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The Wagner Act and the Question of Workplace Representation

David Brody

Nearly sixty years have passed since the passage of the National Labor Relations Act in 1935. So far removed are we from that time, remarked the legal scholar Paul Weiler at the law's fiftieth anniversary nine years ago, that the sides are totally reversed: management is content with it, while organized labor thinks that maybe the best thing would be to scrap the law and return to "the law of the jungle."¹ Is any purpose to be served by revisiting those distant days when the Wagner Act was hailed as Labor's Magna Charta? In a recent essay,² I made the labor historian's case for why knowledge of its past is important to a union movement beset by troubles. My argument took note of the apparent anomaly of the recent Electromation decision: that labor-management shop committees, which many in industry and government consider to be essential for fostering employee participation, are actually illegal under Section 8a(2) of the law. I cited 8a(2) only "to remind us that the principles and rules [the law] asserts came out of a particular history and were premised on a specific set of industrial conditions." But what I had intended as a passing observation turns out to have peculiar relevance to a growing debate in American today over labor law reform. At the heart of that debate is the question of workplace representation. And on exploring further, I have discovered that, far from being marginal to the main purposes of the law, that question, and how it was resolved, stood at the heart of the original debate over the Wagner Act.

Even today 8a(2) remains pristine, without the usual encrustation of

case law of a sixty-year old-provision. The National Labor Relations Board recognized this in its finding in the Electromation case, which is based primarily on an examination of legislative intent. Senator Wagner is quoted extensively, and there is close attention to the successive wording of Section 8a(2)¹ which in the end prohibits not only employer domination in, but interference with, the formation or administration of labor organizations, as well as any support financial or otherwise. The reach of 8a(2) is determined by how the law defines "labor organization," and here too there is no mistaking the legislative intent: in its final wording, Section 2(5) leaves no shelter from the prohibitions of 8a(2) for workplace forms of representation insofar as concerns the terms and conditions of employment.

To the amici in the case who argued that changed industrial conditions call for a more flexible approach, the Board responds rather plaintively that it cannot do so "when congressional intent to the contrary is absolutely clear...." One can understand why, in a law committed to fostering contractual relations between employers and employees, Congress would be anxious to prevent the suborning of a collective bargaining agent by its opposite number. But what can Senator Wagner and his colleagues have had in mind by the radical constraints written into 8a(2) and 2(5), constraints so sweeping that they apply to employee organizations not aspiring to collective bargaining (NLRB v. Cabot Carbon Co [1959]) and to employer actions not tainted by anti-union animus (NLRB v. Newport News Shipbuilding Co. [1939])? That 8a(2) was not inadvertent

¹ In the original Wagner Act, the designation is 8(2), but for consistency's sake, and to avoid confusion, 8a(2) will be used throughout.

became altogether certain when Congress undertook the Taft-Hartley overhaul of 1947. The House adopted a provision permitting employers in the absence of a certified bargaining agent to form or maintain employee committees for the purpose of discussing matters of mutual interest, including the terms and conditions of work. The provision was rejected in conference, specifically (so Senator Taft reported) because the conferees wanted the prohibitions in 8a(2) left "unchanged," and so they have remained ever since.

What has changed is an industrial environment that now places a premium on employee involvement. This takes various forms, from quality circles to production teams and up to, at its most advanced, shop committees like the ones disestablished by Electromation. At stake, argued some amici in that case, was nothing less than American competitiveness in the global economy. And when the Clinton administration came into office a few weeks later, lo and behold that was exactly the position it took. The key competitive arena, says Secretary of Labor Robert B. Reich, is the workplace, and the goal, "high performance work practice." Workplace reform is what in the Clinton administration's mind calls for labor law reform. The link is explicit in the charge it gave to the Commission on the Future of Worker-Management Relations, the so-called Dunlop Commission after its chair, John T. Dunlop. Although nothing is yet settled, clearly what members of the Commission have in mind, and what the secretaries of labor and commerce had in mind when they called it into being, is a system of workplace representation much more varied and collaborative than is permissible under existing law.

The drift of the administration's thinking is underwritten by the most authoritative of academic voices. In his recent book Governing the Workplace: The Future of Labor and Employment Law, Paul Weller in fact commits himself to a specific reform: Employee Participation Committees mandated by law for every workplace with 25 or more workers, taking as his model the German works-council system. Representatives to these EPCs would be elected from within the plants, and their duties would be "to address and respond to the broad spectrum of resource policies of the firm." And yet, powerfully argued and wide-ranging as it is, Professor Weller's book contains but a single sentence[✓] suggesting that this is a choice that the country considered once before and rejected when it chose the Wagner Act.

In what follows, I propose to retrace that history, taking as my central argument that what was at issue--and what accounted for the sweeping language of 8a(2) and 2(5)--was a systemic choice being made between rival forms of workplace representation,[✓] and further, that it was a choice not so different from the one Professor Weller offers us. My method will be, in the fashion of the historian, to follow a basically chronological course, stopping along the way at major junctures--five by my count--that seem to me bear on our debates over labor law. If others find in my account implications I have missed, so much the better.

The history of the Wagner Act begins two years earlier in June 1933 with the National Industrial Recovery Act, the early New Deal's misbegotten effort to fight the Great Depression through the cartelization of American industry, that is, through codes of fair competition. Included in the Recovery Act was Section 7a, which said that

employees had the right to organize and bargain collectively through representatives of their own choosing and in exercising that right to be free from the interference, restraint or coercion by employers or their agents. Only the historian perhaps gets excited about the question of how 7a got into the Recovery bill, and why, once in, it stuck. For our purposes the main thing is to understand that, while 7a might itself have been more or less an historical accident, something like 7a was certain to have been enacted, because the principles it embodied had already prevailed in an ideological struggle going back at least several decades.

Since early in America's industrial revolution, liberty of contract had been the ruling employment principle in law, applying even to agreements for which a condition of the job was not joining a union or going on strike. More palatable in later years than the yellow-dog contract, however, was the open-shop argument, which called on employers themselves to safeguard the contractual freedom of their workers by having no dealings with trade unions. But in a 20th-century world of great industrial corporations and armies of workers, individual rights steadily lost ground to the more urgent claims of collective action. As an answer to the epidemic of strikes and industrial violence, the U.S. Commission on Industrial Relations recommended in 1915 a collective-bargaining law. During World War I, when wartime policy did briefly protect organizing rights, a threshold was crossed, notwithstanding the ugly postwar reaction. After the collapse of a national conference Woodrow Wilson had called in 1919 to find a common ground between labor and capital, Bernard Baruch assured the President that, despite irreconcilable differences, the participants "did not at any time, reject

the principle of the right of workers to organize and bargain collectively with their employers." And when the Norris-LaGuardia Act of 1932 asserted that right as public policy, there was no audible dissent. Indeed, part of the language of Section 7a(1) is lifted bodily from Norris-LaGuardia, and the rest is a paraphrase. There in Norris-LaGuardia, moreover, are the key doctrinal words of the Wagner Act--"full freedom of association" and "actual liberty of contract." That latter phrase disposes of an expiring legal theory--actual liberty of contract is what public policy demands, not the fiction of freely contracting individuals--and the declaration that the yellow-dog contract is unenforceable in the federal courts drives the conclusion neatly home.

Section 7a advances beyond Norris-LaGuardia only insofar as inclusion in the NRA codes of fair competition makes it more than a mere statement of public policy. In fact, inclusion in the codes was not much of an advance, and ineffectuality is the standard theme of 7a history--of the hopes of industrial workers raised and then crushed by the resistance of powerful corporate interests and the fecklessness of the New Deal. All too true. Yet, from the perspective of our own failed labor law, 7a can be seen in a quite different light, for what it also demonstrated was the power of ideas whose time had come. Today, the underlying principles are masked by all the encumbering amendments, court and NLRB doctrine, and institutional interests engulfing the labor law. Section 7a stood quite alone, little more than an assertion of principles, but for that very reason capable of summoning up the force that brought the Wagner Act into being. Remarkably, the validity of the principles were themselves never debated, only what they required, and

from this came a series of rulings, conceived of at the time as an emerging common law of labor, that finally was codified in the Wagner Act: the representation election, majority rule and exclusive representation, and a list of enjoined unfair labor practices by employers.

Once on the books, the Wagner Act developed enormous moral force. The American Civil Liberties Union considered it "in effect a civil liberties statute" and placed it at the top of the list of First Amendment achievements for 1937. This was the atmosphere in which the Supreme Court surprised its critics and handed down the crucial Jones and Laughlin (1937) decision upholding the Wagner Act. The law manifested, in fact, a new understanding of constitutional rights beginning to emerge during the New Deal. "Perhaps it is time to think of civil liberty as protection by the state rather than against the state," wrote John Dewey in 1936. The record of the ACLU--it initially opposed the Wagner Act on traditional libertarian grounds--is a perfect indicator of this remarkable shift, which was a precondition for the civil rights revolution of the 1960s. In the 1930s, however, it was labor's rights that occupied center stage. Listen to Roger Baldwin of the ACLU speaking in 1938:

However important or significant may be the struggle for the political rights of fifteen million Negroes; however important or significant the defense of religious liberties; of academic freedom; of freedom of the press, radio or motion pictures, these are on the whole trifling in national effect compared with the fight for the rights of labor to organize.✓

The debate over labor law reform could do worse than to start from Baldwin's statement or, more realistically perhaps, from the proposition that "full freedom of association" and "actual liberty of contract" are rights of workers worthy of being guaranteed by the state. If that proposition no longer holds the allegiance of the country, better to know

it and proceed accordingly than to remain as we are today where the practical effect of the law is to deny to workers the rights the law says they have. If, as I believe, such a clarifying debate would serve to revitalize the established principles of the Wagner Act, the battle for reform would be three-quarters won: we know quite well what it would take to curb employer intimidation of union workers, make the representation election truly the free choice of employees, and eliminate the barriers to the first contract. More to the point for this inquiry, and where the pathway to reform is less clear, we would also have some principled criteria for assessing changes in the law intended to foster alternative forms of workplace representation.

That was what Section 7a provided in the trial period leading up to the Wagner Act, which leads me to my second historical juncture: how open-shop employers proposed to meet the test of 7a. The damning term commonly used by historians, and by critics at the time, was the company union, but we will do better to accept the term advanced by employers and one more functionally descriptive--the employee representation plan (ERP), or, in some companies, the works council. This was a workplace system of representation, normally limited to single plants, and not contemplating contractual relations. That the works council would be the first line of employer defense was obvious from the jockeying over Section 7a before the Recovery Act was enacted, and while industry lobbyists had not gotten what they wanted--a proviso protecting "existing satisfactory relations"--they went away satisfied that 7a was loose enough to encompass employee representation. Immediately the law was signed, there was a tremendous rush to put ERPs into effect,

sometimes with a charade of employee consultation, mostly not. The cynical motives were all too plain.

Yet employee representation also had quite respectable, well-founded roots in the advanced management thinking of the time. The most direct line into New Deal history runs back to John D. Rockefeller, Jr., the very earnest heir to the Standard Oil fortune. One of his properties, the Colorado Fuel and Iron Company, had fought a bitter strike for recognition by the United Mine Workers that ended in the Ludlow Massacre of 1914. Rockefeller claimed ignorance of the firm's affairs, only to be publicly exposed by evidence developed by the Commission on Industrial Relations. Embarrassed and chastened, he called in the Canadian industrial relations expert (and later prime minister) W.L. Mackenzie King, and between them they devised a representation plan for the Colorado mines. Thenceforth, Rockefeller became a fervent and vocal advocate, establishing a similar plan at Standard Oil (NJ) in 1918, and taking what he considered to be an advanced position in favor of industrial democracy in the postwar period. Subsequently he financed the most important research and consulting operation of its kind in the 1920s--Industrial Relations Counselors, Inc.✓

In early 1934, at the height of the battles over 7a, the head of that group, Arthur H. Young, became vice president in charge of industrial relations at the United States Steel Corporation. From that perch, Young did the strategic thinking for the national ERP movement. And in the Steel Corporation, with its 200,000 employees and pre-eminent place in American industry, he had a big stage for testing his program. We can get a taste of what Young thought he was up to from a statement of principle

he was fond of quoting: -

The human element in industry is the factor of greatest importance. Capital cannot exist without labor and labor without capital is helpless. The development of each is dependent on the cooperation of the other. Confidence and good will are the foundations of every successful enterprise, and these can be created only by securing a point of contact between employer and employee. They must seek to understand each other's problems, understand each other's opinions, and maintain that unity of purpose and effort upon which the very existence of the community which they constitute and the whole future of democratic civilization depend.✓

So how did employee representation fare in practice? The plans commonly called for joint councils, with management and labor accorded equal votes, and a majority required for any action--a transparent management veto, of course. The details varied, but the small print invariably left the final word to management. At International Harvester, where Arthur Young ran things in the early 1920s, representatives who stepped out of line got a hard lesson; they were laid off or transferred.✓ When labor costs had to be cut, as in the sharp recession of 1920-21, the ERPs found themselves bypassed and thereby deflated, and, in general, on wages and the basic terms of employment they got nowhere. Yet it was also true that, after the shakeout of plans initiated only to satisfy a wartime directive or to counter a unionizing threat in the postwar strike period, employee representation developed a good deal of staying power. The necessary ingredients seem to have been, first, a personnel department capable of curbing line supervisors, second, an established and progressive benefits program, and, third, company willingness to expend the energy needed to keep the plans from winding down into inactivity.✓ With 7a, of course, there was a new influx of firms not truly committed to the ERP concept, and this was, as Arthur Young later acknowledged, a problem he had to overcome when he joined

United States Steel. ✓ On the other hand, the incentives to make the ERPs work were now vastly higher than before, and, in fact, over the next two years they were much rewritten and generally made more autonomous of management.

For those in the labor movement who have been wondering whether shop committees might not be a halfway house toward unionization, the answer from the history I have been describing is a qualified yes. The evidence suggests that the ERPs did foster local leadership and, insofar as they failed to produce results, did educate workers and strengthen the case for collective bargaining by outside unions. An extreme instance is to be found in the Akron rubber industry where, after fostering its Industrial Assembly for fifteen years, Goodyear unilaterally re-imposed an eight-hour day in 1935 and opened the floodgates of unionization. At Arthur Young's showcase in U.S. Steel, the ERPs in the sheet and tinplate subsidiary moved in 1935 over his objections toward federation and the next year the ERPs at the basic steel subsidiary were seized by union adherents who, at a critical moment, went in a body over to the CIO. ✓

For those wondering whether the ERP experience of sixty years ago suggests that shop committees can inculcate the company loyalty and commitment we now prize, the answer is also a qualified yes. A pretty fair test would be how the ERPs fared after 1935 when they came up against CIO challenge and NLRB disestablishment. At companies that had made a long-term investment in progressive labor relations--Dupont, for example, or AT & T--independent unions did take root. When Leo Troy surveyed this little-noticed sector in 1961, he estimated a membership of 1.5 million in 2,000 organizations, although he could not specify what

percentage of these actually stemmed from the pre-Wagner Act ERPs. ✓
And, in light of current union-avoidance strategies, Sanford Jacoby has more recently given respectful attention to firms whose welfarist policies in fact worked and who retained the loyalty of their workers. ✓

As to the big question of whether employee representation had ever offered a viable policy choice: the answer is, again, a highly qualified yes. The reality was that because employers had moved so swiftly, the works councils already occupied the ground. At their peak in 1934, they covered probably 3 million workers, more than did the unions and, in the mass-production sector where they were most heavily concentrated, very much more. That fact--that the ERPs existed, that they were functioning, that enormous business interests stood behind them--had to be taken into account, and, initially, it more than any other set the terms of the debate. But there was another fact that also had to be taken into account. With 7a, employee representation was no longer a private affair, but, on the contrary, one deeply entangled in a massive program of industrial regulation, which brings me to my third historical juncture.

In deciding about how to square employee representation with 7a, the country was also deciding what kind of authority the state should assert over labor-management relations. The context in which this happened nearly defies recapturing, for the NRA represents America's one serious romance with a corporatist economy. Each of some 400 codes of fair competition contained in addition to comprehensive trade regulations not only Section 7a, but more or less detailed provisions on wages, hours, child labor and a variety of working conditions. A profusion of agencies sprang up to interpret and enforce all this--the National Labor Board of

1933-34, the successor National Labor Relations Board of 1934-1935, regional labor boards and a few industry labor boards, other labor boards under code authority, and, finally, a whole host of NRA compliance and code committees. The question of collective bargaining rights was enmeshed in this bureaucratic jungle and intermingled with other, sometimes more pressing, NRA concerns with maintaining code labor standards and settling industrial disputes. In this state of confusion or, if you will, open possibilities, what was at issue was not only the definition of bargaining rights, but the scope of state responsibility.

The Wagner Act embodied one resolution--of course, the one that prevailed. But consider another. The powerful men at the head of the National Recovery Administration, General Hugh Johnson and his general counsel Donald Richberg, took the view that Section 7a called for a "perfect neutrality" between forms of labor organization. The company union was just as legitimate as the trade union. It was the employer's duty to deal with both of them, insofar as each was freely chosen by employees, but by virtue of their claim to be represented, not to grant exclusive recognition to either. The Johnson-Richberg plan contemplated multiple representation, protection of the rights of minorities and individuals, no bar against company unions, and a kind of local option over the actual forms of collective bargaining--let the parties decide what they wanted, so to speak. ✓

Where this might have led is best seen in the President's auto settlement of March 25, 1934. The initiating crisis was entirely emblematic of the time: the AFL unions were demanding representation elections leading to exclusive recognition, the companies answered that

their workers already had representation through the ERPs, but that they were willing to deal with (but not recognize or contract with) the unions for their own members (providing membership lists were turned over). Fearful that a national auto strike might set back economic recovery, President Roosevelt himself intervened and crafted a settlement embodying the Johnson-Richberg principles I have just described, but implemented on the specific basis of proportional representation. Employers agreed to bargain with "the freely chosen representatives of groups," with the bargaining committee, if there was more than one group in a plant, to have "total membership prorata to the number of men each member represents." To enforce the settlement the President appointed a special Automobile Labor Board with final and binding authority. The Board first dealt with the backlog of discrimination cases, then in early 1935 administered elections for what it called "bargaining agencies" for every auto plant in the country (except Ford), the members of which were identified by affiliation and selected by a complex process to reflect the plant-wide vote. Each member acted as grievance person for his/her own district, and on broader issues sat on the bargaining agency. ✓ The agencies replaced the ERPs, generally adopting their district lines, and became in effect the state-mandated works councils Paul Weiler has in mind.

We might therefore pause to ask what light that experience throws on the current enthusiasm for alternative forms of workplace representation. Insofar as the works councils in the Professor Weiler's plan are intended to be supplementary to existing collective bargaining protections, not in lieu of them as was the case with the 1934 auto

settlement, to that degree of course the two situations are not comparable. And, in fact, the auto works councils displayed very much the same weaknesses as the ERPs they replaced, with members of the bargaining agencies complaining that in dealing with management they had no independent base of power and no claims on the latter beyond the right to be heard. Yet in the responsibilities they imposed on the state, the auto works councils do have a certain relevance for labor law reform.

The Automobile Labor Board, employing a staff of over a hundred, ordered and administered the plant elections across the industry, and, on unresolved grievances, began to function as a kind of labor court. Who would be charged with these responsibilities if the law mandates, or even only authorizes, works councils? If full freedom of association remains basic doctrine in the law, as I assume it will, will it fall to the NLRB to police the works councils and shop committees against the threat of company domination and manipulation? If so, by what criteria? At the time, auto unionists castigated the works councils for being powerless, but the historical record also reveals them calling the councils "government unions." Most certainly, labor law reformers will want to think carefully about what functions the state will be undertaking if it becomes the author of alternative forms of workplace representation.

The auto settlement was a real alternative at the time. President Roosevelt put it forth as the basis on which "a more comprehensive, a more adequate and a more equitable system of industrial relations may be built than ever before. It is my hope that this system may develop into a kind of works council in industry in which all groups of employees,

whatever may be their choice of organization or form of representation, may participate in joint conferences with their employers.^{23/} Think about what our labor relations might have looked like had FDR's "hope" come to pass.

We come now to my fourth historical juncture--the moment of truth, so to speak--when Congress chose the path leading to the Wagner Act. From the day Senator Wagner set in motion the drafting process in early 1934, the basic strategy proceeded on two tracks, one leading to a viable framework for free collective bargaining, the other to the expurgation of the rival workplace representation system. For the latter purpose, a serviceable weapon was at hand in a principle already well established in railway labor law: that employer domination of labor organizations was an excluded activity corollary to the right of self-organization.^{4/} Specifying such excluded activity was the very first problem to which Senator Wagner's team gave detailed attention when they produced the sketchy initial draft dated January 31, 1934.^{5/} How far to extend the curbs on employer domination, however, was not initially clear. The finished draft of the labor disputes bill (S. 2926) that Wagner submitted to the Senate on March 1 defined as labor organizations those existing for the purpose "of dealing with employers concerning grievances, labor disputes, wages or hours of employment." A more comprehensive phrase covering "other terms of employment" ought to be added, a key academic adviser William E. Leiserson wrote Wagner. Otherwise, "the contention may be made that company unions may be kept in existence to deal with those terms of employment that are not covered in this sub-section defining 'labor organization'." Similar reasoning prompted Leiserson's colleague Edwin H.

Witte to urge the addition of "employee representation committee" to the definition of labor organization. ✓ Logic went in one direction, but politics in another. In early May Senator Wagner lost the initiative in the Senate Education and Labor Committee, and the powerful chair, David I. Walsh, pushed for a more accommodating bill.

Walsh's substitute permitted employers to initiate and influence, but not interfere with or dominate, employee representation committees (and other forms of labor organization), to pay employee representatives for their time (but not contribute financially to labor organizations), and entirely dropped the handling of grievances as a defining function of protected labor organizations. Had the preservation of employee representation been their primary concern, employers should have welcomed the Walsh substitute, but of course their real interest was not protecting the ERPs, but fending off genuine collective bargaining, and here, while the Walsh substitute made the key concession of dropping the explicit duty to recognize and bargain with representatives of employees, employers could not be sure that they would not be faced with exclusive bargaining agents selected by secret ballot through majority rule, all of which was permissible at the discretion of the "industrial adjustment board" created by Walsh's bill. ✓

After it was too late Arthur Young remarked that he thought that employee representation and collective bargaining were not incompatible and could fruitfully function side by side. ✓ If that was Young's belief, he had blown his chance. Employers, Young included, fought the Walsh bill, and helped get it killed in June 1934. In a revealing letter, Young figured that time was on his side: the efforts to enforce 7a could be stonewalled

until it expired, and there would never "be given as good a chance for the passage of the the Wagner Act as now [June 16, 1934]."²⁴ But time proved to be on Wagner's side, not Young's. The steam went out of the pro-business NRA experiment; the 1934 Congressional elections swept out the Republican right wing and created the most liberal Congress in memory; and the futile struggle to enforce 7a exposed ever more sharply the cynicism behind all the fine talk about the rights of workers (not least by the publication of Young's damaging letter). There is no way of understanding what drove the campaign for a labor law without taking account of the nature of management's opposition--above all, to the prospect of genuine collective bargaining with independent unions--and, of course, the miscalculations that come so easily to people bent on preserving their power.

When Senator Wagner resumed the battle in the 1935 Congress, the gloves were off. The definition of employer domination of a labor organization becomes airtight, and likewise the meaning of labor organization in 2(5). On reading the draft, Secretary of Labor Frances Perkins noted that labor organizations were defined as organizations created for the purpose of "dealing with employers." Would not bargaining collectively be the preferred term? No, came the vehement rejoinder. If Senator Wagner accepted Perkins' amendment, "then most of the activity of employers in connection with the company unions we are seeking to outlaw would fall outside the scope of the Act. If, as employers insist, such 'plans,' etc., are lawful representatives of employees, then employers' activity relative to them should be clearly included, whether they merely 'adjust' or exist as a 'method of contact,' or engage in

genuine collective bargaining. It is for this reason that the bill uses the broad term 'dealing with'.²⁰

The architects of the bill are entirely clear about the fact that they are forcing a systemic choice. Hence, for example, the insistence on retaining grievance handling as a defining function of labor organizations. Because employee representation plans are mostly "nothing but agencies for presenting and discussing grievances and other minor matters...to exclude the term 'grievances' particularly would exclude from the provisions of this act the vast field of employer interference with self-organization by way of such plans or committees. This statement, in its remarkable negativity, defines the drafting strategy: workplace organization is encompassed by 2(5) so that it can be excluded in 8a(2).

So did the Congress not contemplate a need for workplace representation or recognize grievances as a legitimate expression of employee discontent? Of course it did, only not through company-dominated labor organization or--just as important--not by legislative enactment. The shaping of 8a(2) has to be placed in its true historical context, which was the massive NRA experiment that was in place during this entire period. (The Supreme Court killed it only on May 27, 1935.) By introducing separate labor legislation, Wagner was intent on an act of disengagement from that corporatist morass, and the evolution of the law was driven by this intention. Thus the NLRB ends up a public board, not tripartite; free-standing, not associated with the Labor Department; concerned strictly with collective bargaining rights, not with mediating and arbitrating labor disputes; and endowed with independent, adequate powers of enforcement, which, under the NRA, had been utterly lacking.

To define the NLRB as quasi-judicial was empowering, but also, in the freewheeling NRA context, delimiting. It was this quite precise combination--of state authority powerfully mobilized, yet narrowly applied--that gave the Wagner Act its distinctive cast and, indeed, its particular programmatic thrust: the law protected the right to organize and bargaining collectively; collective bargaining itself remained free. Section 8a(2) is part of that great settlement, disengaging workplace relations from the meddling NRA structure and leaving it in the realm of free collective bargaining.

And this brings me to my final historical juncture. When collective bargaining began in 1936 and 1937, there was little argument about what would go into the first contracts: provision for shop stewards or committeemen, a formal grievance procedure, and the principles of seniority in layoff and rehire, pay equity across jobs, and at least implicitly just cause in discharge and disciplinary actions. The hallmarks of the unionized workplace are present at its birth. Where had they sprung from? From a history of shopfloor struggle accompanying, and in my view driving, the legislative history I have been describing. The starting point went back much before the New Deal to the emergence of mass-production technology and the parallel development of internal labor markets and hierarchical command structures. In the 1920s and even earlier, one can already spot the key elements in various firms--pay equity as job classification systems appeared, rules for regulating job opportunity among permanent employees, due process in disciplinary matters, a felt need for some formal mechanism for eliciting the views of workers and for processing their grievances, which was of course the

best argument for the employee representation plans. The problem was that corporate employers were only imperfectly committed to what they themselves had created. And when the Great Depression struck, these failures became magnified in the minds of workers, who facing unemployment and speed-up had an enormous stake in predictable, rule-bound treatment. This was the source of the explosive response to 7a-- not from workers on the streets, but from those at work embittered by capricious and arbitrary treatment that violated the very precepts of bureaucratic order of the corporate enterprise itself.

The workplace events of the pre-Wagner Act era all moved in a common direction. Even at their most pliant, the employee representation plans mark a kind of beginning for the grievance procedure. The AFL unions themselves strenuously resisted the ERP system but, given their impotence on the bargaining front, they had little choice but to channel their energies into workplace organization. At General Motors, shop committeemen had won the right to process the grievances of union members well before there was any contract. The sense of formal process inherent in these emerging workplace structures was fostered as well by the NRA's halting efforts at adjudicating violations of Section 7a. Among the principles springing from these proceedings, most interesting perhaps was seniority. One of the charges to the Automobile Labor Board had been to handle discrimination cases by testing discharge and rehire against fixed criteria, which included marital status, efficiency, and seniority. Invoked for this specific purpose, seniority almost at once became a general entitlement, accepted as such by the Auto Board and by the industry. When it signed with the UAW a month after settling the great

Flint sitdown strike, General Motors took the position that it was embodying in the contract practices already in place. What remained implicit, but was perfectly evident in its future actions, was that General Motors was satisfied that it was accepting a workplace system that met the requirements of a great manufacturer of mass-produced automobiles.

Now that we have arrived at the moment when that no longer seems to be the case, it might be well to bear in mind that, historically considered, the workplace contractualism now so much in disfavor actually represents a triumph of accommodation to the industrial world as it then was. And so, perhaps more to the point, does the labor law. It left workplace representation to collective bargaining because it was confident of the result, and swept out alternative forms of workplace representation because no compelling case was made for conserving them. The ban against company domination, after all, is linked to the right to self-organization. No one argued at the time that anything else was at issue, or rather, no one on management's side, because there were indeed union people like Walter Reuther and Clinton Golden who believed that workers had a contribution to make to production practice. A case, indeed, has been recently made that, by empowering workers, Senator Wagner and his advisers thought they were laying the basis for high-trust cooperative workplace relations. Management harbored no such vision; running the plant was their job. The management rights clause in union contracts, as Barry and Irving Bluestone have been at pains to point out, stands as a monument to their determination. In its heyday before the Wagner Act, the works council was never conceived to be of

any serious relevance to better plant operations. Now that it is, we ought not to read the past as a cautionary tale, but rather for what it tells us about the ways we have earlier fashioned the right responses to our economic environment and, in particular, about just what it was that our labor law contributed once before--and might once again--to high-performance workplace relations.

Let me conclude by mentioning the fate of Arthur H. Young. In February 1937, the Supreme Court had not yet validated the Wagner Act, and Young was still trying to keep the ERPs at U.S. Steel going. Young was vice president in charge of labor relations, but he did not know that his boss Myron C. Taylor had been secretly negotiating with John L. Lewis since early January. Soon after the news of the union recognition agreement broke on March 1, 1937, Young resigned. He had thought himself ahead of the curve as a progressive labor manager, but in fact he had fallen far behind. He was not even in on the decision that launched collective bargaining in the steel industry.

1. Paul C. Weiler, "Milestone or Millstone: The Wagner Act at Fifty," in Arbitration 1985: Law and Practice, ed. Walter J. Gershenfeld (Washington, D.C., 1985), 37.
2. "The Future of the Labor Movement in Historical Perspective," Dissent (Winter 1994), 1-10.
3. The decision is reprinted in Daily Labor Report (December 18, 1992), E-1-23. The quotation is in footnote 9. In its brief survey of relevant decisions, the Board takes note (E-6,7) of the one serious departure from

the strict construction of 8a(2) by the Sixth Circuit Court (Scott & Fetzer Co. [1982], Airstream, Inc. [1989]), and finds it wholly unconvincing. For a fuller survey of the judicial history of 8a(2) written under the shadow of the Sixth Circuit initiative, see Thomas C. Kohler, "Models of Worker Participation: The Uncertain Significance of Section 8(a)(2)," Boston College Law Review 27 (1986), 534-45. For a useful listing of the scholarly commentary on 8a(2), see the Bibliographical Note in Raymond L. Hogler and Guillermo J. Grenier, Employee Participation and Labor Law in the American Workplace (Westport, CT, 1992), 174-75.

4. Daily Labor Report (June 8, 1959), D-3 (in the text of NLRB v. Cabot Carbon Co. [1959]).

5. The Commission's mission statement is reprinted in Daily Labor Report 5. (March 25, 1993), F-1.

6. See the statements by Ron Brown and Robert Reich in New York Times, July 5, July 27, August 8, 1993, and by Commission members Thomas Kochan and Paula Voos in Daily Labor Report (April 30, 1993), A-17, and (May 4, 1993), C-2.

7. (Cambridge, Mass., 1990), 213; the quotation is on p. 285.

8. This is not an argument that strains the historical imagination; it is entirely obvious to any reader of the legislative record leading up to Section 8a(2), as, for example, Kohler, "'Models of Worker Participation,'" 531-36.

9. Quoted in David Brody, Labor in Crisis: The Steel Strike of 1919 (Philadelphia, 1965), 127. The Commission on Industrial Relations' recommendation is in Final Report (1915), 33-91.

10. Cletus E. Daniel, The ACLU and the Wagner Act (Ithaca, N.Y., 1980), 18; Jerold S. Auerbach, Labor and Liberty: The LaFollette Committee and the New Deal (Indianapolis, 1966), 26, 210.
11. See, e.g., Memorandum to Members of the Employment Relations Committee, National Association of Manufacturers, May 26, 1933, in U.S Senate, Subcommittee of the Committee on Education and Labor, Violations of Free Speech and Rights of Labor, 75th Cong., 1st sess. (1937), Pt. 17, 7561; Address of the Chairman, American Iron and Steel Institute, Yearbook (1933).
12. The authoritative account is Howard M. Gitelman, Legacy of the Ludlow Massacre: A Chapter in American Labor Relations (Philadelphia, 1988).
13. This was part of the founding statement of the Special Conference Committee, which began in 1919 for purposes of coordinating and information-sharing on labor matters by ten of the largest and most progressive employers in the country. Young sat on it first as the representative of International Harvester and then, by special dispensation, on behalf of IRC. The statement appears in at least three speeches, September 24, 1935, May 25, 1939, March 11, 1941. A.H. Young Papers, California Institute of Technology Archives (copies in possession of author).
14. Toni Gilpin, "Left By Themselves: A History of the United Farm Equipment and Metal Workers Union," Ph. D. diss. (Yale, 1992), 66-67, which also includes a careful analysis of the early history of the International Harvester works council plan in ch. 1.
15. I am following here the assessment in Daniel Nelson, "The Company Union Movement: A Reexamination," Business History Review 56(Autumn 1982), 335-57.

16. Talk by A.H. Young, Town Hall-Section on Industrial Relations, May 18, 1938, Young Papers.
17. For a legislative proposal based directly on the ERP steel experience, see Raymond L. Hogler, "Worker Participation, Employer Anti-Unionism, and Labor Law: The Case of the Steel Industry, 1918-1937," Hofstra Labor Journal 7 (Fall 1989), 1-69.
18. Leo Troy, "Local Independent Unions and the American Labor Movement," Industrial and Labor Relations Review 14 (April 1961), 331-49.
19. E.g.: "Reckoning with Company Unions: The Case of Thompson Products, 1934-64," Industrial and Labor Relations Review 43 (October 1989), 19-40.
20. There is a convenient summary of the Johnson-Richberg plan in Leverett S. Lyon, The National Recovery Administration: An Analysis and Appraisal (Washington, 1935), 461-66.
21. Sidney Fine, The Automobile Under the Blue Eagle (Ann Arbor, 1963), 222-24, and passim for a highly detailed account.
22. E.g.: Meeting of the Automobile Labor Board with the Bargaining Agency Elected By Employees of Cadillac Motor Company, January 3, 1935; with Bargaining Agency...at Buick Motor Company, NRA Papers, R.G. 9, National Archives, Box 2. In the view of the ALB, the auto settlement required the employer to meet with the bargaining agency, but that everything beyond that was strictly voluntary, and that the actual development of collective bargaining would be a long-term voluntary process.
23. Quoted in Fine, Auto under the Blue Eagle 224-25. On FDR's commitment to the auto settlement as the basic definition of 7a rights, see the quotation in Irving Bernstein, The Turbulent Years: A History of the American Worker, 1933-41 (Boston, 1970), 191.

24. On the legal history, Irving Bernstein, The New Deal Collective Bargaining Policy (Berkeley, CA, 1950), 18-22. On the potency of the company-domination principle, see especially the grudging testimony of James A. Emery, general counsel of the National Association of Manufacturers, Legislative History of the National Labor Relations Act, 1935 (Washington, D. C., 1959, repr. 1985), 2 vols., I, 379-81.
25. The early drafts, beginning with the first of January 31, 1934, are reprinted, with commentary, in Kenneth Casebeer, "Drafting Wagner's Act: Leon Keyserling and the Precommittee Drafts of the Labor Disputes Act and the National Labor Relations Act," Industrial Relations Law Journal 11 (1989), 73-131.
26. William L. Leiserson to Wagner, March 8, 1934, Folder 14, Box 1, Leon Keyserling Papers, Georgetown University; Edwin E. Witte, Hearings on S. 2926, Legislative History, I, 271-73; James A. Gross, The Making of the National Labor Relations Board (Albany, NY, 1974), 68. The successive drafts of the labor disputes bill incorporate Leiserson's and Witte's suggestions, but are denoted "Confidential Committee Print" and seem not to have been formally added to the March 1 version. They are not reported in the Legislative History but can be found in Folder 20, Box 1, Keyserling Papers.
27. The Walsh bill is reprinted in Legislative History, I, 1084 ff., with Walsh's explanation on 1101 ff. One change, not especially noted at the time but of peculiar relevance today, was the deletion from the definition of "employee" (Sec. 3 [3] of the labor disputes bill) of a proviso stating that strike replacements were not employees; the deletion survived in the drafting of the final Wagner Act.
28. Town Hall Speech, May 28, 1938, Young Papers.

29. It is to be found, A.H. Young to L.H. Corndorf, June 16, 1934, in Legislative History, II, 2225.
30. Leon Keyserling, undated Memo [1935], Folder 9, Box 1, Keyserling Papers
31. "Comparison of S. 2926 and S. 1958," Legislative History, I, 1320, 1347.
32. In the following discussion I am drawing on my "Workplace Contractualism in Comparative Perspective," in Nelson Lichtenstein and Howell John Harris, eds., Industrial Democracy in America: The Ambiguous Promise (New York, 1993), 176-205.
33. Mark Barenberg. "The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation," Harvard Law Review 106 (1993), 1379-1496.
34. Negotiating the Future: A Labor Perspective on American Business (New York, 1992).