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ORIGINS OF A NATIONAL LABOR POLICY*

In the forty years since passage of the National Labor Relations Act (NLRA),[1] the American labor movement has confronted and precipitated dramatic legal and political change. Senator Wagner described the Act that would bear his name as the charter of democracy's economic creed.[2] It would grant "to our industrial workers the same general idea of freedom which the founding fathers conferred upon citizens of the United States."[3] Subsequent legislation has refined and perhaps narrowed the original formulation. Nevertheless, the NLRA began a process that has institutionalized labor unions in the United States. Recognized as a legitimate force in our society, organized labor enjoys a broad influence over American life.

The Great Depression focused national concern on the long-standing grievances of America's working people. In passing the NLRA, Congress proclaimed "a new Magna Carta for employees."[4] Its goal was to stop "starvation wages and long, inhuman hours of work,"[5] along with other forms of "exploitation by selfish, greedy employers."[6] To many congressmen, the abuses of American industrialism were manifest. Representative Lesinski argued that assembly line techniques had transformed men into the slaves of machines and that job security was often unknown.[7] Senator

* This introduction was written by Carl L. Bucki, an Article Editor of the *Cornell Law Review.*

[1] Act of July 5, 1935, ch. 372, 49 Stat. 449, *as amended,* 29 U.S.C. §§ 151-68 (1970), § 169 (Supp. IV, 1974) (also known as Wagner Act).

[2] Radio address by Senator Wagner, reproduced in 80 CONG. REC. 3301 (1936). *See also* 79 CONG. REC. 2372 (1935) (remarks of Senator Wagner).

[3] 79 CONG. REC. 9710 (1935) (remarks of Representative Mead).

[4] *Id.* at 9716 (remarks of Representative Truax).

[5] *Id.* at 9684 (remarks of Representative Connery).

[6] *Id.* at 9716 (remarks of Representative Truax).

[7] *Id.* at 9736. The Congressman noted instances where the auto industry "paid men for 40 hours but made them work as high as 72 hours and forced the employees to sign weekly

Wagner saw labor reform leading to higher wages, a subsequent increase in consumer demand, and thus ultimately to an end to the depression.[8] Nor was the NLRA's appeal solely economic.

> We are trying to give to the men and women of the United States the right to be free American citizens, to go about and say, "I am master of my soul, I am not an industrial slave. . . . I am free to organize to get decent living wages to take care of my wife and my children."[9]

To achieve its economic and social objectives, the Wagner Act placed primary reliance on the collective bargaining process. The statute's theory was to recognize exclusive representation whenever a union received majority support.[10] As the bargaining agent for all employees, the union could exert their concerted voice in forcing concessions from management. Collective bargaining has subsequently proven its popularity among American labor. Union membership doubled within five years of the NLRA's enactment, and by 1972, it had increased almost six fold.[11] Skeptics may assert that higher wages and improved working conditions were inevitable. Nevertheless, the past four decades have witnessed among unionized workers a lessening of the human tragedies that motivated passage of the Wagner Act.[12]

The National Labor Relations Act instituted a limited and

slips to the effect that they only worked 40 hours." *Id.* Since younger men were better able to withstand this taxing labor, employers frequently discharged those workers over 40 years of age.

[8] *See id.* at 7568 (remarks of Senator Wagner).

[9] *Id.* at 9685 (remarks of Representative Connery).

[10] *Id.* at 7571 (remarks of Senator Wagner). *See id.* at 9727 (remarks of Representative Ramspeck); National Labor Relations Act § 9(a), ch. 372, § 9(a), 49 Stat. 449 (1935), *as amended*, 29 U.S.C. § 159(a) (1970).

[11] BUREAU OF THE CENSUS, DEP'T OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES 98 (1960); BUREAU OF THE CENSUS, DEP'T OF COMMERCE, 1974 STATISTICAL ABSTRACT OF THE UNITED STATES 365 (1974). Although the percentage of union members in the labor force has declined from its peak in 1953, U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, HANDBOOK OF LABOR STATISTICS 333 (1972), this phenomenon possibly reflects the changing nature of the labor force. *Cf.* 1974 STATISTICAL ABSTRACT, *supra*, at 350.

[12] Significant wage increases indicate improved employment conditions among unionized workers. Based on a scale where the average hourly wage in 1967 equaled 100, the following table compares the real value of hourly earnings among selected unionized workers in 1935 and 1971.

	1935	1971
Building Trades	21.8	144.0
Printing	26.5	133.6
Local Transit	22.2	135.8

U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, HANDBOOK OF LABOR STATISTICS 197-98 (1972).

narrowly defined program. Its sponsor in the House indicated that the Act's sole aim was "to guarantee to labor . . . the power to bargain collectively through representatives of their own choosing."[13] The Seventy-fourth Congress consequently confined its concern to the implementation of this proposal. Recalling the recent death of the National Industrial Recovery Act (NRA),[14] congressmen seemed most troubled by constitutional limitations. Although the Supreme Court ultimately approved the Wagner Act,[15] proponents structured their arguments and possibly the statute to satisfy constitutional objections.[16] The other topics of congressional debate primarily centered on the mechanism that would most effectively fulfill the legislation's purpose. Congress wanted to extend democracy to the work place. Senator Wagner argued that

> democracy in industry must be based upon the same principles as democracy in government. Majority rule, with all its imperfections, is the best protection of workers' rights, just as it is the surest guaranty of political liberty that mankind has yet discovered.[17]

The creation of a National Labor Relations Board provided the basic device to implement national labor policy. Designed to foster "harmony and mutual concessions,"[18] this forum would ground its success on the "equal confidence" that both labor and industry would place in its impartiality.[19] Congress therefore desired that the Board be independent,[20] "free from any influence in the executive department,"[21] and nonpartisan.[22]

A limited measure with limited purposes,[23] the NLRA avoided peripheral considerations. Congressional debates never explored such deep issues of later times as civil rights. Indeed, several

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[13] 79 CONG. REC. 9683-84 (1935) (remarks of Representative Connery). *See also id.* at 7660 (remarks of Senator Walsh).

[14] The National Industrial Recovery Act, ch. 90, 48 Stat. 195 (1933), was ruled unconstitutional in Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935). Referring to the symbol of the NRA, Representative Truax noted: "[N]ow the Blue Eagle has been transformed, by the Supreme Court decision, into a blue buzzard, and as General Johnson bas so aptly said, 'is as dead as the dodo' which is extinct." 79 CONG. REC. 9715 (1935).

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

[16] *See* 79 CONG. REC. 7571-72 (1935) (remarks of Senator Wagner).

[17] *Id.* at 7571 (remarks of Senator Wagner).

[18] Radio address by Senator Wagner, reproduced in 80 CONG. REC. 3300 (1936).

[19] 79 CONG. REC. 9723 (1935) (remarks of Representative Marcantonio).

[20] *Id.* at 9725 (remarks of Representative O'Malley).

[21] *Id.* at 9722 (remarks of Representative Ramspeck) (by implication).

[22] *Cf. id.* at 7569 (remarks of Senator Wagner).

[23] *See id.* at 7659-60 (remarks of Senator Walsh); note 13 and accompanying text *supra.*

statements were inconsistent with philosophies of more recent and radical vintage. Senator Walsh argued that "[n]o one can compel an employer to hire others in addition to those he sees fit to hire."[24] Another supporter of the Act charged that its opponents had also fought protective legislation for women.[25]

This symposium commemorates a labor statute that initiated four decades of exciting legal development. Our selection of articles reflects that process of change from the standards of 1936. Discussing the impact of civil rights legislation, Professor Smith's Article and the Note on *Albemarle Paper Co. v. Moody*[26] illustrate a fundamental expansion of legal objectives. Both pieces examine recent efforts by the Supreme Court to define the remedies available for a Title VII violation. To what extent has the Court limited backpay litigation and self-help? The assessment of these questions suggests a possible conflict between the goal of equal opportunity and the original purposes of the NLRA.

Even when competing policies are absent, a statutory formulation may fail to implement legislative intent. Congress desired to infuse democracy into the work place, but Professor Brooks argues that unions have become autocratic and unrepresentative. Because labor legislation has failed to guarantee employees a freedom of choice, Professor Brooks fears that current practices will induce self-destruction for many unions. The situation described by Mr. Vladeck contrasts sharply with congressional hopes that the NLRB would remain independent and nonpartisan. He argues that the men President Nixon appointed to the Board transformed it into an essentially anti-union institution, one that reversed important precedents favorable to the labor movement.

Legislation rarely anticipates every possible controversy that might arise over a statute's interpretation. Student analyses of *Muniz v. Hoffman*[27] and *Connell Construction Co. v. Plumbers Local 100*[28] examine judicial efforts to resolve such uncertainty in the areas of jury rights and antitrust liability. In *Muniz*, the Supreme Court held that the procedural limitations of Norris-La Guardia did not apply to the Wagner Act and other subsequent labor legislation. Since no constitutional rights were infringed, the statutes could deny a jury trial for contempt proceedings. The Note's

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[24] 79 CONG. REC. 7673 (remarks of Senator Walsh).
[25] *Id.* at 9677 (remarks of Representative O'Connor).
[26] 422 U.S. 405 (1975).
[27] 422 U.S. 454 (1975).
[28] 421 U.S. 616 (1975).

author predicts that the availability of a broad power of summary contempt will build tension between labor and the judiciary. In recognizing a union's potential liability under the Sherman Act, *Connell* renewed the longstanding controversy over labor's immunity from the antitrust laws. Questioning the majority's approach, the writer advises that only legislation should draw this arbitrary line between two divergent but legitimate views of congressional intent.

Forty years hindsight provides a perspective to assess the direction that labor law should pursue. Perhaps America must reassert the basic values that the NLRA attempted to implement. Is the current regime becoming obsolete for a society of increasing technical and social complexity? If the collective bargaining process has induced a desired redistribution of wealth, perhaps its application should expand to previously unprotected groups. The resolution of competing policies may require fine distinctions not clearly apparent from statutory and judicial precedents. Social orientations may influence difficult decisions over goals and methods. When employees first battle for a decent living wage, unionization carries a liberal reputation. Once workers secure a comfortable economic position, however, efforts to maintain that status acquire a more conservative image. In both situations, our labor policies must establish *through law* an equitable process of wealth distribution.