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The Intellectual Origins of an Institutional Revolution

Dorothy Sue Cobble*

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.”¹ They “are peering into their medical kits and coming up empty, their arsenal of pharmaceuticals largely exhausted. . . .”² The problem? “Nearly any proposed curative could risk adding to the national debt—a political nonstarter.”³ 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.⁴ And it didn’t add a penny to the national debt.

The positive economic, political, and social effects of the Wagner Act have been significant, and in the first part of this article I review some of the arguments for why that is so. 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 1935 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 laissez-faire and liberty of contract.⁵ It also took a

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1. Peter S. Goodman, *What Can Be Done?*, N.Y. TIMES, Aug. 29, 2010, at Week-In-Review Section 1, available at 2010 WLNR 17197644.

2. *Id.*

3. *Id.*

4. National Labor Relations (Wagner) Act, Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–69 (2006)).

5. Adherents of laissez-faire believed that markets, including labor markets, functioned best without government oversight. “Liberty of contract” refers to the notion that individuals and corporate persons have a right to contract free from government regulation. In *Lochner v. New York*, 198 U.S. 45 (1905), and other decisions, the courts posited this right as constitutionally derived from the Fourteenth Amendment’s Due Process clause forbidding the state to “deprive any person of life, liberty, or property.” *Id.* at 53.

multiclass 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.⁶

In the second part of the article, I focus on the story of 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. We must join the battle for public opinion 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 reexamined, debated, and reconceived. And, as with a century ago, the political revolution will not be possible without the intellectual.⁷

I. Economic Effects of the Act

The sponsors of the 1935 Wagner Act believed it would benefit the U.S. economy as a whole. An “inequality of bargaining power” had depressed “wage rates and the purchasing power of wage earners in industry,” they asserted in the Act’s preamble.⁸ 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

6. I am not claiming that the emergence of a new intellectual consensus was the only reason the Act passed. The economic crisis, the social upheaval of massive strikes and demonstrations, and the legal vacuum created by the decision in *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), declaring the National Industrial Recovery Act unconstitutional, were all crucial to the sense of urgency surrounding the passage of New Deal labor legislation. At the same time, however, as David Plotke notes in *The Wagner Act, Again: Politics and Labor, 1935–1937*, 3 *STUD. AM. POL. DEV.* 105 (1989), these factors do not explain the particular content of the legislation that passed. In addition, it must be remembered that the United States suffered severe economic depressions and weathered major industrial violence for over 60 years without the passage of government legislation enabling collective bargaining.

7. In earlier essays, I have offered specific proposals designed to further labor law reform and new forms of collective representation. See, e.g., Dorothy Sue Cobble, *Making Postindustrial Unionism Possible*, in *RESTORING THE PROMISE OF AMERICAN LABOR LAW* 285, 285–302 (Sheldon Friedman et al. eds., 1994); Dorothy Sue Cobble, *Lost Ways of Unionism: Historical Perspectives on Reinventing the Labor Movement*, in *REKINDLING THE MOVEMENT: LABOR’S QUEST FOR RELEVANCE IN THE 21ST CENTURY* 82, 82–98 (Lowell Turner et al. eds., 2001). In this article I take a different approach, in part because of the different political and intellectual climate in which we live.

8. Wagner Act § 1, 29 U.S.C. § 151.

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. Facilitating collective rather than individual bargaining would augment consumer purchasing power, increase spending for goods and services, and spur economic growth. As Leon Keyserling, legislative assistant to Senator Robert F. 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. . . .”⁹

The Act’s reliance on collective bargaining to heighten consumer demand, it should be noted, was an economic stimulus plan that did not involve large government expenditures. Indeed, Senator Wagner, in introducing the 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.¹⁰ “Unemployment is as great as it was a year ago,” he began, in a speech eerily reminiscent of our contemporary moment, and “[t]he real income of the individual worker working full time is less than in March 1933.”¹¹ He continued, putting the choices facing the nation 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.”¹² The sponsors of the Wagner Act were not Keynesians in the sense of relying heavily on government expenditures to stimulate the economy. Rather, as historian Meg Jacobs points out, they were fiscal conservatives, and they drew on a long and rich tradition of economic and labor theory that focused on the dangers of under-consumption and the need to increase the bargaining power and real wages of workers to ensure a thriving, prosperous economy.¹³

Furthermore, although the Act is associated with the New Deal and with the growth of the federal government, it is, in intention and effect, a decentralized, market-based policy. Collective bargaining as practiced in the United States is a highly decentralized system that

9. See Leon H. Keyserling, *The Wagner Act: Its Origin and Current Significance*, 29 *GEO. WASH. L. REV.* 199, 230 (1960–61) (comparing economic stagnation in the 1960s to stagnation in the 1930s).

10. 79 *CONG. REC.* S7568 (daily ed. May 15, 1935) (statement of Sen. Robert Wagner).

11. *Id.*

12. *Id.* In this same speech, Wagner describes how “[t]echnological changes doubled the productive capacity of the average worker between 1919 and 1933. . . . [Yet] wage earners’ share has declined steadily for nearly a century.” *Id.* at S7567.

13. MEG JACOBS, *POCKETBOOK POLITICS: ECONOMIC CITIZENSHIP IN TWENTIETH-CENTURY AMERICA* 136–78 (2005).

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.

The Act's sponsors believed employers as well as employees would benefit from equalizing bargaining power. In their view, encouraging collective bargaining and the "stabilization of competitive wage rates and working conditions within and between industries" would prevent destructive forms of market competition and reduce the economic incentives for slashing wages and prices.¹⁴ Of course, many employers had their own long-standing practices designed to restrict competition, ranging, as economic historian Alfred Chandler has shown, from establishing monopolistic market shares through vertical and horizontal expansion to organizing employer associations that punished industry outliers who dared pay above or below the agreed-upon rate.¹⁵ But the bulk of employer-initiated labor standards had eroded by the early 1930s. 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.¹⁶ Without the Act and the standardization of wage and working conditions across firms and sectors, many employers would be pushed toward implementing employment policies they deemed socially irresponsible and morally repugnant.

The faith of the Act's advocates in its economic benefits was not misplaced. The newfound bargaining power of workers in the post-World War II decades was certainly among the factors contributing to the economic prosperity 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 was 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 effective political advocacy of labor unions for minimum wage standards and progressive social welfare and tax policies. In addition, the union advantage was not limited to wages. Even today, organized workers are far more likely to have health insurance and 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.¹⁷

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, meat-packing, and other industries; master contracts, which often included 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 United States, among the lowest of any industrialized nation, accompanied by the lack of governmental mechanisms to extend collective bargaining to nonunion firms, laid the economic basis for intense U.S. 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 U.S. employers found it difficult to compete with low-wage nonunion 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 was often extended by statute or social contract.

At the same time, the peculiar employer-based health and welfare system that evolved in the United States in the post-war decades heightened the so-called "union penalty." Ignoring their own economic bottom line, U.S. employers resisted Walter Reuther, president of the United Automobile Workers, and other Congress of Industrial Organizations (CIO) labor leaders who throughout the 1940s and 1950s

14. National Labor Relations (Wagner) Act § 1, 29 U.S.C. § 151 (2006).

15. ALFRED D. CHANDLER JR., *THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS* 122–87 (1977); ALFRED D. CHANDLER JR., *STRATEGY AND STRUCTURE: CHAPTERS IN THE HISTORY OF THE AMERICAN INDUSTRIAL ENTERPRISE* 290–98 (1962).

16. DAVID BRODY, *WORKERS IN INDUSTRIAL AMERICA: ESSAYS ON THE TWENTIETH CENTURY STRUGGLE* 48–78 (2d ed. 1993). See generally SANFORD M. JACOBY, *MODERN MANORS: WELFARE CAPITALISM SINCE THE NEW DEAL* (1997).

17. See generally RICHARD FREEMAN & JAMES L. MEDOFF, *WHAT DO UNIONS DO?* (1984); Ruth Milkman, *Two Worlds of Unionism: Women and the New Labor Movement*, in *THE SEX OF CLASS: WOMEN TRANSFORMING AMERICAN LABOR* 63, 63–67 (Dorothy Sue Cobble ed., 2007). For the benefit gap figures, see *The Employee Free Choice Act: Restoring Economic Opportunity for Working Families: Hearing of the S. Comm. on Health, Educ., Labor, & Pensions*, 110th Cong. 21–22 (2007) (statement of Lawrence Mishel, Economic Policy Institute).

sought business support for universal rather than employment-based entitlements.¹⁸ As a result, as health and pension costs soared, U.S. unionized employers found it difficult to compete with employers in Europe and elsewhere who did not pay the added costs—estimated at twenty-five to thirty-five percent—associated with unionized benefit packages in the United States.¹⁹

II. Intellectual Origins of the NLRA

A. 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, and in the media, they hammered home the CIO's message of economic security, fairness, and prosperity.²⁰ 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 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 American Federation of Labor (AFL) President Samuel Gompers reiterated in 1920, were the hallmark of free men and women everywhere and the birthright of all Americans.²¹ Joseph McCartin, David Montgomery, and others have written superb studies of the widespread labor campaigns for "industrial democracy" in the World War I era.²² These campaigns were not limited to the radical wing of U.S. labor: "industrial democracy," or what Selig Perlman referred to as "liberty in the shop," was at

the heart of the mainstream U.S. trade union philosophy as articulated by the railroad brotherhoods and the AFL.²³ "Self-government in industry, as in politics, is essential to a free people" is how Margaret Dreier Robins, the president of the largest national organization of working women, the Women's Trade Union League, put it in 1922. In the view of the League, democratic workplaces fostered the full development of individual personality and encouraged habits of citizenship and norms of deliberative and democratic decision making.²⁴

By the New Deal and World War II, labor leaders spoke of "industrial citizenship" to signal their belief that members of a workplace community should be granted the full array of citizenship entitlements, including the rights and duties of self-governance and of due process.²⁵ 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.²⁶ A grievance procedure with a third-party neutral as final arbiter and contract provisions such as just cause for discipline would require management accountability in decisions about layoffs 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 meat-packing strike, which involved thousands of workers across the country, was not about money; it was about who had the right to govern the workplace.²⁷ The essence of unionism for him and many other workers was an end to unilateral decision making and lack of consultation.²⁸

23. SELIG PERLMAN, A THEORY OF THE LABOR MOVEMENT (N.Y. Lithographing Corp. 1949) (1928).

24. January–June (1922), *microformed on* Records of the National Women's Trade Union League of America, Reel 2 (Library of Cong., Wash., D.C.); see also Margaret Dreier Robins, *Self-Government in the Workshop: The Demand of the Women's Trade Union League*, LIFE & LAB., Apr. 1912, at 108–10.

25. The concept of "industrial citizenship" is most commonly associated with T.H. Marshall. For more information, see his classic discussion of the various forms of citizenship in T.H. MARSHALL, CITIZENSHIP AND SOCIAL CLASS AND OTHER ESSAYS (1950).

26. For an excellent discussion of workplace contractualism, see BRODY, *supra* note 16.

27. CHERI REGISTER, PACKINGHOUSE DAUGHTER: A MEMOIR 133–230 (2000). See generally JACK METZGAR, STRIKING STEEL: SOLIDARITY REMEMBERED (2000); RANK AND FILE: PERSONAL HISTORIES OF WORKING-CLASS ORGANIZERS (Alice Lynd & Staughton Lynd eds., 1973); HARVEY SCHWARTZ, SOLIDARITY STORIES: AN ORAL HISTORY OF THE ILWU (2009).

28. Some contend that unions are no longer needed because many of the elements of the post-war unionized system have become the norm of good human resource management practice. Yet without strong unions pushing for due process and other benefits, high-road employers, particularly those trying to provide middle-class living standards to nonprofessional employees, have found it harder to survive. Thus, rather than being alternatives to each other, welfare capitalism and trade unionism are interdependent, rising and falling in tandem.

18. JENNIFER KLEIN, FOR ALL THESE RIGHTS: BUSINESS, LABOR, AND THE SHAPING OF AMERICA'S PUBLIC-PRIVATE WELFARE STATE 204–57 (2003).

19. See, e.g., News Release, Bureau of Labor Statistics, U.S. Dep't of Labor, Employer Costs for Employee Compensation (2010), <http://www.bls.gov/news.release/ecec.toc.htm>.

20. See, e.g., WALTER P. REUTHER: SELECTED PAPERS 59–66, 316–30 (Henry M. Christman ed., 1961).

21. 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, at 4 (1920).

22. See JOSEPH A. MCCARTIN, LABOR'S GREAT WAR: THE STRUGGLE FOR INDUSTRIAL DEMOCRACY AND THE ORIGINS OF MODERN AMERICAN LABOR RELATIONS, 1912–1921 (1997); David Montgomery, *Industrial Democracy or Democracy in Industry?: The Theory and Practice of the Labor Movement, 1870–1925*, in INDUSTRIAL DEMOCRACY IN AMERICA: THE AMBIGUOUS PROMISE 20, 20–43 (Nelson Lichtenstein & Howell John Harris eds., 1993).

B. Diversity and Collective Bargaining

Although women and minorities unionized later than did white men, the effects were even more transformative. University of Wisconsin historian Will Jones has documented the impact on African Americans, some of whom, for example, exercised their voting rights for the first time in National Labor Relations Board (NLRB) elections in the 1930s and 1940s.²⁹ 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 nonunion, 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 3,500,000 by 1956.³⁰ Indeed, the labor-based "rights consciousness" of the industrial union movement of the 1930s and 1940s laid the foundation for the subsequent rise of the modern civil rights and women's movements.³¹

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 moved the workplace toward fairness and equal treatment. And in some settings, the labor movement acted as the advance guard of the civil rights revolution. As I have detailed elsewhere, in the 1940s and 1950s in meatpacking, electrical, auto, and other industries, unions secured nondiscrimination clauses in their contracts and pushed for the end of discriminatory wage and hiring policies. In these same decades, newly organized labor women sought employer and state supports for working mothers such as child care, improved maternity benefits, and greater workplace flexibility.³² A powerful coalition of unions also joined with civil rights groups in the late 1940s to lobby 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.³³

The disproportionate growth of unionization among women and minorities since the 1960s 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.³⁴ The rise of public sector unionism and decline of private sector unionism, phenomena that gathered force in the 1960s and continue into the present, are 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.

C. The Act's Forgotten Legacy: "Actual Liberty of Contract"

One of the most important yet oft-forgotten legacies of the Wagner Act was its challenge to the reigning theories of laissez-faire and liberty of contract. The Act 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, it was claimed, was only secured as a social right, as a right given to a group. Actual liberty of contract occurred when parties had some equality of bargaining power and some choice of alternatives. Thus, for most workers in America, freedom had not yet been secured.

Justice Oliver Wendell Holmes and other legal realists raised such issues most notably in dissenting opinions in *Adair*,³⁵ *Coppage*,³⁶ and *Hitchman*.³⁷ 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 AFL's adoption of rights language in the early twentieth century was not an unfortunate conservative turn and an abandonment of more substantive political demands, as some scholars argue.³⁸ Rather, the call of labor leaders for industrial freedom and actual liberty of contract was a radical challenge

29. WILLIAM P. JONES, *THE TRIBE OF BLACK ULYSSES: AFRICAN AMERICAN LUMBER WORKERS IN THE JIM CROW SOUTH* 160 (2005).

30. DOROTHY SUE COBBLE, *THE OTHER WOMEN'S MOVEMENT: WORKPLACE JUSTICE AND SOCIAL RIGHTS IN MODERN AMERICA* 15–25 (2004).

31. NELSON LICHTENSTEIN, *STATE OF THE UNION: A CENTURY OF AMERICAN LABOR* 178–212 (2002).

32. COBBLE, *supra* note 30, at 69–144.

33. KEVIN BOYLE, *THE UAW AND THE HEYDAY OF LIBERALISM, 1945–1968*, at 161–205 (1995); TAYLOR E. DARK, *THE UNIONS AND THE DEMOCRATS: AN ENDURING ALLIANCE* 71 (1999); ALAN DRAPER, *CONFLICT OF INTERESTS: ORGANIZED LABOR AND THE CIVIL RIGHTS MOVEMENT IN THE SOUTH, 1954–1968*, at 3–5 (1994); MICHAEL K. HONEY, *SOUTHERN LABOR AND BLACK CIVIL RIGHTS: ORGANIZING MEMPHIS WORKERS* 177–278 (1993).

34. News Release, Bureau of Labor Statistics, U.S. Dep't of Labor, *Union Members—2010*, at 5 (2010), <http://www.bls.gov/news.release/pdf/union2.pdf>. The percentage of union members who are women was calculated from Table 1. *Id.*

35. *Adair v. United States*, 208 U.S. 161, 180–92 (1908) (McKenna, J., dissenting).

36. *Coppage v. Kansas*, 236 U.S. 1, 26–27 (1915) (Holmes, J., dissenting).

37. *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229, 263–74 (1917) (Brandeis, J., dissenting).

38. *See, e.g.*, WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* 128–66 (1991).

to the core ideologies upon which Gilded Age wealth and power resided. And it was one that found its way into the Wagner Act.³⁹

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 subjugating the liberty of the majority.

Labor's freedom claims found institutional embodiment first in the 1932 Norris-LaGuardia Act,⁴⁰ 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 "attain freedom and dignity only 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."⁴¹

It is true that parts of the Wagner Act's preamble foregrounded the disruptive threat to interstate commerce to justify federal action and defended collective bargaining as a means to industrial peace.⁴² In addition, as James Pope stresses, the NLRB lawyers who argued *NLRB v. Jones & Laughlin Steel Corp.*⁴³ before the Supreme Court emphasized these same sections of the Act's preamble and thus, in his view, they eased the way for later legislative and legal restrictions on labor rights.⁴⁴

Yet Wagner and others repeatedly called for the Act as a way of ending employer-instigated disruption. It was employer violence and interference with the "full freedom of association" that impeded commerce, they argued, and the Act was needed to restrain such interference.⁴⁵ For Wagner and for others, defending the free flow of commerce and defending the right of employees to organize and to strike were not opposed to each other; they were complementary. Industrial violence would end and commerce resume when worker freedom and economic power were protected by law. "Peace rests upon freedom, not restraint; upon equality, not subservience," Wagner stated in a 1934 radio debate with James Emery, counsel for the National Association of Manufacturers.⁴⁶

The majority opinion in *NLRB v. Jones & Laughlin* reflected a similar hybridity: the Commerce Clause was invoked to justify the scope of federal regulation, but that did not negate the Act's freedom charter. As Chief Justice Hughes intoned in delivering the Court's opinion: "The rights of employees to self-organization and to select representatives of their own choosing for collective bargaining or other mutual protection without restraint or coercion by their employer. . . . That is a fundamental right. . . . [C]ollective action [of employees] would be a mockery if representation were made futile by interference with freedom of choice."⁴⁷

In short, the Act was not a repudiation of the freedom tradition but a continuation of it. Like any sturdy table, the Act rested on multiple legs: it made 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 acknowledged its debt to labor's freedom claims and to labor's long struggle against economic autocracy.⁴⁸

39. I have been inspired by and am deeply indebted to legal scholars William Forbath and James Pope for brilliantly recapturing much of this history. See generally *id.*; James Gray Pope, *Labor's Constitution of Freedom*, 106 YALE L.J. 941 (1997); James Gray Pope, *The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921-1957*, 102 COLUM. L. REV. 1 (2002) [hereinafter Pope, *The Thirteenth Amendment*]. Yet as elaborated here and in subsequent paragraphs, I part ways with both on some points of interpretation.

40. Pub. L. No. 72-65, 47 Stat. 70 (1932) (codified as amended at 29 U.S.C. §§ 101-15 (2006)).

41. 79 CONG. REC. S7565 (daily ed. May 15, 1935) (statement of Sen. Robert Wagner).

42. See Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 265-67 (1978); Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379, 1409 (1993).

43. 301 U.S. 1 (1937).

44. See generally Pope, *The Thirteenth Amendment*, *supra* note 39, at 102-06, 111-12.

45. National Labor Relations (Wagner) Act § 1, 29 U.S.C. § 151 (2006).

46. Keyserling, *supra* note 9, at 217.

47. 301 U.S. at 33-34.

48. Wagner Act § 1, 29 U.S.C. § 151. It is also true, as Pope meticulously documents in *The Thirteenth Amendment Versus the Commerce Clause*, that 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. Pope, *The Thirteenth Amendment*, *supra* note 39, at 114, 121-22. 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 policymaking. On the division among labor leaders, see IRVING BERNSTEIN, *THE LEAN YEARS: A HISTORY OF THE AMERICAN WORKER 1920-1933*, at 95-97 (1960); Daniel Ernst, *The Yellow-Dog Contract and Liberal Reform, 1917-1932*, 30 LAB. HIST. 251 (1989). I agree with Pope's overall point that labor rights today would be strengthened were they to be linked to civil and human rights. 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.

III. Conclusion

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, fair, and free society, need to take a page from the pre-Wagner Act labor movement. We need to reclaim the Act's intellectual legacies 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 economic and social well-being of us all. It will take an intellectual revolution, not just a political one, if progress is to be made.