

# The Intellectual Origins and Legacy of an Institutional Revolution

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In an August 29, 2010 *New York Times* column, Peter S. Goodman writes of how contemporary policy makers “have run through ...their remedies for an ailing economy.” They “are peering into their medical kits and coming up empty, their arsenal of pharmaceuticals largely exhausted.” The problem? “Nearly any proposed curative could risk adding to the national debt – a political nonstarter.”<sup>1</sup> How could we have forgotten so much so soon? Yes, the New Dealers, as we all know, primed the economic pump by federal spending; they also used the power of the federal government to stop mortgage foreclosures and regulate suspect banking practices. But what gets surprisingly little attention is an intervention that was undoubtedly a centerpiece of New Deal economic policy: the 1935 Wagner Act. And it didn’t add a penny to the national debt.

By making collective bargaining more possible for a greater number of workers and employers, the Wagner Act advanced US society in multiple ways. In this short paper, I will begin by reviewing some of the economic arguments for why that is so. Next I will turn to the case to be made for the beneficial impact of the Act in increasing democracy and fairness in the workplace and in society at large. The positive economic, political, and social effects of the Act have been significant and certainly sufficient grounds for re-committing ourselves as a society to finding a way to make the practice of collective bargaining once again more accessible and realizable for the majority of US workers.

What is sometimes lost, however, is the wide-ranging case for collective bargaining embedded in the Act itself and the profound intellectual revolution it represented. The set of assumptions underlying the Wagner Act was the product of decades of intellectual debate. It took a half century, if not more, to upend the older intellectual order and call into question accepted notions of “liberty of contract” and “laissez-faire.” It also took a multi-class movement with leaders willing to articulate this new vision in the labor movement, in the academy, in law, in politics, and in other arenas. Without these

leaders and the intellectual consensus across classes and fields of endeavor that crystallized in the early decades of the twentieth century, the Act would not have passed.

My paper will conclude with this longer historical view, focusing on the intellectual origins of the Act and in particular the ideas workers themselves embraced. I present this history in part because it is a contribution workers made to our intellectual and political life that has largely been forgotten. But I am also drawn to this history because of its relevance to our present moment. If the purpose of the Wagner Act is to be realized for the twenty-first century workplace, we too will need an intellectual revolution. The battle for public opinion must be joined again. It is a battle not unlike that won by progressive Democrats and Republicans seventy-five years ago in which the reigning ideologies of the Gilded Age were finally swept aside after a half century of agitation. We are now in a New Gilded Age in which once again fundamental ends and means need to be re-examined, debated, and reconceived. And as with a century ago, the political revolution will not be possible without the intellectual.<sup>2</sup>

#### Economic Equity, Prosperity, and Security

The sponsors of the Wagner Act believed it would benefit the US economy as a whole. An “inequality of bargaining power” depressed “wage rates and the purchasing power of wage earners in industry,” they asserted.<sup>3</sup> The balance of power had shifted too far toward employers, and government action was needed to redress the balance. With a more level playing field, workers would regain a fairer share of the nation’s income. Putting money into the pockets of workers and reducing economic inequality were important ends in themselves, the Act’s proponents believed; they were also necessary for economic recovery. The Act takes what later would be called a Keynesian demand-side perspective: it argues that facilitating collective rather than individual bargaining augments “consumer purchasing

power,” increases spending for goods and services, and spurs economic growth. As Leon Keyserling, legislative assistant to Senator Robert Wagner and one of the Act’s principal drafters, summarized, “A deficit in consumption arising in large part from a deficit in wages has been at the heart of our recent economic troubles.”<sup>4</sup> The Wagner Act offered a solution.

The Act’s reliance on collective bargaining to heighten consumer demand, it should be noted, is an economic stimulus plan that does not involve large government expenditures. Indeed, Robert F. Wagner, in re-introducing the revised Wagner bill on the Senate floor on May 15, 1935, presented it as an alternative to “continuous public spending” as well as a way of avoiding economic relapse. “Unemployment is as great as it was a year ago,” he began, in a speech eerily reminiscent of our contemporary moment, “and real income of individual workers less.” He continues, putting the choices starkly: “If the more recent quickening of business activity is not supported by rises in wages, either we shall have to sustain the market indefinitely by huge and continuous public spending or we shall meet the certainty of another collapse.”<sup>5</sup>

Furthermore, although the Act, passed in 1935, is associated with the New Deal and with the growth of the federal government and government bureaucracy, it is, in intention and effect, a decentralized, market-based policy. Collective bargaining as practiced in the U.S. is a highly decentralized system that relies on private sector associations to regulate the market and address the inefficiencies and inhumanities that can occur in any technical system devoid of human oversight. Ironically, in the 1970s, as real wages stagnated and economic inequality began to grow – two problems the Act was designed to resolve– commentators increasingly viewed the Act and the wage-earning industrial class with which it was associated as anachronisms. The purchasing-power, market-based, civic associational approach to economic health embodied in the Act was marginalized.

Employers as well as employees would benefit from equalizing bargaining power, Section 1 of the Act declared. Encouraging collective bargaining and the setting of common wage and hour standards across firms and sectors would prevent destructive forms of market competition and reduce the economic incentives for slashing wages and prices. Of course, many employers had in place their own long-standing practices designed to restrict competition, ranging, as economic historian Alfred Chandler has shown, from establishing monopolistic market share through vertical and horizontal expansion to organizing employer associations that punished industry outliers who dared pay above or below the agreed-upon rate.<sup>6</sup> But the bulk of employer-initiated labor standards eroded by the early 1930s, under pressure from the free-fall in trade and consumption. Low-road employers were gaining market share at the expense of more benevolent welfare capitalist employers, particularly those who tried to provide some modicum of economic security to employees and their families through job-sharing and other wage stabilization programs.<sup>7</sup> Not surprisingly then, although the business class as a whole opposed the Wagner Act, a few employers and managers lobbied for its passage precisely because they understood that without it, they would be pushed toward implementing employment policies they deemed socially irresponsible and morally repugnant.<sup>8</sup>

The faith of the Act's advocates in its economic benefits was not misplaced. Increased unionization raises wages not only for those covered by contracts but for those in related occupations and industries, the so-called "spill-over effect." The new-found power of organized labor in the post-World War II decades was certainly among the factors contributing to the expansion of the middle-class and the dramatic decline in economic stratification during the "long New Deal" from the 1940s to the 1970s. Cause and effect are of course notoriously difficult if not impossible to prove, but the close correlation between a robust labor movement and a society of lessening economic inequality is due not

only to the tendency of unions to raise the wages of those at the bottom and diminish wage inequalities, including those of gender, race, region, and firm, but also to the long-standing, consistent historical advocacy of labor unions for minimum wage standards and progressive social welfare and tax policies. In addition, the union advantage, as often noted, is not limited to wages. Organized workers are 28 percent more likely to be covered by health insurance and 54 percent more likely to have pension coverage; they also have a greater likelihood of receiving paid vacations, sick leave, and an array of other benefits that promote physical, emotional, and mental well-being.<sup>9</sup>

Unfortunately, the economic and social benefits envisioned by the Act were limited by the failure of collective bargaining to achieve “market density” outside of a few sectors. At the peak of unionization in the early 1950s, “pattern bargaining” (or the standardization of wages and working-conditions among the majority of firms in the relevant competitive market) was established nationally in auto, trucking, meatpacking, and other industries; master contracts, often including all the relevant competitors in a local labor market, also existed in hospitality, garment, construction, and other sectors. Firms benefited as did their employees by the diminishing of destructive competition. But as this system unraveled, economic pressure on the remaining high-road unionized employers intensified.

The limited unionization in the US, among the world’s lowest, accompanied by the lack of governmental mechanisms to extend collective bargaining to non-union firms, laid the economic basis for intense US employer hostility to collective bargaining. Although it can be argued that unionized workplaces are more productive and efficient and hence the wage costs of unionizing are not necessarily greater, many US employers found it difficult to compete with low-wage non-union employers and they blamed their union status for it. In their view, they paid a high penalty for being union, much higher

than employers in Europe and elsewhere where union density was greater and collective bargaining often extended by statute or social contract.

At the same time, the peculiar employer-based health and welfare system that evolved in the US in the post-war decades heightened the so-called “union penalty.” Ignoring their own economic bottom line, US employers resisted Walter Reuther, President of the UAW, and other CIO labor leaders who throughout the 1940s and 1950s sought business support for universal rather than employment-based entitlements.<sup>10</sup> As a result, as health and pension costs soared, US unionized employers found it difficult to compete with employers in Europe and elsewhere who did not pay the added costs – estimated at 25 to 35 percent – associated with unionized benefit packages in the US.<sup>11</sup>

#### Democracy and the Act

CIO leaders like Reuther spoke eloquently of the economic benefits of collective bargaining for workers and for American society as a whole. At the bargaining table, in the union hall, in the media, they hammered home the CIO’s message of economic security, fairness, and prosperity.<sup>12</sup> Yet New Deal labor leaders were clear, just as were labor leaders earlier in the twentieth century, that standard-of-living concerns were only one aspect of their transformative agenda. Their advocacy of “independent trade unionism” -- or as the Act elaborates: workers designating “representatives of their own choosing” and “negotiating the terms and conditions of their employment” – also rested on a deep commitment to preserving and extending democratic principles.

For the labor movement, economic democracy and political democracy were intertwined. Workplaces in which men and women were denied free speech, free assembly, and the right to participate in making the rules that governed them were an anathema to American values. These

“lawful, constitutional, natural, and inherent rights,” as AFL President Samuel Gompers reiterated in 1920, were the hallmark of free men and women everywhere and the birthright of all Americans.<sup>13</sup> Joseph McCartin, David Montgomery, and others have written superb studies of the widespread labor campaigns for “industrial democracy” in the World War I era.<sup>14</sup> These campaigns were not limited to the radical wing of US labor: “industrial democracy,” or what Selig Perlman referred to as “liberty in the shop,” was at the heart of the mainstream US trade union philosophy as articulated by the railroad brotherhoods and the American Federation of Labor.<sup>15</sup> “Self-government in the shop” is how the largest national organization of working women in this era, the Women’s Trade Union League, put it. In the view of the League’s President, Margaret Dreier Robins, democratic workplaces fostered “the full development of individual personality” and encouraged habits of citizenship and norms of deliberative and democratic decision-making.<sup>16</sup>

By the New Deal and World War II, labor leaders spoke of “industrial citizenship” to signal their belief that members of a workplace community were entitled to the full array of citizenship entitlements, including the rights and duties of self-governance and of due process.<sup>17</sup> The arbitrary authority of the foreman, notorious in pre-Wagner Act days, would be reined in by jointly-negotiated procedures and practices. The labor movement sought dignity and democracy through workplace contractualism and the rule of law.<sup>18</sup> A grievance procedure with a third-party neutral as final arbiter and contract provisions such as “just cause” would require management accountability in decisions about lay-offs and discharge and limit employer power to institute rules without consultation. Countless worker memoirs and oral histories attest to the emotional and economic impact of having such protections. As one packinghouse employee explained to his family, the 1959 meatpacking strike, which involved thousands of workers across the country, was not about money; it was about who had

the right to govern the workplace.<sup>19</sup> The essence of unionism for him and many other workers was an end to unilateral decision-making and lack of consultation.<sup>20</sup>

### Diversity and Collective Bargaining

Although women and minorities unionized later than did white men, the effects could be even more transformative. University of Wisconsin historian Will Jones has documented the impact on African-Americans, for example, of exercising their voting rights for the first time in National Labor Relations Board elections.<sup>21</sup> In *The Other Women's Movement* I detailed the ways in which wartime work in unionized, high-paying jobs raised the expectations of women. As they moved back into non-union pink-collar service jobs after the war ended, many sought to regain what they had lost: contractual rights and protections as well as higher wages and guaranteed benefits. The number of women union members moved from 800,000 in 1940 to three and a half million by 1956.<sup>22</sup> Indeed, as Nelson Lichtenstein has argued, the labor-based "rights consciousness" of the industrial union movement of the 1930s and 1940s laid the foundation for the subsequent rise of the civil rights and women's movements.<sup>23</sup>

Unions in some sectors, particularly in construction and heavy industry, failed to challenge engrained patterns of discrimination against women and minorities, but overall the labor movement pushed the workplace toward fairness and equal treatment. And in some settings, the labor movement acted as the advance guard of the civil rights revolution. In meatpacking, electrical, auto, and other industries, unions secured non-discrimination clauses in their contracts, and pushed for the end of discriminatory wage and hiring policies. A powerful coalition of unions also joined with civil rights groups to lobby in the late 1940s for the extension of the wartime Fair Employment Practices Commission;

later, they successfully sought passage of the 1964 Civil Rights Act and the 1965 Voting Rights Act. The AFL-CIO itself did not endorse the 1963 March on Washington but its political clout was crucial to the passage of civil rights legislation.<sup>24</sup>

The disproportionate growth of unionization among women and minorities testifies to the beneficial effects of collective bargaining for these groups. Women now comprise forty-five percent of union members, approaching parity with their percent of the labor force. Fifteen percent of African-Americans are covered by a union contract, making them more highly organized than white workers.<sup>25</sup> The shift from private to public sector unionism, a phenomenon that gathered force in the 1960s and continues into the present, is part of the explanation for the rising numbers of women and workers of color in the labor movement. But the growth of public sector unionism itself rests on the desire for workplace representation among women and minorities and would not have occurred in its absence.

#### Complicating Freedom: The Act's Forgotten Legacy

Let me close by discussing one of the most important yet oft-forgotten legacies of the Act: its challenge to the reigning theories of "laissez-faire" and "liberty of contract." The Act, in the view of some, justified restrictions on "liberty of contract" by positing the greater economic and social good derived from such restrictions. But that is only part of the story. As many in the labor movement believed, the Wagner Act also was necessary because it *increased* freedom. Real as opposed to formal or abstract freedom is often only secured as a social right, as a right given to a group. "Actual liberty of contract" occurs when parties have some equality of bargaining power and some choice of alternatives. Thus, for most workers in America, freedom has not yet been secured.

Oliver Wendell Holmes and other legal realists raised such issues most notably in dissenting opinions in *Adair*,<sup>26</sup> *Coppage*,<sup>27</sup> and *Hitchman*.<sup>28</sup> But what is crucial is that the labor movement itself articulated these notions *and* it acted on these beliefs, doggedly pursuing public policy that would reflect its values. The labor movement's adoption of rights language in the early twentieth century was not, as some scholars have suggested, an unfortunate conservative turn and an abandonment of more substantive political demands.<sup>29</sup> Rather, the call of labor leaders for "industrial freedom" and "actual liberty of contract" was a radical challenge to the core ideologies upon which Gilded Age wealth and power resided. And it was one which found its way into the Wagner Act.<sup>30</sup>

Labor leaders of the 1910s and 1920s battled the dominant tenets of Gilded Age conservatism not by abandoning the terrain of freedom but by reworking its meaning. Individual freedom was not opposed to collective freedom, they claimed: it rested upon it. They saw collective bargaining as a means, not an obstacle, to freedom. By calling for "actual" or "real" liberty of contract, they unmasked the false "freedom" of individual bargaining. Indeed, the so-called "liberty of contract" under which most wage-earners labored, it was asserted, brought them closer to slavery than to freedom. Preserving the liberty of the powerful had come at the expense of securing the liberty of the majority.

Labor's freedom claims found institutional embodiment first in the 1932 Norris-LaGuardia Act, a bill sponsored by two leading liberal Republicans, Senator George Norris and Congressman Fiorello H. LaGuardia, and passed during a Republican Presidency. The Wagner Act continued the institutionalization of this freedom tradition. By 1935, the Wagner bill's assumption that the individual worker, in Senator Wagner's words, "could only attain freedom and dignity by cooperation with others of his group [was] ... a truism ... paid at least the lip service of universal opinion ... and on the page of every treatise and in the platform of every political party."<sup>31</sup>

It is true as Karl Klare and others point out that the Wagner Act foregrounds the disruptive threat to interstate commerce to justify federal action and points to collective bargaining as a means to industrial peace.<sup>32</sup> Yet the Act rests on multiple legs: it makes an economic, social, constitutional, and human rights case for labor organization. And by including the phrases “actual liberty of contract” and “full freedom of association” in Section 1, the Act explicitly acknowledges its debt to labor’s freedom claims and to labor’s long struggle against economic autocracy.

It is also true that as Pope meticulously documents, the arguments of labor leaders such as Andrew Furuseth of the Sea-Farers for the constitutional grounding of both the Norris-LaGuardia Act and the Wagner Act on the Thirteenth Amendment did not prevail.<sup>33</sup> Yet labor divided over the necessity of grounding these laws on the Thirteenth Amendment, and prominent labor leaders like Sidney Hillman of the Amalgamated and John Frey of the Molders sided with progressive legal theorists and other pro-labor liberals who rejected Furuseth’s legal theories and his uncompromising approach to policy-making.<sup>34</sup>

We are once again at a moment in which the fate of labor law reform hinges as much on definitions of liberty, freedom, and the social good as on power politics. Those who believe, as I do, that lessening the inequality of bargaining power is essential for a prosperous, healthy, democratic, and fair society, need to take a page from the pre-Wagner Act labor movement. We need to reclaim the Act’s freedom legacy and make the conversation once again about the fiction of “liberty to contract” and the limits of individual bargaining in a society characterized by growing inequalities of freedom and power. We will need to show how enhancing worker collective rights advances actual freedom and how government policy redressing the imbalance of bargaining power secures the well-being of us all. It will take an intellectual revolution not just a political one if progress is to be made.

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<sup>1</sup> Peter S. Goodman, "What Can Be Done?" *New York Times*, 29 August 2010, Week-In-Review Section, 1,4.

<sup>2</sup> I have written elsewhere about the need to reconceive labor law and current practices of collective representation. For example, Dorothy Sue Cobble, "Making Postindustrial Unionism Possible," in *Restoring the Promise of America's Labor Law*, ed. Sheldon Friedman, et al (Ithaca: Cornell University Press, 1994), pp. 285-302; "Lost Ways of Unionism: Historical Perspectives on Reinventing the Labor Movement," in *Rekindling the Movement: Labor's Quest for Relevance in the Twenty-First Century*, ed. Lowell Turner, et al. (Ithaca: Cornell University Press, 2001), pp. 82-98; "The Promise of Service Worker Unionism" (co-author Michael Merrill), in *Service Work: Critical Perspectives*, ed. Marek Korczynski and Cameron Macdonald (London: Routledge Press, 2008), pp. 151-174. I take a different approach here, in part because of the different political and intellectual climate in which we live.

<sup>3</sup> Section 1, National Labor Relations (Wagner) Act. Pub.L. 74-198, 49 Stat.449 (1935), as amended at 29 U.S.C. 151-169.

<sup>4</sup> Leon H. Keyserling, "The Wagner Act: Its Origin and Current Significance," 29 *George Washington Law Review* (1960-61), pp. 231-32.

<sup>5</sup> In this same speech, Wagner describes how "technological changes doubled the productive capacity of the average worker between 1919 and 1933 ...[yet] wage earners' share ...declined steadily." As quoted in Keyserling, "The Wagner Act," pp. 206, 219.

<sup>6</sup> Alfred D. Chandler, *Visible Hand: The Managerial Revolution in American Business* (Cambridge, MA: Harvard University Press, 1977) and Alfred D. Chandler, *Strategy and Structure: Chapters in the History of the American Industrial Enterprise* (Cambridge, MA: MIT Press, 1969).

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<sup>7</sup> David Brody, *Workers in Industrial America: Essays on the 20<sup>th</sup> Century Struggle* (New York: Oxford University Press, 1993), 48-78; Sanford M. Jacoby, *Modern Manors: Welfare Capitalism Since the New Deal* (Princeton, NJ: Princeton University Press, 1998).

<sup>8</sup> On employer attitudes to the Act, Daniel Ernst, "The Yellow-Dog Contract and Liberal Reform, 1917-1932," *Labor History* 30:2 (Spring 1989): 251-274; David Plotke, "The Wagner Act, Again: Politics and Labor 1935-1937," *Studies in American Political Development* 3 (March 1989): 104-156; Mark Barenberg, "The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation," *Harvard Law Review* 106 (1993): 1409.

<sup>9</sup> Richard Freeman and James L. Medoff, *What Do Unions Do?* (New York: Basic Books, 1986); Ruth Milkman, "Two Worlds of Unionism," in Dorothy Sue Cobble, ed. *Sex of Class: Women Transforming American Labor* (Ithaca, New York: Cornell University Press, 2007), pp. 63-67. For the benefit gap figures, Lawrence Michel, "The Right to Organize, Freedom, and the Middle-Class Squeeze," Testimony before the U.S. Senate Committee on Health, Education, Labor, and Pensions, 27 March 2007. [http://www.epi.org/authors/bio/mishel\\_lawrence/](http://www.epi.org/authors/bio/mishel_lawrence/).

<sup>10</sup> Jennifer Klein, *For All These Rights: Business, Labor, and the Shaping of America's Public-Private Welfare State* (Princeton: Princeton University Press, 2006); Malcolm Gladwell, "The Risk Pool: What's Behind Ireland's Economic Miracle and G.M.'s Financial Crisis," *New Yorker*, 28 August 2006.

<sup>11</sup> See, for example, the quarterly reports on pay and benefits, U.S. Department of Labor, U.S. Bureau of Labor Statistics, *Employer Costs for Employee Compensation* (Washington, D.C. U.S.DOL, 2010).

<sup>12</sup> See, for example, Walter Reuther, *Selected Papers* (New York: The MacMillan Company, 1961), 59-66; 316-330.

<sup>13</sup> Samuel Gompers, *Debate between Samuel Gompers, President of the American Federation of Labor and Henry J. Allen, Governor of Kansas, Carnegie Hall, New York, 28 May 1920*. (New York: E.P. Dutton and Co., 1920), 4.

<sup>14</sup> Joseph A. McCartin, *Labor's Great War: The Struggle for Industrial Democracy and the Origins of Modern American Labor Relations, 1912-1921* (Chapel Hill, NC: University of North Carolina, 1997); David Montgomery,

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“Industrial Democracy or Democracy in Industry?: The Theory and Practice of the Labor Movement, 1870-1925.” In *Industrial Democracy in America: The Ambiguous Legacy*, edited by Nelson Lichtenstein and Howell John Harris (New York: Cambridge University Press, 1993).

<sup>15</sup> Selig Perlman, *A Theory of the Labor Movement* (New York: Macmillan Co, 1928)

<sup>16</sup> Margaret Dreier Robins, Presidential Address, WTUL Convention *Proceedings*, June 1915, WTUL Papers, Library of Congress, Microfilm Edition. Studies showing the positive effect of union membership on voting and other forms of political participation bear out Robins’ point. For further discussion of the contributions of labor organizations to American democracy, see Paula Voos, “Democracy and Industrial Relations,” *Proceedings of the 56<sup>th</sup> Annual Meeting of the Industrial Relations Research Association*, January 3-5, 2004.

<sup>17</sup> The concept of “industrial citizenship” is most commonly associated with T. H. Marshall. See his classic discussion of the various forms of citizenship in *Citizenship and Social Class* (Cambridge: Cambridge University Press, 1950).

<sup>18</sup> For an excellent discussion of workplace contractualism, see Brody, *Workers in Industrial America*, ch. 5.

<sup>19</sup> Cheri Register, *Packinghouse Daughter: A Memoir* (New York: Harper Collins/Perennial, 2001), pp. 133-230. See also Alice Lynd and Staughton Lynd, *Rank and File: Personal Histories of Working-Class Organizers* (New York: Monthly Labor Review Press, 1980); Jack Metzgar, *Striking Steel: Solidarity Remembered* (Philadelphia: Temple University Press, 1988); Harvey Schwartz, *Solidarity Stories: An Oral History of the ILWU* (Seattle: University of Washington Press, 2009).

<sup>20</sup> Some contend that unions are no longer needed because many of the elements of the postwar unionized system have become the norm of good human resource management practice. Yet without strong unions pushing for guaranteed benefits and due process, high road employers, particularly those few still trying to provide middle-class living standards to non-professional employees, have found it harder to survive. Thus, rather than being

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alternatives to each other, as suggested by Jacoby in *Modern Manors* (1988), welfare capitalism and trade unionism are interdependent, rising and falling in tandem.

<sup>21</sup> William P. Jones, *The Tribe of Black Ulysses: African-American Lumber Workers in the Jim Crow South* (Urbana: University of Illinois, 2005), p.160.

<sup>22</sup> Dorothy Sue Cobble, *The Other Women's Movement: Workplace Justice and Social Rights in Modern America* (Princeton: Princeton University Press, 2004), pp. 11-25.

<sup>23</sup> Nelson Lichtenstein, *The State of the Union: A Century of American Labor* (Princeton: Princeton University Press, 2002), chapters 1,2, and 5.

<sup>24</sup> Cobble, *The Other Women's Movement*, chapters 3,6; Michael Honey, *Southern Labor and Black Civil Rights: Organizing Memphis Workers* (Urbana: University of Illinois, 1993); Kevin Boyle, *The UAW and the Heyday of Liberalism, 1945-1968* (Ithaca: Cornell University Press, 1995); Alan Draper, *Conflict of Interests: Organized Labor and the Civil Rights Movement in the South, 1954-1968* (Ithaca, NY: Cornell University Press, 1994); Taylor E. Dark, *The Unions and the Democrats: An Enduring Alliance* (Ithaca, NY: Cornell University Press, 1999).

<sup>25</sup> Bureau of Labor Statistics, "Economic News Release: Union Member Survey," 22 January 2010. Available on-line at [bls.gov/news.release/union2.wr0.htm](http://bls.gov/news.release/union2.wr0.htm). Accessed 14 September 2010. The percentage of union members who are women was calculated from Table 1. Union Affiliation of Employed Wage and Salary Workers by Selected Characteristics.

<sup>26</sup> *Adair v. U.S.* 208 U.S. 161 (1909).

<sup>27</sup> *Coppage v. Kansas*, 236 U.S. 1, 14 (1915).

<sup>28</sup> *Hitchman Coal & Coke Co. v. Mitchell* 245 U.S. 229 (1917).

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<sup>29</sup> See, for example, William E. Forbath, *Law and the Shaping of the American Labor Movement* (Cambridge, MA: Harvard University Press, 1991).

<sup>30</sup> I have been inspired by and am deeply indebted to legal scholars William Forbath and James Pope who have unearthed and brilliantly recaptured much of this history. See Forbath, *Law and the Shaping of the American Labor Movement*; James Gray Pope, "Labor's Constitution of Freedom," 106 *Yale L. J.* vol. 106, no. 4. (January 1997), 941-1-31; and James Gray Pope, "The Thirteenth Amendment versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921-1957," *Columbia Law Review*, vol. 102, no. 1 (Jan. 2002), pp. 1-122. Yet as elaborated here and in subsequent paragraphs I part ways with both on key points of interpretation.

<sup>31</sup> *Congressional Record*, 15 May 1935, p. 7565.

<sup>32</sup> See, for example, Karl Klare, "Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941," *Minnesota Law Review* 62 (1977-1978), pp. 265-339. In addition, Pope (2002) stresses the negative consequences of the choice by NLRB lawyers to emphasize these aspects of the Wagner Act before the Supreme Court in *NLRB v Jones & Laughlin Steel Corp* 301 U.S. (1937), thus easing the way for later legislative and legal restrictions on labor rights. Yet a case also can be made for the positive social benefits of the Act in lessening industrial conflict in a nation with one of the bloodiest and most violent labor histories of any industrializing country. For the high incidence of labor violence in the U.S. and its decline after the Wagner Act, Philip Taft and Philip Ross, "American Labor Violence, Its Causes, Character, and Outcome," in *The History of Violence in America: A Report to the National Commission on the Causes and Prevention of Violence*, edited by Hugh Davis Graham and Ted Robert Gurr (New York: Bantam Books, June 1969), pp. 281-395.

<sup>33</sup> Pope, "The Thirteenth Amendment versus the commerce Clause."

<sup>34</sup> On the division among labor leaders and the intellectual overlap among labor intellectuals and pro-labor progressives, Irving Bernstein, *Lean Years: A History of the American Worker 1920-1933* (Baltimore, MD: Penguin,

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1960), chapters 4, 11; and Ernst, "The Yellow-Dog Contract and Liberal Reform, 1917-1932." Pope's important point in "The Thirteenth Amendment versus the Commerce Clause" that labor rights today would be strengthened were they to be linked to civil and human rights is one with which I agree. Yet I am not convinced that the majority of progressive and New Deal reformers, including the majority of labor leaders, were misguided in their decision not to ground the Norris-LaGuardia and Wagner Acts in the Thirteenth Amendment.