Employee Rights and Employment Policy Journal

Volume 27 | Number 1 Article 1

5-1-2024

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Cover Page Footnote

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Whither the Wagner Act: On the Waning View of Labor Law and Leviathan

By: Brandon R. Magner*

Abstract

The National Labor Relations Act's (NLRA) well-documented weaknesses in substance and enforcement, combined with legislators' inability to adapt the Act to the modern economy, have understandably created many cynics in the field of labor law. For several decades, legal scholars have almost unanimously derided the NLRA and the agency which administers it, the National Labor Relations Board (NLRB), for failing to prevent rampant anti-union conduct by employers and the collapse of the union formation process through the Board's election machinery. This "ossification" of the law, as it has come to be known, is considered to be a key contributor to the United States' private-sector unionization rate declining from its mid-century high of 35 percent to a mere six percent in recent years. While most scholars have generally lamented the diminishing relevance of the NLRA or the squandering of its transformational potential, others have questioned the labor movement's preoccupation with obtaining favorable federal legislation. This clustering of academics and activists are skeptical not only of unions' current reliance on the state for assistance in reversing its fortunes, but of the very decision of New Deal-era politicians to pass the NLRA amidst the high point of worker insurgency and radical organizing in the 1930s.

This Article seeks to correct this narrative. It argues that Senator Robert Wagner was justified in crafting a national

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labor policy from the barbaric conditions which accompanied pre-New Deal union organizing. Wagner's crusade to convert the state from an impediment to a facilitator of collective bargaining was "the most dramatic statutory assault on corporate prerogatives in American history," and it represents the rare instance where a political elite pursued an ambitious economic agenda on behalf of labor and succeeded in the teeth of ferocious internal and industrial opposition. Although this Article takes no position on any recommended path forward, the story of the NLRA's creation and an examination of the NLRB's early history casts significant doubt on any theory of union growth that treats the state as a uniformly enervating force on the American labor movement.

I. INTRODUCTION

On January 3, 2023, the 117th Congress convened for the final time. As it relinquished its powers to a new slate of legislators, it took with it the last chance at labor law reform for the foreseeable future. The Protecting the Right to Organize (PRO) Act,[1] a comprehensive and manifestly pro-union set of proposed amendments[2] to the National Labor Relations Act (NLRA),[3] had passed the House of Representatives in March 2021 but was never brought to a vote on the Senate floor despite possessing 47 co-sponsors in the chamber.[4] The PRO Act suffered the undignified demise of death-by-filibuster, a fate invoked officially or implicitly, joining the boneyard of numerous other attempts at labor reform over the last half-century.[5]

The NLRA's well-documented weaknesses in substance[6] and

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[1] Protecting the Right to Organize Act of 2021, H.R. 842, 117th Cong. (as received by Senate, Mar. 11, 2021).

[2] Andy Levin & Colton Puckett, *Labor Law Reform at a Critical Juncture: The Case for the Protecting the Right to Organize Act*, 59 HARV. J. ON LEGIS. 1, 23–33 (2022).

[3] 29 U.S.C. §§ 151–169 (2018).

[4] *See* Michael J. Lotito & Glenn Spencer, Opinion, *Congressional Democrats Want to Weaponize Federal Labor Law*, WALL ST. J. (Sept. 12, 2021, 4:24 PM), https://www.wsj.com/articles/congressional-democrats-federal-labor-law-pro-act-nlrb-fines-reconciliation-budget-bill-11631471051.

[5] Levin & Puckett, *supra* note 2, at 11–13; *see also* Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1540–41 (2002).

[6] *See generally* JAMES A. GROSS, BROKEN PROMISE: THE SUBVERSION OF U.S. LABOR RELATIONS POLICY, 1947–1994 (1995).

enforcement,[7] combined with legislators' inability to adapt the Act to the modern economy, have understandably created many cynics in the field of labor law. Beginning in the late 1970s, legal scholars have almost unanimously derided the NLRA and the agency which administers it, the National Labor Relations Board (NLRB), for failing to prevent rampant anti-union conduct by employers and the collapse of the union certification process through the Board's election machinery.[8] This "ossification" of the law, as it has come to be known,[9] is considered to be a key contributor to the United States private-sector unionization rate declining from its mid-century high of 35% to a mere 6% in recent years.[10] Some research indicates that it may be the leading cause.[11]

While most scholars have generally lamented the diminishing relevance of the NLRA or the squandering of its transformational potential, [12] others have questioned the labor movement's preoccupation with obtaining favorable federal legislation. This clustering of academics and activists, who I will crudely call the neo-voluntarists, are skeptical not only of unions' current reliance on the state for assistance in reversing its fortunes, but of the very decision of New Deal-era politicians to pass the NLRA amidst the high point of worker insurgency and radical organizing in the 1930s. To these

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[7] Anna Stansbury, *Do US Firms Have an Incentive to Comply with the FLSA and the NLRA?*, 22–30 (Peterson Inst. for Int'l Econ., Working Paper No. 21-9, 2021), https://www.piie.com/publications/working-papers/do-us-firms-have-incentive-comply-flsa-and-nlra (concluding that modern application of the NLRA's remedies is so weak that "it is extremely unlikely that the costs of noncompliance will outweigh the benefits for employers").

[8] Cynthia Estlund, *Reflections on the Declining Prestige of American Labor Law Scholarship*, 23 COMP. LAB. LAW & POL'Y J. 789, 796–97 (2002).

[9] Estlund, *supra* note 5.

[10] Taylor Johnston, *The U.S. Labor Movement is Popular, Prominent, and Also Shrinking*, N.Y. TIMES (Jan. 25, 2022), https://www.nytimes.com/interactive/2022/01/25/business/unions-amazon-starbucks.html.

[11] LAWRENCE MISHEL, LYNN RHINEHART & LANE WINDHAM, EXPLAINING THE EROSION OF PRIVATE-SECTOR UNIONS: HOW CORPORATE PRACTICES AND LEGAL CHANGES HAVE UNDERCUT THE ABILITY OF WORKERS TO ORGANIZE AND BARGAIN 45 (Econ. Pol'y Inst. Nov. 18, 2020), https://files.epi.org/pdf/215908.pdf (concluding that "[t]he sharp decline of union representation and new union members in the 1970s" was mostly the result of "a combination of employer tactics and weaknesses in the law").

[12] *See generally* Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941*, 62 MINN. L. REV. 265 (1978).

commentators, the NLRA represented a deliberate attempt by government officials to "constrain, limit, and control the increasingly militant labor movement," by which political and economic elites successfully diffused any latent challenges to the capitalist system of production and channeled unions' energies into a bureaucratic and legalistic regime of regulation.[13] In this telling, the purported rights and protections provided under the Wagner Act—as the NLRA was commonly known before its post-war amendments, named after its intellectual architect Senator Robert F. Wagner—constitute an original sin of sorts that labor has never atoned for. By substituting the NLRB's administrative apparati for solidarity-generating strike tactics, then, "what the [S]tate offered workers and their organizations was ultimately no more than the opportunity to participate in the construction of their own subordination."[14]

A thorough explication of the neo-voluntarist theory of industrial relations first surfaced in Christopher Tomlins's pathbreaking 1985 book *The State and the Unions*,[15] which departed from more Wagner-sympathetic appraisals put forth by fellow scholars in the nascent Critical Legal Studies movement.[16] The theory was articulated and defended most forcefully by political scientist Michael Goldfield in his classic 1989[17] and 1990[18] articles exploring the passage and effects of the Wagner Act. Specifically, the theory that concessions can only be extracted from the state through intense and radical strike activity—but that those concessions, when coming in the form of regulatory legislation, are intrinsically designed to subordinate labor to the state—has settled as unquestionable wisdom for many on the intellectual left.

In 2017, Joseph McCartin observed that "evaluations of the Wagner Act have been influenced by the historical vantage point from

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[13] Michael Goldfield, *Worker Insurgency, Radical Organization, and New Deal Labor Legislation*, 83 AM. POL. SCI. REV. 1257, 1274 (1989).

[14] CHRISTOPHER L. TOMLINS, THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880–1960 327 (1985).

[15] *Id.*

[16] *See* JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW (1983); Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509 (1981); Klare, *supra* note 12. For a concise overview of the development of scholarship on the relationship of labor and the state, see MELVYN DUBOFSKY, THE STATE AND LABOR IN MODERN AMERICA xi–xviii (1994).

[17] Goldfield, *supra* note 13.

[18] Theda Skocpol, Kenneth Finegold & Michael Goldfield, *Explaining New Deal Labor Policy*, 84 AM. POL. SCI. REV. 1297, 1304–12 (1990).

which they have been written."[19] Those evaluations, McCartin found, have generally waxed and waned with the labor movement's varying levels of optimism towards the possibility for legal reform.[20] Whereas scholars have slowly but surely agreed that labor should look for reform outside of the New Deal collective bargaining framework, this shift rarely comes with a denunciation of the Wager Act as originally passed. But while McCartin's history is equal parts eloquent and comprehensive, his assessment that the "rotten at its core" view of the Act that broke through in the 1980s "was not revived and carried forward by a new generation of revisionists" perhaps came prematurely.[21] Tomlins and Goldfield's teachings have been echoed in recent years through the neo-voluntarist writings of Joe Burns,[22] Matthew Dimick,[23] Kim Moody,[24] Charles Post,[25] Charles Romney,[26] and numerous other left thinkers. Goldfield himself has returned to this theme in a 2019 article, castigating any scholars who continue to suggest that New Deal labor legislation had any beneficial effect on workers which they themselves did not create.[27] As Diana Reddy noted in 2021, "the limitations of labor's current legal regime have led to a resurgence in labor's laissez-faire instincts."[28]

It is not necessary to exaggerate the NLRA's largesse or ignore its indisputable flaws to understand that the neo-voluntarist school relies upon a blinkered reading of history. The radical

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[19] Joseph A. McCartin, *"As Long as There Survives": Contemplating the Wagner Act After Eighty Years*, 14 LAB. HIST. 21, 24 (2017).

[20] *Id.*

[21] *Id.* at 29, 30.

[22] *See* Joe Burns, *Against the Law*, JACOBIN (Feb. 17, 2016), https://jacobin.com/2016/

02/antonin-scalia-death-friedrichs-labor-union-right-to-work.

[23] Matthew Dimick, *Counterfeit Liberty*, 3 CATALYST 47 (2019).

[24] Kim Moody, *Worker Insurgency and the New Deal: The Inevitability of Hindsight*, TEMPEST (Dec. 20, 2022), https://www.tempestmag.org/2022/12/worker-insurgency-and-the-new-deal/.

[25] Charlie Post, *Labor Law Reform and Class Struggle: Myths and Realities*, TEMPEST (June 9, 2021), https://www.tempestmag.org/2021/06/labor-law-reform-and-class-struggle/.

[26] CHARLES W. ROMNEY, RIGHTS DELAYED: THE AMERICAN STATE AND THE DEFEAT OF PROGRESSIVE UNIONS, 1935–1950 (2016).

[27] Michael Goldfield & Cody R. Melcher, *The Myth of Section 7(a): Worker Militancy, Progressive Labor Legislation, and the Coal Miners*, 16 LAB. 49 (2019).

[28] Diana S. Reddy, *"There Is No Such Thing as an Illegal Strike": Reconceptualizing the Strike in Law and Political Economy*, 130 YALE L.J. FORUM 421, 458 (2021).

reinterpretation of the NLRA's origins (1) dilutes Wagner's role and intent in drafting his legislation; (2) overstates the connection between U.S. strike actions and government concessions as an alternative explanation of the Wagner Act's passage; and (3) freights the voluntarist potential of American labor with weight beyond what the historical foundation can bear. That there existed other pathways for unions which did not involve the Act's passage does not suggest that any of them ended in the subordination of the state to an autonomous, militant labor movement which seriously (or even consciously) challenged capitalism. This is not mere determinism; it is a sober examination of the profoundly unique and reactionary environment that characterizes U.S. labor relations.

This Article seeks to correct a narrative that has indulged to the point of excess. It argues that Wagner was justified in crafting a national labor policy from the barbaric conditions which accompanied pre-New Deal union organizing. Whether deemed radical, revolutionary, or simply reformist, Wagner's crusade to convert the state from an impediment to a facilitator of collective bargaining was "the most dramatic statutory assault on corporate prerogatives in American history,"[29] and it represents the rare instance where a political elite pursued an ambitious economic agenda on behalf of labor and succeeded in the teeth of ferocious internal and industrial opposition. This debate especially matters in the context of the labor movement's continuous failures to amend the NLRA and the temptations which may emerge to abandon these efforts entirely, as well as renewed constitutional campaigns by employers to cripple the Act. While Wagner's victory should have little bearing on the substance or merits of modern reform proposals, and this Article takes no position on any recommended path forward for the law, the story of the NLRA's creation and an examination of the NLRB's early history casts significant doubt on any theory of union growth that treats the state as a uniformly enervating force on the American labor movement.

Part II of this Article reviews the history surrounding the writing and passage of the Wagner Act and finds little reason to doubt the traditional explanation that the law was intended to empower the labor movement without condition. Part III questions the popular alternative theory of strikes-as-lawmaking for its inability to explain hostile federal reaction to labor militance which preceded and followed the Wagner Act. Part IV critically examines proposals for the

[29] Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379, 1397 (1993).

American labor movement to return to its voluntarist roots in light of unions' historical inability to organize without favorable state intervention. Part V concludes the Article by reconsidering the context of major labor defeats—using the United Auto Workers' multi-strike struggle against Caterpillar, Inc. throughout the 1990s as an example—in a world where unions again possessed no state-sanctioned right to organize or collectively bargain.

II. THE REPRESSIVE INTENT OF THE WAGNER ACT[30]

A. The Debates Over the Wagner Act's Passage

By any measure, the Wagner Act was a transformative piece of legislation with regards to employer sovereignty in the workplace. The Act prohibited the vast majority of private-sector employers from interfering with their employees' attempts to unionize, from retaliating against employees based upon their union affiliation, and from refusing to recognize or bargain in good faith with their employees' collective representative. Prior to the Act's passage, this behavior had either been encouraged, accepted, or at least not seriously opposed by federal law. The Act further explicitly protected the right to strike, encouraged collective bargaining as official policy of the federal government, and subjected employers to a compulsory government schema of union certification. Most strikingly, the Act was unabashedly one-sided in its design and application. None of its proscribed unfair labor practices applied to unions; such restrictions only emerged through later amendments intended to weaken the labor movement and, correspondingly, the potency of the new legal regime.[31] The Act thus unambiguously conferred new legal rights upon unions without depriving them of anything in return.[32]

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[30] At the outset, the author is sensitive to Melvyn Dubofsky's frustration with lawyers who mistake legal briefing for serious historical work. Melvyn Dubofsky, *Book Reviews*, LAW & HIST. REV. 467, 471 (1986) (reviewing TOMLINS, *supra* note 14). This Article does not pretend to be something it is not; it is an argument based upon facts established by others, not an addition to the historical record. Moreover, the author is content to rely upon Dubofsky's own interpretations of twentieth-century labor history, which inspire many of the arguments made in this Article. *See* DUBOFSKY, *supra* note 16.

[31] For the seminal analysis of the Wagner Act and its first major legislative amendments, see HARRY A. MILLIS & EMILY CLARK BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY: A STUDY OF NATIONAL LABOR POLICY AND LABOR RELATIONS (1950).

[32] Some commentators have argued that because the NLRA's election machinery

The question of Congress's intent in writing, promoting, and ultimately passing this unprecedented economic and legal accommodation to unions has long vexed historians, political scientists, and labor scholars of all stripes. While Dimick has argued that inquiries into the Act's passage should be secondary to its impact upon the labor movement, he goes too far in asserting that interest in the former amounts to a "sideshow."[33] As Goldfield once aptly stated, "[t]hese debates raise important issues of wide interest, including fundamental questions of U.S. politics, the nature of the modern state, and basic problems of social science methodology."[34] After all, "if one wants to examine how groups, classes, parties, state capacities, organizations, and structures influence fundamental issues of public policy and especially whether labor militancy, social movements, and radical organization are important to consider, the passage of the NLRA is a reasonably good place to start."[35] In that vein, if the historical evidence indicates that the Wagner Act was not, in fact, designed with the intent to "constrain, limit, and control" unions, the neo-voluntarist view of American labor relations is greatly undermined in at least one important respect.[36]

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largely replaced recognition strikes as twentieth-century unions' chief method of organizing, the Act effectively diminished union's ability to engage in radical, collective action and made them an "acceptable but junior partner" in national labor policy. *See, e.g.*, Nate Holdren, *The National Labor Relations Act is Anti-Strike Legislation*, ORGANIZING WORK (Aug. 3, 2023), https://organizing.work/2023/08/the-national-labor-relations-act-is-anti-strike-legislation/. This argument is buttressed by the fact that the NLRB held at least some recognition strikes to be unprotected even before the Taft-Hartley Act strictly circumscribed their usage. TOMLINS, *supra* note 14, at 267–72. However, it should be noted that even if recognition strikes were not sanctioned by the Wagner Act's later administrators, these strikes did not enjoy any legal protection prior to the Act's passage that would have prevented employers from discharging employees who engaged in them. Thus, the Act did not deprive unions of anything they originally possessed without the state's intervention, and unions which preferred to utilize this route of organization over the Board's certification procedures remained free to do so prior to 1947. *See generally* Dubofsky, *supra* note 30, at 471–72 (noting "[t]ogether with the Norris-LaGuardia Act, the NLRA liberated unions from most forms of judicial injunction.").

[33] Matthew Dimick, *The Wagner Act: Causes and Consequences*, ORGANIZING WORK (Aug. 19, 2022), https://organizing.work/2022/08/the-wagner-act-causes-and-consequences/.

[34] Goldfield, *supra* note 13, at 1257.

[35] *Id.* at 1258.

[36] Dimick further argues that it is not contradictory for the state to simultaneously seek to "constrain, limit, and control" the labor movement and

Aside from discrete interpretative battles waged through litigation, such as the long-running dialogue between the Board, the courts, and the legal academy over what the duty to bargain entailed,[37] little debate was had over the social and economic aims of the Wagner Act during the first several decades of its existence. The consensus espoused by the so-called "industrial pluralist" school of labor experts that is said to have dominated the post-war application of the Act hailed it for erecting standards of self-government by employers and unions through the arena of collective bargaining.[38] Pundits largely took the NLRA at its word, looking to its stated objectives of equalizing bargaining power in the contractual employment relationship.[39]

An inflection point came in the 1980s. Theda Skocpol opened the decade with her tentpole article on the state autonomy theory, which posits that the state is capable of acting independent of capitalistic interests or those of any dominant social class.[40] In responding to what she dubbed "neo-Marxist" conceptions of the New Deal, Skocpol took aim at corporate-cat's-paw assessments of 1930s reforms by pointing to the Wagner Act as an obvious rebuttal. Skocpol's argument was devilishly simple: if employers uniformly opposed the Act at every step of the process and exhibited no influence over Wagner during its drafting, as every recounting of the period has made clear, how could the law have been devised to serve their interests?[41] More ambitiously, Skocpol argued that because the "U.S. industrial working class of the 1930s was not strong enough either to force concessions through economic disruption alone or to impose a

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increase its bargaining power. Dimick, *supra* note 33. Even if Dimick is correct, as this Part will make clear, I do not believe this accurately describes the Wagner Act's intent.

[37] *See, e.g.*, Archibald Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401 (1958).

[38] Stone, *supra* note 16, at 1513–17. For an analysis that is skeptical of the industrial pluralists' influence, see Jean-Christian Vinel, *The Other Side of Industrial Pluralism: William Leiserson, Harry Millis, Paul Herzog and the Quest for an 'Employment Democracy,' 1939–47*, 48 LAB. HIST. 1 (2007). For an analysis that rejects the concept of industrial pluralism altogether, see Matthew W. Finkin, *Revisionism in Labor Law*, 43 MD. L. REV. 23, 54–84 (1984).

[39] Jean-Christian Vinel, *Christopher Tomlins'* The State and the Unions *Today: What the Critical Synthesis Can Teach Us Now that the Unions Have Gone*, 54 LAB. HIST. 177, 178–79 (2013).

[40] Theda Skocpol, *Political Response to Capitalist Crisis: Neo-Marxist Theories of the State and the Case of the New Deal*, 10 POL. & SOC'Y 155 (1980).

[41] *Id.* at 166–69.

comprehensive recovery program through the national political process," class-struggle theories of an unwittingly capitalist-serving state could not explain the Wagner Act's passage.[42] In Skocpol's eyes, "it cannot be plausibly argued that [the 1933-34] strikes directly produced" the legislation that materialized in 1935.[43]

While Skocpol's article immediately found purchase in social science circles, it debuted at a time where labor and its supporters had grown increasingly disillusioned with the law. Deindustrialization was shredding millions of jobs in unions' core manufacturing strongholds, and the NLRA was interpreted by courts and conservative Board members to provide employees little relief against capital mobility.[44] The Critical Legal Studies view of labor law was ascendant, and even mainstream scholars had concluded that the Act as constructed could no longer prevent the most basic and flagrant violations. [45] Union leadership was perhaps most scathing in its survey of the 1980s legal landscape. Lane Kirkland, the president of the AFL-CIO, speculated that the labor movement would benefit from repeal of the NLRA and a reinstatement of the "law of the jungle,"[46] and future federation president Richard Trumka provocatively declared that after fifty years, the NLRB was now a "gulag" for labor's interests.[47]

It is thus not surprising that before the decade ended, a challenge had emerged to Skocpol's thesis from labor spheres. In his 1989 article, *Worker Insurgency, Radical Organization, and New Deal Labor Legislation*,[48] Goldfield lambasted Skocpol for reducing and even ignoring the effect of the 1930s strike wave on the motivations of New Deal legislators. Goldfield assembled several quotes from politicians which indicated they were aware of the growing number

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[42] *Id.* at 189.

[43] *Id.* at 187.

[44] *See, e.g.*, First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666 (1981) (freeing employers of duty to bargain over most partial closing decisions); Milwaukee Spring Div. of Illinois Coil Spring Co., 268 N.L.R.B. 601 (1984) (employer's midterm relocation of bargaining-unit work is permissible so long as its collective bargaining agreement does not expressly restrict its right to do so and decision is free of animus).

[45] *See, e.g.*, Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization under the NLRA*, 96 HARV. L. REV. 1769 (1983).

[46] Cathy Trost & Leonard M. Apcar, *AFL-CIO Chief Calls Labor Laws a 'Dead Letter,'* WALL ST. J. (Aug. 16, 1984), ProQuest, Doc. ID 397981921.

[47] Richard L. Trumka, *Why Labor Law Has Failed*, 89 W. VA. L. REV. 871, 881 (1987).

[48] Goldfield, *supra* note 13.

and the radical orientation of strikes in recent years and that they viewed the Act as a necessary measure to stanch this uprising, both through creating a regulatory structure to safely funnel worker discontent and in empowering existing American Federation of Labor (AFL) unions as a bulwark against militant factions.[49] These statements, ubiquitous in the Wagner Act's legislative history, demonstrated that the Act's passage "was a direct result of the broad labor upsurge, conflicts within the labor movement, and the growing influence of radicalism."[50] Goldfield also took umbrage with Skocpol's rather cursory declaration of the Wagner Act's subsequent influence on union growth between 1935 and 1938, noting that most gains in this period were made before the law was upheld as constitutional by the Supreme Court in April 1937; prior to this, the NLRB was barely even operational against employers' widespread noncompliance.[51] Goldfield was further unwilling to grant the NLRA even a *symbolic* role in the membership boom, as the two pivotal organizing campaigns of the era, the sit-down strike campaign at General Motors and the voluntary recognition agreement procured from U.S. Steel, were conducted outside of the NLRB's oversight.[52]

In consideration of the important historical questions at issue (and, perhaps, acknowledging the strong challenge posed to Skocpol by Goldfield), the *American Political Science Review* published a brief debate between the two in 1990.[53] Skocpol and her co-author, Kenneth Finegold, writing first, criticized Goldfield for ignoring the actual intent of the Wagner Act's drafters, especially Wagner himself. For example, it made little sense to portray the NLRA as a strikebreaking, AFL-bolstering statute when Wagner explicitly protected and fulsomely defended the right to strike and NLRB policymakers deliberately favored the breakaway Committee for Industrial Organization (later Congress of Industrial Organizations) unions, which were often infused with or even led by the radicals that Goldfield accused the Act of stifling.[54] Skocpol and Finegold offered two political explanations for why the Wagner Act passed in 1935 rather than the more strike-filled climate of the year prior: the 1934

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[49] *Id.* at 1273–77.

[50] *Id.* at 1269.

[51] *Id.* at 1267.

[52] *Id.* at 1267–68. As discussed later in this Article, Goldfield's narrow focus on NLRB election data ignores the full scope of the Board's influence on unions' abilities to obtain recognition and first contracts after 1937. *See infra* Part III.B.

[53] Skocpol, Finegold & Goldfield, *supra* note 18.

[54] *Id.* at 1300, 1303.

midterms saw a marked increase in progressives' margins in Congress, and the Supreme Court's gutting of National Industrial Recovery Act in the *Schechter Poultry* decision [55] left the federal government without any national labor policy.[56]

In response, Goldfield largely sidestepped the difficult question of the drafters' intent and focused on lower-hanging fruit. First, Goldfield claimed that the 1934 election results were in part the product of the intense protest environment, which supported his point about the strikes' influence.[57] Second, he reasoned that the NIRA's invalidation could not have explained the Wagner Act's passage when it had already cleared the Senate in a landslide vote by the time of the Supreme Court's ruling. [58] Third, Goldfield handwaved the 1934 versus 1935 passage point of the Act by stating that "[t]ime lags are a common feature of many social science models." [59] Finally, he hammered home Skocpol and Finegold's mistakes in interpreting post-'35 strike and union membership data as the corollary of (virtually nonexistent) NLRB involvement.[60]

Based purely on the terms of the fight which Goldfield chose to engage, his response reads like a knockout. And there the debate has largely rested. While some later complained that Goldfield's theories have been unjustifiably disregarded in the political science realm, where Skocpol still reigns supreme,[61] the same cannot be said for those who study labor. Goldfield's *Worker Insurgency* article has been favorably cited by leading legal scholars[62] and become a cornerstone

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[55] A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

[56] Skocpol, Finegold & Goldfield, *supra* note 18, at 1300–01.

[57] *Id.* at 1305–07.

[58] *Id.* at 1307–08.

[59] *Id.* at 1309.

[60] *Id.* at 1309–11. In reviewing this debate, one realizes that Dimick is clearly wrong to reduce Goldfield's argument of worker insurgency and the Wagner Act's passage to a mere proximate cause analysis of competing variables. Dimick, *supra* note 33. Goldfield does not suggest that radical militance was simply the match that lit the Wagner Act's campfire; by crediting strikes for politicians' legislative response and even many of their electoral victories in 1934, militance is the match, the oxygen, *and* the wood in Goldfield's equation.

[61] *See* Brian Waddell, *When the Past Is Not Prologue: The Wagner Act Debates and the Limits of American Political Science*, 34 NEW POL. SCI. 338 (2012).

[62] *See* Ahmed White, *Its Own Dubious Battle: The Impossible Defense of an Effective Right to Strike*, 2018 WIS. L. REV. 1065, 1086 n.89; James Gray Pope, *The Thirteenth Amendment versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921–1957*, 102 COLUM. L. REV. 1, 59 n.283 (2002); James B. Atleson, *Law and Union Power: Thoughts on the United States*

analysis on the left when discussing strikes and their relationship with progressive legislation.[63] The takeaway for modern activists is almost always the same:

> Political scientist Michael Goldfield shows in a seminal study that massive unrest and then three major general strikes in 1934—led in part by revolutionary socialist cadres—pushed political and economic elites to choose an ultimately successful strategy of concessions in order to placate, contain, and redirect worker rebellion into less disruptive channels.[64]

Because "mass, disruptive action by the workers tended to push politicians to be more 'sympathetic'," the "legislate first, organize later" strategy draws the wrong lessons from history; "major labor law reforms tend to follow upsurges in union organizing and strike activity, not the other way around."[65] Those who still advocate for state intervention as a means of increasing workers' bargaining power are thus ignoring the forest for the trees. Goldfield is even more forceful on this point in his most recent article on New Deal labor legislation, admonishing any observer who still believes the NLRA was primarily an act of "benevolence" by Wagner or other progressive politicians.[66]

Before signing off on Goldfield's revisionist reading of the NLRA and its origins, we must return to the questions he ignored in his exchange with Skocpol and Finegold. Who wrote the Wagner Act? What were their motives in writing the Act and what did they hope to accomplish? What sort of lobbying was undertaken by the two interest

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and Canada, 42 BUFF. L. REV. 463, 492 n.104 (1994).

[63] *See, e.g.*, Micah Uetricht & Barry Eidlin, *U.S. Union Revitalization and the Missing "Militant Minority,"* 44 LAB. STUD. J. 36, 38 (2019).

[64] Jeremy Gong, *Workplace Organizing Is Still Crucial for the Socialist Movement*, JACOBIN (Nov. 20, 2021), https://jacobin.com/2021/11/workers-labor-strikes-rank-and-file-strategy-dsa-elections.

[65] *Id.*; *see also* Uetricht & Eidlin, *supra* note 63, at 38.

[66] Goldfield & Melcher, *supra* note 27, at 49. This sort of instrumentalist view of New Deal labor law is a common theme in neo-voluntarist scholarship. *See* Christopher Tomlins, *A Call Out of Seir: The Meaning and Future of US Labor Law*, 46 LAW & SOC. INQUIRY 572, 577 (2021) (claiming that "the labor relations system that prevails in the United States is not a consequence of law's failure but, rather, the intended outcome"). Curiously, Tomlins cites Joel Rogers's famous 1990 essay for this proposition, despite Rogers limiting his analysis to the Taft-Hartley amendments to the Wagner Act and explicitly declining to delve into any inquiry of the Act's intent. Joel Rogers, *Divide and Conquer: Further "Reflections on the Distinctive Character of American Labor Laws,"* 1990 WIS. L. REV. 1, 8 nn.24–25.

groups most affected by the Act—private-sector unions and employers—and were they successful in extracting favorable changes to the law? And what did the writers think of the various social forces which have been credited for producing the Act? Only through answering these questions can we reach a satisfactory conclusion as to whether the Wagner Act was truly intended to "constrain, limit, and control" radical elements of the labor movement.

B. Writing the Wagner Act

The story of the Wagner Act's drafting is remarkable for its sheer simplicity. In the fall of 1933, after Section 7(a) of the NIRA had already revealed its impotency in resolving the rising number of recognition-based disputes, Wagner tasked his lone legislative assistant with drafting a comprehensive statute that could protect and enforce unions' rights to organize and collectively bargain.[67] Leon Keyserling, a 25-year-old legal wunderkind, produced a series of drafts between 1933 and 1935 which eventually culminated in what we now know as the Wagner Act.[68]

Keyserling was known as a primary author of the Act not long after its passage.[69] In 1960, amidst celebrations of the Act's twenty-fifth anniversary, he confirmed that he and Wagner were in effect the *only* authors.[70] Aside from consulting with the AFL's general counsel and officials of the non-statutory labor boards that preceded the NLRB, Keyserling wrote the meat of the Act—the structure of the agency, the substance of the unfair labor practices, and the exclusive representation feature of election certifications—in direct collaboration with Wagner,[71] who provided "immediate and constant supervision."[72] As Tomlins has stridently documented, unions had no lobbying success with the bill; none of their proposed amendments

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[67] Kenneth M. Casebeer, *Drafting Wagner's Act: Leon Keyserling and the Precommittee Drafts of the Labor Disputes Act and the National Labor Relations Act*, 11 INDUS. REL. L.J. 73, 73–74 (1989).

[68] *Id.* at 74–75.

[69] *See, e.g.*, IRVING BERNSTEIN, THE NEW DEAL COLLECTIVE BARGAINING POLICY 88 (1950).

[70] Leon H. Keyserling, *The Wagner Act: Its Origin and Current Significance*, 29 GEO. WASH. L. REV. 199, 200–01 (1960).

[71] Kenneth M. Casebeer, *Holder of the Pen: An Interview with Leon Keyserling on Drafting the Wagner Act*, 42 U. MIAMI L. REV. 285, 303, 306–07 (1987).

[72] Keyserling, *supra* note 70, at 200. Keyserling credited Milton Handler, Calvert Magruder, and their respective staffs with contributing greatly to the procedural aspects of the bill. Casebeer, *supra* note 71, at 313.

were adopted by Wagner. Employers, of course, were shut out of the process altogether.[73]

For all intents and purposes, then, the NLRA was the ideological imprint of Wagner's office, and Wagner's office only. While Goldfield frequently points to individual quotes made in committee hearings or on the floors of Congress by other supporters of the bill as evidence of its cumulatively repressive intent,[74] this exercise is particularly inappropriate in the context of the Wagner Act. Kenneth Casebeer, the foremost scholar on the Wagner-Keyserling collaboration, has described why "several variables reduce the usual interpretive leaps" in "attributing too much of the result to the intent of the drafters" of the Wagner Act:

> First, Senator Wagner was an active and powerful legislator with a long background in labor law and policy. Second, the Senator insisted upon keeping control over the drafting process of virtually all legislation that he introduced. Third, particularly in 1935, the anti-New Deal constitutional vision secured by the striking down of the NIRA led many congressmen to acquiesce in the legislation on the belief that the courts would find it invalid. Fourth, the massive Democratic congressional majorities produced in 1934 reduced the need for compromise after the [failed 1934 Labor Dispute Act's] introduction. Fifth, the AFL and organized labor willingly ceded the drafting specifics to Wagner's office, supporting any legitimization of organizing and bargaining.[75]

This "extraordinary degree of control"[76] over the bill exhibited by Wagner's office extended past its introduction in Congress. Despite not possessing membership on either labor committee that held hearings on the bill, Wagner was invited to sit in on and participate in the vast majority of the testimony which was heard throughout the

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[73] TOMLINS, *supra* note 14, at 138–41; *see also* David Plotke, *The Wagner Act, Again: Politics and Labor, 1935-37*, 3 STUD. AM. POL. DEV. 105, 134–35 (1989) ("in a situation in which capital opposed the Wagner Act and labor did not have enough strength to impose it, both the formulation and implementation of the measure were significantly dependent on what occurred within governmental institutions and political discourse.").

[74] Unlike committee reports, individual debate statements have long been considered a largely unreliable form of statutory interpretation. *See* Clarence A. Miller, *The Value of Legislative History of Federal Statutes*, 73 U. PA. L. REV. 158, 167–70 (1925).

[75] Casebeer, *supra* note 67, at 76–77.

[76] *Id.* at 77.

springs of 1934 and 1935.[77] While the hearings were long and arduous, and frequently contentious between Wagner and employer representatives,[78] the bill was reported out of the Senate labor committee with only one substantive revision: the inclusion of an employer's refusal to bargain in good faith as an unfair labor practice, a specification which labor board personnel considered necessary.[79] Keyserling was delegated the unusual task of writing the Senate *and* House committee reports on the bill, assuring that both chambers spoke with the same voice.[80] The floor debates were abbreviated, consisting mostly of unsuccessful attempts to place the independent NLRB under the control of the Department of Labor and "equalize" the bill through the addition of union unfair labor practices by forbidding coercion from "any source," not just that of employers.[81] The bill passed 63 to 12 in the Senate and without even a recorded vote in the House.[82] According to Keyserling, the final product contained only one defect which represented a sobering political compromise: the bill's exclusion of agricultural workers, a political calculation Wagner thought necessary to gain votes from Congress's Southern bloc.[83] The Senator otherwise got everything he wanted.

History thus bears out Keyserling's boast that "the Wagner Act in its final form was shaped by Senator Wagner and me perhaps to the extent that any two people can shape so important a piece of legislation."[84] The NLRA was emphatically not an example of political potpourri; it contained virtually zero logrolling or horse-trading which

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[77] *See To Create a National Labor Board: Hearings on S. 2926 Before the S. Comm. on Educ. and Lab.*, 73d Cong. 18 (1934) [hereinafter *Hearings on S. 2926*], *reprinted in* 1 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 48 (1949) [hereinafter LEGISLATIVE HISTORY] (inviting Wagner to "participate in the questioning" "during the course of these hearings").

[78] The acidic exchange between Wagner and James Emery, General Counsel of the National Association of Manufacturers, represents one such confrontation. *National Labor Relations Board: Hearings on S. 1958 Before the S. Comm. on Educ. and Lab.*, 74th Cong. 866 (1935) [hereinafter *Hearings on S. 1958*], *reprinted in* 2 LEGISLATIVE HISTORY, *supra* note 77, at 2251.

[79] JAMES A. GROSS, THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD 136–40 (1974). Keyserling believed the duty to bargain flowed implicitly from the catch-all language in Section 8(1), but Wagner agreed to incorporate it. Casebeer, *supra* note 71, at 329–30.

[80] Casebeer, *supra* note 71, at 343.

[81] GROSS, *supra* note 79, at 140–42, 145.

[82] *Id.* at 142, 146.

[83] Casebeer, *supra* note 71, at 334.

[84] Keyserling, *supra* note 70, at 201.

may have lopped off protections or tacked on restraints to distort its original objective. While Goldfield claimed that his theories regarding the Act's *passage* are "completely compatible" with Keyserling's account of the Act's *writing*,[85] Goldfield's premise of the Act's intent is undercut by subsuming the motives of its creators within a New Deal coalition that was by and large disinterested or even ignorant in the creation of government policies addressing union recognition and collective bargaining—personified best by President Franklin D. Roosevelt himself, who "never lifted a finger" in support of the Act's passage.[86]

One episode in particular from the Wagner Act's journey to codification demonstrates the dangers in ascribing too much agency to a silent majority. In May 1935, Wagner was summoned to the White House for an emergency meeting with Roosevelt, Senator Pat Harrison, and Senate Majority Leader Joseph Robinson. The NLRA was mere days away from its Senate floor vote, and Harrison and Robinson—apparently convinced that the Act couldn't pass as written—wanted to either persuade Wagner to withdraw his bill or have the President demand that he do so. Wagner refused to capitulate, and Roosevelt remained neutral.[87] The bill passed as scheduled with Robinson and Harrison in the majority.[88] History officially remembers them as "supporters" of the Wagner Act.

Given the inextricable influence of Wagner's office on the contents of the NLRA and the vanishingly little evidence of other actors' impact, we can learn far more about what the law was meant to accomplish by discerning the motives of its authors.

C. The Ideologies of the Wagner Act's Authors

Wagner had solidified his reputation as a genuine friend of labor long before introducing the NLRA in Congress. As the leader of the New York State Senate, Wagner orchestrated the passage of numerous progressive reforms that unions endorsed, including a workmen's compensation law and a raft of employment regulations in the wake of the Triangle Shirtwaist Factory fire.[89] As a judge on the

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[85] Skocpol, Finegold & Goldfield, *supra* note 18, at 1313 n.7.

[86] WILLIAM E. LEUCHTENBERG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL, 1932–40 150 n.23 (1963); Keyserling, *supra* note 70, at 202–03.

[87] GROSS, *supra* note 79, at 140–41.

[88] 79 CONG. REC. 7681 (1935), *reprinted in* 2 LEGISLATIVE HISTORY, *supra* note 77, at 2415.

[89] *See generally* J. JOSEPH HUTHMACHER, SENATOR ROBERT F. WAGNER AND THE

(trial-level) New York State Supreme Court, Wagner issued the first bargaining order in history by granting an injunction against an employer which had breached its collective bargaining agreement with a union.[90] As a lawyer, Wagner spearheaded the first successful challenge to a court's injunction barring a union from organizing workers who had signed yellow-dog contracts with their employer.[91] Wagner served as counsel to the defendant union and recruited fellow legal realists Robert Hale and Herman Oliphant to help write a 480-page brief which served as a hornbook of sorts for future anti-injunction campaigns.[92] As a United States Senator, Wagner fused his disapproval of yellow-dog agreements and judicial injunctions against strikes into playing a starring role in the fight for the Norris-LaGuardia Act, which prohibited federal courts from enforcing either.[93] Wagner was thus sharply attuned to unions' key legal obstacles and willing to expend political capital to remedy them long before the 1930s strike wave.[94]

As a politician possessing unusual degrees of national respect and notoriety, Wagner's public commentary on industrial relations was voluminous. It is not necessary to recount all of his views on the "labor question" of his day where so many other scholars have already distilled them. It is enough that Mark Barenberg, the leading scholar on Wagner and the intent of his labor reform agenda, concluded that Wagner, "[v]irtually alone" among members of Congress, "had an all-consuming commitment to collective bargaining as an integral component of political democracy in the age of mass production."[95] But Wagner's quasi-utopian visions of "industrial democracy," built upon the pillar of labor peace, did not involve unions laying down their economic weapons. While Wagner saw strikes as damaging to the

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RISE OF URBAN LIBERALISM (1968); *see also* Frances B. Jensen, *The Triangle Fire and the Limits of Progressivism* 195, 215–21, 226 (Jan. 1, 1996) (unpublished Ph.D. dissertation, Univ. of Mass. Amherst), *available at* https://scholarworks.umass.edu/cgi/viewcontent.cgi?article=2231&context=dissertations_1.

[90] Schlesinger v. Quinto, 192 N.Y.S. 564 (N.Y. Sup. Ct. 1922).

[91] Interborough Rapid Transit Co. v. Green, 227 N.Y.S. 258 (N.Y. Sup. Ct. 1928).

[92] Barenberg, *supra* note 29, at 1429 n.230.

[93] 29 U.S.C. §§ 101–115 (2018); Barenberg, *supra* note 29, at 1436 n.258 (citing 75 CONG. REC. 4916 (1932)).

[94] In light of this resume, Moody's reference to Wagner as a mere "Tammany Hall Democrat" seems to give him short shrift. Moody, *supra* note 24. For a more nuanced take, see Jensen, *supra* note 89, at 198–202 (detailing Wagner's origin in New York machine politics and his growing interest in workers' welfare).

[95] Barenberg, *supra* note 29, at 1410.

New Deal's recovery efforts and initially prioritized mediation as a deliberate strike-avoidance policy, [96] Wagner quickly became frustrated with employers' maneuvering around or wholesale rejection of Section 7(a) and accepted a more judicial role for his agencies.[97] Moreover, the specific type of strikes that Wagner wished to reduce as a means of national labor policy were those undertaken for recognition—a historically bloody, traumatizing, and largely futile means of organizing.[98] Right or wrong, perceptive or myopic, Wagner viewed strikes waged by extant unions for bargaining leverage as fundamentally different and insisted upon the explicit protection of the right to strike in his legislation. "Wagner was always strong for the right to strike on the ground that without the right to strike, which was labor's ultimate weapon, they really had no other weapon," Keyserling stated. "That guarantee was a part of his thinking."[99]

Whereas Wagner was a committed supporter of capitalism, the man writing most of Wagner's speeches, editorials, and policy briefs during his fight for the NLRA was not. As detailed in Landon Storrs's book on post-war red-baiting, the Keyserling of the mid-1930s was a socialist who viewed his reformist legislative work as contributing to a "chain reaction" of heightened expectations of the populace through which "the power of capitalism is going to be weakened to the point of extinction." [100] Keyserling's private beliefs, expressed in letters written to his father amidst the fight for the doomed Labor Disputes Act in 1934, are that of a young radical:

> I am very much afraid that the country is recovering too rapidly. A few more years of depression would have promoted violence, and without violence fundamental reform is unlikely. . . . [T]here is no chance for lasting gains to either

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[96] GROSS, *supra* note 79, at 15–23.

[97] *Id.* at 53–59; *see also* DUBOFSKY, *supra* note 16, at 119 ("His experiences [as chair of the NLB] had convinced Wagner that few employers would voluntarily concede to employees the right to organize and also that the NLB lacked effective power.").

[98] Casebeer, *supra* note 71, at 291–92, 319; *see also* David M. Rabban, *Has the NLRA Hurt Labor?*, 54 U. CHI. L. REV. 407, 425 (1987) ("the orderly procedures of the NLRA helped unions avoid the often suicidal organizational strikes that had previously crippled them.").

[99] *Id.* at 353; *see also* Casebeer, *supra* note 67, at 83. Wagner was also more wary of intruding on unions' "customary practices" than scholars like Tomlins have given him credit for, epitomized by Wagner's defense of the closed shop. DUBOFSKY, *supra* note 16, at 120.

[100] LANDON R.Y. STORRS, THE SECOND RED SCARE AND THE UNMAKING OF THE NEW DEAL LEFT 162 (2012).

> farmer or laborer save by revolution, and the only materials for revolt are the industrial workers. The farmers in this country show not the slightest sign of class consciousness or the collective spirit. They are all individualists.[101]

To be clear, Keyserling was never a card-carrying Communist Party member, and like many New Deal recruits, his politics moderated with age and ambition.[102] There are also observable contradictions in Keyserling's words and his actions. As Storrs points out, while Keyserling professed to welcome a future of violent revolution, his work in Washington could hardly be called that of an accelerationist.[103] There is certainly no indication that Keyserling believed Wagner's bills would exacerbate American labor relations.

Given the powers of hindsight, perhaps Keyserling can be accused of naïveté for not foreseeing the devitalizing effect that a federal regulatory regime could have on labor radicalism, especially when groups such as the ACLU and Communist Party predicted such outcomes in their rhetorical campaigns against the Wagner Act.[104] But it seems preposterous to claim that the Act was *intentionally* made to subdue the labor movement when its primary author secretly pined for massive unrest and insurgency from the country's industrial workers. If this is not apparent from Keyserling's familial correspondence, it should be made obvious from any objective comparison of the NLRA to competing labor law proposals of the time.

D. The Substance of the Wagner Act

As countless histories of the Wagner Act's origins have described, the contents of the Act were influenced principally by the difficulties the National Labor Board (NLB) and ("first" or "old") National Labor Relations Board experienced in attempting to enforce Section 7(a) of the NIRA between 1933 and 1935.[105] Well known examples of this "education of Senator Wagner"[106] include the duty to bargain

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[101] *Id.* at 160.

[102] Nick French, *The Red Scare Deformed the New Deal by Purging Its Radical Civil Servants*, JACOBIN (Jan. 17, 2023), https://jacobin.com/2023/01/red-scare-anti-communist-new-deal-fdr-radical-civil-servants.

[103] STORRS, *supra* note 100, at 162.

[104] *See* Goldfield, *supra* note 13, at 1274.

[105] Barenberg, *supra* note 29, at 1401–03.

[106] *Id.* at 1401 n.81 (citing Howell Harris, *The Snares of Liberalism? Politicians, Bureaucrats, and the Shaping of the Federal Labour Relations Policy in the United States, ca. 1915-47*, *in* SHOP FLOOR BARGAINING AND THE STATE 166

becoming equated with employers' duty to recognize their employees' designated representative;[107] the concept of exclusive representation emerging from employers' favoring of their company unions to subvert any independent organizations' bargaining efforts; [108] and the consolidation of enforcement powers within the NLRB due to the incompetence or outright hostility exhibited to appeals of board orders by the National Recovery Administration and Department of Justice.[109] Less discussed is Wagner's abandonment of any mediation components which featured prominently in early drafts. [110] This constituted a monumental shift in labor policy, as the federal government was positioned in a strictly prosecutorial (rather than conciliatory) posture when addressing legal violations.

While these lessons seemed self-evident to Wagner's office and the staffs of the predecessor boards, they were not so obvious to others. Alternative proposals for New Deal labor law abounded.[111] A report published by the leading think tank Twentieth Century Fund, for example, championed compulsory federal mediation, included employers' desired "coercion-from-any-source" language, and would have required unions to provide 15-day notice before undertaking strikes.[112] The Department of Labor, which bitterly dueled Wagner for

(Steven Tolliday & Jonathan Zeitlin eds., 1985)).

[107] PHILIP ROSS, THE GOVERNMENT AS A SOURCE OF UNION POWER 78–81 (1965).

[108] GROSS, *supra* note 79, at 89–100, 136.

[109] *Id.* at 122–30, 135.

[110] *See supra* notes 96–97 and accompanying text.

[111] As David Plotke observes, Goldfield "does not seriously consider the range of regulatory measures that might have been passed given the levels of working-class and popular mobilization that existed." DAVID PLOTKE, BUILDING A DEMOCRATIC POLITICAL ORDER: RESHAPING AMERICAN LIBERALISM IN THE 1930S AND 1940S, at 119–20 (1996). "In fact, a number of political possibilities existed, virtually all of them less prolabor than the NLRA." *Id.* at 119. Plotke argues rather abstractly that "[t]he response might have been extended repression, expanded company unions, support for AFL unions and their initiatives in mass production industries, [or] a minimal NLRA and limited recognition of industrial unions." *Id.* A more concrete set of alternative possibilities to the Wagner Act are reflected in the following discussion. *See infra* notes 112–24 and accompanying text.

[112] *Hearings on S. 1958*, *supra* note 77, at 719–23, *reprinted in* 2 LEGISLATIVE HISTORY, *supra* note 77, at 2105–09. Tomlins appears to favorably compare the Fund's legislative proposals to those made by NLRB staff, noting the former's desire to treat representation matters as a form of "adjustment" between workers in which employers would have no formal right to participate. TOMLINS, *supra* note 14, at 136–40.

control of the fledgling agency from start to finish,[113] offered a far narrower vision of permissible union activity vis-à-vis employer conduct. A draft of the bill written by Department lawyer Charles Wyzanski and funneled through Senator David Walsh would have eliminated coverage of the Act for employers with less than ten employees, restricted the lawfulness of the closed shop to only newly organized bargaining units, and significantly limited the definition of company unionism.[114] In an abstract but pivotal battle, Wyzanski failed to confine the Section 1 "preamble"—perceived as critical to the Act's fight for constitutionality—to a mechanical recitation that violations of the Act caused industrial disputes which reduced the flow of commerce.[115] Keyserling prevailed in keeping his tone-setting language regarding the recognition of unequal bargaining power between corporations and workers, the condemnation of employers' prevailing industrial practices towards unionism, and the federal encouragement of collective bargaining and wage redistribution.[116] Both versions called for intervention, but only the latter situated the government as receptive to unions' presence.

Even more obstructive than the Department of Labor to a boldly progressive labor bill was the NRA. Where Frances Perkins only needled Wagner, recovery czar Donald Richberg was abjectly hostile. At the same time that the predecessor boards were carefully teasing out common-law standards for good-faith bargaining, majority rule, and union nondiscrimination from the precepts of Section 7(a),[117] the NRA laid a parallel track of statutory interpretation predicated upon "proportional" representation in the workplace, under which the selection of a majority representative would not prevent employers from bargaining with minority groups of employees or even individual employees.[118] This doctrine meant the de facto legalization of company unions and banning of closed shops in Blue Eagle industries.[119] It is worth considering whether this regime was the

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[113] Keyserling, *supra* note 70, at 203, 207–08; GROSS, *supra* note 79, at 104–08.

[114] S. REP. NO. 1184, 73d Cong., at 23–44, *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 77, at 1085–98. On Wyzanski's authorship of both this "greatly mutilated bill" and the ensuing Public Resolution 44, see Casebeer, *supra* note 71, at 304.

[115] Casebeer, *supra* note 71, at 308–12.

[116] *See* National Labor Relations (Wagner) Act, ch. 372 § 1, 49 Stat. 449, 449 (1935) (codified as amended at 29 U.S.C. § 151 (2018)).

[117] GROSS, *supra* note 79, at 51–53, 89–103, 109–112.

[118] *Id.* at 33.

[119] *See id.*

likeliest substitute design for industrial relations if Wagner's legislation had not come together at the precise time it did. Roosevelt himself endorsed Richberg's model in the 1934 automobile-industry settlement.[120]

But the most statist possibility for private-sector labor relations already existed in the legislative annals. Passed in 1926, the Railway Labor Act[121] established a stunningly intrusive system of oversight. In preventing interruptions to interstate commerce, the RLA involves a convoluted dispute resolution process that requires extensive negotiation and mediation before unions are free to strike. Even then, the RLA grants the President powers to impose a "cooling-off" period on the parties while assembling an ad hoc emergency board to investigate the dispute and make recommendations for its resolution.[122] Congress may then pass legislation to implement those recommendations. As workers recently learned, this framework essentially guarantees that the state may avert any strike it considers sufficiently threatening to the free flow of capital,[123] a power that was conspicuously vacant in the Wagner Act.[124]

Wagner rejected these alternatives and embraced much of labor's traditional arsenal. Rather than adopt the various strike-averting protocols that the government had experimented with, Wagner assiduously protected the right to strike and tasked Keyserling with making it bulletproof. The duo went to great lengths to clarify that strikers remained employees for purposes of the Act, ensuring the integrity of the economic strike and the NLRB's election procedures

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[120] *Id.* at 61–64. For other instances of Richberg's undermining of Wagner's labor boards and legislation, see *id.* at 56, 101–02, 112–22, 143–44; *see also* DUBOFSKY, *supra* note 16, at 117–19, 125–26.

[121] 45 U.S.C. §§ 151–188 (2018).

[122] 45 U.S.C. § 160. The Supreme Court has described intent of the cooling-off requirements in the RLA as "prevent[ing] the union from striking and management from doing anything that would justify a strike." Detroit and Toledo Shore Line R.R. Co. v. United Transportation Union, 396 U.S. 142, 150 (1969).

[123] Andrew Elrod & Nelson Lichtenstein, *The Railway Labor Act Allowed Congress to Break the Rail Strike. We Should Get Rid of It.*, JACOBIN (Dec. 7, 2022), https://jacobin.com/2022/12/railway-labor-act-unions-strikes-history.

[124] The Taft-Hartley amendments subsequently empowered the president to enjoin strikes which are believed to pose national emergencies. Steelworkers v. United States, 361 U.S. 39, 52–53 (1959) (Frankfurter and Harlan, JJ., concurring). Discussions of the RLA—and the railway brotherhoods' role in jointly crafting the law with the railroads' lawyers, Elrod & Lichtenstein, *supra* note 123—are bizarrely absent in Tomlins's sprawling history of pre-New Deal voluntarism in the labor movement.

in at least one crucial respect.[125] Keyserling described Wagner's office as deeply suspicious of elites' motives in finding false equivalencies when construing his legislation:

> It was particularly necessary because a lot of people made the argument that because the government was giving labor the right to bargain collectively, that was a substitute for the right to strike, which was utterly wrong. . . . [S]ome courts would have construed the opposite: that [labor] had to exercise this right as a condition precedent to the right to strike. We didn't want to interfere in any way with that basic weapon. . . . [W]ithout the explicit guarantee of section 13, they may well have developed, as a result of pressure on the part of employers, pressure on the part of the media, or even through court decisions, some idea that Congress had given labor something as an alternative to the right to strike. This wasn't true at all.[126]

As passed, the NLRA was much stronger than its forerunners: Section 7(a) of the NIRA, the Department of Labor's surrogate bill, the White House's stop-gap Public Resolution 44, and even Wagner's failed Labor Disputes Act.[127] As Skocpol and Finegold reasoned, this poses difficult questions to those who consider the law a repressive response to the radical-led strikes of 1934. Why did the Wagner Act pass in the summer of 1935 when reform efforts fizzled amidst the previous summer's strike wave?[128] Again, Goldfield's answer was that "[o]ften there is a considerable time lag" in the influence of social movements on public policy.[129] This is hardly convincing when read alongside his argument that political elites were attuned to, fearful of, and responsive to the mass unrest of the previous year. If this was the *dispositive* explanation for the Act's passage, as Goldfield suggests,[130] why did Congress—after observing the NLB's failures—punt the issue

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[125] S. REP. NO. 573, 74th Cong., at 6–7, *reprinted in* 2 LEGISLATIVE HISTORY, *supra* note 77, at 2306.

[126] Casebeer, *supra* note 71, at 353–54. It is for this reason alone that the Wagner Act cannot be deemed an example of "anti-strike" legislation, at least as that concept is historically understood. *Contra* Holdren, *supra* note 32.

[127] Casebeer, *supra* note 67, at 95–96.

[128] Skocpol, Finegold & Goldfield, *supra* note 18, at 1299–1300.

[129] *Id.* at 1309.

[130] Goldfield, *supra* note 13, at 1273 ("The most reasonable hypothesis to account for the passage of the NLRA is that labor militancy, catapulted into national prominence by the 1934 strikes and the political response to this movement, paved the way for the passage of the act.").

in June 1934 by creating another temporary agency which lacked enforcement powers? Does it make sense for a "haunted" government to consign itself to further studying its specter?[131] As discussed in the next Part, the state had never before sat on its haunches when seeking to extinguish strike threats.

More complications arise along the trails of Goldfield's theory. If one assumes that the mid-1930s strike wave motivated political elites to pass repressive legislation and defang the rabid breeds of the labor movement, it is puzzling why employers did not welcome this development. Indeed, employers not only initiated a public campaign against the Wagner Act deemed "the greatest ever conducted by industry regarding any congressional measure,"[132] they unanimously opposed federal regulation of collective bargaining policy of any sort during this period. Put another way, industry's managers were far more willing to face the general strikes, sit-downs, and mass picketing of the decade than submit themselves to state interference.[133] The neo-voluntarists generally dismiss employers' attitude of this era as reactionary and shortsighted, but this logic becomes tenuous when applied to organized, sophisticated trade associations and the corporate lawyers who served them. It was these entities which led the campaign against the Wagner Act, not mom-and-pops.[134]

In the end, there is strikingly little evidence that Wagner (or any other major player) was particularly influenced by the anti-capitalist tenor of the 1930s strikes while the NLRA was being drafted, debated, and ultimately passed.[135] While there are examples in the legislative history which suggest politicians, employers, and union leaders alike

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[131] *Id.* at 1276 ("To many in 1935, it did indeed seem that a specter was haunting the United States.").

[132] GROSS, *s* note 79, at 139 (quoting BERNSTEIN, *supra* note 68, at 110).

[133] This is consistent with employers' attitude throughout the 1900s. *See* Rabban, *supra* note 98, at 423 ("managers, though bothered by wildcat strikes and other militant rank-and-file attempts at control in the workplace, were much more concerned about the threat to their prerogatives from the orderly process of collective bargaining with bureaucratic unions.") (citing HOWELL JOHN HARRIS, THE RIGHT TO MANAGE 67 (1982)); DUBOFSKY, *supra* note 16, at 80 ("It was the union movement and not the specter of violent revolution that unsettled most businessmen.").

[134] Comment, *The Radical Potential of the Wagner Act: The Duty to Bargain Collectively*, 129 U. PA. L. REV. 1392, 1415 (1981).

[135] Tellingly, Wagner still adamantly defended the right to strike even after the radical-led sit-down wave of 1936–37, equating the "outlawry" of strikes with authoritarianism. Robert F. Wagner, *Wagner Challenges Critics of His Act*, N.Y. TIMES. MAG., July 5, 1937, at 1.

were wary of the growing radical undercurrent in prominent labor disputes, such vague ruminations are dwarfed by the number of Wagner's statements in the record expounding a far more straightforward impetus for his Act: Section 7(a) had simultaneously galvanized and frustrated organizing efforts across the country; employers had responded by repressing recognition strikes and implementing company unions; and the government was otherwise powerless to address the damage done to workers' associational rights and macroeconomic recovery.[136] National labor policy under the NIRA had imploded in an embarrassingly visible manner, and it was the duty of the state to rectify it. Wagner believed substantive regulation of labor relations to be inevitable and acted in part to preempt draconian legislation from a less hospitable political climate. [137]

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[136] *See, e.g.*, 78 CONG. REC. 12020 (1934), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 77, at 1189 (statement of Sen. Wagner). Colleagues expressed the same agenda. *See* 78 CONG. REC. 12020 (1934), *reprinted in* 1 LEGISLATIVE HISTORY, *supra* note 77, at 1189–90 (statement of Sen. Walsh); 79 CONG. REC. 1134–35 (1935), *reprinted in* 2 LEGISLATIVE HISTORY, *supra* note 77, at 2440–44 (statement of Rep. Boland).

Goldfield has recently argued that the nearly century-long belief in Section 7(a)'s catalyzing influence on early 1930s union organizing amounts to a "myth." Goldfield & Melcher, *supra* note 27. This is an ambitious claim to make given that Goldfield extrapolates it from the organizing history in a single industry, coal mining. *See* Eric Blanc, *Can Labor Laws Spur Militancy?*, LAB. POL. (July 12, 2022), https://laborpolitics.substack.com/p/can-laws-spur-labor-militancy ("the major flaw in Goldfield's argument is that it overgeneralizes from miners to the rest of the U.S. working class."). Such generalizations are common in neo-voluntarist scholarship. *See* ROMNEY, *supra* note 26 (claiming Wagner Act undermined progressive unions based upon experience of a handful of west-coast cannery locals). But it is especially curious where Goldfield himself has conceded that mineworkers enjoyed far lower barriers to unionization than most industrial workers of the time, such that "comparisons of strike rates of miners with those of steelworkers must be done with a great deal of circumspection." MICHAEL GOLDFIELD, THE SOUTHERN KEY: CLASS, RACE, AND RADICALISM IN THE 1930S AND 1940S 27–28 (2020). Regardless, calculating the "true" impact of Section 7(a) is not what is important when investigating the Wagner Act's intent; it is determining what the relevant political actors *perceived* Section 7(a) to have wrought. And Wagner expressed as early as October 1933 that he believed the "recent surge of strikes" was "due almost entirely to misunderstandings and misconceptions" of Section 7(a). GROSS, *supra* note 79, at 16.

[137] Wagner's correspondence with the ACLU during the hearings of his 1935 bill is instructive. CLETUS E. DANIEL, THE ACLU AND THE WAGNER ACT: AN INQUIRY INTO THE DEPRESSION-ERA CRISIS OF AMERICAN LIBERALISM 103 (1980) (quoting Letter from Robert F. Wagner to Roger N. Baldwin (April 5, 1935)):

Whether we will it or not, government in every country is going to be

Acknowledging Wagner's sincere and steadfast belief in the "dismal failure of letting things alone," [138] however conventional an interpretation of his Act's origin, remains the one most faithful to its legislative history and drafters' intent.

III. GOVERNMENT CONCESSIONS AS AN ALTERNATIVE EXPLANATION FOR THE WAGNER ACT

Another article of faith in the neo-voluntarist school is the instrumental relationship between workers' strike activity and the passage of legislation. While conceptually similar to Goldfield's argument regarding the Wagner Act's passage, which lends to a natural suspicion of any state labor policy, the logic here is broader—and the ideological tent is bigger—because it does not require that the reform be reactionary, repressive, or even distantly debilitating on the labor movement. It rather serves as a common-sense example of cause-and-effect: workers strike en masse, government reacts. The larger the threat the strike actions pose to the capitalist order, the more government actors (be they politicians, bureaucrats, or even judges) will be willing to accommodate the workers' plight. This formula for state concessions is replete in the literature,[139] and it informs many on the folly of modern labor law reform without a mass labor insurgency having first delivered a sufficient shock to the system.[140]

> forced to play a more important role in every phase of economic life, and for that reason it seems to me more useful to attempt to direct the nature of that role rather than merely state the truism that government is likely to be influenced by the forces in society that happen to be the strongest. Certainly these forces cannot be checked by governmental self-limitation . . .

[138] Barenberg, *supra* note 29, at 1397–98 (quoting Robert F. Wagner, *Labor Dispute Bill and Other Points in Program for Economic Reform* [draft] 4 (Apr. 15, 1934) (on file in The Robert Wagner Papers, Georgetown University, at 600 SF 103, Folder 30).

[139] *See* James Gray Pope, *The First Amendment, the Thirteenth Amendment, and the Right to Organize in the Twenty-First Century*, 51 RUTGERS L. REV. 941, 969 (1999); Alan Hyde, *A Theory of Labor Legislation*, 38 BUFF. L. REV. 383, 431–32 (1990).

[140] *See, e.g.*, Cody R. Melcher & Michael Goldfield, *Moments of Rupture: The 1930s and the Great Depression*, CONVERGENCE (Nov. 9, 2021), https://convergencemag.com/articles/moments-of-rupture-the-1930s-and-the-great-depression/ ("[Pro-union] legislation is almost always a consequence of successful labor struggles, hardly ever their impetus. While we would certainly have no objection to more favorable union legislation, we do not think that

Though this theory is more flexible, it is also less precise. In studying the history of American strike waves from the emergence of capitalist relations of production to the present-day economic order, it is difficult to construct a coherent evaluative model of labor law reforms which can explain or predict why the state responded as it did to various moments of industrial unrest. The most obvious counterexample to the state concessions premise, raised by Skocpol and Finegold, is that strike activity in the United States immediately following both World Wars greatly exceeded the militancy displayed between 1933 and 1935, but the federal government responded with military repression in 1919 and anti-union legislation in 1947.[141] Goldfield's defense was two-fold: that unlike the post-war examples, the 1930s "had brought wide strata of the population, in addition to factory workers, into militant protest activities," and this decade featured stronger radical organizations than the "uneven" participation of these groups in 1919 and the "declining" and "defensive" radical influence in 1946.[142]

Neither point passes facial scrutiny. If the fatal flaw of 1919 militance is that it was limited to "geographically concentrated industries" of "steel, coal, and meat packing,"[143] then the even larger 1945-46 strike wave, which absorbed countless industries and spanned the country from coast-to-coast,[144] should not have followed

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should be a major focus of resources."); Post, *supra* note 25; Tomlins, *supra* note 66, at 588; Gong, *supra* note 64; Burns, *supra* note 22. Neo-voluntarists have instead prioritized internal union reforms which could foster a return of workplace militancy. *See generally* Melcher & Goldfield, *supra*; JOE BURNS, CLASS STRUGGLE UNIONISM (2022); Matthew Dimick, *Revitalizing Union Democracy: Labor Law, Bureaucracy, and Workplace Association*, 88 DENV. U. L. REV. 1 (2010). In a provocative but powerful article, comparative legal scholar Jedidiah Kroncke has argued that this internal agenda risks further undermining U.S. unions' "core functions of wage-bargaining and the acquisition of political capital" by re-localizing rather than centralizing the labor movement's intrinsic fight against "the operational logics of wage-labor markets." Jedidiah J. Kroncke, *The False Hope of Union Democracy*, 39 U. PA. J. INT'L L. 615, 616, 701 (2018).

[141] Skocpol, Finegold & Goldfield, *supra* note 18, at 1303–04.

[142] *Id.* at 1305.

[143] *Id.*

[144] *See* JAMES A. GROSS, THE RESHAPING OF THE NATIONAL LABOR RELATIONS BOARD: NATIONAL LABOR POLICY IN TRANSITION, 1937-1947, 251–52 (1981). Goldfield further places great emphasis upon the broader social movements brought into the 1930s fold, such as the widescale unemployment protests. Skocpol, Finegold & Goldfield, *supra* note 18, at 1305. But while "protests from the unemployed were uniquely disruptive during the early 1930s," as Eric Blanc

a similar script. And based upon Goldfield's own theory of the Wagner Act, which he claims was passed to "constrain, limit, and control" the radical elements of the 1930s labor movement, the purported lesser presence of radicalism in the post-war strikes should have mollified the federal government. In reality, the perceived radicalism of these uprisings led to intense and overt state repression through the Red Scare programs in the late 1910s[145] and Section 9(h) of the 1947 Taft-Hartley amendments, which restricted access to the NLRB's processes for unions whose officers refused to attest that they were not member of the Communist Party.[146] It is confounding to suggest that *more* radical involvement in these strikes would have produced a less reactionary government response.

The state concessions premise struggles to explain other pivotal moments in labor law history. While it is clear that the various pieces of railway labor legislation up to and including the RLA were passed in response to unique threats posed by craft militancy, there is no indication that the other major union-endorsed statutes which preceded the Wagner Act—the Clayton Act[147] and Norris-LaGuardia Act—were the result of inordinate strike pressure placed upon legislators. The Clayton Act's labor components were generally attributed to Congress's desire to clarify that unions were exempted from antitrust law following a series of controversial Supreme Court decisions applying the Sherman Act to labor boycotts[148] and the AFL's unprecedented participation in the 1908 and 1912 presidential elections.[149] While the path to the Norris-LaGuardia Act's passage no

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has argued, "it's unclear how these could have been determinative for pressuring state actors to pass a reform primarily benefiting *employed* workers." Eric Blanc, *Revisiting the Wagner Act & its Causes*, LAB. POL. (July 28, 2022), https://laborpolitics.

substack.com/p/revisiting-the-wagner-act-and-its.

[145] Ahmed A. White, *The Crime of Economic Radicalism: Criminal Syndicalism Laws and the Industrial Workers of the World, 1917–1927*, 85 OR. L. REV. 649, 696–700 (2006).

[146] Labor Management Relations (Taft-Hartley) Act, ch. 120, § 9(h), 61 Stat. 136, 146 (1947) (repealed 1959).

[147] 15 U.S.C. §§ 12–27 (2018).

[148] Gompers v. Buck's Stove & Range Co., 221 U.S. 418 (1911); Loewe v. Lawlor, 208 U.S. 274 (1908).

[149] *See, e.g.*, Alpheus T. Mason, *The Labor Causes of the Clayton Act*, 18 AM. POL. SCI. REV. 489, 490 (1924); *see also* DUBOFSKY, *supra* note 16, at 49–60 (recounting the burgeoning alliance between organized labor and the Democratic Party prior to U.S. entry into World War I).

doubt involved "decades of worker resistance to labor injunctions,"[150] strikes were near their nadir by 1932 following the labor movement's contraction throughout the previous decade.[151] The intervening cause was instead the publication and widespread dissemination of Felix Frankfurter and Nathan Greene's 1930 book excoriating the judiciary's use of such injunctions,[152] which "was essentially a brief" for the law.[153]

Maybe the most aggressive claim proffered in the state concessions genre is that the radical strikes of 1936 and 1937 pressured and convinced the Supreme Court to uphold the Wagner Act in its *Jones & Laughlin* decision[154] and four companion cases establishing the Act's constitutionality.[155] First analyzed in-depth by a law student[156] and then taken up by James Gray Pope,[157] this theory posits that the General Motors sit-down strike in Flint, Michigan, which began while the cases were being briefed and ended on the day of their oral argument, serves as the superior explanation for Justice Owen Roberts's mysterious about-face on the scope of the Commerce Clause to the more historically accepted theories of Roosevelt's court-packing proposal or acquiescence to the results of the 1936 elections.

As with other theories scrutinizing the "switch in time," there is no smoking gun document which identifies Roberts's reasoning for his votes in the Wagner Act cases,[158] nor is there any first-hand testimony from colleagues, clerks, family, or friends which can pinpoint the culprit. The sit-down theory relies solely upon the timing of the

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[150] Pope, *supra* note 139.

[151] *See* Moody, *supra* note 24, tbl. II.

[152] FELIX FRANKFURTER & NATHAN GREENE, THE LABOR INJUNCTION (1930).

[153] White, *supra* note 62, at 1080. These arguments were much more warmly received by the progressive wave of legislators that had flowed into Congress in the 1930 midterms. DUBOFSKY, *supra* note 16, at 102–05.

[154] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

[155] Washington, Virginia & Maryland Coach Co. v. NLRB, 301 U.S. 142 (1937); Associated Press v. NLRB, 301 U.S. 103 (1937); NLRB v. Friedman-Harry Marks Clothing Co., 301 U.S. 58 (1937); NLRB v. Fruehauf Trailer Co., 301 U.S. 49 (1937).

[156] Drew D. Hansen, *The Sit-Down Strikes and the Switch in Time*, 46 WAYNE ST. L. REV. 49, 130–33 (2000).

[157] Pope, *supra* note 62, at 89–97.

[158] After Roberts's death, then-Justice Felix Frankfurter claimed to possess a memorandum written by Roberts in 1945 which explained the latter's votes in favor of upholding minimum-wage legislation in 1937. Felix Frankfurter, *Mr. Justice Roberts*, 104 U. PA. L. REV. 311, 314 n.a1 (1955). The memo contains no mention of the *Jones & Laughlin* case. *Id.* at 314–15.

events, the media's constant coverage of the strikes, and one oralist's allusion to the GM dispute at the closing of his argument.[159] While the sit-down strikers' heroism brought the NLRB's arguments regarding the "facts of industrial life" into focus with breathtaking clarity, the concept of a strike-induced capitulation by the Court is impeded by prior and subsequent judicial behavior. Judges had never proven malleable to labor unrest in the past, and in fact had appeared willing to aggravate labor interests through decades of unflinching repression.[160] When the Court was presented the opportunity to uphold the labor immunity sections of the Clayton Act on the heels of a record strike wave, the Justices gutted this language in a six-to-three vote.[161] Moreover, the Court's about-face in 1937 was not limited to the Wagner Act. Roberts had already voted to uphold a state minimum wage law months before the Wagner Act cases were argued,[162] and Roberts thereafter became a reliable vote in favor of upholding government regulations of all varieties, including the Social Security Act,[163] food safety regulations,[164] and even production quotas.[165] This episode suggests a comprehensive and fundamental shift in Roberts's politics rather than a surrender to labor militancy, especially in light of the Court's banning of the use of sit-down strikes altogether just two years later in *NLRB v. Fansteel Metallurgical Corp.*[166]

None of this is to say that the Wagner Act could have existed

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[159] Hansen, *supra* note 156, at 108–21.

[160] *See* William E. Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109, 1148–1202 (1989).

[161] Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921).

[162] *See* Frankfurter, *supra* note 158, at 313–16 (discussing West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937)). The Justices voted on the outcome of *West Coast Hotel* on December 19, 1936, well before the *Jones & Laughlin* case was argued in February 1937. *Id.* at 315. It is for this reason that *West Coast Hotel* is typically considered the pivotal case coinciding with the "switch in time." *See, e.g.*, G. Edward White, West Coast Hotel*'s Place in American Constitutional History*, 122 YALE L.J. ONLINE 69 (2012).

[163] Charles C. Steward Mach. Co. v. Davis, 301 U.S. 548 (1937).

[164] United States v. Carolene Prods. Co., 304 U.S. 144 (1938).

[165] Wickard v. Filburn, 317 U.S. 111 (1942).

[166] 306 U.S. 240 (1939). New Deal legal historian Barry Cushman has cast doubts on the impact of the sit-down strikes on the outcome of Justice Roberts's vote in the initial Wagner Act cases. Barry Cushman, *The Man on the Flying Trapeze*, 15 U. PA. J. CONST. L. 183, 253 (2012); BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION 32, 237–38 n.156 (1998).

without the rapid rise in strike activity between 1933 and 1935. Even if one fully endorses this Article's interpretation of the Act's passage, it must be conceded that the strikes' delegitimization of Section 7(a) and the NIRA regulatory structure was a crucial pedagogic event for many New Deal "political entrepreneurs," as Barenberg has coined them, most notably Wagner himself.[167] But while strikes are irreplaceable under capitalism as the tool by which workers attempt to "redress the asymmetries of bargaining power," and indeed serve as the "essence of collective labor activity,"[168] the state concessions premise more often than not represents a clumsy grafting of unions' economic strength at halting production by particular firms or industries onto a body of political theory. The Taft-Hartley saga alone demonstrates the risks in brandishing strikes as a policy-making weapon, and similar phenomena abound in Britain, considered the United States's close relative in capitalist development and industrial relations.[169] And the under-discussed phenomenon of state anti-strike laws, passed across the country in the late 1930s and early 1940s in direct response to militant strike activity, further counsels against subscribing to the subordinating potential of strikes on U.S. government policy.[170]

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[167] Barenberg, *supra* note 29, at 1403–10.

[168] Craig Becker, *"Better than a Strike": Protecting New Forms of Collective Work Stoppages Under the National Labor Relations Act*, 61 U. CHI. L. REV. 351, 351–52 (1994).

[169] Dimick, *supra* note 23, at 53–58. During the infamous "Winter of Discontent" in 1978 and 1979, a record number of strikes erupted across Britain. The strikes were followed by severe public disapproval and a decade's worth of repressive labor law reforms by the ascendant Conservative Party, which targeted unions' right to strike. Gary Younge, *Britain's Winter of Discontent*, NATION (Jan. 31, 2023), https://www.thenation.com/article/world/britain-strikes-winter-discontent/. Unions have never succeeded in repealing these laws, and more encroachment has recently followed. In the summer of 2022, British unions engaged in the country's largest strike wave in decades to demand that wages keep pace with the rising cost of living. *Id.* The country's government reacted not with capitulation, but with the introduction of legislation that would even further erode the strike weapon. *Id.* The law passed in July 2023. Strike Bill becomes Law, GOV.UK (July 20, 2023) https://www.gov.uk/government/news/strikes-bill-becomes-law.

[170] Anthony Michael Daniel, *From Wagner to Taft-Hartley, Revisited* 118–73 (2017) (unpublished Ph.D. dissertation, Columbia Univ.). Daniel specifically finds "a clear relationship between state-level militance and Republican seat gains in 1938 statehouses outside the South." *Id.* at 30. This is not surprising considering that the strike waves of the late 1930s were wildly unpopular in public opinion. *Id.* at 70–118. The uniformity of this reactionary impulse and its influence on the Taft-Hartley amendments leads Daniel to conclude that "there

The Wagner Act thus emerges from this survey as a sort of *sui generis* moment upon which little precedential value should be placed when assessing the value of any modern reform proposals. Worker militancy in the private sector has had little success in procuring concessions from the state outside of the New Deal period despite strikes remaining at historically high levels through the 1970s.[171] Although neo-voluntarists describe these failures as the consequence of unions' muzzling by the law, as the next Part of this Article discusses, the labor movement fared no better when espousing a philosophy which rejected state beneficence.

IV. STATISM, VOLUNTARISM, AND THE REALITIES OF U.S. LABOR RELATIONS

A. Neo-Voluntarism as a Model for U.S. Labor Law

It is now well accepted by labor scholars that the origin of the AFL's anti-statist disposition in the early twentieth century is rooted in the state's consistent hostility to unions. At the same time that federal and state governments were enthusiastically promoting the incorporation and organization of business firms, these bodies generally opposed and even criminalized the basic practices inherent in labor organizing, including strikes, boycotts, mass picketing, and attempts to enforce the closed shop. Under this legal regime, the coercive powers of the state were regularly deployed against unions through court injunctions, police interference, and even military detachments. Unions had no formal right to exist; their survival depended solely on their economic strength. Voluntarism was therefore as much a strategic shield as it was a reflection of the AFL's conservative politics.[172]

A half century after the AFL officially abandoned its voluntarist traditions to support the New Deal, Christopher Tomlins

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was no plausible strategy for labor to forestall the onset of restrictive laws" and, more intrepidly, "that the union movement could not have plausibly achieved a better result than the one it currently enjoys, despite its comparatively weak position." *Id.* at 6.

[171] Melvyn Dubofsky, *Legal Theory and Workers' Rights: A Historian's Critique*, 4 INDUS. REL. L.J. 496, 499 (1981).

[172] TOMLINS, *supra* note 14; Forbath, *supra* note 160; *see also* RUTH O'BRIEN, WORKERS' PARADOX: THE REPUBLICAN ORIGINS OF NEW DEAL LABOR POLICY, 1886–1935 (1998). However, Dubofsky has demonstrated that the AFL's commitment to voluntarism had all but evaporated by no later than the Wilson administration. DUBOFSKY, *supra* note 16, at 52–81.

provocatively argued that the Federation's decision to lower its defenses against state intervention was a calamitous one for American workers.[173] Tomlins's thesis was sweeping, though his evidence was highly esoteric. He believed that the Wagner Act's reconstitution of collective bargaining from a private function to a public concern inspired the NLRB to usurp unions' role in dictating the composition of their bargaining units, jettisoning decades of jurisdictional self-determinism by the trades and shaping the labor movement along contours the state considered most appropriate to achieve the statutory goal of industrial peace.[174] Tomlins accordingly relied to a precipitous degree on the decisions, doctrines, ideologies, and personnel appointments of the early NLRB in drawing his conclusions about the terms of unions' surrender and the opportunities they forewent.[175] His book ended with a haunting passage that is still routinely quoted in labor scholarship: "a counterfeit liberty is the most that American workers and their organizations have been able to gain through the state."[176]

That concept of "counterfeit liberty" was revisited and expanded upon in a 2019 essay by Matt Dimick.[177] Dimick, Tomlins's most promising student of neo-voluntarism, utilized a concise and incisive comparison of various nations' labor codes to illustrate how the U.S. labor movement (along with its Anglophone siblings in Australia and Britain) became procedurally dependent on the federal government as a result of the country's early industrialization and lack of coordinating capacity between the craft unions which then existed.[178] He proceeded to show how the nondiscrimination and organizational rights encased within the Wagner Act were contingent upon unions strictly operating within the framework established by the NLRB. Strikes for recognition are greatly limited by the availability of the Board's election machinery;[179] strikes seizing an employer's property

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[173] TOMLINS, *supra* note 14.

[174] *Id.* at 247–316.

[175] *See* Jean-Christian Vinel, *A Counterfeit Liberty? The Wagner Act and Its Critics: An Assessment*, *in* LIBERTÉ / LIBERTÉS 147, paras. 17, 33 (Sylvia Ullmo ed., 2005), https://books.openedition.org/pufr/4264.

[176] TOMLINS, *supra* note 14, at 328. Tomlins has reiterated his thesis in a recent article. Tomlins, *supra* note 66, at 582–85. Tomlins appears exasperated with labor law scholars who continue to propose reforms to the "operative legal regime," deeming such efforts an exercise in futility. *Id.* at 578–82.

[177] Dimick, *supra* note 23.

[178] *Id.* at 50–65.

[179] *Id.* at 72–73.

in response to the latter's unfair labor practices are forbidden because workers can already file charges protesting that conduct.[180] The problem is not so much the *content* of modern labor law, Dimick reasons, but the legalistic nature of U.S. labor relations in general.[181]

Unlike Tomlins, Dimick offers the labor movement a possible offramp from its statist cycle. Instead of investing in efforts to legislate more expansive protections for unions' abilities to organize, negotiate contracts, and strike, which would further beholden unions to their labor rights granted *by* the state, unions should embrace a philosophy which prioritizes labor freedoms *from* the state.[182] As Dimick explains it, rights grant persons a legal *protection* against interference with the regulated interest, to the point where any person can call upon the state to prevent someone else from violating the correlative *duty* not to interfere with the right.[183] Freedoms, on the other hand, contain no duties. A person which has the freedom to undertake an action is *permitted* to do so without the other party being able to ask the state to prevent it, but that party may in turn obstruct the person to no consequence.[184] This has obvious implications for labor law, and Dimick provides two illuminating examples. Under the labor rights regime of the NLRA, a worker has the *right* to join a union and, if their employer discharges them from doing so, may file an unfair labor practice charge with the NLRB. Under a system of labor freedoms, that worker is *permitted* to join a union and the employer is permitted to discharge them; the worker cannot then run to a federal agency to seek reinstatement and backpay, but the employer cannot hail the courts, police, or military to referee any subsequent fallout of the discharge.[185] Similarly, unions' periodic attempts to pass legislation which bans employers' use of permanent replacement workers during economic strikes would bestow a right to employee reinstatement and impose an employer's obligation to discharge its replacements immediately at the conclusion of a strike. Dimick would give employers the freedom to discharge economic strikers *and* unfair labor practice strikers and, assumedly, eliminate the post-strike right to recall.[186]

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[180] *Id.* at 76–77.

[181] *Id.* at 77–82.

[182] *Id.* at 49.

[183] *Id.*

[184] *Id.*

[185] *Id.*

[186] *Id.* at 81–82, 86; *accord* NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333, 345 (1938) (establishing employers' right to permanently replace economic

While one may wonder why unions would willingly adopt Dimick's deregulatory framework, he challenges us to observe his groundwork from a bird's-eye view. A comprehensive labor freedom package would remove the legal bans of unions' most formidable economic weapons, including recognition strikes, secondary boycotts, and mass picketing. [187] The latter tool would have far more effect on resuscitating unions' ability to strike than outlawing the use of permanent replacements, Dimick contends, because employers have possessed this right since the early days of the Wagner Act but only exercised it upon the decline of robust picket-line solidarity.[188] This hands-off, *laissez-faire* approach to industrial relations "establishes the viability of governing the labor market through workers' own organizations" by engendering a genuine independent nature in those unions, as exemplified by the self-regulating labor movements in the Nordic countries.[189] It is only here, through a dedicated commitment to state evasion, can workers build their "own hegemonic project and begin to subordinate the state to society."[190]

Dimick is by far the most cogent and methodical of the neo-voluntarists in constructing a tangible alternative to the NLRA, but the legal reasoning he employs to prove the Faustian bargain behind labor rights is surprisingly tenuous. Perhaps the keystone argument of Dimick's essay is that "the existence of a legal right itself entails a restriction on the ability to strike to protect the same interest."[191] This may be true based upon particular developments of Supreme Court case law and reactionary legislation, but it does not inherently flow from the Wagner Act or other New Deal labor reforms. For example, Dimick uses the Court's decision in the *Fansteel* case[192] to prove that the Act's unfair labor practice and remedial provisions logically preempt worker actions which venture outside of that schema, including the seizure of employer property: "whether violent or not, concerted action to enforce rights *already subject* to Board administration and enforcement subverts the appropriate scheme of rights enacted by the NLRA."[193] First, Dimick is simply wrong in his

strikers); Laidlaw Corp., 171 N.L.R.B. 1366 (1968) (establishing preferential hiring rights for economic strikers).

[187] Dimick, *supra* note 23, at 83–84.

[188] *Id.* at 86.

[189] *Id.* at 85.

[190] *Id.* at 50.

[191] *Id.* at 75.

[192] NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240 (1939).

[193] Dimick, *supra* note 23, at 77.

characterization of the law—so wrong, in fact, that he risks capsizing his entire thesis. Most non-violent concerted actions by employees undertaken in response to an employer's unfair labor practice—up to and including strikes—are *protected* by the NLRA.[194] Second, Dimick understates the extent to which the Court's logic constituted a naked policy choice. The NLRB, the entity whose processes were ostensibly being flouted, had fashioned a balancing test to assess the legality of sit-down strikes and ordered the *Fansteel* strikers reinstated.[195] The Court cited no legislative history that contravened the Board's interpretation of the Act.

Dimick sings the same tune in his discussion of implied no-strike obligations to arbitrate grievances. In *Boys Markets, Inc. v. Retail Clerks Union*,[196] the Court affirmed a district court's grant of an injunction against a union that had struck over a grievable issue despite a no-strike clause in the parties' collective bargaining agreement and the Norris LaGuardia Act's express prohibition of labor-dispute injunctions. In presenting the *Boys Market* holding, Dimick counsels that "strikes are *legally* redundant" in the context of contract enforcement because the existence of grievance-arbitration machinery already provides unions an avenue to vindicate their claims.[197] This time Dimick is correct in his legal recitation, but the Court's decision here was even less compelled by the law than in *Fansteel*. The Court itself had infamously reached the exact opposite conclusion just eight years prior.[198]

I do not mean to suggest that Dimick condones the Court's jurisprudence in these cases. But despite railing against the actions

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[194] Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956). Indeed, Dimick's construction of the law was explicitly rejected by the Court in *Mastro Plastics*. *See id.* at 286–87 (explaining that such an interpretation would vitiate "employees' freedom to strike against unfair labor practices" because it "would relegate the employees to filing charges under a procedure too slow to be effective."). The union in that case additionally struck in derogation of the 60-day "waiting period" prescribed by Section 8(d) of the NLRA, but the Court still sustained the Board's order finding the strikers' conduct protected. *Id.* at 285–86. It did so even without any clear legislative history mandating this result. *Id.* at 287–89. This case law is responsible for the potentially massive backpay liabilities that flow from violations committed during an unfair labor practice strike, which likely constitute the NLRB's most effective form of deterrence against employer wrongdoing. *See infra* Part V.

[195] Fansteel Metallurgical Corp., 5 N.L.R.B. 930, 949–50 (1938).

[196] 398 U.S. 235, 253–54 (1970).

[197] Dimick, *supra* note 23, at 75.

[198] Sinclair Refin. Co. v. Atkinson, 370 U.S. 195, 197–99 (1962).

of empowered "bureaucrats, judges, and legislators," [199] Dimick ironically gives too much credit to Supreme Court Justices, the most elite of state actors. The cases he exhibits were hardly examples of consistent decision making based upon giveth-and-taketh facets of the NLRA; they were contested grounds on which various factions of the federal government disagreed as to which rights predominated. Moreover, Dimick's "social contract" conception of labor rights does not reliably explain many aspects of labor law. It certainly does not clarify why the Court has required employers to bargain with unions that have engaged in unprotected slowdowns; [200] preserved the majority status of non-certified unions that refused to comply with the NLRB's anti-communist provisions;[201] or, as mentioned, protected the use of strikes by employees who have suffered unfair labor practices which could be remedied through Board processes.[202]

Dimick's model deteriorates further when confronted with the realities of U.S. politics. In his survey of comparative labor law, Dimick approvingly describes the systems chosen by Denmark and Sweden, which feature highly coordinated and centralized bargaining of private "basic agreements" between the top federations of employers and unions.[203] He especially savors the Scandinavian use of "labor courts"—the state's sole involvement with the basic agreements—that adjudicate disputes "as a means of legal backing" of the agreements and mandate union representation in their membership. Because the courts' decisions are final and cannot be appealed, this "keeps the regulation of labor relations insulated from the administrative apparatus of the state and the rest of the court system." [204] This setup is almost certainly unconstitutional in the United States, where virtually all agency decisions are reviewable by courts[205] and even private arbitrators' awards may be scrutinized to some degree. [206] Dimick anticipates criticisms of "Nordic exceptionalism,"[207] but even this sells the differences short. As labor law scholars have long remarked, U.S. labor relations "erupted into

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[199] Dimick, *supra* note 23, at 83.

[200] NLRB v. Insurance Agents' International Union, 361 U.S. 477 (1960).

[201] United Mine Workers v. Arkansas Oak Floorings Co., 351 U.S. 62 (1956).

[202] Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956).

[203] Dimick, *supra* note 23, at 58–60.

[204] *Id.* at 60–61.

[205] Administrative Procedure Act, 5 U.S.C. § 704 (2018).

[206] United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

[207] Dimick, *supra* note 23, at 85.

violence" more than in any other industrialized nation.[208] Though employers initially resisted unionization in Denmark and Sweden, disputes did not devolve into the (often state-facilitated) massacres of workers which frequented American history, and the corporations, militaries, and markets of the Scandinavian political economy are dwarfed by those in the United States in size and strength. It should go without saying that the "friendly and cooperative" employers of Sweden render it an immeasurably easier target for labor to tame.[209]

The failed "Murray Hill" experiment—Dimick's explanation for the difference in employer attitudes—instead drives home this insurmountable difference between national labor policies. In 1900, the International Association of Machinists and National Metal Trades Association signed an agreement which sought to centralize bargaining over wages, hours, and working conditions for all NMTA employees. But rank-and-file workers, rebelling against union leadership's acceptance of the open shop and employers' right to manage, struck in support of the closed shop and job control; the agreement collapsed thereafter. Thus the U.S. labor movement lost a potential panacea towards achieving private coordination of the labor market. [210] Dimick contrasts this failure with the "December Compromise" of 1905, whereby Swedish metal workers agreed to the open shop and broadly conceded on management rights in exchange for employers' explicit acceptance of unions and collective bargaining as legitimate institutions. This multi-industry, national agreement served as the template for a Swedish entente which eventually delivered "high union density, the lowest level of wage dispersion in the advanced capitalist world, and most critically, high inclusivity, encompassing virtually all wage earners."[211]

Strangely, Dimick portrays this dichotomy as proof that "the possibilities, if not the concrete choices available to the [U.S.] labor movement in the early 1900s, were not limited to either a Leviathan

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[208] Derek C. Bok, *Reflections on the Distinctive Character of American Labor Laws*, 84 HARV. L. REV. 1394, 1401 (1971); *see also* Philip Taft & Philip Ross, *American Labor Violence, Its Causes, Character and Outcome in* VIOLENCE IN AMERICA: HISTORICAL AND COMPARATIVE PERSPECTIVES 280 (Hugh Davis Graham & Ted Robert Gurr, eds., 1969), http://www.ditext.com/taft/violence1.html ("The United States has had the bloodiest and most violent labor history of any industrial nation in the world.").

[209] Bok, *supra* note 208, at 1460; *see also* Clyde Summers, *Worker Participation in Sweden and the United States: Some Comparisons from an American Perspective*, 133 U. PA. L. REV. 175, 180–88 (1984).

[210] Dimick, *supra* note 23, at 69–70.

[211] *Id.* at 70.

or narrow craft voluntarism."[212] His own account of the countries' working-class formations demonstrate why no such choice was realistically afforded. "Because capitalist relations of production preceded large-scale factory production," American unionism became predicated upon skilled craftsmanship, worker control of the labor process, and "an enormously adversarial set of workplace relations" as employers vied for control of that process.[213] In Denmark and Sweden, on the other hand, "the appearance of the factory *coincided* with the emergence of capitalist relations of production, making the job-control unionism of the Anglophone type an anachronism."[214] The Murray Hill agreement was palatable to Swedish workers but intolerable to the IAM's members. Dimick makes precisely this point,[215] so it is unclear what "choice" he believes was actually available to U.S. unions. In fact, his essay offers a convincing case for the inevitability of the Leviathan's presence and an exoneration of the New Deal's machinations.

This review of history raises questions about the neo-voluntarist attacks on the labor rights vision reinforcing the Wagner Act. First, if American labor had adopted a limited view of unionism long before the federal government endeavored to grant these rights, how can the Act be blamed for unions acting according to their nature? As one critic of *The State and the Unions* has observed:

> Tomlins focuses on the collective bargaining policy of the New Deal, and particularly on the role of the NLRA in conditioning the legitimacy of labor activity. But his description of the transformation of organized labor between 1900 and 1920 from an ambitious social movement to a narrow economic one seems much more significant. Imbued with the broad collective values amalgamated from its republican traditions and European social democratic thought, the AFL as late as the turn of the twentieth century saw itself as the means by which labor would transform society. By the 1920s, however, it had accepted corporate capitalism and had limited itself to a redefined voluntarism that sought, through collective bargaining agreements with employers, to obtain greater economic benefits for employees.[216]

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[212] *Id.* at 69.

[213] *Id.* at 54.

[214] *Id.* at 58.

[215] *Id.* at 70–71.

[216] Rabban, *supra* note 98, at 421.

Clearly, then, it was not just the state which offered workers "the opportunity to participate in the construction of their own subordination."[217] "The dramatic constriction of labor's own purposes in the early twentieth century . . . overshadows whatever role the state may have had later in limiting the efforts of unions and workers to achieve their goals."[218]

Second, what are the practical effects of a labor freedoms regime? In Dimick's example of the discharged worker, the employer is not deprived of all of its rights to effectuate the termination. Even if it cannot call upon the police to arrest the worker for their joining a union, it can haul them away if they refuse to leave the premises as a result of the employer's property rights in its facility.[219] The same logic applies to strikers who attempt to block replacement workers from crossing their picket line. The state *can* be summoned to keep production running, even if the union remains *permitted* to strike safely outside the factory gates.

These freedoms, even if achieved legislatively (and they would require legislation), would not abolish employers' innumerable advantages under capitalism. Returning labor relations to a superficially unregulated contest of economic strength therefore requires unions to unilaterally relinquish *all* of their access to state enforcement of their organizing interests while their opponents retain the intrinsic privilege to "defend" their property. Nonetheless, Dimick insists the Wagner Act has been a net negative for the labor movement in terms of "union density and bargaining level coverage."[220] It is worth examining what a labor movement without the Wagner Act would have looked like.

B. Re-Asserting the Traditional View of the Wagner Act

The neo-voluntarists have commonly defended their arguments by accusing skeptics of engaging in historical determinism.[221] These

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[217] TOMLINS, *supra* note 14, at 327.

[218] Rabban, *supra* note 98, at 421.

[219] Matthew Dimick, *Rights, Freedoms, and the Law: A Reply to Roberts*, LEGAL FORM n.5 (Oct. 16, 2019), https://legalform.blog/2019/10/16/rights-freedoms-and-the-law-a-reply-to-roberts-matthew-dimick/.

[220] Dimick, *supra* note 33.

[221] *See, e.g.*, Moody, *supra* note 24 ("Blanc has argued that nothing other than what happened, just as it happened, was possible. Or to put it another way, what did happen was inevitable.") (responding to Eric Blanc, *Should Labor Support Democrats?*, LAB. POL. (Aug. 4, 2022), https://laborpolitics.substack.com/p/should-labor-support-democrats).

moments in history were *not* predetermined, they argue; the social, political, and economic terrain underlying the outcomes of radical union movements and the enactment of legislation was highly disputed and contingent on the subjective choices of state actors. Goldfield implores us to imagine a timeline in which Congress did not pass the Wagner Act. Without the federal government's interference, he insists that "the labor movement might have continued to develop, perhaps a little later, perhaps more violently, certainly in a more radical political direction."[222]

In response, scholars have questioned whether a sufficient number of U.S. workers were ever willing to battle employers over issues outside of unions' traditional bargaining interests, let alone challenge the state and the core tenets of American capitalism beyond hostility to union recognition.[223] Further suspicion should be cast on a hypothetical radical labor movement's ability to withstand cultural inflection points such as World War II, the Cold War, and the onset of mass deindustrialization any better than our Wagner Act-dependent unions. But the neo-voluntarists are generally content to rest on the historical record as they understand it. They point to unions' steady decline throughout post-war history, pillory the Wagner Act for its contributions to this cycle, and speculate that the labor movement could have thrived—or at least not have come out any *worse*—if the Act never existed to dig its many pitfalls.

New research by a team of labor economists casts significant doubt on any theory of union power in the United States that does not credit state subsidization. In a 2021 paper studying the inverse relationship between union density and income inequality since the New Deal, the economists observed that "almost all the rise in U.S. density takes place during two short windows of time:" after the passage of the Wagner Act in 1935 and during World War II.[224] This ten-year period encapsulated the legalization of union organization and collective bargaining and the promotion of union security clauses at firms receiving defense contracts, and it marked the only span of U.S. history in which the federal government adopted an

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[222] Goldfield, *supra* note 13, at 1278.

[223] *See* Plotke, *supra* note 73, at 149–51 ("If there is an error here [in historians' measuring of radicalism of the 1930s working class], it is probably in claiming too much for radicalism."); *see also* Michael Kazin, *Struggling With Class Struggle: Marxism And The Search For A Synthesis Of U.S. Labor History*, 28 LAB. HIST. 497, 509 (1987); Melvyn Dubofsky, *Not So "Turbulent Years": Another Look at the American 1930's*, 24 AMERIKASTUDIEN 5 (1979).

[224] Henry S. Farber, et al., *Unions and Inequality Over the Twentieth Century: New Evidence from Survey Data*, 136 Q.J. ECON. 1325, 1373 (2021).

unambiguously pro-unionization stance as national labor policy.[225]

Contrary to Goldfield's theory of unaided worker militancy, the economists find that it was this initial policy shift of the Wagner Act, "not an increase in union organizing, that led to the sudden gains in the second half of the 1930s."[226] Latent demand for unionization existed for decades prior to the New Deal, but recognition strikes—the primary method by which unions organized—generally failed in the face of employer resistance and state coercion.[227] While the number of recognition strikes increased only modestly under the Wagner Act, the share of such strikes that were successful (i.e., those ending in union recognition) almost doubled in the years following the Act's passage.[228] This "Wagner Shock," comprising a "top-down change in the rules government used to referee management-labor relations,"[229] generated a rapid increase in union members that was only surpassed by "the massive increase in demand for U.S. industrial production during World War II."[230]

This research does not directly rebut Goldfield, who has dismissed the Wagner Act's role in any 1930s membership gains due to employers' universal defiance of the Act prior to the *Jones & Laughlin* decision; the indeterminacy of claims "that the law functioned symbolically to stimulate labor activity"; and the organizing victories at General Motors and U.S. Steel having occurred without direct aid of the NLRB.[231] But as an initial matter, Goldfield overlooks some established facts of state influence between 1935 and 1937, including that John L. Lewis decided to found and fund the CIO in part because of his belief in the Wagner Act's potential;[232] that the NLRB pursued nationally-covered cases against top employers even before the agency was fully functional, maintaining the front-page presence of New Deal labor policy,[233] and gathered evidence for the influential

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[225] *Id.* at 1373–74.

[226] *Id*. at Online App., 132, https://doi.org/10.1093/qje/qjab012 (scroll to Figure I; then follow "Online Appendix E" hyperlink in caption).

[227] *Id.* at Online App., 132–33.

[228] *Id.* at Online App., 133.

[229] *Id.* at Online App., 132.

[230] *Id*. at 1373, Online App., 127–28.

[231] Goldfield, *supra* note 13, at 1265–68.

[232] DUBOFSKY, *supra* note 16, at 133–35; *see also* IRVING BERNSTEIN, THE TURBULENT YEARS: A HISTORY OF THE AMERICAN WORKER, 1933–1941 386 (1969) (quoting Lewis's prediction to AFL leadership in May 1935 that "[i]f the Wagner bill is enacted there is going to be increasing organization" in mass-production industries).

[233] *See, e.g.*, Remington Rand, Inc., 2 N.L.R.B. 626 (1937); William Randolph

investigations into corporate anti-union repression that were conducted by the LaFollette Committee;[234] and that many of the Flint sit-down strikers portrayed their struggle as a vindication of their NLRA rights instead of one independent of government efforts, let alone in opposition to the incumbent administration.[235] Moreover, Goldfield's examples ignore that the CIO only obtained its top priority of exclusive representation at General Motors and U.S. Steel through Board elections conducted years later rather than by imposition of economic will.[236] Both companies signed members-only contracts in 1937,[237] although General Motors additionally conceded to what was essentially a six-month neutrality agreement with regards to UAW organizing, to be umpired by Michigan Governor Frank Murphy.[238]

Indeed, labor historians have long acknowledged the pivotal role that New Deal-loyalist governors played in these campaigns. "Had Michigan's governor been someone like M. Clifford Townsend rather than Frank Murphy," wrote Sidney Fine, referring to the Indiana governor who declared martial law in response to UAW struggles in his state, "the strike would almost certainly have had a different outcome . . . ."[239] Nelson Lichtenstein has gone so far as to say that "the UAW victory was possible not so much because of the vast outpouring of union sentiment among autoworkers, but because General Motors was temporarily denied recourse to the police power of the state."[240] It is difficult to imagine such a scenario where the sitting president had not endorsed and signed the Wagner Act.

Most importantly, Goldfield's narrow focus on NLRB election data

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Hearst, 2 N.L.R.B. 530 (1937); International Harvester Co., 2 N.L.R.B. 310 (1936); The Associated Press, 1 N.L.R.B. 686 (1936); Standard Oil Co. of California, 1 N.L.R.B. 614 (1936); Chrysler Corp., 1 N.L.R.B. 164 (1936).

[234] GROSS, *supra* note 79, at 214–23. Much of this evidence was gathered specifically to assist the Flint sit-down strikers. DUBOFSKY, *supra* note 16, at 139.

[235] Pope, *supra* note 62, at 76–81 (strikers viewed Wagner Act as "human rights statute").

[236] SIDNEY FINE, SIT-DOWN: THE GENERAL MOTORS STRIKE OF 1936–1937 329 (1969); Walter Galenson, *The Unionization of the American Steel Industry*, 1 INT'L REV. OF SOC. HIST. 8, 23 (1956).

[237] FINE, *supra* note 236, at 304; Galenson, *supra* note 236, at 40.

[238] FINE, *supra* note 236, at 304–05.

[239] *Id.* at 311.

[240] NELSON LICHTENSTEIN, WALTER REUTHER: THE MOST DANGEROUS MAN IN DETROIT 75 (1995). Strategically, Murphy seized on General Motors's violations of the Wagner Act as justification for refusing to evict the sit-down strikers. FINE, *supra* note 236, at 233–37.

distorts the extent of the Board's contemporary influence on union organizing. As Ahmed White has meticulously chronicled, the Little Steel strike waged by the Steel Workers Organizing Committee in the summer of 1937 ended in unmitigated defeat for the CIO.[241] The steel companies had weathered the strikes and resumed production by convincing governors to call out the National Guard and join local police and private armies to break the SWOC's picket lines; at least sixteen union supporters were killed, hundreds were injured, and thousands were discharged.[242] The Little Steel cases became the NLRB's first major test as an operational agency, and the Board "aggressively prosecuted these charges in the face of strident company resistance."[243] After years of litigation and millions of dollars in liabilities accrued by Republic Steel, the industry's worst offender, the Board procured a settlement in 1940 and additional stipulations from the company in 1941. The final resolution required Republic to pay roughly $1.5 million in backpay and benefits, reinstate over five-thousand strikers, and, most importantly, acquiesce to a card check of union membership lists against company payrolls which conclusively demonstrated the SWOC's majority support.[244] Settlements at Inland Steel and Youngstown Sheet & Tube also ended with affirmative card checks, and Bethlehem Steel—ordered by the Board to disband its company union—agreed to hold a dozen secret-ballot elections at its mills. The union won every single one.[245] White, hardly a New Deal nostalgist,[246] is unequivocal in his appraisal of the Wagner Act's role in bringing Little Steel to heel:

> Were it not for the NLRB prosecution of the Wagner Act, most all strikers who were effectively fired by the companies would have lost their jobs permanently, and none of these men would have received any payment. Nor would the companies have been compelled to recognize and bargain with the union. The board's Little Steel cases may be the most outstanding example of the agency's effort to enforce the labor law against large, powerful, and intransigent employers; and these cases'

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[241] AHMED WHITE, THE LAST GREAT STRIKE: LITTLE STEEL, THE CIO, AND THE STRUGGLE FOR LABOR RIGHTS IN NEW DEAL AMERICA 211–25 (2016).

[242] *Id.* at 229–50.

[243] *Id.* at 251.

[244] *Id.* at 252–61, 269–71.

[245] *Id*. at 260–61, 270–71.

[246] *See, e.g.*, Ahmed White, *The Depression Era Sit-Down Strikes and the Limits of Liberal Labor Law*, 40 SETON HALL L. REV. 1 (2010).

role in advancing labor rights is significant.[247]

In July 1942, the National War Labor Board (NWLB) issued a precedent-setting decision in the Little Steel cases which awarded wage increases, dues-checkoff, and a maintenance-of-membership clause to any union that surrendered the right to strike during war time and committed to policing wildcat activity amongst its ranks.[248] This "formula" provided the newly-established United Steelworkers (USW) several of the contractual terms they had been unable to extract from the previous year of bargaining, and with their leverage now greatly diminished, the Little Steel employers all signed contracts with the USW in August.[249] Similarly, U.S. Steel's years-long resistance to granting the union the right to exclusive representation only ended in 1942 following a series of NLRB elections and a NWLB directive.[250] By September of that year, "[a]pproximately 90 [percent] of the industry was organized on a basis that provided the union with a considerable degree of membership security."[251] Given the sluggishness of the union's organizing efforts as late as 1940 and the rapidity which the steel titans capitulated following the NLRB's backpay and reinstatement orders and the country's entry into World War II, CIO leaders can hardly be faulted for believing their best option after the Little Steel strike's failure was to "win through the New Deal administrative state what it could not in a sheer test of economic strength."[252]

To be sure, White is critical of both the Wagner Act's weak deterrents against Little Steel's willful violations of the law and unions' learned reliance on the politically fickle compact with New Deal liberalism.[253] White concludes that the Little Steel strike "confirmed that the NLRB and the Wagner Act would neither fundamentally alter the overall contours of industrial relations nor uproot capitalist hegemony in the workplace."[254] He is almost certainly correct that Wagner's vision of industrial democracy did not include a radical reordering of who controlled the means of

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[247] WHITE, *supra* note 241, at 261.

[248] *Id.* at 272.

[249] *Id.* at 271–72. On the vast influence of the NWLB on traditional aspects of voluntarism and private ordering, see DUBOFSKY, *supra* note 16, at 182–91.

[250] Galenson, *supra* note 236, at 40.

[251] *Id.*

[252] WHITE, *supra* note 241, at 274.

[253] *Id.* at 261–68.

[254] *Id.* at 7.

production.[255] However, White's criticism is a far cry from Goldfield's account of the period, wherein the Wagner Act played no part in unions' major organizing triumphs and had only a deleterious effect afterwards in constraining their radical potential. Goldfield thus relegates the state to the role of a bad house guest: it arrived late, overstayed its welcome, and later took credit for throwing a great party. As we have seen, it is tremendously difficult (if not impossible) to square this version of events with the reality of Little Steel, where the federal government induced the near complete organization of a fervently anti-union and nationally vital industry through vigorous prosecution and economic coercion.[256] Scholars can weigh the costs and benefits to the labor movement of the New Deal's defeat of the open shop in steel, but they cannot pretend that this result was inevitable—or even probable—without enormous aid from the state.[257]

The very concept of removing the state from industrial relations is a misnomer. The federalist system of American government has ensured that some level of the state has regulated private-sector unions and workers' collective action at varying intensity, whether it be through federal, state, or local bodies, or comes in the form of criminal, antitrust, or labor law.[258] Revealingly, when the state endeavored in the 1910s to deregulate the preceding legal regime by legitimizing unions' use of strikes, boycotts, and picketing *without* enacting a comprehensive administrative scheme to officiate this

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[255] For rejections of an anti-capitalist reading of the Wagner Act, see Finkin, *supra* note 38; Comment, *supra* note 134; *see also* PLOTKE, *supra* note 111, at 98–101.

[256] *See supra* notes 241–52 and accompanying text.

[257] Galenson, *supra* note 236, at 40 ("Whether this could have been achieved in so short a time, indeed, if at all, without the favorable conjuncture of government assistance through the National Labor Relations Board and, even more important, the condition of full employment created by the war, is at least problematical."). Similarly, the previous major push to unionize the steel industry in the late 1910s rose and fell concomitant with the lifespan of the federal government's protective wartime schema. DUBOFSKY, *supra* note 16, at 74–79.

[258] *See generally* DANIEL R. ERNST, LAWYERS AGAINST LABOR: FROM INDIVIDUAL RIGHTS TO CORPORATE LIBERALISM (1995). For example, the Supreme Court has upheld the authority of states to restrict mass picketing—Dimick's favored tool for restoring union power—despite the Taft-Hartley amendments already forbidding such conduct. *See, e.g.*, UAW v. Wis. Emp't Rels. Bd., 351 U.S. 266 (1956). Dimick's vision of labor freedom would therefore require unions to legislatively enact a system of federal preemption even stronger than what the NLRA currently enjoys.

landscape, a strategy not unlike the one Dimick advocates, the judiciary had thwarted these efforts—despite having dubious grounds to do so.[259] Proponents of a renewed deregulatory agenda must explain how labor will navigate and interact with these myriad hostile institutions while sacrificing its rights to state enforcement of its traditional objectives, no matter how illusory those rights are said to be under the current structure.

Finally, it must be addressed why the politics surrounding labor law often bear little resemblance to the world the neo-voluntarists describe. Despite the state's alleged pacifying influence on labor, conservatives still do not welcome regulations in industrial relations; they oppose them as concertedly and vociferously today as they did in the 1930s.[260] The NLRB remains under siege, as attacks have been levied this century upon the agency's basic abilities to prosecute high-profile violations,[261] confirm personnel,[262] hold a quorum for adjudications,[263] and even staff its field operations.[264] If the NLRA were up for repeal, it is not difficult to project which groups and interests would support its elimination.[265] And tracking back to the Wagner Act, it is unclear why labor's foes considered the Taft-Hartley

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[259] *See* Stanley I. Kutler, *Labor, the Clayton Act, and the Supreme Court*, 3 LAB. HIST. 19 (1962). The Supreme Court's *Duplex Printing Press* decision was one of the main ires of Frankfurter and other anti-injunction progressives. *See* FRANKFURTER & GREENE, *supra* note 152, at 176 (lamenting that "the more things are legislatively changed, the more they remain the same judicially.").

[260] Ken Silverstein, *Labor's Last Stand*, HARPER'S MAG. (July 2009), https://harpers.org/archive/2009/07/labors-last-stand/.

[261] *See* Julius Getman, *Boeing, the IAM, and the NLRB: Why U.S. Labor is Failing*, 98 MINN. L. REV. 1651 (2014).

[262] Josh Hicks, *How Obama's NLRB Nominees Became Central to Senate Filibuster Deal*, WASH. POST (July 17, 2013, 6:00 AM), https://www.washingtonpost.com/news/federal-eye/wp/2013/07/17/how-obamas-nlrb-nominees-became-central-to-the-senates-filibuster-deal/.

[263] Thomas J. Donahue, *The NLRB's Uncertain State*, POLITICO (Feb. 4, 2013, 9:25 PM), https://www.politico.com/story/2013/02/the-nlrbsuncertain-state-087153.

[264] Steven Greenhouse, *US Labor Leaders Say Underfunding at Federal Agency Has "Reached Crisis Stage,"* GUARDIAN (Aug. 17, 2022, 7:00 AM), https://www.theguardian.com/us-news/2022/aug/17/us-labor-agency-union-activity.

[265] Indeed, employers are increasingly challenging the constitutionality of key components of the Act, including the structure of the NLRB. See Steven Greenhouse, Major Corporations Threaten to Return Labor to 'Law of the Jungle," GUARDIAN (Mar. 10, 2024), https://www.theguardian.com/us-news/2024/mar/10/starbucks-trader-joes-spacex-challenge-labor-board.

amendments to be so necessary if the law at its inception "subject[ed] the labor relations regime to broader conservative political aims[.]"[266] As Jean-Christian Vinel has perceptively asked, "why did Congress modify a regime that had been, or was in the process of being tamed?"[267]

If nothing else, it should now be clear why Craig Becker—arguably the most decorated labor lawyer of the last several generations [268] —once rebuked the neo-voluntarist narrative for "dismiss[ing] far too hastily the rights that the Wagner Act afforded labor."[269] Becker's defense of the Act is worth quoting at some length:

> The labor policy of the New Deal marked a watershed in the relationship between the state and unions but not of the kind Tomlins describes. For in his view, the wage contract remained a private bargain—the province of employers and unions but not of government—until the rise of the "liberal bureaucratic-administrative state" during the New Deal. Attentive to the language of law rather than the actual exercise of power, he portrays the Wagner Act as an unprecedented, unwarranted intrusion by government into wage relations, which transformed the private bargain into a public contract. But the statute did not suddenly lift the wage contract from the private into the public sphere. Rather, it refashioned the form of state intervention into productive relations, establishing a "legal discourse" that translated the public interest in industrial peace from the inarticulate force of the billy club into a code of rights and obligations.[270]

Thus, only by "divert[ing] attention from both the concrete social antagonisms that provoked [the Wagner Act's] passage and the unprecedented protection it gave to workers engaged in daily conflict with employers" can the neo-voluntarists depict the Act as an

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[266] Vinel, *supra* note 175, at para. 29.

[267] *Id.*

[268] Becker has served as a law firm partner, a law professor, in-house counsel to an international union, a Member of the National Labor Relations Board, and General Counsel of the AFL-CIO. See Craig Becker, AFL-CIO (last visited Mar. 10, 2024), https://aflcio.org/press/experts/craig-becker.

[269] Craig Becker, *Individual Rights and Collective Action: The Legal History of Trade Union in America*, 100 HARV. L. REV. 672, 684 (1987) (reviewing TOMLINS, *supra* note 14).

[270] *Id.* at 687 (internal citations omitted).

unqualified "shackle" upon labor's destiny.[271]

V. CONCLUSION

On March 31, 1992, over ten thousand United Auto Workers (UAW) strikers were given a devastating choice. Caterpillar, Inc., their employer, had issued them an ultimatum amidst their six-month strike, which had shuttered most of the company's Illinois factories: report to work the next week or face permanent replacement. For the first time in the parties' forty-four-year bargaining relationship, Caterpillar was promising to restart production during a strike. Caterpillar succeeded. While the April 6 deadline saw only a trickle of UAW members cross the picket line, a week of news reports inundated with rumors of the company interviewing replacement workers created a flow of defection. By April 14, over a thousand members had returned to work, forcing the union to end the strike in exchange for a cessation of the company's hiring plans. Workers returned to the plants without a new collective bargaining agreement.[272]

While Caterpillar's threat provoked an outcry from organized labor and sympathetic politicians, the UAW did not wait for legislative action; it decided to "bring the strike inside" by pursuing slowdowns through an extensive work-to-rule campaign. By workers doing only what the contract absolutely required them to, they gummed up production and invited management castigation. Caterpillar foremen routinely meted out discipline in response, and many of the more open union supporters on the floor were discharged. With no functioning grievance procedure under the expired agreement, an avalanche of unfair labor practice charges were filed with the NLRB.[273] Between November 1991 and March 1998, the UAW filed almost 900 charges and the Board issued 441 complaints against Caterpillar.[274]

The hostilities provoked months of wildcat activity across a half-dozen facilities until rank-and-file pressure convinced UAW leadership to call another strike in June 1994—now with the law's

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[271] *Id.* at 684, 687.

[272] Michael H. Cimini, *Caterpillar's Prolonged Dispute Ends*, BUREAU OF LAB. STAT., COMP. & WORK. CONDITIONS, Sept. 1998, at 5–6.

[273] *Id.* at 6–8.

[274] Stephen Franklin, Caterpillar, UAW Plan to Negotiate Face-to-Face, CHI. TRIB. (Jan. 31, 1998), https://www.chicagotribune.com/1998/01/31/caterpillar-uaw-plan-to-negotiate-face-to-face/.

protection from permanent replacement. The union stayed out this time for seventeen months. It was a resounding failure. Several thousand members refused to heed the union's strike call at all, providing Caterpillar enough employees to continue production when supplemented by contractors, office staff, and replacement hires. The company reported record profits in a favorable economic environment for earthmoving equipment manufacturers. With the union unable to create any bargaining leverage on the picket lines or through community sympathy, leadership declared the strike over in December 1995 despite the members rejecting Caterpillar's last offer.[275]

No bargaining occurred for almost two years. The NLRB litigation dominated the parties' energies, as the charges, complaints, and trials continued to accumulate.[276] With the UAW surpassing half-a-decade without a successor contract, rumors of decertification attempts swirled in the shops.[277] A turning point came in early 1997, when the Board's General Counsel issued complaints alleging that the 1994–95 walkout constituted an unfair labor practice strike and Caterpillar had thus unlawfully delayed reinstating many of the returning strikers by weeks or even months. The upshot of this violation—which involved thousands of workers missing hundreds of thousands of hours of work—meant a gargantuan backpay liability for the company, estimated at $113 million by the UAW.[278] This figure did not include the millions of dollars already at stake for the countless suspensions, discharges, and disparate granting of benefits that Caterpillar was accused of committing during the labor dispute, nor the costs in attorney's fees required to defend and appeal the charges. Only then did the parties settle. Caterpillar returned to the bargaining table and hammered out a new contract, agreeing to reinstate every terminated worker in exchange for the union's withdrawal of its NLRB charges.[279]

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[275] Cimini, *supra* note 272, at 8–9.

[276] *Id.* at 9–11.

[277] *See* Isaac Cohen, *The Caterpillar Labor Dispute and the UAW, 1991-1998*, 27 LAB. STUD. J. 77, 93 (2003); *see also* Frank Swoboda, *Caterpillar, UAW at Crossroads*, WASH. POST. (Feb. 24, 1998) (claiming UAW was at risk of "losing its right to represent Caterpillar workers.").

[278] Valerie Lilley, *NLRB Complaint Seeks Pay, Benefits*, PEORIA J. STAR, May 29, 1997, at A1. This figure would have constituted almost a third of all backpay collected by the NLRB in its first 50 years of existence. NLRB, THE FIRST 50 YEARS: THE STORY OF THE NATIONAL LABOR RELATIONS BOARD 1935-1985, at 64 (1986) [hereinafter NLRB, THE FIRST 50 YEARS].

[279] Cimini, *supra* note 272, at 11.

I conclude this Article with the Caterpillar-UAW relationship not to exaggerate the impact of the NLRA on modern labor disputes. This story was not a happy one for the UAW; it is regularly included in the canon of other monumental defeats for organized labor during the end of the twentieth century.[280] The 1998 contract contained a two-tier wage scale, job security by name (rather than a commitment to a set number of positions), and a six-year term instead of the standard three, some of the very proposals the union struck over in 1991.[281] These concessions have been described as leading causes for the deterioration of the union from its mighty past at Caterpillar to its current shell. [282] Where the UAW's Peoria-area facilities once comprised its second-largest local in the entire union, it now stands at just a few thousand members. [283] And where the UAW struck Caterpillar almost ritually with every contract expiration in the first half-century of its existence, honing its well-earned reputation for militance, it has not engaged in a single strike of the company since signing the 1998 agreement.

But the union survived. Even under the post-war revisions to the NLRA, Caterpillar's numerous unfair labor practices prevented it from bargaining to impasse and unilaterally implementing its desired terms and conditions of employment, which included major capital allocation decisions such as the closure of the company's unionized plant in York, Pennsylvania,[284] until all outstanding complaints were dismissed, withdrawn, or fully remedied through years (if not decades) of litigation.[285] Decertification was also taken completely off the table.[286] Caterpillar was thus drawn back to the bargaining table

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[280] *See, e.g.*, MISHEL, ET AL., *supra* note 11, at 31–32.

[281] Cimini, *supra* note 272, at 5, 11.

[282] *See* Louis Uchitelle, *Two Tiers, Slipping Into One*, N.Y. TIMES (Feb. 26, 2006), https://www.nytimes.com/2006/02/26/business/yourmoney/two-tiers-slipping-into-one.html.

[283] Terry Bibo, *UAW Still Has Pull as Numbers Drop*, PEORIA J. STAR (Sept. 6, 2009, 5:01 AM), https://www.pjstar.com/story/news/2009/09/06/uaw-still-has-pull-as/42299102007/.

[284] Paul Gordon, *Legal Matters Holding Up Talks*, PEORIA J. STAR (Feb. 10, 1998), at A1.

[285] *See* Alwin Mfg. Co. v. NLRB, 192 F.3d 133, 141 (D.C. Cir. 1999) (unremedied unfair labor practices preclude valid impasse if the existence of those unfair labor practices contributed to the deadlock). The *Darlington Mills* case serves as an extreme example of Board litigation which took a quarter-century to resolve. NLRB, THE FIRST 50 YEARS, *supra* note 278 (noting the Board entered an unfair labor practice finding against Darlington in 1956 and settled the case in 1980).

[286] See Overnite Transportation Co., 333 N.L.R.B. 1392, 1392–93 (2001) (the

by the UAW's statutory protections, the company's contractual paralysis, and its record-breaking projected backpay liability, which mounted with every passing day.[287]

The UAW endured despite losing the economic war in overwhelming fashion. Caterpillar had shrugged off every one of the union's attacks, ranging from the traditional (legal and extralegal) weaponry of strikes, slowdowns, pickets, and secondary boycotts to a more modern corporate campaign targeting the firm's reputation and community ties. The UAW was a conquered combatant by any objective measure, and if not for the NLRA's proscription, Caterpillar could have conceivably reopened its plants with a nonunion workforce, as employers regularly did before the advent of the Wagner Act.[288]

These are the battles (and bargaining units) which labor would likely lose in returning to the "law of the jungle," as the AFL-CIO once flirted with and the neo-voluntarists openly advocate. Of course, they may be right that abandoning labor law as we know it may ultimately

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Board "generally will dismiss a representation petition, subject to reinstatement, where there is a concurrent unfair labor practice complaint alleging conduct that, if proven, (1) would interfere with employee free choice in an election, and (2) is inherently inconsistent with the petition itself.").

[287] This is the analysis proffered by Glenn A. Zipp, the former Regional Director of the NLRB's Peoria, Illinois office, which investigated and prosecuted the vast majority of the 1990s Caterpillar litigation. E-mail from Glenn A. Zipp to Brandon R. Magner (Oct. 5, 2020) (on file with author).

[288] WHITE, *supra* note 241, at 13–15 (recounting the 1892 Homestead strike). Employers still attempted this maneuver after the Wagner Act, but they were often rebuffed. In the 1950s Kohler strike, for example, the UAW failed to win a successor contract despite engaging in months of mass picketing and a years-long nationwide boycott campaign. The union was effectively defeated until the NLRB found that Kohler's bad-faith bargaining had converted the dispute into an unfair labor practice strike and ordered the company to discharge its replacement workers, re-hire 1,700 strikers, and resume bargaining with the union. Kohler Co., 128 N.L.R.B. 1062, 1109–11 (1960), *enf'd in relevant part sub nom.* Local 833, UAW v. NLRB, 300 F.2d 699 (D.C. Cir. 1962). The UAW represents employees at Kohler to this day. Chad Held, *Kohler Co. and UAW Local 833 Agree on New Contract*, SHEBOYGAN SUN (July 24, 2023), https://www.sheboygansun.com/business/kohler-co-and-uaw-local-833-agree-on-new-contract/article_bf843812-2a34-11ee-9769-07af4a97d3cd.html. For an account of the strike that is highly critical of the union but nonetheless recognizes the effectiveness of the Board's order, see SYLVESTER PETRO, THE KOHLER STRIKE: UNION VIOLENCE AND ADMINISTRATIVE LAW 41–46 (1961). For other examples of the potency behind the finding of an unfair labor practice strike and, more broadly, the importance of a federal duty to bargain to some unions' existence, see ROSS, *supra* note 107, at 184–95.

be better for unions than continuing on their current path, but these discussions are rarely specific as to which types of losses should be accepted and what sacrifices should be made. If collective bargaining is now endangered after seventy years of steady decline in union density, it could very well become extinct through an overnight repeal of the NLRA. As pre-New Deal history and the Caterpillar-UAW example demonstrate, only unions with ample economic leverage can independently compel an employer to bargain. The rest must rely on at least some form of state coercion to press their demands. In this era of multinational corporations, capital mobility, decentralized supply chains, and fissured workplaces, a Darwinian approach to industrial relations threatens to place unions in an even worse position than they found themselves before the 1930s.[289]

The NLRA is a deeply flawed statute. As White's history of the Little Steel strike painstakingly details, the Wagner Act's lack of any explicit punitive power allowed it to be quickly cabined by the courts as a purely remedial statute,[290] and the NLRB has struggled to deter violations of the law ever since.[291] Such deficiencies should not be surprising in legislation drafted nearly ninety years ago, especially where its only major modifications were passed to blunt the thrust of the charter provisions. If the NLRA is to regain some foothold of relevance in the twenty-first century, it will at minimum require a dramatic overhaul to the Board's capacity to "take such affirmative action . . . as will effectuate the policies of this Act,"[292] if not a reconsideration of what those policies entail.

This Article has sought to spotlight and re-examine the growing

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[289] *See* Brian Callaci, *It's Time for Labor to Embrace Antimonopoly*, FORGE (Apr. 13, 2021), https://forgeorganizing.org/article/its-time-labor-embrace-antimonopoly; *see also* NELSON LICHTENSTEIN, LABOR'S WAR AT HOME: THE CIO IN WORLD WAR II x (Temple Univ. Press 2003) (1982) ("In the early twenty-first century . . . organized labor's incorporation into a claustrophobic state apparatus seems far less of an issue than the survival of those same unions, not to mention the revival of a socially conscious, New Deal impulse within the body politic.").

[290] Republic Steel Corp. v. NLRB, 311 U.S. 7, 10 (1940). *But see* Michael Weiner, Comment, *Can the NLRB Deter Unfair Labor Practices? Reassessing the Punitive-Remedial Distinction in Labor Law Enforcement*, 52 UCLA L. REV. 1579 (2005) (arguing the Court erred in circumscribing the Board's remedial authority).

[291] Stansbury, *supra* note 7.

[292] 29 U.S.C. § 160(c) (2018); *see also* Eleanor Mueller, *Democrats Clear Reconciliation Without New Teeth for NLRB*, POLITICO (Aug. 12, 2022, 6:06 PM), https://subscriber.politicopro.com/article/2022/08/democrats-clear-reconciliation-without-new-teeth-for-nlrb-00051511 (discussing congressional efforts to provide NLRB authority to issue civil fines for unfair labor practices).

trend among an influential strain of labor academics and activists to question, criticize, and lament Congress's passage of the Wagner Act. It argues that these radical conceptualizations of the Act's origins misconstrue the statute's intent and distort the state's impact on the trajectory of U.S. labor relations. While the neo-voluntarist account of New Deal collective bargaining law has provided us interesting counterfactuals about labor and the law which scholars must duly consider, its contentions are fatally undermined by the facts of American history and limitations inherent in the country's political economy. The Wagner Act should instead be understood for it was: a preliminary but valorous foray into national labor policy, by which future reformers may rightfully look to for inspiration. There, they will likely find that the spirit of the Act—rather than its substance—will prove most useful.[293]

[293] McCartin, *supra* note 19, at 35–38.