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LABOR UNIONS: A CORPORATIST INSTITUTION
IN A COMPETITIVE WORLD

MICHAEL L. WACHTER[†]

Union membership, as a percentage of the private sector workforce, has been in decline for fifty years. I argue that the cause of this unrelenting decline is a single, fundamental factor—the change in the United States economy from a corporatist-regulated economy to one based on free competition. Most labor commentators have explained the decline by a confluence of unrelated economic and legal forces. Labor economists typically stress economic explanations, which vary from compositional shifts in the job structure to increased competition both domestically and internationally. On the other hand, labor law commentators naturally focus on labor law explanations, such as the difficulty of controlling management opposition to unions.

This Article shows that both economic and legal forces must be viewed through the same lens. What matters is the choice of the political economy. Once that system is chosen, the role and centrality of unions are determined. Unions are central to a corporatist regime and are peripheral in a liberal pluralist regime. Consequently, in my approach, to understand the causes of the decline in union membership it is critical to return to the period of the original growth in union power; that is, to the New Deal.

In examining the differences in the political economy between today and the New Deal, one must look not only to labor law, but also to corporate law and antitrust. Unions were successful in the 1930s when the goals of labor law were consistent with the goals of corporate law and antitrust. These goals are in conflict today.

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INTRODUCTION

Union membership, as a percentage of the private sector workforce, has been in decline for fifty-three years. That is a long time. Today, private sector union membership is less than ten percent of private sector employment, far below its peak of thirty-four percent in the early 1950s, and roughly where it was in 1930.¹

¹ See *infra* fig.1, at 634. In making this assertion I am comparing the solid line (union density, overall economy) with the dashed line (union density, private sector). Because public sector unionism did not become significant until the early 1970s and government employment was relatively small in the 1930s, it is possible to treat the solid line as indicative of union density for the private sector as well as for the overall economy.

For purposes of this paper I will use the solid line for years prior to 1973 as an approximation of private sector union density and the dashed line for the years after 1973 as actual private sector union density. Note that in the initial overlap year of 1973, the union densities for the private sector and the total economy are approxi-

This unrelenting decline in union membership represents one of the most important institutional changes affecting the United States economy. I argue that the cause of this unrelenting decline is a single, fundamental factor—the change in the United States economy from a corporatist-regulated economy to one based on free competition. Most labor commentators have explained the decline by a confluence of unrelated economic and legal forces. Labor economists typically stress economic explanations, which vary from compositional shifts in the job structure to increased competition both domestically and internationally. On the other hand, labor law commentators naturally focus on labor law explanations, such as the difficulty of controlling management opposition to unions.

This Article shows that both sets of factors must be viewed through the same lens. What matters is the choice of the political economy. Once that system is chosen, the role and centrality of unions is determined. Unions are central to a corporatist regime and are peripheral in a liberal pluralist regime. Consequently, to understand the causes of the decline in union membership it is critical to return to the period of the original growth in union power; that is, to the New Deal. With private sector union density today back to its starting point in the early days of the New Deal, the union movement has made a complete 360-degree journey.

In examining the differences in the political economy between today and the New Deal, one must look not only to labor law, but also to corporate law and antitrust. The success of unions depends heavily on their place in the overall legal and economic structure of the country. Unions were most successful in the 1930s when the goals of labor law were consistent with the goals of corporate law and antitrust. These goals are in conflict today.

The historical story of the growth and decline of unions plays out in two Acts. The First Act is of nearly exponential growth, with the Second Act being an extended period of decline. The theme of the First Act is the Franklin D. Roosevelt administration's adoption of a corporatist economic policy, which was the key innovation of the National Industrial Recovery Act (NIRA). Corporatism views free competition as a destructive force that has to be both controlled and channeled through institutions that practice fair—but not free—competition under the watchful, mediating power of the government.

mately the same. The two measures only diverge sharply during the 1970s due to the growth of union membership and employment in the government sectors.

In corporatism, fair competition means the “stabilization of business” with prices at levels that support fair union wages, and economic policy that responds to institutional actors such as unions and corporations rather than to individuals.

As a coherent public position, the high-water marks for corporatist policies were the adoption of the NIRA in June 1933 and the measures taken to guide the economy during World War II and the Korean War. Consequently, while the NIRA was declared unconstitutional in *A.L.A. Schechter Poultry Corp. v. United States*,² important elements of corporatist policies continued to operate well beyond the New Deal.

During Act I of the story, the union movement quickly came to a position of substantial strength and prominence. A primary goal of unions—to take wages out of competition—was a near-perfect policy fit with corporatist ideology. Labor unions thus played a central and positive role, in part as a counterweight to the power of corporations, and in part as a separate institutional force in the adoption of economic policy. In the structure of this period, unions were not a niche movement, representing those unique sectors most easily unionized, but a mass movement.

The National Labor Relations Act (NLRA), often viewed as the causal factor in the expansion of unions, actually represents a step backward in my approach. Yes, the NLRA expanded unions’ organizing abilities and strengthened their ability to achieve collective bargaining contracts. And, yes, union membership continued to increase sharply when the NLRA replaced the labor policy of the NIRA. But, the NIRA was an integrated plan that had compatible policies governing labor law, antitrust policy, and corporate law. When the NIRA was replaced by the NLRA, all that survived was the pro-union labor law. The critical support of the corporate and antitrust policies was lost. However, in certain sectors, industry-specific regulatory mechanisms were adopted that in effect continued the policies of the NIRA.

The Second Act began with the end of the Korean War. Although union membership, as a percentage of employment, peaked after World War II, it remained at or near the peak through the end of the Korean War. In that sense, the First and Second Acts were separated by an eight-year intermission, where the groundwork was laid for the decline in unions that was about to begin.

² 295 U.S. 495 (1935).

The Second Act, unlike the First, was not marked by singular events such as the passage of the NIRA or the outbreaks of World War II and the Korean War. Rather, the Second Act developed slowly as the legacies of the corporatist past were gradually replaced with an economic policy that had but one primary theme—that the country is best served by a competitive economy. In a competitive economy, nothing of importance is taken out of competition, certainly not labor costs. Consequently, as the nation's policies became pro-competitive, taking wages out of competition became difficult to accomplish.

I. ECONOMIC FACTORS IN THE DECLINE IN UNION MEMBERSHIP

Union strategy creates an overarching goal of negotiating for higher wages and benefits than those that would prevail in a competitive economy.³ At this goal, unions have been and continue to be successful. The same is not true for the union goal of growing, or at least maintaining, union employment. Union density is now less than ten percent of the private sector workforce.⁴ Obviously, the two goals are likely to be in conflict: it is not surprising that employment suffers when pay premiums exist.

In explaining the extended decline in union employment, the union pay premium is a logical culprit. However, there is also a substantial literature citing other factors, including compositional shifts in employment, management opposition to unions, the growth of a body of federal rules that may serve as a substitute for unions, and the increased openness of the American economy to international trade.

In the conventional story, it is the coming together of these disparate, largely independent factors that contributes to the decline in union membership. In my story, these factors are endogenous, themselves caused by the one, overarching factor: the change from a corporatist to a competitive economy.

The compositional shift in employment away from traditionally unionized industries is most frequently cited as a cause of union decline.⁵ This explanation itself includes a variety of shifts; for example,

³ See generally BARRY T. HIRSCH & JOHN T. ADDISON, *THE ECONOMIC ANALYSIS OF UNIONS: NEW APPROACHES AND EVIDENCE* 9 (1986) (“[A] union can cause wage and nonwage outcomes to diverge from competitive levels, primarily although not exclusively through the use of the strike threat and other restrictions on factor supplies.”).

⁴ See *infra* fig.1, at 634.

⁵ Based on the accounting methodology of Farber and Western, American jobs are disproportionately being created in the service-producing sectors rather than in

a decline in the product market of more traditionally unionized industries, a decline in the percentage of the labor force composed of males with a stable labor market attachment, and a decline in the percentage of full-time workers.

In the broader multidecade picture, compositional elements are problematic as an exogenous explanatory factor. It is certainly easier to increase membership in areas where unions are already strong. But in a vibrant economy, compositional shifts are a regular phenomenon. Strong organizations adapt themselves to these shifts, and unions have indeed been able to organize new sectors when the underlying policy support was available.

In a fascinating paper published in 1933, George Barnett, the incoming president of the American Economic Association, predicted that “unionism is likely to be a declining influence in determining [the] conditions of labor.”⁶ He attributed this decline to structural shifts in the economy, a logical inference since unions had always organized the skilled craft trades and transportation workers.⁷ The new industrial unions proved that unionization did not have to be limited to craft workers.⁸ The scene was played out again when unions organized the state and local sectors during the 1960s and 1970s.⁹

the goods-producing sectors, and in professional and managerial occupations rather than in blue-collar occupations. In addition, the American labor force is increasingly better educated and more mobile, whereas unions have traditionally been strongest among less-educated and less-mobile workers. See Henry S. Farber & Bruce Western, *Accounting for the Decline of Unions in the Private Sector, 1973-1998*, in *THE FUTURE OF PRIVATE SECTOR UNIONISM IN THE UNITED STATES* 28, 29 (James T. Bennett & Bruce E. Kaufman eds., 2002) (arguing that “most of the decline in the [private sector] union membership rate is due to differential employment growth rates in the union and nonunion sectors,” rather than “changes in union organizing activity”).

⁶ George E. Barnett, *American Trade Unionism and Social Insurance*, 23 *AM. ECON. REV.* 1, 6 (1933) (quoted in Bruce E. Kaufman, *The Future of U.S. Private Sector Unionism: Did George Barnett Get It Right After All?*, in *THE FUTURE OF PRIVATE SECTOR UNIONISM IN THE UNITED STATES*, *supra* note 5, at 330, 330). At the time of his presidential speech, Barnett was writing about a sharp decline in the absolute number of union members from a peak membership of 4.55 million in 1920 to 3.21 million in 1924 and continuing at a low level when the Depression set in. Richard B. Freeman, *Spurts in Union Growth: Defining Moments and Social Processes*, 58 *tbl.A1* (Nat'l Bureau of Econ. Research, Working Paper No. 6012, 1997).

⁷ See Kaufman, *supra* note 6, at 332-33 (reviewing Barnett's theory that the narrowing of the areas within which American trade unions operated in the 1920s, combined with the replacement of labor by machinery, led to the decline in union membership after 1920).

⁸ After the passage of the NIRA, the American Federation of Labor (AFL) adopted the slogan of “Organize the Unorganized in the Mass Production Industries” and proceeded to organize automobile, steel, lumber, and rubber workers who were

The same is true of other compositional shifts. For example, the shift to a more mobile population is itself partially a result of today's competitive economy with considerable job turnover as new firms develop and old ones lose market share. In a corporatist regime of fair competition there would be less job turnover, because declining industries would not be as exposed to withering attacks from new entrants.

Management opposition to unions has been a longstanding complaint by union supporters who believe that it represents an important causal factor in the decline in unions.¹⁰ However, in a competitive economy, where corporations are managed on behalf of the shareholders, above-market union pay should be expected to generate management opposition. Similarly, the claim that management opposition is higher today than in the past is predicted by the fact that the union pay premium remains high while product markets are more competitive.¹¹

outside of the craft union system. FOSTER RHEA DULLES, *LABOR IN AMERICA: A HISTORY* 268 (2d rev. ed. 1960).

⁹ See Melvin W. Reder, *The Rise and Fall of Unions: The Public Sector and the Private*, 2 J. ECON. PERSP. 89, 103-05 (1988) (describing an "upsurge in public sector unionism during the 1960s and 1970s" as a result of "pent-up demand for collective bargaining," "a climate of opinion in which virtually any group had de facto standing to make demands upon constituted authority," and favorable changes in labor law).

¹⁰ See generally PAUL C. WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* 10-11 (1990) (presenting evidence for both supply-side and demand-side explanations for the decline in union membership); Morris M. Kleiner, *Intensity of Management Resistance: Understanding the Decline of Unionization in the Private Sector*, in *THE FUTURE OF PRIVATE SECTOR UNIONISM IN THE UNITED STATES*, *supra* note 5, at 292, 292 (describing management opposition to unions as "carrots"—incentives offered to employees such as pay raises and employee involvement programs—and "sticks"—forceful deterrents such as captive-audience speeches by supervisors, harassment and firing of union leaders, and failure to engage in bona fide bargaining for first contracts). The issue becomes more complex to the extent that management opposition includes an increased use of unfair labor practices. From a purely economic perspective, one can attribute the growth in unfair labor practice claims against management to a similarly rational cost-benefit calculation on the part of management. Still, the issue is highly controversial, largely because of the normative questions it poses.

¹¹ For evidence that the rise in the union wage premium during the 1950s was a causal factor in the subsequent decline in union membership, see Peter D. Linneman, Michael L. Wachter & William H. Carter, *Evaluating the Evidence on Union Employment and Wages*, 44 INDUS. & LAB. REL. REV. 34, 51 (1990) ("[A]lthough unions may have been hurt by exogenous forces causing sectoral output shifts from goods- to service-producing industries, they have been hurt even more by their rising wage premiums."); see also Bernt Bratsberg & James F. Ragan, Jr., *Changes in the Union Wage Premium by Industry*, 56 INDUS. & LAB. REL. REV. 65, 81 (2002) ("[U]nion wages held up better to in-

Another factor frequently mentioned regarding the decline in union membership is the growth of government employment policies, including those dealing with health and safety, pensions, and antidiscrimination.¹² These policies serve as substitutes for unions since employees can have the benefit of the policies without the cost of union membership. However, the adoption of such policies by the federal government may be a *result* of low union membership, rather than its cause. If most sectors are unionized, a policy option is to leave labor market regulation to private contracting. When few private sector workers are covered by collective bargaining contracts, private contracting cannot be relied upon.

This paper does not argue that compositional shifts, management opposition, and labor market regulation are not important. They are important, but they are not underlying causes of the decline in unions. Rather, the role of these factors works through the changing institutional structure of the economy. It is the change in the institutional structure that is truly causal.

II. CORPORATISM: STRUCTURE AND THE GREAT DEBATES

A. *Economic Structure of Corporatism*

At the time of the 1932 presidential election, unions had declining membership, possessed little economic power, and were largely a niche movement in the skilled craft trades. Yet within a few years, unions grew into one of the power actors in the New Deal. These were heady days, as union leaders put aside concerns about mere survival and became central actors on the economic stage of an emerging political order. This transformation set off an extraordinary flourishing of union membership. The reason for the turn of events was the adoption of corporatist policies by Franklin D. Roosevelt's administration. In the corporatist economy that Roosevelt wanted to construct, strong unions were pivotal actors. Since the reality was that unions

creased international competition than nonunion wages, though apparently at the expense of reduced union employment.”).

¹² See generally James T. Bennett & Jason E. Taylor, *Labor Unions: Victims of Their Own Political Success?*, in *THE FUTURE OF PRIVATE SECTOR UNIONISM IN THE UNITED STATES*, *supra* note 5, at 245, 247 (arguing that the phenomenon described by the “substitution hypothesis”—a theory that government regulations have replaced the need for unions—is “an important contributing factor” in the decline of union membership).

were weak and unimportant on the national scene, things had to change quickly, and so they did.

What is corporatism? Although the term is not well known in the United States, corporatist policies had been debated in European political circles since the late 1800s and became formally adopted by a number of countries in the 1920s and 1930s.¹³ The term never became an articulated political theory or policy in the United States, even when the Roosevelt administration was adopting important planks of the theory's structure. But corporatism it was.

As described by one commentator, corporatism is one of the three great "isms" of the twentieth century, with communism and liberal pluralism representing the other two.¹⁴ Although pure forms of any of the three movements do not exist in the real world, the theoretical pure forms serve as useful reference points. In terms of jurisprudence, the three can be differentiated in terms of core questions: who is enfranchised and thus gets to address the sovereign, and whose preferences count when the sovereign makes its policy decisions?

In liberal pluralism, only the preferences of individuals in their role as citizens get counted in the welfare calculus of government policy. Policy outcomes are determined by competition for the votes of individuals in a political marketplace. While individuals with shared interests form advocacy groups to compete for favorable policy outcomes, the interest groups themselves have no political status beyond the aggregation of their members' interests. Although corporations, unions, and interest groups express their official views, they count only to the extent that they offer informed judgments, make political donations, or control votes.¹⁵

Corporatism, on the other hand, has a more complex structure and unions figure prominently into its workings. The pivotal distinction between corporatism and pluralism is that in corporatism, groups are enfranchised as well as individuals. Individuals who belong to

¹³ See HOWARD J. WIARDA, *CORPORATISM AND COMPARATIVE POLITICS: THE OTHER GREAT "ISM"* 36-42 (1997) (discussing the underpinnings of corporatist thought in Europe as well as the factors contributing to its rise in acceptance both inside and outside Europe).

¹⁴ See *id.* at 5 ("Liberal-pluralism, Marxism, and corporatism have for a long time offered competing perspectives on society, governance, and state-society relations.").

¹⁵ At the other extreme, in communism, only the party gets to address the state and only its preferences matter. Unions are instruments to carry out the party's political agenda. Advocacy groups keep a low profile, if they exist at all. The people's democracies are democracies only in the sense that the party claims knowledge of what the people should want.

groups in a sense get to have two or more votes, and their group participation may be the most important. As one commentator has described it, those outside the shield of a recognized negotiating group have only “the devalued currency of electoral representation.”¹⁶ Individuals are identified by their group, whether it be parish, occupational association, industry association, or union organization. The groups then operate as the political actors. Rather than employing a “one-person, one-vote” system, it is the groups that vote in determining government policy, with the more powerful groups having the most votes.¹⁷

Corporatism emphasizes a cooperative relationship among groups, and between the state and different groups. This is based on two principles. The first is the conception of some sort of objectively cognizable “public interest” that is articulated by the government with consultation from the major groups. Once the public interest is expressed, the various groups are expected to adapt their policies so as to support the public interest.¹⁸

Corporatism also seeks to limit the number of groups with access to the state. Where pluralism envisions an unlimited number of interest groups acting essentially as so many atomistic actors creating a competitive political marketplace, corporatist theory sees a limited number of groups, each wielding substantial political power.¹⁹ Groups are assembled into hierarchies, with “peak associations” at the top holding the most influence with government policymakers. These peak associations are groups like industry-wide business associations or national labor federations, and the broad membership of these groups is thought to discourage narrow conceptions of political interest. Consequently, in corporatism, it is not the local unions but the

¹⁶ ALAN CAWSON, *CORPORATISM AND POLITICAL THEORY* 145 (1986).

¹⁷ See WIARDA, *supra* note 13, at 18 (“In this way, group interests and solidarity would become stronger than the individual ones as represented in liberalism; similarly, the class-conflict model of Marxism would be replaced by the presumed class harmony model of corporatism.”).

¹⁸ HARMON ZEIGLER, *PLURALISM, CORPORATISM, AND CONFUCIANISM: POLITICAL ASSOCIATION AND CONFLICT REGULATION IN THE UNITED STATES, EUROPE, AND TAIWAN* 21-22 (1988) (“Corporatism thus details a decision-making system in which conflict is subordinate to cooperation, a set of circumstances possible only if the state regulates the ebb and flow of group behavior.”).

¹⁹ See CAWSON, *supra* note 16, at 35 (explaining that in liberal pluralism, public and private entities do not intersect, while a key notion to corporatist theory is the interplay between the state and private groups, which wield power due to the state’s need for their cooperation).

national unions, and even more so, the federations, that are expected to wield power.

These peak groups are expected to exert discipline among their constituent local groups so as to maintain cohesive support for national policies. Corporatism requires group discipline to function properly. The peak associations can then battle with, or serve as counterweights to, rival peak associations. For example, union federations are pivotal because they offer a counterweight to the largest corporations, which are perhaps the most powerful of the peak associations.

B. *Great Debates Favoring Corporatism*

1. Labor Market—Labor Law

In a corporatist economy, the role of unions is fundamentally different than in a competitive economy. To corporatist commentators, unions were necessary to prevent wages from falling to arbitrarily low levels. Malthus's view of the reproductive abilities of workers was still a strong force: population growth would always lead to subsistence level wages.²⁰ Labor relations experts offered similar arguments. For example, John R. Commons, one of the original giants of industrial relations, argued that "cutthroat competition" among workers set the market wage at the wage that the "cheapest laborer" would be willing to accept.²¹ In Commons's view, unions or minimum wage legislation could help break the excessive competition without causing job losses because employers would respond to the higher wage by insisting on offsetting gains in productivity.²²

These institutional theories took a holistic approach to labor markets that was appealing on one level but highly confused on another.

²⁰ See T.R. MALTHUS, 1 AN ESSAY ON POPULATION 17-18 (J.M. Dent & Sons Ltd. 1958) (1798) (discussing how an increase in laborers without an increase in wages will naturally result in an increase in the price of goods, which means a real decrease in laborers' wages).

²¹ JOHN R. COMMONS & JOHN B. ANDREWS, PRINCIPLES OF LABOR LEGISLATION 48 (4th rev. ed. 1936).

²² *Id.* at 73 (denying that a guaranteed minimum wage would decrease "incentive and output" and claiming that it would in fact have "the opposite effect," both because employers would expect greater returns and because workers would respond to "the improved rate of remuneration"). Commons's and Andrews's support for this claim was meager, citing to R.H. Tawney's study of the tailoring industry, which concluded that "as a general rule the girls work better if they are paid more." R.H. TAWNEY, THE ESTABLISHMENT OF MINIMUM RATES IN THE TAILORING INDUSTRY UNDER THE TRADE BOARDS ACT OF 1909, at 133 (1915) (quotation marks omitted).

Commons lacked an equilibrating framework that allowed wages to rise with the productivity of the workforce or, if nothing else, to avoid a free fall to subsistence level.²³ Rather, he had a story, and the story was a complex mixture of business cycle dynamics and unconstrained managerial power.²⁴

This labor market debate has always had a strong social as well as an economic component, and this was particularly true after World War I and the communist revolution in Russia. President Wilson, attending the Versailles conference, spoke about “the question of labor” being of primary importance.²⁵ Public intellectuals called on workers to unite to defend not only their own economic interests, but also to fight class inequities. Noted progressive Frederick Howe remarked that “[l]abor would not serve privilege.”²⁶ The labor movement offered assistance in ending the “immorality of exploitation” brought about by corporate power dealing with unorganized labor.²⁷ Clyde Summers, at a later time and in the context of the NLRA, made a forceful claim that labor unions promoted democracy, and that in a democratic political system, workers should be allowed free association and the choice of their own representatives.²⁸

²³ Commons’s bleak outlook borrowed from Malthus, but without the key feature of the Malthusian model, which was the perfectly elastic supply of workers at the subsistence wage, driven by the inability of the citizenry to control its fertility. Commons did mention immigration as being a negative force on the wages of the unskilled, but did not include the uncontrolled immigration needed to maintain wages at the subsistence level in a modern labor market model.

²⁴ Kaufman does a wonderful job of “modernizing” Commons and pointing out that his writings have been unfortunately neglected. See Bruce E. Kaufman, *The Organization of Economic Activity: Insights from the Institutional Theory of John R. Commons*, 52 J. ECON. BEHAV. & ORG. 71, 93 (2003) (“Although Commons was a major figure in American economics in the first-third of the 20th century, his theoretical work is now largely neglected and/or dismissed by most contemporary writers . . .”). Commons was an expert on the institutional forces at work in labor markets. But his theory of wages was internally inconsistent (except on the most generous of readings) and was contradicted by the data.

²⁵ Steve Fraser, *The ‘Labor Question’, in THE RISE AND FALL OF THE NEW DEAL ORDER, 1930-1980*, at 55, 55 (Steve Fraser & Gary Gerstle eds., 1989) (quoting Woodrow Wilson).

²⁶ *Id.* (quoting Frederick Howe).

²⁷ *Id.* at 56.

²⁸ See Clyde W. Summers, *The Public Interest in Union Democracy*, 53 NW. U. L. REV. 610, 622-23 (1958) (arguing that unions in particular must be democratic because they play an important role in society: “A pluralist society such as ours gives special significance to certain private groups and structures which serve as centers of distributed power for regulatory purposes”). If people become accustomed to deferring to experts

The modern concept of competitive labor markets was undeveloped at this time. It was only in 1932 that John Hicks published his then-controversial *The Theory of Wages*. Hicks's contribution was to develop what he called the marginal productivity theory of wages, or what modern readers would recognize as contemporary wage theory.²⁹ But Hicks's construct of competitive labor markets had not yet escaped the boundaries of the academy when the NIRA was being drafted.³⁰

2. Antitrust—Business Regulation

Proponents of antitrust laws have been an extraordinarily mixed group, and this was true in the 1930s as well. One group was the economists and other commentators who favored antitrust policy as a way to make the economy more competitive. They were joined by business associations that favored the antitrust laws to the extent that they encouraged the free enterprise system. A second major group, the progressives, supported antitrust policies to achieve entirely different goals. To the progressives, antitrust law should promote competition in the form of a large number of small, locally owned firms. If one large firm were more efficient than the smaller ones, then the progressives would favor protecting the latter.

The progressives were concerned over the growth of large firms because of its political implications: it represented an accumulation of political power in a few powerful hands. At the time of the New Deal, the Great Satan to the progressives was The Great Atlantic and Pacific Tea Company (A&P). A&P was efficient and had low prices, and it was precisely that efficiency that threatened to destroy numerous family owned and small businesses.³¹

or autocrats in the governance of their day-to-day work life, then they will start ceding their democratic rights in their political life as well.

²⁹ J.R. HICKS, *THE THEORY OF WAGES* 86 (2d ed. 1963) (defining the term “marginal product” and discussing its role as a “regulator of wages”).

³⁰ 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.

³¹ See Richard C. Schragger, *The Anti-Chain Store Movement, Localist Ideology, and the Remnants of the Progressive Constitution, 1920-1940*, 90 IOWA L. REV. 1011, 1025 (2005) (quoting then-Senator Hugo Black of Alabama, from 1930: “The local man and merchant is passing and his community loses his contribution to local affairs A few of these useful citizens . . . become clerks of the great chain machines . . . while many enter the growing ranks of the unemployed.”).

Historically, the Sherman Act is seen as the best case for the “efficiency” rationale for the antitrust laws, although even that law is subject to mixed interpretations.³² The legislation that followed at the turn of the century, namely the Federal Trade Commission Act and the Clayton Act, began to be problematic in that certain business policies that allowed efficient large firms to win the competitive struggles became unlawful.³³ Even so, while the legislation’s impact is mixed, there is little explicit anticompetitive, small-producer language in the Acts.³⁴

It was not until the New Deal that protection for small, less efficient businesses became an articulated goal of antitrust policy. Although the Robinson-Patman Act would not become effective until 1936,³⁵ leading progressives were actively pushing for Robinson-Patman-type legislation in the late 1920s and early 1930s.³⁶ It is now received wisdom that the Act was a product of the pessimistic view that unregulated competition meant destructive competition that harmed small businesses, and, more specifically, the strongly held belief that the success of the Great Atlantic and Pacific Tea Company in taking market share from the small local stores had to be constrained.³⁷

Even the Supreme Court was prepared to support fair competition over free competition in certain circumstances. In its *Appalachian Coals* decision the Court applied a “rule of reason” analysis and held coal producers’ concerted activity to be a reasonable restraint of competition, even though all competition among producers had been eliminated.³⁸ The rationale for this unusual decision was that the

³² See HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* 49-51 (2d ed. 1999).

³³ See ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 35 (1978) (characterizing the Clayton and Federal Trade Commission Acts as having “had thoroughly pernicious results”).

³⁴ See E. THOMAS SULLIVAN & HERBERT HOVENKAMP, *ANTITRUST LAW, POLICY, AND PROCEDURE: CASES, MATERIALS, PROBLEMS* 16 (5th ed. 2003) (“Although there are a few statements suggesting that the protection of the opportunity of small business to compete was one motivating factor for the legislators, these statements do not imply that protection of small businesses was meant to override other goals.”).

³⁵ Robinson-Patman Antidiscrimination Act, Pub. L. No. 74-692, 49 Stat. 1526 (1936) (codified as amended at 15 U.S.C. §§ 13-13b, 21a (2000)).

³⁶ See Schragger, *supra* note 31, at 1057-62 (discussing the congressional response to chain stores, which included pushes “to amend the antitrust laws to protect the small dealer”).

³⁷ See FREDERICK M. ROSE, *PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT* 534 (1962).

³⁸ *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 372-78 (1933).

Court was responsive to arguments about the “unfortunate state of the industry” and the overly competitive conditions that resulted from it.³⁹

3. Corporation Law

To the corporatists, the Great Depression appeared to confirm the darkest fears of its leading political and economic supporters. One such supporter was Adolf Berle. A key architect of the NIRA, Berle was also a major commentator on American corporations. Berle, working with Gardiner Means, believed that capitalism would generate a highly undesirable concentration of power in the hands of a few corporations. In their influential book *The Modern Corporation*, Berle and Means concluded with the following gloomy view of the corporate landscape:

The rise of the modern corporation has brought a concentration of economic power which can compete on equal terms with the modern state The future may see . . . the corporation, not only on an equal plane with the state, but possibly even superseding it as the dominant form of social organization. The law of corporations, accordingly, might well be considered as a potential constitutional law for the new economic state, while business practice is increasingly assuming the aspect of economic statesmanship.⁴⁰

To Berle and Means, the possibility that large corporations could exercise enormous political power was based on two predictions. The first was that no existing economic forces could prevent individual corporations from amassing enormous market power.⁴¹ The second was that senior managers in large corporations, who owned little of the company’s stock, would be reckless in spending corporate funds.⁴²

The corporate law predictions in *The Modern Corporation* reflected the authors’ observation that the modern corporation, unlike earlier business organizations, was marked by a nearly complete separation of

³⁹ See Rudolph J. Peritz, *A Counter-History of Antitrust Law*, 1990 DUKE L. J. 263, 289 (noting the Court’s responsiveness to “the industry . . . in distress” and the “evil conditions to be cured” (quoting *Appalachian Coals*, 288 U.S. at 372)).

⁴⁰ ADOLF A. BERLE, JR., & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 357 (William S. Hein & Co., Inc. 1982) (1933).

⁴¹ See *id.* at 41-46 (predicting the continued growth of corporations with no economic forces to check them).

⁴² See *id.* at 119-25 (discussing the divergent motives of managers, whose interests might be served through decisions harmful to shareholders).

ownership and control.⁴³ To the authors, this meant that the senior managers who controlled these corporations might well act to amass political power, even if such power had no economic rationale. Since it was the shareholders' money that would be spent, corporations were not constrained in building political empires if the managers were so inclined. Specifically, "[u]nchecked by present legal balances, a social-economic absolutism of corporate administrators, even if benevolent, might be unsafe."⁴⁴

Other corporate law scholars also took the position that managers had a social responsibility to the community and, in modern parlance, to other stakeholders.⁴⁵ Merrick Dodd, in his famous debate with Berle, argued that the separation of ownership and control implied that shareholders had given managers the authority to take the actions that they deemed to be appropriate to fulfill their social obligations.⁴⁶ In effect, the corporations were quasi-public entities and the managers had as much right to be called owners as did the shareholders.⁴⁷

⁴³ See *id.* at 90-118 (describing the phenomenon in which shareholders own a corporation but leave control to management).

⁴⁴ A.A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365, 1372 (1932).

⁴⁵ The question of whether corporate boards of directors can successfully be socially responsible has generated ongoing debate. For examples, see Victor Brudney, *The Independent Director—Heavenly City or Potemkin Village?*, 95 HARV. L. REV. 597 (1982), and Elliott J. Weiss, *Social Regulation of Business Activity: Reforming the Corporate Governance System to Resolve an Institutional Impasse*, 28 UCLA L. REV. 343 (1981). Both authors support the proposition that corporate boards should be socially responsible. They disagree on the success of independent directors in achieving this goal. Weiss argues that a board dominated by independent directors can be socially responsible, but only if the state requires that the nominees be restricted to a pre-selected group of candidates committed to social objectives. *Id.* at 426-34. Brudney argues that independent directors are less effective than regulation in directing corporate action. Brudney, *supra* at 658. More recently, Jeffrey Gordon has argued that independent directors are more likely to maximize stockholder welfare than to be socially responsible. Jeffrey N. Gordon, *Independent Directors and Stock Market Prices: The New Corporate Governance Paradigm* (Aug. 2006), available at <http://ssrn.com/abstract=928100>.

⁴⁶ For an excellent treatment of the Dodd and Berle debate, see William W. Bratton, *Berle and Means Reconsidered at the Century's Turn*, 26 J. CORP. L. 737, 761-62 (2001). The debate between Dodd and Berle is well known in the corporate law literature. Based on Berle's response to Dodd, Berle is frequently viewed to be a supporter of shareholder rights. But this interpretation is incorrect. *The Modern Corporation's* public policy stance is in accord with corporatism and not shareholder supremacy. This point is recognized in Dalia Tsuk, *From Pluralism to Individualism: Berle and Means and 20th-Century American Legal Thought*, 30 LAW & SOC. INQUIRY 179, 185-94 (2005).

⁴⁷ "If, therefore, the managers of modern businesses were also [their] owners, the development of a public opinion to the effect that business has responsibilities to its

Berle's response to Dodd has to be read in the context of his central role in the Roosevelt administration and in the adoption of the NIRA.⁴⁸ He wrote that the "[r]igid enforcement of property rights" of passive shareholders would give way in the face of a "convincing system of community obligations."⁴⁹ In meeting their obligations, corporate leaders would be expected to "set forth a program comprising fair wages, security to employees, reasonable service to their public, and stabilization of business."⁵⁰ Once developed, narrow shareholder interest in maximizing the value of the corporations would need to give way. In other words, the fiduciary duties of managers would address not only the interest of shareholders, but also of society. Ultimately, Berle favored a federal fiduciary law principle that would mean that managers would be required to pursue the well-laid national goals, but were otherwise responsible to the shareholders.⁵¹

Berle's solution did not make its way into policy, perhaps because the NIRA did not last long. Consequently, we can only speculate as to how this might have been accomplished. The possibilities for implementation range from a federal fiduciary duty law to mandates by the National Recovery Administration (NRA). But the potential rules or recommendation could have led to a major restructuring of fiduciary

employees and its customers would, quite apart from any legal compulsion, tend to affect the conduct of the better type of business man." E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1153 (1932).

⁴⁸ Roberta Romano also interprets Berle as a corporatist. She writes that "Berle reconceptualized the manager's role to be that of a disinterested public servant, a role that could provide the social stability necessary for the attainment of the corporatist ideal." Roberta Romano, *Metapolitics and Corporate Law Reform*, 36 STAN. L. REV. 923, 936 (1984).

⁴⁹ BERLE & MEANS, *supra* note 40, at 356.

⁵⁰ *Id.* Berle did believe that shareholders remained the true owners (or at least residual claimants) of the corporation and that they had made no such quasi-contractual giveaway of their rights as residual claimants. While Berle had few good words for absolutist corporate administrators, he had a soft spot for shareholders, whom he identified with ordinary working people who needed to collect their dividend checks to make ends meet. *See, e.g.*, Berle, *supra* note 44, at 1368 (arguing that a disruption in the income stream of stock and security holders would cause a "large portion" of them to "devolve[] on the community," and to require relief).

⁵¹ *See id.* at 1372 (looking to a time when "corporate administration will be held to a high degree of required responsibility . . . conceived not merely in terms of stockholders' rights, but in terms of economic government satisfying the respective needs of investors, workers, customers, and the aggregated community").

duty law to support an economy based on fair rather than free competition.⁵²

In summary, all the pieces were in place for the United States to adopt a corporatist policy. Policymakers dealing with labor market, antitrust, and corporate law policies were in agreement that competitive forces had become destructive and that this was a cause of the Great Depression. In this context, unions were a critically important part of a well-functioning economy.

III. THE NATIONAL INDUSTRIAL RECOVERY ACT

A. *The NIRA Experiment*

The passage of the National Industrial Recovery Act represented the adoption of corporatism by the United States and was recognized at the time as drawing from the models being created in Europe.⁵³ The first full adoption of a corporatist policy was in Benito Mussolini's Italy in 1922, and a few other European countries followed suit during the 1920s.⁵⁴ But it was the Great Depression that brought about the wholesale adoption of corporatist policies in Europe and then in the United States.⁵⁵

⁵² Berle never got around to making specific the context in which shareholder supremacy would give way to the broader government policy. See William W. Bratton & Joseph A. McCahery, *The Equilibrium Content of Corporate Federalism*, 41 WAKE FOREST L. REV. 619, 637 n.90 (2006) (noting that Berle proposed "an overarching standard" to guide the courts in the exercise of their equitable powers).

⁵³ In addition to the NIRA, the Miller-Tydings Act of 1937, ch. 690, 50 Stat. 673 (codified as amended at 15 U.S.C. § 1 (2000)), the Robinson-Patman Act of 1936, Pub. L. No. 74-692, 49 Stat. 1526 (codified as amended at 15 U.S.C. §§ 13a-13b, 21a (2000)), the Davis-Bacon Act of 1931, ch. 411, § 1, 46 Stat. 1494 (codified as amended at 40 U.S.C. § 276a-276a5 (2000)), as well as state and local price-maintenance laws, were elements of the move toward a corporatist economy.

⁵⁴ European countries adopting corporatist policies prior to the Great Depression included Portugal, Bulgaria, Lithuania, Poland, Albania, and Yugoslavia. WIARDA, *supra* note 13, at 40-41. The corporatist regimes were first known as fascist regimes, until the word fascism became associated with Nazi Germany and lost its appeal. *Id.* at 111. However, Romano differentiates between corporatism and fascism. Romano, *supra* note 48, at 935-36.

⁵⁵ The United States had experimented with corporatism in order to mobilize the country to fight the Great War. President Wilson established the War Industries Board in order both "to ensure the adequate supply of raw materials and manufactured goods" and "to maintain labor peace during the war by incorporating both capital and labor under government guidance." WIARDA, *supra* note 13, at 135. The Board established an "essentially corporatist, tripartite (business, labor, the state) arrangement to

The NIRA, passed in June 1933, was the centerpiece of President Roosevelt's first-term New Deal.⁵⁶ The NIRA was administered by the National Recovery Administration (NRA). The NRA's leaders were committed corporatists who sought to replace what was seen as an individualistic, selfish, hyper-competitive system with a system built around concerted activity under government supervision. The first head of the NRA, General Hugh Johnson, believed that capitalism had brought the United States to the brink of collapse.⁵⁷

The NIRA was supported by an unstable alliance: the corporatists and the progressives.⁵⁸ Both shared a common belief that the free enterprise system had failed. After that, they offered diametrically opposed solutions. Corporatists favored an administered economy. Industries would be pushed to form cartels built around private ownership of firms. In this new, centralized economy, corporate managers and union leaders would help establish the policies that would then direct their own activities. The progressives, on the other hand, wanted to protect small business and were deeply troubled by the idea of allowing the managers of the large corporations a significant policy role.⁵⁹

At the core of the NIRA were its codes of fair competition for individual industries. Trade associations, as the hierarchical peak groups, could ask the federal government to approve codes of practices for their industries.⁶⁰ The codes, once approved by the NRA, were legally binding on all the firms in the industry. If the trade association proved reluctant, the NRA could adopt a code for an industry that failed to adopt one.⁶¹

protect against strikes during the war and to ensure the necessary massive and uninterrupted production." *Id.*

⁵⁶ National Industrial Recovery Act, ch. 90, 48 Stat. 195 (1933), *invalidated by* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

⁵⁷ See DONALD R. BRAND, CORPORATISM AND THE RULE OF LAW: A STUDY OF THE NATIONAL RECOVERY ADMINISTRATION 99-100 (1988) (describing Johnson's disdain for the competitiveness of capitalism and his admiration for corporatism).

⁵⁸ See *id.* at 128-29 (describing the "inherent tensions between these alternative conceptions of corporatism").

⁵⁹ See *id.* at 129 (noting that progressives had "no faith in the ability of businessmen to clean their own house").

⁶⁰ Ch. 90, § 3a, 48 Stat. 195, 196 ("Upon the application to the President by one or more trade or industrial associations or groups, the President may approve a code or codes of fair competition for the trade or industry . . .").

⁶¹ BRAND, *supra* note 57, at 235 (noting that although the NRA had the power to impose a code on an industry unilaterally, it was rare for the principal parties to fail to come to a "mutually acceptable agreement").

The codes offered business firms an unusual plum—namely, legalized concert of action as a way out of the disastrous price cutting that had led to alarming numbers of bankruptcies. In short order, most of the major industries were covered by codes, and the companies that belonged to associations with approved codes were allowed to display the Blue Eagle, which publicly advertised their good standing with the NRA.⁶²

The NIRA got off to a fast start, but it fell apart almost as quickly. The internal contradictions and the unnatural alliances that supported the NIRA were too great. In the rush to implement the New Deal, the original drafting of the NIRA was left to progressive politicians such as Senator Robert Wagner, a second-term Democrat from New York, and allowed little input from businesses or unions.⁶³

Once approved, business firms were supposed to change their behavior and become reliable members of the cartel. However, no sooner had the fair price been set than cartel members started cheating on the price to gain additional customers and profitable volume.⁶⁴ Noncompliance begat further noncompliance, as code-abiding businessmen began to feel the pinch of competition from cheating firms. The NRA responded by establishing a Compliance Division and a National Compliance Board with regional offices in every state.⁶⁵ But the enforcement problem could not be controlled by a voluntary system.

The lack of cooperation might have earned the enmity of the administration, but if a company did not fear political repercussions, its loss would be minimal. Although the Blue Eagle symbol was popular, it was inadequate to secure cooperation.⁶⁶ Corporatism, while voluntary in spirit, worked best in countries where the cost of annoying the political regime carried greater penalties.⁶⁷

While the firms were busy cheating on the cartel prices, the progressives' support for the NIRA was declining because of unhappiness over the announced price increases permitted by the codes. While the progressives supported the wage increases being won by newly organ-

⁶² *Id.* at 94 (explaining that the popularity of the Blue Eagle program was such that opposition was “tantamount to disloyalty”).

⁶³ *See id.* at 83-86 (describing the drafting of the NIRA).

⁶⁴ *See id.* at 103 (referring to a “crisis in compliance” by the fall of 1933).

⁶⁵ *Id.*

⁶⁶ *Id.* at 94 (commenting that the “moral enthusiasm” for the NRA lasted only for the first few months of the program).

⁶⁷ *See generally* WIARDA, *supra* note 13, at 71-93 (analyzing corporatist regimes at the regional and national levels).

ized workers, they were upset by the price increases that were necessary to cover the cost of the wage increases.⁶⁸ Aggrieved by these internal contradictions of the system, progressives in Congress began to argue that the codes' price-fixing practices were illegal under prevailing antitrust law.⁶⁹

B. *The Labor Movement During the NIRA Experiment*

The unions were major beneficiaries of the NIRA. At the start of the New Deal, labor was largely unorganized, weak, and entirely unable to serve as a functional partner in the business/labor cooperative envisioned by the NIRA. The spur for the creation of the modern labor union movement was section 7(a) of the NIRA.⁷⁰ While section 7(a) was only a restatement of the previously acknowledged right of labor to organize, it added to that right a prohibition on interference by employers.⁷¹ In addition, the industry codes, before being approved, "had to meet specific conditions regarding the rights of employees to participate in union activities and requirements of employ-

⁶⁸ For an excellent discussion of the conflict within the progressive movement as it tried to come to terms with Roosevelt's corporatist economy, including the government's adherence to fair prices and acceptance of price-fixing under the sponsorship of government agencies, see Schragger, *supra* note 31, at 1043 (examining the tension between antimonopoly progressives and corporatist New Dealers).

⁶⁹ Key to the price codes was a rule that permitted manufacturers to exchange information about not only past, but also current and future selling prices. Graham K. Wilson, *Why Is There No Corporatism in the United States?*, in PATTERNS OF CORPORATIST POLICY-MAKING 219, 231 (Gerhard Lehbruch & Philippe C. Schmitter eds., 1982). Without the NIRA's blessing, this practice would have been illegal under prevailing antitrust statutes; progressive legislators saw the rule as a threat to the nation's antitrust laws.

⁷⁰ Section 7(a) stated:

[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

National Industrial Recovery Act, ch. 90, § 7(a)(1), 48 Stat. 195, 198, *invalidated by* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

⁷¹ 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. It also left ambiguous the legal status of such previously forbidden practices as secondary boycotts, interference with contractual relations, and refusal to work on nonunion goods. *E.g.*, BRAND, *supra* note 57, at 230 (discussing the legal advantages the NIRA provided to the labor movement).

ers to comply with maximum work hours and minimum rates of pay.”⁷²

The union leadership saw the bigger picture: labor was a necessary component of Roosevelt’s new cooperative relationships. Unions campaigned for worker support on the platform that “[t]he President wants you to unionize.”⁷³ “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 to federal and local unions were issued. In the following year 1196 more charters were issued.”⁷⁴

While unions supported the NIRA and prospered under it, they found elements of the new cooperative/public interest environment less to their liking. The American union movement had always been built around business unions that would collectively bargain with individual employers to establish the terms and conditions of employment. The codes of fair competition, on the other hand, provided for industry-wide maximum hours and minimum wages arrived at through an openly political process. In addition, union leadership was reluctant to undermine its goal of improving the economic position of union members in favor of what the NIRA decided was the public interest.⁷⁵

To succeed in the new system, unions and business had to exercise self-restraint in their bargaining demands and to be responsible in

⁷² THE GREAT DEPRESSION AND THE NEW DEAL: LEGISLATIVE ACTS IN THEIR ENTIRETY (1932-1933) AND STATISTICAL ECONOMIC DATA (1926-1946) 194 (Frederick E. Hosen ed., 1992).

⁷³ BRAND, *supra* note 57, at 271 (quoting from a union banner of the period).

⁷⁴ *Id.* at 272. William Green, president of the AFL, credited section 7(a) with adding 1.5 million new union members, more than a one-third increase, by the time of the October 1933 convention. MARC ALLEN EISNER, REGULATORY POLITICS IN TRANSITION 84 (2nd ed. 2000).

⁷⁵ The major union grievance with the NIRA was that it allowed for diverse union interests to be represented in the same bargaining unit, a kind of proportional representation. This was in direct conflict with the primary goal of exclusive representation favored by the AFL locals. The concept of a menagerie of unions of different stripes working under the umbrella of a powerful peak association under the control of national union leadership was not, and never had been, part of American unionism. Instead, stress was placed on strong locals as the exclusive bargaining agent of the workers, negotiating with specific employers about the terms and conditions of individual workplaces. See David A. McCabe, *The Effects of the Recovery Act Upon Labor Organization*, 49 Q. J. ECON. 52, 64-78 (1934) (predicting that the likelihood that the labor movement would be able to take advantage of the new labor rights granted by the NIRA would largely be dependent on its ability to coalesce within a bargaining system “which is industry-deep as well as industry-wide”).

supporting national priorities over their own priorities. This did not happen.⁷⁶ There were numerous union-organizing and bargaining conflicts with businesses that required the mediating skills of the NIRA leadership and often Roosevelt himself.⁷⁷ Rather than paving the way for successful bargaining between the many new unions and the newly organized companies, strikes and lockouts spread. Instead of providing for greater labor stability, the number of workdays lost to strikes nearly tripled between 1932 and 1934.⁷⁸

This provided one of the continuing dilemmas faced by the supporters of the NIRA. The NIRA leadership wanted a system where “fundamentally decent businessmen would not be forced by competitive pressures to exploit their employees.”⁷⁹ While their goal was to adopt regulations that would encourage cooperative industrial practices, the effect of the labor policy was to stir inherent conflicts between labor and management. The result was the unleashing of combative forces that the NIRA regulators could not control.⁸⁰

The new social ethic propagated by the system had just not caught on. Although the new economic system was premised on cooperation by the key players, the drafters forgot to train the “fundamentally decent businessmen” and labor leaders in the new etiquette that was the centerpiece of the system.⁸¹ The organizational hierarchies envi-

⁷⁶ See BRAND, *supra* note 57, at 94 (noting that the Depression did not elicit the “level of virtuous self-restraint” necessary for NRA compliance).

⁷⁷ See DULLES, *supra* note 8, at 271-72 (describing the precipitous increase in strikes under NIRA as workers fought for higher wages and union recognition).

⁷⁸ See BRAND, *supra* note 57, at 257 (chronicling the growth of labor militancy after the NIRA’s passage).

⁷⁹ *Id.* at 12.

⁸⁰ See *id.* at 277 (noting that New Dealers attempted to “unleash the forces of reform,” while at the same time maintaining control over “excessive labor militance”).

⁸¹ Gross, Schragger, and Brand take different positions on the NIRA and its creation. See generally 1 JAMES A. GROSS, *THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD: A STUDY IN ECONOMICS, POLITICS, AND THE LAW* 9 (1974) (“The politics of the New Deal . . . were flexibly pragmatic rather than ideologically rigid. The administration’s goal was to create a friendly, cooperative partnership out of many diverse interests with the federal government acting as broker state, unifying, harmonizing, and mediating among the major interest groups.”); Schragger, *supra* note 31, at 1042-43 (observing that “[t]he anti-chain store movement emerged at the very moment the country was forced to rethink the premises of an old political-economic order” and that the movement “gained sustenance from the crisis that precipitated that rethinking”); BRAND, *supra* note 57, at 81-90 (reviewing President Roosevelt’s ideologically charged inaugural speech and his subsequent actions in recruiting a “Brain Trust” of advisors to facilitate the adoption of progressive ideas by political activists). Gross stresses the pragmatism of Roosevelt in creating the NIRA where Schragger and Brand see it as a strong political statement by the progressives and the coalition that helped

sioned by the corporatist system did not materialize. Neither the Chamber of Commerce nor the AFL could successfully force member firms or union locals to modify their own goals in accord with the public policy goals announced by the Roosevelt administration. Nor is it clear that they ever tried to rally their troops.⁸²

Simply put, neither management nor labor was willing to play within the new corporatist structure. Corporations were unconvinced that the relaxation of the antitrust laws was sufficient to compensate them for the cost of section 7(a). Union leaders were in a similar position, as members' aspirations and militancy increased along with workers' new organizational rights. And unions, more than business, were willing to gamble that the NLB (or later the NLRB) or the President himself would intervene and support their claims in order to restore labor peace. As a consequence, the NIRA was terminal even before it was put to rest by the Supreme Court in *Schechter*.⁸³

The source of my interest in the NIRA is that it provided a structure in which unions could prosper by being integral players in the formulation of the nation's economic policy. In this system, unions were indeed "part of the solution." The union leadership was correct, with some literary license, in claiming that Roosevelt wanted—or more specifically, *needed*—the workers to unionize.

The NIRA was the catalyst behind the surge in union membership that occurred in the 1930s. Union membership increased 33% in just the two years, from 1933 to 1935, that the NIRA was in operation.⁸⁴ But the new unions formed during these two years and the impetus behind organized labor in general were just beginning to show results.

get Roosevelt elected. I take more of the Schragger/Brand position since I also stress Roosevelt's bold, if failed, move to adopt a corporatist economic structure for the United States. The adoption of corporatism hardly seems pragmatic.

⁸² Henry Harriman, president of the Chamber of Commerce, claimed in May of 1933 that the NIRA was "The Magna Charta of Industry and Labor" and his legal staff would immediately begin drafting a model code of fair competition. CHARLES F. ROOS, *NRA ECONOMIC PLANNING* 43 (Frank Freidel ed., Da Capo Press 1971) (1937). However, by November of 1933 the Chamber had become concerned with the level of government involvement in industry regulation, and by May 1935 had "publicly declared war on the New Deal." BRAND, *supra* note 57, at 140, 284.

⁸³ *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). In *Schechter*, the Court held that the code-making authority conferred by NIRA was an excessive delegation of legislative power and therefore unconstitutional. *Id.* at 542. The *Schechter* Court's use of the nondelegation doctrine to overturn NIRA is now viewed as a "legal anachronism" because equally broad grants of authority to government agencies have been consistently upheld since the New Deal. BRAND, *supra* note 57, at 291.

⁸⁴ See *infra* fig.1, at 634.

Between 1935 and 1940, union membership increased by nearly 150%. During the seven-year period between NIRA's passage and 1940, organized labor membership grew from 2.6 million to 8.42 million. Union density—the percentage of employees who were union members—jumped from 11% of the economy to 26%.

IV. THE NATIONAL LABOR RELATIONS ACT, INDUSTRY REGULATION, AND WORLD WAR II

A. *National Labor Relations Act*

In the history of American unionism, the NIRA is given short shrift by commentators, who prefer to focus on the NLRA. In fact, the NLRA was intended to continue and strengthen the NIRA's labor policies. Senator Wagner's ideas for the NLRA were fashioned out of his experiences with the failure of the NIRA.⁸⁵ He was one of the primary authors of both. The Roosevelt administration backed the NLRA only after the NIRA had been declared unconstitutional, and then only with some hesitation.⁸⁶

On the surface, the NLRA was modeled after the NIRA. The heart of the NLRA, section 7, was largely a carryover from section 7 of the NIRA.⁸⁷ Workers were given a right to join labor organizations, to bargain collectively, and to engage in concerted activities, such as strikes, without interference, restraint, or coercion by management.⁸⁸

However, the NLRA was different from the NIRA in three key respects. One major difference was that it replaced voluntarism with mandates and a new enforcement mechanism. Section 8(1) outlawed employer coercion of employees in the exercise of their section 7

⁸⁵ In Senate debates on the Wagner Act, Senator Wagner stated: "Every one of its provisions is addressed to specific evils that have become abundantly manifest during the ten months' experience of the National Labor Board [during the NIRA]." Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379, 1401 (1993) (quoting 78 CONG. REC. 12,018 (1934)).

⁸⁶ See GROSS, *supra* note 81, at 141, 143-44 (describing President Roosevelt's progression from offering no support for the NLRA to endorsing the NLRA in "some form" after it became clear that the bill would pass "overwhelmingly whether he endorsed it or not" in the shadow of the impending *Schechter* decision).

⁸⁷ *Id.* at 3. 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, *id.*, which remains the premier discussion of these issues.

⁸⁸ Pub. L. No. 74-198, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 157-158(a)(1) (2006)).

rights.⁸⁹ Employers could not foster company-controlled unions or work councils, and unions had a right to exclusive representation of employees.⁹⁰ Unfair labor practices by employers were now controlled by providing the National Labor Relations Board with real enforcement powers.⁹¹

The second key difference was that the NIRA, although a voluntary system, was much broader in scope in its attempt to change the industrial system. The theory behind the NIRA cooperative system was logically coherent, containing not only a labor policy, but also antitrust and corporate law policies consistent with the labor policy.⁹² When the NIRA was declared unconstitutional in *Schechter*, the only piece of its complex industrial policy that was reformulated in new legislation was the labor policy. The industry codes were gone, anti-trust reverted to a pro-competitive policy, and any thoughts of changing the fiduciary duties of directors had been abandoned.

Finally, the passing of the baton from the NIRA to the NLRA significantly reduced the public policy role of unions. Unions had no seat at the government's policy table because peak associations, including labor, were no longer invited. Unions were still favored by public policy because they were instrumental in reducing industrial strife. But in their collective bargaining with employers, unions were now acting in their own interest rather than in the public interest when they bargained for above-competitive wages and benefits.

On balance, these key differences would eventually prove to be harmful to organized labor. While unions had won in the short term with stronger enforcement mechanisms against employers and greater statutory proscription of employer activity, they lost in the larger picture because their key supports—ancillary industrial policies and the government's need to foster its peak associations—were gone.

Labor commentators talk about the cooperative business/labor environment that was to result from the creation of the NLRA, at least as its legislators intended. One can make a strong case that some individuals involved in the drafting of the NLRA, particularly Senator

⁸⁹ 29 U.S.C. § 158(a)(1) (2006).

⁹⁰ *Id.* § 158(a)(1)-(a)(3).

⁹¹ *See, e.g., id.* § 160(a)-(b) (empowering the Board to prevent unfair labor practices affecting commerce and to hear grievances); *id.* § 160(e)-(j) (empowering the Board to seek injunctions of enforcement of its orders from the courts); *id.* § 161 (outlining the Board's investigative powers).

⁹² *See* GROSS, *supra* note 81, at 9 (describing the NIRA as a pragmatic "omnibus proposal" representing a true concert of self-regulation, antitrust, and labor interests).

Wagner, entertained such hopes.⁹³ But the idea that the transition from the NIRA to the NLRA would make management more cooperative in dealing with unions was illusory.

Absent the elaborate nonlabor market policies of the NIRA, it is difficult to imagine why supporters of the NLRA would believe that business leaders would voluntarily cooperate and agree to pay a “fair” wage rather than a “competitive” wage.⁹⁴ The higher costs could no longer be passed on in higher prices. Corporate boards of directors could not credibly claim that they were favoring labor in order to meet their commitments under government policies. Even the symbolism of the Blue Eagle was gone.

Moreover, the NLRA introduced the terminology of the “competitive wage” in its preamble.⁹⁵ The language does not refer to “taking wages out of competition,” but rather to maintaining the competitive wage during business cycles. Wages could fall below competitive levels during a depression, and that outcome had to be avoided. But, there was no policy language in the Act that favored “fair” wages above competitive levels. This was not a matter of semantics. Wagner, as well as all the other participants in drafting the NLRA, should have been well aware of the differences between the competitive wage and the fair wage after their experiences with the NIRA.

B. *Industry-Specific Regulation*

The adoption of the NLRA and the abandonment of a formal corporatist structure did not coincide with a new era of free competition. In its place was a host of industry-specific regulatory mechanisms. Indeed, from an administrative law perspective, the New Deal is best remembered for the creation or expansion in the powers of these regulatory agencies. Most of these agencies enacted rules that controlled entry and exit and fixed prices. In so doing, the new regulatory agencies were akin to miniature or industry-specific NIRAs

⁹³ See Barenberg, *supra* note 85, at 1427-30 (detailing Wagner’s vision of collective bargaining as cooperative rather than adversarial).

⁹⁴ For the most credible claims that the NLRA can be interpreted as intending to develop a cooperative collective bargaining environment, see *id.* See also JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 40-41 (1983) (noting that the Act was intended to “reduce industrial strife” by promoting peaceful resolution to disputes, barring “those employer actions thought most disruptive,” and compelling employers to bargain in good faith with employee representatives).

⁹⁵ 29 U.S.C. § 151 (2000).

aimed at preventing excessive competition. A few examples should be sufficient to illustrate this point.

When the codes of fair competition for the motor vehicle industry died with the NIRA, the American Trucking Association pushed for the successful passage of the Motor Carrier Act in 1935. This provided for government-sponsored cartelization in that all trucking companies had to submit proposals for any rate changes for inspection by the public, including competitors.⁹⁶ If the Interstate Commerce Commission (ICC)⁹⁷ determined that the rates were below its estimate of the full cost of the transaction, the new rates were denied.⁹⁸ This prevented price competition which threatened profits and, with the unionization of the industry, also prevented the undercutting of prices that might weaken the ability of firms to pay the unionized rates.

To regulate the emerging airline industry, the Civil Aeronautics Act of 1938 created the Civil Aeronautics Authority, renamed the Civil Aeronautics Board (CAB) in 1940.⁹⁹ The CAB was closely modeled after the ICC, and like the ICC, had the authority to regulate entry and exit in the market and to set “just and reasonable” prices.¹⁰⁰ The CAB represented the New Deal’s commitment to limiting competition as a means of creating economic stability. As the first annual report of the CAB stated, “[f]or the first time air carriers and the public [were] safeguarded against uneconomic, destructive competition.”¹⁰¹

In 1935 and 1938, respectively, the Federal Power Act and the Natural Gas Act significantly expanded the powers of the Federal Power Commission (FPC).¹⁰² Under these statutes, the FPC had the

⁹⁶ See Thomas Gale Moore, *Unfinished Business in Motor Carrier Deregulation*, REGULATION, Summer 1991, at 49-50, available at <http://www.cato.org/pubs/regulation/regv14n3/reg14n3-moore.html> (describing the history of motor carrier regulation and how it prompted reforms and a later movement toward deregulation).

⁹⁷ The Interstate Commerce Commission was created in 1887 to regulate the railroads. See Interstate Commerce Act of 1887, ch. 104, §§ 11-12, 24 Stat. 379, 383. It was abolished in 1995 and its remaining powers transferred to the Department of Transportation. Interstate Commerce Commission Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803.

⁹⁸ Moore, *supra* note 96 at 49, 50.

⁹⁹ Civil Aeronautics Act of 1938, ch. 601 § 201, 52 Stat. 973, 980-81, *authority reorganized and renamed by* Reorganization Plan No. IV, § 7, 54 Stat. 1234, 1235 (1940).

¹⁰⁰ EISNER, *supra* note 74, at 116-17.

¹⁰¹ *Id.* at 117 (quoting CIV. AERONAUTICS AUTHORITY, ANN. REP. 2 (1939)).

¹⁰² Natural Gas Act, ch. 556, 52 Stat. 821 (1938); Federal Power Act of 1935, ch. 687 pt. 2, 49 Stat. 847. The Federal Power Commission was established in 1920 to

authority to “control the profits, prices, and services” of companies that produced or transported natural gas for interstate commerce or sold electricity across state lines.¹⁰³ In order to meet its goal of securing “just and reasonable prices,” the FPC required companies to sell their services for close to their average cost of production.¹⁰⁴

A labor market example of the regulatory spirit of the 1930s was the Davis-Bacon Act.¹⁰⁵ The goal of Davis-Bacon was to assure prevailing wages in federal construction projects. What “prevailing wages” came to mean under Department of Labor regulation was union wages; that is, “fair” rather than competitive or market wages.¹⁰⁶ Davis-Bacon is appropriately seen as an industry regulation policy because it set the price of labor and, indirectly, the market price. In essence, Davis-Bacon did for the construction industry what ICC and FPC rate-setting did for the transportation and power industries, respectively.

The theories behind the regulation of individual industries were the natural progeny of the NIRA. The key elements are all there. There is regulation on entry by new firms or exit of existing firms. To assure a firm’s profitability, prices were set administratively based on the concept of full-cost pricing. Full-cost pricing included a profit for a firm based on its required market rate of return on capital. Regulated firms often had direct input into the regulatory process. Finally, unionized firms could pay above-competitive, fair wages under the

oversee federal hydroelectric projects. Federal Water Power Act, ch. 285, 41 Stat. 1063 (1920).

¹⁰³ STEPHEN G. BREYER & PAUL W. MACAVOY, ENERGY REGULATION BY THE FEDERAL POWER COMMISSION I (1974).

¹⁰⁴ *Id.* (quoting § 205(a), 49 Stat. at 851).

¹⁰⁵ Ch. 411, 46 Stat. 1494 (1931) (codified as amended at 40 U.S.C. §§ 276a to 276a-5 (2000)).

¹⁰⁶ Davis-Bacon was enacted during the Hoover administration and required that the prevailing wage in a locality be paid on federally funded public construction projects. The Act was a response to the precipitous drop in construction wages during the Depression as contractors competed to have the lowest bid by importing labor from more distressed areas. See ARMAND J. THIEBLOT, JR., PREVAILING WAGE LEGISLATION 28-29 (1986) (noting that common construction wages fell from pre-Depression levels of \$3.50 to \$4.00 per day to less than \$2.00 per day by 1931). As enacted in 1931, Davis-Bacon was extremely vague regarding the definition of a prevailing wage and contained no provision for the government to determine the prevailing wage before contractors made their bids. In fact, Hoover vetoed an amendment which would have added such a provision on the grounds that it would require too many government resources. *Id.* at 31-32. It was not until 1935 that Roosevelt signed into law the current system, under which the Department of Labor (DOL) predetermines the prevailing wage in each locality. The definition of “prevailing wage” was left to the discretion of the DOL. *Id.* at 33-34.

protective umbrella of full-cost pricing and regulated entry. These regulated sectors became the most strongly unionized and had the highest union wage premiums.¹⁰⁷

C. *Union Gains: Corporatism During World War II*

Full-blown corporatist policies returned with World War II in response to the need for increases in production of war machinery. Given the exigencies of the war, Roosevelt replaced the soft sanctions of the NIRA with heavy-handed, authoritarian sanctions. The irony of corporatism is that the voluntarism that it preaches works best when “voluntarism” is backed by the threat of government sanctions.

The Roosevelt administration intervened in private sector labor-management relations with unprecedented frequency and to an unprecedented extent to prevent private labor-management disputes from affecting war production.¹⁰⁸ The United States Conciliation Service helped management and labor settle disputes and strikes, while the National Labor Relations Board handled union representation and unfair labor practice complaints.¹⁰⁹ The number of cases the United States Conciliation Service and the National Labor Relations Board handled nearly tripled, from 11,000 in the 1940 fiscal year to 30,000 in the 1945 fiscal year.¹¹⁰ In 1941, Roosevelt supplemented these organizations by creating the National Defense Mediation Board, which settled 96 of its 118 cases, despite having little power beyond “fact-finding” and arbitrating cases when both parties agreed to do so.¹¹¹ Following the collapse of the National Defense Mediation Board, Roosevelt created the National War Labor Board, which lasted until the end of the war in 1945.¹¹²

Several major strikes in 1941 helped set the tone of government support and prompted the militancy of unions to gain a permanent

¹⁰⁷ By 1973, the private sector union density across the mining, construction, durable goods manufacturing, transportation, and utilities industries was forty-one percent, as compared to the national average union density of twenty-four percent. BUREAU OF LABOR STATISTICS, CURRENT POPULATION SURVEY (1973).

¹⁰⁸ See BARTHOLOMEW H. SPARROW, FROM THE OUTSIDE IN: WORLD WAR II AND THE AMERICAN STATE 96 (1996) (discussing federal labor regulation during the war).

¹⁰⁹ *Id.* at 68-69.

¹¹⁰ *Id.* at 85.

¹¹¹ *Id.* at 70.

¹¹² *Id.* at 70-71. It is noteworthy that the National War Labor Board handled an additional 20,000 cases between 1942 and 1945, beyond those heard by the National Labor Relations Board. *Id.* at 85.

hold on their members. There was considerable concern that the end of the war could result in a return to depression conditions, and unions felt they needed to entrench their position as the exclusive bargaining representative of the workers. Workers at the Federal Shipbuilding and Drydock Company's Kearny, New Jersey yards went on strike after management rejected a National Defense Mediation Board recommendation to adopt a "maintenance of membership" plan.¹¹³ Bethlehem Steel workers struck over the company's continued support of an internal employee representation plan, which the National Labor Relations board found to be company-dominated, and against an order to dissolve the organization.¹¹⁴ Milwaukee's Allis-Chalmers Manufacturing Company plant struck for months when the United Automobile Workers' request for a closed shop was not met.¹¹⁵ In Detroit, American Federation of Labor transportation workers struck, closing the city's bus and trolley network, seeking exclusive bargaining rights.¹¹⁶

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. During the war, there were no fewer than eighteen executive orders centered on labor regulation. All of the government's industrial seizures in this period were accomplished by executive order.¹¹⁷ From 1941 to 1945, Presidents Roosevelt and Truman used this mechanism to conduct seventy-one industrial seizures.¹¹⁸ The number of seizures increased during each year of the war and peaked during fiscal year 1945.¹¹⁹ Of the top one hundred American corporations, more than one-third were seized either in whole or in part.¹²⁰ Among those seized were railroads, coal mines, and even the Montgomery Ward department store.¹²¹

¹¹³ Joel Seidman, *Six Significant Strikes of 1941*, 30 SURVEY GRAPHIC: MAGAZINE OF SOCIAL INTERPRETATION 578, 578 (1941) available at <http://newdeal.feri.org/survey/sg41578.htm>.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ SPARROW, *supra* note 108, at 73-74.

¹¹⁸ *Id.* at 73.

¹¹⁹ *Id.* at 87 tbl.3.5. Court settlements, however, peaked in 1941. Perhaps this indicates a shift in tactics by the Roosevelt administration, as labor-management disputes affected defense production.

¹²⁰ *Id.* at 73 n.13.

¹²¹ GEOFFREY PERRETT, *DAYS OF SADNESS, YEARS OF TRIUMPH: THE AMERICAN PEOPLE 1939-1945*, at 303 (1973).

The war policies, which included wage and price controls and had a low tolerance for even lawful work stoppages, were an ideal ground for extending union membership gains. Union membership grew from 8.42 million in 1940 to 13.83 million in 1945, and in 1945 union membership as a percentage of employment hit a peak level of thirty-four percent—a percentage it would never reach again. The entire gain in union density thus occurred in a period of thirteen years. In 1932, prior to the start of the NIRA, union membership was 2.9 million and was destined to increase nearly five-fold in just thirteen years. Union density, which was close to ten percent prior to the onset of the Great Depression, would more than triple over this period.¹²²

By the end of World War II, a major shift in political sentiment had occurred. Unions were less the underdog, and strike activity both during and after the war changed public opinion. As early as 1941, seventy-five percent of Americans favored a complete ban on strikes—no matter the cause, and even if the strike would not affect defense.¹²³ Congress passed the Smith-Connally Act in response to a series of wartime strikes by the United Mine Workers.¹²⁴ The act required a thirty-day cooling-off period between the announcement of a strike and the actual walkout, created a statutory basis for both the National War Labor Board and presidential industrial takeover powers, prohibited strikes in defense industries, banned union contributions to political parties, and made illegal strikes federal offenses.¹²⁵ Congress passed the act over President Roosevelt's veto.¹²⁶ After several wartime strikes, 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.¹²⁷

Union membership was stagnant from the end of World War II until the beginning of the Korean War. Once again, the need to mobilize the economy for a major war pushed the Truman administration and Congress into reinstating the corporatist economic controls

¹²² See *infra* fig.1, at 634; Freeman, *supra* note 6, at 7.

¹²³ PERRETT, *supra* note 121, at 177-78. In Gallup Poll surveys conducted in 1942 and 1943, respondents most frequently attributed strikes to “unjust demands of workers” or “labor leaders who seek personal power.” ALAN BRINKLEY, *THE END OF REFORM: NEW DEAL LIBERALISM IN RECESSION AND WAR* 215 (1995) (quotation marks omitted).

¹²⁴ SPARROW, *supra* note 108, at 71.

¹²⁵ *Id.*; PERRETT, *supra* note 121, at 307.

¹²⁶ PERRETT, *supra* note 121, at 307.

¹²⁷ JOHN MORTON BLUM, *V WAS FOR VICTORY: POLITICS AND AMERICAN CULTURE DURING WORLD WAR II*, 254 (1976).

that had been used during the 1940s. During the war, corporatist policies performed the magic they had accomplished twice before. Union membership increased from 13.78 million in 1950 (slightly below the level reached in 1945) to 16.36 million in 1953, and union density, after falling from thirty-four percent to thirty percent during this period, climbed back to thirty-three percent.¹²⁸

V. THE LONG DECLINE IN UNION MEMBERSHIP

The central point of this Article is that the decline in unions is due to one factor—the shift from a corporatist to a highly competitive economy. If that is the case, and if corporatism died with the Korean War, then there is a puzzle. The puzzle is not that union representation declined—rather, the puzzle is why the decline has taken so long. It took just twelve years for union density to climb from twelve percent prior to the NIRA to its peak of thirty-four percent at the end of World War II, but it was another forty-six years from the end of the Korean War until union density fell back to twelve percent in 1989. Today, private sector union density is roughly eight percent.¹²⁹ Why has it taken more than half a century for unions to decline to the point that they are largely a niche movement in the private sector economy?

The answer is that the dismantling of the corporatist economy was itself a long, drawn-out process, taking roughly half a century. Although the process actually began after World War II, major elements in the development of today's competitive economy occurred during the 1980s. As the table on union representation, *infra*, shows, it was only after the 1980s that unions lost their presence as a major institutional feature of the labor market.¹³⁰

Obviously, the scope of this Article cannot be to explain the dismantling in any great detail. Rather, my goal is to show that it indeed did take a long time to arrive at what we take for granted today: a highly competitive United States economy. For the purposes of this Article, I cite the major transformational political and legal events that brought us to our current state.

¹²⁸ See *infra* fig.1, at 634; Freeman, *supra* note 6, at 34.

¹²⁹ See *infra* fig.1, at 634.

¹³⁰ *Id.*

A. *Labor Law*

The end of the Korean War re-released the forces that had fueled the public's negative perception of unions. Were it not for the Korean War and the accompanying return to corporatism, the decline in unions would have begun after the end of World War II. This change in attitude was evident in the passage of the Taft-Hartley amendments to the NLRA, a bill that had enough support to pass over the veto of President Truman.

To most labor law scholars, Taft-Hartley represents one of the key causal factors leading to the decline in unions. Taft-Hartley certainly represented a rebalancing of the two sides' strike powers in favor of management. In particular, the Act introduced a set of "unfair labor practices" by unions.¹³¹ In the original Wagner Act, unfair labor practices were restricted to the behavior of company managers. Now, the NLRB could sanction the union if it engaged in certain activities such as secondary boycotts, which had previously proved to be highly successful strike weapons.¹³²

I argue that the adoption of the Taft-Hartley amendments was not the cause of union decline; it was a symptom, one of the first indicators of the forces that were afoot. Economic policy was moving to support a highly competitive economy and the original Wagner Act was not in step with the changes. Taft-Hartley updated the Wagner Act to reflect these fundamental forces in the economy.

Presidential-level interference in collective bargaining outcomes—one of the hallmarks of a corporatist regime—was still an option in the 1960s when strikes or wage and price increases were at odds with public policy. One of the most notable incidents was President Kennedy's intervention in the contract dispute between Big Steel (the major steel producers) and the United Steelworkers Union (USW). It was exactly the kind of intrusive involvement one might have expected

¹³¹ MICHAEL C. HARPER ET AL., *LABOR LAW: CASES, MATERIALS, AND PROBLEMS* 92-95 (5th ed. 2003).

¹³² The Taft-Hartley amendments added to the existing preamble language regarding misconduct by employers a paragraph recognizing the problems caused by union activity: "Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed." 29 U.S.C. § 151 (2000). See also CHRISTOPHER L. TOMLINS, *THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880-1960*, at 275-81 (1985) (discussing the debates leading up to the passage of Taft-Hartley).

of Presidents Roosevelt or Truman in labor disputes during the 1930s and 1940s.

President Kennedy intervened publicly in the stalled negotiations between Big Steel and USW, forcing the parties to agree to a wage increase that was consistent with his inflation goal. Clearly the President thought he had a deal with the steel companies, but their price increase following the contract settlement was greater than he expected.¹³³ Although U.S. Steel's Roger Blough was allowed an audience with the President to justify the company's position, President Kennedy publicly called Big Steel's actions "'irresponsible defiance' of the public interest."¹³⁴

The dispute's denouement, which extended over three days, was labeled by the *New York Times* as a "72-Hour Drama with an All-Star Cast."¹³⁵ It starts with Roger Blough paying the aforementioned visit to the President to announce the size of the price increase. The President, believing that he was double-crossed by Big Steel, lost his temper. The *New York Times* reports him as saying that Big Steel's actions led him to believe his father's teachings "that all business men are sons-of-bitches."¹³⁶ Immediately, Robert Kennedy's Justice Department agents descended on the headquarters of U.S. Steel and Big Steel members, including Bethlehem and Jones & Laughlin, and served subpoenas for documents bearing on the price increases and other matters. Robert Kennedy convened a grand jury to look at the increases. During that three-day period, four antitrust investigations of the steel industry were conceived and a bill to roll back prices was considered, as were outright price controls on steel. Finally, the Defense Department began to direct purchases away from U.S. Steel.

As the pace of events quickened, Clark Clifford was dispatched to tell Roger Blough that he, Clifford, hoped that a *tragedy* that might befall the company could be averted. Inland Steel was the first Big Steel member to cave, followed by Bethlehem Steel. But the final ending, occurring seventy-two hours after Blough's visit to Kennedy, was U.S. Steel's announcement that it too was rolling back prices to the level allowed by the President. The President was informed of the surrender as he came off the nuclear submarine *Thomas A. Edison* in Norfolk.

¹³³ See A.H. Raskin, *Kennedy Acts on Prices*, N.Y. TIMES, Sept. 10, 1961, at E8.

¹³⁴ Kenneth S. Smith, *Steel Price Rise Strikes Barrier*, N.Y. TIMES, Apr. 15, 1962, at F1.

¹³⁵ Wallace Carroll, *Steel: A 72-Hour Drama with an All-Star Cast*, N.Y. TIMES, Apr. 23, 1962, at 1.

¹³⁶ *Id.* (quotation marks omitted).

In keeping with the legacies of corporatism, President Kennedy publicly stated his position that the government had the right to look over the shoulders of capital and labor and to insist that any agreement they reached respect the national interest.¹³⁷ The President, however, was looking to the past rather than to the future.

One of the other components of a corporatist economy—wage and price controls—did not go out of fashion as a way of directing the private economy until President Nixon last used it. Wage and price controls were announced in a presidential address on August 15, 1971¹³⁸ and remained in effect until April 30, 1974.¹³⁹ This was the last time that the United States adopted an economy-wide corporatist policy, perhaps because it was so remarkably unsuccessful. The inflation rate at the time of the imposition of controls was slightly above four percent.¹⁴⁰ It did dip slightly after the imposition of controls, but by the end of controls in 1974, inflation had reached double-digit rates. It appears that business and union leaders were no more willing to listen to President Nixon in the 1970s than they had been willing to listen to President Roosevelt in the 1930s.

By the late 1980s, the struggle between corporatist-type government intervention and competitive-type policies had tipped in favor of the latter. Wage and price controls provide a perfect example. When President Nixon introduced such controls in 1971, the inflation rate was 4.4%. By the end of the Carter presidency, the inflation rate had reached 13.5%.¹⁴¹ But the times had changed. While President Carter did introduce price controls over oil,¹⁴² he intervened no further in the economy's market system.

While President Kennedy used corporatist strategies to deal with contract disputes, President Reagan did not. President Reagan's intervention in the air traffic controller dispute in 1981 was entirely different in form and substance from President Kennedy's involvement

¹³⁷ *Id.*

¹³⁸ *Transcript of President's Address on Moves to Deal with Economic Problems*, N.Y. TIMES, Aug. 16, 1971, at 14.

¹³⁹ Michael C. Jensen, *Price Rises Seen as Controls End*, N.Y. TIMES, Apr. 22, 1974, at 73.

¹⁴⁰ BUREAU OF LABOR STATISTICS, U.S. DEPT. OF LABOR, CONSUMER PRICE INDEX DETAILED REPORT, tbl.24 (2006), available at <http://www.bls.gov/cpi/cpid0608.pdf>.

¹⁴¹ *Id.*

¹⁴² These controls were ended through an executive order by President Reagan in 1981. Gene Rondinaro, *Deregulated Fuel Prices Straining Budgets*, N.Y. TIMES, Feb. 22, 1981, at NJ1.

in the steel negotiations in 1961. While President Kennedy had intervened in detail to hammer out an agreement, President Reagan did not intercede in the contract negotiations. When the negotiations stalemated on August 3, 1981, nearly 13,000 of the 15,000 members of the Professional Air Traffic Controllers Organization (PATCO) walked off the job,¹⁴³ hoping to disrupt the nation's transportation system and force the federal government to accede to its demands for higher wages, a shorter work week, and better retirement benefits.¹⁴⁴ That same day, President Reagan responded with a threat to fire the strikers if they did not return to work within forty-eight hours.¹⁴⁵ Only 1,000 of the strikers returned to work, and the remaining 12,000 were fired.¹⁴⁶

As federal employees, the controllers were violating the no-strike clause of their employment contracts. In 1955, Congress had made such strikes a crime punishable by a fine or one year of incarceration¹⁴⁷—a law upheld by the Supreme Court in 1971.¹⁴⁸ Nevertheless, thirty-one unauthorized federal strikes occurred between 1962 and 1981 that resulted in no ill effects for the striking workers.¹⁴⁹ Illegal strikes in state and local governments were a mainstay of the 1970s, generally leading to large wage gains and changes in the law allowing strikes; the same fate would not hold true for the air traffic controllers, however.

Although the firing of the PATCO workers was allowed under federal law and had no direct implications for the private sector, it had enormous indirect effects. Since the Supreme Court's decision in *Mackay Radio*, unionized firms could permanently replace striking

¹⁴³ See Richard Witkin, *Controllers Strike, Halting 7,000 Flights; Reagan Gives 48-Hour Notice of Dismissal*, N.Y. TIMES, Aug. 4, 1981, at A1 (noting wages, work weeks, and retirement as the primary areas of dispute between the FAA and PATCO).

¹⁴⁴ See *Key Issues in Walkout*, N.Y. TIMES, Aug. 4, 1981, at B8.

¹⁴⁵ *Text of Reagan Talk on Strike*, N.Y. TIMES, Aug. 4, 1981, at B8.

¹⁴⁶ Richard Witkin, *U.S. Says Goal Now Is To Reconstruct Air Control Force*, N.Y. TIMES, Aug. 7, 1981, at A1.

¹⁴⁷ Act of Aug. 9, 1955, Pub. L. No. 84-330, 69 Stat. 624 (codified as amended at 5 U.S.C. § 7311 (2000) & 18 U.S.C. § 1918 (2000)).

¹⁴⁸ See *United Fed'n of Postal Clerks v. Blount*, 404 U.S. 802 (1971) (mem.), *aff'g* 325 F. Supp. 879, 882 (D.D.C. 1971) (holding that "government employees do not have the right to strike").

¹⁴⁹ During the same period, there were seven illegal strikes that did result in dismissals of between 3 and 165 employees. Eugene H. Becker, *Research Summary, Analysis of Work Stoppages in the Federal Sector, 1962-81*, 105 MONTHLY LAB. REV. 49, 50-51 (1982).

workers.¹⁵⁰ Although a potentially successful company strategy in cases where union workers are paid a premium over market wages, it was not used by major firms for fear of adverse pressure by the President.¹⁵¹ Once a President had himself used the approach, however, firms were willing to adopt, or threaten to adopt, the strategy. Perhaps the most notable example involved the dispute between heavy machinery manufacturer Caterpillar and the UAW. On April 1, 1992, in the midst of a strike going into its fifth month, Caterpillar threatened to discharge striking workers if they did not return to work within five days.¹⁵² Few of the strikers reported to work, and Caterpillar began to successfully replace those who did not.¹⁵³ Eight days later, the union capitulated and agreed to end the strike based on Caterpillar's agreement to stop hiring replacement workers.¹⁵⁴

B. Industry-Specific Regulation

As noted earlier, while the NIRA died quickly, industry-specific regulations were passed during the 1930s to replace it in a number of critical industries. Piece by piece, the industry-specific regulatory framework of the New Deal¹⁵⁵ was rolled back, beginning in the 1970s.

The opening salvo was announced on February 18, 1975, when President Ford disclosed that he would propose legislation deregulating the airline industry.¹⁵⁶ Contending that the system was inefficient,

¹⁵⁰ See *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345 (1938) (holding that "an employer . . . has . . . the right to protect and continue his business by supplying places left vacant by strikers").

¹⁵¹ The claim that the strategy of replacing striking workers, as permitted in *Mackay Radio*, is most useful when union wages are well above competitive levels is made in George M. Cohen & Michael L. Wachter, *Replacing Striking Workers: The Law and Economics Approach*, in PROCEEDINGS OF NEW YORK UNIVERSITY FORTY-THIRD ANNUAL NATIONAL CONFERENCE ON LABOR 109, 117-19 (Bruno Stein ed., 1990).

¹⁵² *Caterpillar Threatens To Replace Strikers*, N.Y. TIMES, Apr. 2, 1992, at D7.

¹⁵³ Jonathan P. Hicks, *Few Strikers Return To Their Jobs as Caterpillar's Deadline Passes*, N.Y. TIMES, Apr. 7, 1992, at A1.

¹⁵⁴ Jonathan P. Hicks, *Union Agrees to End Strike at Caterpillar: Company To Stop Trying To Hire Replacements*, N.Y. TIMES, Apr. 15, 1992, at A1.

¹⁵⁵ The industry-specific regulatory practices of the 1930s were similar to the industry codes of the NIRA in "stabilizing" business and allowing firms to pass on the higher wages required by the regulations in the form of higher prices.

¹⁵⁶ In the mid-1970s, under the coaching of future Supreme Court Justice Stephen Breyer, Senator Edward Kennedy conducted hearings regarding airline deregulation. During the hearings, Senator Kennedy stated: "Regulators all too often encourage or approve unreasonably high prices, inadequate service, and anticompetitive behavior. The cost of this regulation is always passed on to the consumer. And that cost is astro-

costing the country more than \$1 billion annually, he proposed removing most federal controls over prices, entry, and exit.¹⁵⁷ Ford's proposal became law during the Carter administration in the form of the Airline Deregulation Act of 1978.¹⁵⁸ The Act loosened controls and phased out the Civil Aeronautics Board, with all remaining airline oversight handed off to the Department of Transportation by 1985.

Trucking and railroad deregulation also began in the 1970s with the appointment of deregulation-minded commissioners to the ICC¹⁵⁹ and was further instigated by the Motor Carrier Act of 1980.¹⁶⁰ While the Act itself called only for liberalized entry and exit in the trucking industry, the ICC interpreted it as a call for wholesale deregulation and responded accordingly. The ICC removed itself from any meaningful regulation in its industries and was sunsetted by Congress in 1995, over one hundred years after its birth as the United States's first independent agency.¹⁶¹

Deregulation in the utility industry was more gradual, taking place over several decades and continuing through today. It was effectuated through a series of legislative and administrative pronouncements. The watershed year in the utility industry was 1978, bringing both the Public Utilities Regulatory Act, which allowed independent electricity producers to enter the electricity generating market, and the Natural Gas Policy Act, which excluded new gas pipelines from existing controls. A series of orders from the Federal Energy Regulatory Commission (FERC, the FPC's successor) and finally, the passage of the Natural Gas Wellhead Decontrol Act of 1989,¹⁶² completed natural gas unbundling, and electricity restructuring was finalized by the Energy Policy Act of 1992¹⁶³ and the ensuing FERC orders.

The Justice Department was the moving force behind telecommunication deregulation when it called for the breakup of AT&T in 1981. The case was resolved with a settlement that divided AT&T into

nomical." Paul Stephen Dempsey, *Transportation: A Legal History*, 30 *TRANSP. L.J.* 235, 331 (2003) (quotation marks omitted). Several agencies, including the Department of Justice's Antitrust Division, the Office of Management and Budget, and the Council of Economic Advisors, also called for deregulation. EISNER, *supra* note 74, at 177.

¹⁵⁷ Robert Lindsey, *Airline Deregulation Is Weighed*, *N.Y. TIMES*, Feb. 18, 1975, at 37.

¹⁵⁸ Pub. L. No. 95-504, 92 Stat. 1705 (1978), *substantially repealed* by Pub. L. No. 103-272, § 7(b), 108 Stat. 1379 (1994).

¹⁵⁹ Dempsey, *supra* note 156, at 347.

¹⁶⁰ *Id.* at 343-45.

¹⁶¹ *Id.* at 349-50.

¹⁶² Pub. L. No. 101-60, 103 Stat. 157 (1989) (no longer in effect).

¹⁶³ Pub. L. No. 102-486, 106 Stat. 2776 (1992).

a number of regional Bell operating companies and the long distance carrier that would continue to own the manufacturing arm.¹⁶⁴ Although the strongest supporters of regulation had always been AT&T and the labor unions, it was believed to have strong public support as well. When AT&T settled and agreed to a deregulation plan under Judge Harold Greene, there was no longer much public support for cartel-like regulatory systems.¹⁶⁵

Comparable trends were affecting labor market regulation under Davis-Bacon. Guidelines promulgated in 1985 dictated that the federal wage rate paid on construction projects would typically be the average wage and not the union wage.¹⁶⁶ This was a critical change since unions were losing their control over the construction industry. In the 1930s, federal projects dominated the industry and the unions were protected from competition by Davis-Bacon. Today, federal projects are a small part of the industry, and the residential and commercial markets have become increasingly nonunion because there are no regulatory barriers preventing price competition.¹⁶⁷

C. Corporation Law

The last major event in the story of the decline of corporatism went largely unnoticed by labor law and labor relations experts be-

¹⁶⁴ *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 226-27 (D.D.C. 1982), *aff'd mem. sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

¹⁶⁵ Then-president of AT&T William Ellinghaus explained his company's willingness to settle on a divestiture plan by noting that "a great deal of change has taken place in this country with respect to what people want in regards to telecommunications." *The Background of the Case*, N.Y. TIMES, Jan. 11, 1982, at D6 (quotation marks omitted).

¹⁶⁶ See 29 C.F.R. § 1.2(a)(1) (2006) (defining the federal rate as the wage paid to "more than 50 percent" of the employees performing comparable work in the area); see also THIEBLOT, *supra* note 106, at 89-90 (discussing the history of this regulation and noting that it was likely to curtail the number of locales where the union wage would be paid).

¹⁶⁷ When Davis-Bacon was enacted, the federal government funded sixty percent of new construction projects. Today, the federal government funds only five percent of new construction. Christine Tracey, Comment, *An Argument for the Repeal of the Davis-Bacon Act*, 5 J. SMALL & EMERGING BUS. L. 285, 286-88 (2001). However, Davis-Bacon may cover a greater portion of contracts because many state and local projects are partially federally funded. In 1982, the Congressional Budget Office estimated Davis-Bacon coverage at twenty to twenty-five percent of all contracts. See Daniel P. Kessler & Lawrence F. Katz, *Prevailing Wage Laws and Construction Labor Markets*, 54 INDUS. & LAB. REL. REV. 259, 261 (2001) (citing estimates from the Congressional Budget Office as support for the proposition that "the federal prevailing wage law is likely to affect labor markets disproportionately").

cause it occurred in a courthouse in Delaware. The issue was the quintessential one in the intersection of labor and corporate law: To what extent should companies consider the interests of their workers in choosing among corporate policies? Specifically, could the directors of a corporation reject a hostile tender offer on the grounds that a rejection was better for employees, customers, or other stakeholders, even when such actions might make shareholders worse off?

The Delaware Supreme Court's answer was no. In *Unocal Corp. v. Mesa Petroleum Co.*, the court stated: "In the board's exercise of corporate power to forestall a takeover bid our analysis begins with the basic principle that corporate directors have a fiduciary duty to act in the best interests of the corporation's stockholders."¹⁶⁸ Although the directors could weigh other considerations and could use their own informed position as to what constitutes the best interests of shareholders, it was for the shareholders that the corporation was to be managed.¹⁶⁹

The issue was posed in its starkest terms in *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*,¹⁷⁰ a case where the directors had decided to sell the corporation for cash. This was factually different from *Unocal*, where the shareholders were to remain as shareholders after the contested transaction was implemented. Consequently, *Unocal's* management could claim that the long-run interests of shareholders would be better served by a policy that might appear to favor other constituencies than shareholders in the short run. Since managers may at times have better information about the profitability of their proposed corporate policies, this is a credible claim.¹⁷¹

But in the *Revlon* transaction, the shareholders were being cashed out. There would be no long run over which management's superior information might prove to be correct. Although the *Revlon* opinion is limited to the facts of the case, it contains the Delaware Supreme Court's clearest statement regarding the "for whom is the corporation" debate: "[W]hile concern for various corporate constituencies is proper when addressing a takeover threat, that principle is limited by

¹⁶⁸ *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 955 (Del. 1985).

¹⁶⁹ *Id.* at 954 ("[T]he board's power to act derives from its fundamental duty and obligation to protect the corporate enterprise, which includes stockholders . . .").

¹⁷⁰ 506 A.2d 173 (Del. 1985).

¹⁷¹ See Michael L. Wachter, *Takeover Defense When Financial Markets Are (Only) Relatively Efficient*, 151 U. PA. L. REV. 787, 793 (2003) ("[M]anagement's superior information may be difficult to communicate to financial markets in a manner that is verifiable by the market so as to be incorporated into stock prices.").

the requirement that there be some rationally related benefit accruing to the stockholders.”¹⁷² And furthermore, in rejecting Revlon’s decision to deal exclusively with its preferred bidder, even though the rival bid offered more cash to shareholders, the court stated: “[C]oncern for non-stockholder interests is inappropriate when an auction among active bidders is in progress, and the object no longer is to protect or maintain the corporate enterprise but to sell it to the highest bidder.”¹⁷³

At the time, the importance of the Delaware court’s ruling and the stakes involved were well understood. Interest groups, particularly labor unions, immediately began a campaign to have legislatures change their corporate law statutes to allow directors to weigh stakeholder interests along with the interests of shareholders. The most famous of the modifications that were enacted was Pennsylvania’s statute, which specifically allowed corporations to weigh the interest of its workers, among other groups.¹⁷⁴

However, the political campaign to transform corporate law fizzled. Although Pennsylvania entertained some hopes that the legislation would cause companies to reincorporate in Pennsylvania instead of Delaware, that outcome did not happen. Instead, under pressure, lawmakers allowed Pennsylvania corporations to opt out of that provision, and many of the largest companies did.¹⁷⁵ The Delaware legislature declined to reform its corporate law by introducing a stakeholder protection provision.

This battle over corporate law had major implications for organized labor. A board of directors’ fiduciary duty is to manage the corporation so as to benefit the shareholders. Union pay premiums resulting from an interest in paying a “fair” rather than a “competitive” wage are antithetical to the interests of the corporation unless it can be shown that shareholders are better off when the company agrees to pay such a premium. As we shall see below, not even the most ardent

¹⁷² *Revlon*, 506 A.2d at 176. Although there is considerable gloss attached to this statement, the overarching goal of the directors is to manage on behalf of the corporation.

¹⁷³ *Id.* at 182.

¹⁷⁴ See 15 PA. CONS. STAT. ANN. § 1715(a) (West 1995) (permitting corporations to consider “[t]he effects of any action upon any or all groups affected by such action, including shareholders, employees, suppliers, customers and creditors”).

¹⁷⁵ See Leslie Wayne, *Many Companies in Pennsylvania Reject State’s Takeover Protection*, N.Y. TIMES, July 20, 1990, at A1 (reporting that twenty-two major Pennsylvania corporations, including H.J. Heinz, Quaker Chemical, the Sun Company, and the PNC Financial Corporation, had opted out).

supporters of unions make this claim.¹⁷⁶ It is universally accepted that unions redistribute profits from shareholders to workers.

The policy changes of the 1970s and 1980s took a toll on union membership. In 1960, union density remained relatively high at thirty percent, but had dropped to twenty percent by 1980.¹⁷⁷ That same year, the absolute number of union members began dropping, moving from 14.33 million in 1980 to 10.25 million in 1990.¹⁷⁸ Between 1960 and today, union membership decreased by half, falling from 16.46 million to 8.26 million.¹⁷⁹

VI. MODERN-DAY RESOLUTIONS OF THE GREAT DEBATES

While public policies were playing out the Second Act of the union story—replacing the 1930s-inspired corporatist policies with today's competitive policies—the great debates of the 1930s were also being resolved in favor of free rather than fair competition.

A. *Labor Market—Labor Law*

As noted above, Sir John Hicks was developing a rigorous theory of labor markets that included the effects of labor unions and large corporations at the time the United States was first embarking on its corporatist policies.¹⁸⁰ What Hicks and a continuing line of theorists in neoclassical economics have pointed out is that a competitive labor market generates employment and pay levels with positive normative features. In particular, the competitive solution is the efficient solution in that one cannot generate higher wages without having lower employment. In addition, individual workers are maximizing their own welfare with respect to work and leisure.

Although the modern neoclassical theory of the labor market was being developed during the 1930s, it did not become accepted wisdom until the 1950s. By now, it is typically accepted as an empirical matter that labor markets are generally competitive.¹⁸¹ There may be

¹⁷⁶ See *infra* notes 187-196 and accompanying text.

¹⁷⁷ See *infra* fig.1, at 634.

¹⁷⁸ BARRY T. HIRSCH & DAVID A. MACPHERSON, UNION MEMBERSHIP AND EARNINGS DATA BOOK, tbl.1b at 60-1 (2006).

¹⁷⁹ Freeman, *supra* note 6, at tbl.A1; *infra* fig.1, at 634.

¹⁸⁰ See *supra* text accompanying notes 29-30.

¹⁸¹ See generally RONALD G. EHRENBERG & ROBERT S. SMITH, MODERN LABOR ECONOMICS, 34-53 (8th ed. 2003) (discussing “how the labor market works” and the effects of the forces of supply and demand).

pockets of inefficiency where firms take advantage of uninformed workers, but the labor market is too broad and labor mobility too wide for the labor market to produce generally inefficient results. In other words, the debate between the modern-day Malthusians, such as John Commons, and the neoclassical economists has been decided in favor of the latter.

Sir John was also among the first scholars to take account of the presence of unions as an institutional feature of the labor market. He recognized that wages would not always vary sufficiently and quickly enough to clear the labor market. At the same time, he theorized that equilibrating forces work in that direction, pulling wages toward the competitive level. Consequently, while unions could raise wages above competitive levels, the result would be more unemployed workers.¹⁸² Thus, competitive results generated more efficient and even more equitable results than did unions.¹⁸³

By the end of World War II, the first academic articles were appearing that perceived the now-powerful unions to be as much or even more of a problem than large corporations. Henry Simons wrote the first major academic article arguing that unions, along with corporations, had become part of the problem of concentrated power.¹⁸⁴ Friedrich Hayek weighed in with *The Road to Serfdom*¹⁸⁵ and Milton Friedman with *Capitalism and Freedom*,¹⁸⁶ lending support for liberal pluralism. Although these books may appear extreme to some modern readers, they were of a time when public intellectual and business and union leaders last debated the pros and cons of the three great “isms.”

Those advocating the original 1930s corporatist position that unions were still a public good that was necessary to offset the power of

¹⁸² See HICKS, *supra* note 29, at 179-97 (discussing the role of unemployment in a competitive labor market).

¹⁸³ Even when monopoly power existed in product markets, it would not necessarily translate into monopsony power in labor markets. Indeed, Hicks may have been the first economist to argue that profitable corporations might even decide to pay an above-market wage to secure a more reliable and loyal workforce. See *id.* at 85 (“[I]t is much more likely that a private monopolist will feel it prudent to offer his skilled employees a share in his monopoly gains than that he will ask them to contribute.”).

¹⁸⁴ Simons opined: “In the name of equalizing bargaining power we have sanctioned and promoted the proliferation of militant labor monopolies whose proper, natural function is exploitation of consumers.” Henry C. Simons, *Some Reflections on Syndicalism*, 52 J. POL. ECON. 1, 18 (1944).

¹⁸⁵ F.A. HAYEK, *THE ROAD TO SERFDOM* (1944).

¹⁸⁶ MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* (1962).

corporations became fewer in number. John Kenneth Galbraith was one commentator who continued to argue in favor of unions as a “countervailing power” even in a liberal pluralistic society.¹⁸⁷ He, like Berle and Means, saw the large corporation as having too much power and unions as having too little. Supporting union growth and power thus provided a counterweight to business power. But Galbraith’s major treatises were written in the 1950s and 1960s, and no one of his stature has since taken up the claim.

By the late 1970s and early 1980s, most labor economists were documenting the fact that unions had raised wages above competitive levels, a clearly self-serving goal. In several respects, Freeman and Medoff’s *What Do Unions Do?*¹⁸⁸ is the last attempt to provide support for the fair and union wage viewpoints. But their claims were more modest than those advocated by Galbraith, Commons, and others who saw unions as a public good. Freeman and Medoff claimed that unions had two faces—efficiency and inefficiency promoting—and those two faces were largely offsetting.¹⁸⁹

Critical to the Freeman-Medoff thesis is the claim that unions are primarily capturing monopoly rents or managing to increase productivity, thus offsetting the higher wage rate. But this claim is not supported by other empirical studies¹⁹⁰ and enjoys little support among

¹⁸⁷ JOHN KENNETH GALBRAITH, AMERICAN CAPITALISM: THE CONCEPT OF COUNTERVAILING POWER 121-23 (1952) (arguing that unions are particularly necessary in labor markets dominated by strong corporations, involving “the competition of many sellers dealing with few buyers”).

¹⁸⁸ RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? (1984).

¹⁸⁹ See *id.* at 14-15 (arguing that, among other factors, unions reduce efficiency by striking and misallocating resources, but that they can also improve efficiency by providing a more cooperative work environment and fostering management accountability).

¹⁹⁰ In an article that systematically reviewed the evidence of union effects on productivity, Hirsch concluded: “The empirical evidence does not allow one to infer a precise estimate of the average union productivity effect, but my assessment of existing evidence is that the average union effect is very close to zero, and as likely to be somewhat negative as somewhat positive.” Barry T. Hirsch, *What Do Unions Do for Economic Performance?*, 25 J. LAB. RES. 415, 430 (2004). See also, e.g., BARRY T. HIRSCH, LABOR UNIONS AND THE ECONOMIC PERFORMANCE OF FIRMS 91-112 (1991) (finding, through empirical evidence, no strong correlation between unions and productivity among U.S. companies); Kim B. Clark, *Unionization and Firm Performance: The Impact on Profits, Growth, and Productivity*, 74 AM. ECON. REV. 893, 915 (1984) (finding that “unionized firms earn substantially lower returns than their nonunion counterparts”); Barry T. Hirsch & Robert A. Connolly, *Do Unions Capture Monopoly Profits?*, 41 INDUS. & LAB. REL. REV. 118, 132 (1987) (concluding that unionization may reduce long-term profitability by capturing funds that would otherwise be invested in research).

economists today.¹⁹¹ In other words, unionized firms are likely to have higher unit labor costs and thus be less efficient than nonunion firms.

The cost inefficiency of unions is a critical result. In a competitive economy, firms with high labor costs always lose market share to firms with lower labor costs unless there are other offsetting economic advantages. The decline of unions throughout the competitive private sectors of the economy confirms that there are no offsetting features.

The most recent literature appears to accept this key economic result and has instead become more normative and less focused on the economic issues. Speaking to the social and political benefits that unionization brings to a democratic society, Cynthia Estlund's recent book develops more fully and updates the original claims made by Clyde Summers.¹⁹² Specifically, the purpose of labor law should be to promote freedom of association, to protect workers' due process, and to further workplace democracy.¹⁹³ Although Estlund notes that workplaces are inherently hierarchical and nondemocratic, she argues that public policy has regularly intervened in the workplace to promote democratic goals.

In her recent book, Katherine Stone argues that unions play a critical role in enforcing the implicit promises of employers.¹⁹⁴ She claims that today's employment agreements contain an unstated promise that employees will work hard (harder than they would for the salary alone) in exchange for the skills, training, and networking opportunities that the employer provides. This training and network-

¹⁹¹ A recent survey that measured the views of labor economists at top universities asked them to estimate the "percentage impact of unions on [the] productivity of unionized companies." The median response was zero and the mean response 3.1%. Victor R. Fuchs et al., *Economists' Views About Parameters, Values, and Policies: Survey Results in Labor and Public Economics*, 36 J. ECON. LIT. 1387, 1418, 1392 (1998). See also Christos Doucouliagos & Patrice Laroche, *What Do Unions Do to Productivity? A Meta-Analysis*, 42 INDUS. REL. 650, 670 (2003) (concluding from empirical research that there is "a near zero association between unions and productivity").

¹⁹² CYNTHIA ESTLUND, *WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY* 103-44 (2003) (explaining various ways that workplace associations "enrich democratic life"); Summers, *supra* note 28, at 622-23 (arguing that unions are important in sustaining a democratic society).

¹⁹³ See ESTLUND, *supra* note 192, at 169. ("[T]he law's . . . longstanding commitment to protecting employees' freedom of expression and association, and their efforts to democratize the workplace through unionization, is the firmest foothold in existing law for imposing civic-ness and connectedness in the workplace.")

¹⁹⁴ KATHERINE V.W. STONE, *FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE* 198 (2004) (identifying unions as the "only significant organized group that has an interest in pressing for social legislation" such as working conditions).

ing is important to the employee because there is high job turnover in today's economy, so employees need to be prepared to find new jobs on a relatively regular basis. Stone believes unions can play an important role in this system by ensuring that employers deliver on their promises of training and networking opportunities.

Estlund and Stone show that much is lost in the decline of unions. Maybe so, but what is the policy mechanism that can provide for these benefits if unionized firms lose market share because of the benefit costs? Both authors recommend changes to the NLRA, as others have done. However, amending the NLRA in a manner that is politically acceptable today has been tried before,¹⁹⁵ with no effect. As long as unions raise labor costs in competitive sectors of the economy, unionized firms will continue to lose market share, managers in the nonunion sectors will continue to strongly resist unionization, and labor law reforms that facilitate unionization will remain unpopular. In a political economy that favors more competition, labor law reform is less likely to succeed.

B. *Antitrust—Business Regulation*

The antitrust debate was the first to settle in favor of competition. One of the stress points in the Roosevelt administration from the very beginning of the NIRA was its implications for antitrust policy. The progressives who provided much of the early enthusiasm for the New Deal were very much for fair rather than free competition and the idea that government policy should stabilize business. That prong of NIRA thinking was supported. The idea that the result of stabilizing business would be codes that allowed for price fixing—virtual market cartelization—was anathema to the progressives.

With the NIRA out of the way and Roosevelt's progressive support base clamoring for an end to cartelization, Roosevelt appointed Thurman Arnold as chief of the Antitrust Division. Arnold was a strong believer in a rigorous application of antitrust policy in support of competitive outcomes.¹⁹⁶ Arnold's appointment signaled the end

¹⁹⁵ See COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, THE DUNLOP COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS: FINAL REPORT (1994), available at http://digitalcommons.ilr.cornell.edu/key_workplace/2/.

¹⁹⁶ Arnold vigorously enforced the antitrust statutes, filing half the number of suits in his five years in office as all of his predecessors combined. Arnold used "industry-wide" prosecutions which sought to eliminate anticompetitive practices that were not necessarily confined to an individual firm or group. The standard by which he judged

of the cartelization experiment and also the end of any serious intellectual debate that antitrust should be used to restrict competition rather than to promote it.

Appalachian Coals remains the Supreme Court's single decision that applied the rule of reason to protect a price-fixing agreement among sellers. Although the case precedes the passage of the NIRA, the fact pattern could easily have been applied to a price-fixing code of the NIRA. The case has had little force or effect in the antitrust landscape.¹⁹⁷ It remains "a relic of the New Deal's distrust of competition and [the traditional application of] the antitrust laws."¹⁹⁸

Today, it is generally recognized that modern neoclassical economics forms the basis of federal antitrust law.¹⁹⁹ The primary statutory exception is the Robinson-Patman Act, which remains on the books due to the support "of small and medium-sized businesses [that want protection from] larger, [more efficient] competitors."²⁰⁰ However, Robinson-Patman's hostility to competition makes it nearly incomprehensible in the context of the modern antitrust laws.²⁰¹ Perhaps as a consequence, the "Department of Justice has not enforced the Act since 1977, and the Federal Trade Commission has greatly reduced its enforcement as well."²⁰²

Today, no major antitrust scholar advocates that antitrust laws be overhauled so that competing firms could restrict product market competition so as to generate monopoly profits. But without the mo-

monopoly was simply consumer prices, believing any organization that had the power to inflate prices was a problem. ALAN BRINKLEY, *THE END OF REFORM: NEW DEAL LIBERALISM IN RECESSION AND WAR*, 116-17 (1995).

¹⁹⁷ See Spencer Weber Waller, *The Antitrust Philosophy of Justice Holmes*, 18 S. ILL. U. L.J. 283, 294 (1994) ("While . . . one can twist *Appalachian Coals* into an approximation of modern per se/rule of reason analysis, it is clearly an aberration of the Depression era. . . . [I]t has never been followed or even cited approvingly in any subsequent antitrust case in the Supreme Court.").

¹⁹⁸ HOVENKAMP, *supra* note 32, at 200. The case does retain interest for its approach to measure market power. *Id.* It is likely that the narrow scope of the group setting the price of coal would not have succeeded.

¹⁹⁹ See *id.* at 2 (noting that "antitrust policy makers are quite stodgy about adopting new theory" and that it is "relatively orthodox economics that forms the basis of federal antitrust policy").

²⁰⁰ SULLIVAN & HOVENKAMP, *supra* note 34, at 931.

²⁰¹ See HOVENKAMP, *supra* note 32, at 572-73 ("[Robinson-Patman's] inconsistencies with the other antitrust laws are so substantial that businesses have often complained that they can comply with the Robinson-Patman Act only by violating the other antitrust laws, or vice-versa. . . . The [whole] theory of injury embodied in the Robinson-Patman Act is an intellectually hostile, impenetrable swamp.").

²⁰² *Id.* at 572.

nopoly profits, unions cannot succeed in their primary goal of taking wages out of competition. Although the NIRA is itself a relic, the drafters of the NIRA were willing to recognize the important tie between labor law and antitrust law.

As noted above,²⁰³ the regulation of individual industries was the New Deal's replacement for the NIRA. Industry-based regulation remained popular among commentators until the early 1970s, when George Stigler's influential article²⁰⁴ began to change the debate. He criticized as idealistic and unrealistic the view that public regulation would benefit the public interest. Instead, he claimed that the main beneficiaries of regulation were the regulated companies, who were protected by barriers to entry, direct subsidies, and price controls.²⁰⁵ This, he wrote, should not come as a surprise, since an industry's regulation is created in the political process where politicians curry favor with interest groups, including the regulated companies.²⁰⁶

Stigler's theory that the regulators "capture" the regulatory process is meant to be highly critical. This indicates how far the corporatist ideal had faded in people's memory. In the corporatist economy, the peak associations were supposed to have a seat at the policy table. The peak associations—that is, the regulated parties—were supposed to help set the prices and wages of fair competition.²⁰⁷

At the same time, Alfred Kahn weighed in with the first of his two-volume work on the economics of regulation. Kahn, like Stigler, argued that regulation should be viewed through an economics lens and that the costs of regulation might indeed outweigh the benefits.²⁰⁸

These articles turned the tide in the debate about industry regulation. An interesting feature of the debate is the change in the chords

²⁰³ See *supra* Part IV.B.

²⁰⁴ George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971).

²⁰⁵ *Id.* at 3.

²⁰⁶ *Id.* at 17-18.

²⁰⁷ See *supra* text accompanying note 19.

²⁰⁸ See 2 ALFRED E. KAHN, *THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS* 326 (1970). ("The possibility is by no means excluded that on balance regulation does more harm than good . . ."). Economist Arnold Harberger suggested that the economic benefits of regulation are small. While noting that the loss in welfare due to monopoly is difficult to calculate, he estimated that the loss is relatively low. See Arnold C. Harberger, *The Measurement of Waste*, 54 AM. ECON. REV. 58, 59-60 (1964); Arnold C. Harberger, *Monopoly and Resource Allocation*, 44 AM. ECON. REV. 77, 85 (1954) (estimating the welfare loss attributable to monopoly inefficiencies at one-thirtieth of one percent of the economy).

being sounded. The only benefits and costs that count are those of the consumer, while the special interests of small businesses are given no weight. No special attention is paid to the goals of labor unions and fair wages. The only goal is achieving the competitive price in a competitive economy.

C. Corporation Law

The great debate between Berle and Dodd ended when key components of their respective positions were rendered equally unsupported by actual economic and political developments. The Berle and Means position rested heavily on the assumption that economic power would continue to consolidate in a few extremely powerful corporations.²⁰⁹ That did not happen. As the economy expanded, markets grew in size, product differentiation took hold, and new industries developed, it became clear that competitive forces were at work that provided a natural restraint on the size of the firm.

Berle and Dodd also believed that the separation of ownership from control would create agency cost problems that would be nearly impossible to constrain, with the result that firms would be managed to maximize managerial wealth rather than stockholder wealth.²¹⁰ That did not happen either. While the principal/agent problem continues to be a major topic of research today, the debate has moved far away from the raw, unconstrained agency problem discussed by Berle and Means.

The modern debate recognizes that the corporate issue is similar to the general problem of delegation of authority from principals to agents. Principals have an incentive to monitor their agents, and agents have an incentive to bond their behavior. The corporate law principal/agent issue is different to the extent that directors are trustees as much as they are agents.

The monitoring and bonding behavior envisioned by the theory is supported by elaborate state corporation law and federal securities law. Delaware has amended its statutory duty of loyalty a number of times and case law has developed a detailed and nuanced mechanism for controlling self-interested transactions by directors and manag-

²⁰⁹ BERLE & MEANS, *supra* note 40, at 357.

²¹⁰ See Dodd, *supra* note 47, at 1147 (indicating that the basis of the Dodd position was that dispersed shareholders, by delegating authority to managers, had given up their claim to have the corporation managed exclusively for their benefit).

ers.²¹¹ Federal securities laws, first passed during the Great Depression, provide for a massive disclosure requirement that enables informed stock market analysts and investors to track the self-interested behavior by directors and managers.²¹²

If the law is adequate in restraining the agency costs raised by the separation of ownership of control, then the Berle and Means threshold assumption is incorrect. Agency costs are not that large and, consequently, the corporation can be managed on behalf of the shareholders.

This leaves the normative question as to whether the corporation should be managed to take account of other constituencies. On this point, the academic answer is almost universally in favor of managing on behalf of shareholders. Indeed, much of the academic literature²¹³ reaches the same conclusion as did the Delaware Supreme Court in *Revlon*: although other constituencies can be considered when directors discharge their responsibilities, those constituent interests can only be considered when they are “rationally related benefit[s] accruing to the stockholders.”²¹⁴

CONCLUSION

The rapid rise of unions takes place in a brief, thirteen-year period: 1932 to 1945. There is then a decade-long intermission, where union density hardly changes: 1945 to 1954. This is then followed by a slow decline over fifty years. Union representation in the private sector of the economy is now back to where it was prior to the Great Depression.

Both the rise and the decline are remarkable events. Neither was caused by a lucky or unlucky confluence of factors that by happenstance came together to cause the two events. Both were caused by a single fundamental factor: the adoption and then abandonment of key elements of corporatism. During the periods when corporatism was in effect, under either the NIRA or subsequent, industry-specific

²¹¹ See Edward Rock & Michael Wachter, *Dangerous Liaisons: Corporate Law, Trust Law, and Interdoctrinal Legal Transplants*, 96 NW. U. L. REV. 651, 668-69 (2002) (examining the development of Delaware’s current rule of “entire fairness” to the firm).

²¹² Securities Act of 1933, 15 U.S.C. § 77 (2000); Securities Exchange Act of 1934, 15 U.S.C. § 78 (2000).

²¹³ See Wachter, *supra* note 171, at 805 n.56.

²¹⁴ *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 173 (Del. 1985).

regulation, unions grew in strength. Unions declined slowly and steadily as the United States moved from a corporatist economy at the end of the Korean War to the highly competitive economy that exists today.

In a corporatist economy, labor unions, and in particular the federation of unions, are central players. The union federation, as a peak association, counts separately from its members and has a seat at the highest level of policymaking. The union federation's primary goal—achieving a fair wage rather than a competitive wage—fits the corporatist goal of stabilizing business. Unions serve as a public good, the critical countervailing force to corporate power.

The United States's experiment with corporatism offered a coherent theory. Labor, antitrust, and corporate laws were all to pull in the same direction. Fair wages were to be paid and those wages were to be above competitive wages. Fair wages were to be paid out of fair prices, and the fair prices were to be above the prices that would exist in a competitive product market. Directors of corporations would be asked to consider the interests of stakeholders such as workers, in addition to shareholders.

That coherent story, where unions had a clear and consistent public-supporting role, was not replaced when today's highly competitive economy crystallized. Unions no longer count directly in the public welfare calculus; only individuals count. Unions still bargain for a fair wage, but antitrust or industrial regulation no longer provides for above-competitive prices to pay those above-market wages. In corporate law, the directors are asked to manage the corporation so as to maximize the value of the shareholders' interest. High wages that reduce corporate profits are arguably inconsistent with the fiduciary duties of faithful corporate directors.

The unraveling of the coherent corporatist theory leaves unions alone. Unions are a corporatist institution; they do not prosper when the forces of the competitive economy are unleashed.

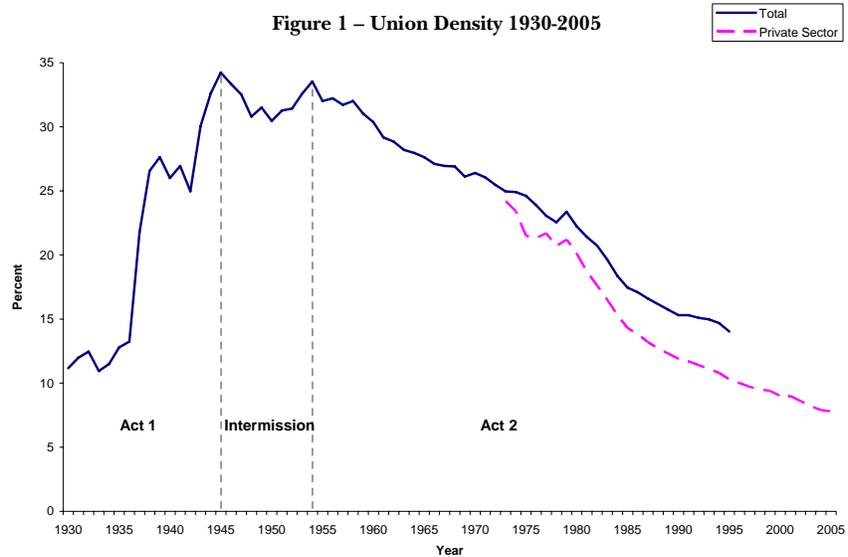
If my argument is correct, then we also need to reexamine our understanding of the expectations that the founders of the original NLRA (the Wagner Act) might have reasonably entertained. The Wagner Act followed on the heels of the demise of the NIRA. Unlike the NIRA, the Wagner Act was a labor-only policy since there was no ancillary, supporting legislation in other areas of industrial policy.

My analysis attempts to be neither normative nor to recommend policies, although my modern sympathies for a competitive system probably show through. However, there are a few implications that

are worth mentioning. If my analysis is correct, then no change in labor law or labor market policies, absent changes in overall industrial policy, will allow unions to become the mass movement they were in 1945. Tinkering with the NLRA is unlikely to substitute for an NIRA-type structure.

On the other hand, unions may be able to continue prospering as a niche movement in the government sector, which is the sole remaining noncompetitive sector, and in sectors where individual firms or industries take advantage of either uninformed or immobile workers to enforce below-competitive pay packages. As Neil Chamberlain, another one of the great figures in industrial relations, wrote in 1960: “unions’ chief contribution to their members’ welfare has been to free them from the tyranny of arbitrary decision or discriminatory action in the work place.”²¹⁵ In those cases where individual firms exercise exploitative power to set wages below competitive levels, the same beneficial results emerge—unions can and should improve the functioning of labor markets.

²¹⁵ Neil Chamberlain, *The Corporation and the Trade Union*, in *THE CORPORATION IN MODERN SOCIETY* 122, 140 (Edward S. Mason ed., 1960).



Sources: Data for Total: Richard B. Freeman, *Spurts in Union Growth: Defining Moments and Social Processes*, app. A1 (Nat'l Bureau of Econ. Research, Working Paper No. 6012, 1997).
Data for Private Sector: BARRY HIRSCH & DAVID MACPHERSON, UNION MEMBERSHIP AND EARNINGS DATA BOOK, 14 tbl.1d (2006).