Rights, Not Interests

Resolving Value Clashes under the National Labor Relations Act

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INTRODUCTION

In 1935, Congress passed the Wagner Act (National Labor Relations Act, NLRA) which was intended to democratize a vast number of American workplaces to enable workers to participate in the employment decisions that most directly affected their lives. What was commonly termed "industrial democracy" was, through the statutory encouragement and protection of worker organization and collective bargaining and other forms of collective action, to replace industrial autocracy—employers' unilateral determination of wages, hours, and working conditions. Today the Wagner Act, although battered by amendment and interpretation, is still in effect and is still a vibrant source of workers' rights.

For over forty years my research has concentrated on the National Labor Relations Board (NLRB), the administrative agency created by Congress to interpret and apply the Wagner Act. Rather than focus on the procedures and case doctrines of the NLRB, most of my prior NLRB-related publications, including three volumes dealing exclusively with the NLRB, have analyzed how the NLRB's making of labor policy has been influenced

by the president, the Congress, and the United States Supreme Court as well as by the manipulation of public opinion, intense resistance by employers, the political and economic strategies of organized labor, and the ideological dispositions of NLRB appointees.

For example, in the first volume, *The Making of the National Labor Relations Board: A Study in Economics, Politics, and the Law, 1933–1937* (1974), I demonstrate that the major provisions of the Wagner Act were crafted out of the practical lessons learned by people who served on the pre–Wagner Act National Labor Board (NLB) and the "old" NLRB in conflicts with employers and unions: majority rule, and exclusive representation; the specifications of employer unfair labor practices; the right of employees to organize; and the obligation of employers to bargain with the representative of those employees. Equally important for the making of national labor policy was the transformation of what began in 1933 as a tripartite NLB created to settle strikes through mediation and voluntary cooperation into an independent quasi-judicial NLRB with enforcement power, deciding cases by setting forth binding principles of law.

The second volume, *The Reshaping of the NLRB: National Labor Policy in Transition* (1981), covers the period from 1937 when the United States Supreme Court upheld the constitutionality of the Wagner Act to the 1947 enactment of the Taft-Hartley Act amendments to the NLRA. In that book I analyze the NLRB's vigorous and uncompromising enforcement of the Wagner Act after constitutionality, and the intense hostile political pressure to which the Board was subjected as a consequence. More specifically, that volume reveals the direct connection between the work of a hostile congressional investigating committee (the Smith Committee) and an alliance of the American Federation of Labor (AFL), business, and Republicans with conservative southern Democrats in Congress and enactment of Taft-Hartley Act.

In the third volume, *Broken Promise: the Subversion of U.S. Labor Relations Policy, 1947–1994* (1995), I explain, among other things, how U.S. labor policy has been at cross-purposes with itself ever since Congress passed the Taft-Hartley Act amendments to the NLRA. Although the Wagner Act's statement of purpose encouraging collective bargaining was carried over verbatim into Taft-Hartley, Taft-Hartley's emphasis on the right of employees to reject collective bargaining, and the inclusion of union unfair labor practices in particular, led to claims that the purpose

of the Act was no longer to encourage collective action but was rather to protect the rights of individual employees. This interpretation rejected the concept of the federal government as a promoter of collective bargaining; instead the federal government was perceived as a neutral guarantor of employee free choice between individual and collective bargaining, indifferent to the choice employees made. That volume concluded with the assertion that any reconstruction of national labor policy must start with a resolution of this fundamental disagreement about what the purpose of the law is.

In other research and publications between 1995 and 2015, I came to the view that workers' rights must be viewed as human rights, not just rights set forth in statutes or collective bargaining agreements subject to shifting political and bargaining power. That shift in perspective is detailed in, among other writings, *A Shameful Business: The Case For Human Rights in The American Workplace* (2010).

This fourth volume, *Rights Not Interests: Resolving Value Clashes under the National Labor Relations Act*, applies that human rights framework of analysis to the work of the NLRB and to U.S. labor policy. This did require, of course, a review of my previous books but in a way that applied human rights standards to important events in NLRB history.

This fourth volume brings a new, and needed, perspective to the reexamination and assessment of U.S. domestic labor policy and the NLRB, in large part but not exclusively, by using internationally accepted human rights principles as standards for judgment. The application of the human rights standard is long overdue because at its core the Wagner Act was a historic human rights statute. Although not using the term *human rights*, the Wagner Act was far ahead of its time in applying human rights principles to U.S. workforces. As set forth in the Act's Statement of Purpose, the law was intended to promote the fundamental human right of collective action to protect other vital human rights, specifically "the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." Violations of the Wagner-Taft-Hartley Act were never considered to be violations of human rights, however, even though that statement of purpose has remained unchanged even following the enactment of the Taft-Hartley Act.

As Senator Robert Wagner put it, the exercise of the right to organize and bargain collectively is a matter of basic social justice. The right of people to participate in and influence the workplace decisions that affect their lives is one of the most fundamental human rights and principles of democracy. Wagner understood that worker participation in the economic, as well as political and social aspects of their lives, would not only help free them from servility at the workplace but also enable them to protect themselves against the arbitrary exercise of power by others or the alleged impersonal forces of the so-called free market. The law was intended to give workers the opportunity, protection, and support they needed to secure their own rights through participation in workplace decision making.[1]

The values underlying many provisions of the Wagner Act, particularly its statement of purpose, are values most consistent with human rights values. The NLRA's freedom of association meant not only collective action, labor organization, and collective bargaining but also the power to make the claims of workers' human rights both known and effective. Wagner's Act was intended to have workers stand before their employers as adult persons with rights, not as powerless children or servants dependent on the will and interests of their employers. His objective of having wages, hours, and working conditions determined by workers and their employers—through collective bargaining and not unilaterally by employers or an authoritarian state—recognized that servility is incompatible with human rights.

The NLRA also was intended to enable workers, by exercising their freedom of association, to change those workplace power relationships whereby most people are subjected to economic forces and economic power over which they have little or no control. In that most significant sense, the framers of the Wagner Act were far in advance of human rights activists in recognizing that it was not only the state that had the power to violate people's rights. More specifically, the Wagner Act emphasized the importance of economic rights—for example, the identification of wages, hours, and working conditions as subjects of collective action and collective bargaining. Wagner asserted that true freedom could not exist without economic security and independence. As the drafters of the Universal Declaration of Human Rights would state thirteen years after the Wagner Act became law, conditions for a fully human life are created only when all people enjoy their economic, social, and cultural rights as well as their civil and political rights.

As discussed further in this book, the values of the Wagner Act, in part because of their potential for establishing workers' rights as human rights, constituted a new vision and a new perspective on the traditional common-law values underlying labor-management relations, namely, property rights, freedom of contract, employment at will, management authority, limited government, and minimal regulations of the market.

These same core human rights principles of freedom of association and collective bargaining are also set forth in the most important international human rights declarations, covenants, and conventions. The International Bill of Human Rights, consisting of the Universal Declaration of Human Rights (UDHR), the International Covenant on Economic, Social, and Cultural Rights (ICESCR), and the International Covenant on Civil and Political Rights (ICCPR), contains many labor relations clauses covering freedom of association, organizing, and collective bargaining; prohibitions on forced labor and child labor; nondiscrimination, health, and safety in the workplace; and decent wages and benefits; among others. More specifically, the UDHR, for which the United States voted, calls on all nations to promote human rights and to take "progressive measures, national and international, to secure their universal and effective recognition and observance." Among the human rights in the Declaration are the right to freedom of association (Article 20) and the right to form and join unions (Article 23 [4]). The ICCPR, which the United States has signed and ratified with reservations, commits each state party to ensure the rights set forth in the covenant to all (Article 2), including the freedom of association, "the right to form and join trade unions for the protection of [his or her] interests." The ICESCR, which the United States has signed but not ratified, obliges each state party to "take steps" to achieve the "full realization" of rights recognized in the covenant, including the right of everyone to join trade unions "for the promotion and protection of [his or her] economic and social rights" (Article 8).

The Declaration of Philadelphia, annexed to the Constitution of the International Labour Organization (ILO), recognizes the solemn obligation of the ILO (of which the United States is a member) to further among nations of the world, programs that would achieve, among other things, "the effective recognition of the right to collective bargaining." Even before that, over forty years before the UDHR, the ILO had incorporated into its constitution the right of freedom of association as a fundamental human right necessary for social justice. ILO Conventions nos. 87 and 98,

which became effective in the 1960s, affirm the right to freedom of association and the right to bargain collectively. In 1998, the ILO issued a Declaration on Fundamental Principles and Rights at Work, which obligates all ILO members, whether or not they had ratified the relevant ILO Conventions, to promote and respect certain core rights, the first of which is "freedom of association and the effective recognition of the right to collective bargaining."

The concept of human rights is certainly not new, but the notion of workers' rights as human rights has emerged only in the past fifteen to twenty years. The human rights movement within the U.S. workforce is now growing and challenging long-held beliefs and practices in labor relations. The values underlying the Wagner Act, its conceptions of workers' rights, and most (but not all) of its provisions are consistent with human rights values.

The inward assessment of U.S. labor relations law using internationally accepted human rights principles as standards for judgment made in this volume—much as Human Rights Watch did fifteen years ago[2]—constitutes new and creative thinking about the Act. It creates new perspectives on old issues and introduces new standards of judgment that challenge much orthodoxy and many accepted rules in U.S. labor law and labor relations.

Although the phrase *human rights* does not appear in the language of the NLRA, the theme of this book is the Wagner Act's intention was to be at its core a workers' rights statute. Senator Wagner was asserting more than an abstract philosophical position when he said that the achievement of social justice through collective bargaining at the workplace was the primary objective of his law. In this volume I explain how when the Wagner Act was passed, the dominant early New Deal objective of protecting the free flow of commerce to facilitate economic recovery had become at best a derivative or consequence of the promotion and protection of workers' rights. Labor peace was not to be purchased at the price of workers' rights.

Not only is the NLRA a workers' rights statute but it also promoted and protected collective action by workers to secure their rights at their workplaces. That "bottom-up" enforcement power was a radical idea then and remains a radical idea now. The NLRA is radical in other ways as well. It reversed the role of the state from one that consistently subordinated and permitted the subordination of the rights of workers to employer property

rights and economic development to one that not only enabled workers to obtain sufficient power to make their rights both known and effective at their workplaces but also prohibited employers from using their economic power to prevent the exercise of those workers' rights. The NLRA's conception of the role of the state is identical to that set forth in Article II of ILO Conventions no. 87 on worker freedom of association and no. 98 on collective bargaining, which constitutes a detailed application of Article II. That article obliges a state to take all necessary measures to ensure worker freedom of association and to prevent any interference with the exercise of that right.

In addition, the New Deal, of which the NLRA was a part, radically transformed the "government hands-off notion" requiring the protection of only civil and political rights into a vision of freedom and rights requiring the affirmative involvement of the government in securing economic rights, including decent work for all Americans. The NLRA reflected an understanding of the interrelatedness of political, civil, and economic rights—as do the ICCPR and the ICESCR. The NLRA part of the New Deal, however, left the economic rights of workers not to determination by the national government but to the employer-employee collective bargaining process. That was one of the Act's unique strengths but at the same time one of its greatest weaknesses.

The counterrevolution against the Wagner Act began with its enactment, intensified when the NLRB enforced the new law in a literal way that maximized the realization of workers' rights, and it continues to this day. Over the years, the counterrevolution has been led by employer organizations (often seeking, among other things, to eliminate the Act's statement that it was the policy of the United States to encourage collective bargaining); Congress (often using congressional hearings as partisan devices to achieve predetermined objectives and with "equalizing" amendments, such as Taft-Hartley, permitting and encouraging employer resistance to unionization while weakening unions); chief executives such as Ronald Reagan (whose appointments to the NLRB were hostile not only to the purposes of the Act but also to the entire system of government regulation); and, the judiciary (particularly through Supreme Court decisions that instead of moving toward the realization of the fullness of workers' rights have back-tracked into the pre–Wagner Act values scheme

promoting and protecting employer property, authority, and economic development).

Often ignored, but discussed in this volume, is the fact that a most effective obstacle to the realization of the workers' rights set forth in the Act is the shift in control of the interpretation and application of the law from those who vigorously enforce workers' rights to those who perceive the law as seeking workable, mutual accommodation and "balance" between labor and management. Rights become transformed into interests, and labor law becomes merely a means to find some balance between employers' attempting to do business without interference and labor's pursuit of its economic self-interest.

This conflict-of-interest conception of the Act results in a fundamentally different labor policy far from a focus on workers' rights—transforming the NLRA into a statute intended to change the labor-management relationship from an adversarial model into a cooperative, mutual-gains, high-productivity model that would enable U.S. firms to compete more successfully. This high-performance model allows for various forms of worker participation, mostly nonunion, with strong implications that unionization and collective bargaining are not compatible with the partnership model.

The promoters of the Taft-Hartley Act talked of balancing the *interests* of labor and management, which still inspires talk of "a level playing field." That approach also reflects the pluralistic notion in which all disputes are considered conflicts of interest—particularly economic interest—and in which everything is negotiable. Consideration of rights becomes an impractical, unrealistic impediment to compromise, the sine qua non of conflict resolution.

The rights-versus-interest clash of values continues and explains much of the so-called flip-flopping of NLRB case doctrine over the years. It also explains the strong emphasis on the employee free choice provisions in the Act by some Board members who stress employees' right not to join a union while still approving workers' cooperative efforts with their employers.

Values clashes and choices are major considerations in explaining the events discussed in this volume. One cannot judge or understand reality without reference to values and value choices underlying the decisions that help make that reality. Simply put, values are personal or societal conceptions of the way things ought to be. In varying degrees they influence the

choices among conflicting alternatives or sets of principles,[3] privilege some voices and stifle others,[4] and create boundaries to thinking that make certain routes or directions rather than others seem right.[5] Ultimately, the conscious and deliberate choices by legislators, judges, and governmental agencies among different value judgments about the worth of human life, about workers' right to participate in the decisions that affect their workplace lives, and about the sources and extent of worker and employer rights underlie much of the decision making in regard to the clashes of rights at workplaces.[6] At the same time, there is no escaping the reality of power in the protection and promotion of workers' rights or the balancing of employer and union interests. The exercise of that power and the choices made as a result are value laden. There is no neutrality.

The NLRA commits the government to protecting and assisting workers so that they can gain sufficient power to organize and engage in collective bargaining and other concerted activity in order to make their rights both known and effective. How that can be and how is that periodically but imperfectly accomplished, often in the context of the contrary sets of values, is the main subject of this book. In regard to where we go from here, a number of other subjects are explored, beginning with a reassessment of obituary writers' contention that the Act is dead. On the contrary, despite the pounding of hostile forces over its entire existence, the core provisions and values of the Act remain solid foundations for the promotion and protection of workers' rights—not only as statutory rights but also as human rights.

The Act does need amending to eliminate impediments to the realization of workers' rights and to realize those rights more effectively and broadly. During that process some old rules need to be reconsidered and some changed, but in the process, the old Wagner Act values have to be honored.

Many proposals for change have been around for a long time yet still have merit. This book ends with a call for creative and visionary thinking beyond precedent-bound confines because more is required than fine-tuning for marginal adjustments. More specifically the call is for creative and visionary thinking concerning employment at will and its effect on the decisions of employees to exercise their right of freedom of association; taking workers' rights as human rights seriously and opening U.S. labor law in all its aspects to the challenges and consequences of applying international human rights standards and principles, including asking

whether, if freedom of association is a human right, employers should be permitted to resist its exercise; understanding and using the wide latitude the NLRB still has through rule making, remedy powers, and doctrinal development to achieve the workers' rights purpose of the Act more effectively; and exploring intellectually challenging and potentially transformative ideas on reconsidering the U.S. Constitution as a source for a national law of human rights, including the rights of labor.

These are vital and exciting challenges. All is far from lost. It is time, not for morose expressions of futility, but rather for optimism in knowing that political winds change. It is time to think big. Opponents of the NLRA's focus on workers' rights persistently have tried and have consistently failed to eliminate the Wagner Act's core statement of purpose, which remains unchanged: that it is the policy of the U.S. government to encourage—and protect and promote—workers' full freedom of association and collective action for negotiating the terms and conditions of their employment and for other mutual aid or protection.

Too often, however, workers have to risk their livelihood if they exercise their statutory and human right to organize and engage in other concerted activity. No worker should have to bear such risks in order to exercise his or her rights. The least that reform of the NLRA must do is to eliminate those risks.

1

From Wagner to Taft-Hartley: From Rights to Interests

The Transformation from Interests to Rights

The Wagner Act's statement of purpose and text outlined the same worker human rights and freedom of association and collective bargaining that are now well established in international human rights documents. The Act also embraced other important legislative goals of economic growth and stabilization through wider distribution of wealth and industrial peace by reducing strikes. Wagner was clear, however, that committing the national government to safeguarding the rights of freedom of association and collective bargaining "was the Act's primary goal; its other goals of fostering industrial peace and increasing workers' purchasing power were secondary."[1]

The best evidence of the intent to give first priority to workers' rights is found in the evolution or transformation of the two pre–Wagner Act labor boards, the NLB (1933) and the "old NLRB" (1934). These two boards evolved from agencies created to settle strikes through mediation by

unpaid, high-ranking partisan representatives of labor and management, with a focus on compromises acceptable to the disputing parties, informal and friendly discussions, voluntary cooperation, and reliance on public sentiment, into independent quasi-judicial agencies with full-time paid neutrals and enforcement powers, deciding cases on the basis of evidence produced through a formal adversarial process, thereby developing a body of case law defining and developing the principles of workers' rights.

There were more strikes in 1933 than in any year since 1921. President Franklin Delano Roosevelt issued a plan for industrial peace and created the National Labor Board (NLB), chaired by Senator Wagner and three industrial representatives selected by the National Recovery Administration's (NRA's) Industrial Advisory Board and three labor representatives chosen by the NRA's Labor Advisory Board to settle differences arising out of the President's Reemployment Agreement.[2] In part that assignment involved Section 7(a) of the National Industrial Recovery Act (NIRA), which provided that workers had the right to organize and bargain collectively free from employer interference, restraint, or coercion.[3] The New Deal's NRA, which administered the NIRA, had become committed to government-business cooperation and had decided that industry acceptance of its so-called codes of industrial self-government was essential. The NLB sought labor-management agreement through mediation. The NLB emphasized the importance of flexibility and informality in successful mediation and instructed its regional boards to "make settlements even though you are told it violates all the laws of the land."[4] Should voluntary cooperation fail, however, the NLB's legal powers were uncertain.

When employer challenges to the authority of the NLB became widespread, the NLB moved reluctantly and cautiously, and without formal authority, into a decision-making role of formulating principles rather than fashioning compromises. The mediation criteria of acceptability to the disputing parties, however, continued to guide the NLB so that many of its "decisions" were susceptible to compromise according to the circumstances and the pressures of each case. When the NLB issued decisions that employers found unacceptable, however, entire industries supported by trade associations and leading employer organizations engaged in an organized campaign of noncompliance with those decisions.

The NLB had reached an impasse with employers by March 1934. By that time the NLB, in addition to promoting and conducting approximately

forty representation elections, had begun to develop a common law of labor relations by ruling that

> an employee discharged for union activity be reinstated with back pay from the date of his discharge, that the employees' right to bargain collectively imposed a corresponding duty on the employer, that the parties approach negotiations with an open mind and exert every reasonable effort to reach an agreement, that self-organization and representation elections concerned employees exclusively and employers must keep "hands off," that strikers be given reinstatement priority over employees hired after the strike began, that all strikers be reinstated at the end of the strike when the board believed the strike was justified or when the strike was caused by an employer's violation of the law, and that, in many cases involving representation elections in reinstatement, strikers were to be treated as employees.[5]

The NLB experience, moreover, had demonstrated the potential incompatibility of its two goals: strike settlements based on formulas mutually acceptable to employers and unions and the interpretation of Section 7(a) through decisions identifying and establishing rights and duties. Ironically, it was employer opposition to the NLB's mediation efforts that forced the NLB toward the formal determination of rights and away from strike settlement by informal mediation. Employer opposition to mediation also led many to reject partisan representation on the Board and advocate for an independent, neutral, quasi-judicial agency free from the necessity of compromise.[6]

After the defeat of Senator Wagner's Labor Disputes Bill in 1934,[7] the NLB was abolished by the same Executive Order 6763 that created a new NLRB on June 29, 1934. Although that executive order conferred no decision-making authority on this pre–Wagner Act NLRB, the three full-time paid neutrals who comprised the Board decided at the outset to sit as judges, not to engage in mediation, and to reject strike prevention as its primary objective. They also decided that, unlike the NLB, their Board would not act as both mediator and judge, because Section 7(a) was law and the Board was set up to bring about compliance with it. In its reorganization of the regional Boards, the national Board worked to implement its decisions to abandon the informal, nonlegalistic mediation approach.

The old NLRB continued to build a body of labor law while affirming the precedents established in the opinions of the NLB. In one case

in particular, *Houde Engineering Company*, the old NLRB proceeded to weave what it found to be the meaning of Section 7(a) into labor policy that would become the core of the Wagner Act approximately eleven months later. The basic elements of the Board's decision were that the purpose of Section 7(a) was to encourage collective bargaining, that under Section 7(a) employees have the right to organize and bargain collectively free from employer interference with the exercise of that right, that the workers' right to bargain collectively implied a duty of employers to bargain with their employees' representatives, that without this duty to bargain the right to bargain would be sterile, and that the "only interpretation of Section 7(a) which can give effect to its purposes is that the representative of the majority should constitute the exclusive agency for collective bargaining with the employer."[8]

Despite the Roosevelt administration's reluctance to make a firm commitment to the labor policy and collective bargaining rights set forth in NLB and old NLRB decisions, the old NLRB and the NLB had pioneered in the creation and development of the common law of labor relations rights and duties rooted in the principles expressed in Section 7(a) that workers have the right to organize and bargain collectively free from employer interference with the exercise of those rights. However, the old NLRB's inability to obtain enforcement of its decisions amounted to a nullification of its case law. Given persistent employer opposition, it became clear to the old NLRB and others that this unenforceable common law had to be made into an enforceable statutory authority.

When the Wagner Act was being drafted, the old NLRB's staff was the largest outside contributor to the Act's content in regard to both procedure and substance. Philip Levy, who had been on the legal staff of the NLB and the old NLRB, called the participation and experience of the two Boards the "vital added factor,"[9] and Wagner's chief draftsman, Leon Keyserling, credited the "great deal of help" he received from the staff of the nonstatutory Board and from Levy. The result was that every major provision of the Wagner Act was crafted out of the experiences and practical lessons learned by the NLB and the old NLRB. Wagner was asserting more than a philosophical position when he said that the achievement of social justice through collective bargaining at the workplace was the primary concern of his law, to which the other goals of economic recovery were subordinate. The practical experience of the NLB and the old NLRB

provided ample evidence that the once-dominant objective of protecting the flow of commerce had become at best a derivative or consequence of the promotion and protection of workers' rights.

This was a momentous change. It did not mean that labor peace was unimportant. It did mean that, as Wagner put it, he "would not buy peace at the price of slavery."[10] Labor peace was not to be purchased at the price of workers' rights. The right to bargain collectively was more than merely a system of countervailing power or a way of determining wages, hours, and working conditions. To Wagner the right to bargain collectively was at the core of social justice for the worker: "Denial or observance of this right means the difference between despotism and democracy."[11]

The state, which until the New Deal and the Wagner Act had consistently subordinated and permitted the subordination of the rights of workers to employer property rights and economic development, was now committed by the Wagner Act to enabling workers to obtain sufficient power to make the claims of their human rights both known and effective. The government was to protect and empower those most in need of protection and empowerment. The New Deal, of which the Wagner Act was a part, was more than a mandate to expand government and the power of the federal government; it was a mandate to use governmental power to recognize, safeguard, and promote "new rights and new rights bearers"[12] It envisioned an affirmative state that would use its power "to protect individual rights against debilitating private power."[13]

The legislative design and intent of the Wagner Act sought to accomplish that end not only by enforcing the rights of workers to organize and bargain collectively, thereby promoting democratic self-government at the workplace, but also by seriously weakening employers' common law power over workers and workplaces. The Act prohibited employers from interfering by restraining or coercing workers who exercise their right to organize, to bargain collectively, and to engage in other concerted activities for their mutual aid or protection; from maintaining employer-controlled labor organizations; from discriminating against workers to discourage or encourage union activity; from discriminating against a worker for filing charges or giving testimony pursuant to the Act; and from refusing to bargain collectively with the duly designated representatives of employees.

The four U.S. Supreme Court justices who dissented in the *Jones & Laughlin* decision upholding the constitutionality of the Wagner Act[14]

deplored these limitations on employers as "an arbitrary interference with the liberty of contract which no government can legally justify in a free land." The dissenters called the right to contract "fundamental" and claimed it was "unduly abridged" because the Wagner Act deprived a private employer "of power to manage his own property by freely selecting those to whom his manufacturing operations are to be entrusted."[15]

The five justices in the majority, however (although concentrating on the power to regulate commerce), saw the workers' right to organize and bargain collectively as the prevailing "fundamental right."[16] For more than a century before the *Jones & Laughlin* decision, the dominant, common law–rooted employment right in this country was the freedom of contract—despite the fact that the reality of employer power made fiction of the conception of freedom of contract. The New Deal replaced this negative hands-off notion of freedom and rights with a far different vision of freedom, one that required affirmative economic rights, including decent work and livelihoods for all Americans.[17] Those rights would be legislatively enacted and safeguarded by Congress.[18] This new kind of economic freedom was one that "emphasized not formal rights to be free from government interference but effective rights to pursue happiness; one that depicted the guarantee of minimum conditions of economic security by government not as the paternalistic antithesis of freedom, but its precondition."[19] Asserting that political rights have proved "inadequate to assure . . . equality in the pursuit of happiness," Roosevelt, in his January 11, 1944, message to Congress, specified some of these substantive economic rights in what has become known as the Economic Bill of Rights or the Second Bill of Rights:

> We have come to a clear realization of the fact that true individual freedom cannot exist without economic security and independence. . . . In our day these economic truths have become accepted as self-evident. We have accepted, so to speak, a second Bill of Rights under which a new basic security and prosperity can be established for all—regardless of station, race or creed.
>
> Among these are:
>
> The right to a useful and remunerative job;
> The right to earn enough to provide adequate food and clothing and recreation; . . .

> The right of every family to a decent home;
> The right to adequate medical care and the opportunity to achieve and enjoy good health;
> The right to adequate protection from the economic fears of old age, sickness, accident and unemployment;
> The right to a good education.[20]

Roosevelt's Economic Bill of Rights, for example, had a powerful influence on the UDHR, which included economic rights as well as civil and political rights and did not distinguish between them. The Preamble of the ICCPR confirms the interrelatedness of these rights: "The ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his [*sic*] civil and political rights as well as his [*sic*] economic, social and cultural rights."[21] The ICESCR, which was joined with the UDHR and the ICCPR to compose the International Bill of Human Rights, affirms the same inextricable interrelatedness of economic and political rights: "The ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights as well as his civil and political rights."[22]

Wagner's law also reflected an understanding of the necessary interrelatedness of political and economic rights. He recognized that for those without bread, the guarantees of freedom of association, freedom of speech, and political participation are in reality meaningless. The fundamental rights that people need so they might live a human life, therefore, include not only those the government must not invade but also those the government must provide or promote.[23] The philosophy and design of the Wagner Act was consistent with the interrelatedness of economic and political rights. The Act empowered the government to promote and protect the economic rights of workers to organize and bargain collectively and prohibited employers from exercising their economic power to interfere with or prevent the exercise of those workers' rights. Beyond that, however, it left specific rights determinations to the joint employer-employee collective bargaining process and the mutual agreement, if any, of the negotiators.

The satisfaction of material needs was not enough. The Act was radical in that it rejected employers' unilateral determination of what workers'

rights would be, if any. Wagner's Act was intended, therefore, to democratize vast numbers of U.S. workplaces so that workers could participate in the employment decisions that most directly affected their lives. This is what Wagner meant when he said that the right of workers to participate in these decisions—and to establish, promote, and protect their rights—was essential for social justice. The Act's success, therefore, depended on the realization of a major redistribution of power from the powerful to the powerless at U.S. workplaces covered by the statute. More precisely, the realization of workers' rights, including workers' human rights, became dependent on workers' bargaining power. In that sense, the Act was also conservative because it rejected government determination of the specific economic rights of workers.

The NLRB, of course, continued to be another most important determinant of workers' rights. As Clyde Summers put it years later, "The Board, in exercising its functions of interpreting and elaborating the skeletal words of the statute, is compelled to mold and develop a body of law. It cannot act as a mechanical brain but must choose between competing considerations."[24]

The Transformation from Rights to Interests

Immediately after the Supreme Court declared the Wagner Act constitutional, the NLRB, chaired by J. Warren Madden, engaged in vigorous and uncompromising enforcement of the rights of working men and women set forth in the Wagner Act. By the end of 1937 the *New Republic* reported that the NLRB had "tackled the Big Boys in every industry," and in July 1938 *The Nation* concluded that "inexorably the sharp hook of justice [was] sinking into the tough gullet[s]" of some of the nation's staunchest opponents of unionism and the Wagner Act itself.[25]

Among those early decisions, the Board moved vigorously against the widespread use by employers of professional spies, armed guards, and strikebreakers, and it held companies responsible for the anti-union activities of their supervisors and managers as well as for discharging employees individually or in groups for union activity or membership. In the sensitive area of employer speech, the Board concluded that employer anti-union comments, even when containing no direct or even indirect

threat, were designed to exploit a worker's fear of losing his or her job. The Board also ruled that it was an unfair labor practice for an employer to refuse to enter into a written and signed collective bargaining contract once an agreement was reached with the union. Not only were employers ordered to cease and desist from engaging in unfair labor practices, but they were also required to take affirmative action to effectuate the policies of the Wagner Act, including the posting of notices in their plants with admissions of guilt of violations of the Act, or that recognition had been withdrawn from a company-dominated union, or that workers who had been discriminated against and discharged were reinstated to their former positions with full back pay.

The NLRB also used its power to favor union organization of employees. Under the provisions of the Wagner Act, the Board could determine either by a secret ballot of employees or by any other suitable method, what labor organization, if any, represented the employees in an appropriate bargaining unit. Until July 1939, the Board regularly certified unions as exclusive bargaining representatives without conducting a representation election—(approximately 31 percent of the unions certified)—on the basis of signed authorization cards, membership applications, petitions signed by a majority of the employees, signatures of employees receiving strike benefits, or participation of a majority of the employees in a strike called by the labor organization. The NLRB also made it much less difficult for unions to win representation elections by certifying as exclusive bargaining representative the labor organization receiving a majority of the votes cast rather than requiring a majority of those eligible to vote, which had been the rule before July 1936.

The Board continued its aggressive enforcement of the Wagner Act during the spring of 1938. In March 1938, the NLRB reinstated workers who had seized two buildings of the Fansteel Metallurgical Corporation in one of the more spectacular sit-down strikes that swept the country in 1937. The Board ruled that it did "not lie in the mouth of the respondent [Fansteel]" to assert that the offenses of its striking employees made them "any less fit to be employees than the respondent is to be an employer." The Board reaffirmed its *Fansteel* decision in *Republic Steel* when it reinstated strikers guilty of violence in the infamous "Little Steel" strike. In sharp language, the Board said that Republic Steel did not "come before the Board with clean hands."[26] In December 1937, at the same time that

the Appropriations Committees of the House and Senate were examining the Board's budget request, the NLRB, in another strongly worded decision, found the Ford Motor Company guilty of an antagonism to labor organizations that was "brought home to its employees through constant hostility of foremen and supervisory officials, through the systematic discharge of union advocates [and] through the employment by the respondent [Ford] of hired thugs to terrorize and beat union members and sympathizers."[27]

Senator Wagner approved of the Board's "marvelous record of vigorously enforcing the law and not compromising" and believed that the Board's "very strong position" had "vindicated the law very completely."[28] The NLRB's literal enforcement of the Wagner Act, however, did not go unchallenged. As *Time* magazine put it, the NLRB had "applied a drastic statute so literally that it has accumulated a fine roster of enemies."[29] Powerful conservative groups within industry, the labor movement, and politics attacked the NLRB because the Board was at the cutting edge of changes taking place in the balance of rights and power in the U.S. economy.

The counterrevolution that developed, however, was intent on defeating the entire New Deal, of which the Wagner Act was only a part, although an important part. Driving this counterrevolution was an alliance of southern Democrats and like-minded northern Republicans and employer associations and employers. The alliance shared a "Conservative Manifesto" in support of limited national government, states' rights (home rule and local-self-government), common law freedom of contract, property rights of the owners of capital[30] and attested to an aversion to the rise of the administrative state.[31] The southern bloc of the alliance, in particular, sought to defend the "racial civilization" it prized by upholding the Constitution against "Negroes, the New Deal and . . . Karl Marx."[32] Given their numbers, seniority, and control over key committees, Southern Democrats had a "hammerlock on Congress" that resulted in a "sway of Jim Crow over the politics of New Deal lawmaking."[33] Among other things, they successfully insisted that key bills—not only the Wagner Act but also the Agricultural Adjustment Act, Fair Labor Standards Act, and Social Security Act—exclude from coverage agricultural and domestic workers, "thereby expelling the majority of black Americans who worked in these two sectors."[34] Although the

NLRA excluded agriculture and domestic workers to accommodate Jim Crow, the Act in particular remained a focal point of the conservative alliance.

Nonetheless, the one person, one vote policy implemented in thousands of NLRB elections enfranchised black industrial workers, who never before had voted or participated as rights bearers in the public sphere. The new unions, in turn, "offered black workers industrial citizenship—participating in union governance, deliberating and deciding upon workplace grievances and broader goals . . . to generate a militant rights consciousness among black workers."[35]

The NLRB represented a new power being exerted by the federal government in ways that threatened the virtually unchallenged hegemony in labor relations that employers had enjoyed for decades. After the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) split in the late 1930s, moreover, the Board had the power to shape the nature of the new labor movement. The NLRB, therefore, threatened not only the power positions of American industry and its leaders but also the power position of traditional AFL craft unions and their leaders. Increasingly, almost every NLRB decision and representation election policy or practice became a matter of political controversy.

The NLRB, although technically an independent administrative agency, is in many ways a creature of Congress and the executive. At the same time, the Board's performance of its quasi-judicial duties is supposed to be independent of congressional or executive influence or control. At best it is a delicate balance of judicial independence and congressional and executive dependence. The first Wagner Act Board epitomized the independent NLRB to an extent unequaled by any subsequent Board. The Board's then chair, J. Warren Madden, for example, believed "that if the President would leave us alone . . . then we would leave him alone and not get his undeliberated reactions and then feel as if we had to follow them or be embarrassed by not following them."[36] Madden also told a hostile congressional committee in 1938 that the Board would not try to avoid criticism by compromising the principles of the Act: "We have chosen instead to vigorously put into effect the principles of the Act. And we shall continue to do so."[37] In Madden's opinion, "No law which was ever passed in this country has come so near to fulfilling what it was passed to accomplish as this law."[38]

The Counterrevolution: Pragmatic Balances

So near, but for such a brief period of time. Only two years after the Supreme Court found the Wagner Act constitutional, internal and external pressures resulted in the beginning of the transformation of the Board from an aggressive worker rights–enforcing agency that played a major role in the formulation of labor policy into a conservative, insecure, politically sensitive agency preoccupied with its own survival. That transformation was brought about mainly through appointments to the Board and through congressional hearings and investigations leading to the Taft-Hartley Act in 1947. The consequences have been enduring.

Hostile proposals to amend the Wagner Act were submitted to the Senate as early as June 1937. The Senate and House Labor Committees began hearings on bills to amend the Wagner Act in the spring of 1939. When pro-amendment forces charged that these committees were delaying their hearings, Congressman Howard Smith, a southern conservative farmer from Virginia, succeeded in having a House-sponsored "special investigation" of the NLRB.[39] The AFL, after forming overt political alliances with employers and political conservatives in Congress in response to what it considered the NLRB's pro-CIO bias, cooperated with Congressman Smith.

While pressure from Congress was building, including from the pending Smith Committee investigation, President Roosevelt sought to relieve the pressure on himself and his administration by filling a vacancy on the Board in April 1939 with William Leiserson. This appointment was the beginning of the end of the Madden Board's pursuit of independence. Leiserson, who was serving as the chair of the National Mediation Board at the time of his appointment to the Board, was a nationally known mediator and arbitrator and considered himself a mediator, not a judge. The impression was that Leiserson was appointed to "tone down" or moderate the NLRB. On the doctrinal front, for example, within three months of Leiserson's appointment, the Board by a 2–1 vote abandoned its policy of certification of a union on the basis of membership cards, asserting that the policies of the Act would be best effectuated if representation questions were resolved by secret ballot elections.[40]

The Smith Committee intended to lay the foundation for amendments and to create anti-NLRB public opinion, gaining maximum publicity effect

by feeding the press sensational stories.[41] Smith introduced his amendments in the House in March 1940. Among other things, the committee majority drastically redefined the meaning of collective bargaining as developed by the NLRB, limiting an employer's bargaining obligations to only "meet and confer" and excluding any employer obligation to submit counterproposals. The majority also proposed to permit employers to express opinions about unionism, provided those expressions were not accompanied by acts or threats of coercion, intimidation, or discrimination. According to the Madden Board, the objective of that proposed amendment was "to abandon the fundamental principle of the Act that the employer shall keep his hands off the self-organization of employees." The Madden Board maintained that an employer could not express an opinion in a vacuum: "Behind what he says lies the full weight of his economic position, based upon his control over the livelihood of his employees."[42]

The best evidence of the Smith Committee majority's overall intent, however, was its proposal to eliminate the assertion in the Act's Preamble that it was the declared policy of the United States to encourage collective bargaining.[43] That struck at the core of the Act. Although the Smith bill passed the House but was bottled up in the Senate Labor Committee, the Smith Committee's investigation had a dramatic and long-lasting effect on American labor policy and the NLRB's administration of that policy. Most important was the direct line between the committee's proposed amendments and the Hartley bill, which was rooted in those amendments, many of which became law when the Taft-Hartley Act was passed in 1947.

The Smith Committee investigation also made it impossible for Roosevelt to reappoint J. Warren Madden to the NLRB. One journalist wrote, "If Madden is dropped despite his record, the lesson for these quasi-judicial bodies is demoralizingly clear. It would be far safer for them to be quasi-political."[44] A new era began at the NLRB with the appointment of University of Chicago economics professor Harry Millis at the conclusion of the Smith Committee investigation. Millis was a peacemaker who believed that enforcing the law should never become a crusade. Millis referred to his chairmanship as a time for "emphasis on workable, realistic labor relations under the Act, [and] perhaps increased attention to criticism where found justified."[45] Millis acknowledged that while during his administration "unions considered the Board less militant in protection of workers' rights[,] some employers at least considered that the Act was being

administered more fairly."[46] While on the NLRB, Millis and Leiserson pursued what they considered "realistic industrial relations."[47]

The Millis-Leiserson appointments to the Board marked a movement away from the fundamental rights–based understanding of the Wagner Act and the fundamental rights–based interpretations of the Madden Board to protect and promote unobstructed exercise of workers' right to organization and collective bargaining. Those workers' rights were treated as ends in themselves by the first Wagner Act NLRB. After Millis and Leiserson, rights were at best instrumental means to an end—to obtaining a better bargain.[48] Millis and Leiserson evaded these supposedly "abstract" questions of rights and justice[49] in great part because an emphasis on rights interfered with pragmatic bargaining.[50]

Millis and Leiserson saw worker-employer relations as a private process of mutual accommodation or "give-and-take" leading to collective contracts. Instead of promoting legalistic definitions and enforcement of workers' rights, Leiserson was committed to the "whole idea of flexible and informal handling of modern economic problems by expert administrative agencies."[51] Workers' rights were transformed into workers' interests—self-interested, economic activity, the same as business activity.

Labor law, U.S. Supreme Court justice Felix Frankfurter asserted, involved balancing "the effort of the employer to carry on his business free from the interference of others against the effort of labor to further its economic self-interest."[52] In other words, stable, efficient, and effective collective bargaining relationships required workers and employers to give up their fundamental rights claims.[53] A congressional investigation, two appointments to the Board, and a great deal of politics and power of all sorts had changed the NLRB from being a workers' rights–enforcing body into a balancer of the competing interests of workers, unions, and employers.

President Harry Truman appointed Paul Herzog to replace Millis as the NLRB chair in 1945. Herzog was hailed as a stabilizing influence, as Millis had been. Herzog lamented that neither Madden nor Millis had any appreciation of public relations, which he considered "utterly essential."[54] The Herzog Board's decisions continued the trend that began with Millis of being less militant in enforcing the Wagner Act: enunciating employer free speech policies far removed from the

strict employer neutrality required in Madden's days and moving toward the "equalization" of the Wagner Act that critics of the Act had long demanded.

Taft-Hartley: A New Statutory Purpose?

After the Republicans gained control of the House and Senate in 1946 (for the first time since 1930), and the movement for what became the Taft-Hartley Act gained momentum, it was already clear that appeasement had not prevented the attacks on the NLRB. The Taft-Hartley Act, passed over President Truman's veto in 1947, threatened most directly and sweepingly the workers' rights nature of the Wagner Act. The Act contained many provisions that weakened unions and increased employers' power to resist organization and collective bargaining. The new law contained, for example, a series of prohibited union unfair labor practices, an expansion of employer "free speech" rights, a prohibition of the closed shop, and provision for the use of injunctions against strikes that imperiled national health and safety.

Labor relations experts at the time warned that employers would use the law to prevent unionization and avoid collective bargaining. One pointed to provisions that "encourage employers to take up the battle again over the question of whether or not their employees should be represented by unions."[55] Even former Board chair Millis deplored Taft-Hartley as a "bungling attempt to deal with difficult problems," including the "weakening of restraints upon employers who still seek to avoid a democratic system of labor relations."[56] NLRB chair Herzog told President Truman when Taft-Hartley passed that it not only weakened the Wagner Act "as a shield for working men but converted [it] into a sword to be used to combat their collective action."[57]

It was not clear at the time—and it remains a matter of heated debate today—the extent to which Taft-Hartley changed the core principle of the Wagner Act: that it was the policy of the United States to encourage collective bargaining. The Hartley bill, a direct product of the Smith investigation of 1939–1940, would have deleted the declaration of purpose from the Wagner Act and substituted a new declaration of policy, which