THE FUTURE OF EMPLOYEE REPRESENTATION IN AMERICA: ENABLING FREEDOM OF ASSOCIATION IN THE WORKPLACE IN CHANGING TIMES THROUGH STATUTORY REFORM

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INTRODUCTION

The future of organizing: should we return to the policy of the Wagner Act? This question, as part of a consideration of the future of labor unions in the twenty-first century, compels one to focus on a crucial premise: that the Wagner Act was helpful to unions in the middle part of the twentieth century. Moreover, most persons who would agree that the Wagner Act was helpful to unions assume, without conscious examination, a related premise: namely, that the Wagner Act was helpful to workers.

Examining these premises is essential. If the Wagner Act at its outset did not provide a sound foundation for future growth of employee representation, then it is most unlikely that any amount of tinkering with it will provide a statutory vehicle suitable for the vastly changed economic and working environment of the twenty-first century. No amount of labor law reform can overcome a weak foundation.

GOALS OF THE WAGNER ACT

The overriding question is: what was the fundamental goal of the Wagner Act? Bluntly speaking, what was the Wagner Act designed to achieve? Much has been written about the turmoil of the early 1930s, particularly the radical change that occurred in American politics with the

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election of Franklin D. Roosevelt and the advent of the New Deal. What clearly emerges is that employers were overwhelmingly opposed to collective bargaining.\(^1\) Workers, previously laboring in poor conditions, found themselves in desperate straits as the Great Depression deepened.\(^2\) For the first time in America, significant numbers of workers in different parts of the nation engaged in industrial conflict in an attempt to improve their terms and conditions of work.\(^3\) Congress intervened in this labor conflict for the first time, as the widespread social unrest came to be seen as a national problem.\(^4\) In contrast to its policy set forth only three years earlier in the Norris-LaGuardia Act,\(^5\) Congress enacted a statute that gave

\(^1\) Several studies focused on tactics used by employers to defeat union organizing efforts. The most complete, contemporaneous study was conducted by the La Follette Committee. In June 1936, Congress directed an investigation of antiunion tactics to be undertaken by the Committee on Education and Labor chaired by Senator Robert La Follette of Wisconsin. S. Res. 266, 74th Cong. The La Follette Committee conducted 58 days of hearings, and published fourteen volumes of testimony. The committee later published a series of summary documents by topic. An example is the frequently cited Report on Industrial Espionage, Report No. 46, 75th Congress (1937), which described employers’ use of undercover agents, such as those supplied by Pinkerton’s, inside the plant to identify pro-union employees who would then be fired.

Why Americans employers were so opposed to unionization and why they continue to be so is another question. For a discussion, see Derek C. Bok, Reflections on the Distinctive Character of American Labor Law, 84 HARv. L. REV. 1394, 1409-1411 (1971).

\(^2\) In 1933, 24.9 percent of the civilian labor force was unemployed. COUNCIL OF ECONOMIC ADVISORS, ECONOMIC REPORT OF THE PRESIDENT 316, table B-35 (2001). Since 1941, the unemployment rate in the United States has never exceeded 10 percent. Id. It is difficult to capture the impact of the Depression on average working persons from statistics. For a leading historian’s account, see WILLIAM E. LEUCHTENBURG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL (1963). Chapter 6, One Third of a Nation, is particularly effective in describing the financial impact and emotional pain of widespread, long-lasting unemployment. Id. at 118-142.

\(^3\) For a general discussion of union activity (such as strikes) and of union membership figures, see HARRY A. MILLIS & ROYAL E. MONTGOMERY, ORGANIZED LABOR (1945).

\(^4\) In his first presidential campaign, President Roosevelt had promised a New Deal, and had also promised immediate action to attack the economic and financial crisis facing the country. In his campaign, Roosevelt sought to depict the incumbent president, Herbert Hoover, as a person doing nothing in the face of a severe crisis, one in which banks were failing and the unemployment rate was climbing to the highest ever experienced. The main idea underlying the recovery plan was that the deflationary cycle could only be halted by increasing the purchasing power of people, which in turn meant taking action to keep people in jobs (rather than being laid off) and at wage rates which at least remained stable (rather than falling). Congress passed the National Industrial Recovery Act during the first 100 days of Roosevelt’s administration. Most of the provisions of this statute relate to erecting a system whereby industry groups would regulate the production and prices for a given industry, and would execute a “code.” One section, however, dealt with labor matters. Section 7(a) stated that employees have the right to organize and bargain collectively.

\(^5\) In the 1932 Norris-LaGuardia Act, 29 U.S.C. §§ 101-115 (1994), Congress limited the federal courts’ ability to issue injunctions in cases involving or growing out of a labor dispute. The act can be—and was at the time—seen as an improvement, because federal courts were no longer interfering in labor disputes. See BENJAMIN J. TAYLOR & FRED
employees certain rights and established a federal institution to implement and enforce the statute. 6

Some view the Wagner Act as a radical piece of social legislation designed to guarantee democracy in the workplace. 7 As the notion of industrial democracy was a rallying cry of leftists in Europe in the 1920s, 8 it may have been that some members of Congress saw the Wagner Act as the basis for a transformation of American society. 9 In fact, the media quoted Senator Wagner himself as propounding the view that those

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6. National Labor Relations Act (NLRA), 29 U.S.C. §§ 151-169 (1994). Although Congress enacted two separate statutes in the period from 1934 to 1935, the statutes can be viewed together as a single response to the wave of industrial disputes. In the National Industrial Recovery Act of 1933, ch. 246 Stat. 375, repeated by Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Exec. Order No. 7252 (Dec. 21, 1935); Exec. Order No. 7323 (Mar. 26, 1936), Congress provided employees with the right to organize and bargain collectively, and gave the National Labor Relations Board power to order elections and hear complaints. But the statute failed to specify patterns of antiunion conduct, and failed to provide the Board with enforcement power. The flaws in the NIRA were glaringly obvious. See JAMES A. GROSS, THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD, 1933-1937 23-39, 122-130 (1974). The statute's sudden and early demise proved fortunate to organized labor. In Schechter Poultry Corp. v. United States, 295 U.S. 495, 495 (1935), the Supreme Court held that the entire NIRA was unconstitutional. This captured the attention of Congress. There was an immediate need to re-enact the employee rights enumerated in section 7(a) of the NIRA so that workers would not lose those that they previously had. Moreover, now there was an opportunity to re-enact those rights in a much better designed statute. Congress did so in one month.

7. See, e.g., 79 CONG. REC. 7565 (1935) (statement of Senator Wagner) (expressing a broader social vision with references to workers "dwarfed by the size of corporate enterprise," and the need for cooperation among such workers so they can attain "freedom and dignity").


accustomed to industrial democracy would be stalwarts of freedom and democracy in the political sphere. Although some individual legislators may have seen the Wagner Act in this light, it is difficult to find evidence that Congress had such a broad vision when enacting the Wagner Act. There is no statement in the legislative history to this effect. Virtually nothing was said in committee or on the floor of Congress about collective bargaining being a basis for democratic participation. Rather, supporters of the statute repeatedly emphasized that by requiring employers and workers to bargain over issues such as wages and hours, their differences often would be resolved, and thus the likelihood that workers would resort to strikes and other economic weapons would be greatly reduced.

Because section 7 of the Wagner Act is the foundation of employee representation rights, one might think that the statute was designed to inject modes of employee representation into the workplace. Once again, there is no evidence in the legislative history to support this view. Moreover, there appears to be nothing in contemporaneous media accounts that suggests that any member of Congress had a glimpse of employee representation models other than unions. Some advisors to Congressional labor proponents were aware of developments such as the first works council legislation in Germany in 1920. Yet, there is no expression of any intent to give workers who were not affiliated with unions any vehicle for workplace representation.

It is evident from all contemporary accounts that Congress was

10. See Robert F. Wagner, The Ideal Industrial State, N.Y. TIMES MAGAZINE, May 9, 1937 at 23 (“But let men know the dignity of freedom and self-expression in their daily lives, and they will never bow to tyranny in any quarter of their national life”).
12. See id. (notwithstanding Senator Wagner’s comments, discussing the principle of majority rule for purposes of representation as “the best protection of workers’ rights, just as it is the surest guaranty of political liberty”).
13. Id. at 7565-73.
15. At the time the German legislation was enacted, it was seen as a victory for employers because it was thought that plant-based works councils would satisfy the desire of employees for some modicum of employee participation and would undercut the ability of socialist unions to organize these workers. Id. at 150. Professor Weiss states that “the law of 1920 more closely resembled the models established by employers in the 19th century than it did the ideas developed by the unions.” He further comments that the law of 1920 was enacted “in spite of the unions and not because of them.” This view proved to be correct. WEISS, supra note 14, at 149-150. The 1920 Works Constitution Act covered both the public and private sector. After World War II, the situation changed. The 1952 Works Constitution Act, amended in 1972, covers the private sector only. The 1955 Federal Staff Representation Act, amended in 1974, covers the public sector. For a general discussion, see Johannes Schregle, Co-determination in the Federal Republic of Germany: a comparative view, 117 INT’L L. REV. 81 (1978).
responding pragmatically to an existing situation, one where unions were battling to be recognized by employers and to be engaged in collective bargaining over terms of employment. Congress focused on the specific problems facing unions; most notably, the legal barriers that made it extremely difficult in practice for unions to organize in the face of employer opposition.\(^6\) Simply put, the laws of property, contracts and torts, as applied to an organizing situation, assisted the employer. If workers were to go on strike, they were considered to have breached their employment contracts.\(^7\) If a union organizer persuaded workers to stop working, the organizer was deemed to have committed a tort (inducing a breach of contract).\(^8\) Work stoppages and picketing activities resulted in an economic loss to the employer could be viewed as interfering with the employer's property rights.\(^9\) Even activities in which one person could lawfully engage, such as negotiating for a higher wage, could be deemed an unlawful conspiracy if several workers banded together for the same purpose.\(^{10}\) Employers did not sue for damages, partly because workers had

\(^{16}\) Several legal doctrines had the effect of making the union's acts unlawful when applied to situations of industrial conflict. Typically, employers went into court and sought an order restraining the union from engaging in the industrial action, such as a strike, picketing or a boycott. *See Felix Frankfurter & Nathan Greene, The Labor Injunction* (1930) (definitive study on the use of the injunction in labor disputes, and on the strategic reasons why employers sought injunctive relief). *See also Edwin E. Witte, The Government in Labor Disputes* (1932).

\(^{17}\) In *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229 (1918), the Court held that the union attempted to "subvert the system of employment at the mine by coerced breaches of the contract of employment known to be in force there."

\(^{18}\) This was possible where the employer had required workers, as a condition of employment, to agree not to join a union. In *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229, 250-51 (1918), the Supreme Court upheld the legality of the "yellow dog" contract. Employers recognized that employees, having agreed to such a clause, would be fearful that if they supported a union, they would breach their own contract. In *UMW v. Red Jacket Consolidated Coal & Coke Co.*, 18 F.2d 839, 849 (4th Cir. 1927), the court held that it was unlawful for union organizers to approach employees working under such contracts for the purpose of inducing them to join the union and to go on strike in order to compel the company to recognize the union.

\(^{19}\) American courts took a more expansive view of what constituted property rights than did British courts. Intangible items, such as the right to do business, were deemed property rights. *For a discussion, see Charles O. Gregory, Labor and the Law* 97 (1946).

\(^{20}\) By the 1930s, these would have been brought as civil, not criminal, suits. It is generally accepted that the first recorded case involving what today would be called labor activity was the Philadelphia Cordwainers’ case, *Commonwealth v. Pullis*, (Philadelphia Mayor's Court, 1806). The case is reported in *3 A Documentary History of American Industrial Society* 59-248 (John R. Commons et al. eds., 1910). In *Pullis*, the court held that "... a combination of workmen to raise their wages may be considered in a twofold point of view: one is to benefit themselves... the other is to injure those who do not join their society. The rule of law condemns both." The Cordwainers' decision was influential. Between 1806 and 1842, there were 17 trials in which union members were charged with
inadequate savings to cover such damages. Rather, they sought injunctive relief, because their main goal was to break the union, and to get people back to work as quickly as possible. In a recognition dispute, employers were able to draw on existing common law as a source of useful rights, whereas unions found themselves in a weaker legal position. The legislative history of the Wagner Act makes it abundantly clear that Congress was responding to specific situations where this legal deficit made it extremely difficult for unions to organize, to compel employer recognition, or to engage in collective bargaining.

See Edward E. Witte, *Early American Labor Cases*, 35 YALE L. J. 825, 827 (1926). In Commonwealth of Massachusetts v. Hunt, 45 Mass. (4 Met.) 111 (1842), the Massachusetts court held that labor unions, per se, were not unlawful associations, although a lawful organization could be found to have pursued unlawful objectives. This case marked the shift from criminal to civil prosecution of labor cases. For a general discussion, see Edwin E. Witte, *Early American Labor Cases*, 35 YALE L.J. 825 (1926). At the time of the Wagner Act’s passage, Congress responded to the legal vulnerability of collective activity as opposed to individual action. ROBERT A. GORMAN, *BASIC TEXT ON LABOR LAW* 2 (1976). There was not thought to be a need to protect individual action because the courts had seized on the fact that two or more persons acted in concert to do something that would have been lawful if one person did it. It is ironic that years later, individual action was deemed to need explicit protection in light of judicial decisions. See Robert A. Gorman & Matthew W. Finkin, *The Individual and the Requirement of “Concert” Under the National Labor Relations Act*, 130 U. PA. L. REV. 286, 329 (1981).

21. One famous case, *Danbury Hatters*, illustrates this. In the first case that went to the Supreme Court, Loewe v. Lawlor, 208 U.S. 274 (1908), the Court held that the Sherman Antitrust Act could be used against labor unions. The hat makers’ union, with 9000 members, had organized a boycott of nonunion company’s products. The company claimed that in one year it had suffered a loss of $85,000 from the boycott of its hats. In January 1915, damages of $252,000 were awarded, with the individual union members held liable for the payment of the damages. Loewe v. Lawlor, 235 U.S. 522 (1915). The award crippled the union and was a severe blow to the low paid union members. To avert financial disaster for the workers, the American Federation of Labor raised the funds necessary. See Daniel R. Ernst, *The Danbury Hatters’ Case*, in *LABOR LAW IN AMERICA* 180-200 (Christopher L. Tomlins & Andrew J. King eds., 1992). What is interesting is that in the suit to recover damages, 248 defendants were listed. The plaintiff’s attorney had combed real estate and banking records to determine which of the union’s 2000 Connecticut members had homes or bank accounts, and only 248 had assets which he could attach. WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* 93 n. 131 (1991).

22. See I THE DEVELOPING LABOR LAW 7 (Patrick Hardin ed., 3d ed. 1992). The use of the labor injunction to undermine union activity was decreed in a study of injunctions issued by both federal and state courts, a study widely cited in the period preceding the enactment of the Norris-LaGuardia Act. See FELIX FRANKFURTER AND NATHAN GREENE, *THE LABOR INJUNCTION* (1930). A more recent historical study reviews cases prior to 1930 and likewise concludes that anti-strike decrees were commonplace. See WILLIAM E. FORBATH, supra note 21, at 59-97, 193-198.

The main goal of the Wagner Act was to assist unions in their organizing efforts by according workers certain statutory rights designed to counterbalance the employer's common law rights. The ultimate objectives of Congress are unclear, and in any event, unimportant, since no subsequent legislation has expanded upon the rights granted in section 7. If this was the policy of the Wagner Act, the question today is whether the policy is still relevant. To answer this requires a two-part consideration: first, whether the unions still face legal barriers in organizing; and second, whether statutory devices designed for the industrial relations environment of the 1930s are still relevant today.

The first question, whether unions still face legal barriers in organizing, can be answered quickly and definitively with a resounding yes. If section 7 of the Wagner Act were repealed, unions would be thrust back into the common law regime existing in the 1920s. The common law doctrines of property, contract, and tort law used by employers' lawyers have never been repudiated by the courts. They are not applied today for the simple reason that statutory rights have taken precedence over them. In the absence of the protections provided by section 7, however, twenty-first century courts would apply existing common law doctrines.

24. The preamble to the statute makes economic stability an important objective. 29 U.S.C. § 151 (1994). Support for the Wagner Act can also be traced to the acceptance of the under-consumption view of the Great Depression. JOHN MAYNARD KEYNES, THE GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY (1936). The analysis put forward by Keynesian macroeconomics explains that the Depression was caused by insufficient aggregate demand because of a failure of consumer purchasing power to keep pace with the growing productive capacity of America's mass production industries. Those taking this view believed that if workers organized, they would be able to secure higher wages, which in turn give them greater purchasing power. This view was expressed by company spokesmen in Senate hearings on the Wagner Act. See THOMAS A. KOCHAN, HARRY C. KATZ & ROBERT B. MCKERSIE, THE TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS 26 (1986). Undoubtedly, the economic crisis of the 1930s made this goal important, but it was not mentioned in the Labor Management Relations Act of 1947 (LMRA, Taft-Hartley Act), U.S.C. §§ 141 et seq. (1994), or the Labor-Management Reporting and Disclosure of 1959 (LMRDA, Landrum-Griffin Act), 29 U.S.C. §§ 401 et seq. (1990).

25. An expansion or refinement of section 7 rights in light of subsequent developments might have indicated that some unstated Congressional objective had not been attained. An example would be a requirement that employees receive information on and be consulted regarding firm investment decisions that may affect them. For a discussion, see Janice R. Bellace, Mandatory Consultation: The Untravelled Road in American Labor Law, Proceedings of the 40th Annual Meeting of the Industrial Relations Research Association, Chicago, Illinois, Dec. 1987, pp. 78-83.

26. Some scholars have argued, however, that very strong notions of employer property rights influence how the courts interpret section 7 rights, thus diluting what would seem to be robust employee rights to organize. See, e.g., James Atleson, Confronting Judicial Values: Rewriting the Law of Work in a Common Law System, 45 BUFFALO L. REV. 435 (1997).
Not only would unions still confront legal barriers to organizing if section 7 were repealed, but the even more distressing fact is that the accretion of 65 years' of case law has not significantly strengthened the section 7 rights related to organizing. Unions still face substantial problems when organizing due to legal weaknesses. Numerous scholarly works and reports have documented these problems, so there is no need to detail them here. One example related to a critical aspect of organizing will suffice. Consider the ways in which workers might organize. One possibility is that an unorganized group of workers, on its own, spontaneously decides to form a union. A second possibility is that a few workers become frustrated with the terms and conditions at work and contact a union to see if the union can assist them. A third possibility is that a union realizes that a certain workplace is not organized, and the union, as part of its strategy to organize workers in its industry or craft, targets that workplace. Anyone who speaks with the organizing departments of unions knows that the first possibility almost never occurs. The second and third possibilities both occur, with the incidence of the third possibility related to the resources the union devotes to organizing. Whether a given unorganized workplace presents itself as a target for organizing through opportunistic, unplanned information or through systematic planning, one factor immediately arises. The union must make contact with employees at that workplace. At the initial stage, a union organizer who does not work at the unorganized workplace must make contact with the workers there. If there is no successful communication, there is no chance the union will be able to organize. The union organizers must then persuade the workers to be interested in, and ultimately vote for a union. The union's ability to get in front of employees and present its message is the key to success. If the union cannot do this, it cannot win; if the union is seriously hampered in its ability to do this, it will find it difficult to win.

It is clear to employers that contact and communication are critical to union success. Various tactics, including no-solicitation policies, are used

27. See, e.g., Paul Weiler, Promises to Keep: Securing Workers' Rights to Self-Organization under the NLRA, 96 HARV. L. REV. 1769, 1776-1803 (1983) (arguing that the current NLRB certification procedure does not effectively insulate employees from the types of antiunion employer tactics that the NLRA was supposed to eliminate).

28. See David Dial, Reversal of NLRB Policy Regarding No-Solicitation Rules, 34 BAYLOR L. REV. 143 (1982) ("Throughout the union movement, one of the most effective strategies used by employers to thwart employees' efforts to unionize has been the promulgation of no-solicitation rules.").

29. Id.

30. Id.

31. For a discussion of the effect of specific union organizing communication techniques, see Hoyt N. Wheeler & John A. McClendon, The Individual Decision to Unionize, in THE STATE OF THE UNIONS 47-79, 66 (George Strauss, Daniel G. Gallagher &
to keep workers away from union organizers. 32

In 1935, Congress was well aware of the difficulties union organizers faced. 33 Section 7 of the National Labor Relations Act ("NLRA") was designed to overcome this. The NLRA gave employees the right to form, join and assist unions. 34 Congress realized that some employers literally threw the non-employee union organizer out of town, 35 and, therefore, it defined "employee" broadly in the Wagner Act to cover "any employee." 36 This expanded definition has been interpreted to mean that non-employee union organizers would have a right of access to unorganized workers, at least to the extent that access occurs during non-working time and in areas that do not interfere with the conduct of the business. 37 With the increase in union organizing activity following the passage of the Wagner Act, employers began instituting no-solicitation policies. 38 In 1945, in Republic Aviation Corp. v. NLRB, the Supreme Court considered for the first time the impact of such a policy and upheld the NLRB's view that time outside working hours is the employees' time to use as they wish even though the employees are on company property. 39 Yet, in 1956, in NLRB v. Babcock & Wilcox, the Supreme Court denied union organizers of the only reasonable, safe, straightforward access to employees. Seizing on the fact


32. See Pressures in Today's Workplace: Oversight Hearings Before the Subcomm. on Labor-Management Relations of the Comm. on Labor-Management Relations of the Comm. on Education and Labor, 95th Cong. (1979) (statement of Robert A. Georgine, President of the Building and Construction Trades Department of the AFL-CIO) (detailing some of the different practices companies use to prevent union organizer communication with employees).


34. Id.

35. Such occurrences were more common in the 1920s as company towns and mining towns were much more prevalent. See supra note 18 for prominent mining cases. The appearance of a non-employee showing up in town and talking to workers would have been immediately apparent to the company supervisors. That Congress was well aware of these cases is clear from the fate that befell Judge Parker, the federal court of appeals judge who wrote the majority opinion in the 1927 United Mine Workers of America v. Red Jacket Consolidated Coal & Coke Co., 18 F.2d 839 (4th Cir. 1927). Three years later, Judge Parker was nominated for a vacancy on the U.S. Supreme Court. Donald E. Lively, The Supreme Court Appointment Process: In Search of Constitutional Roles and Responsibilities, 59 S. Cal. L. Rev. 551, 567 (1986). On May 7, 1930, the Senate voted to reject the nomination. The rejection of Judge Parker was front page news. See Senate Rejects Judge Parker, 41 to 39; Spirited Attack by Johnson Precedes Final Vote on Hoover's Choice for Bench, N.Y. Times, May 8, 1930, p. 1. cols. 6-8.


that the organizers were not employees of the target employer, the Court concluded that the employer's private property rights trumped the employees' rights to discuss unionization.\textsuperscript{40} The Court held that the union had reasonable alternatives for communicating with the employees without any analysis whatsoever of how the union would identify who the employees were, where they lived, what mode of initial contact would be made, how much this would cost, and how much time it would take to reach the employees.\textsuperscript{41} There also was no balancing of the burden this would place on the employees' self-organization rights versus the burden placed on the employer's private property rights by having some non-employee union organizers standing in the company-owned parking lot next to the plant.\textsuperscript{42}

\textit{Babcock \& Wilcox} is an extremely important case because it was the harbinger of a string of cases where courts proceeded on the assumption that the employer's private property rights were paramount.\textsuperscript{43}

In these cases, the Court also assumed that the employees' right to self-organization need only be met in some way, but certainly not fully exercised in a cost-effective, time efficient, direct, non-disruptive way.\textsuperscript{44} \textit{Babcock \& Wilcox} is also an important case because the specific factual situation reflects a major change in American society—the move from the cities to the suburbs. In debating the Wagner Act, Congress had in mind the prominent labor disputes of the day and the workers that unions were trying to recruit for their organizations.\textsuperscript{45} For the most part these workers lived in cities or in company towns. They walked to work, or took public transportation.\textsuperscript{46} Pickets in a labor dispute or union organizers

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\textsuperscript{40} \textit{Babcock and Wilcox}, 351 U.S. at 111-112.

\textsuperscript{41} \textit{Id.} at 112.

\textsuperscript{42} \textit{Id.}

\textsuperscript{43} See, e.g., Lechmere, Inc. v. NLRB, 502 U.S. 527, 537 (1992); NLRB v. Jones Laughlin Steel Corp., 301 U.S. 1, 47-48 (1937); NLRB v. Cities Servs. Oil Co., 122 F.2d 149, 150 (2d Cir. 1941); Arts Metal Constr. Co. v. NLRB, 110 F.2d 148, 150 (2d Cir. 1940).

\textsuperscript{44} \textit{Babcock \& Wilcox}, as a judicial decision, can also be seen as representative of the 1950s, a conservative period in American history, and a period when Eisenhower appointees to the NLRB and to the federal courts changed the direction of national labor policy. \textit{See James A. Gross, Broken Promises: The Subversion of U.S. Labor Relations Policy, 1947-1994} 124 (1995). In his detailed analysis of this period, Professor James Gross concludes: "[M]any of those statutorily guaranteed protections were withdrawn as employer resistance to union organization was substantially deregulated and even protected while ever-increasing restrictions were placed on union organizing techniques." \textit{Id.} at 144-145.


\textsuperscript{46} For instance, one survey of the hosiery industry showed most workers in Philadelphia living within a two-mile radius of their jobs with practically all walking to work. Other surveys of the era indicate the great majority of workers living less than a 40 minute walk from work. \textit{See Walter Licht, Getting Work: Philadelphia, 1840-1950} 51-55 (1992).
typically stood outside the plant, on the publicly owned sidewalk. Twenty years later, in *Babcock & Wilcox*, the plant was located on a 100-acre fenced-in tract outside a town.\textsuperscript{47} Only forty percent of the workers lived in the town, with the majority living in a thirty-mile radius of the plant.\textsuperscript{48} Ninety percent of the workers drove in private automobiles to work.\textsuperscript{49} The only public property where the union organizers could stand was the narrow strip of land between the end of the company's privately owned parking lot driveway and the highway.\textsuperscript{50} Thus, *Babcock & Wilcox* can be seen as the archetypal suburban plant. It is not surprising that since 1956 the battleground on the enforceability of no-solicitation rules has involved similar sites, such as industrial parks and shopping centers. As industry and commerce have moved increasingly to the suburbs, places where often there is virtually no public property, union organizers have found themselves like the union organizers of the 1920s, wondering how to make contact with workers in the company town that they can't get near.\textsuperscript{51}

The judicial philosophy underlying *Babcock & Wilcox*, that common law private property rights prevail unless it can be shown that the employees' statutory self-organization rights cannot be exercised in any other way,\textsuperscript{52} continues to this day. Despite the Wagner Act's support for employee self-organization, the courts have never found implicit in section 7 a worker's right to access information about unions. While recognizing that the workers do need to be informed about unions, there is no indication that the courts have ever considered innovative approaches to facilitating communication that would avoid burdening the employer's private property rights. For instance, a union is entitled to a list of the employees' names and addresses once an election has been agreed upon or ordered.\textsuperscript{53} In announcing this policy, the Board in *Excelsior Underwear, Inc.*\textsuperscript{54} took the position that employees would be in a better position to make a fully informed and reasoned choice on union representation if they heard

\textsuperscript{47} *Babcock & Wilcox*, 351 U.S. at 106.
\textsuperscript{48} Id.
\textsuperscript{49} Id. at 106-107.
\textsuperscript{50} Id.

\textsuperscript{51} In a situation where no person from the unorganized company has contacted the union, the non-employee union organizer must identify some employees who may have some pro-union disposition. Once the organizer has identified those persons, it may be possible for form an in-plant organizing committee whose members are employees. Thus, the harshest impact of the *Babcock & Wilcox* holding occurs when the union is attempting to gain a foothold at a nonunion facility.

\textsuperscript{52} As a factual matter, research has shown that there is a significant imbalance between employer and union opportunities for organizational communication and that this has a direct effect on election outcomes. JULIUS G. GEMANN, JEAN GOLDBERG & JEANNE HERMAN, UNION REPRESENTATION ELECTIONS: LAW AND REALITY 156-159 (1976).

\textsuperscript{54} Id.
arguments from both sides.\textsuperscript{55} Yet, one could argue that if employees heard arguments from both sides at the initial steps in the representation process, they would be in a better position to make a fully informed and reasoned decision on whether to even sign a union authorization card. Under this reasoning, the Board could establish a procedure that permitted a union wanting to organize a facility to request the names and addresses of the employees so it could mail them literature on union organization. The employer, aware of the union's interest, could likewise communicate with its employees on why they should not be interested in a union. This suggestion will strike most readers as either absurd, or at a minimum, wildly unlikely to be ever accepted by the courts. The reaction is telling, for it reflects an understanding built up over half a century that, while ostensibly balancing the employer's rights against the employees' rights, the courts, in practice, balance a robust fully-formed notion of private property rights against a weak, vaguely-realized notion of self-organization rights.

Returning to the first question, whether the legal barriers unions face today in organizing are still relevant, the answer is obvious. If section 7 of the Wagner Act were repealed, unions would be thrust back into the common law regime existing in the 1920s.\textsuperscript{56} This is evident from the fact that even today the courts continue to rely on common law notions of property rights to dilute the strength of employees' statutory rights.\textsuperscript{57} These common law rights have never been abolished. At present, the full force of their application is restrained solely by the existence of the section 7 rights. As one commentator has observed about the situation in the 1950s, "[O]rganized labor was locked into a law that in important ways was being used to defeat union organization for collective bargaining,"\textsuperscript{58} unions continue to face the same dilemma. The law is being used against them, but without that law their situation would be even more bleak than it currently is with the law.\textsuperscript{59}

\textsuperscript{55} Id. at 1240. The Supreme Court sustained the substantive validity of the Board issued requirement in NLRB v. Wyman-Gordon Co., 394 U.S. 759, 767 (1969).

\textsuperscript{56} It is a matter of speculation on whether and how courts today would apply any given common law doctrine to a labor relations fact situation. A switch from our statutory labor law regime to one based on common law has been proposed; see Richard A. Epstein, \textit{A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation}, 92 \textit{Yale L. J.} 1357, 1357-58 (1983).

\textsuperscript{57} A prominent British scholar has argued that judges are trained in the common law, and notions of property and contract law are so fundamental to them that they fail to grasp, or find abhorrent, the startling ideology of labor law. Lord Wedderburn, \textit{Labour Law: From Here to Autonomy?}, 16 \textit{Indus. L. J.} 1, 4-7 (1987).

\textsuperscript{58} See Gross, supra note 44, at 145.

\textsuperscript{59} The term "bleak" is used because unions represent only 9.0% of the private sector labor force. \textit{See Bureau of Labor Statistics, U.S. Dept. of Labor, Union Members in 2000} (2001), available at \texttt{http://www.bls.gov/news.release/union2.nr0.htm}. Including
THE CHANGING INDUSTRIAL RELATIONS ENVIRONMENT

Over the past thirty years, much of the debate on labor law reform has assumed that if the Wagner Act were interpreted and enforced for the purpose originally intended, to encourage unionization, unions today would represent a far larger percentage of the labor force. Buttressing this view is survey evidence which reveals that many non-union employees are interested in representation, or at least in having influence at work. Yet, there is much reason to be skeptical that a reinvigorated Wagner Act could prove a vehicle for bringing representation to the masses. The major problem is that the world for which the Wagner Act was designed has ceased to exist.

The Wagner Act was designed to regulate labor relations in an industrial economy, one that produced almost exclusively for a domestic market. The statute was designed for industrial workers, evident from the fact that the act expressly excluded from its coverage agricultural laborers and domestic servants, both employing very large numbers of workers in the 1930s. The examples used by members of Congress and the newspaper accounts of the day also indicate that the picture Congress had in mind was that of a male, blue-collar worker most often working in a factory. The public sector workers, the total represented is 13.5%. Id. They need to organize a larger proportion of the labor force, yet their ability to do so is hampered by the statute that only gives legal protection to union organizing.

60. See RICHARD B. FREEMAN & JOEL ROGERS, WHAT WORKERS WANT (1999) (providing a detailed examination of the desires of American workers). This book is based on the findings of the 1994-95 Worker Representation Participation Study, a large-scale survey conducted by academics.


62. In 1933, the United States had a civilian labor force of 51.59 million persons. Of these, 10.09 million were employed in agriculture and 28.67 million were in non-agricultural employment. By the end of the 20th century, the size of the civilian labor force had increased 270 percent, but the number of persons in agricultural was less than one-third the number in 1933. In 1999, when 139.37 million persons were in the civilian labor force, only 3.28 million were employed in agriculture and 130.2 million were in non-agricultural employment. (Note: data before 1947 defined the civilian labor force as persons over 14. After 1947, the minimum age was raised to 16, and calculations were conducted accordingly.) See COUNCIL OF ECONOMIC ADVISORS, ECONOMIC REPORT OF THE PRESIDENT 316, table B-35 (2001).


64. Accounts of the day virtually always discussed workers as "he." Even the focus on the unemployed worker during the Depression was expressed as a problem of a man's unemployment and the impact that had on him and his family. See, e.g., LEUCHTENBURG, supra note 2, at 119 nn. 2-4 (listing contemporary accounts), for use of masculine pronouns. See also Michael J. Piore, The Future of Unions, in THE STATE OF THE UNIONS 387-410, 402 (George Strauss, Daniel G. Gallagher & Jack Fiorito, eds., 1991) (noting that "the social
mental picture Congress had of the typical worker and the typical workplace influenced the process contemplated by the statute.

The Wagner Act assumes that for the most part, workers may well have difficulty joining independent unions, and that employers will not voluntarily recognize unions. The statute assumes that an employer will not voluntarily engage in collective bargaining and that even if it does, the union may need to engage in some form of industrial action in order to compel the employer to sign a collective agreement. At the time, factories and mines were managed along Taylorist lines. The demarcation between workers and managers was very clear. Workers were not paid to think; they were paid to follow orders given to them by their managers.

The Wagner Act is premised on an industrial relations model that there are two classes in the industrial world, labor and management, and that these two classes have very different, in fact opposing, interests. The model for employee voice in this industrial relations environment is representation through a union. The expression of that voice is assumed to occur in an adversarial setting. Industrial combat is expected. The entire statute rests upon the notion that to get anything employees will have to

structure in which modern trade unions developed was built upon an ideal in which the household was represented in the labor market by a single, dominant (generally male) wage earner whom unions organized and represented; “the labor market commitment of women was especially limited: they generally withdrew when they had their first child and reentered only when the children began school or even later”). Piore points out that this general pattern of withdrawal changed substantially in the 1980s.

65. In looking at managerial practices in the early 1900s, the academic literature distinguishes between three approaches to managing workers in factories: the drive system, scientific management (Taylor’s approach), and the human relations movement. See HARRY C. KATZ & THOMAS A. KOCHAN, AN INTRODUCTION TO COLLECTIVE BARGAINING AND INDUSTRIAL RELATIONS 39-43 (1992). In the drive system, individual foremen and supervisors were given substantial authority to hire, fire, and generally supervise labor as they saw fit. Frederick Taylor promoted the scientific management approach based on appropriate task designs (based on industrial engineering principles) and wage systems as means of reducing conflict and increasing the efficiency of the production line. See, e.g., ROBERT HOXIE, SCIENTIFIC MANAGEMENT AND LABOR (1915). Those who advocated the human relations movement stressed that satisfied workers would work together in cooperative work groups, and that these would achieve higher productivity. See, e.g., ELTON MAYO, A NEW APPROACH TO INDUSTRIAL RELATIONS (1930). Both the scientific management approach and the human relations approach agreed that to eliminate the variations in personnel policies of the drive system, personnel functions had to be centralized and supervisors had to be trained to apply the company policies.

66. For a discussion of American managerial practices, see MASTERS TO MANAGERS (Sanford M. Jacoby ed., 1990). The three main approaches (the drive system, scientific management, and human relations movement) all existed in the early 1930s, although they tended not to co-exist in the same company. Ford Motor Company became known for embracing scientific management, while the Bell Telephone Company followed the human relations movement approach. See also SANFORD M. JACOBY, EMPLOYING BUREAUCRACY: MANAGERS, UNIONS AND THE TRANSFORMATION OF WORK IN AMERICAN INDUSTRY, 1900-1945 (1985).
wrest it from the employer, and to force concessions employees might have to strike. As a result, a great deal of attention was focused on the strike weapon and no attention whatsoever was paid to supporting labor-management cooperation.

THE DANGER OF RELYING ON STRIKE POWER

While the assumptions embedded in the Wagner Act can be justified by the events of the era, problems with its internal logic should have been apparent even then. The logic of the Wagner Act can be summarized, in basic terms, as follows: if workers are able to organize into a union, then if the employer is compelled to bargain with the union and the workers are permitted to strike to wrest concessions from the employer, then eventually a collective agreement will be signed that will improve the workers’ terms and conditions of employment. This sounds simplistic, but on close examination there is nothing else in the Act. There was no need for more because the statute had no grander goal. It was not attempting to transform American unions which, unlike European unions, preferred to stick to pragmatic “bread and butter” objectives and to rely on their own bargaining power. Neither was it attempting to transform American employers, or trying to give workers any specific rights outside that of being able to bargain. The Wagner Act was simply providing support for the process of collective bargaining, in particular by buttressing the ability of workers to organize themselves into a party capable of effective bargaining with the employer.

Collective bargaining, however, does not in itself lead to continuing agreements that provide the basis for long-term employer-union coexistence. There must be bargaining power, which is nearly always based on the ability to strike effectively, and no law can supply that. Even in 1935, it was evident that some workers had little or no strike power. 68

67. See ROY J. ADAMS, INDUSTRIAL RELATIONS UNDER LIBERAL DEMOCRACY: NORTH AMERICA IN COMPARATIVE PERSPECTIVE 34-62 (1995) (discussing the orientation of American unions). In chapter three, American Exceptionalism, Professor Adams emphasizes that the American Federation of Labor rejected socialism and did not seek to organize the entire labor force. Id. at 39. Rather, the AFL focused on collective bargaining, not political reform, as the way to improve its members’ lot. Id. at 43. Because of this emphasis on simply improving the members’ terms and conditions of employment, it has sometimes been referred to as “pure and simple” unionism. Id. at 53. Although the Congress of Industrial Organizations (CIO) was emerging as an independent federation just as the Wagner Act, the philosophy of the statute completely reflects the pragmatic orientation of the American Federation of Labor (AFL). Id. at 49.

68. Samuel Gompers, founding president of the American Federation of Labor and the most prominent labor leader of his era, had been acutely aware that bargaining power rested on strike power, and as such, the AFL unions focused on organizing craft workers since these workers had skills which were difficult to replace. See generally SAMUEL GOMPERS,
Although not widespread, there were already some examples of companies moving from high wage areas to low wage areas in large measure to escape the costs of unionization.69

SEVENTY YEARS OF LIFE AND LABOR (1925; reprinted ed. 1967); FLORENCE C. THORNE, SAMUEL GOMPERS—AMERICAN STATESMAN (1957). The labor economic theory explaining this view was set forth in the classic book SELIG PERLMAN, A THEORY OF THE LABOR MOVEMENT (1928). The CIO unions recognized that semi-skilled and unskilled workers could possess strike power if they joined together because by walking out they could shut down a factory and the employer would find it difficult to find a sufficient number of replacements in a short period of time. See ALBERT REES, THE ECONOMICS OF TRADE UNIONS 17 (1962); LEUCHTENBURG, supra note 2, at 111; LLOYD G. REYNOLDS, LABOR ECONOMICS AND LABOR RELATIONS 336-338 (5th ed. 1970); WALTER F. GALENSON, THE CIO CHALLENGE TO THE AFL (1960). But even in the 1930s unions thought it difficult to organize women workers, or those engaged in casual labor where companies went out each day and hired the number of persons they needed. The noted labor economist, John Dunlop, in 1948 articulated the traditional view: “One of the problems in organizing women arises from the fact that they expect only a short working life and then plan to retire to the more arduous duties of the household.” John T. Dunlop, The Development of Labor Organization: A Theoretical Framework, in RICHARD A. LESTER AND JOSEPH SHISTER, INSIGHTS INTO LABOR ISSUES 84 (1948). The standard explanation focuses on labor force attachment. It posits that American workers make a pragmatic cost-benefit analysis when evaluating the utility of union membership. They appreciate that there will be a cost (e.g., from dues, lost earnings due to strikes) and they consider whether future higher wage rates will outweigh the cost. If workers do not expect to remain with the same employer for very long, the cost of union membership will be perceived to be more than the benefit. Historically, women remained in a given company’s employment for a shorter time than men, typically because they would leave upon the birth of a child. Prior to civil rights legislation, women’s shorter job tenure and employer discriminatory practices also meant that women were much less likely to receive job training that would enable them to transfer to better paying jobs. Thus, they were less interested in a union’s claim that it would bargain about training and promotional opportunities. See BARBARA R. BERGMANN, THE ECONOMIC EMERGENCE OF WOMEN (1986). Chapter 4, Women’s Place in the Labor Market, discusses various factors that explain the wage gap between men and women. Id. at 62-86. She points out that “whether a person had taken time away from employment did have an appreciable effect on the wages a person (whether a man or woman) got when they returned.” Id. at 79. A study with a sample size of over 5000 done in the 1970s found that on average, women had taken 5.8 years away from paid work. Only some men had been away from work, and the men’s absences averaged only half a year. Mary Corcoran & Gregory J. Duncan, Work History, Labor-Force Attachment, and Earnings Differences Between the Races and Sexes, 14 J. OF HUMAN RESOURCES 3 (1979). While the standard economic explanation may identify the reason why women were difficult to organize, it cannot be denied that many unions were uninterested in recruiting women members, sometimes because male members thought that women would undercut the wage rates and opposed their membership. Women were hardly likely to embrace unions that were hostile to them. For a discussion of female union membership prior to 1950, see Philip S. Foner, Women and the American Labor Movement: A Historical Perspective, in WORKING WOMEN: PAST, PRESENT, FUTURE 154-186 (Karen Shallercoz Kozlara, Michael H. Moskow & Lucretia Dewey Tanner, eds., 1987).

69. The most prominent example is the textile industry. In the 1920s, textile mills shut down in the North, especially Massachusetts, as the companies moved to the nonunion, low wage South. See ALICE GALENSON, THE MIGRATION OF THE COTTON TEXTILE INDUSTRY
Perhaps Congress was pragmatic about the limits of the law, as evidenced by one egregious omission in the statute: permissible employer treatment of striking workers. In the 1920s and early 1930s, it was common for employers to dismiss all those out on strike and to hire replacements. This effectively crushed the union organizing attempt and the replacement workers were on notice of what would happen if they should organize. This employer response was so common and so destructive of union organization and collective bargaining that one would think Congress would have addressed it in the debate on the Wagner Act, if not in the statute itself, but it did not. Thus, the Supreme Court's decision in *NLRB v. Mackay Radio and Telegraph Co.* is not unexpected. The Court rejected the argument that section 13 of the statute, which states that nothing in the Act shall be construed so as to interfere with or impede or diminish in any way the right to strike, and restrained the employer from replacing strikers. The Court took the view that it simply did not follow that an employer who had violated no provision of the Act somehow had lost “the right to protect and continue his business by supplying places left vacant by strikers.” While the holding in *Mackay Radio* can be argued to follow from Congress's silence on common employer response to a strike, what is more surprising is the lack of any significant outcry against *Mackay Radio*. As one commentator has pointed out: “The employer right permanently to replace economic strikers . . . obviously deters the exercise

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70. Factories tended to be smaller, and thus perhaps only 100-200 unskilled workers might have to be replaced. In the large cities of the North and Midwest, there was a sizable pool of available labor, often recent immigrants, that usually could be tapped to supply replacement workers.

71. 304 U.S. 333 (1938).

72. Id. at 344-345.

73. Id. at 345-346.

74. Id. at 345. This is one of the earliest post-Wagner Act examples of how the Supreme Court would rely on a general notion of the extent of private property rights, with no citation to any case or other authority, to defeat an important union organizing interest. Over the years, the Court has seemed incapable of balancing private property rights against general notions of employee rights. Rather, there must be a specific statutory provision or a specific precedent that can be used before overriding a general property right. See James A. Gross, *A Human Rights Perspective on United States Labor Relations Law: A Violation of the Right of Freedom of Association*, 3 EMPLOYEE RIGHTS & EMPLOYMENT POLICY J. 65 (1999).

75. For nearly thirty years, workers replaced in an economic strike had no right to preferential reinstatement status when jobs opened up. The lack of protest against the dire penalty they paid for exercising a statutory right is especially surprising. In 1976, the Supreme Court held that the right to reinstate striking workers continues until those workers have found other similar employment. *See NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967).
of the right to strike and is a severe sanction therefor."\textsuperscript{76}

Compared to the 1930s, markets are vastly different today. In the 1930s nearly all manufactured goods were made for a domestic market, imports were limited for the most part to raw materials rather than finished goods, and American employers were competing only with other domestic employers for sales. American unions have known for several years that they cannot raise wages in one location if the employer’s products have to compete with goods made in another region where wages are significantly lower.\textsuperscript{77} This realization led directly to the formation of national unions.\textsuperscript{78}

In industries with high union density, such as automobiles and steel, unions were able to maintain high standards until the 1970s.\textsuperscript{79} Thereafter increasing importation of manufactured goods put pressure on companies to cut costs, and labor costs were an obvious target for savings.\textsuperscript{80} Regardless of unionization, American wage levels were still higher than in many parts of the world, which is why in the 1970s and 1980s companies began in large numbers to move manufacturing plants abroad.\textsuperscript{81} These two

\textsuperscript{76} ROBERT A. GORMAN, BASIC TEXT ON LABOR LAW 342 (1976).

\textsuperscript{77} The oft-quoted saying is: “A union must organize the length and breadth of the market.” See GORDON F. BLOOM AND HERBERT R. NORTHROP, ECONOMICS OF LABOR RELATIONS 42 (9th ed. 1981). The pioneering work in labor economics was done by John R. Commons and others at the University of Wisconsin in the early 1900s. See, e.g., TRADE UNIONISM AND LABOR PROBLEMS (John R. Commons ed., 1921).

\textsuperscript{78} See REES, supra note 68, at 6: “In part, national unions arose in response to the problem of competition in product markets as goods made in low-wage areas were sold in the same markets as those made by local unions that had won higher wage scales.” Professor Rees comments that the development of national unions in the 1850s was related to the improvements in transportation (the railroad) and in communications (the telegraph) that made it technically and economically feasible to ship goods produced in one part of the country to markets in another part. For a detailed study, see LLOYD ULMAN, THE RISE OF THE NATIONAL TRADE UNION (1955).


\textsuperscript{80} For a discussion of various forces compelling employers to restructure their employment arrangements, see PETER CAPPELLI, THE NEW DEAL AT WORK 69-112 (1999). Professor Cappelli notes that despite the fact that the changes accompanying this restructuring appear to make employees substantially worse off, at least in the short run, resistance by employees has been virtually nonexistent. He comments: “One reason is that the ability of unions to counter management efforts to change practices declined sharply in the 1980s.” Id. at 110. He observes that many unionized firms were so weak that workers had little choice but to acquiesce or see the firm shut down. See also Michael J. Piore, The Future of Unions, in GEORGE STRAUSS, DANIEL G. GALLAGHER & JACK FIORITO, eds., THE STATE OF THE UNIONS 387 – 410 (1991). Piore states: “Union wages, which previously had been viewed as sustaining domestic demand, came now to be seen as handicapping American industry in its competition with foreign producers for national (and international) markets.” Id. at 393.

\textsuperscript{81} Id. Cappelli notes that management’s ability to move jobs away “seriously weakened union power and forced unions to accept concessions.”
decades witnessed a significant deindustrialization of America. While this may have been good for America, it meant that fewer workers were employed in jobs where striking is useful. It also meant that pattern bargaining, a strategy used by many large unions in the mass-manufacturing industry, became less successful. This was because companies were able to be less generous in their agreements, and could rest assured that their competitors would do the same.

Compared to the 1930s, the technological environment is vastly differently today. In many industries, it is possible for a company to

82. The main reason for this is that because the American standard of living was higher than that in the rapidly industrializing countries of Asia, U.S. hourly wage rates were higher than those in Asian countries such as Japan, Korea and Singapore. Goods manufactured abroad could come into the United States, be competitive on price if not on quality. In contrast, until recently workers in service industries were mostly insulated from competition with foreign workers. To put it succinctly, a bus may be made in Asia but the bus driver has to live locally. A paper delivered in 1983 correctly forecast the impact of globalization on American workers. See Lee Price, Growing Problems for American Workers in International Trade, in THOMAS A. KOCHAN, ed., CHALLENGES AND CHOICES FACING AMERICAN LABOR 125-147 (1985). See also Robert Z. Lawrence, Is Trade Deindustrializing America? A Medium Term Perspective, in 1 BROOKINGS PAPERS ON ECONOMIC ACTIVITY (1983).

83. This author does believe that this period of deindustrialization was necessary as part of the transition to an information economy. In the long term, this will bring benefits to all. In the short term, those laid off at closed plants often suffered as social safety nets. Though they hoped for only temporary periods of unemployment, many of those laid off had inadequate educational attainment for remaining jobs that paid as well as the job they lost.

84. Michael Gottesman, Starting Over: Imagining a Labor Law for Unorganized Workers, 69 CHI. KENT. L. REV. 59, 63 (1993) (“The last thing the worker frightened for survival of the firm wants is to engage in ‘economic warfare’ that will cripple the employer’s ability to compete.”) (citation omitted).


86. See William Gould, Introductory Comment: Some Reflections on Fifty Years of the National Labor Relations Act: The Need for Labor Board and Labor Law Reform, 38 STAN. L. REV. 937, 937 (1986). Although true multi-employer bargaining has never been common, pattern bargaining has. See Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co., 381 U.S. 676, 722 (1965) (Goldberg, J. concurring in the result and dissenting from the opinion) (“Terms and conditions of employment in a given industry ... are often secured ... through bargaining with market leaders that sets a ‘pattern’ for agreements on labor standards with other employers.”). Pattern bargaining was used in industries dominated by a few large companies and one union. Id. Typically, the union would choose one company as the target in a given bargaining round. Id. Once the union had settled with that company, it would turn to the other companies in the industry and seek to apply the pattern to them. Id. Usually, the other companies quickly agreed to nearly identical increases. Pattern bargaining was common in autos, steel, rubber, paper, chemicals and oil. This broke down in the 1970s as companies facing foreign competition sought to contain labor costs. As a result, labor relations in many companies, which had been stable for over twenty-five years, became more acrimonious as companies sought to escape the cost burden of being unionized.
operate during strikes. As a result, workers are aware that if they go on strike, it may be a very long strike. Not surprisingly, therefore, unionized manufacturing workers display a reduced proclivity for striking. Similarly, some service industry workers are also aware that if they were to go on strike, there would be minimal impact on the employer. Although these perceptions are often not tested, they are very important because they explain the disinclination of many persons to vote for a union. Employers know what employers will tell them during an organizing campaign: that the union cannot get anything more from the employer than the employer is willing to give; and, that the union’s only weapon is to go on strike (even then the employer would not give concessions that would make the company unprofitable). Employers often do not need to discuss the possible adverse effects of a strike, such as being replaced, with the workers. Workers can do a rough calculation and conclude that the cost of joining a union may well outweigh the benefits.

A statute, which at its core relies on bargaining power and the strike weapon, hits a discordant note today. Compared to the 1930s, the industrial relations environment is vastly different. Even more importantly, today’s average worker is significantly different than his or her 1930s counterpart. The average worker today is much better educated, works in a service industry job, lives in suburbia, and thinks of himself or herself as middle class. They tend to eschew angry, adversarial modes of expression. They want a middle class lifestyle, and they deeply fear losing it. These average workers of today probably would not use the word “worker” to describe themselves, for it conjures up a blue collar or lower class image. Rather, they see themselves as “employees.” They want to identify with their employer, and will become frustrated and disillusioned if they perceive that their employer treats them as replaceable items. Human resource management approaches of the last thirty years have also greatly reduced the “us vs. them” organization of the workplace.


88. Peter Sherer, *Reflections on Employee Voice and Representation for the Future*, 69 Chi. Kent. L. Rev. 249, 251 (1986) (“Competition has also had an effect on employee attitudes about union representation]…. [M]any employees have become more concerned about their firm’s competitive position. These employees do not want to lose good jobs because they are hard to come by.”) (citations omitted).

89. *See* id. at 252.


91. This is not to deny that there are millions of low paid workers who live in cities, but these are not the vast “middle” of the labor force.

92. Labor historian David Brody posits that over the last century, employers’ methods
no longer a sharp cleavage between workers and supervisors.\textsuperscript{93} Workers of different levels are members of the same team.\textsuperscript{94} Non-supervisory workers often do not work under direct supervision.\textsuperscript{95} Workers are empowered to organize how they do their own work.\textsuperscript{96} In fact, while today’s employees do not like to view themselves as “workers,” even their employers may refer to them as “associates” rather than “employees.” All of these factors combine to make many of today’s workers, even those who have strike power, reject the idea of striking.

\textbf{THE EMPLOYEE VOICE STRAIT JACKET}

Because of the changes in the mindset of the average worker, the appeal of traditional unionism does not resonate with them. They may not be against unions and, in fact, may agree that some people still need unions, but they do not see unions as something they would join.\textsuperscript{97} This is for organizing production and their human management resource orientation have led to a response from labor. At points of major changes, existing labor organizations have found it difficult to respond. See David Brody, \textit{Labor Crisis in Perspective, in THE STATE OF THE UNIONS 277-311} (George Strauss, Daniel G. Gallagher & Jack Fiorito eds., 1991). Brody believes that “postindustrial technology demands involvement and commitment from employees,” and that as a result, management has changed its human resource management orientation to one of less adversarialism and more cooperation. \textit{Id.} at 309. Brody quotes a statement of the Economic Policy Council that a “‘them and us’ system of workplace relations [is] simply inadequate in today’s social and economic environment.” \textit{Id.} at 309-310.

\textsuperscript{93} Piore notes that in the 1980s, the “clear demarcation between workers and managers was compromised through quality circles and worker representation on management teams, even on company boards of directors.” See Piore, \textit{supra} note 80, at 394.

\textsuperscript{94} See EILEEN APPELBAUM & ROSEMAY BATT, \textit{THE NEW AMERICAN WORKPLACE: TRANSFORMING WORK SYSTEMS IN THE UNITED STATES} (1994). In discussing American models of high performance, they detail distinctive aspects of the American form of team production. \textit{Id.} at 135-139.

\textsuperscript{95} Appelbaum and Batt, \textit{id.}, studied a number of companies utilizing self-directed work teams. They note that the basic production unit is a team or collaborative work group, and commented that “the key is that front-line employees participate fully in shaping their areas of responsibility.” \textit{Id.} at 137. One of the most notable examples is Saturn Corporation, where the “integration of technical and social work organization is an organizing principle . . . that extends to the electronic data systems which track information on everything from human resources and the flow of materials to financial data, manufacturing, product engineering, marketing and service.” \textit{Id.}


\textsuperscript{97} See ADAMS, \textit{supra} note 67, at 44-46. Professor Adams points out that the AFL philosophy, which was accepting of capitalism, cast unionism as something workers might elect when it benefited them in their specific job. Since Americans are taught that they are all political and social equals, but also that they should strive to improve their individual economic position, they are inclined to view belonging to unions as legitimate depending on an individual’s need. \textit{Id.} at 44-46. It is interesting to note that the sector that enjoyed great gains during the 1990s, finance, insurance and real estate, are the sectors with the lowest
particularly likely when they perceive that their own employer is opposed to unions. This does not mean, however, that today’s workers are not interested in any form of employee representation. Surveys show that there is significant interest in having a voice at work. It is clear that there are many more workers who want unions than workers who are actually members of unions. But the numbers do not necessarily mean that there is fertile organizing territory for unions, since latent union supporters are likely to be spread out among workplaces and, therefore, constitute a minority in any given workplace. Since current law requires that the union receive the support of a majority of workers in an appropriate unit, even the most vigorous of organizing efforts is not likely to capture many of these persons expressing an interest in unionism. Moreover, even those expressing an interest in unions might quickly be swayed otherwise once a union organizing campaign began and the employer responded.

The dilemma facing many American workers is simple. They would
like more employee voice at work, but the only option presented to them, traditional unionism wedded to adversarial bargaining, does not appeal to them. One striking facet of contemporary American labor relations is that there is only one mode of employee voice sanctioned. There is a mismatch between what employees indicate they want and what is offered. At present, aside from utilizing elected employee representatives, the only form of employee voice on terms and conditions of employment is the traditional labor organization contemplated by the Wagner Act.

This is in contrast to most European countries, where dual channels of employee voice are in place. Although the structures and exact delineation vary by country, the general pattern is that unions represent workers for the purpose of bargaining on wages and hours, and works councils represent workers for the purpose of receiving information and being consulted on issues relevant to the workplace. In all countries, unions are voluntary organizations, and bargaining can best be described as adversarial. In almost no European country do members elect union officers in some process supervised by the state. Rather, members in a voluntary organization are assumed to set their own procedures for the governance of the organization. In most European countries, some body akin to a works council exists by virtue of legislation. It varies whether a company must have a works council, or whether employees must request it. In nearly all continental European countries, the procedures for electing the worker representatives for the works council are stipulated by


107. Id.


The works council is not only seen as a forum for dealing with workplace issues, it is also seen as a body whose members should work in a cooperative mode.111 During the past twenty years, European countries have also witnessed some degree of deindustrialization, with the consequent shift in the labor force to services.112 To some extent, this has had a negative impact on unions, although to a much smaller degree than in the United States.113 In contrast, works councils have not only remained firmly in place but have expanded in influence.114

This has occurred because the cooperative, modus operandi of works councils appeals to today’s service and knowledge-based workers. The appeal flows from several factors. First, works councils are not adversarial, and the more educated worker more favorably views a process that relies on information-sharing, discussion, and exploration of options. Second, the

110. Id. Frequently, legislation exempts small enterprises from the requirement of a works council. See Marco Biagi, Employee Representation in Small and Medium-Sized Enterprises: A Comparative Overview, 13 COMP. LAB. L.J. 257 (1992), for a review of the legislation in European countries. In a few countries, a works council type body exists, but there is no legislation governing how its members are selected. Italy is a prime example of this. See Marco Biagi, Employee Representational Participation in Italy, 15 COMP. LAB. L.J. 155 (1994).

111. In some European countries, such as Italy and the United Kingdom, there is no legal distinction between adversarial collective bargaining and non-adversarial consultation. See Marco Biagi, Employee Representational Participation in Italy, 15 COMP. LAB. L.J. 155, 163 (1994); Davies, supra note 108, at 169. In some countries, however, such as Germany, a works council may operate under legislation known as a “peace obligation” that precludes a strike in support of a works council position but allows a strike in support of a union position. See Rudolf Buschmann, Workers Participation and Collective Bargaining in Germany, 15 COMP. LAB. L.J. 26, 29 (1993).

112. See Charles Feinstein, Structural Changes in the Developed Countries during the Twentieth Century, 15 OXFORD REV. ECON. POLICY 35 (1999).

113. The main explanation for this relates to the level of bargaining. In most European countries, bargaining occurs on an industry-wide basis, by region or nationally. All employers are in the same employers’ federation and will sign one agreement with the union. The agreement by necessity covers only the major terms on wages and hours. It is often called a “framework” agreement as it is understood that company and plant specific terms will be filled in later, by a local round of bargaining or by the works council. Thus, there was much less pressure on any one employer to de-unionize. All employers were under pressure to achieve a more reasonable agreement with the union. In contrast, in the United States where most bargaining occurs at company or even lower level, each individual company sought to lower its labor costs by demanding concessions from its union, or by escaping unionism. See generally ORGANIZED INDUSTRIAL RELATIONS IN EUROPE: WHAT FUTURE? (Colin Crouch & Franz Traxler eds., 1995); TRADE UNIONS IN THE EUROPEAN UNION (Wolfgang Lechner ed., 1994).

114. To some extent, traditional works councils (located at the workplace and enterprise level) have assumed greater importance because they feed up into the new European level works council mandated by a European Union directive. See Thorsten Schulten, European Works Councils: Prospects for A New System of European Industrial Relations, 2 EUR. J. INDUS. REL. 303 (1996).
issues before the works council are for the most part confined to the workplace. These are issues that the workers know well and can understand. They are also of a type that are often susceptible to win-win solutions. Third, because these occur at the level of the facility, those represented actually know the co-workers speaking for them, and they know those who speak for management. This personal knowledge invariably creates more interest in the works council's deliberations, and it often creates more trust in it. Fourth, workers do not have to take any bold action to form a works council, nor does their desire for a works council signal any disloyalty to the employer. All these factors contribute to an overall picture where works councils are non-controversial forums, a venue for the discussion of workplace issues.

The continuing interest in works councils may stem from the fact that a works council becomes the vehicle for something that more educated employees want: information about the employer's plans. Today's employees are aware that their jobs may be threatened because the employer may be doing badly, planning to introduce new technology, or planning to change the products made or the services sold. More educated employees want information, and they want to be able to influence decisions that will affect them. It may be this need that has caused widespread political support for the extension of works councils. In Europe, works councils were originally plant-based, but they are now used as the basis for higher level consultation and information disclosure, extending up to the level of the European Union.

In Europe, since 1974, there has been a movement to use European Union mechanisms to ensure that workers are informed and consulted about events that concern them. This coincides with the European Commission's view that in the creation of an internal market, the affairs of companies should become more transparent so that governments, investors and workers have the relevant information upon which to base important decisions. The European Commission has directed that workers' information and consultation rights should extend beyond the terms and conditions of employment to information concerning the state of the company, the introduction of new technology, and the market for the

117. Id. at 339.
118. Id. at 340-49.
company's products and services. This is in sharp contrast to the view on the rights of American workers to information. Although the Wagner Act made no mention of worker rights to information, the courts quickly recognized that it would be impossible for unions to bargain if they lacked necessary information on the terms and conditions of employment. From its earliest origins, the duty to disclose has always been viewed as a derivative right, linked to the duty to bargain in good faith. This linkage, rather than extending the scope of disclosure over the years, has served to limit the extension of the disclosure obligation. This has come about as a result of NLRB v. Wooster Div. of Borg-Warner Corp., where the Supreme Court considered the universe of possible subjects of bargaining and separated subjects into three categories: mandatory, permissive and illegal. The employer's duty to disclose relevant and necessary information remained linked to mandatory subjects of bargaining. Not only do employees have no right to bargain over permissive subjects, but employees do not even have the right to be informed of, let alone consulted about, important events. Any decision that declares a subject is permissive has ramifications for the information rights of employees, rights that are not even mentioned by the Supreme Court. Nowhere in the decision did the Court indicate why employees should not be informed that their employment would cease suddenly in a short time. Information disclosure was not mentioned at all.

How American labor law came to reach the point where unionized employees lack the right to receive relevant information about their imminent employment status can best be explained by blind adherence to the rigid model of adversarial bargaining that underlies the Wagner Act. Put in the most basic language, employers do not have to tell employees anything unless required to do so by law, and all the Wagner Act requires is that employers disclose information relevant and necessary to bargaining.

119. Id.
120. See S.L. Allen & Co., Inc., 1 N.L.R.B. 714, 728 (1936), enforced, 2 L.R.R.M. (BNA) 780 (3d Cir. 1938) (demonstrating employer resistance to provide any information on what the company was paying its workers).
123. Id. at 348-49.
124. See, e.g., First Nat'l Maint. Corp. v. NLRB, 452 U.S. 666, 678 (1981) (providing many reasons why the employer would be burdened if it had to bargain with the union over its plan to discontinue the contract for the services of these janitorial employees).
125. See Janice R. Bellace, Mandatory Consultation: The Untravelled Road in American Labor Law, 40 INDUS. RELATIONS RESEARCH ASS’N. PROC. 79-83 (1987) (arguing that the duty to bargain often times actually serves to constrain the collective bargaining process).
This view of information disclosure seems out of step with a broader trend in society that advocates the free flow of information because it results in better decisions. What is surprising in America is that there has been no movement to give all workers information rights. Compare this with the efforts since the 1930s to give shareholders increasing rights to information on the grounds that markets work best when buyers and sellers have symmetric information. Yet there has been no corresponding call that employees, as stakeholders of the company and as investors of their human capital, should have information necessary to optimize their position in the labor market.

While the Wagner Act may still remain valuable in meeting the need to fend off common law restraints on union organizing and bargaining, it has become a strait jacket. Those seeking other forms of employee representational participation are told it is unlawful, and employees are left with no alternatives to adversarial bargaining.

EMPLOYEE VOICE IN THE INFORMATION AGE

The transition in America, from an industrial economy to what some call the post-industrial era or information age, demands new forms of employee representation. The model of representation appropriate for 1930s America, focusing on an industrial economy, a domestic market, industrial workers, and a model embraced by the Wagner Act, is no longer appropriate. This is not to say it is obsolete, but the challenge for anyone proposing a new model is to consider how the existing model can be sustained alongside something new. Some workers may want to engage


128. Beginning in the 1920s, some companies sponsored what were called “employee representation plans” which provided employees with a way of expressing their voice in the workplace. While some companies may have had benevolent motives for so doing, others utilized employee representation plans as a way of forestalling the development of independent union organizations. See Daniel Nelson, Employee Representation in Historical Perspective, in EMPLOYEE REPRESENTATION: ALTERNATIVES AND FUTURE DIRECTIONS 371-390 (Bruce E. Kaufman & Morris M. Kleiner eds., 1993). Derided as “company unions” by the AFL, such company-based employee organizations were seen as moderate, and were definitely not independent. The number of companies sponsoring employee representation plans sharply increased after the passage of the National Industrial Recovery Act in 1933, as employers sought to comply with section 7(a) of the NIRA as part of meeting the conditions for displaying the Blue Eagle. At the time, it was estimated that 70% of employer-sponsored unions had sprung up after the enactment of section 7(a). Report of the Senate Committee on Education and Labor, S. REP. 573, 74th Cong., 1st Sess. at 9-11 (1934). The experience under the National Labor Board in 1934, when independent unions were found to be at a substantial disadvantage in trying to organize workers at a plant where a company
in traditional collective bargaining and it may work well in many current employment situations. Many persons who support unions fear that an employee consultative forum will undermine the support of unions, and thus they oppose the consultative committee idea. This fear is not groundless.  

At this point, it is helpful to re-cast the original question posed at the beginning of this article. It is not the future of unions in the twenty-first century that should concern us but the future of employee representation. What is critical is the core value underlying the Wagner Act; namely, freedom of association. Section 7 states this eloquently when it says that workers shall have the right to form, join and assist organizations of their own choosing. What is needed today is government support of this core value that is essential to democracy. Lacking in America is a realization that there are fundamental human rights that must be permitted to exist at the workplace or else our claim of freedom and democracy rings hollow.

**FREEDOM OF ASSOCIATION**

There is already an international consensus on fundamental human workplace rights. Since 1994, the International Labor Organization (ILO) has also sought to raise public consciousness regarding four core rights, emanating from fundamental human rights. These four core rights are not merely labor standards as might be found in a fair labor standards statute. The ILO has stressed that these rights are not “worker rights” but...
"rights at work." That is, they are rights that all persons possess by virtue of being human, but they are human rights with particular applicability at work. Paragraph 2 of the ILO 1998 Declaration of Fundamental Principles and Rights at Work sets out four rights: (1) freedom of association and the effective recognition of the right to collective bargaining, (2) the elimination of all forms of forced or compulsory labor, (3) the effective abolition of child labor, and (4) the elimination of employment and occupation discrimination. A fuller understanding of the meaning of these four rights comes from the eight core ILO conventions underlying them.

Of these conventions, the one that most directly relates to employee voice is Convention No. 87, Freedom of Association. The origins of the notion of freedom of association as applied to a workplace setting can be traced to the 1800s, as a philosophical outcry against the suppression of workers' organizations. The notion of freedom of association became


137. See generally THE ORIGINS OF THE INTERNATIONAL LABOR ORGANIZATION (J.T.
internationally accepted as a lynchpin of democracy at the end of World War I. Part XIII of the 1919 Versailles Peace Treaty ending World War I not only created the ILO, but it also listed principles of special and urgent importance, including freedom of association. The 1944 Declaration of Philadelphia, adopted by the International Labour Conference in the midst of the world war against fascism, when free trade unions in many countries had been ruthlessly suppressed, strongly emphasized the right of freedom of association and the effective recognition of the right of collective bargaining. The ILO’s attention to these specific matters was hastened by political developments of the immediate post-war period as the Iron Curtain was falling. Convention No. 87, Freedom of Association and the Right to Organise, was adopted by the International Labour Conference in 1948. The integrally related convention, Convention No. 98, Right of Collective Bargaining, was adopted in 1949. In this same time period, the United Nations Universal Declaration of Human Rights was adopted. Article 20 of the 1948 United Nations Declaration declares that everyone has the right to freedom of peaceful assembly and association, and article 23 states that everyone has the right to form and to join trade unions for the protection of his interests.

Although Convention No. 87 has 141 ratifications, the United States has never ratified it. Admittedly the United States has ratified few conventions, but often one can say that the United States would meet the standards laid down by a convention and could ratify that convention if it chose to do so. This is not the case with Convention No. 87 because current American law permits major gaps in protection to exist. The most prominent gaps relate to exclusions from protections. For instance, Convention No. 87 states that all workers have the right to join organizations of their own choosing, and ‘workers’ is defined broadly to

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138. See Bartolomei de la Cruz, supra note 132, at 4-5. See also Jill Murray, Transnational Labour Regulation: The ILO and EC Compared 35-40 (2001).


141. Convention No. 87 has been ratified by 141 countries as of Sept. 13, 2002. The list of ratifications may be found at the ILO website, http://ilolex.ilo.ch:1567/english/convdisp1.htm. The United States is not listed as having ratified this Convention.

142. See, e.g., Convention No. 111, Discrimination in Respect of Employment and Occupation, 1958, supra note 135, at 176-79.

include nearly all employees. In contrast, the Wagner Act's definition of employee excludes substantial portions of the civilian labor force. Convention No. 87 and the inextricably related Convention No. 98 protect the right of workers, including public sector workers, to engage in collective bargaining.

EMBODYING FREEDOM OF ASSOCIATION IN A NEW MODEL

The starting point for any proposal for a new form of employee representation is that it should apply the internationally accepted notion of freedom of association. Whatever the parameters of the model, its hallmark should be the independence of employee voice. All employees should be covered by the statute that gives legal support to the new model of employee representation. The new law should recognize that employees have the right to form, join and assist organizations of their own choosing. It should guarantee that that they have the right to fashion these organizations. In addition, the new law should be suited to assist them in their goal of expressing their views at the workplace for the purpose of improving their terms and conditions of employment and of their own employability. The expression of views should be bolstered by ensuring the employees are in receipt of relevant information, and thus information disclosure by employers should be required by law. The employees should be free to decide whether this expression of views occurs through adversarial collective bargaining, consultation, or some other mode.

To achieve this, a new statute is necessary. The Wagner Act does not have a sufficiently strong foundation upon which to build new structures that will transform existing concepts of employee representation. In addition, because such a statute would exist against a backdrop of sixty-five years of case law not hospitable to a profoundly robust view of employee rights, there must be a strong legislative statement to the effect that it is the policy of the United States to support freedom of association and to ensure the application of this fundamental human right at work. There will only be a future for employee representation, and for unions, in the twenty-first century if there is widespread acceptance that freedom of

145. The only exceptions are for those public servants engaged in the administration of the state. See GENERAL SURVEY, supra note 139, at 24-28, for a discussion of the view of the Committee of Experts on the ability of the state to limit the rights of public servants to bargain collectively and/or to strike.
146. Professor Clyde Summers makes this point eloquently and lists the aspects of the principle that must be incorporated into any new statutory scheme. See Clyde W. Summers, Employee Voice and Employer Choice: A Structured Exception to Section 8(A)(2), in THE LEGAL FUTURE OF EMPLOYEE REPRESENTATION 126 (Matthew W. Finkin ed., 1994).
association is the bedrock of democracy, and that it is a principle that must be operative at work.