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Government Without Rights:
The Labor Law Vision
of Archibald Cox*

Staughton Lynd†

The Wagner Act¹ may have brought American workers out of the
industrial state of nature,² but it did so by imposing a most ambiguous
social contract. The right to strike is expressly conferred on workers by
statute³ but it is routinely surrendered in collective bargaining negotia-
tions.⁴ Management is required to bargain with unions in good faith⁵
yet somehow it remains free to shut down a plant and thus discharge its
entire workforce without giving advance notice, without consulting ei-
ther its own workers or the public, and without being obliged to pro-
vide just cause for its action.⁶

The ambiguous consequences of the Wagner Act reflect the dual

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GANIZERS, edited with Alice Lynd (2d rev. ed. 1981) and LABOR LAW FOR THE RANK
2. The generally accepted proposition that the Wagner Act itself was responsible for labor's
success in the 1930's is subject to question. The Wagner Act was not held constitutional by the
Supreme Court until April 12, 1937, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937)
[hereinafter cited as Jones & Laughlin], after the victorious sit-down strikes in Akron and Flint in
1936-37, and after the United States Steel Corporation recognized the Steel Workers Organizing
Committee on March 2, 1937. It can be argued that the Supreme Court's decision upholding the
Wagner Act owes as much to the success of workers in the streets, and the resulting decision of
General Motors and United States Steel to accept the CIO, as the CIO owes to the Wagner Act.
See F. PIVEN & H. CLOWARD, POOR PEOPLE'S MOVEMENTS 96-175 (1978).
NLRA].
4. Because of the brevity of this presentation, I shall cite certain of my writings not as
particularly authoritative but as fuller explanations of points stated here in a sentence or two. See,
on the right to strike and its waiver by contract, Lynd, The Right to Engage in Concerted Activity
After Union Recognition: A Study of Legislative History, 50 IND. L.J. 720 (1975) [hereinafter cited as
Concerted Activity].
6. See Lynd, Investment Decisions and the Quid Pro Quo Myth, 29 CASE W. RES. L. REV.
396, 416 (1979) [hereinafter cited as Investment Decisions].
character of the Act's intent. Section 7 of the Wagner Act confers or recognizes the right of employees to engage in concerted activity for their mutual aid or protection. Section 13 declares explicitly: "Nothing in this [Act] shall be construed so as to interfere with or impede or diminish in any way the right to strike." Yet Section 1 of the Wagner Act, which declares public policy, asserts that the effect of the Act will be to diminish industrial strife and unrest. In theory, these purposes may not be contradictory. In practice, however, those who have administered the Wagner Act have had a choice between an emphasis on workers' rights, and an emphasis on labor peace.

Both approaches, the one emphasizing workers' rights and the other labor peace, are legitimate interpretations of the Wagner Act. The Supreme Court has viewed each policy with favor at different times in its history. In recent years, however, the Court has consistently adopted the approach emphasizing labor peace. Workers' rights have suffered as a result.

From 1937, when the Supreme Court held the Wagner Act constitutional in Jones & Laughlin, to the enactment of the Taft-Hartley amendments in 1947, the Court attached great importance to workers' rights. During this period the Court was responding to the continuing surge of CIO organization. Some of the cases which came to the Court sought protection for workers' rights to organize, associate, strike, picket and leaflet without interference by the state. In other cases, essentially the same rights were threatened by the employer.

The first group of cases were first amendment cases, while the second group of cases required clarification of section 7 of the Wagner

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9. Id. § 163.
10. Id. § 151. A concern to diminish strikes was expressed by the Senate Committee on Education and Labor in reporting the Wagner Act, by President Roosevelt in signing the bill into law, and by the Supreme Court in holding the Act constitutional in Jones & Laughlin. Further, it is clear that the impetus to pass the Wagner Act waxed and waned in direct correlation with the waxing and waning of the strike wave of 1934-35. I. Bernstein, The New Deal Collective Bargaining Policy 71, 76-77 (1950); J. Huthmacher, Senator Robert F. Wagner and the Rise of Urban Liberalism 166, 190 (1968).
11. I should like to associate myself with the splendid discussion of the ambiguous and multiple intents of the Wagner Act in Klare, supra note 7, at 281-93.
15. See notes 18-20 infra and accompanying text.
16. See notes 21-23 infra and accompanying text.
The Supreme Court responded to the issues presented by articulating a single developing body of doctrine for both sets of cases. Labor cases which presented the first amendment problem of permissible interference by the state prompted the Court to articulate the "public forum" and "overbreadth" doctrines, and to revive the concept of "clear and present danger." And in clarifying the scope of speech rights under section 7, the National Labor Relations Board, sensitive to the Court's attitude, pointed to first amendment parallels in the Court's contemporaneous decisions on "fighting words," leafleting as a form of speech, and the irrelevance of the regulator's motive. The Court, in Republic Aviation, its leading case on employee speech rights vis-à-vis the employer, in effect protected employee speech on private property except when likely to pose a clear and present danger of disrupting production. In these decisions, the Court faithfully reflected one of the purposes of the Wagner Act: to recognize "rights which are admitted everywhere to be the basis of industrial no less than political democracy."

17. See Lynd, Employee Speech in the Private and Public Workplace: Two Doctrines or One?, I INDUS. REL. L.J. 711, 715-16 (1977) [hereinafter cited as Employee Speech]: The Board looked for guidance in creating speech rights under the National Labor Relations Act to then contemporaneous Supreme Court decisions interpreting the first amendment. Although the lack of state action prevented first amendment adjudication from being directly applicable to cases involving employer discipline, the Board properly viewed these decisions as expressions of policy which should be followed under section 7. (footnotes omitted). The Supreme Court approved the Board's reasoning in Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945). See notes 21-23 infra.


25. Speech was held presumptively protected in non-working areas during non-working hours. Id. An employer's rule more generally prohibiting union solicitation on company property was held presumptively overbroad. Id.

26. S. REP. NO. 1184, 79th Cong., 2d Sess. 4 (1934), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935 at 1099, 1103 (1949). See Lynd, Concerted Activity, supra note 4, at 730 n.47. The vision in this first period of Wagner Act interpretation that workers enjoyed the same rights inside and outside the plant is illustrated by Thornhill v. Alabama. The Court there dealt with an antipicketing statute applied to pickets who "appear to have been on Company property . . ." 310 U.S. at 94. Disregarding whether speech restriction took place on public or private property, the Court declared broadly that "dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discus-
Since 1947, the Supreme Court's emphasis in interpreting the Wagner Act has shifted from the rights of workers to the promotion of labor peace. The Court's decisions on three issues illustrate this shift in emphasis. The fictitious notion that union organization has made labor equal in strength with capital\(^2^7\) has been elaborated in the celebrated "quid pro quo" doctrine, according to which workers voluntarily relinquish the right to strike in exchange for management's promise to submit contract grievances to arbitration.\(^2^8\) This doctrine overlooks the fact that workers thereby lose the right to strike over all problems, while management agrees to arbitrate problems covered by the contract but retains, thanks to contractual management prerogative clauses, the right to make investment decisions unilaterally.\(^2^9\) Further, although section 4 of the Norris-LaGuardia Act has never been repealed,\(^3^0\) in *Boys Markets, Inc. v. Retail Clerks*\(^3^1\) the Supreme Court emasculated the Act by a so-called "accommodation" of the Norris-LaGuardia and Taft-Hartley Acts. This "accommodation" permits a Federal court to enjoin a strike if the strike violates a contractual no-strike clause.\(^3^2\) Finally, and most unfairly, in *Emporium Capwell Co. v. Western Addition Community Organization*\(^3^3\) the Court held that the rights to strike and picket, which Norris-LaGuardia protected whether expressed "singly or in concert,"\(^3^4\) are mere "collective rights" which are protected not for their own sake but as an instrument of the national labor policy of minimizing industrial strife "by encouraging the

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27. So long as management retains the right unilaterally to make investment decisions labor and capital will not be equal in strength.


30. Section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104 (1976), deprives federal courts of jurisdiction to enjoin strikes, picketing and kindred activities, whether done "singly or in concert," in any case involving or growing out of a labor dispute.


32. *Id.* at 250-53.


34. Section 7 of the Wagner Act was considered by its sponsors to protect the same activities protected by section 4 of the Norris-LaGuardia Act. See note 30 supra; Lynd, *Concerted Activity*, supra note 4, at 726-34.

The vision these cases set forth is one of industrial government under which workers have few if any individual, much less inalienable, rights. That the Court has so painlessly accepted this view, in opinions often authored by the Court's leading liberals, owes much to a group of labor law professors who told the Court year after year that the subjugation of workers' rights to the interests of labor peace was reasonable and in the interest of "national labor policy." Foremost among these intellectuals has been Archibald Cox.36

Many of Cox's early labor law articles were co-authored with Harvard economist John Dunlop, a major exponent of what has been termed "pluralistic industrialism." Elaborated in the 1950s, this body of thought paralleled the "consensus" interpretation of American history and the "pluralist" model of decisionmaking in contemporary American society.37 Its proponents sought to institutionalize, and thereby regulate, class conflict through collective bargaining.38

35. Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. at 62. I am not certain what a "collective right" is. It appears to be a right so important that the powers that be do not wish it to be left to individuals to exercise. See discussion in Afterword, infra. See also Lynd, Concerted Activity, supra note 4, at 726 ("In Emporium Capwell, as in other recent cases, the Supreme Court takes the position that the selection of a bargaining representative extinguishes the rights of individuals to take direct action on their own behalf."). For discussions of the concept of "collective rights" see generally Finkin, The Limits of Majority Rule in Collective Bargaining, 64 MINN. L. REV. 183, 188-91 (1980); Finkin, The Truncation of LAIDLAW Rights by Collective Agreement, 3 INDUS. REL. L.J. 591 (1979); Kaden, Judges and Arbitrators: Observations on the Scope of Judicial Review, 80 COLUM. L. REV. 267, 277-83 (1980). See also Alexander v. Gardner-Denver Co., 415 U.S. 36, 51 (1974):

[A] union may waive certain statutory rights related to collective activity, such as the right to strike . . . These rights are conferred on employees collectively to foster the processes of bargaining and properly may be exercised or relinquished by the union as collective-bargaining agent to obtain economic benefits for union members. (citations omitted).


The first sentence of a major Cox and Dunlop article states: "The purpose of the original Wagner Act was to facilitate the organization of unions and the establishment of collective bargaining relationships." This view severely curtails the scope of the rights assured workers by the Wagner Act. In contrast to a political theory which conceptualizes government as an instrument for protecting rights, here unions and collective bargaining are seen as ends in themselves. It is as if the Declaration of Independence contained only the expression, "Governments are instituted among men, deriving their just powers from the consent of the governed," omitting both the preceding affirmation that government exists to protect certain inalienable rights, and the claim that if government ceases to protect those rights "it is the right of the people to alter or abolish it." What Cox believes is the reverse: the rights are created to bring the government into being, and once the government exists the rights are no longer needed.

Having asserted that the purpose of the Wagner Act is to establish collective bargaining, Cox and Dunlop went on to assert that the Act was never intended to effect in any way what happened once bargaining began. It is a dramatic illustration of what Karl Klare calls the deradicalization of the Wagner Act by means of a revived contractualism. As long as management and labor engage in the process of collective bargaining, "the substantive contents of the parties' arrangements" are of no concern to the public, according to Cox and Dunlop. Specifically, they urged that the Board give up the attempt

39. Cox & Dunlop, Regulation of Collective Bargaining By the National Labor Relations Board, 63 Harv. L. Rev. 389, 389 (1950) (footnote omitted) [hereinafter cited as Regulation of Collective Bargaining]. But see Klare, supra note 7, at 288 n.73, citing Smith, The Evolution of the "Duty to Bargain" Concept in American Law, 39 Mich. L. Rev. 1063, 1107 (1940). "[I]t cannot be clearly determined whether or not Congress intended the NLRB to engage in substantive scrutiny of employer proposals in the course of its administration of section 8(5); Congress simply did not think the problem through."


41. Klare, supra note 7, at 293-310. Klare defines contractualism as a doctrine in which "justice consists in enforcing the agreement of the parties so long as they have the capacity and have had a proper opportunity to bargain for terms satisfactory to each." Id. at 295.

42. Id.

43. Cox & Dunlop, Regulation of Collective Bargaining, supra note 39, at 394-95. Cox and Dunlop regarded collective bargaining as a "partnership," with capital and labor being "equal partners." Id. at 421. From this false premise that capital and labor bring equal strength to the bargaining table, they derive the misleading conclusion that one of the factors one should consider in interpreting the content of the term "collective bargaining" as used in the Act is the practice of collective bargaining as it already exists:

In the interpretation of section 8(a)(5) predominant weight should be given to the practices and philosophy of collective bargaining reflected by voluntary arrangements in industries in which collective bargaining is well established. The law of collective bargaining will have little value to the community if the process of logical deduction from prior decisions results in wide divergence between the administrative and judicial rules and the needs of both management and labor. Furthermore, there is every reason to believe that the needs of the industrial world can be determined most accurately by
to define a list of subjects about which management has a statutory
duty to bargain collectively. They recommended instead the follow-
ing interpretations:

1. Although the Wagner Act requires employers to bargain col-
lectively about "rates of pay, wages, hours of employment, or other
conditions of employment," according to Cox and Dunlop "it is gen-
erally agreed" that management should have exclusive responsibility
for decisions about what products to make, what prices to charge,
where to locate its plants, by what processes to produce, and where to
assign workers.

2. A union may give up in bargaining its statutory right to have a
voice in a given category of management decisions.

3. An employer bargains in "good faith" by simply discussing a
matter with the union. Having done so, management may make a uni-
lateral decision about any matter reserved to it by the collective bar-

examining the arrangements which management and labor have worked out through
negotiation, trial, and error. This is not a situation in which solutions satisfactory to the
industry concerned may be detrimental to the rest of the community. If capital and
labor are able to adjust questions concerning the allocation of responsibilities to their
mutual satisfaction, society will gain nothing by imposing different answers.

Id. at 405-06 (footnotes omitted). Thus the existence and justification of any agreement between
capital and labor tend to be one and the same. Public policy (read "labor peace"), Cox & Dunlop
concluded, favors "pragmatic private accommodations" to "uniform, rigid, and doctrinaire" gov-

44. Id. at 396-98.
46. Cox & Dunlop, Regulation of Collective Bargaining, supra note 39, at 401. While courts
may have once shared such an opinion, there is no longer such general agreement. The Board and
the courts have recognized as mandatory subjects of bargaining employer decisions to subcontract,
see, e.g., Fibreboard Paper Products Corp., 138 N.L.R.B. 550, 51 L.R.R.M. 1101 (1962), enforced,
322 F.2d 411 (D.C. Cir. 1963), aff'd, 379 U.S. 203 (1964); relocate a plant, see, e.g., McLaughlin
remove plant work, see, e.g., Weltronic Co., 173 N.L.R.B. 235, 69 L.R.R.M. 1282 (1968), enforced,
419 F.2d 1120 (6th Cir. 1970), cert. denied, 398 U.S. 938 (1970); and automated work, see, e.g.,
L.E. Davis, 237 N.L.R.B. 1042, 99 L.R.R.M. 1235 (1978), enforced as modified, 617 F.2d 1264 (7th
Cir. 1980).

The Supreme Court's recent decision in NLRB v. First Nat'l Maintenance Corp., 49
U.S.L.W. 4769 (June 22, 1981), while refusing to require an employer to bargain over its purely
economic decision to close part of its business, does acknowledge that some "management deci-
sions" will be subject to mandatory bargaining. The Court set forth the following test to deter-
mine whether an employer must bargain over its "managerial" decisions:

[1] In view of an employer's need for unencumbered decisionmaking, bargaining over
management decisions that have a substantial impact on the continued availability of
employment should be required only if the benefit, for labor-management relations and
the collection bargaining process, outweighs the burden placed on the conduct of the
business.

Id. at 4772. Moreover, even in 1950 when they were writing, Cox and Dunlop appear to have ignored
that as recently as the General Motors strike of 1946 a major CIO union had demanded
that management "open up the books." See A. PREIS, LABOR'S GIANT STEP 265 (1964); V.

The crux of this line of argument is that unions may waive workers' statutory rights. Just as John Locke justified class government in England by the fictitious notion that at some previous point in time, in some unidentified forest glade, citizens had willingly surrendered their rights to the government, so Cox assumed that when the union signed the collective bargaining agreement the individual worker voluntarily waived his or her right to bargain over "conditions of employment" such as shutting a plant. In fact, the individual worker often has little more "liberty of contract" with respect to what is in the collective bargaining agreement than he or she had over the terms of employment before a union was organized. But in the last analysis Cox was no more concerned than Locke to show that an actual, historical waiver had really occurred. To justify their concept of a waiver of rights, Cox and Dunlop ultimately relied on what they called "considerations of policy," explained as follows:

In interpreting the words of a statute which declares a basic ideal of policy, leaving it to the courts or an administrative agency to work out the necessary body of legal doctrine, historical accuracy and the limitations observed in prior decisions may have to yield to the present demands of policy.\(^49\)

The great advantage in assuming that a right ceded to management by a contract had been deliberately waived by its possessors was that it made for labor peace. From this assumption Cox and Dunlop concluded that, when management takes unilateral action in an area in which the workers' right to participate has been waived, there will be little danger of the resentments and frustrations leading to strikes. For in such a case the ultimate authority for management's action is mutual consent.\(^50\)

The principal obstacle to this emerging vision of labor law was the language of section 7. In a 1951 article Cox conceded: "Although the NLRA is primarily concerned with safeguarding employees in their right to organize labor unions and bargain collectively, it also confers important rights to engage in strikes, picketing and other forms of eco-

\(^{48}\) Id. at 403-05.

\(^{49}\) Id. at 425-26.

\(^{50}\) Id. at 427. Indeed Cox and Dunlop came close to advising management how it could circumvent the Board's definition of the scope of mandatory bargaining. Of the decision in the Inland Steel cases, 170 F.2d 247(7th Cir. 1948), cert. denied, 336 U.S. 960 (1949), that pensions were a mandatory subject of bargaining, they wrote that:

[If Inland had taken the position which we suggest and had secured the union's agreement to classifying decisions concerning retirements and pensions among management's functions, then its determinations would derive authority from both sides of the bargaining table.

Id. at 421.]
nomic pressure.”51 Strikes themselves might be held to have been waived by a no-strike clause, but such a waiver does not necessarily apply to slowdowns or other forms of concerted activity for mutual aid or protection within the shop. Cox contended, however, that “an apparently deep-seated community sentiment” condemned “occupying a job and taking pay while simultaneously refusing to perform the services required.”52 Moreover, he said, slowdowns and similar disobedience on the job “are too effective to permit them to be part of the employees’ arsenal.”53 On similar grounds he argued that employee participation in a consumer boycott of their employer’s product was just cause for discharge,54 a view soon after adopted by the Supreme Court in NLRB v. Local 1229, IBEW.55

To appreciate this deference to the state of public opinion one need only recall the first amendment analogy. Little would be left of the right to express controversial ideas if speech could validly be restricted on the basis of what was or was not a “deep-rooted community sentiment” at any given point in time.

In a 1957 article Cox addressed the central issue of modern American labor relations, “whether an employer can secure effective relief against a labor union which resorts to a strike, boycott or picketing to obtain the favorable disposition of a grievance instead of submitting the grievance to arbitration in accordance with the applicable collective

52. Id. at 338.
53. Id. at 339. Cox’s conclusion is based on his “equal partnership” assumption (see note 43 supra): “Collective bargaining can function as a mechanism for pricing labor only if there is some bargaining power on each side. Slow-downs and similar disobedience on the job cost the employees nothing and, if they were protected activities, management would be helpless to resist.” Id.

In an unpublished manuscript, James Atleson points out that a “slowdown” unlike a “sit-down” does not violate state or federal law. Atleson, Values and Assumptions in Labor Law. He cites Elk Lumber Co., 91 N.L.R.B. 333, 26 L.R.R.M. 1493 (1950), as a critical case in which the Board held unprotected by section 7 a slowdown one might have thought a classic instance of concerted activity for mutual aid or protection. The workers in that case responded to the employer’s unilateral reduction in the rate of pay by reducing their rate of work by a roughly proportional amount. The employer at no time warned the workers that they would be discharged if they failed to increase their production. When the employer solicited suggestions for improving production, a worker spokesperson replied that production would not increase until the workers were given a corresponding increase in pay. Id. at 335-36, 26 L.R.R.M. at 1494. Cox cites Elk Lumber as well as NLRB v. Mt. Clemens Pottery Co., 147 F.2d 262 (6th Cir. 1945), C.G. Conn, Ltd. v. NLRB, 108 F.2d 390 (7th Cir. 1939) (refusal to work overtime held unprotected), NLRB v. Montgomery Ward & Co., 157 F.2d 486 (8th Cir. 1946) (refusal to handle correspondence of a struck plant held unprotected), UAW Local 232 v. Wisconsin Employment Relations Bd., 336 U.S. 245 (1949) (intermittent surprise work stoppages held unprotected), and other cases. Cox, The Right to Engage in Concerted Activities, supra note 51, at 335-38. Contractual no-strike clauses may or may not be broad enough to prohibit these in-plant activities.
bargaining agreement.” 56 Section 4 of the Norris-LaGuardia Act, expressly prohibiting a federal court injunction of such activity, remained on the books. Cox nevertheless argued that the Norris-LaGuardia prohibition was an “anachronism.” 57 Thirteen years later the Supreme Court finally concurred in Boys Markets, 58 after Justice Stewart changed his vote on the issue. Not only did the employer’s brief to the Supreme Court quote the relevant passage of Cox’s 1957 article; 59 Justice Brennan, in his opinion for the Court, rationalized the apparent disregard of the language of Norris-LaGuardia by a Coxian gloss of its legislative intent. The Court stated that

the central purpose of the Norris-LaGuardia Act to foster the growth and viability of labor organizations is hardly retarded—if anything, this goal is advanced—by a remedial device that merely enforces the obligation that the union freely undertook under a specifically enforceable agreement to submit disputes to arbitration. 60

According to Cox, workers’ rights, including the right to strike, exist merely to bring about other desirable things which can be waived by an entity over which the worker may have no effective control. Such a limited right is hardly a right at all. Cox conceded as much in his most important article, Rights Under A Labor Agreement, published in 1956. 61 There, Cox argued that enforcement of an individual’s grievance alleging a violation of the collective bargaining agreement by the employer should be controlled not by the individual worker, but by the union. 62 Here again Cox confronted the obstacle of statutory language apparently to the contrary, in this case the proviso to section 9(a) of the Wagner Act which declares:

57. Id. at 254, 256.
59. Brief for Petitioner at 34, id.
60. Id. at 252-53.
61. 69 HARV. L. REV. 601 [hereinafter cited as Rights Under A Labor Agreement]. See, for a contrary view of the role of the individual workers in grievance arbitration and contract enforcement, Lynd, Concerted Activity, supra note 4, at 734-37.
62. Rights Under A Labor Agreement, supra note 61, at 618-20. For reasons of space I have not commented in the text on an important element of Cox’s thinking, namely, that the union negotiates the collective bargaining agreement on behalf of its members not only in periodic contract negotiations, but also in processing individual grievances. Id. at 606, 633. Thereby, according to Cox, the union creates a “common law” of the shop which supplements the statutory law of the collective bargaining agreement. See Cox, Reflections Upon Labor Arbitration, 72 HARV. L. REV. 1482, 1499 (1959) (“common law of the shop”), quoted in United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. at 579; Cox, The Legal Nature of Collective Bargaining Agreements, 57 MICH. L. REV. 1, 24 (“body of shop law”), 34 (“body of ‘common law’”) (1958); Rights Under A Labor Agreement, supra note 61, at 606 (“law of the plant”). I believe this metaphor to be altogether inappropriate. The common law grows by uncoordinated litigation, initiated and controlled by individual plaintiffs. Cox turns the common law on its head in using it to argue for central coordination by the union of all grievance settlements. Id. at 626-27.
That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect. 63

Cox brushes this problem aside with the staggering observation that "[g]enerally speaking" the Wagner Act "was not intended to enlarge the rights of individuals." 64 Cox visualizes the union not as a representative government created by individual workers to safeguard their rights, but as a trustee. 65 A trustee is normally the only proper party to bring an action on the contract and the judgment binds the beneficiary; the trustee can enter into binding settlements with the obligor, and the beneficiary's remedy is to show a breach of fiduciary obligations. Likewise, according to Cox a union should be able "to control the prosecution of claims for breach of contract, whether by pressing grievances, invoking arbitration, or instituting legal proceedings." 66 The union, it follows, is subject only to a duty of fair representation analogous to the fiduciary responsibility of a trustee. 67

Cox expressly opposed the view "that the assent of both the individual employee and the union is essential to the binding adjustment of a claim of contract violation" because this practice not only multiplies litigation but . . . discourages the kind of day-to-day cooperation between company and unions which is normally the mark of sound industrial relations—a relationship in which grievances are treated as problems to be solved and contract clauses are only guideposts in a dynamic human relationship. 68

CONCLUSION

Unlike lawyers, historians do not ordinarily end a presentation with a prayer for relief. However, being a much-battered advocate for the rank and file, as well as a sometime historian, I end with a prayerful question. I have attempted to show that the view of the intent of American labor laws Archibald Cox taught the Supreme Court is a view both legitimate and one-sided. It is the view from above: the view of em-

64. Cox, Rights Under A Labor Agreement, supra note 61, at 624. An alternative interpretation of the rights of individual workers under sections 7 and 9(a) is offered in Lynd, Concerted Activity, supra note 4, at 737-49. "This proviso [to Section 9(a)] can be understood not only to give rank-and-file workers a right to settle grievances directly with their employers, but also to legitimize reasonable concerted activities in support of those grievances." Id. at 724.
66. Id. at 625.
67. Id. at 620, 632-34. See also Cox, The Duty of Fair Representation, 2 VILL. L. REV. 151 (1957).
ployers, arbitrators and government bureaucrats, for whom strikes and grievances are "problems to be solved" rather than cries for help. There is an equally one-sided but also equally legitimate view of the intent of the Norris-LaGuardia, Wagner and Taft-Hartley Acts, a view from below which begins and ends with workers' rights, rather than with labor peace. Such a view from below is desperately needed by those who now struggle essentially empty-handed against plant closings and unjust discharges.

**AFTERWORD**

Professors Klare and Kennedy suggest that the liberal conception of workers' rights cannot be restated in such a way as to provide working people the legal protection they need. Insofar as that philosophy is merely a "political theory of possessive individualism," in which all rights are conceptualized as an individual's entitlement to property over and against other individuals, I might agree. The Norris-LaGuardia and Wagner Acts, however, recognize a different kind of right: the right to engage in concerted activity for mutual aid or protection.

I argue in the foregoing article that this right was intended to be exercised by individuals at their discretion, as when a single individual pickets. I also argue that it emasculates the right to engage in concerted activity for mutual aid or protection to envision it as a "collective right" that can be exercised only by people acting in groups, not individually. Yet, in a different sense, the right set forth in section 4 of Norris-LaGuardia and section 7 of Wagner is indeed a collective right, profoundly different from the individual inalienable rights enumerated by the Declaration of Independence. The right to engage in concerted activity for mutual aid or protection is a translation into law of the labor movement concept of "solidarity," or more fully articulated, that "an injury to one is an injury to all." In place of the conception of rights otherwise prevalent in our society and jurisprudence, in which one person's right subtracts from, or at most is separate from, another person's right, here the qualitatively different vision is set forth of a right which is diminished when another person's exercise of the same right is inhibited.

For this reason—because section 7 affirms a right so close to the essence of what the labor movement is and so different from the rights otherwise prevalent in Anglo-American jurisprudence—I disagree with Professors Klare and Kennedy that the entire philosophy of rights articulated by the Wagner Act should be jettisoned. Instead I think activists and advocates building the interpretation of the Wagner Act "from

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below” should celebrate and seek to restore to its intended vigor the right to engage in concerted activity for mutual aid or protection.