Contents

Introduction
The Blue Eagle Is Not Extinct

Its Labor Law Is Alive and Ready to Fly

Almost all ancient peoples believed the Earth to be flat. And almost all Americans involved in employment relations believe that a minority union has no right to engage in collective bargaining, even where no majority union has yet been designated. But come with me on a journey of legal discovery-or rather rediscovery-and we shall learn that this conventional wisdom is an illusion without foundation and that what will appear to be a new world of labor relations lies beyond. Historically, however, this new legal landscape will be no more new than the new world that Columbus found, but the prospect for change in American labor relations, as with the rediscovery of America, will indeed be new.

My personal journey of rediscovery began in the year 2000 when a friend, Peter Zschiesche, director of the San Diego Employee Rights Center,[1] called my attention to the plight of seventeen immigrant workers for whom he had filed an unfair labor practice charge. These were young men who had been employed at Hi Tech Honeycomb, Inc.,[2] a southern California aerospace subcontracting company. Reacting to their low wages and abysmal working conditions, on the morning of February 10, 1999-without labor-union assistance-they organized themselves into an informal peer group and staged a brief walkout to protest those conditions. The company owner refused to meet with them as a group to discuss their grievances and swiftly retaliated by firing all of them. In response to Zschiesche's request, I provided those workers with pro bono legal representation before the Regional Director and the General Counsel of the National Labor Relations Board (NLRB, or Board). While engaged in such representation, I began to analyze the multiple legal issues posed by their situation and to delve into the labor and legislative history that affected those issues. After lengthy study that continued far beyond the final action in the NLRB case, I was able to confidently re-

confirm-contrary to conventional wisdom-that in workplaces where there is not yet a majority/exclusive representative, collective bargaining on behalf of the members of a minority labor union is a protected right fully guaranteed by the National Labor Relations Act (NLRA, Wagner Act, or Act).3

The yield from that and further research and analysis forms the core of this book, which also explores the nature of the end product of such members-only union organizing and bargaining and the impact that this rediscovered process will likely have on future labor-management relations in this country. This book is therefore a hybrid of the interrelated disciplines of labor law and industrial relations, with a generous dollop of labor history. Although my primary aim is to provide rigorous and objective legal analyses of the propositions posed herein, the importance of those issues compels me to direct my text to both legal and lay audiences. It is thus my hope that this presentation-in which I have tried to avoid legal and academic jargon-will be of interest and use to a wide range of readers, including lawyers, judges, and administrative personnel who regularly handle labor-law problems, as well as others who deal directly with employee relations on a daily basis (i.e., human resource professionals, union officials and organizers, and individual employees and employers who might desire more knowledge about the legal nature of their own employment relationship) and of course academics and students in all of these fields.

My attention to the iconoclastic thesis that I am here presenting was prompted earlier-in 1990-when I read Professor Clyde Summers's article, *Unions without Majority - A Black Hole,4* in which he made an observation that had not appeared in the legal literature since 1936,5 to wit, that the plain words of the Act "would seem to require an employer, in the absence of a majority union, to bargain collectively with a non-majority union for its own members";6 and he noted various historical features to support that observation. He suggested, however, that "it may be too late to open this question."? Writing separately in 1993, Professors Alan Hyde and Matthew Finkin, although not disagreeing with Summers's premise,s contended that because of the passage of time legislative action would be required to reaffirm this true meaning of the law. Rejecting that pessimistic appraisal, I wrote in 1994 that although "the role of the minority union should be reaffirmed and reinvigorated. . . amending the Act is not essential to the confirmation of the existence of the rights of minority unions";9 nevertheless, I then conceded that amendments, or perhaps the issuance of administrative rules, would be desirable to emphasize and clarify those rights.1° And so the matter rested-at least for me-until my interest was aroused again by the peremptory firing of those seventeen immigrant workers. Subsequent research that I initiated on their behalf produced considerable new evidence and substantiated that the present law is clear and sufficient, that amendments to the Act-which in any event would be unobtainable in the foreseeable future-are unnecessary and would serve no useful purpose.

What happened to those seventeen workers was a disgrace to American democracy. Those young men, who were of Vietnamese, Cambodian, and Philippine originll and new to America, apparently trusted that this was a land of opportunity where they could improve their lot through hard work and cooperation with others. Lacking the usual fear that traditional American employees typically display toward organizational activity in the workplace, they boldly decided to join together to confront their employer about their grievances. The company, which employed about fifty production workers, manufactured honeycombs (filters made of welded metal that resemble beehive honeycombs) for jet engines. Despite the low wages, which were only slightly above minimum wage for most of the group, the employees' job tasks required considerable skill and attention. The group's chief complaints were that they had been promised wage increases that were either long delayed or never delivered; they had been denied such basic safety protections as gloves (for handling hazardous fluid) and safety goggles and face masks when needed; some of them had been promised promotions which never materialized; some had often been denied rest breaks; and some had suffered verbal abuse from the owner himself.

Operating on the premise that "enough is enough," these aggrieved workers organized and signed a petition for presentation to their employer through a spokesperson whom they had democratically selected. He then asked management for a meeting on behalf of the group, but when that was not promptly forthcoming the aggrieved employees shut down their machines and quietly walked out. Soon after, they gathered at a meeting in a public park near where they lived, and later that day they returned to the factory to renew their request for a group meeting with management to discuss their complaints. The owner denied their request, insisting that the company would not meet with them as a group and would only see them individually. Preferring to maintain their group solidarity, the employees refused to meet alone, whereupon management immediately advised them that they had all forfeited their jobs. They were thus terminated for having engaged in concerted activity that was intended to improve their wages and working conditions through a civilized process of jointly discussing their grievances with management-that is, through a rudimentary form of collective bargaining. Federal law unequivocally states that they "have the right. . . to bargain collectively through representatives of their own choosing. . . ." [12] The Hi Tech owner admitted to one of his supervisors that the reason "he did not want them together as a group [was] because he felt that they would back each other up if he offered something to one employee." This seemed to fly in the face of the congressional intent behind the Act that was meant to create "some equality of bargaining power." [13]

Out of desperation-for they had families to feed-several of the men broke ranks. Later that afternoon, assuming they had no alternative, a few met individually with management, and some were rehired shortly thereafter. A few others were selectively rehired during the next several months. The re-

mainder sought other employment or left the area. Hi Tech Honeycomb had thus effectively squelched this fledgling effort by a group of its employees to achieve self-organization in their new American workplace.

Previous to my being made aware of the happenings at Hi Tech, the NLRB Regional Director had issued a complaint against the company and the case was set for hearing, for the discharges were clearly in violation of well-settled law14 (although the employer could have obtained the same result legally by replacing-instead of discharging-the striking employees15). However, it had not occurred to the Regional Director to seek an order requiring the employer to meet and bargain with the employee group, which was really the key issue. I tried, unsuccessfully, to achieve that objective with an amendment to the complaint, citing as a separate unfair labor practice the company's refusal to meet with the employees as a *group.* The General Counsel declined to consider such an amendment because the case had already been set for hearing and apparently a settlement was deemed likely. In fact, over my objection, the employer eagerly settled the case for 80 percent of lost back wages, a belated offer of reinstatement (a year and a half had elapsed since the discharges), and the posting of an effectively meaningless notice. Thus, for a total payment of only $26,000 for all lost wages, the company was able to relish its success in crushing the organizational efforts of seventeen courageous but naIve employees.

The National Labor Relations Act, or at least its administration, had totally failed these new American workers at the most critical point on the scale of rights protected by the Act-the point of initial organizing and rudimentary collective bargaining. Yet this inaction of Board officials was fully consistent with conventional wisdom, according to which Hi Tech had no duty to bargain with the representative of that employee group, notwithstanding that the group was clearly, in the words of the statute, an "organization[,] committee or plan" formed for the purpose of bargaining collectively with the employer "concerning grievances."16 When I noted this, together with other legal arguments, to Leonard Page, the NLRB General Counsel at the time, he did not disagree with my construction of the law (indeed four earlier General Counsels had indicated their agreement in similar cases17), but he declined to amend the complaint for the reasons already noted, indicating, however, that he would reconsider "this type allegation in a more appropriate case." Unfortunately, however, Page's tenure as General Counsel expired a few months later. The conventional wisdom on this issue thus remains ripe for reconsideration, which is the justification for this book.

About that conventional wisdom-actually *latter-day* conventional wisdom-as Sportin' Life in *Porgy and Bess* reminds us, "it ain't necessarily so." 18In fact, minority-union recognition by employers, accompanied by bilateral collective bargaining for union members only, was the *original* conventional wisdom on this subject, for such bargaining was commonly practiced following passage of the Wagner Act in 1935. Although the ulti-

mate goal of the statute was the institution of exclusive collective bargaining with majority unions, in workplaces where majority bargaining was not yet established Congress did not intend to bar minority-union members-only bargaining, which was deemed a preliminary stage in the development of mature collective bargaining.19

It may come as a surprise to most readers to learn that members-on:ly bargaining was widely practiced by employers and unions during the early years following passage of the Wagner Act. In fact, one of the most influential corporate executives in the nation, Myron C. Taylor, U.S. Steel's chairman of the board and chief policy maker, issued a written formula for union recognition in 1937 that declared that

> The Company recognizes the right of its employees to bargain collectively through representatives freely chosen by them [and] will negotiate and contract with the representatives of any group of its employees so chosen and with any organization *as the representative of its members.* . . .20

That is exactly what U.S. Steel did several months later when it signed a *members-only* agreement with the CIO Steelworkers Union,21 which at the time represented less than a majority of the company's eligible employees. That same pattern was widely followed in most of the steel industry and elsewhere. Eighty-five percent of the original Steelworkers agreements were for "members only," as were 64 percent of the UAW22 contracts in the auto industry. Indeed, in the late 193 os members-only contracts, which were popular with both the CIO and AFL23 unions, were just as common as majority-exclusivity contracts.24 When a union finally achieved majority status under such contracts, which almost always occurred, these preliminary agreements were typically followed by conventional exclusive-recognition agreements. The postenactment industrial relations community was thus putting into effect what scholarly comment on the new law had already observed, for in 1936 E. G. Latham, a fellow of the Social Science Research Council, had written that "it appears to be a reasonable construction [of the Act that] the employer may be bound to bargain with minority groups until . . . <*proper majorities'* have been selected. "25 He concluded that" *[IJt is reasonable to suppose that where there is no majority organization at all . . . minority rights are. . . reserved."26*

Notwithstanding that early history, today almost everyone in the field of labor and employment relations takes for granted that American employers have no duty to bargain with any union until its majority status has been certified or recognized, usually as a result of an NLRB election. That assumption has long prevailed despite the fact that the Act clearly indicates that in workplaces where no exclusive bargaining agent has yet been" designated or selected. . . by the majority of the employees" in an appropriate bargaining unit pursuant to Section 9(a),27 all employees, regardless of majority status,

are entitled "to bargain collectively through representatives of their own choosing."28 At first blush, this literal reading of the law may sound like a radical proposition, but it is not. As the reader will discover, not only is this meaning conveyed by the ordinary language contained in the statutory text, it is also fully supported by unequivocal legislative history. But if that is so, why is it that latter-day conventional wisdom assumes the contrary? In an ironic twist of history, a misunderstanding of the law's protection-or at least an unawareness of that protection-evolved despite the absence of any decisional authority to support the conventional view. As the record will show, neither the NLRB nor the courts have ever held that an employer has no duty to bargain with a minority union for its members only, although in a few cases there are vague dicta-but no decisional holdings-that pay lip service to latter-day conventional wisdom.29 Notwithstanding the absence of any adverse rulings-in fact all of the related cases are supportive3O-the early practice of members-only bargaining was abandoned and eventually forgotten. Why?

The reason is simple. After the labor movement had made use of members-only bargaining for only a few years, it quickly became apparent that a faster and less expensive way to obtain exclusive recognition was available through direct NLRB representational processes, usually by means of an election. In the Board's first decade, the unions' success rate through this route was truly phenomenal-in over 85 percent of all NLRB representation cases the unions won recognition.31 Consequently, out of sheer convenience for most unions, NLRB elections became the favored organizational device. And in a relatively short period of time-which included the period during World War II and the postwar boom that followed-this deceptively easy expedient became habit-forming. From then on, the labor movement made no visible effort to resume organizing through members-only bargaining. And after I947 unions were busily distracted by massive amounts of litigation engendered by the Taft-Hartley Act,32 whereupon members-only bargaining was effectively forgotten. Although such institutional forgetfulness may be understandable, it is nonetheless to be regretted, for the premature abandonment of minority-union organizing and bargaining undoubtedly contributed to the steady decline in the density of union membership and coverage.

Employers, however, had no reason to question the dependence on the election process, for elections provided them with an ideal forum in which to mount offensive campaigns against union representation. Thus, in a short time NLRB elections became the centerpiece of the statute and the established norm for union organizing. Accordingly, the interplay of employer self-interest and union acquiescence eventually repressed all institutional memory of the duty to bargain with minority unions, and the lack of wisdom about that duty metamorphosed into the latter-day conventional wisdom. Although labor's retreat from members-only organizing and bargaining was

not the product of deliberate decision-it just happened, without any of the principals being aware that it was happening-the impact of that retreat lJ1eant that Senator Robert F. Wagner's vision of industrial democracy would be put on hold.

That vision about the role of democracy in the workplace, for which Senator Wagner provided the legislative imprimatur, was neither novel nor revolutionary. The concept of industrial democracy had a long history in American political and economic thought. In the early days of the republic, Albert Gallatin, Treasury Secretary under Thomas Jefferson and James Madison, advocated that the democratic principle of "the political process" be applied as well to "the industrial operation,"33 and expressions of that goal were reiterated countlessly. For example, the United States Industrial Relations Commission of 1902 declared that only by the introduction of an "element of democracy into the governance of industry [can] workers. . . effectively take part in determining the conditions under which they work."34 And Louis D. Brandeis renewed that thesis in 1915 when he reminded the country that attainment of "rule by the people. . . involves industrial democracy as well as political democracy."35

It was Senator Wagner's view that a partnership between employers and labor unions was an "indispensable complement to political democracy."36 When he submitted his bill to the Senate in 1935, he therefore envisioned a "new industrial democracy that is bound to come, that is growing, here at our feet, inexorably. . . ."37 And two years after passage of the Act he reemphasized that

> The struggle for a voice in industry through the process of collective bargaining is at the heart of the struggle for the preservation of political as well as economic democracy in America.38

In passing the Wagner Act, Congress clearly intended that employees would participate in the democratic process of determining their working conditions through collective bargaining. In addition to the Act's substantive provisions to that effect, its opening section specifically declared this to be the official policy of the United States,39 and, despite some wishful thinking to the contrary by the employer community, Congress has never amended that policy.4o

The collective bargaining process that Wagner envisioned was to begin with the democratic expression of the right of association that would be achieved through the exercise and enforcement of certain basic employee rights, including the right to join labor unions and engage in collective bargaining. These are essentially the same rights that the civilized world later recognized to be fundamental human rights41 and which the United States reaffirmed by international agreements in 1992 and 1998.42

Where are those rights today? As we know too well, they are effectively

unavailable to most American workers. Over 90 percent of the employees in the private sector are not working under collective bargaining conditions,43 and formidable obstacles stand in the way of their obtaining union representation.44 According to recent polling reports, 50 percent of nonunion workers in America would vote for a union if they were given the opportunity,45 but under present conditions very few employees will have that opportunity. The international civil rights organization, Human Rights Watch, recently conducted an investigation of the status of workers' freedom of association in the United States and concluded, based on intensively documented evidence, that

> millions of workers are excluded from coverage by laws to protect rights of organizing, bargaining and striking. For workers who are covered by such laws, recourse for labor rights violations is often delayed to a point where it ceases to provide redress. When they are applied, remedies are weak and often ineffective. In a system replete with all the appearance of legality and due process, workers' exercise of rights to organize, to bargain, and to strike in the United States have been frustrated by many employers who realize they have little to fear from labor law enforcement through a ponderous, delay-ridden legal system with meager remedial powers.46

Those conclusions have long been recognized, but legislative correction has been unobtainable because of the sixty-member requirement to break a filibuster in the U.S. Senate.47 But is legislative action the only means to restore the original democratic potential of the Wagner Act? It is my contention that it is not. That Act-despite several amendments and judicially imposed restrictions-still contains the basic elements that are sufficient to achieve meaningful realization of democracy in the workplace.

For that reason, it is my purpose and concern in this book (I) to set forth and explain the original and accurate reading of the NLRA concerning the critical issue of less-than-majority collective bargaining in workplaces where there is no exclusive/majority bargaining agent; (2) to describe how that process can be utilized and developed through traditional unions, and to a limited extent through alternative forms of employee representation; and (3) to provide a reasoned forecast of the resulting impact of these changes on the labor relations landscape.

Before the advent of statutory-based collective bargaining, which began on the railroads with enactment of the Railway Labor Act (RLA}48 in 1926 and for other employee relations in 1933 with passage of Section 7{a) of the Depression-era National Industrial Recovery Act (NIRA},49 it had been traditional for unions to achieve bargaining rights based entirely on the extent of their membership-often expressed by a strike for recognition. Elections were not part of the organizational process. Elections for determining union recognition developed relatively late in the history of American industrial re-

lations. And when they finally appeared, they were used primarily to determine which union would be recognized when multiple unions were claiming representation; that was their justification in the railroad industry where such elections were first held.5O It was not until much later-but rarely prior to passage of the Wagner Act-that another reason for elections developed: to provide an employer with a reliable means to verify whether a union that sought, or claimed, to represent all the employees in an appropriate bargaining unit did in fact represent a majority.

Prior to the time when union recognition was conventionally based on majority selection within a bargaining unit, it was commonly accepted-although usually resisted by employers-that an employer had a duty to bargain with any union that sought to represent its employee-members, whether a minority or a majority union. And this was indeed the prevailing practice under the Blue Eagle" Codes of Fair Competition" promulgated under NIRA Section 7(a), which guaranteed the right of employees "to bargain collectively through representatives of their own choosing" -language that had been derived from the Norris-LaGuardia Act of I932.51 Such legislative protection of the right of nonrailroad employees to organize into labor unions and engage in collective bargaining had been preceded by judicial recognition in I930 of those general rights in the unanimous decision of the Supreme Court in *Texas & New Orleans Railway Co. v. Brotherhood of Railway Clerks,* [52] in which Chief Justice Charles Evans Hughes wrote:

> The legality of collective action on the part of employees in order to safeguard their proper interests is not to be disputed. It has long been recognized that employees are entitled to organize for the purpose of securing the redress of grievances and to promote agreements with employers relating to rates of pay and conditions of work.53

The Norris-Laguardia Act and Section 7(a) gave legislative expression to those rights. And the same statutory text that defined those rights in the Blue Eagle codes of the NIRA, which was enacted as a temporary measure, was soon incorporated into permanent law in Section 7 of the I93 5 Wagner Act. That statute, which was passed by overwhelming majority vote,54 explicitly-then and now-guarantees that employees have the right "to bargain collectively through representatives of their own choosing" and provides that it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of" that right. [55] From the beginning, Senator Wagner emphasized that his bill "creates no new substantive rights"56 and "does not present a single novel principle for the consideration of Congress. "57 Leon Keyserling, his legislative assistant who drafted the bill, later commented that the "background of the Wagner Act of I93 5 is contained in the history of the National Industrial Recovery Act." Blue Eagle labor law thus continued to prevail as the law of the land.

Although minority-union bargaining received brief textual attention in the drafting of Wagner's unsuccessful 1934 bill, such bargaining was never perceived to be an issue in his 1935 bill. In the congressional debate on the latter-the bill that eventually became law-the matter of preliminary minority-union bargaining was but a blip on the legislative screen. It was not a contested issue, for such bargaining was widely recognized and accepted at the time and was taken for granted even by employers; it was thus not deemed controversial. The primary focus of the public debate that preceded passage of the 1935 Act, both in and out of Congress-as legislative history distinctly records-concerned other, more controversial questions: mainly issues of company unions, the closed shop, majority-rule exclusivity, and whether the Act was constitutional. The majority-rule exclusivity concept represented the chosen legislative response to the prevailing problem of dual unionism, where one of the contending unions was almost always a company union. Although the matter of members-only bargaining prior to the establishment of majority representation received no direct attention in the congressional debates, Wagner and Keyserling had carefully and knowingly made certain in the drafting process and in the final text that such bargaining would be protected. At the time, minority-union bargaining was fairly common and was not viewed as a problem requiring special attention, provided no competing union was seeking or claiming recognition. While it is true that employers were generally opposed to outside unions and they vehemently objected to closed-shop unionism, where a minority union was strong enough to obtain bargaining recognition for its own members and was not insisting on exclusive representation, nonmajority status was a nonissue. The legislative history of the enactment of the 1935 Wagner Act shows positively that its authors fully and intentionally protected, in the broad text of the statute, all minority-union bargaining that would occur prior to mature majority-based exclusivity bargaining.

As the reader will learn, numerous aspects of this history support that conclusion. However, one particular feature not previously noted in the literature provides a historical "smoking gun" that unequivocally validates this deduction.[58] Legislative history therefore confirms the plain reading of the textual provisions that recognize the statutory protection afforded members-only bargaining prior to the employees' selection of a majority union. Such a reading-rather than the latter-day conventional wisdom-is the true state of the law. The analyses presented here also establish that this statutory right is part of a fundamental right of association that is consistent with and ultimately protected by the First Amendment of the U.S. Constitution and by international law to which the United States is a confirming party.[59]

It is sad, nevertheless, that after two-thirds of a century, this basic law relating to minority-union bargaining has yet to be judicially articulated in the manner originally intended by Congress. But long delay sometimes happens to the best of statutes. To mention but one, it took more than a century for

Section 1982 of the Civil Rights Act of 186660 to begin to be applied in the manner intended by Congress. As the Supreme Court reminded us in *Jones v. Alfred* H. *Mayer Co.,61* the fact that this civil rights "statute lay partially dormant for many years does not diminish its force today."62 Belated application of that statute to private acts of discrimination regarding disposition of property-like the anticipated belated application of Sections 8(a)(I) and 8(a)(5) of the NLRA to minority-union members-only bargaining-occurred under uniquely similar circumstances: long-held custom and practice to the contrary, conventional wisdom that assumed the statute did not really mean what its words clearly said, and adverse judicial dicta. Better late than never.

It is my hope that this book will help restore an important missing link in the American labor-relations system. That link-by now obvious-is the reinvocation of the methodology of minority-union collective bargaining by labor unions for their members only, for this is the natural preliminary stage in the organizational development of mature, majority-based exclusivity bargaining. When traditional unions reclaim the process of organizing by representing and bargaining on behalf of their members from the very beginning-or at least attempting to do so-they will be returning to their roots. They will be organizing by recruiting dues-paying members-not card-signers or potential voters, which is the common practice today. And even if employers refuse to deal with these minority unions-which is not unlikely for most employers, at least until the NLRB requires it or the judiciary confirms it-membership-based organizing will make infinitely more sense than the current alternative.

An actively organizing members-only union, even without the advantage of formal collective bargaining, can make its mark in the workplace simply by acting like a union. It can assist employees in many different ways, especially regarding concerted action for "mutual aid or protection" (another aspect of Section 7 rights). For example, it can offer a union steward to assist any employee (whether or not a union member) who is called in for a disciplinary interview-a right that is otherwise not available to nonunion employees.63 And it can provide employees with a variety of social and economic services that are not dependent upon a collective bargaining relationship.64 Such a fledgling union can thus become a clearinghouse for information and action and an organizational link to an assortment of community activities,65 all of which are consistent with the role of a new union seeking to prove its worth and expand its membership.66

More important, however, the new union will begin to represent its members by engaging in its primary function, which is to negotiate on their behalf about a variety of statutory bargaining subjects affecting their employment,67 albeit such bargaining will probably be conducted initially on an ad hoc basis. The resulting premajority agreements, which will be legally enforceable, will apply to union members only, although employers will probably extend the same economic benefits to nonunion employees. But

noneconomic benefits, such as grievance and arbitration procedures, will apply only to union members.68 When the minority union finally develops into a majority union-which will likely occur in most instances-it will then become the exclusive bargaining agent for all employees in the unit, whereupon it will be legally entitled to function like any traditional majority union, with collective bargaining applicable to all employees in the unit. The labor-relations system resulting from this rediscovered concept should be infinitely more user friendly than the prevailing system. Employee morale ought to improve significantly, and high-performance workplaces will probably become more prevalent. It is also likely that the advent of members-only bargaining will encourage the creation of a variety of alternative forms of employee representation. Indeed, the process may spawn many nontraditional employee groupings.69

My goal in this book is therefore to call attention to a means that already exists in present law to rationalize the respective but interdependent roles of workers and employers. As Professors Paul Osterman and Thomas A. Kochan and their colleagues aptly remind us, "work is a social as well as an economic process [that] involves important moral values and power relationships that are not always reflected in the unregulated workings of market forces."7o The government is therefore expected to provide a legal environment that reflects the moral values of our society, "leaving the greatest possible amount of control in the hands of those closest to the problems."71 That is the role of democracy in the workplace, and collective bargaining is its repository.

Simplifying the process of labor organizing-a process that can again be made available to all employees covered by the Act-will open the way to wider and more meaningful employee participation in the collective bargaining process. Under the broad umbrella of the NLRA, the nature of that process can be tailor-made to fit the particular needs of almost any workplace environment. Because the substantive provisions of that Act are brief and simple,72 collective bargaining can take almost any form the parties voluntarily decide to give it. Properly understood and enforced, the NLRA can thus offer the basis for a vibrant and flexible system of employee relations in which the voices of organized workers can provide a healthy dose of countervailing economic and political power,73 which is now sorely deficient in the American economy. I shall leave to the economists the task of defining with some degree of precision how such a redistribution of power might address the widening gap between the lowest and highest income earners in the nation. It seems obvious, however, that the renewed presence of a strong labor movement would once again represent a positive force for higher earnings at the bottom- and middle-income levels of the economy and a restraining factor on some of the out-oI-control earnings prevailing at the upper levels. If so, this could be a viable means to help replenish the ranks of the vanishing middle class. Such a prospective change is long overdue.

I conclude this introduction by offering the reader some assistance in picking and choosing among the legal, historical, and industrial-relations portions of this book, for I recognize that certain readers may wish to concentrate only on specific parts. For example, most attorneys may be interested mainly in the foundational legal materials, most union and human resources readers may be especially concerned with the "how-to" and policy-oriented sections, and some labor history buffs may prefer to focus on the historical materials. I wish to emphasize, however, that all the materials are integrated and interrelated-and, I hope, they will prove to be clear and understandable to the interested reader.

Here then is a brief outline of the book's organizational format. Chapter 1 begins the account of the pertinent historical factors that preceded passage of the Act. Chapters 2 and 3 continue that story, recounting the relevant parts of legislative history that contribute to the thesis, and Chapter 4 covers postenactment industrial-relations history. Chapter 5 provides legal analyses of the statutory text; and Chapters 6, 7, and 8 examine the thesis from the perspectives of constitutional law, administrative law, and the dimensions of international and human-rights law, respectively. Chapter 9 reviews the current state of decisional law, and Chapter 10 provides a road map for the legal implementation of the thesis. Chapter II provides "how-to" guidelines and forecasts for membership-based union organizing. And Chapter 12 closes with an overview of the likely outcome of the prospective changes and their policy implications.

The reader should now be ready for this journey of legal rediscovery, a journey that will reveal that the labor law of the Blue Eagle codes under Section 7(a) of the 1933 NIRA is alive and well in the NLRA of today. The Blue Eagle is at work and ready to fly again.

PART I
The Past as Prologue

I *Membership-Based Collective Bargaining, the Noms-LaGuardia Act, and Section 7(a) of the National Industrial Recovery Act*

The Origin of the Statutory Specie

Although the underlying concern of this book is the elucidation of statutory law, our interpretative journey begins with an examination of the historical origins of the statutory text here in issue. Because this language has a long-established historical meaning, our narrative begins with a recitation of that text-a critical fourteen-word phrase. now contained in Section 7 of the NLRA, the core provision that governs the right of minority unions to engage in collective bargaining on behalf of their employee-members. The phrase simply declares that

> Employees shall have the right to . . . bargain collectively through representatives of their own choosing. . . .1

Although that same language is contained in Section 2 (preamble) of the Norris-LaGuardia Act,2 from which the identical text in Section 7(a) of the Depression-era NIRA3-the "Blue Eagle" law-was consciously derived,4 the administrative-although not the legislative-antecedent of this language dates to yet an earlier instrument, to President Woodrow Wilson's proclamation that created the War Labor Board during World War 1.5 To appreciate the evolutionary origin of this statutory specie, the reader's attention is directed to the documentary excerpts that follow chronologically. These quotations-identified by boldface and *italic* emphases (for substantive and *prohibitory* language, respectively)-trace the passage of the critical statutory language in a direct line of succession from the World War I proclamation to comparable wording in Sections 7 and 8(1)6 of the NLRA. This

unbroken line of text continues to this very day to establish the right of employees to engage in collective bargaining, including their right to do so through minority unions in workplaces where no majority representative has yet been designated.

From the 1918 National War Labor Board proclamation:

> The right of workers to organize in trade unions and to bargain collectively through chosen representatives is recognized and affinned. *This right shall not be denied, abridged, or interfered with by employers in any manner whatsoever.* [7]

From Section 2 of the 1932 Norris-LaGuardia Act:

> Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that *he shall be free from the interference, restraint, or coercion of employers* of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . .8

From Section 7(a) of the 1933 NIRA:

> . . . employees shall have the right to organize and bargain collectively through representatives of their own choosing, and *shall be free from the interference, restraint, or coercion of employers of labor,* or their agents, *in the designation of such representatives* or in self organization or in other concerted activities *for the purpose of collective bargaining* or other mutual aid or protection.9

From Section 7 of the 1935 NLRA (Wagner Act):

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities, for the purpose of collective bargaining or other mutual aid or protection. . . .10

And from Section (8)(1) of that Act:

> *It shall be an unfair labor practice for an emplayer. . .* to *interfere with, restrain, or coerce emplayees in the exercise of the rights guaranteed in section* 7 **...**[11]

It is self-evident from these passages that the basic fourteen-word boldface phrase in Section 7 of the Wagner Act, that "employees shall have the right to **...** bargain collectively through representatives of their own choosing," which is the key language here in issue, is identical to the corresponding phrase in Section 7(a) of the NIRA. It is to be further noted that the related prohibitory language (italicized) in Section 8(1) of the Wagner Act, except for immaterial changes in syntax, is likewise identical to the corresponding prohibitory language in NIRA Section 7(a), which also matches similar italicized prohibitory language in Section 2 of the Norris-LaGuardia Act and in the War Labor Board proclamation.

This juxtaposition of text in its various legislative incarnations demonstrates that the substantive law here in issue-albeit not its enforcement procedure-has been continuously in effect in one or more manifestations since 1932: first as congressional policy under the Norris-LaGuardia Act (which is still in effect); thereafter from June 16, 1933,12 until May 27, 1935,13 as a statutory requirement for all Blue Eagle codes of fair competition under the National Recovery Administration (NRA); and thereafter since July 5, 1935 (when it became the law in its present form upon the signing of the NLRA by President Franklin Delano Roosevelt), as current law.

Thus when the Wagner Act was first enacted, the critical language in Sections 7 and 8(1)-particularly the basic fourteen-word provision-had already acquired a recognized meaning. Despite some controversy regarding other aspects of Section 7(a) of the NIRA, which will be noted in due course, the language here in issue had never been deemed to require designation of a majority representative as a precondition to collective bargaining, and this is the only language in that statute that mandated such bargaining. By borrowing in 1935 this exact language from preexisting legislation, Congress was identifying and incorporating prevailing legislative meaning.

Although this book focuses primarily on the bargaining requirements applicable to employers vis-a.-vis minority unions composed of member employees, part of this examination necessarily sweeps more broadly to include the full scope of congressional intent that motivated passage of the NLRA. Because Congress did not seek to introduce major changes in preexisting substantive law-it sought only to reenact with clarity that same law and make it realistically enforceable-the Wagner Act represented no significant divergence from the way in which the core substantive provisions of the prior law had been viewed and interpreted by the earlier boards that functioned

under the NIRA. Such recognition that the Wagner Act's major innovations concerned only *procedures* and *remedies* puts in perspective what Congress intended to achieve in 1935 when it again provided for statutory facilitation of collective bargaining.

From Membership-Based Collective Bargaining to the Enactment of a New Deal for American Labor

Historically, including the years immediately preceding passage of the Wagner Act, collective bargaining as an institution was intertwined with the concept of union membership,14 As one academic observer wrote in 1927, "[u)nless the employers recognize the union officials as spokesmen for members of the union, there is, of course, no collective bargaining."15 In 1933, another wrote that

> Recognition is the admission on the part of an employer that his employees have a right to and may negotiate an agreement as a body rather than as individuals and that he recognizes the union as the authorized agent of those of his employees who are its members. . . .16

Unions thus normally bargained only on behalf of their members. I? Union recognition by an employer usually occurred when the union's membership was strong enough to demand and receive recognition-which more often than not resulted from a strike or threat of a strike. Union membership was the sine qua non of collective bargaining.

Majority selection by employees was not a requisite for union representation and collective bargaining. As Milton Derber, in his carefully researched volume on industrial democracy, reported concerning trade unionism in the nineteenth century, 18

> The majority-rule principle. . . was not an established principle in determining union representation in the workplace. . . . Normally the union established its status by persuading the employer of its desirability or by a showing of strength through a strike. Majority rule played little or no role on the management side.19

That description continued to be accurate well into the twentieth century. For example, in its report on collective bargaining in the glass industry prior to 1935, the Twentieth Century Fund concluded that "[s)igning an agreement or obtaining recognition before a substantial union membership had been gained were not uncommon in the industry."2o

Even the unions' penchant for closed-shop agreements fitted the nexus between membership and collective bargaining. When a union's membership

was large enough to represent an effective voice for most if not all of the involved employees, union leaders would usually perceive a need to ensure job security for their members and guaranteed protection for the bargaining process, which only closed-shop agreements could provide efficiently. Moreover, such agreements brought union coverage over otherwise free-riders and also financial contributions from them. On the other hand, when a union was not strong enough to obtain a closed shop or even full recognition, it often settled for a members-only collective agreement,21 for this was considered a logical step in the organizational process that would eventually lead to total employee recognition. In these scenarios, it was the membership factor that provided the union with agency authority to engage in collective bargamng.

During the pre-Wagner Act years of American labor history, strikes and boycotts, or threats of such activity, were usually a union's only means of securing recognition, for employers vigorously opposed dealing with any outside unions. The list of tactics typically used by employers to avoid unionization is lengthy: companies inundated their employees with anti-union propaganda and threats, frequently enforced yellow-dog contracts,22 employed labor spies, organized company unions, discharged union adherents, exchanged blacklists of union militants, obtained labor injunctions to suppress union activity, and on a number of occasions resorted to the use of goon squads and armed force.23 Here is a typical observation from recorded American labor history-this from Foster Rhea Dulles:

> Nor was propaganda the only weapon employed in fighting unionism and promoting the open shop. Many employers continued to force yellow-dog contracts upon employees, to plant labor spies in their plants, to exchange black lists of undesirable union members, and openly follow the most discriminatory practices in hiring workers. It was the old story of intimidation and coercion, and when trouble developed in spite of all such precautions, strong-arm guards were often employed to beat up the trouble-makers while incipient strikes were crushed by bringing in strikebreakers under protection of local authorities.24

Elections for recognition were not part of that picture. In most industries, elections and the concept of majority-union exclusivity did not evolve until relatively late,2s although they appeared earlier in the railroad industry. Acceptance of the majoritarian concept occurred first on the railroads primarily because "railroads were the first major industry where both labor and management advocated the tenets of collective bargaining and sought to develop procedures to make it work. "26 The original Railway Labor Act (RLA) of 192627 did not provide for elections, although nonstatutory elections were occasionally utilized on some of the railroads.28 As a result of the RLA amendments of 1934,29 however, the National Mediation Board (NMB) was

authorized to hold secret-ballot elections, within its discretion, to determine *"who* are the representatives" of a "craft or class"3O of employees. Those amendments also conferred exclusivity on majority unions by mandating that "[t]he majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act."3! As our historical review will demonstrate, representation elections outside the railroad industry were not resorted to until late in 1933, following enactment of Section 7(a) of the NIRA.32

In 1932, the year Norris-LaGuardia was passed, a union's majority was not relevant to an employee's right to designate "representatives of his own choosing to negotiate the terms and conditions of his employment. . . ."33 That key phrase in the Norris-LaGuardia preamble and its accompanying language was, in the words of Felix Frankfurter and Nathan Green, "intended as an explicit avowal of the considerations moving Congressional action and, therefore, controlling any loyal application of national policy by the COurtS,"34for it was their view that "it is the primary function of the legislature to define public policy."35 Collective bargaining was thus declared to be the national policy applicable to every employee in America. When the Norris-LaGuardia Act was passed in early March, 1932-well in advance of the national elections-it "was overwhelmingly supported in both the House and Senate and received widespread popular approval."36 Indeed, that Act set the tone for the New Deal legislation of the following year. The collective bargaining and right-of-association policy described in its preamble became the model for the labor provisions of the new legislation. Its statement of policy, which stressed the importance of the individual employee's right to choose his *own* representative, implicitly affirmed that collective bargaining was not dependent on majority designation.37 As a Brookings Institution report observed just prior to passage of the Wagner Act,

> The language of this declaration [in the Norris-LaGuardiaActJ was truly extraordinary. It expressed a thoroughgoing change of previous legislative policy with regard to labor organization. The act was premised on the idea that there could ordinarily be no equality of liberty of contract between employer and employee except on the basis of organized and collective bargaining. That *the Act contemplated collective bargaining in according with trade union practices* is clear from the fact that it was sponsored by the A. F. of L. and that specific provisions were directed against many of the practices whereby the courts in the past had made it difficult for trade unions to organize and to carry on their activities.38

Following the 1932 elections, the new president, Franklin Roosevelt, quickly proceeded to implement his New Deal program to fight the Depression and revitalize the American economy. The Administration's immediate objective was to stimulate business and thereby reduce unemployment. Cen-

tral among its early legislative programs to achieve those goals was the National Industrial Recovery bill,39 the principal feature of which was suspension of the antitrust laws to permit companies to join with others in their industry through "codes of fair competition" that would cooperatively regulate prices, production, and labor standards. Pragmatically realizing that full labor support would be essential to the success of that program, the new Administration recognized early in the planning stages that it would need to balance those novel economic freedoms for business with a grant of rights for employees and unions that would promote labor organizing and collective bargaining.4O To develop and guide this labor portion of the legislative package-which became Section 7(a) of the NIRA-the President turned mainly to Senator Robert F. Wagner of his own state of New York. Wagner, "recognized as the member of Congress most active in the labor field,"41 seized the opportunity to fashion legislation that would foster his long-cherished objective of linking collective bargaining with the democratic process.

It was Wagner's view that a partnership between industry and labor was an "indispensable complement to political democracy"42 and that such democratic self-government in industry would require the active participation of workers. He therefore insisted that "the right to bargain collectively is at the bottom of social justice for the worker, as well as the sensible conduct of business affairs[, for] the denial of observance of this right means the difference between despotism and democracy. "43 Wagner's vision of industrial democracy was a manifestation of a venerable and highly respected concept in American political and economic thought. Milton Derber, who traced that idea in his insightful study, *The American Idea of Industrial Democracy, 1865-1965,44* reported an early reference attributed to Albert Gallatin, Secretary of the Treasury under both Thomas Jefferson and James Madison, regarding a profit-sharing plan in his Pennsylvania glass works, which was that "[t]he democratic principle on which this nation was founded should not be restricted to the political process but should be applied to the industrial operation as well.,,45 And the 1902 *Final Report of the United States Industrial Commission46* recommended that democracy be instituted in industry as follows:

> By the organization of labor, and by no other means, it is possible to introduce an element of democracy into the government of industry. By this means only the workers can effectively take part in determining the conditions under which they work. This becomes true in the fullest and best sense only when employers frankly meet the representatives of the workmen, and deal with them as parties equally interested in the conduct of affairs. It is only under such conditions that a real partnership of labor and capital exists.47

Senator Wagner was indeed pursuing a long-recognized social objective, a goal that Louis D. Brandeis had described in his 1915 testimony before an-

other industrial relations commission. Viewing the American commitment to social justice as an incident of democracy, Brandeis stressed that

> the end for which we must strive is the attainment of rule by the people, and that involves industrial democracy as well as political democracy. That means that the problem of trade should be no longer the problem of the employer alone. The problems of his business, and it is not the employer's business alone, are the problems of all in it.[48]

Although several draftsmen were ultimately involved in the crafting of Section 7(a), the principal writer was Donald R. Richberg, who had been one of the authors of the Norris-LaGuardia Act.[49] One contemporaneous report on the resulting provision observed that it was obviously patterned after Section 2 of the latter statute, "even to employing much of its phraseology."[50] Richberg's subsequent interpretation of key phrases of Section 7(a), to be noted later, contributes to our understanding of what that language was recognized to mean when the NIRA was in effect.

Section 7(a), in its final version as passed, read as follows:

> Every code of fair competition, agreement, and license approved, prescribed, or issued under this title shall contain the following conditions: (I) That *employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purposes of collective bargaining or other mutual aid or protection;* (2) that no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing; and (3) that employees shall comply with the maximum hours of labor, minimum rates of pay, and other conditions of employment, approved or prescribed by the President.[51]

The President selected Wagner to introduce the NIRA bill in the Senate.[52] It quickly sailed through Congress, and Roosevelt signed it on June 16, 1933.[53] The Blue Eagle, displayed by companies participating in the *codes of fair competition,* now became the symbolic icon of the federal government's new role in labor relations.

Wagner was pleased with the final product. A year later he recalled that in passing Section 7(a), "Congress [had] projected into economic affairs the essence of true democracy, by outlining a system of checks and balances between industry and labor, crowned by governmental supervision and advice."[54]

The Short Life of "Self-Policing" and Mediation

Inasmuch as Section 7(a) contained no explicit means of enforcement, its effectiveness depended on factors that were uncertain or unknown when the statute was passed. On its face, the collective bargaining obligation in Section 7(a) does not appear to have required any precondition other than the presence of an identifiable group of employees who are members of a labor organization that seeks to represent them in bargaining collectively with their employer. The basic fourteen-word provision required no more and no less. This process could embrace either minority- or majority-union bargaining-even proportional bargaining with two or more labor organizations. As labor historian James Gross perceptively recognized, "its wording was susceptible to interpretations that would sanction. . . *proportional* rather than exclusive representation. "55 The provision contained no reference to majority representation.

Shortly after passage of the NlRA, General Hugh S. Johnson, who had been appointed head of the National Recovery Administration (NRA), the agency charged with administering the Act, announced with reference to Section 7(a) that he looked "to this new industrial self-government to be self-policing," although he acknowledged that if there were violations the government "could step in. "56 That concept of "self-policing" remained the policy of the Administration for only a short time, however. Encouraged by the enactment of Section 7(a), the trade union movement undertook a massive organizational campaign that exceeded any such activity since World War 1,57 and in July, immediately after passage of the Act, a wave of strikes swept over the country. In that month, 1,375,000 worker-days were lost due to strikes, and in August the number rose to 2,378,000, which was three times the average for the first half of 1933.58 The magnitude of these strikes prompted the Administration to immediately create some form of governmental machinery to address the settlement of labor-management disputes;59 whereupon, on August 5, 1933, President Roosevelt announced the establishment of a National Labor Board (NLB)60 to assist in the implementation of Section 7(a). This represented the first institutional attempt to shape 7(a) "in the NRA mold of voluntary self-government."61 However, Roosevelt issued no executive order defining the Board's authority at that time. His announcement simply stated that the Board would "consider, adjust, and settle differences and controversies"62 among disputing parties. It was not until December 16, 1933, that the President issued his first executive order acknowledging the Board's existence and defining its authority, but that order still left the matter of its jurisdiction in a state of uncertainty.63 In fact, throughout its tenure, the "Board was never quite sure of its own authority. "64

In accordance with the Administration's voluntary self-policing approach,