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THE NEW DEAL, COLLECTIVE BARGAINING, AND THE TRIUMPH OF INDUSTRIAL PLURALISM

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This paper addresses what the author views as a prevailing misconception of labor law theorists and practitioners: that the goal of the Wagner Act was no more than the promotion of peaceful negotiating procedures and written agreements between organized interests—unions and employers—presumptively equal in power. The author argues that in fact the NLRA was drafted, and for a time implemented, with the avowed purpose of giving workers equality with employers in all aspects of industrial policy making, and that the now-prevalent approach became ascendant only after considerable conflict and the displacement of the Act's original administrators.

For the last forty years labor law discourse in the United States has been dominated by a set of values and assumptions that can conveniently be termed "industrial pluralism." Industrial pluralism connotes a systematic approach to labor relations, informed by liberal political and social theory, whose point of departure is the belief that industrial conflict in democratic capitalist societies is best dealt with through routinized procedures of negotiation and compromise leading to agreements formalized in contracts. Its adherents conceive of management and labor as self-governing equals who, through collective bargaining, jointly determine the terms and conditions of sale of labor power; and they see the historic purpose of labor relations law as nothing more than the facilitation of this process.

Recently a new and skeptical school of labor jurisprudence, associated with what is known as the "critical legal studies" movement, has arisen to challenge the industrial pluralist paradigm. These scholars argue that the equality of labor and management in collective bargaining is purely formal, concealing a substantive inequality that renders pluralist explanations of the purpose of labor relations law incoherent. Indeed, once the false presumption of equality is removed, the critical scholars say, procedures represented as means to achieve peaceful labor-management cooperation stand revealed as "an institutional architecture" that actually

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serves to reinforce managerial domination of the workplace by narrowly confining unions to the role of "fiduciaries of an imagined societal interest in industrial peace" more or less forced to serve "specific managerial and disciplinary functions." From this perspective the purpose of labor relations law is not to facilitate wide-ranging and socially constructive interactions between equals. Rather it is "to integrate the labor movement into the mainstream contours of pressure-group politics and to institutionalize, regulate and thereby dampen industrial conflict.'

At first sight, such observations appear little different from the "new left" analyses of the late 1960s and early 1970s that reduced all law and reform activity to an epiphenomenal reflex of capitalist productive relations. The critical scholars have avoided reductionism, however, by emphasizing that the legal outcomes they describe have been "systematically fashioned," a theoretical position that acknowledges the contingency of those outcomes. The leading figure of the genre, Karl Klare, has made this proposition the point of departure in his own work by arguing that the New Deal innovations on which modern labor relations law is based were "not a crystallization of consensus or a signpost indicating a solitary direction for future development," but "a texture of openness and divergency." Only by engaging in a conscious process of "deradicalization," a systematic and purposeful foreclosure of all options save those serving liberal pluralist values, did the courts achieve the structure of labor law we know today.

Their efforts to avoid reductionism have not saved the critical labor law scholars from controversy. First, they have been faulted for their lack of attention to the social and political context in which legal events occur. Melvyn Dubofsky, for example, argues that the evolution of labor law "must be seen in light of shifts in the political balance of power and ebbs and flows in the labor movement." Second, it is argued that once labor law has been placed in that context, attempts to portray it as the product of a successful judicial campaign to thwart the Wagner Act's radical potential become totally unconvincing. No dramatic "deradicalization" occurred in the 1930s and 1940s. Rather, the creation of a pluralistic labor relations law was the culmination of a consistent pattern of development in American industrial relations discourse. The savage conflicts that attended the birth of that law were between reactionaries and liberals contesting the very existence of unions and collective bargaining, not between liberals and radicals over what the right to self-organization and collective bargaining actually meant.

Legal scholars should be castigated whenever they pay insufficient attention to the circumstances within which legal doctrine unfolds. In this case, however, historical investigation of these circumstances tends to confirm rather than rebut the critical scholars' contentions. To intimate that the Wagner Act might have been the most radical piece of legislation ever enacted by Congress is, perhaps, unnecessarily extravagant. Certainly, however, the act's legislative history discloses a marked willingness on the part of at least some of its proponents to depart from the pluralist assumptions of American industrial relations discourse; certainly there ensued after its passage a struggle to impose a restricted

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pluralist meaning on it; and certainly the result was the eventual triumph of that restricted meaning in labor relations law.

The New Deal Collective Bargaining Policy

Background

Innovations in public policy, we have been reminded, do not occur in a vacuum. In the case of the New Deal collective bargaining policy, the legislative and administrative contests that determined its substance were fought out in a context structured by long-term developments in the practice of collective bargaining as pursued by the American Federation of Labor; the theories of collective bargaining embraced by labor economists; and the administrative strategies of state institutions vis-à-vis the labor movement.

Collective bargaining and the AFL. Collective bargaining became fully established as the axis of labor-management relations in AFL policy at the end of the nineteenth century. As the pace and scale of business activity accelerated after the 1893-98 depression, unions responded by shifting their organizational orientation away from local product markets to a regional and even national focus, diluting their strategic reliance on local craft control struggles and seeking instead to win material concessions from employers through negotiated guarantees of uninterrupted production. Such written "trade agreements" were not entirely twentieth-century innovations. Previous arrangements, however, had been predominantly informal and of restricted ambit. Not until the late 1890s did national unions begin acquiring sufficient centralized administrative and disciplinary capacity to be able to offer employers permanent routinized accommodations in exchange for uniform wages and conditions on a market-wide basis.8

Collective bargaining theories. Few employers responded to these early union initiatives. Greater interest was shown, however, by contemporary labor economists. Dismissive of classical political economy's individualistic faith in the market mechanism as a harmonizing agency, specialists in this new sub-field argued that economic activity was a collective phenomenon and was thus dependent on the development of social mechanisms that could adjust differing collective interests. They seized upon the trade agreement and collective bargaining as prime examples of such mechanisms. "[The trade agreement] implies the equal organization of employers [and employees] and the settlement of a wage scale and conditions of work through conferences of representatives," wrote the doyen of the field, John R. Commons, in 1907. "It is a form of constitutional government with its legislative, executive and judicial branches, its common law and statute law, its penalties and sanctions."9

This approach was taken up and developed further by William M. Leiserson, a student of Commons who would play a role of major importance in the debates over collective bargaining policy during the 1930s. According to Leiserson, trade agreements were "nothing less than constitutions for the industries which they cover, constitutions which set up organs of government, define and limit them, provide agencies for making, executing and interpreting laws for the industry, and means for their enforcement."10

Conceptualized politically, as a means of resolving conflicts over the employment relationship by imposing a redistribution of power on hitherto unequal parties, the trade agreement-as-constitution could have become an instrument of real industrial democracy. Commons and Leiserson, however, did not take this approach. In their hands the agreement and the institutions it created were procedural devices through which the quid pro quo of individual commercial exchange might be reproduced in contemporary social and economic rela-

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tionships through the interaction of organizations presumed already to be equal in power. Historically, both argued, industrial strife had developed not because relations of dominance and subordination were inherent in capitalist production but because the original organic mutuality of employers and employees had been disrupted by the growth of competition among employers during the nineteenth century's extension of markets. By setting up mechanisms to govern the sale of labor power throughout a given market, employers and employees could together eliminate destructive competition over wage costs. On this basis they could achieve industrial peace and reconstitute their former mutuality.

**Liberal-labor alliance.** In the years after 1900, developments in the structure and ideology of the organized labor movement and in industrial relations theory became closely related; so much so, in fact, as to constitute a common program for the future development of collective bargaining. Within the organized labor movement the emergence in unions like the Machinists and the Carpenters of powerful national bureaucracies seeking routinized working relationships with employers confirmed the AFL's evolution from a locally based quasi-syndicalist movement of self-governing trades into a loose confederacy of self-interested organizations. Simultaneously, labor economists worked on refining their sketchy ideas about constitutional government into a comprehensive functionalist theory of cooperative dispute adjustment.

Key AFL officials endorsed this confluence of union practice and industrial relations theory. In 1923, for example, the Federation's executive council declared cooperative collaboration and the rejection of conflict to be the keystone of labor's relations with employers. Two years later William Green called on employers to endorse the establishment between themselves and the unions of "a proper regard for the functional exercise of each within their recognized spheres of jurisdiction."

**The associative state.** Wider trends in the American political economy were creating the sort of environment in which these liberal-labor themes of industrial accommodation and self-government might become the basis for a new mode of labor-capital relations. Between 1890 and 1920 an astonishing efflorescence of collective organization and group activity—corporations, professional organizations and peak associations, reform movements, unions—swept aside nineteenth-century individualism and pointed the course of public life in a new direction. The nation's mode of government, in particular, underwent fundamental alteration as state institutions increasingly sought to accommodate these new nonpublic groups and organizations in the exercise of public power. This trend reached a climax during World War I, when the establishment of functional interdependence between public and private bureaucracies came to be regarded as the very sine qua non of a successful mobilization policy.

Proponents of collective bargaining applauded the emergence of this "associative state" and looked forward to the acceptance of labor unions into the company of policy-making institutions. But in fact organized labor's role in the American political economy remained marginal. The Wilson administration, it is true, treated the AFL as the effectual wartime spokesman for the "labor" segment of American society in wartime manpower and dispute-adjustment matters, but the fruits of coop-

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eration were soon forgotten in the savage labor-management conflicts of 1919–20. Even those employers ready at war’s end to admit that some kind of continuing employer-employee relations might be desirable were overwhelmingly hostile toward the AFL and almost invariably chose to experiment with nonunion institutional forms: shop committees, employee representation plans, company unions. Nor were the architects of postwar domestic policy much more forthcoming, preferring to leave employers free to “reestablish an intimate relationship” with their employees unencumbered by guarantees to the unions. Any lingering thoughts of policy innovations to encourage peacetime collective bargaining that they might have entertained were “regulated . . . to the periphery of national politics” after 1922 by the return of prosperity.

Development
The onset of the Depression decisively altered the context of labor relations policy making. First, economic collapse comprehensively disrupted industry’s existing labor policies. Second, as the crisis deepened it focused congressional attention more and more on the question of the distribution of national income. These circumstances offered proponents of collective bargaining new opportunities to seek legislative support. The result was a string of innovations endorsing collective bargaining and the right to organize: the Norris-LaGuardia Anti-injunction Act (1932); section 7(a) of the National Industrial Recovery Act (1933); Senator Robert F. Wagner’s unsuccessful Labor Disputes bill (1934); and finally, in 1935, Wagner’s National Labor Relations Act.

The legislation passed during the early stages of the burgeoning reform movement broadly embodied the liberal-labor consensus on union-employer collaboration that had been gathering force over the previous quarter-century. Before this consensus could become a viable foundation for labor-capital relations, however, its proponents had first to persuade employers to entertain collective bargaining as an acceptable “associational” activity. The refusal of employers to do so undermined the authority of the liberal-labor consensus and stimulated the emergence from within the embryonic federal labor relations bureaucracy of an alternative and less accommodative approach to labor law reform predicated upon a radical expansion of the state’s legal authority and administrative capacities in the labor relations arena and an uncompromising enforcement of workers’ civil rights of collective organization and representation. By early 1935 a contest for final authority to define the precise direction of labor relations policy was under way within Wagner’s reform coalition between advocates of these two approaches.

Early initiatives. The early rounds of the labor law reform campaign were clearly dominated (on the reform side) by advocates of the liberal-labor position. Their premises are easily stated. The public interest lay in the stabilization of wages, hours, and working conditions in industry at large. In the first instance this required the resolution of “problems of economic control and government,” that is, terms and conditions of employment, arising within each particular enterprise. Reform should thus be aimed at the establishment of mecha-

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17On the maturation of this consensus, see David Brody, “On the Failure of U.S. Radical Politics: A Farmer-Labor Analysis,” Industrial Relations, Vol. 22, No. 3 (Spring 1983), pp. 152–57. However, see also Steve Fraser, “From the New Unionism to the New Deal,” Labor History, Vol. 25, No. 3 (Summer 1984), pp. 405–30, describing the partial displacement of the AFL’s voluntarism from the center of the liberal-labor trajectory by a newer proto-Keynesian impulse centered on the Amalgamated Clothing Workers. It is not unlikely that further exploration will reveal considerable symmetry in the relationship between Fraser’s proto-Keynesians and the pluralist impulse in labor relations law. On this topic in the postwar period, see Stone, “Post-War Paradigm,” pp. 1509–80.
nisms to facilitate joint determination and extend it to new areas of the economy. State intervention in the *substance* of the parties’ relationship, however, should be avoided. Collective bargaining should remain a self-effectuating private process.

The voluntarism of these early reform initiatives struck a chord in a Congress still under the influence of the associative ideology of the New Era. As Charles O. Gregory wrote many years ago of the passage of the Norris-LaGuardia Act in 1932, “It is as if Congress had said in this act: ’... We have instructed the judges to withhold the use of the injunction against your self-help coercive activities. ... From now on it is up to you union people to promote your own economic activities, as you see them, within the area of conflict we have defined.’”

The National Industrial Recovery Act, approved the following year, represented in large part a further endorsement of the same approach. Unlike the Norris-LaGuardia Act, however, the Recovery Act delegated substantial legislative authority to the private sector to plan output, prices, wages, and hours. This precipitated bitter conflicts between unions and employers over where the frontiers of associational involvement in the planning process should lie.

To the AFL the endorsement of collective bargaining in section 7(a) of the Recovery Act underlined the legitimacy of union participation in policy making and implementation. Representation, code formulation, and code administration were to be matters for decision by the peak organizations of capital and labor in place on each side of industry. These would function in their own right in partnership with the government as regulators of both organized and previously unorganized areas of industry.

Employers and Recovery Administration officials denied, however, that the act’s guarantees required them to countenance any role for joint determination within the recovery program. In their eyes the industrial order that the act was designed to procure was predicated on cooperation among employers, not cooperation between employers and unions. This impasse meant a rapid escalation in industrial unrest, prompting calls in and out of Congress for the creation of dispute-resolving mechanisms. On August 5, 1933, Roosevelt established the National Labor Board, an ad hoc bipartisan body chaired by Senator Wagner, and gave it the task of addressing disputes over employee representation and other controversies impeding achievement of the act’s purposes.

The half-year following the establishment of the National Labor Board was a period of considerable importance in the further development of the reform impulse. Initially the Board approached conflicts between employees claiming section 7(a) rights and employers refusing to acknowledge them with the methods and ideology of private dispute adjustment, primarily mediation. Its choice of this strategy was hardly surprising, for at this stage it was dominated by the liberal-labor allies of the 1920s, with AFL leaders sitting on the Board and William Leiserson serving as its chief administrative officer. But mediation proved increasingly incapable of coping with determined employer opposition.

Two important developments followed. Leiserson left to join the Petroleum Labor Policy Board and, largely at the instigation of General Counsel Milton Handler, the NLB moved to abandon adjustment of 7(a) disputes in favor of establishing representation and collective bargaining as rights to be enforced. Handler was successful in obtaining an executive order to this effect from the president in February 1934. Simultaneously a “Labor Disputes” bill giving statutory authorization to the new approach was drawn up by the Board’s tiny legal staff under the direction of Senator Wagner’s assistant, Leon Keyserling.

The Labor Disputes bill. The move away from adjustment of 7(a) disputes to enforcement of 7(a) rights was of major

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20 Administrative Principles of the American Federation of Labor in Dealings Under the National Industrial Recovery Act” (June 8, 1933), in *AFL Records*, reel 57.

importance to the development of federal labor relations policy. Initially Wagner tied the move to the requirements of the recovery program, particularly to the importance of creating a balance of power within the associative state. "The keynote of the recovery program is organization and cooperation," he said on introducing the Labor Disputes bill. "Employers are allowed to unite in trade associations in order to pool their information and experience and make a concerted drive upon the problems of modern industrialism. If properly directed this united strength will result in unalloyed good to the nation. But it is fraught with great danger to workers and consumers if it is not counterbalanced by the equal organization and equal bargaining power of employees. Such equality is the central need of the economic world today. It is necessary to ensure a wise distribution of wealth between management and labor, to maintain a full flow of purchasing power, and to prevent recurrent depressions."2

No matter how instrumental the rationale, however, a policy of enforcing rights still required its proponents to define what the rights which they proposed to enforce—the rights to representation and collective bargaining—actually meant. It was here that major differences were to emerge within the reform consensus.

To the AFL, the character of representation and collective bargaining was determined by its own jurisdictional structure and by the bargaining strategies of its member unions. In practical terms the right to representation and collective bargaining meant the right of a particular worker to join the union to which the federation had assigned jurisdiction over his job. The assignments themselves were based on a complex web of considerations internal to the organized labor movement: custom, bargaining history, and, above all, the distribution of power within the federation. Each affiliate was well aware of the precise extent of its jurisdictional "property" rights; each was perennially insistent upon its right to represent whatever workers occupied those particular jobs.

This interpretation of representation rights was shared by the unions' pluralist allies. Leiserson, for example, advised Wagner that his Labor Disputes bill should specify explicitly that employers bargain with "the labor organizations of [their] employees" through the officers "duly designated" by those labor organizations.23 To the pluralists, as to the unions, exercising one's right to representation meant no more than enlisting the appropriate union to bargain on one's behalf. The real goal was the joint agreement, whereby relations between the two sides of industry would be institutionalized in a system of countervailing power, and industrial peace ensured.

The bill's attempts to enforce section 7(a), however, were susceptible to a different interpretation, one that treated the designation of representatives not simply as a means to legitimize accommodations arrived at between union and employer but rather as an expression by employees of a much broader civil right of participation in industrial government.24 Thus, the original draft of the bill as introduced in the Senate stated in section 4 that employees "shall have the right to organize and join labor organizations or otherwise, for the purposes of organizing and bargaining collectively through representatives of their own choosing, or for other purposes of mutual aid or protection."25 Advo-

cating the bill's passage, NLB member Francis Haas adverted to "the inherent rights which all possess to participate in making regulations to govern them." The rights the bill sought to protect were rights given by nature, indistinguishable from the rights which "our Federal and State constitutions declare that [workers] may exercise . . . to elect their representatives in Government, whether local or national."

Seen from this perspective, the bill presented the prospect of using the power of the state to create an entirely new presence, a citizenry of employees, in industry. Rather than a procedural means to an essentially limited end—the "cooperative marketing" of labor through the negotiation of stabilizing collective agreements—the rights of employees to representation and organization were treated in the bill as ends in themselves. They were "fundamental rights," the unobstructed exercise of which comprised a non-negotiable prerequisite for "frank and friendly relations in industry."

Here, inconclusively, matters rested. Wagner was unable to marshal sufficient congressional support to overcome the opposition of employers, and the Labor Disputes bill was shelved in favor of a substitute "Industrial Adjustments Bill," introduced by Senate Labor Committee chairman David Walsh. Subsequently the Walsh bill was also discarded. Nevertheless, the debate over the Labor Disputes bill had been of considerable significance. First, it had revealed to all proponents of collective bargaining the depth of opposition among employers to labor reform proposals of any sort; this convinced Wagner that meaningful reforms could never be achieved through compromise. Second, the debate had suggested the existence of significant differences of emphasis and interpretation within the ranks of the coalition supporting labor law reform.

These differences grew firmer over the next six months. By the end of 1934 they had matured into two distinct programs for labor law reform, one focusing upon the strengthening of existing private institutions and the creation of mechanisms to encourage their interaction, the other geared to the protection of workers' civil rights and to the production of a transformed institutional order in industry.

The Wagner Act. The development of two distinct approaches within the reform coalition is relatively easy to trace, because by late 1934, when planning for new legislation began again in earnest, two separate centers of discussion and drafting had appeared. One was in Washington where, coordinated by Leon Keyserling and under the political direction of Senator Wagner, the legal staff of the Garrison Labor Relations Board was engaged in completely rewriting the Labor Disputes bill. The other was in New York, where Edward A. Filene's Twentieth Century Fund had assembled a committee of lawyers, industrial relations experts, economists, social scientists, and progressive employers—William H. Davis (Chairman), the peripatetic Leiserson, Sumner Slichter, Robert S. Lynd, William Chenery, Henry Dennison, and others—to
determine the appropriate role for government in labor relations.

The National Labor Relations Board staff's priorities in rewriting the Labor Disputes bill were clear and unambiguous. "The board wanted Congress to state clearly the obligation of the employer to bargain collectively, endorse and define the principle of majority rule, create a judicial and administrative agency 'wholly independent of any executive branch of the government,' provide for vigorous and prompt enforcement of the board's rulings, grant the board 'the widest scope . . . to permit it to build up a constructive body of labor law,' and apply the legislation to all workers in all industries engaged in interstate commerce." This pointed the board away from associative concepts of the state and the ideology of adjustment among "interests" that informed those concepts. It placed the emphasis in labor relations policy squarely upon expansion of the state's administrative capacity to establish substantive rights and enforce correlative duties.

The priorities of the Twentieth Century Fund Committee contrasted in a number of respects. Whereas the NLRB stressed the enforcement of individual rights, the Fund Committee continued to address itself to expediting the adjustment of group interests. "We are part of a competitive economy in which . . . various groups are struggling for immediate economic advantage. The government should create rules and mechanisms which will guarantee to both parties to the industrial bargain a fair field in negotiations." The committee accepted that those rules and mechanisms should be founded on effective implementation of 7(a), but it tied enforcement specifically to the peaceful adjustment of disputes and the promotion of agreements. As Slichter put it, "What we are trying to get in the report is a public policy. That public policy has two main parts: one is the encouragement of organization and collective bargaining. . . . [The other] is the promotion of industrial peace."

In the same vein, Leiserson argued that simply denouncing the sins of employers and creating a powerful new agency to stamp them out was not a realistic approach to industrial relations. The government should instead concentrate on developing procedures that parties to collective bargaining should be obliged by law to follow. Leiserson proposed that the Committee make a particular point of recommending that "a definite procedure should be laid down which must be gone through before any group may assume the right to strike." The divergence between the positions of the two groups was accentuated by the absence of any sustained contact between

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31 Special Committee on the Role of Government in Labor Relations, Twentieth Century Fund, Minutes of the Third Meeting (January 18, 1935), in Leiserson Papers, Boxes 40-41.
them. Each expressed considerable interest in the work of the other, but little concrete information was exchanged until relatively late in the day; the Fund Committee decided early on that none of its findings should be communicated to anyone until its report and proposals were complete, while for its part the Board group did not provide the Fund with a draft of its bill until the middle of February 1935, three months after the two groups had begun their separate discussions and only five days before Wagner was to introduce the bill in the Senate.

The Twentieth Century Fund Committee's reaction to the Wagner bill, once it had finally seen a copy, is extremely interesting. "It was the consensus of the committee that the Wagner bill was in all probability a bargaining bill. Mr. Dennison expressed the opinion that the committee should not throw their recommendations into the discussion of the Wagner bill, but that they should be released to the public after the Wagner bill had been introduced and the opposition had launched its fight against the bill. The committee's recommendations might then become the basis for a compromise bill." The committee's minutes report "general agreement" with these proposals.\(^3\) Plainly, the committee thought the bill should not pass as it stood.

The Fund Committee underscored its opinion of the Wagner bill by offering amendments during the Senate hearings that diluted the bill's emphasis upon the use of public authority to entrench fundamental employee rights. Acknowledging that employees had a right to freedom of association and self-organization, the committee simultaneously qualified its acknowledgment by arguing that the right should be affirmed insofar as to do so would advance the purposes of peaceful and constructive collective bargaining. "We believe... that it is possible and desirable to go beyond the mere assertion of right and prohibition of interference, in the direction of positive and useful encouragement of collective agreements between management and labor. The organization of workers and their choice of representatives are, after all, only means to an end—the establishment and observance of written agreements."\(^3^4\)

To that end the committee proposed that the act include a "more comprehensive definition of unlawful practices,"\(^3^5\) by which it meant the inclusion of provisions regulating employee and union behavior. It also proposed that the "Federal Labor Commission," which it advocated as a replacement for the NLRB, be empowered to register collective bargaining agreements and enforce compliance with them.\(^3^6\) In addition, the committee's amendments narrowed somewhat the definition of employee rights contained in section 7 of the Wagner bill,\(^3^7\) and opened the door to employer suits against employees and

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\(^3^3\) Twentieth Century Fund Committee, "Recommendations" (February 22, 1935), in Leiserson Papers, Boxes 40-41.

\(^3^4\) Twentieth Century Fund Committee, "Memorandum of Findings and Recommendations" (March 20, 1935), in Leiserson Papers, Boxes 40-41.

\(^3^5\) Ibid. Describing the committee's recommendations to the Senate Committee on Education and Labor, William H. Davis went to some lengths to emphasize that the "Federal Labor Commission," although otherwise modeled on the Federal Trade Commission, would not enjoy any of the initiating or investigatory powers claimed by the latter, but would be confined to rulings on matters brought before it by the parties. *Hearings on S 1958*, pp. 707-9.

\(^3^6\) The Wagner bill reads: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection." In contrast, the Twentieth Century Fund Committee defined employee rights as follows. "The right of the employees to full freedom of association, self-organization, and designation of representatives of their own choosing for collective bargaining with their employers is hereby recognized and affirmed. It shall be the duty of the Commission to foster that right and to encourage collective bargaining."
employee organizations engaging in disputes. The Twentieth Century Fund Committee was wrong, however, in assuming that the Wagner bill could not be enacted as it stood. The failure of the Fund's amendments, moreover, meant that the three-year labor law reform drive had culminated in legislation geared to lawyerly preoccupations with the precise definition and active enforcement of workers' rights and employers' correlative duties rather than to the pluralists' instrumental insistence on legislative prescription of procedures whereby collective contracts might be written, executed, and enforced. As the reconstituted NLRB approached the task of implementing labor relations policy, it tended to accent further those aspects of the act most characteristic of its lawyerly provenance. The result was a mode of administration and an articulation of goals profoundly disturbing to the pluralist element in the reform coalition. Within a few months of the act's passage, Leiserson, for one, could be heard privately expressing his "grave doubts" as to whether members of the new Board could be successful "under the procedure that they have adopted."

Section 10(a) of the Wagner Act reads: "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise." Compare the Twentieth Century Fund Committee's section 10(a): "The Commission is empowered, as hereinafter provided, to issue a cease and desist order to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. The power to issue such cease and desist orders shall be vested exclusively in the Commission: Provided. That nothing in this section shall limit the jurisdiction of the several district courts of the United States, as provided in section 11."

The committee's version would thus have allowed courts to adjudicate unfair labor practice disputes. As we have seen, among the passages on unfair labor practices in the committee's amendments were provisions restraining "anyone" from interfering with an employee's exercise of section 7 rights, and "either party" from "violate[ing] or fail[ing] to observe any condition" of a collective bargaining agreement registered with the Commission.

Conflicts over Policy

Despite the development of two distinct reform strategies within the coalition supporting collective bargaining, there were no open quarrels during the congressional debates. Labor leaders, the nascent federal labor relations bureaucracy, and pluralist industrial relations experts remained sufficiently united to ensure passage of the Wagner Act. Once the new Board moved to implement the act, however, rifts began to emerge. The fault line lay between the established liberal-labor constituency, on the one hand, and the NLRB and its lawyers on the other. The immediate occasion for these strains exploding in conflict was the split within the labor movement between the AFL and the CIO and the controversy which this provoked over the NLRB's exercise of its powers to intervene in representation disputes. Board policy was condemned both by liberal pluralists and by AFL unions as an assault on union custom and practice. In 1938–39, AFL hostility toward the Board peaked in a campaign for legislative curbs on the NLRB's authority.

The appointment of William Leiserson to the NLRB in 1939 added a crucial new dimension to the controversy by providing a focus within the federal labor relations bureaucracy around which critics of the Board's reform strategy could coalesce. It was here that the struggle climaxed with the replacement in November 1940 of the incumbent chairman, J. Warren Madden, by the labor economist and arbitrator Harry A. Millis. Millis's appointment confirmed the defeat of the line followed by the Board during its first five years and marked the ascendancy of the industrial pluralists and the triumph of their paradigm in American labor relations.

The AFL and the NLRB. Compared with the contributions of the Twentieth Century Fund Committee and of the NLRB's legal staff, the role of the AFL in the 1934–35 debates was a minor one. AFL representatives were kept informed of the general nature of the Washington discussions, and the Federation's general counsel, Charlton Ogburn, sat in on some sessions, but the Federation satisfied itself comparatively
early on that the proposed legislation was in its interests, and from then on limited its participation in the policy-making process to attempts to amend the legislation so as to retain a degree of procedural initiative over employment of the act’s sanctions in its own hands. Rejection of its amendments did not appear to weaken the AFL’s overall support for the bill.

Elements within the AFL leadership, however, were always uneasy about particular facets of the bill, notably the sections giving the NLRB final authority over the structure of labor representation. With the development, by mid-1935, of serious challenges to the authority of the incumbent leadership over the allocation of representation rights in mass production industries, assurances were sought that determination of representation questions would not enter the public domain and thus move beyond the incumbent leadership’s control. Once given, these assurances temporarily restored to the legislation the quantum of ambiguity necessary to quiet the AFL’s unease and ensure harmony in the reform coalition. But the question reemerged almost immediately after the act was passed. By the end of the year, prompted by the formation of the minority CIO faction within the Federation and the threat, ultimately realized, of a split, AFL leaders had embarked upon what would become an increasingly bitter campaign to ensure that the Board’s discretion in determining representation would be subordinated to the dictates of official Federation policy.

The main points at issue between the AFL and the NLRB are illustrated in *Shipowners’ Association of the Pacific Coast.* In this case the International Longshoremen’s and Warehousemen’s Union—CIO sought certification as the bargaining representative for all Pacific Coast longshoremen over the opposition of the International Longshoremen’s Association—AFL, which sought recognition as the bargaining representative of longshoremen in four ports in the Pacific Northwest. The Board found that the entire Pacific Coast constituted one bargaining unit and certified the ILWU.

The AFL challenged the Board’s authority to make such a determination on the grounds that the decision deprived the ILA of its “right to engage in business as a labor organization.” According to AFL general counsel Joseph Padway, unions, once recognized, acquired vested interests—property rights—in their contractual relationships with employers that no merely administrative agency could vacate. The AFL accepted that passage of the Wagner Act had made it “a necessary and vital prerequisite or condition of the proper functioning of any labor organization seeking to represent employees for the purpose of collective bargaining” that it first obtain the Board’s certification that the group of employees for whom it sought to bargain was an appropriate group. But, the AFL argued, as long as the union could show that it had the support of a majority of the group it had designated, it was “entitled” to be certified so that it might retain its property rights.

The Board argued differently. First, the right to organize and bargain collectively was not a property right of unions but a civil right of workers. Where challenged, it was to be exercised through administrative action in accordance with statutory prescriptions. Second, a union could have no legal claim to a particular certification. The Board’s “finding of fact” was the only basis upon which assertions of union right might be made, and then only by a union already certified as the designated representative of workers in a unit found by the Board to be appropriate.

Pre-enactment ambiguity gave rise to
conflicts other than that over representation. Union behavior was similarly affected. Section 8 of the Wagner Act, for example, prohibited employers from "dominating or interfering with the formation or administration of any labor organization" and from entering into an exclusive agreement with any organization that was not the certified representative of employees in a collective bargaining unit approved by the Board. The purpose of this provision was to ensure disestablishment of company unions. The Senate Labor Committee report on the Wagner bill had recommended, however, that the provision be interpreted also as prohibiting exclusive agreements made by independent unions that did not represent a majority of the employees concerned. The NLRB's concurrence meant that a collective bargaining technique employed by unions for many years was rendered illegitimate. Henceforth, any employer who signed a closed shop contract without proof that the union in question represented the majority of his workers in an appropriate bargaining unit could be held guilty of improperly assisting a labor organization. Under such circumstances, said the Board, it would "restore the status quo by obliterating the illegal contract."

To the AFL, such policies threatened the entire panoply of collective bargaining practices and union-employer accommodations that it had been trying to develop since 1900. Consequently, in April and May of 1939 its leadership appeared before the House and Senate Labor Committees to press a series of amendments to the Wagner Act designed to force the Board to move toward a more accommodating model of labor relations. These amendments required the Board to grant workers representation in accordance with the jurisdictional structure of their unions; guaranteed unions the opportunity to seek enforcement of the act in independent actions; denied the Board power to intervene in jurisdiction disputes; required it to respect contracts made by bona fide unions on behalf of minority groups of workers pending final determination of a majority representative, even where it found that the employer had been partial; and provided that unions should have unrestricted rights to seek review of Board decisions that affected their interests.

The appointment of Leiserson. The AFL's campaign against the NLRB failed to bring about the substantive limitations on the Board's discretion that the Federation sought. It did, however, alarm the Roosevelt administration. Conscious in the wake of the 1938 elections of waning domestic support, Roosevelt sought to appease the AFL by denying retiring Board member Donald W. Smith reappointment, and put William Leiserson in his place. Already known as a critic of the current Board, Leiserson was under instructions from Roosevelt to “clean up” the NLRB's administration of the act.

Leiserson's appointment precipitated bitter conflicts within the Board, for Leiserson arrived determined to rebuild labor relations law around the private processes of accommodation engaged in by the organized parties. By undertaking to "protect by law the wage earners who cannot by their own strength overcome the oppressions of their employers," Leiserson argued, the Wagner Act had projected public authority into a field already occupied by nonpublic rule-making bodies: unions and employers. For government policy to succeed, the public agency created to administer it should learn from the institutions already established in the field and seek harmony with their environment, not "impose new rules [based] on [its] own notions of reasonableness."
The struggle was played out in the arena of bargaining unit determinations. Here, diametrically opposed views of how an appropriate unit should be determined contested for dominance.

To Leiserson the Wagner Act had been passed to secure stable and responsible collective bargaining. Hence the appropriate unit in any case was that which best afforded the parties an opportunity to develop a stable and responsible bargaining relationship. The best guide to what was appropriate was provided by the parties' own customs and practices. In particular, if the parties had already arrived at a contract, that contract should define the unit. Leiserson repeatedly condemned "units established by Board members on the basis of their own opinions as to appropriateness" in disregard of arrangements already established and functioning. Only units developed in the course of dealings between unions and management could form the basis for "sound labor relations." 51

Leiserson's colleagues rejected his contention that their discretion was limited by private contractual arrangements entered into by the parties. "I do not agree . . . that the Board 'is not authorized by the Act' to find a different bargaining unit from that which has been previously embodied in an exclusive bargaining contract," wrote veteran NLRB member Edwin S. Smith. "I think the past history of collective bargaining in a plant . . . is an important . . . factor in the determination of the appropriate bargaining unit. But I do not believe that the Board is precluded by anything in the Act from finding a different unit to be appropriate." 52

These differing approaches clearly illustrate the major difference of principle separating Leiserson on the one hand from Smith and Madden on the other. Smith and Madden believed that the Wagner Act gave the Board widespread power to protect the self-determination of employees and, crucially, to establish them in bargaining relationships that maximized their opportunity for further substantive self-determination. Leiserson, in contrast, held that the act did not authorize the Board to exercise independent judgment as to the appropriateness of units but only gave it fact-finding powers to, in effect, register and certify whatever units organized labor established in its relations with organized employers. His emphasis upon the determinative influence of the contract further expressed his conviction that the Board's overriding function was to achieve stability, order, and efficiency in collective bargaining and that the proper way to do that was for the Board simply to lend its imprimatur to whatever working arrangements had been established by the parties concerned. 54

51See, for example, Leiserson's opinions in American Can Company, 13 NLRB 1252 (1939), and Milton Bradley Company, 15 NLRB 938 (1939).


The difference, stated in the broadest possible terms, was between a position that took seriously the act's commitment to the achievement of an equality of bargaining power and saw section 9 as the key to that commitment, and a position that held, as William H. Davis put it in his testimony before the Senate Committee on Education and Labor in 1935, that the equality mooted in the act was not an equality of power between employees and employers but an equality of opportunity to be represented in collective bargaining. "You cannot get strong, outright, friendly cooperation, unless you have equal parties on the two sides of the table. By that we mean equally free to represent the people they are there to talk for." Hearings on S 1958, p. 713 (emphasis added). Davis also here expresses the pluralist view that the union is the party principal on the labor side, and that the significance of section 9 resides primarily in its provision of a channel through which employee consent to union decisions might be obtained.
The Board remained in a state of fundamental disagreement on the unit issue throughout the first fifteen months of Leiserson's term. This did not prevent it from making decisions. It was even able to achieve unanimity on many occasions. Nevertheless, its disagreements were more than sufficient to obstruct the further development of the unit policies it had pursued before Leiserson's appointment.\(^55\)

The obstruction was not destined to last. Both Madden and Smith were close to the ends of their terms of office, and in each case renewal was refused. Madden, the first to go, was retired after the 1940 election; his replacement as chairman was an avowed pluralist, the University of Chicago economist and labor arbitrator Harry A. Millis. Smith remained for another year but was rendered powerless by the pluralist axis of Millis and Leiserson. Leiserson was delighted that the conflict of the previous fifteen months had at last been resolved so decisively in his favor. "Now if the President only appoints Ed Witte next August when Smith's appointment expires, then we would have a real Board," he wrote to John R. Commons a week after Millis's appointment had been announced. "You would have all three of the Board members your boys—and you would be sure that the administration of the law was both proper and intelligent."\(^56\)

The Triumph of Industrial Pluralism

The appointment of Harry A. Millis as chairman left the NLRB committed to the achievement of stable collective bargaining relationships as the sole object of federal labor relations policy. Having defined this essentially limited goal as the abiding purpose of the representation of labor envisaged by the Wagner Act, Millis and Leiserson used their majority to ensure that self-activity of workers became focused fully on its realization by entrenching bar-

gaining structures wherever they were established and functioning. This offered incumbents a considerable degree of relief from the insecurities engendered by the unit policies of the Madden Board, and with CIO as well as AFL unions increasingly interested in establishing institutional stability through permanent bargaining relationships with employers, the triumph of an industrial relations paradigm based on entrenched contractual relations was assured.\(^57\)

Commentators writing in the pluralist tradition have, unsurprisingly, denied that any sort of “thermidor” in employee rights accompanied the transition from the Madden Board to the Millis Board. Millis himself represented the changes he helped to institute as little more than a logical and largely complementary extension of the Madden Board's policies. The Madden Board, he wrote, had established “the major outlines of the application of the law.” Its successor’s task had been to tidy up the loose ends: “to improve administration, in the interest of prompt, efficient and economical handling of cases, and to increase the emphasis upon good and workable industrial relations practices, which had to some degree been lost sight of in the tendency to legalistic emphasis in the first five years.”\(^58\)

Subsequent writers have followed the same track, ignoring the differences within the original reform coalition and minimizing the ideological conflicts over the implementation of federal policy that dominated the Board's first five years. This is typified in Philip Selznick's insistence that the Wagner Act was a “celebration of voluntarism and bargaining,” which was “in spirit akin to traditional contract law in that its chief aim was to facilitate private transactions and arrangements.” According to Selznick, the act's contribution began and ended at

\(^55\)See, for example, Edwin Smith's comments on the course of Board policy since Leiserson's appointment contained in his dissent to the majority decision in Libbey-Owens-Ford Glass Company, 31 NLRB 243 (1941).

\(^56\)Leiserson to John R. Commons (November 22, 1940), in Leiserson Papers, Box 9.


"creating the conditions for bargaining and formalized agreement.

Pluralist writers like Millis and Selznick correctly describe what has become the role of American labor relations law. As we have seen, however, it is questionable whether their description proceeds from assumptions about the function and goals of labor relations law consistent with those embraced by the Wagner Act's mentors and early administrators. The ideology of industrial pluralism, I would argue, was not inscribed in the Wagner Act from the outset, nor was its hegemony necessarily what the act's architects intended. Rather, pluralist hegemony came about only after bitter conflicts over labor relations policy had undermined "debate in terms of legal and natural rights" in favor of "recognition of the necessity of 'give and take'" in industrial relations. Only then did labor relations law begin to proliferate administrative innovations safeguarding incumbents and circumscribing collective activity. Only then did it become apparent that in the service of that "give and take" the values of free choice and self-determination—values that, it had once been claimed, would make the Wagner Act the symbol of a new age—would, where necessary, be allowed to fall by the wayside.
