bargaining.' Whatever the merits of Taft's claim . . . [t]he majority of the House did not intend to promote collective bargaining as the solution to labor problems. Their statement of policy, not only in its omission of any reference to collective bargaining but also in its historical context, was intended at least to weaken, and possibly eliminate, collective bargaining.").
 34. "Open shop" is a system that Taft-Hartley did not mandate but does permit states to mandate. Outside the 22 right-to-work states, unions can negotiate for a "union shop" by which employees have to join (or now pay an agency fee) within 30 days of starting work.
 35. See also Hirsch's contribution to this volume.
 36. A virtue of focusing on the globalization point is that it takes away any onus that may have been placed in the above analysis. If the competition is only within the United States, then the unionized firms that lose market share are less likely to find political support. If union workers in Michigan receive higher wages than non-union workers in North Carolina, where they are doing comparable levels of work, then it is easy to make a normative argument to support the competitive markets that lead to work leaving Michigan to go to North Carolina. If the work is migrating to lower wage firms in China, or now Vietnam, then the normative story is different. Almost no one would favor United States wage levels to fall to the level in the Chinese market. Hence, if the competitive advantage arises from the low wage level in China, then a policy argument to protect American workers from such competition is easier to make (at least to American voters). On the other hand, almost no one would favor building in constraints that would prevent jobs from migrating from Michigan to North Carolina. Yes, the migration benefits one group of American workers over another group of American workers. But if both groups of workers are doing the same work, then it is unclear why government policy should favor one group over another. For a detailed discussion of this issue, see Cowie (2001).
 37. There is a contract, of course, even if it's terminable at will, and even if its terms can be altered at will by the employer prospectively. The contract provides for a specific wage or salary, certain job duties, etc., all subject to change by the employer. It may have almost no prospective impact, but as to work that has been done, the contract governs. Most non-union, non-managerial employees probably work under a contract that is expressly terminable at will, by the terms of an employee handbook or other document that many courts are willing to give legal effect.
 38. Referring to a "crisis in compliance" by fall of 1933.
 39. See Brand (1988, p. 94) (noting that the Depression did not elicit the "level of virtuous self-restraint" necessary for NIRA compliance).
 40. See Dulles (1960, pp. 271–2) (describing the precipitous increase in strikes under NIRA as workers fought for higher wages and union recognition).
 41. As mentioned above, Pencavel and Hartsog (1984) confirmed Lewis's (1963) findings and placed the premium between 18 and 26 percent for the period of 1920–80. Hirsch and Macpherson's (2011) data show that the wage premium has typically been between 15 and 20 percent since 1973.
 42. Although the number of strikes increased between the Wagner Act period and the Taft-Hartley period, the percentage increase in strikes decreased dramatically. Additionally, the number of strikes adjusted for the size of the labor force had declined.
 43. The Professional Air Traffic Controllers Organization (PATCO) went on strike on August 3, 1981, seeking better working conditions and a shorter workweek. As a government union, PATCO violated 5 U.S.C. § 7311, which prohibits government unions from striking. Historically, the government had been lax in punishing violations of this law, so it was surprising when President Reagan used it to order the strikers back to work within 48 hours of the announcement of the strike. The public was supportive of Reagan's tactics because the strike seemed to lack moral content; "the salaries and working conditions of the strikers scarcely generated sympathy among a public conscious of high levels of inflation and unemployment" and "the strikers had not only defied the law but also, as constantly emphasized by the Administration, had broken their oath." See Meltzer and Sunstein (1983, p. 760) (referencing Gallup polls as well as editorials from the major newspapers).
 44. The battle between the UAW and Caterpillar is a primary example. See Corbett (1994, p. 822) and Bearak (1995).
 45. There is considerable debate on the question as to whether the legal right to organize is fully effective. See, for just two examples, Weiler (1990) and Gould (1996).

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