

Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941†

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The legal system is, fundamentally, a normative instance of history. It defines goals, decides what roads society must travel, and dictates the norms of social action. The legal system, therefore, has within its essence a profound political content; it is not a flower which blossoms in the desert. Law always expresses a vision of society. It also expresses the groups behind this vision and the interests served by conceiving the society in that particular form.

—From a speech by José Antonio Viera-Gallo**

I. THE PROBLEM

When passed, the National Labor Relations (Wagner) Act¹ was perhaps the most radical piece of legislation ever enacted by the United States Congress.² Enacted in the wake of the great strikes of 1934, at an unusually tense and fluid historical moment, it represented, in the words of one historian, "an almost unbelievable capitulation."

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This Article is dedicated to Hallie R. Carmen.

** Subsecretary of the Chilean Ministry of Justice in the Popular Government of Salvador Allende, July 1971, reprinted in *The Legal System and Socialism*, 1972 Wis. L. Rev. 754, 755.

1. Ch. 372, 49 Stat. 449 (1935) (current version at 29 U.S.C. §§ 151-168 (1970)). The National Labor Relations Act (NLRA) was substantially amended by the Labor Management Relations (Taft-Hartley) Act, ch. 120, 61 Stat. 136 (1947) (current version at 29 U.S.C. §§ 141-187 (1970)), and by the Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, Pub. L. No. 86-257, 73 Stat. 519 (codified in scattered sections of 29 U.S.C.).

2. See text accompanying notes 62-79 *infra*.

lation by the government."³ It appears that a small number of the most sophisticated representatives of business favored passage of the Act on the theory that some such measure was essential to preserve the social order and to forestall developments toward even more radical change.⁴ Nonetheless, most employers, large and small, bitterly opposed passage of the Act,⁵ and its enactment touched off several years of fierce and concerted resistance to labor and law throughout the ranks of American business.⁶ This massive employer resistance was met by one of the most dramatic strike waves in the annals of labor, culminating in the "sit-down" movement and the rise of the Congress of Industrial Organizations (CIO).

It is of transcendent importance in understanding what follows to appreciate that the Wagner Act did not fully become "the law" when Congress passed it in 1935, or even when the Supreme Court ruled it constitutional in 1937, although obviously these legal events enhanced the legitimacy of the labor movement. The Act "became law" only when employers were forced to obey its command by the imaginative, courageous, and concerted efforts of countless unheralded workers.⁷ This was one of the rare instances in which the common people, often heedless of the advice of their own leaders, seized control of their destinies and genuinely altered the course of American history.

The Wagner Act and the rise of organized labor unquestionably effected profound changes in the American political economy. Collective bargaining became fairly widespread, unions attained a significant role in the partisan political system, the labor market was rationalized in certain important ways, many people improved their standard of living and job security, and millions of workers experienced a new sense of participation and dignity.

Nevertheless, at the beginning of labor's New Deal, many employers feared that the Act would lead to state control of business and

3. P. CONKIN, FDR AND THE ORIGINS OF THE WELFARE STATE 63 (1967).

4. See generally I. BERNSTEIN, THE NEW DEAL COLLECTIVE BARGAINING POLICY 100-06 (1950); G. DOMHOFF, THE HIGHER CIRCLES 233-49 (1970).

5. See notes 62-66 *infra* and accompanying text.

6. See notes 67-76 *infra* and accompanying text.

7. The two most crucial early breakthroughs in collective bargaining, which laid a political foundation for more widespread employer acceptance of and obedience to the Wagner Act, were probably General Motors' agreement with the United Auto Workers and United States Steel's about-face decision to deal with the Steel Workers Organizing Committee. Both events occurred before the April 12, 1937, decision of the Supreme Court upholding the Act, *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), but after the sit-down strike wave had begun; in particular, both occurred against the backdrop of the momentous Flint sit-down strike against General Motors in the winter of 1936-1937 and are directly traceable to that strike and its surrounding events and circumstances. See I. BERNSTEIN, TURBULENT YEARS 457-73, 519-51 (1970).

compulsory arbitration of the terms and conditions of employment, if not a usurpation of the prerogatives of private property ownership itself. These fears proved to be exaggerated, however, for whatever its achievements, the Act did not produce a fundamental transformation of the premises and institutions of capitalist society. True, private ownership was burdened by state regulation that allowed most workers the right to organize and bargain collectively. But state regulation is characteristic of advanced capitalism;⁸ rather than radically revising property relations or the social distribution of power, it protects them. Likewise, although workers in unionized industries generally enjoy a higher standard of living and more security now than did most workers a generation ago, the Act did little to enhance their decision-making role regarding the use of society's means of production, the organization of the work-process, and other decisions that affect their industrial lives. Moreover, New Deal reform appears to have fostered the co-optation of the workers' movement and, with the exception of certain periods such as the post-World War II strike wave, a diminution of labor's combativeness. Indeed, it has been argued that collective bargaining has become an institutional structure not for expressing workers' needs and aspirations but for controlling and disciplining the labor force and rationalizing the labor market.⁹ One need not accept these claims fully to recognize that, since World War II, organized labor has become more integrated into the economic system of advanced capitalism, progressively more dependent on its erstwhile corporate adversaries, and largely conventional in the political arena.¹⁰

8. See notes 28-29 *infra* and accompanying text.

9. The structure of postwar collective bargaining has been extensively criticized.

See S. ARONOWITZ, FALSE PROMISES (1973); J. BRECHER, STRIKE! (1972); C. MILLS, THE NEW MEN OF POWER (1948); J. O'CONNOR, THE FISCAL CRISIS OF THE STATE (1973); W. SERRIN, THE COMPANY AND THE UNION (1973); C. SPENCER, BLUE COLLAR (1977); Bell, *The Subversion of Collective Bargaining*, 29 COMMENTARY 185 (1960); Zernan, *Organized Labor versus "The Revolt Against Work": The Critical Contest*, *TELOS*, Fall 1974, at 194.

10. Reference to the "incorporation" or "integration" of the working class refers to the complex historical transition from a prototypical mode of working-class self-consciousness (reflected in its institutions and struggles), in which the working class saw itself as outcast, lacking entitlement to participation as of right in the affairs of state, and forced by hostile social and political institutions to depend entirely on its own efforts to secure economic and social betterment, to one in which it sees itself as having claims upon the state, interests that are in part synonymous with those of the state, and meaningful participation in the state's affairs. Paralleling this transformation is a process by which the earlier understanding of key political actors that relations between capital and labor were essentially private transactions is transformed into a perception that the adjustment of relations between capital and labor is, to a significant degree, a concern of public policy.

This incorporation process is assumed to have a deradicalizing impact on working-

How this transformation of the labor movement took place is the broad underlying question motivating this Article. Obviously many processes were at work—political, social, economic, and cultural. I will make no attempt to canvass them here. I will focus only on what was contributed to the deradicalization and incorporation of the working class by developments within the relatively autonomous dimension of legal consciousness, legal institutions, and legal practice, as revealed in the Supreme Court's early Wagner Act decisions.¹¹ I do not argue that there is a direct causal relationship between the Supreme Court's decisions and the integration of the working class into the postwar social order. But those decisions did have two more indirect consequences worth noting. First, they provided the beginnings of the conceptual integration of the working class by laying the intellectual groundwork upon which were later erected the prevailing political theories of the postwar period, which in turn have in significant measure been internalized by and become the self-conception of the leadership of the labor movement.¹² Second, in the process of adopting some and foreclosing other paths of doctrinal development under the relatively general terms of the Act, the Court began to elaborate the boundaries of "legitimate" labor activity. This process not only had some immediate political consequences in the 1930's but its ultimate, more enduring, significance was the creation of the rudi-

class movements. "Incorporation" imports more than mere concessions by the established order; it connotes a change in the self-conception of the working class. Of course, the integrative process has never been totally effective; the point is not to make claims of an absolute nature about American labor, but to point, by way of comparison to the 1930's, to certain dominant tendencies in the postwar period, at least with respect to the leadership of the labor movement, if not much of its rank and file.

In particular, I regard as inaccurate the view that the incorporation process has negated any future prospect of working-class radicalism in the United States or that it is possible to describe the working class as in any sense satisfied with current standards of living in either the material or cultural aspects.

11. By focusing on the Supreme Court, I do not mean to imply that other legal institutions, notably the National Labor Relations Board, did not also contribute to the integrative process here described. I have emphasized the Court because some of the most significant issues in this process are highlighted by the Court's several attempts to define its relationship to the Board and to other courts.

12. The argument relies on the theory of hegemony articulated in the work of the Italian Marxist philosopher Antonio Gramsci. See A. GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS (Q. Hoare & G. Nowell Smith eds. and trans. 1971). See generally C. BOGGS, GRAMSCI'S MARXISM (1976); J. CAMMETT, ANTONIO GRAMSCI AND THE ORIGINS OF ITALIAN COMMUNISM (1967); Anderson, *The Antinomies of Antonio Gramsci*, NEW LEFT REV., November 1976-January 1977, at 5; Williams, *The Concept of "Egemonia" in the Thought of Antonio Gramsci: Some Notes on Interpretation*, 21 J. HIST. IDEAS 586 (1960). By "hegemony" Gramsci meant "the permeation throughout civil society . . . of an entire system of values, attitudes, beliefs, morality, etc., that is in one way or another supportive of the established order and the class interests that dominate it." C. BOGGS, *supra* at 39.

ments of what later became an increasingly formalized and regulated institutional structure for the state administration of the class struggle.

It is not suggested that the Supreme Court engaged in a plot or conspiracy to defeat or co-opt the labor movement, nor do I think that the Court can adequately be understood as an instrument of particular economic interests.¹³ I emphatically reject any such reductionism or determinism. That the Court did so much to guide the long-run development of the labor movement into domesticated channels and, indeed, to impede workers' interests is, in fact, ironic precisely because it was so often attacked by contemporaries as overly friendly

13. I adopt the concept of the "relative autonomy" of legal consciousness, institutions, and practice, notwithstanding my obvious commitment to the view that the legal process is deeply imbedded in the political process and not only reflects the political and class structure of American capitalism but serves to maintain and reproduce it. The view that law reflects the political and class structure does not require or imply the reductionist argument that the legal process is directly responsive to the needs and preferences of dominant social and political actors. See Balbus, *Commodity Form and Legal Form: An Essay on the "Relative Autonomy" of the Law*, 11 LAW & Soc'y Rev. 571, 572-73 (1977). Indeed, though determinism regrettably remains the popular conception of Marxist method, the most creative work on law within the Marxist tradition begins with the rejection of economic determinism as an explanatory mode. This intellectual tradition has sought to develop a theory adequate to explain the way in which law ultimately reflects and sustains the social order, yet has its own internal logic and unique modes of discourse and institutional patterns that are to some extent independent of the will of powerful, nonlegal, social and political actors and that represent an important constitutive element of the social totality in their own right.

Different approaches have been attempted toward such a theory, including Balbus' thesis of "structural homologies" and the thesis developed in the following pages of lawmaking as a form of social and political practice. It must be conceded, however, that at present no comprehensive theory of the relative autonomy of law exists. The effort here is simply to acquaint the reader with this intellectual project and to indicate some paths of ongoing research. See generally D. HAY, P. LINEBAUGH, J. RULE, E.P. THOMPSON, & C. WINSLOW, ALBION'S FATAL TREE (1975); E.P. THOMPSON, WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT (1975); Gabel, *Intention and Structure in Contractual Conditions: Outline of a Method for Critical Legal Theory*, 61 MINN. L. REV. 601 (1977); Pashukanis, *The General Theory of Law and Marxism*, in SOVIET LEGAL PHILOSOPHY 111 (H. Babb trans. 1951); Tushnet, *A Marxist Analysis of American Law*, 1 MARXIST PERSPECTIVES (forthcoming); Tushnet, *Perspectives on the Development of American Law: A Critical Review of Friedman's "A History of American Law,"* 1977 WIS. L. REV. 81; Gabel, Book Review, 91 HARV. L. REV. 302 (1977) (R. DWORKIN, TAKING RIGHTS SERIOUSLY); A. Fraser, *Legal Theory and Legal Practice*, in Arena, A Marxist Journal of Criticism & Discussion, Nos. 44-45 (1976) (published in Greensboro, Victoria, Australia; copy in Harvard University Library).

Analogous lines of development also appear in recent debates between the instrumentalist, structuralist, and neo-Hegelian positions within the neo-Marxist theory of the state. See Gold, Lo, & Wright, *Recent Developments in Marxist Theories of the Capitalist State* (pts. 1-2), MONTHLY REV., October 1975, at 29 & November 1975, at 36; Wolfe, *New Directions in the Marxist Theory of Politics*, 4 POL. & Soc'y 131 (1974).

to labor. Many decisions of the prewar period were intended to be, and were then understood as, tremendous victories for organized labor.¹⁴ But these prolabor victories contained the seeds of long-term defeats, because through them the Court, including its most liberal members, set in motion a distinctive style of legal analysis characteristic of modern American legal consciousness¹⁵ that came to stand, whatever the intentions of its authors, as an ineluctable barrier to worker self-activity.

II. THE SETTING

At the outset, it is appropriate to situate the focus of this Article within its historical and political context.¹⁶ What follows is a provisional and schematic outline of the relationship of the Article to the revisionist controversy in American historiography,¹⁷ followed by a location of the issues herein discussed within the crosscurrents of

14. See, e.g., NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); notes 185-88 *infra* and accompanying text.

15. See text following note 49 *infra*.

16. This Article will consider the work of the Court from the 1937 decision upholding the Act, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), to Pearl Harbor. After Pearl Harbor, the creation of the National War Labor Board on January 12, 1942, see Exec. Order No. 9017, 3 C.F.R. 1075 (1938-1943 compilation), reprinted in 9 L.R.R.M. 945 (1943), and such other wartime enactments as the War Labor Disputes Act, ch. 144, 57 Stat. 163 (1943), so radically altered the legal status of labor that the conceptual scheme of the NLRA was temporarily abandoned. The system of labor relations that emerged during World War II involved routine state intervention into the substantive terms of collective bargaining; settlement of labor disputes by compulsory mediation or arbitration without resort to economic action; the prohibition of concerted activity, enforced both by the law and by the politics of the "no-strike pledge"; the development of governmentally sanctioned union security devices that served as a basis for stabilizing (and bureaucratizing) the leadership of labor; and delegation to labor's leadership of the role of disciplining rank-and-file employees in the name of productivity and at the expense of the militant defense of workers' interests. Concurrently, top labor leaders were co-opted onto various boards and agencies, thus increasing their distance from the rank-and-file while cementing their new "junior partner" role in national politics.

The War's end was followed by one of the most momentous strike waves in American history, but a dramatic shift in the political climate soon occurred within both labor and the nation at large. The restrictions imposed on labor by the Taft-Hartley Act abruptly foreclosed any radical departures within the legal plane, just as the Cold War foreclosed any opening to the left on the political plane. The nascent working-class radicalism of the 1930's and early 1940's was arrested, and the potentiality for reform of the workplace was forestalled for a generation.

Until recently very little work had been done on the situation of labor in the 1940's, the imagination of far more social historians being captured by the 1930's. This deficiency, which seriously distorts our understanding of the labor movement, is now being remedied by a new generation of historians. See generally *American Labor in the 1940's*, RADICAL AMERICA, July-August 1975 (Special Issue).

17. See note 28 *infra* and accompanying text.

modern American jurisprudence. Considerations of space prevent me from fully developing or defending the positions advanced; they are offered simply to provide a sense of the background and to alert the reader to my political assumptions.¹⁸

A. THE THEORY OF CORPORATE LIBERALISM

The assumptions of Progressive historiography dominated writing about the Constitution and the Supreme Court, particularly regarding the problem of social reform, in the period from the beginning of the century through the Court-packing crisis of 1937.¹⁹ Progressive historiography viewed the American past as a slow but steady march toward the democratization of society. The animating force behind this progress was the conflict between privileged and nonprivileged groups identified either on a sectoral or regional basis or more typically on the basis of economic interest.²⁰ Characteristically, propertied interests were viewed as being in perennial conflict with groups who possessed relatively little or no property—the farmer, the consumer, the small businessperson, the worker—in short, the “people.” Progressive historiography regarded liberalism as a movement of the underprivileged, assisted by the enlightened middle class, to curb the power and interests of the propertied and business classes.²¹

18. The same disclaimer applies to my admittedly polemical discussion of contractualism. See text accompanying notes 93-102 *infra*. Recognizing the controversial nature of the propositions advanced, the effort has been to set the stage for the case analysis and to expose my political assumptions without burdening the text with a full-scale defense of these assumptions.

19. See Lerner, *The Supreme Court and American Capitalism*, 42 YALE L.J. 668, 672-78 (1933) (tracing the impact of Progressivism as an historiographical school and as a political movement on the acrimonious pre-New Deal debate over the political role of the Supreme Court). Classical works in this tradition include C. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913); C. BEARD, THE SUPREME COURT AND THE CONSTITUTION (1912); J. SMITH, THE SPIRIT OF AMERICAN GOVERNMENT (1907).

20. See S. LYND, *Introduction: Beyond Beard*, in CLASS CONFLICT, SLAVERY, AND THE UNITED STATES CONSTITUTION: TEN ESSAYS 3 (1967); Bernstein, *Introduction to Towards a New Past* at vi (B. Bernstein ed. 1968).

The Progressive viewpoint may appear closely allied with Marxism, but the difference between the two perspectives is fundamental. The former looks not toward a break with the assumptions and goals of classical liberal political thought, but to their extension to, and realization in, all spheres of social life. This goal is typically thought to be capable of realization within the governmental and economic framework of American capitalism, at least in its broadest outlines. Marxism, on the other hand, represents a decisive break with the liberal political tradition and views a comprehensive change in the socioeconomic and political system as a necessary component of the democratization of social life.

21. In Arthur M. Schlesinger, Jr.'s classic formulation, "liberalism in America has been ordinarily the movement on the part of the other sections of society to restrain

The rise of the historiographical tradition was connected to the ferment generated by the Progressive political movement of the early twentieth century. This movement was the political articulation of the liberalism of that era and took as an article of faith that the American democratic destiny would evolve through governmental regulation of business in the interests of the public. The Interstate Commerce Act (1887),²² the Sherman Antitrust Act (1890),²³ and the Federal Trade Commission Act (1914),²⁴ for example, were seen as so many milestones of liberal achievement in the defense of the common people. In fact, the entire branch of modern legal thought known as administrative law, whatever its origins in the ancient common law writs, is symbiotically connected to the Progressive vision.²⁵

The Progressive tradition viewed the Supreme Court as hopelessly out of touch with modern reality and beyond the reach of the democratic process. The institution of judicial review was particularly attacked as a key mechanism by which the representatives of Big Business were able to place a brake on needed social reform. In Max Lerner's formulation,

[c]apitalist enterprise in America generated, as capitalism has everywhere generated, forces in government and in the underlying classes hostile to capitalist expansion and bent upon curbing it: it became the function of the Court to check those forces and to lay down the lines of economic orthodoxy . . . [The Court] . . . may be regarded from other angles. But if we seek a single and consistent body of principles which will furnish the rationale of the judicial power in the last half century, we must find it in the dynamics of American business enterprise.²⁶

The heirs of Progressivism therefore viewed the dramatic 1937 turn of the Court toward an attitude of judicial deference to legislative

the power of the business community." A. SCHLESINGER, JR., *THE AGE OF JACKSON* 505 (1945).

22. Ch. 104, 24 Stat. 379 (1887) (codified in scattered sections of 49 U.S.C.).

23. Ch. 647, 26 Stat. 209 (1890) (codified at 15 U.S.C. §§ 1-7 (1970)).

24. Ch. 311, 38 Stat. 717 (1914) (codified at 15 U.S.C. §§ 41-51 (1970)).

25. "The administrative process has, during the last seventy-five years, been the characteristic instrument of political and economic reform." L. JAFFE & N. NATHANSON, *ADMINISTRATIVE LAW* 7 (3d ed. 1968).

The descendants of Progressivism would later see the New Deal as the consummation of the reform process. See sources cited in Bernstein, *The New Deal: The Conservative Achievements of Liberal Reform*, in *TOWARDS A NEW PAST*, *supra* note 20, at 263 nn.1 & 2.

26. Lerner, *supra* note 19, at 672. Lerner also says that, during the Progressive Era, it became "a general assumption among the students of the Court that the decisions of the justices could be explained by their economic interests and sympathies." *Id.* at 676.

authority²⁷ (classically but somewhat naively viewed as the repository of the popular will) as a triumph for democracy, a great divide that fundamentally resolved the problem of the role of the courts in a liberal democratic society.

In the 1960's, some historians began to rethink the legacy of Progressivism, both as a political movement and as a description of the American past. There arose a revisionist version of American history, known as the theory of corporate liberalism.²⁸ The proponents of this theory rejected Progressive historiography as historically inaccurate and politically misleading. In their view, liberal economic and political reform was not adequately described as an imposition upon Big Business. On the contrary, most significant modern reforms were enacted with the tacit approval, if not ardent support, of major corporate interests, because the more sophisticated sectors of the business community recognized that government intervention in the private sector was essential to rationalize²⁹ the chaos of a market economy, to enhance the stability, predictability, and security of the competitive capitalist system, and to provide a stable political environment

27. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 43 (1937); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399 (1937).

28. See, e.g., G. KOLKO, *RAILROADS AND REGULATION, 1877-1916* (1965); G. KOLKO, *THE TRIUMPH OF CONSERVATISM* (1963); R. RADOSH, *AMERICAN LABOR AND UNITED STATES FOREIGN POLICY* (1969); J. WEINSTEIN, *THE CORPORATE IDEAL IN THE LIBERAL STATE: 1900-1918* (1968); W. WILLIAMS, *THE CONTOURS OF AMERICAN HISTORY* (1961); W. WILLIAMS, *THE TRAGEDY OF AMERICAN DIPLOMACY* (1959); Radosh, *The Corporate Ideology of American Labor Leaders from Gompers to Hillman*, *STUDIES ON THE LEFT*, November-December 1966, at 66; Sklar, *On the Proletarian Revolution and the End of Political-Economic Society*, *RADICAL AMERICA*, May-Juné 1969, at 1; Sklar, *Woodrow Wilson and the Political Economy of Modern United States Liberalism*, *STUDIES ON THE LEFT*, Fall 1960, at 17; D. EAKINS, *The Development of Corporate Liberal Policy Research in the United States, 1885-1965* (1966) (unpublished Ph.D. dissertation in University of Wisconsin Library). See generally 'New Left Historians' Of the 1960s, *RADICAL AMERICA*, November 1970, at 81.

It should be noted that, besides the theory of corporate liberalism, the postwar period produced another major school, led by the so-called "consensus" historians, notably Daniel Boorstin and Louis Hartz, that also defined itself in opposition to Progressive historiography. See R. HOFSTADTER, *THE PROGRESSIVE HISTORIANS* 437-66 (1968).

29. Kolko defines "rationalization" as the utilization of political outlets by the major economic interests to achieve stability ("the elimination of internecine competition and erratic fluctuations in the economy"); predictability ("the ability . . . to plan future economic action on the basis of fairly calculable expectations"); and security ("protection from the political attacks [upon the major economic interests] latent in any formally democratic political structure"). "I mean by [rationalization] the organization of the economy and the larger political and social spheres in a manner that will allow corporations to function in a predictable and secure environment permitting reasonable profits over the long run." G. KOLKO, *THE TRIUMPH OF CONSERVATISM* 3 (1963).

in which the corporations could get on with the business of making reasonable profits. In short, the revisionist historians argued that, notwithstanding the laissez-faire and social-Darwinist rhetoric sometimes circulated for public consumption, Big Business systematically sought and achieved a political capitalism in which the state played a crucial, rationalizing role designed to protect corporate interests and retrieve the business world from recurring market crises. Whatever reforms and concessions were enacted in the process furthered these ends and forestalled even more radical measures that might have been enacted into law or imposed by extraparliamentary pressures had popular discontent been permitted to crystallize into a coherent oppositional political force.³⁰

Corporate liberal research has thus far produced its most significant results with regard to the Progressive Era proper.³¹ Although attempts have been made to assimilate New Deal politics into the corporate liberal theory,³² in my view these have inadequately con-

30. It was further argued that middle class reformers, however sincere, played a limited and ultimately subordinate role in defining the nature of Progressive reform. Likewise, the Left (e.g., the Socialist Party and the IWW in the early part of this century) lacked a comprehensive alternative vision to Progressivism and was unable to articulate a comprehensive democratic and redistributive program of its own. Accordingly, it also played a subordinate, largely futile role in defining the content of political reform. See J. WEINSTEIN, THE DECLINE OF SOCIALISM IN AMERICA, 1912-1925 (1967); Weinstein, *The Left, Old and New, SOCIALIST REVOLUTION*, July-August 1972, at 7.

31. The corporate liberal theorists have produced very little writing about the Supreme Court or about legal institutions generally. Kolko, however, has some brief notes about the Supreme Court's early treatment of railroad legislation that show the deficiency of the "economic interpretation" of the pre-New Deal Court and dramatically illustrate the methodological assumption made here that legal practice must always be seen as a relatively autonomous social force, not the mere resultant of prevailing economic and political vectors. See note 13 *supra* and accompanying text. Referring to the period around the turn of the century, he argues that, although most of the Justices identified with and favored business interests, they frequently had difficulty penetrating business' laissez-faire rhetoric and appreciating its need and desire for governmental intervention in the economy. Decisions written by Justices who imagined themselves to be providing aid and comfort to the corporations by initiating regulatory legislation therefore did great harm to vital business interests because those interests were fundamentally misunderstood. See G. KOLKO, RAILROADS AND REGULATION, 1877-1916, at 80-83 (1965).

32. See, e.g., G. DOMHOFF, *supra* note 4, ch. 6. A more balanced viewpoint may be found in Bernstein, *America in War and Peace: The Test of Liberalism*, in TOWARDS A NEW PAST, *supra* note 20, at 289; and Bernstein, *The New Deal: The Conservative Achievements of Liberal Reform*, in TOWARDS A NEW PAST, *supra* note 20, at 263. The Wagner Act itself points to certain continuities with the earlier period, since the statutory scheme has origins in the war labor policies of Woodrow Wilson's administration. The continuities between earlier labor legislation and the NLRA are explored in Smith, *The Evolution of the "Duty to Bargain" Concept in American Law*, 39 MICH. L. REV. 1065 (1941). The Supreme Court acknowledged this continuity with the World War I experience in *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 183-85 (1941).

fronted the central difficulty presented by the Wagner Act. Although over the long run the institutionalization of collective bargaining has served corporate interests in economic stability and predictability, the historical record makes emphatically clear that the business community, with few exceptions, did not initially conceive collective bargaining to be in its long-run interests, resisted passage of the Act, and later attempted to shape it or its own ends only when forced to obey it by working people and their allies in the federal government. In short, although the corporate liberal thesis is a good starting point from which to describe the general contours of the emergence of post-World War I monopoly capitalism, both it and the conventional interpretation of New Deal labor law reform, influenced by the Progressive tradition, are inadequate to explain fully the events of the period.³³

A major goal of this Article is to supply the groundwork for a more intricate explanation of this most perplexing problem of New Deal historiography, affirming both the context of class struggle that surrounded the early years of the Wagner Act and the role of the Act in stabilizing and preserving the social order of American capitalism.

B. THE CRISIS OF THE LEGAL ORDER³⁴

During the Depression, capitalism entered a period of profound, world-wide crisis, not only economically but also in politics, culture, and law. The particular manifestation of this crisis in law was the

33. Thus, conceding the influence of the revisionist school, this Article nonetheless reflects the more recent development toward a critical perspective on the theory of corporate liberalism, particularly insofar as it exaggerates the self-consciousness and rationality of the dominant business sectors, and the ability of the system to reform itself, and minimizes the significance of popular resistance. See TWENTIETH-CENTURY AMERICA: RECENT INTERPRETATIONS 6-8 (B. Bernstein & A. Matusow eds. 1969); Block, *Beyond Corporate Liberalism*, 24 Soc. PROB. 352 (1977). See also Schatz, *The End of Corporate Liberalism: Class Struggle in the Electrical Manufacturing Industry, 1933-1950*, RADICAL AMERICA, July-August 1975, at 187.

On the other hand, the conventional interpretation of the Wagner Act, as imposed upon the business community in the interests of the American worker by an enlightened government, is also inadequate. See notes 77-79 *infra* and accompanying text. This interpretation fails to do justice to the massive, extraparliamentary struggle waged by the working class during the period, without which the legislation probably would have meant very little, nor does it confront the profoundly conservative implications of New Deal labor law reform.

34. I have focused these contextual notes on the rise of legal realism, but obviously the cases to be discussed were also decided against the backdrop of three more well-known and politically explicit legal debates of the 1930's: the "commerce-power" question; the Court-packing crisis; and the pre-NLRA debate regarding the legal status of organized labor, particularly in light of the antitrust laws. As to the last, see I. BERNSTEIN, THE LEAN YEARS, ch. 4 (1960); F. FRANKFURTER & N. GREENE, THE LABOR INJUNCTION (1930); Shulman, *Labor and the Anti-Trust Laws*, 34 ILL. L. REV. 769 (1940).

incipient disintegration of liberal legalism.

"Legalism" has been defined as "[t]he ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules."³⁵ "Liberal legalism" is a particular historical incarnation of the legalist outlook, which characteristically serves as the philosophical foundation of the legitimacy of the legal order in capitalist societies.³⁶ Its essential features are the commitment to general, democratically promulgated rules, the equal treatment of all citizens before the law, and the radical separation of morals, politics, and personality from judicial action.³⁷ Liberal legalism also consists of a complex of social practices and institutions that complement and elaborate upon its underlying political philosophy and jurisprudence. With respect to its modern Anglo-American form, these include adherence to precedent, separation of the legislative (prospective) and the judicial (retrospective) functions, the obligation to formulate legal rules on a general basis (the notion of *ratio decidendi*), adherence to complex procedural formalities, and the search for specialized methods of analysis ("legal reasoning"). All of these institutions are designed to serve the fundamental desideratum of separating morals, politics, and personal bias from adjudication.³⁸ The rise and elaboration of the ide-

35. J. SHKLAR, *LEGALISM* 1 (1964).

36. See generally L. FULLER, *LEGAL FICTIONS* (1967); M. HORWITZ, *ORIGINS OF JUDICIAL REVIEW* (tent. ed. 1973); F. NEUMANN, *The Change in the Function of Law in Modern Society*, in *THE DEMOCRATIC AND THE AUTHORITARIAN STATE* 22 (H. Marcuse ed. 1957); Horwitz, *The Legacy of 1776 in Legal and Economic Thought*, 19 J.L. & ECON. 621 (1976); Kennedy, *Legal Formality*, 2 J. *LEGAL STUD.* 351 (1974).

37. The last of these commitments is embodied in the claim that the liberal state is a "government of laws, and not of men." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

38. The historical development and interrelationships of these practices and their connection to liberal legalist jurisprudence are traced in M. HORWITZ, *supra* note 36. See generally Horwitz, *supra* note 36.

Horwitz points out that, although the central institution of separation of powers is ordinarily justified as a device to subordinate the judiciary to the popular will as expressed in legislation, it arose historically in the United States in connection with the development of the institution of judicial review as a conservative justification for checking and impeding the redistributive and egalitarian tendencies imagined to be inherent in popularly elected legislatures.

Liberal legalist jurisprudence is closely related to the classical liberal political tradition. The metaphysical underpinnings of the enumerated practices are supplied by the central philosophical themes of that tradition: the notion that values are subjective and derive from personal desire, and that therefore ethical discourse is conducted profitably only in instrumental terms; the view that society is an artificial aggregation of autonomous individuals; the separation in political philosophy between public and private interests (between state and civil society); and a commitment to a formal or procedural rather than a substantive conception of justice.

These themes are sounded in the great writings of the classical liberal political

ology, practices, and institutions of liberal legalism have been accompanied by the growth of a specialized, professional caste of experts trained in manipulating legal reasoning and the legal process.

Not surprisingly, the crisis of liberal capitalism revealed itself within law as a breakdown of the separation between law and politics and between law and private interests,³⁹ as a tendency for law and politics to merge or for law to become politicized.⁴⁰ The political character of adjudication was already fairly apparent to labor activists, but the Supreme Court decisions of the early (pre-1937) New Deal striking down reform legislation cast the politics of the Court into stark relief.⁴¹

Within academic legal circles, the primary manifestation of the crisis of liberalism was the rise of the legal realist reaction to "conceptualist formalism." "Formalism" refers to styles of legal rea-

tradition, as exemplified in the work of Thomas Hobbes, John Locke, and David Hume. The interrelationship of the ethical, psychological, social, and political assumptions characteristic of the liberal tradition is developed in R. UNGER, KNOWLEDGE & POLITICS (1975); the connection of these metaphysical assumptions to liberal legalist jurisprudence and the unity of liberal legalist thought are discussed in chapter 2 of that work and in R. UNGER, LAW IN MODERN SOCIETY (1976). The connection of the metaphysical premises of the liberal tradition to liberal legalism is also explored in Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1766-78 (1976).

39. There is, of course, no claim implied here that at any time prior to the crisis of the 1930's the legal order was in fact autonomous from politics, but only that it became increasingly difficult in the 1930's to maintain the legalist belief that this was, could, or should be so.

40. See F. NEUMANN, *supra* note 36. The most dramatic example of this phenomenon was the rise of Nazi and Fascist law in Germany and Italy respectively, see *id.*; F. NEUMANN, BEHEMOTH: THE STRUCTURE AND PRACTICE OF NATIONAL SOCIALISM, 1933-1944 (rev. ed. 1944), although there is some question whether "fascist law" is, properly speaking, entitled to the name "law" at all. Obviously this debate goes to the heart of the liberal legalist belief that law is something more than the mere command of those in power and contains as part of its essential nature an autonomous and reasoned character. Compare Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958), with Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

Liberal capitalism in the United States enjoyed more flexibility and resiliency than perhaps anywhere else in the world, and the traumatic experiences of Central Europe were avoided. The transformation of the old order into the new was more modulated, involving less disruption to the social fabric. The remarkable suppleness of liberal capitalism in the United States is one of the central facts of our political history, particularly the history of the limitations of our left-wing movements. Yet rarely is a critical attempt made to account for it, historians often contenting themselves with references to the myth of American classlessness or to the sage pragmatism of our political leaders.

41. See, e.g., *United States v. Butler*, 297 U.S. 1 (1936); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Railroad Retirement Bd. v. Alton R.R.*, 295 U.S. 330 (1935); *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935).

soning that assume that the processes of deriving legal rules to govern new situations and of applying ascertained rules to given sets of facts can be relatively determinate, objective, and value-free operations, which proceed according to specialized modes of analytical deduction. Logically and historically, formalism is connected to formal conceptions of justice.⁴² "Conceptualism" is a particular version of formalism that was the prevailing mode of thought among the legal elite in the United States in the period roughly from 1885 to 1930.⁴³ The characteristic conceptualist glosses to formalism are the belief that very abstract and general principles of law can be used to resolve very concrete legal problems and an identification of legal reasoning with natural science.⁴⁴

"Realism" denotes a movement in legal thought that united thinkers of disparate political philosophies in an attack on conceptualism. As a style of legal reasoning, realism denies the objective and autonomous character of rule-formulation and rule-application and assumes the indeterminacy of legal concepts and rules. It sees legal reasoning as a purposive or instrumental, rather than a purely deductive, enterprise, and it asserts that proper judicial action requires and may legitimately involve inquiry into the social policies intended to be served by legal rules and the practical social consequences of a court's decisions.

Plainly, realism threatened to undermine the legitimacy of the legal process by politicizing it. This could not be otherwise when it was proposed that the decision of cases explicitly turn on the judge's assessment of competing notions of social policy. This is by definition the danger that liberal legalism had hitherto sought to avoid.⁴⁵ The

42. The distinction between formalistic and purposive legal reasoning and their respective connections to formal and substantive conceptions of justice are discussed in R. UNGER, *LAW IN MODERN SOCIETY* 194-216 (1976).

43. A pathbreaking examination of conceptualism is D. Kennedy, *The Rise and Fall of Classical Legal Thought, 1865-1940* (1975) (unpublished manuscript on file at MINNESOTA LAW REVIEW).

44. Labor law issues have supplied the context for many of the classics of conceptualism. See *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923) (minimum wage legislation); *Hitchman Coal & Coke v. Mitchell*, 245 U.S. 229 (1917) (union enjoined from organizing mine without mine owner's consent); *Coppage v. Kansas*, 236 U.S. 1 (1915) (yellow-dog contract); *Adair v. United States*, 208 U.S. 161 (1908) (yellow-dog contract); *Lochner v. New York*, 198 U.S. 45 (1905) (maximum hours legislation); *In re Debs*, 158 U.S. 564 (1895) (sweeping labor injunction).

45. This is not to claim, of course, that formalism successfully banished politics from law or that formalist judges decided cases without being influenced by articulate conceptions of social policy. See *Lochner v. New York*, 198 U.S. 45 (1905) (Holmes, J., dissenting). Indeed, one of the achievements of realism was to expose the value-laden character of formalistic legal reasoning. The point is that formalism denied the desirability of politically purposive judicial action and purportedly searched for methods to avoid overtly political or value-laden decisions. That is, formalism and realism differed

realists did not call for the demise of the rule of law, but they did urge candor about the ethical and political character of all legal decisions and believed that instrumental decisionmaking was proper and just. In Felix Cohen's words,

creative legal thought will more and more look behind the traditionally accepted principles of "justice" and "reason" to appraise in ethical terms the social values at stake in any choice between two precedents.

"Social policy" will be comprehended not as an emergency factor in legal argument but rather as the gravitational field that gives weight to any rule or precedent, whether it be in constitutional law, in the law of trademarks, or in the most technical details of legal procedure.⁴⁶

Realist jurisprudence released a radically destabilizing force within legalism. This was not widely perceived at first, partly because realism spread initially among academics, not judges, and partly because, other than a generalized inclination of many toward President Roosevelt and the New Deal, the realists shared no explicit political program. In time, when realism ascended to the bench, its subversive content became more apparent. This in turn provoked a conceptualist counterattack, although this reaction was to be obscured by its adoption of the language and style of realist discourse.⁴⁷ The cases I will discuss occur against the backdrop of the traumatic encounter between conceptualism and realism.

It is commonly believed that during the New Deal a "revolution"⁴⁸ occurred in American legal thought in general, and labor law in particular, that swept away the cobwebs of archaic conceptualism and, for the first time, gave the poor and the downtrodden a fair hearing in the courts of the land.⁴⁹ It is imagined that this

in the first instance as theories of the kinds of justifications that might legitimately be advanced in support of judicial decisions. See R. UNGER, LAW IN MODERN SOCIETY 194, 205 (1976). While by no means equivalent to a description of what actually takes place in adjudication, the self-consciousness and assumptions of a jurisprudential approach are, of course, crucial components of its political legitimacy. Realism implicitly posed the question whether a sophisticated, contemporary jurisprudence necessarily clashed with, or even pushed beyond the boundaries of, liberal legalism.

46. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 833-34 (1935).

47. The revival of conceptualism was not the only line of attack on realism. See, e.g., L. FULLER, THE LAW IN QUEST OF ITSELF (2d ed. 1966).

48. See, e.g., I. BERNSTEIN, *supra* note 7, ch. 13.

49. The opening shots of this revolution were believed to be the Supreme Court's decisions in NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), and West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

The upholding of the NLRA in the *Jones & Laughlin Steel* case was, of course, the handwriting on the wall which the more astute of the country's

revolution coincided with, indeed resulted from, the triumph of legal realism, particularly in the Supreme Court, in the persons of Justices Black, Douglas, and Frankfurter, but also more generally in the legal establishment.

This period clearly marked a new era in our legal history. Whether "revolution" is the appropriate word to describe that transformation is another question. Likewise, whereas legal realism undoubtedly came into its own, whether it consigned conceptualism to the dustbin of history is also problematic. In my view the dividing line between the Old Court and the New is much more indistinct than is commonly supposed. The early Labor Board cases were an attempt—at the height of the so-called labor law revolution—to forestall the disintegration of legalism that is the necessary consequence of the merger of law and politics and to assimilate realism to mainstream legalist jurisprudence by diluting its implicit political content. Put another way, liberal legalism exhibited the same resilience in its moment of crisis as did the American political system as a whole during the Depression. The Labor Board cases marked the emergence of a distinctively modern legal consciousness that eventually superseded realism in the direction of a new "social conceptualism." In effect, each side in the debate tacitly refrained from pushing the internal logic of its position to its ultimate conclusions and was eventually absorbed into its adversary. The resultant, hybrid style of legal reasoning was more attentive to social and political realities and more self-conscious and candid about the political character of adjudication than its conceptualist predecessor. But like the latter, it was premised on the notion that a disjunction between law and politics is necessary to legitimate the judicial role, and it sought in the reasoned elaboration of neutral principles a method for upholding the law/politics distinction. The new social conceptualism reproduced the formal, undemocratic, and uncritical character of the old. The New Deal solution to the crisis of legalism was to update legal consciousness and to make it more responsive to contemporary social exigencies—that is, to give a new life to the liberal legal order—while at the same time preserving its contradictions and mystifications. The Labor Board cases were a significant early episode in this process.

business leaders were well able to read. Unionization followed as a matter of course, and the hoary fiction of freedom of contract between labor and management was quietly laid to rest.

2 W. SWINDLER, COURT AND CONSTITUTION IN THE TWENTIETH CENTURY 107 (1970). *But see* H.K. Porter Co. v. NLRB, 397 U.S. 99, 108 (1970) (Black, J.) ("One of these fundamental policies [of the Wagner Act] is freedom of contract.").

C. THE WAGNER ACT: GOALS AND PERCEPTIONS

It is not easy to discern and articulate the goals of the NLRA. The legislative history is often vague and inconclusive, and on many issues that were subsequently the subject of burning debate, Congress simply expressed no legislative intent.⁵⁰ Nonetheless, from the "Findings and Policy" incorporated in section 1 of the Act⁵¹ and from the labor law cases and literature, it is possible to identify at least six statutory goals:

1. *Industrial Peace*: By encouraging collective bargaining, the Act aimed to subdue "strikes and other forms of industrial strife or unrest,"⁵² because industrial warfare interfered with interstate commerce; that is, it was unhealthy in a business economy.⁵³ Moreover,

50. See, e.g., Smith, *supra* note 32 (legislative history of section 8(5) of the NLRA).

51. National Labor Relations (Wagner) Act § 1, 29 U.S.C. § 151 (1970). That the policy statement of section 1 is not mere surplusage safely to be ignored is particularly clear in light of the express language of section 10(c) commanding the Board to fashion such remedies "as will effectuate the policies of this Act," *id.* § 10(c), 29 U.S.C. § 160(c), and the similar command in section 9(b) that the "appropriateness" of a unit for collective bargaining purposes is to be measured against the policies of the Act, *see id.* § 9, 29 U.S.C. § 159(b).

In the early years of the Act, this statement of policy played a central role in the debate over whether and to what degree courts were to defer to the Board's "informed judgment" on labor law matters. This controversy, of course, was intimately connected with the crisis of legalism. Traditionalists warned that judicial deference to "administrative discretion" would mark the end of the rule of law. The Court's defense of administrative discretion in the face of this charge was essential to the rise of our modern administrative practice and to the accomplishment of the purposes of the Act itself. The existence of some statutory standards or principles to which the Court could point as placing at least apparent limits or boundaries on administrative discretion was crucial strategically to its ability so firmly to defend the new administrative law.

52. *Id.* § 1, 29 U.S.C. § 151.

53. Ironically, section 13 of the Act emphatically affirms the right to strike, and its sponsors must have known that in the short run the Act would encourage workers to exercise this right on a massive scale, which is exactly what happened. Thus, the industrial peace rationale only makes sense on the assumption that employers would eventually come to their senses and accept collective bargaining as more productive from the long-run standpoint of the business system than intransigent efforts to hold back the clock. In other words, the Act gave workers a powerful weapon in industrial warfare so that industrial warfare would, in the long run, be dissipated. Not only does this show that the sponsors of the Act had a rather awesome confidence in their own foresight, but also that they were fully prepared to wait on the sidelines while revitalized unions clobbered backward employers into submission. See Lynd, *The United Front in America: A Note*, RADICAL AMERICA, July-August 1974, at 29.

Not surprisingly, once section 13 served its purpose, the Court and Congress began to impose elaborate restrictions on the right to strike and other potentially disruptive activity. *See, e.g.*, Hudgens v. NLRB, 424 U.S. 507 (1976) (picketing rights subordinated to property rights); Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50 (1975) (minority concerted activity unprotected); Linden

although this thought was not embodied in the text, industrial warfare clearly promoted other undesirable conditions, such as political turmoil, violence, and general uncertainty.

2. *Collective Bargaining*: The Act sought to enhance collective bargaining for its own sake because of its presumed "mediating" or "therapeutic" impact on industrial conflict.⁵⁴

3. *Bargaining Power*: The Act aimed to promote "actual liberty of contract"⁵⁵ by redressing the unequal balance of bargaining power between employers and employees.⁵⁶

Lumber Div. v. NLRB, 419 U.S. 301 (1974) (restriction of the recognitional strike); Gateway Coal Co. v. UMW, 414 U.S. 368 (1974) (restrictions on safety strikes); Boys Mkts., Inc. v. Retail Clerks Union Local 770, 398 U.S. 235 (1970) (revival of the labor injunction); Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962) (implication of no-strike clause); NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958) (barring strike to win demand on "permissive subject"); Labor Management Relations (Taft-Hartley) Act §§ 8(b)(4), 303, 29 U.S.C. §§ 158(b)(4), 187 (1970) (prohibiting secondary activity); *id.* §§ 206-210, 29 U.S.C. §§ 176-180 (restrictions on strikes impeding national health or safety).

54. In the words of the congressional finding: "Experience has proved that protection by law of the right of employees to organize and bargain collectively . . . promotes the flow of commerce . . . by encouraging practices fundamental to the friendly adjustment of industrial disputes." National Labor Relations (Wagner) Act § 1, 29 U.S.C. § 151 (1970). This premise has been elaborated into a philosophy of collective bargaining as an ideal of rational and informed persuasion. By this view, much industrial conflict could be alleviated simply by an intelligent exchange of views and information at the bargaining table. *See generally* Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1408-09 (1958). Notwithstanding the finding of Congress just quoted and Cox's view that the sponsors of the Act undoubtedly hoped to accomplish this goal, Cox says it is unclear whether the goal, as well as the goal of industrial democracy, *see note 60 infra*, was written directly into the statute. Cox, *supra* at 1408-09.

55. National Labor Relations (Wagner) Act § 1, 29 U.S.C. § 151 (1970). This concept of "actual" liberty of contract is also invoked in the Norris-LaGuardia Act § 2, 29 U.S.C. § 102 (1970).

56. The Wagner Act is ambiguous as to how much "redressing" was to take place. Section 1 states that legal protection of unionization and collective bargaining promotes commerce "by restoring *equality* of bargaining power between employers and employees." National Labor Relations (Wagner) Act § 1, 29 U.S.C. § 151 (1970) (emphasis added). This phrase might mean that in administering the Act, the National Labor Relations Board was consciously to seek an even balance of forces between capital and labor. Alternatively, it might mean, more modestly, that, in Congress' view, collective bargaining in and of itself put capital and labor on an equal footing. *Cf. Coppage v. Kansas*, 236 U.S. 1, 26-27 (1915) (Holmes, J., dissenting) (workers' belief in unionism may be protected by law "in order to establish the equality of position between the parties in which liberty of contract begins").

At any rate, in Cox's words, "[t]he most important purpose of the Wagner Act was to create aggregations of economic power on the side of employees countervailing the existing power of corporations to establish labor standards." Cox, *supra* note 54, at 1407. *See NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 506-07 (1960) (Frankfurter, J., separate opinion) (citation omitted).

The main purpose of the Wagner Act was to put the force of law behind

4. *Free Choice:* The Act was intended to protect the free choice of workers to associate amongst themselves and to select representatives of their own choosing for collective bargaining.⁵⁷

5. *Underconsumption:* The Act was designed to promote economic recovery and to prevent future depressions by increasing the earnings and purchasing power of workers.⁵⁸

the promotion of unionism as the legitimate and necessary instrument "to give laborers opportunity to deal on equality with their employer." Equality of bargaining power between capital and labor, to use the conventional terminology of our predominant economic system, was the aim of this legislation.

No doubt it was contemplated that these new aggregations of economic power would be strong in an absolute sense and that they would come to play a significant role in political and social life as well as in collective bargaining. That is, it was a general goal of the Act to promote union organization and to make unions powerful.

57. This principle of employee freedom of association was sometimes deemed a "fundamental right" that pre-existed enactment of the Act. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937); text accompanying note 156 *infra*.

58. Section 1 of the Act explicitly finds that the unequal bargaining power of employees "tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners." National Labor Relations (Wagner) Act § 1, 29 U.S.C. § 151 (1970). If these words mean anything at all, they mean that Congress intended the Act to result in a redistribution of income shares in favor of wage earners. Though the redistributive goals were virtually read out of the Act by judicial and administrative interpretation, references to the underconsumption theory were retained in the Labor Management Relations (Taft-Hartley) Act § 1, 29 U.S.C. § 141 (1970), and a faint echo of the theory appears, somewhat out of place, in the Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, § 2(c)(4), 29 U.S.C. § 401(c)(4)(1970).

Considerations of space bar anything but the brief notes that follow on the political economy of the Wagner Act. I have relied extensively on E. HAWLEY, THE NEW DEAL AND THE PROBLEM OF MONOPOLY (1966). The New Deal never had an economic policy; rather, it had several articulated and competing perspectives. Thus, the group most closely identified with the corporate liberal tradition within Big Business saw overproduction as the greatest evil and advocated a program of restrictions on output, downward price rigidity, and market division, i.e., governmentally protected, rationalized oligopoly. A second center of opinion favored market rationalization, but in the context of redistribution of income to counteract underconsumption, a more rational allocation of resources, and some sort of national economic planning. This group looked toward new units of "countervailing power" (unions, farmers' groups, cooperatives, consumers' groups) as its constituency. A third major perspective was faithful to traditional antitrust ideals and saw restoration of the competitive market as the key to recovery and social justice. This group looked to small businesspeople, large corporate interests operating in certain atypical markets, and rural Progressives for its political support.

Each of these perspectives found a significant reflection in the scheme of the NLRA. The restrictionist emphasis prevailed in the fundamental decision to legalize combination ("concerted activity") in the market governing the sale of labor power; the "planning theme" shows through both in the creation of a government agency with the novel charter to oversee the collective bargaining process and in the self-consciously redistributive focus of section 1 of the Act; and finally, significant antitrust

6. *Industrial Democracy*: This is the most elusive aspect of the legislative purpose, although most commentators indicate that a concept of industrial democracy is embedded in the statutory scheme, or at the least was one of the articulated goals of the sponsors of the Act. Senator Wagner frequently sounded the industrial democracy theme in ringing notes,⁵⁹ and scholars have subsequently seen in collective bargaining "the means of establishing industrial democracy, . . . the means of providing for the workers' lives in industry the sense of worth, of freedom, and of participation that democratic government promises them as citizens."⁶⁰ Indeed, one carefully argued study has gone so far as to conclude that

Congress viewed the objective of the Act as establishing throughout the country as the normal relationship between employer and employees, a system whereby employees would participate through their representatives in governing all matters affecting their conditions of work . . . When judges and the public become more famil-

ideals were reflected in the Act's underconsumptionist explanations of the Depression and its attempted creation of decentralized foci of countervailing power to combat "bigness."

President Roosevelt personally made no choice as between these competing strategies. Eventually he and his advisers stumbled into spending, as such, as a compromise solution to the intractable problems posed by their policy paralysis in the face of the 1937-1938 recession. Roosevelt's inconsistency and ambivalence on economic policy brilliantly complemented his personalistic, consensus style of politics, but guaranteed that the New Deal would make no fundamental transformation of the economic order. True, he alienated the business community by encouraging the rhetoric of economic redistribution, particularly in the period 1935-1937. But he never entertained a serious intention of attacking the hegemony of corporate interests. The "shift to the left" in the mid-1930's coincided with a turn to the right in economic policy and the defeat of the idea of national planning. Without denying its humanitarian achievements, the New Deal accomplished far less than is imagined in the area of redistribution of wealth and power. See Bernstein, *America in War and Peace: The Test of Liberalism*, in TOWARDS A NEW PAST, *supra* note 20, at 289; Bernstein, *The New Deal: The Conservative Achievements of Liberal Reform*, in TOWARDS A NEW PAST, *supra* note 20, at 263. Ironically, Roosevelt on the one hand helped the business community, which was often hostile to him, by fashioning the institutional underpinnings of the advanced capitalist system of corporate-government interdependence, while on the other, contributed the least by way of permanent institutional reform to the poor and the working people who idolized him. This irony closely parallels that involved in the "judicial deradicalization" of the Wagner Act described here. See notes 11-15 *supra* and accompanying text.

59. See, e.g., I. BERNSTEIN, *supra* note 4, at 115; H. WELLINGTON, *LABOR AND THE LEGAL PROCESS* 88 (1968); Fleming, *The Significance of the Wagner Act*, in *LABOR AND THE NEW DEAL* 135 (M. Derber & E. Young eds. 1957).

60. Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1002 (1955). Cox writes more cautiously that Congress possibly intended, in promulgating the section 8(5) duty to bargain, that "the divine right of the king must yield to a constitutional monarchy, in which a large measure of industrial democracy will prevail. Wages, hours, and conditions of employment should be determined by mutual consent." Cox, *supra* note 54, at 1408 (footnote omitted).

iar with the principles of industrial democracy it is to be expected that any autocratic conduct by an employer will come to be viewed as a serious breach of the employees' rights to self-organization and collective bargaining.⁶¹

Enumerating the statutory premises in this manner makes apparent why the Wagner Act was, at first, perceived by employers as such a radical threat. Although it demands an effort of historical imagination sufficient to penetrate the narcotic haze of hindsight to understand this perception, the Act by its terms apparently accorded a governmental blessing to powerful workers' organizations that were to acquire equal bargaining power with corporations, accomplish a redistribution of income, and subject the workplace to a regime of participatory democracy. The Act's plain language was susceptible to an overtly anticapitalist interpretation.⁶²

To corporate management, the Act was unquestionably the most unpopular piece of New Deal legislation affecting industry.⁶³ The bill was denounced in vivid terms by representatives of a wide spectrum of business interests, and most employers, large and small, opposed its passage.⁶⁴ The *Commercial and Financial Chronicle* had called

61. Weyand, *Majority Rule in Collective Bargaining*, 45 COLUM. L. REV. 556, 599 (1945). Weyand's formulation suggests a fundamental ambiguity in the concept of industrial democracy that is not resolved by the legislative history: is the contemplated industrial democracy to be "participatory" or "representational"? As will be seen, the subsequent development of the law was directed almost entirely toward the latter model, with only a passive role allowed rank-and-file employees in day-to-day industrial affairs.

62. Obviously such a radical reading of the Act is not compelled by the legislative history. It does, however, find substantial support in that history and in the text of the Act, see notes 50-61 *supra* and accompanying text; and moderate and conventional interpretations of the Act, however more plausible they may seem now, cannot conclusively be said to be *commanded* by the legislative history either.

63. Of the major New Deal legislation included in a 1939 survey, the Wagner Act was the least popular. By far the highest percentage of those surveyed, 43.9%, said the Wagner Act was the worst of several listed New Deal reforms (although more respondents demanded outright repeal of the undistributed profits tax (66.2%) than of the Wagner Act (40.9%)). See *What Business Thinks*, FORTUNE, October 1939, at 52, 90. See generally Wilcock, *Industrial Management's Policies Toward Unionism*, in *LABOR AND THE NEW DEAL*, *supra* note 59, at 310.

64. When the Act was pending in Congress, representatives of the business community testified in opposition to it "in virtually solid phalanx." I. BERNSTEIN, *supra* note 4, at 100. The National Association of Manufacturers undertook a campaign described by a contemporary source as "the greatest ever conducted by industry regarding any Congressional measure." I. BERNSTEIN, *supra* note 7, at 339. The press also opposed the bill with near unanimity. See I. BERNSTEIN, *supra* note 4, at 89. Senator Wagner received no assistance from President Roosevelt through most of the legislative battles. The President "never lifted a finger," recalled Secretary of Labor Perkins, who herself "had very little sympathy with the bill." W. LEUCHTBURG, *FRANKLIN D. ROOSEVELT AND THE NEW DEAL*, 1932-1940, at 150 n.23 (1963). Roosevelt belatedly endorsed and supported the bill after it passed in the Senate. See *id.* at 151.

Senator Wagner's predecessor bill, "one of the most objectionable, as well as one of the most revolutionary, pieces of legislation ever presented to Congress,"⁶⁵ while the Associated Industries of Oklahoma thought the new bill would "out-SOVIET the Russian Soviets."⁶⁶ Nor was opposition to the Act limited to verbal assaults. The business community embarked upon a path of deliberate and concerted disobedience to the Act between 1935 and 1937,⁶⁷ a response marked by

65. *Collective Bargaining and the American Federation of Labor*, 138 COM. & FINANCIAL CHRONICLE 1975, 1976 (1934).

66. A. SCHLESINGER, JR., *THE AGE OF ROOSEVELT: THE COMING OF THE NEW DEAL* 405 (1959)(citing "a clipping from an Oklahoma City paper, Apr. 19, 1934"). This was a period of increasing estrangement between Roosevelt and the business community, during which both he and the government were widely perceived as moving rapidly to the left and as tampering with the fundamentals of the American economic system: free enterprise and private ownership of property. The Wagner Act debate roughly coincided with consideration of the Administration's so-called "soak-the-rich" tax plan and the Public Utility Holding Company Act of 1935, ch. 687, tit. I, 49 Stat. 803 (codified at 15 U.S.C. §§ 79-79z-6 (1970)), which produced a torrent of business criticism. See E. HAWLEY, *supra* note 58, at 154-56. The irony of this development is that the business opponents of the Administration misconstrued President Roosevelt's rhetoric and political direction, indeed, that they attacked him when in a sense they ought to have been his allies. See P. CONKIN, *supra* note 3, at 71-81; note 58 *supra*.

67. The overwhelming bulk of the National Labor Relations Board's efforts and limited resources during these years was devoted to defending the constitutionality of the Act and to combatting employers' legal harassment of Board operations. Employer representatives coordinated their attacks at least to the extent of widespread exchange of form pleadings and memoranda, and within a year after passage of the Act, the Board was defending 83 injunction proceedings brought to restrain its operations. Another aspect of this campaign of opposition was the "anticipatory nullification" of the Act: prominent counsel retained by employers' spokespersons opined that the Act was unconstitutional, and employers thereupon refused to obey it. The leading example of this tactic was the American Liberty League's issuance on September 5, 1935, before the Board had even completed its initial organization or published its first rules and regulations, of a legal memorandum declaring the Act unconstitutional; the wide circulation of this document seriously impeded efforts to enforce the Act. During its first two years of operation, the Board issued 95 cease-and-desist orders against employers. These cases were carefully investigated and prepared because of the likelihood of close appellate scrutiny; yet in only four cases did the Board succeed in securing employer compliance with its order. See I. BERNSTEIN, *supra* note 7, at 349, 450, 639, 646-48; H. MILLIS & E. BROWN, *FROM THE WAGNER ACT TO TAFT-HARTLEY* 35-40 (1950); Wilcock, *supra* note 63, at 290-91.

It should be noted that many unfair labor practice cases were settled "informally" by voluntary compliance or withdrawal of the charge. The significance of these dispositions must be depreciated, however, in view of the pressures toward settlement placed on the Board by the overriding need to ensure that the inevitable constitutional test would arise in the context of an important and clear-cut violation. See H. MILLIS & E. BROWN, *supra*.

Even when the constitutional hurdle had been passed, the opposition of employers to the Act did not cease. Rather, "it was redirected to Congress to demand amendments to the Wagner Act and to deny adequate appropriations to the NLRB. The

determination and often by violence. Large and respected corporate employers engaged vast resources in systematic and typically unlawful antiunion campaigns involving such tactics as company unionism, propaganda, espionage, surveillance, weapons stockpiling, lockouts, pooling agreements for the supply of strikebreakers, and terrorism.⁶⁸

What provoked this extraordinary campaign of lawlessness and opposition to the statute? It is difficult to say with certainty whether the dominant motive was simply opposition to the Act's promotion of unionism and redistribution of bargaining power or a more fundamental fear that the Act was a prelude to state regulation of the substantive terms of the wage-bargain and the loss of management's exclusive right to direct the production process. From the available evidence, however, it is at least possible to conclude that, in addition to the purely economic costs of collective bargaining, business opposition to the Act was in significant measure prompted by two fundamental considerations. First, the Act's radical potential justifiably produced a fear that collective bargaining meant the loss of control over the production process, the fatal subversion of the hallowed right of managerial freedom to run the enterprise. In short, business took the Act's rhetoric of industrial democracy seriously.⁶⁹ This common

Board sustained a propaganda onslaught, in which the press joined ferociously, that was without historic precedent among federal agencies." I. BERNSTEIN, *supra* note 7, at 648.

68. According to the La Follette Subcommittee, the General Motors Company operated "the most colossal supersystem of spies yet devised in any American corporation." I. BERNSTEIN, *supra* note 7, at 517. Every plant manager in the GM corporate system employed detectives, and GM spent nearly a million dollars on labor spies between January 1934 and June 1936 alone. See *id.* at 516-17. The Ford Motor Company openly employed thugs to assault union organizers, *see id.* at 569-71, and the Republic Steel Corporation maintained a private police force of 370 men armed with pistols, rifles, shotguns, gas grenades, billies, and other weapons. In May 1937, Republic spent almost \$50,000 on munitions, stockpiled in preparation for a strike that it forced prematurely, in part by use of a lockout. Republic's police force was better stocked with gas weapons and gas munitions than any law enforcement agency, local, state, or federal. The company also employed large espionage and propaganda operations. *See Proposed Amendments to the National Labor Relations Act: Hearings Before the [La Follette] Subcomm. of the Senate Comm. on Education and Labor*, 76th Cong., 1st Sess. 29 (1939), quoted in R. BOYER & H. MORAIS, LABOR'S UNTOLD STORY 315 (3d ed. 1970); I. BERNSTEIN, *supra* note 7, at 482-83.

For a description of the so-called "Mohawk Valley Formula," a widely touted, comprehensive system for busting unions that involved a variety of propaganda techniques, creation of puppet employee associations to lead "back-to-work" movements, and the use of large, intimidating armed forces of loyal local and state police and vigilantes, see Remington Rand, Inc., 2 N.L.R.B. 626, 664-66 (1937).

69. *See* Wilcock, *supra* note 63, at 280, 311 (reference to mass production industry):

The mere belief that unionism means or would mean the loss of some of management's authority and prestige is a sufficient explanation for much of

denominator of fear of loss of managerial control runs through much of business' perceptions of the Act.⁷⁰ Business was particularly outraged because the statute went beyond merely legalizing union activity and providing for representation elections, but in addition created an affirmative *duty* on the part of employers to bargain with the employees' exclusive representative over terms and conditions of employment.⁷¹ This requirement raised the spectre that section 8(5)⁷² could lead to administrative scrutiny of the substantive terms of employment contracts, indeed, to compulsory arbitration of the terms of employment, and was viewed as a dramatic departure from the concept of managerial control.⁷³

The other motif prominent in expressions of business opposition to the Act was the fear that the Act would encourage and promote labor radicalism and class conflict as a necessary consequence of promoting any kind of unionism.⁷⁴ A Cleveland Chamber of Com-

management's opposition to unionism over the years. . . .

The available evidence indicates that during the New Deal period management's self-concept of its role in the economy and in society did not permit it to change its basic philosophy and belief about unionism, namely that unions would interfere with and compromise management's full and rightful authority to manage.

70. It was, for example, central to General Motors' pre-1937 determination to crush unionism in company plants. *See I. BERNSTEIN, supra* note 7, at 515-16.

71. *See National Labor Relations (Wagner) Act, § 8(5), 29 U.S.C. § 158(a)(5)* (1970).

72. Section 8(5) of the Wagner Act made it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)." *Id.* § 8(5), 29 U.S.C. § 158(a)(5).

73. *See Smith, supra* note 32, at 1065-67, and sources cited therein. It is important to recognize that, as a matter of history, there was no clear national policy or consensus by 1935 indicating that private-ordering was always, or even ordinarily, the preferred method of government regulation of the wage-bargain, assuming that regulation was deemed appropriate at all. Several prior experiments in the regulation of labor bargaining, such as the activities of the War Labor Board during World War I and the Railroad Labor Board under the Transportation Act, 1920, ch. 91, 41 Stat. 456, stressed an adjudicatory model, as opposed to a bargaining or private-ordering model. Smith's review indicates that subsequent enactments and administrative experience prior to the Wagner Act failed to clarify the meaning of the "duty to bargain" concept, particularly in regard to whether it implied primarily a procedural or a substantive model. Smith concludes that it cannot be clearly determined whether or not Congress intended the NLRB to engage in substantive scrutiny of employer proposals in the course of its administration of section 8(5); Congress simply did not think the problem through. *See Smith, supra* note 32, at 1107.

74. Somewhere in the testimony of almost every industry representative during the course of the hearings on the Wagner Act is to be found the thesis that a major defect in the bill was its premise that the relationship between employer and employee was one of conflict rather than cooperation. . . . The growth of a strong national union movement meant union

merce resolution of the era, for example, expressed concern about "professional labor agitators whose primary objective is to foment antagonism, with a view to an organized power, socially, politically and economically dangerous to the American Commonwealth."⁷⁵ In fact, business had good reason to fear that the Act would lead, at least in the short run, to labor conflict and, therefore, in the context of the times, to the possibility of increased working-class militancy and political radicalism. As the sponsors of the Act themselves must have foreseen, their rhetoric of industrial peace notwithstanding, the inevitable short-run impact of the Act would be a substantial increase in strikes.⁷⁶

It is even more difficult accurately to specify working people's perceptions of, and attitudes toward, the Wagner Act. Conventional labor historiography has tended to equate the aspirations and goals of working people with those of the leadership of organized labor and, apart from the well-known rivalry between the AFL and the CIO over the craft versus industrial models of unionization, has assumed widespread consensus among working people as to what was desired: legal protection of the right to organize; equalization of bargaining power by—and to the extent of—promoting unions as units of countervailing economic power; use of this power to achieve higher standards of living through wage-bargaining; and an industrial democracy limited to the notion that the bargaining unit is a political constituency to which should be extended the traditional democratic right to vote for or against representation, but that democratic participation is largely exhausted by that choice.⁷⁷ From this perspective, it follows that the Wagner Act embodied the highest aspirations of labor and that its passage and success not only marked the irreversible emergence of labor as a political force in American life, but was triumphant testimony to the possibilities of democratic reform within the framework of capitalism.

domination such as many industrialists believed to exist in England at the time.

Fleming, *supra* note 59, at 142. See also I. BERNSTEIN, *supra* note 7, at 515 (quoting Alfred P. Sloan, President of General Motors, on the threat of labor radicalism). Business rhetoric was sometimes quite exaggerated. Alfred P. Sloan, President of General Motors during the 1930's, described the Flint auto sit-down strike as an attempt "to Sovietize" the automobile industry and as "a dress rehearsal for Sovietizing the entire country." R. BOYER & H. MORAIS, *supra* note 68, at 303.

75. Fleming, *supra* note 59, at 143 (quoting the resolution).

76. See note 53 *supra* and accompanying text.

77. See, e.g., I. BERNSTEIN, *supra* note 7; Green, *Working Class Militancy in the Depression*, RADICAL AMERICA, November-December 1972, at 1. Irving Bernstein's work, relied upon throughout this Article, exemplifies the assumptions of the conventional historiography of the period and is one of the finest achievements of this genre.

Recent reexaminations of the American labor history of the 1930's suggest, however, that, whereas the foregoing goals may have reflected the attitudes of union leadership, a vastly more complicated and variegated situation is revealed beneath the plane of articulate historical actors at the level of ordinary, historically anonymous, working people.⁷⁸ The conventional view exaggerates the unitary character of what labor sought generally in the 1930's and particularly from the collective bargaining law. It appears that the leadership of labor was in many respects quite distant from the rank and file and often acted at cross-purposes to its desires. There is evidence to support the claim that the collective bargaining model that eventually prevailed in the United States may not accurately reflect the aspirations of at least a significant number of those who were foot-soldiers in the industrial battles of the New Deal era. Rather, these working people may have contemplated a far more radical restructuring of relationships within the workplace in which industrial democracy, as an ongoing, participatory process both in the factory and the union, was at least as important as improved living standards. From this perspective, working people fought with determination to make the Act a reality—many giving their lives—because it imported more to them than the right to engage in endless economic combat for whatever benefits could be wrung from their corporate adversaries; it meant a commitment of government assistance toward the achievement of an objectively decent living standard and some control over the industrial decisions that affected their lives. At the very least, it can be asserted that the Act meant many different things to different people and groups on the labor side and that, for a substantial number, although they may have had only a vague idea of what the statute actually said, it nevertheless symbolized a significant opening in the direction of radical change.⁷⁹

78. See, e.g., J. BRECHER, *supra* note 9; A. LYND & S. LYND, *RANK AND FILE: PERSONAL HISTORIES BY WORKING-CLASS ORGANIZERS* (1973); Green, *supra* note 77, and sources cited therein; Lynd, *supra* note 53; Lynd, *The Possibility of Radicalism in the Early 1930's: The Case of Steel*, *RADICAL AMERICA*, November-December 1972, at 37.

This new research was stimulated in part by developments in the field of European social history exemplified by the work of Christopher Hill, E.J. Hobsbawm, George Rudé, and E.P. Thompson.

79. The evidence on which these claims typically are based comes in part from oral histories given by participants in the events of the 1930's and in part from a fresh review of the record of working-class action. See generally sources cited in note 78 *supra*. Key points often made in support of the new viewpoint are that (1) the sit-down strikes—particularly in rubber and auto—resulted from spontaneous militancy on the part of the rank and file, who often acted against union advice and received only reluctant and belated support from the leadership of the CIO; (2) many crucial strikes were precipitated by issues concerning control of the work-process (e.g., the

An important conclusion emerges from the foregoing discussion: the indeterminacy of the text and legislative history of the Act, the political circumstances surrounding its passage, the complexity and fluidity of working-class attitudes toward collective bargaining and labor law reform during the period, and the hostility and disobedience of the business community make it clear that there was no coherent or agreed-upon fund of ideas or principles available as a conclusive guide in interpreting the Act. The statute was a texture of openness and divergency, not a crystallization of consensus or a signpost indicating a solitary direction for future development. This situation presented first the Board and the lower courts, but ultimately the United States Supreme Court, with the task of plotting the contours of the nation's new labor law. In doing so, the Court had

speed of the assembly line; work-discipline) rather than wage issues; (3) militant rank-and-file groups often expressed disillusionment during the period with both the CIO leadership and the government, and they expressed a perspective of reliance on their own concerted activity as the primary resource for achieving reform; (4) the positive and often leading role played by left-wing activists (Communists, Trotskyists, and others) has been distorted and underplayed in conventional historiography; and, the most problematical claim, (5) the conduct of workers during the sit-downs—particularly their efforts to create collective forms of social life during the building occupations—intimates a yearning for, and the possibility of, a democratic reorganization of the workplace on the basis of a workers' control model. By contrast, it is argued, CIO leaders moved swiftly after union recognition to suppress the more spontaneous and participatory expressions of working-class militancy so as to be able to present themselves to management as competent guarantors of labor discipline.

Although this new labor history adds an important dimension to our understanding of the era, as with corporate liberalism theory, it is important to maintain a critical distance. Even accepting the claims of the new histories, it remains to be explained why collective bargaining was almost universally and uncritically viewed by working-class activists, both within and outside of the organized left-wing groups, as the cornerstone of all programs for social justice and why, in contrast, the concept of workers' control as such, and workers' councils, public ownership, state planning or decentralized planning, and direct state regulation of the terms and conditions of employment never became dominant rallying cries. Numerous explanations may be suggested why stronger, more overtly socialist tendencies did not emerge, including the pressure of circumstances for the satisfaction of immediate needs; the traditional conservatism of American labor leaders; the fatal dependency of the labor movement on the federal government, particularly after the Little Steel and Ford disasters of 1937; the stabilizing role played by the Communist Party in the context of its Popular Front politics; and the growing understanding and exploitation by corporate executives of the co-optative potential of collective bargaining. The argument of this Article is that the law itself, as a legitimating ideology and a system of institutions, played a role in the deradicalizing process.

Regardless of the strength of these explanations, however, the new labor history provides convincing support for the proposition that the possibilities of, and support for, working-class radicalism going beyond the quest for reforms within the boundaries of capitalism existed during the 1930's to a far greater degree than is customarily supposed.

to select one set of principles from among the Wagner Act's possible meanings and give to it the imprimatur of law. This task was unavoidably a *political* enterprise that thrust the Court into a central role in shaping the ideological and institutional architecture of the modern capitalist workplace.

Of course, the Court was not presented with treatises on political philosophy or industrial sociology in the argument of cases nor was it asked to write such treatises in its decisions. The Court decided issues of law in particular cases. Yet in many cases, the Court easily could have reached one or more alternative results, while employing accepted, competent, and traditional modes of judicial analysis and remaining well within the boundaries of the legislative history of the Act. In a number of cases, the Court overruled decisions of the Board that were fully "responsible" in any traditional sense of appropriate legal discourse⁸⁰ and thereby pushed the law in a markedly different political direction. To justify not one result, but the entire set of results, the Court was obliged to articulate a new legal consciousness respecting labor matters, a new intellectual outlook on the nature of the wage-bargain. As this world view matured, it began to set boundaries on the type of questions the Court would ask and the possible scope of results it could reach in the labor field; that is, future decisions were mediated through, and in part determined by, the new legal consciousness. At a certain point, this mediation of legal consciousness may explain particular results in particular cases, where the mere logic of precedent or legislative history, on the one hand, or political result-orientation, on the other, are unable to do so. Though it changed and adapted throughout the postwar period,⁸¹ the outlines of the Court's modern outlook on labor issues were established in the crucible of the late 1930's. To the extent that the vision of the law is a form of legitimating ideology supportive and protective of the institutional structure of the workplace, this vision itself serves as a form of political domination.⁸²

The remainder of this Article will attempt to demonstrate that, in shaping the nation's labor law, the Court embraced those aims of the Act most consistent with the assumptions of liberal capitalism and foreclosed those potential paths of development most threatening to the established order. Thus, the Wagner Act's goals of industrial

80. See, e.g., Fansteel Metallurgical Corp., 5 N.L.R.B. 930, *rev'd*, 98 F.2d 375 (7th Cir. 1938), *aff'd*, 306 U.S. 240 (1939); Sands Mfg. Co., 1 N.L.R.B. 546 (1936), *enforcement denied*, 96 F.2d 721 (6th Cir. 1938), *aff'd*, 306 U.S. 332 (1939).

81. See note 278 *infra*.

82. The theory of the mediating role of legal consciousness, as an explanation of judicial action distinct from both formalism and instrumentalism, owes much to the work of Duncan Kennedy. See generally D. Kennedy, note 43 *supra*.

peace, collective bargaining as therapy, a safely cabined worker free choice, and some rearrangement of relative bargaining power survived judicial construction of the Act, whereas the goals of redistribution, equality of bargaining power, and industrial democracy—although abiding in rhetoric—were jettisoned as serious components of national labor policy.⁸³ This process will be discussed in terms of three central aspects of the Court's deradicalization of the Wagner Act and articulation of a more modern legal consciousness: its emphasis on contractualism; its development of the "public right" doctrine; and its promulgation of certain limitations on the legal protection of employee concerted activity.

III. JUDICIAL TREATMENT OF THE WAGNER ACT: FROM THE SIT-DOWNS TO PEARL HARBOR⁸⁴

A. THE CONTRACTUALIST PHOENIX: THE LABOR LAW REVOLUTION AS THE REVIVAL OF *Lochner v. New York*⁸⁵

In 1931, Walton Hamilton argued that the days of "freedom of contract" were numbered.⁸⁶ When the Wagner Act was passed, commentators and courts saw in it the fulfillment of this prophecy with respect to labor contracts.⁸⁷ Indeed, it is widely believed today that the Wagner Act effected a detachment of labor relations from the law of contracts that had previously governed it.⁸⁸ This notion is seriously

83. "[The section 7 rights of employees] are protected not for their own sake but as an instrument of the national labor policy of minimizing industrial strife" *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 62 (1975).

84. For purposes of the following discussion, it is unnecessary to include updating references to changes in the law since the period under discussion. Obviously, these changes are substantial and many statements of law made in the following pages have been superseded or qualified by later developments. The effort here is to reconstruct the internal structure of the legal thought of the period in order to demonstrate its ideological and institutional role and to determine whether the internalized political vision of the labor movement changed in partial response to its changing legal environment.

85. 198 U.S. 45 (1905).

86. See Hamilton, *Freedom of Contract*, in 6 ENCYCLOPAEDIA OF THE SOCIAL SCIENCES 450, 454 (1931).

87. See, e.g., NLRB v. Mackay Radio & Tel. Co., 87 F.2d 611, *aff'd on rehearing*, 92 F.2d 761 (9th Cir. 1937), *rev'd*, 304 U.S. 333 (1938); Smith, *supra* note 32, at 1065-67, and sources cited therein.

88. This detachment is often seen as reflecting a broader trend toward the general atrophy of contract law.

The most dramatic changes touching the significance of contract law in modern life . . . came about, not through internal developments in contract law, but through developments in public policy which systematically robbed contract of its subject-matter. Some of the best known of these developments

misleading. Contract is alive and well in the law of labor relations.⁸⁹ To be sure, the collective bargaining agreement is a special kind of contract, with peculiar legal incidents,⁹⁰ but despite the strongly anti-contractualist overtones of the Act⁹¹ the Supreme Court ensured from

have been mentioned—labor law, antitrust law, insurance law, business regulation, and social welfare legislation. The growth of these specialized bodies of public policy removed from “contract” (in the sense of abstract relationships) transactions and situations formerly governed by it.

L. FRIEDMAN, CONTRACT LAW IN AMERICA 24 (1965). See also G. GILMORE, THE DEATH OF CONTRACT (1974).

89. See H.K. Porter Co. v. NLRB, 397 U.S. 99, 108 (1970) (Black, J.) (“One of these fundamental policies [of the Act] is freedom of contract.”).

90. For example, the collective bargaining contract is subject to certain special canons of interpretation designed to effectuate substantive federal labor policy. See United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960). See also Vaca v. Sipes, 386 U.S. 171 (1967)(complex entry barriers to individual employee's suit on collective bargaining contract fashioned to protect arbitral process pursuant to federal labor policy); Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) (federal courts commissioned to fashion a substantive law of the collective bargaining agreement based on federal labor policy under the Labor Management Relations (Taft-Hartley) Act § 301, 29 U.S.C. § 185 (1970)).

It has been persuasively argued that the distinctive features of the collective bargaining contract have been so far elaborated that it may appropriately be said that it is not a contract at all in the traditional sense, but a “charter” or “code” establishing a system of private law for governing, and an adjudicatory mechanism for resolving, disputes within the workplace; that is, that the “contractual” analysis of the collective bargaining agreement must now be superseded by a “governmental function” conception. See Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CALIF. L. REV. 663 (1973).

Professor Feller's “institutional” argument, even if fully accepted, does not rebut the position advanced here concerning the reincarnation and vitality of contractualism in the Wagner Act cases (with the resulting regressive political impact). Feller's primary point is that contractual rights do not vest in *individual employees* under a collective bargaining agreement, but even in his view the collective agreement is a contract between the employer and the *union*. See *id.* at 792-805. Thus, Feller's theory contains an irreducible contractualist core. See *id.* at 802-03, 853-54. There could not be a more explicit statement of the authoritarian character of the workplace than his. See *id.* at 737-38. Compare Dunau, *Employee Participation in the Grievance Aspect of Collective Bargaining*, 50 COLUM. L. REV. 731 (1950). See also Lynd, *The Right to Engage in Conceted Activity After Union Recognition*, 50 IND. L.J. 720 (1975); M. Rauch, *Individual Rights Under a Labor Agreement: Doctrine and Theory During the Interwar Period* (1975)(unpublished paper on file at MINNESOTA LAW REVIEW). In sum, the development of the governmental function conception of the collective bargaining agreement represents not the demise or death of contract, but the emergence of a new conception of contract law appropriate to the complexity of postwar corporate capitalism. See notes 154-84 *infra* and accompanying text.

91. See, e.g., National Labor Relations (Wagner) Act § 8(3), 29 U.S.C. § 158(a)(3)(1970) (impinging upon the right of employers to choose their employees); *id.* § 8(5), 29 U.S.C. § 158(a)(5) (creating a duty to bargain exclusively with union selected

the start that contractualism would be the jurisprudential framework of the law of labor relations.⁹²

The political ramifications of the Court's revivification of labor contractualism at the moment of its apparent demise can be seen from an analysis of the philosophy or ethos of freedom of contract. Although contrary emphases on social control had never been excluded from the law of contracts,⁹³ in the nineteenth century, freedom of contract doctrine reshaped and revised that law so as to provide a framework for protecting expectations and facilitating transactions deemed essential or desirable from the standpoint of the emerging capitalist order.⁹⁴ In the spirit of *laissez faire*, the doctrine extolled the social virtue of uncomelled private-ordering of most transactions: the right of private citizens to establish the legal incidents and standards governing most of their relationships.⁹⁵ The central moral ideal of contractualism was and is that justice consists in enforcing the agreement of the parties so long as they have capacity and have had a proper opportunity to bargain for terms satisfactory to each. Contractual justice is, therefore, formal and abstract: within the broad scope of legal bargains it is disinterested in the substantive content of the parties' arrangements.⁹⁶

by a majority of employees). Moreover, if the duty to bargain were, as once feared, to be interpreted as requiring the making of objectively reasonable proposals and counter-proposals, it threatened to involve the state directly in the determination of terms and conditions of employment, see notes 53-73 *supra* and accompanying text, a manifest threat to traditional contractualist notions.

92. See notes 103-53 *infra* and accompanying text.

93. See F. KESSLER & G. GILMORE, CONTRACTS 1-15 (2d ed. 1970).

94. On the connection between the appearance of modern contract law and the rise of capitalism, see M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860, ch. 6 (1977); F. KESSLER & G. GILMORE, *supra* note 93, at 1-15; Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943); Thompson, *The Moral Economy of the English Crowd in the Eighteenth Century*, 50 PAST & PRESENT 76 (1971).

95. The underlying philosophical assumptions of the freedom of contract doctrine parallel those that characterize the classical liberal political tradition, see note 38 *supra* and accompanying text; namely, that all values are arbitrary, subjective, and personal; that society is an artificial aggregation of autonomous individuals who come together solely for the instrumental purpose of maximizing personal satisfactions; that the state should do no more than facilitate the orderly quest for such satisfactions; and that, because values are arbitrary and subjective, only the concurrence, actual or constructive, of individual desires can provide standards of ethical obligation. See M. HORWITZ, *supra* note 94, at 161.

96. It is, of course, commonplace that many traditional contract doctrines, such as capacity, duress, undue influence, and unconscionability, allow or even invite judges to inquire into the substantive terms of a contract. Indeed, it is well known that judges do so anyway in the course of applying doctrines intended precisely to disallow such inquiry, although ordinarily such substantive scrutiny cannot be accomplished

Since its appearance a century or more ago, the moral and social policy of freedom of contract has been assailed by critics who regard as its chief vice the fact that the substantive content of private-ordering reflects the gross disparities of economic power characteristic of capitalist society.⁹⁷ In this view, freedom of contract is, in practice, an institutional framework for the legitimate exercise of coercive power.⁹⁸ The amount of freedom created by the system of freedom of contract depends on the structure of economic power,⁹⁹ yet differences of economic or class power are ordinarily either ignored or regarded as legitimate in contractualist jurisprudence, particularly in its late nineteenth- and early twentieth-century conceptualist version.¹⁰⁰ The

explicitly without subverting the prevailing rules of law. See U.C.C. § 2-302, Comment 1; I. MACNEIL, CASES AND MATERIALS ON CONTRACTS 279-81 (1971); Kessler, *supra* note 94, at 633. Nonetheless, the animating ideology of contractualism urges courts to regard as morally irrelevant the substantive terms of a contract, and historically this has often led to oppressive results.

The disjunction of form and substance in modern contract law is exemplified with exceptional clarity in H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970) (Black, J.).

97. Contractualism has also been criticized by questioning the validity of its underlying metaphysical assumptions. Thus, in contrast to the liberal political tradition, it has been argued that the good is not arbitrary and wholly subjective; that needs and values can arise from shared social experience apart from mere coincidence or situations of domination; that there is a natural, spontaneous component of human sociality; that public and private life are indissolubly linked; that the ideal of community is a meaningful and worthy starting point for political philosophy; and that justice properly has a substantive meaning. Each of these themes has been advanced by major dissenting intellectual traditions in liberal society, located at a variety of positions on the political spectrum; they are reflected in the Marxist tradition from which this paper draws its inspiration. See generally R. UNGER, KNOWLEDGE & POLITICS (1975).

98. The system of "free" contract described by nineteenth century theory is now coming to be recognized as a world of fantasy . . . As welcome fiction is slowly displaced by sober fact, the regime of "freedom" can be visualized as merely another system, more elaborate and more highly organized, for the exercise of economic pressure.

Dawson, *Economic Duress and the Fair Exchange in French and German Law*, 11 TUL. L. REV. 345, 345 (1937). See also Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603 (1943).

99. See Weber, *Freedom and Coercion*, in ON LAW IN ECONOMY AND SOCIETY 188-91 (M. Rheinstein ed. 1954).

100. An extraordinarily powerful statement of this view has been rendered by the Supreme Court:

No doubt, wherever the right of private property exists, there must and will be inequalities of fortune; and thus it naturally happens that parties negotiating about a contract are not equally unhampered by circumstances. . . . [I]t is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights.

Coppage v. Kansas, 236 U.S. 1, 17 (1915).

tendency of freedom of contract doctrine has been to treat as naturally preordained an historically contingent system of class relations.

In the context of the labor market, freedom of contract produced oppressive and morally defective results for two reasons. First, the wage-bargain is inherently an unequal exchange, because the value produced by the employee, and appropriated by the capitalist, must ordinarily be greater than the value received back in wages.¹⁰¹ Second, the wage contract is more than a legal relationship. It establishes an entire system of social relations in the workplace whereby the employer is entitled to control the worker's actions and choices during the major portion of his waking hours. Thus, labor contractualism functions as the institutional basis of domination in the workplace.¹⁰² Private-ordering in the labor market therefore means, for the ordinary American worker, only the freedom to choose one capitalist or another to whom to sell one's labor power. It offers no freedom to opt out of the social relations of capitalism, to participate as a subject in defining the quality of work or of life. It is for this reason that

101. This is the essence of Marx's theory of surplus value. See 1 K. MARX, CAPITAL 270-306 (Fowkes trans. 1976). See also G. Young, Justice and Capitalist Production: Marx and Bourgeois Ideology (May 28, 1977) (unpublished paper presented to the Conference on Critical Legal Studies, Madison, Wisconsin). In my view, this theory remains sound, notwithstanding persuasive criticisms that have challenged the continuing validity of some of Marx's other economic ideas, and the fact that, with the rise of labor unions, the disparity between capital and labor may be somewhat abated.

102. In their capacity as commodity traders, all participants [in the market], capitalists and workers, are free in the sense that they can sell to anyone willing to buy, and buy from anyone willing to sell. This applies to the worker's sale and the capitalist's purchase of labour-power just as much as it applies to transactions in any other commodity. As traders, capitalists and workers participate equally . . . [But, having] sold himself, the worker must now work for the capitalist. In the labour-process he works under the control of the capitalist, producing what the latter wants, submitting to capitalist labour discipline and performing the kind of work the capitalist desires.

Rowthorn, *Neo-Classicism, Neo-Ricardianism, and Marxism*, NEW LEFT REV., July-August 1974, at 63, 79-80. This point derives from Marx's theory of alienation, first articulated in his early works, see generally K. MARX, EARLY WRITINGS 279-400 (R. Livingstone & G. Benton trans. 1975); K. MARX, ECONOMIC AND PHILOSOPHIC MANUSCRIPTS OF 1844 (M. Milligan trans. 1964), and developed throughout his mature work, see generally K. MARX, *supra* note 101; K. MARX, GRUNDRIFFE (M. Nicolaus trans. 1973). Capitalist wage-labor for Marx, was not an expression of freedom and creativity, but a veritable "catastrophe of the human essence." Breines, *Notes on Georg Lukács' "The Old Culture and the New Culture,"* TELOS, Spring 1970, at 1, 13 (quoting Marcuse, *Neue Quellen zur Grundlegung des historischen Materialismus*, 9 DIE GESELLSCHAFT 136 (1932)). Work continues to be an experience of domination and dehumanization for most people in late capitalism. See generally H. BRAVERMAN, LABOR AND MONOPOLY CAPITAL (1974).

working-class movements have traditionally sought to curtail freedom of contract, through struggles to limit the hours of work, to set minimum wages, or to restrict the employer's discretion in hiring and firing.

The foremost task of the Supreme Court, in the wake of the Wagner Act, was to resolve whether the wage-bargain would remain fundamentally within the contractualist, private ordering framework. This task was accomplished in the very first cases decided under the Act. *NLRB v. Jones & Laughlin Steel Corp.*¹⁰³ and its companion cases¹⁰⁴ are chiefly remembered for their far-reaching innovations in the areas of federalism, the commerce power, and the scope of judicial review,¹⁰⁵ but this fact must not obscure their crucial historical role in updating and preserving the freedom of contract ideal.

Jones & Laughlin began by establishing that employees would be allowed to pool their bargaining power to offset the superior economic position of the employer and that the employer would not be permitted to interfere with its employees' decision whether to adopt a collective posture for wage-bargaining or their choice of a representative for that purpose.¹⁰⁶ Chief Justice Hughes' conception appeared to be that employees had a privilege to create a quasi-fiduciary or protected economic relationship between each of them individually and the others by constituting a collective bargaining unit and designating an "agent" or "agency" (a word commonly used to refer to unions in the early opinions) to represent them.¹⁰⁷ The designation of the bargaining agency constituted the creation of the "protected" relationship, and the unfair labor practices proscribed in section 8¹⁰⁸ were conceived essentially as torts of injurious interference with the

103. 301 U.S. 1 (1937).

104. *NLRB v. Fruehauf Trailer Co.*, 301 U.S. 49 (1937); *NLRB v. Friedman-Harry Marks Clothing Co.*, 301 U.S. 58 (1937); *Associated Press v. NLRB*, 301 U.S. 103 (1937); *Washington, Va. & Md. Coach Co. v. NLRB*, 301 U.S. 142 (1937).

105. See, e.g., *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 25-32 (1937). A number of subsequent labor cases raised the commerce power issue, but as a constitutional question it rapidly became moot so far as the Wagner Act was concerned. See *NLRB v. White Swan Co.*, 313 U.S. 23 (1941); *NLRB v. Bradford Dyeing Ass'n*, 310 U.S. 318 (1940); *NLRB v. Fainblatt*, 306 U.S. 601 (1939); *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938); *Santa Cruz Fruit Packing Co. v. NLRB*, 303 U.S. 453 (1938).

106. See 301 U.S. at 33-34.

107. See *id.*

108. Section 8 made it an unfair labor practice for an employer generally to interfere with the rights of employees, to dominate or interfere with the formation or administration of labor organizations, to discriminate against members of a labor organization, or to refuse to bargain collectively. See National Labor Relations (Wagner) Act § 8, 29 U.S.C. § 158(a)(1)-(5) (1970).

privileged relationship.¹⁰⁹ That is, employer interference with employee choice of a bargaining representative was treated conceptually as similar to employee interference with the employer's protected relationship with its representative, such as would occur, for example, if an employee intercepted the employer's communications with counsel:

[Legitimate] collective action would be a mockery if representation were made futile by interference with freedom of choice. Hence the prohibition by Congress of interference with the selection of representatives for the purpose of negotiation and conference between employers and employees, "instead of being an invasion of the constitutional right of either, was based on the recognition of the rights of both."¹¹⁰

But the Court emphatically rejected any suggestion that the Act abolished private-ordering as the framework of relationships in the workplace:

The Act does not compel agreements between employers and employees. It does not compel any agreement whatever. It does not prevent the employer "from refusing to make a collective contract and hiring individuals on whatever terms" the employer "may by unilateral action determine." . . . The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation, and, on the other hand, the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than such intimidation and coercion.¹¹¹

109. See 301 U.S. at 33-34.

110. *Id.* at 34 (quoting *Texas & N.O.R.R. v. Brotherhood of Ry. & S.S. Clerks*, 281 U.S. 548, 570 (1930)). The "quasi-tort" conception of the unfair labor practice had been previously articulated in the Railway Labor Act cases. See *Virginian Ry. Co. v. System Fed'n No. 40*, 300 U.S. 515 (1937); *Texas & N.O.R.R. v. Brotherhood of Ry. & S.S. Clerks*, 281 U.S. 548 (1930). The Court leans heavily on the authority of these cases in *Jones & Laughlin*. The symmetry of Chief Justice Hughes' view was faintly echoed in the 1947 Taft-Hartley amendments by the addition of rarely invoked section 8(b)(1)(B), which made it an unfair labor practice for labor organizations to restrain or coerce "an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." *Labor Management Relations (Taft-Hartley) Act* § 8(b)(1)(B), 29 U.S.C. § 158(b)(1)(B) (1970).

111. 301 U.S. at 45-46 (citations omitted). Chief Justice Hughes' apparent belief in the survival of the employer's right to enter individual contracts of employment notwithstanding the duty to bargain collectively was clearly incongruent with the statutory plan, as the Court soon made clear. See *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678 (1944); *Order of R.R. Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342 (1944); *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944). It indicates, however, how far the Court strained to preserve individualist contractualism. See *Weyand*, *supra* note 61, at 568-69.

In the Court's view, the Act did not infringe on normal managerial prerogatives except insofar as the employer was prohibited from invading the employees' privilege to pool their bargaining power and to choose and act through a bargaining agent.¹¹² The Act was no warrant for a regime of governmental supervision of normal managerial decisions. The Court rejected any inference that the law would inquire into the substantive justice of labor-management relations or the fairness of the wage-bargain. In short, the opinion of Chief Justice Hughes really went no further than the dissenting opinions in the classical freedom of contract cases of *Adair v. United States*¹¹³ and *Coppage v. Kansas*;¹¹⁴ his conceptual universe was akin to that which inspired those opinions.¹¹⁵

112. See *Associated Press v. NLRB*, 301 U.S. 103, 132-33 (1937).

113. 208 U.S. 161 (1908).

114. 236 U.S. 1 (1915). Indeed, the Court in *Jones & Laughlin* claimed to distinguish *Adair* and *Coppage*, thereby avoiding the need to overrule them. See 301 U.S. at 45.

115. The Court's adherence to traditional contractualist ideals was further evidenced by its unwillingness to detonate the explosive question of duress in the employment contract. The moral presuppositions of contract law logically compel the existence of a doctrine that contracts entered into under duress, where free-choice is overborne, are unenforceable. See Dawson, *Economic Duress—An Essay in Perspective*, 46 MICH. L. REV. 253 (1947); Note, *Economic Duress After the Demise of Free Will Theory: A Proposed Tort Analysis*, 53 IOWA L. REV. 892 (1968). The problem with this doctrine, and its companion, undue influence, as applied to the law of labor relations is articulating boundaries to its application. In a world where survival is the dominant motivation of employees in entering the wage-bargain, an expansive application of these doctrines would undermine the contractualist, private-ordering structure of the labor market because, as Dawson convincingly argues, the logic of the doctrine is to invite scrutiny of the substantive fairness of the exchange. See Dawson, *supra* at 282-90. This contradiction between the conceptual and logical necessity for a doctrine of nonliability on account of duress and the imperatives of social and economic reality has had a permanent existence in the law of labor contracts. Cf. *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229, 263-74 (1917) (Brandeis, J., dissenting) ("[i]f it is coercion to threaten to strike unless [the employer] consents to a closed union shop, it is coercion also to threaten not to give one employment unless the [employee] will consent to a closed nonunion shop").

In *Jones & Laughlin*, Chief Justice Hughes refused to confront this contradiction. He conceded that employees were disadvantaged in bargaining with employers:

Long ago we stated the reason for labor organizations. We said that they were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and family; that if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment; that union was essential to give laborers opportunity to deal on an equality with their employer.

301 U.S. at 33 (citing *American Steel Foundries v. Tri-City Cent. Trades Council*, 257 U.S. 184 (1921)). Because of this disparity, employees would henceforth have a privilege to pool their bargaining power.

Subsequent cases of the period preserved this framework, with a bloc composed of Chief Justice Hughes and Justices Roberts and Stone continuing to adhere to contractualism and a conceptualist style of analysis. In *NLRB v. Mackay Radio & Telegraph Co.*,¹¹⁶ for example, the Court established the crucial strategic right of struck employers to offer permanent positions to workers hired to replace strikers (so long as the strike was not provoked or prolonged by unfair labor practices).¹¹⁷ The manner in which the Court reached its conclusion is instructive. The issue before the Court was whether, as a matter of labor policy, the employer should have the weapon of permanent replacement at its disposal. The Court, however, never candidly addressed this question, saying only that it did not follow from

But having sanctioned this limited interference with the traditional model of freedom of contract so as to make freedom of contract work, the Court left the parties largely on their own. The concept of duress was not made available to challenge the integrity of the wage-bargain so long as neither party violated the rules designed to permit employees to bargain collectively. Even in those cases, the law would act only to remedy a quasi-tortious interference with a privileged relationship, see notes 107-10 *supra* and accompanying text, not a defect of contractualism itself. Any hint that the Act might bar management from utilizing its vastly superior bargaining power in labor negotiations was silenced. In this respect, labor law was not detached from the law of contracts, but assimilated to itself the persistent antinomies of contractualism.

116. 304 U.S. 333 (1938)(Roberts, J.).

117. See *id.* at 345-46. The National Labor Relations Board did not challenge this position, for reasons that are unclear. Rather, it focused on its claim that discrimination against union adherents in the process of reinstating or recalling employees at the conclusion of an economic strike violated the Act. The former issue, however, was clearly presented in the case.

The employer's theory in the lower court was that it had a constitutional, as well as statutory, right to treat the employment relationship as voluntarily severed when employees embarked upon an economic strike and that the Board's order seeking reinstatement on account of an unfair labor practice occurring subsequent to the onset of a strike invaded not only its protected liberty to decline to contract with "former" employees, but also its freedom to maintain its contracts with permanent replacements. See *NLRB v. Mackay Radio & Tel. Co.*, 87 F.2d 611, 627-29, *aff'd on rehearing*, 92 F.2d 761 (9th Cir. 1937), *rev'd*, 304 U.S. 333 (1938). On rehearing, the court of appeals adopted the view, as a matter of statutory construction, that the employer was invulnerable to any charge of an unfair labor practice occurring at the end of an economic strike because, at the outset, economic strikers lost the status of employees, see 92 F.2d at 764-65; one judge took the view that the maximum right of economic strikers was to be reinstated to the position of applicants for employment rather than as employees, see *id.*

The Board's failure to argue that an offer of permanent placement to strikebreakers is unlawful is surprising, since few other forms of employer conduct have a more chilling effect on employee concerted activity. Moreover, it would have been a natural argument to attempt to bring permanent replacement of strikers within the condemnation of section 8(1), read in light of the strong admonition of section 13 that the Act shall not be construed "so as to interfere with or impede or diminish in any way the right to strike." National Labor Relations (Wagner) Act § 13, 29 U.S.C. § 163 (1970).

section 13¹¹⁸ "that an employer, guilty of no act denounced by the statute, [had] lost the right to protect and continue his business by supplying places left vacant by strikers."¹¹⁹ This statement is a paradigmatic representation of the vices of conceptualist legal reasoning because the question whether the employer was "guilty of [an] act denounced by the statute" was precisely the matter to be decided, and the question whether the employer had a right to protect his business, if to do so would invade the right of his employees to engage in concerted activity, likewise required explicit analysis from the standpoint of the society's labor policy. In each case, the Court merely assumed its conclusion, presenting as compelled by the words of the Act, or by Reason, or simply as a priori true, judgments involving debatable choices from among competing economic and political values. Thus, the conceptualist tradition was upheld and continued as the Court masked the unavoidably ideological content of judicial action.¹²⁰

The *Mackay* rule remains the prevailing law.¹²¹ It is historically important because it was one of the earliest manifestations of the developing premise that once an employer lawfully bargains to impasse, it is free unilaterally to impose terms and conditions of employment, if it has the economic staying power to defeat a strike.¹²² Thus, the decision furthered the principle that the Act is disinter-

118. National Labor Relations (Wagner) Act § 13, 29 U.S.C. § 163 (1970)(protecting the right to strike).

119. 304 U.S. at 345.

120. The point is not that a realist analysis would have guaranteed a different or better result in *Mackay*. An explicit sociopolitical analysis might have more candidly addressed the real issues involved, but ultimately a realist balancing of competing interests in light of Congress' labor policy might have led to the same result. Neither conceptualism nor realism succeeds in immunizing adjudication from politics, nor is either a method that provides a determinate answer to every legal problem. The effort here is simply to delineate the texture and vision of the legal consciousness developing in the cases under discussion.

121. *But see NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967) (continuing recall rights of economic strikers); *Laidlaw Corp.*, 171 N.L.R.B. 1366 (1968) (continuing recall rights of economic strikers), *enforced*, 414 F.2d 99 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970).

122. True, the union has no duty to yield on a so-called mandatory subject of collective bargaining, and it can strike to win its demands if it has otherwise met its duty to bargain in good faith under the 1947 amendments. But this does not negate the superior bargaining and staying power that management typically enjoys over labor, nor does it correct the imbalances contained in the law itself. For example, employers are ordinarily free to make unilateral changes respecting nonmandatory subjects of collective bargaining, whereas labor has no legal right to enforce its demands as to such subjects. *See generally Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971); *NLRB v. Katz*, 369 U.S. 736 (1962); *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958).

ested in the substantive justice of the labor contract since it taught that not only would the wage-bargain not ordinarily be subject to substantive scrutiny, but also that the economic combat of the parties had replaced a "meeting of the minds" as the moral basis of labor contractualism.

*NLRB v. Sands Manufacturing Co.*¹²³ was another example of this trend.¹²⁴ In *Sands*, a dispute arose between the union and the employer during the term of a collective bargaining agreement. The Court held that the statutory duty to bargain attached in such situations.¹²⁵ The dispute in question remained unresolved after discussion, however, and a work-stoppage was threatened. The company thereupon discharged the entire work force and reopened the plant with a wholly new complement of employees. It was contested whether the initial dispute went to a question of contract application or to a proposed modification; in any event, the union refused to compromise its position. Interpreting the contract *sua sponte*, the Court announced that its terms favored the employer's version and that, therefore, the union was unilaterally insisting upon a midterm modification.¹²⁶ The Court held that employees may not use economic

123. 306 U.S. 332 (1939) (Roberts, J.).

124. See generally *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 297-98 (1939) (Stone, J.) (holding that an employer cannot be guilty of violating section 8(5) unless a formal offer to bargain is tendered by employee representatives); *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938) (Hughes, C.J.) (preserving through strained analysis the validity of contracts that, judging strictly from the facts recited by the Court, were tainted by unfair labor practices); see also S. KONEFSKY, CHIEF JUSTICE STONE AND THE SUPREME COURT 151-58 (1945).

The element of extreme formalism in the *Columbian Enameling* opinion stems from the Court's refusal to accept a Board finding of fact that an offer to bargain—relayed by federal conciliators on the scene—was indeed outstanding in this case. Justice Stone, unimpressed by the Board's appraisal of the evidence, in effect held that the employees had forfeited or waived their right to oblige the company to bargain by having failed to meet a rather exacting standard of what constitutes an offer. See 306 U.S. at 297-300. Justice Black's dissent was caustic:

To conclude that the company—through its president—was unaware the conciliators were acting at the instance of the Union, and, therefore, is not to be held responsible for its flat refusal to meet with its employees, is both to ignore the record and to shut our eyes to the realities of the conditions of modern industry and industrial strife. The atmosphere of a strike between an employer and employees with whom the employer is familiar does not evoke, and should not require, punctilious observance of legalistic formalities and social exactness in discussions relative to the settlement of the strike. . . . In a realistic view, the company's statement of July 23 to the conciliators, that it would meet with them and the Union, clearly indicated the company's acceptance of the fact that the conciliators were appearing for the Union.

Id. at 303-04.

125. 306 U.S. at 342.

126. See *id.* at 340-45.

power to impose their demands in such a situation, despite the fact that the contract did not contain a "no-strike" clause and, in fact, reserved full liberty of action to the employees in case of impasse in attempts to resolve "misunderstandings" between the company and the work force.¹²⁷ The employees' insistence that they would not work except under their interpretation of the contract was held to be a "breach" or "repudiation" of an implied contractual obligation, sufficient to divest the workers of their statutory right to engage in concerted activity. The Court stated,

The Act does not prohibit an effective discharge for repudiation by the employee of his agreement

. . . If, as we have held, the respondent was confronted with a concerted refusal on the part of [the union] to permit its members to perform their contract there was nothing unlawful in the company's attempting to procure others to fill their places.¹²⁸

The Court's opinion in *Sands* relied on a highly formalistic and contractualist reading of the statute to legitimize the inequalities of bargaining power arising from the unequal social distribution of property ownership.¹²⁹ The ban on the use of economic power by the union was, given the record presented, presumably meant to apply equally to attempts to impose a union interpretation of an agreement as well as to achieve a midterm modification of the agreement. That is, if an impasse is reached, the employer could use its economic power, namely its ownership and control of the business, to get its way, but the workers could not use their primary economic weapon, the work-stoppage.

The Court's initial period of contractualist formalism under the Wagner Act was followed by a series of realist victories, written chiefly by Justices Black and Douglas. One series of these cases concerned the definition of "free choice," an essential ingredient of traditional contract doctrine, in the context of alleged employer domination of labor organizations.

The old-fashioned company union was one of the preeminent

127. See *id.* at 343. It is curious that *Sands* is no longer remembered in terms of its actual facts, but rather is commonly assumed to reflect the case in which the union has agreed to a no-strike clause. For example, one prominent casebook cites *Sands* for the proposition that "although a strike during the term of a labor contract, in violation of a no-strike clause, is not prohibited by the Labor Act, it is unprotected . . ." A. Cox, D. Bok, & R. GORMAN, *LABOR LAW* 935-36 (8th ed. 1977).

In 1947 Congress provided statutory guidelines relating to the midterm modification problem with the addition of section 8(d)(1)-(4), 29 U.S.C. § 158(d)(1)-(4) (1970).

128. 306 U.S. at 344-45.

129. See generally note 100 *supra* and accompanying text.

weapons employers used to defeat the labor movement.¹³⁰ Therefore, section 8(2) of the Act was a crucial battleground in the 1930's.¹³¹ If the Act were to fulfill its functions, the company union had to be eliminated. To this end, the Board and the courts developed the remedy of "disestablishing" organizations found to be employer-dominated.¹³² The realists pushed this remedy to its limits. In *NLRB v. Falk Corp.*,¹³³ for example, one issue was whether the remedy of "disestablishment" meant that the company union was to be denied a place on the ballot in an election to choose a new bargaining representative. Justice Black, writing for the Court, upheld the Board's conclusion that the "company-created union could not emancipate itself from habitual subservience to its creator, and that in order to insure employees that complete freedom of choice guaranteed by § 7, [the dominated union] must be . . . kept off the ballot."¹³⁴ In other words, if the workers voted for the company union in a fair election, that would not be "free choice." This free choice had a substantive content, determined by the history of the workplace, not merely a formal content determined by the mechanics of secret balloting.¹³⁵

The realist tide swept away other formalistic doctrines. In *NLRB v. Waterman Steamship Co.*,¹³⁶ Justice Black held that the formalit-

130. See, e.g., I. BERNSTEIN, *supra* note 34, ch. 3; I. BERNSTEIN, *supra* note 7, *passim*; Wilcock, *supra* note 63, at 288, 296-97. After the Act became law many employers attempted to achieve similar results not by setting up company unions from scratch, but by encouraging employees to form an independent and, inevitably, employer-dominated union or by assisting the more conservative of two competing unions to gain exclusive bargaining status. Typically this involved favoring the AFL affiliate over the CIO affiliate. See generally *id.* at 305.

131. National Labor Relations (Wagner) Act § 8(2), 29 U.S.C. § 158(a)(2) (1970) (unfair labor practice for an employer to dominate or interfere with any labor organization).

132. See, e.g., *NLRB v. Newport News Shipbuilding & Dry Dock Co.*, 308 U.S. 241, 251 (1939); *NLRB v. Pacific Greyhound Lines, Inc.*, 303 U.S. 272, 275 (1938); *NLRB v. Pennsylvania Greyhound Lines, Inc.*, 303 U.S. 261, 263, 268 (1938).

133. 308 U.S. 453 (1940).

134. *Id.* at 461.

135. See also *NLRB v. Link-Belt Co.*, 311 U.S. 584 (1941); *NLRB v. Bradford Dyeing Ass'n*, 310 U.S. 318 (1940) (employees who had designated a CIO affiliate as their bargaining agent and had switched, in the context of section 8(2) unfair labor practices, to a company union could not revoke their earlier choice).

Link-Belt is perhaps the most extreme example of the realist position in the free choice area. In that case, it was argued that the "dominated union" was, in fact, a bona fide labor organization and that the unfair labor practices consisted only in the employer's favoring it over another union. Accordingly, it was argued that full disestablishment would amount to the destruction of an innocent union due to the wrongdoing of a third party. See 311 U.S. at 600. Justice Douglas rejected this argument, upholding the Board's position that the only way to protect "complete freedom of choice" and to dissipate the effects of employer misconduct was completely to disestablish the favored union. See *id.*

136. 309 U.S. 206 (1940).

ties of the typical seaman's contract, under which each voyage constitutes a separate and distinct contractual relationship, were not controlling under the Act.¹³⁷ The words of the Act were

not limited so as to outlaw discrimination only where there is in existence a formal contract or relation of employment between employer and employee. They embrace, as well, all elements of the employment relationship which in fact customarily attend employment and with respect to which an employer's discrimination may as readily be the means of interfering with employees' right of self-organization as if these elements were precise terms of a written contract of employment. . . . For the purpose of the Act, it is immaterial that employment is at will and terminable at any time by either party.¹³⁸

The Court held that, although the employer had a clear contractual right to discharge his employees after a voyage for any reason whatsoever or no reason at all, it could not exercise that right in such a way as to chill union activity.¹³⁹

Similarly, in *International Association of Machinists v. NLRB*,¹⁴⁰ the Court developed a broad doctrine of "imputed liability" in order to safeguard worker free choice.¹⁴¹ The Court stated that the technicalities of *respondeat superior* were not applicable to proceedings under the Act:

The employer, however, may be held to have assisted the formation of a union even though the acts of the so-called agents were not expressly authorized or might not be attributable to him on strict application of the rules of *respondeat superior*. . . . Thus, where the employees would have just cause to believe that solicitors professedly for a labor organization were acting for and on behalf of the management, the Board would be justified in concluding that they did not have the complete and unhampered freedom of choice which the Act contemplates.¹⁴²

Undoubtedly, the free choice decisions overrode certain traditional doctrines governing the employment contract, but they did not attack contractualism as such. They sought to achieve what the Court saw as the preconditions of "true" or "actual" private-ordering; they were designed to make contractualism work, not to abolish it. There is no intimation in these decisions that, once the

137. See *id.* at 218-19.

138. *Id.*

139. See *id.*

140. 311 U.S. 72 (1940) (Douglas, J.).

141. See also *NLRB v. Link-Belt Co.*, 311 U.S. 584 (1941) (Douglas, J.); *H. J. Heinz Co. v. NLRB*, 311 U.S. 514 (1941) (Stone, J.).

142. 311 U.S. at 80 (citations omitted).

preconditions of "actual liberty of contract" were realized, the law would inquire into the substantive results of bargaining. Thus, the new realism preserved the formal and abstentionist posture of traditional contract doctrine,¹⁴³ and the political function of labor contractualism—the creation of an institutional framework in which social relations of domination appear in the guise of free exchange—was reaffirmed.

Only the uncertain shadow of the section 8(5)¹⁴⁴ duty to bargain clouded this contractualist horizon. The legislative history of section 8(5) contains repeated indications that the Act was not intended to require the parties to agree to anything, but just to meet and bargain.¹⁴⁵ Nevertheless, it was clear from the pre-NLRA experience of the National Labor Board and the "old" National Labor Relations Board under section 7(a) of the National Industrial Recovery Act,¹⁴⁶ that the duty to bargain would have to mean more, if it were to mean anything, than just a minimal duty physically to meet with employee representatives. The Board and the courts, however, largely avoided setting the parameters of the duty during the period under discussion, because the primary battleground of the 1930's was the field of union organization and recognition, not collective bargaining as such.¹⁴⁷

143. An interesting illustration of residual contractualism is the case of *National Licorice Co. v. NLRB*, 309 U.S. 350 (1940), which held that the Board has the power under section 10(c) to set aside contracts that are the fruit of unfair labor practices and that contractual agreements cannot waive or defeat essential rights under the Act. This represented a very severe stance toward employer domination. Yet what the remedy meant in practice was left totally unclear since it was left open to the employees to sue on the tainted contract even though the employer was barred from taking any benefit from it. That is, although the contract was so tainted by illegality as to render ordinary enforcement against public policy, it was still sometimes a contract *vis-à-vis* the employees.

144. The text of section 8(5) appears in note 72 *supra*.

145. See, e.g., 79 CONG. REC. 7659 (1935). Section 8(d), which explicitly provides that the duty to bargain "does not compel either party to agree to a proposal or require the making of a concession," was not added until 1947. *Labor Management Relations (Taft-Hartley) Act*, ch. 120, § 101(8)(d), 61 Stat. 136 (1947) (codified at 29 U.S.C. § 158(d) (1970)).

146. Ch. 90, § 7(a), 48 Stat. 195 (1933) (protecting the right of employees to organize and bargain collectively). The National Industrial Recovery Act was held unconstitutional in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

147. [T]he courts so far . . . have for the most part approved the present Labor Board's statements of principle which might logically be said to imply a testing of the reasonableness of the employer's arguments and proposals . . . [but they] have so far largely shied away from a deliberate approval of such a testing process, perhaps because the board has done likewise.

Smith, *supra* note 32, at 1105-06.

In the period before Pearl Harbor, the only major Supreme Court decision under section 8(5) was *H.J. Heinz Co. v. NLRB*,¹⁴⁸ which held that, although an employer was not compelled to agree to a union's demands, if the parties did reach an agreement, the section 8(5) duty required the employer, on request, to incorporate the agreed terms into a written, signed document.¹⁴⁹ It was logically possible to imply from *Heinz* a power in the Board to scrutinize employers' bargaining conduct against a standard of objectively reasonable bargaining practice, but the Court's actual reasoning supplied no basis for anticipating that the Board would be empowered to judge bargaining conduct, much less the content of proposals, under a broad reasonableness standard.¹⁵⁰ Rather, the *Heinz* rule was understood at the time as a minimal imposition designed to stabilize and regularize the collective bargaining relationship, as part of the program to make contractualism work. Thus, although the Court's pronouncements in this area were minimal, it is nevertheless apparent, given that substantive scrutiny was at least a plausible outcome in light of the legislative history, that the Court's preference for purely procedural review represented a matter of conscious choice.¹⁵¹

148. 311 U.S. 514 (1941)(Stone, J.).

149. *See id.* at 523-26.

150. The argument for such a reading would be as follows: because in *Heinz* the company complied in all other respects with its duty to bargain (*i.e.*, since there was no evidence of bad faith or surface bargaining in a subjective sense, save what was supplied by the refusal to sign a document, *see id.* at 523), the Court must have adopted a reasonableness test under which certain practices would be deemed without more to constitute a refusal to bargain in good faith. This argument gains weight from the Court's substantial reliance on the fact that written contracts are the accepted practice where mature collective bargaining prevails. *See id.* at 523-25.

There are several problems with this argument. First, the Court indicated at one point that the company's refusal to join in a signed writing was properly deemed by the Board as evidence of want of good faith in a subjective sense, *see id.* at 526; that is, the Court simply was not clear about whether the refusal to sign was taken as circumstantial evidence of state of mind or as objectively unreasonable conduct. Second, the context and phrasing of the references to accepted industrial practice indicate that they were offered as evidence that Congress specifically had addressed itself to this particular form of bargaining conduct and intended that the written contract rule attach to the duty to bargain, *see id.* at 524-25; this presentation of the argument is somewhat different from saying that the Board was free to judge *any* category of bargaining behavior against the accepted industrial practice respecting such conduct. Finally, the Court's opinion explicitly reaffirmed that the statute imposes no obligation on employers to reach any agreement. *See id.* at 525.

151. The foregoing discussion is not a legal argument that the Board should have been granted the power of substantive scrutiny over wage-bargaining. Nor is it contended that substantive review of the wage-bargain would have been the answer to labor's problems or a guarantee of justice for the American worker. From a theoretical standpoint, the idea of a democratic process establishing what the community regards as fair and just terms of employment is attractive compared to leaving such decisions

The rudimentary foundations of a new jurisprudential synthesis, "social conceptualism," began to appear on two levels in the process of development of the new labor contractualism. On a substantive level, the Court recognized that state regulation of the wage-bargain could coexist with private-ordering. This outlook at once affirmed two seemingly contradictory social values: that it is appropriate and just for the state to rearrange the relative bargaining strengths of capital and labor because the pre-existing disparity of power produced substantively unacceptable results and that the state ought not to intervene in private wage-bargaining to encourage or assure any particular substantive outcome. In logic, these competing social values may be mutually exclusive, but not so in the new judicial consciousness, which accommodated both regulation and private-ordering by refusing to push either principle to its limits.¹⁵²

On a second, methodological level, the emerging legal consciousness became sensitized to the social and political ramifications of legal rules and decisions, but the Supreme Court was not prepared simply to assimilate legal reasoning to social policy analysis. The political realism that indicated the necessity of state intervention in labor bargaining did not inexorably lead to legal realism as an adjudicatory method. On the contrary, the process at work was the reification of ad hoc social policies into "values" or "first principles" that

to the outcome of the raw conflict of class power. I do not share the premise of liberal political theory that there is an inherent contradiction between community intervention and individual or group self-actualization and freedom. Nevertheless, in society as presently constituted, there is no reason to assume that a grant of substantive review powers to an administrative agency would, with any likelihood, result in a democratic process or just terms of employment. The Board is *a priori* no more likely to serve the needs of employees (or employers) than the courts or the private collective bargaining process.

My political claim, therefore, does not rest on a preference for the assumption by the Board of substantive review powers. Rather my claim is that, had the Court permitted and encouraged the Board to assume such powers, a potentially radicalizing force would have been introduced into the law by the making of a *public political issue* of the substantive terms of the wage-bargain. Public discussion and criticism of Board decisions respecting the fairness of terms of employment would have had a politicizing and destabilizing impact on the labor movement by creating greater public understanding of the contingent nature of social relationships and the way in which the purportedly neutral decisions of government reflect the preponderant influence of class power on the state. In this sense, the Court's preference for a formal, proceduralist model represented a deradicalization of the potential of the Wagner Act.

152. See Kennedy, *supra* note 38, at 1731-37. The problem with this unstable merger was, of course, how courts deciding cases were to determine the relative weight to be accorded to each branch of the dichotomy. It was not until the postwar period that substantial efforts were made to develop a method for making such determinations, while purporting to maintain the separation of law and politics. See note 277 *infra* and accompanying text.

were then conceived to provide determinate—and therefore legitimate—solutions to legal problems, as, for example, with Justice Roberts' concept of the employer's right to protect the business and Justices Douglas' and Black's notion of free choice.¹⁵³

B. THE PUBLIC RIGHT DOCTRINE: NEW DEAL ADMINISTRATIVE LAW AS A CONTRIBUTION TO PLURALIST POLITICAL THEORY

A classical problem of liberal political theory has been to preserve the neutrality of the state in a world understood to be dominated and motivated by the conflict of private interests. Liberal political theory has always conceived of the state as being radically divorced from, or rising above, civil society, the realm of private and group interest. During the early years of the Great Depression, however, the purported neutrality of the state, particularly the federal judiciary was, as had happened before, called into widespread doubt. The New Dealers eventually appointed to the Court confronted a massive crisis of legitimacy. Their difficult task, therefore, was to make the law more responsive to pressing social priorities and the constituencies that the reform programs of the New Deal were designed to aid, while restoring the purported neutrality of the state. That is, although the law was to be mobilized to carry out new regulatory and welfare functions representing the triumph of a particular political coalition, the rhetoric of liberal legalism had to be repaired and enhanced, proving that Americans did, indeed, live under the rule of law, not men.

The articulation of a comprehensive modern administrative law was one of the New Deal jurists' most creative responses to this dilemma. In this jurisprudence, the actions of administrative agencies and tribunals were considered subject to the rule of law and not mere reflections of the shifting interests of partisan power, yet administrative bodies were also conceived to be relatively emancipated from rule-formalism insofar as their responsiveness to changing crystallizations of public interest and policy was deemed legitimate. This uneasy merger of formalism and result-orientation required careful and articulate justification. New doctrinal formulas were needed to enable progressive courts to brush aside some of the finer concerns and details of traditional private adjudication in reviewing the work of the agencies, while at the same time avoiding any appearance of capitulation to partisan interest.

A second challenging aspect of rehabilitating the state's image as neutral arbiter above group conflict was to provide a theoretical justification for the delegation of the lawmaking function (*i.e.*, the

153. See note 276 *infra* and accompanying text.

setting of enforceable standards of conduct) to socially significant groups.¹⁵⁴ If the Wagner Act and the other New Deal reform measures were to succeed, the law had to allow for some notion of legitimate private lawmaking. The radical disjunction between public and private that characterized classical liberal political theory was no longer tenable in the late capitalist welfare state in which the government systematically and pervasively intervened in the private sector and, conversely, in which institutions, such as corporations and unions, hitherto deemed to be purely private in nature, increasingly assumed the functions, attributes, or powers of quasi-governmental agencies.¹⁵⁵ On the other hand, the public/private distinction could not be abandoned altogether without subverting the basic philosophical premises of the liberal democratic state. The preservation of the public/private distinction in a world in which it was becoming increasingly incoherent, at least in the classical liberal formulation, became one of the central projects of the new jurisprudence of social conceptualism. One minor but significant early episode in the process was the strategy developed in the NLRA cases of maintaining the forms of private conflict-resolution in the administrative and legal process while superimposing on them a new version of the higher law through the public right doctrine.

In *Jones & Laughlin*, Chief Justice Hughes made a remarkable claim:

Thus, in its present application, the statute goes no further than to safeguard the right 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. Employees have as clear a right to organize and select their representatives for lawful purposes as the [company] has to organize its business and select its own officers and agents. Discrimination and coercion to prevent the free exercise of the right of employees to self-organization and represen-

154. The delegation of lawmaking powers to private parties or groups is an essential feature of the private-ordering system. In a contract, for example, the state in effect delegates an element of its sovereignty to the parties, who are permitted to establish legal incidents governing their relationship that are legally protected as against third parties. See Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 585-92 (1933); Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 201 (1937). Nonetheless, the myth of American law had hitherto been that the delegation of sovereignty to private groups is fundamentally repugnant to our constitutional scheme. See Carter v. Carter Coal Co., 298 U.S. 238 (1936); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

155. See R. UNGER, *LAW IN MODERN SOCIETY*, ch. 3 (1976); A. Fraser, *supra* note 13.

tation is a proper subject for condemnation by competent legislative authority.¹⁵⁶

Hughes' choice of language implied that the rights guaranteed by the Act were not created by it. Rather, they were basic or inherent rights deriving from a source of law much more fundamental than mere statute.¹⁵⁷ Hughes conceived of the Act as providing for the protection, as a matter of public policy, of a *right inhering in private law*¹⁵⁸ and as striking a general balance between the respective private rights of adverse parties, with the Board assigned the detailed task of weighing and resolving clashes of *private* interests in particular factual settings.

Of course, the historical record flatly contradicted the view that the right to organize was recognized by law prior to 1935 as a fundamental, extrastatutory right, or, indeed, as a right at all. Perhaps Chief Justice Hughes was motivated to use this schema by a desire to depreciate the momentousness of what the Court was actually doing in *Jones & Laughlin*. In any case, the opinion reflects the inertia of legal concepts, the difficulty of conceptualizing radical change even at the moment it is experienced or brought about. Though everyone knew the Act was a marked political departure, the radical innovations it implied in legal theory were at first only dimly understood. The idea of a right had theretofore been associated with a private law conception of adjudication,¹⁵⁹ and it is no surprise, therefore, that Hughes interpreted the Act within this conceptual framework. Moreover, his account of the Act had, in retrospect, a great virtue: it focused attention on the raw fact of class (group) conflict, rather than on the nebulous, and ideological, conception of a public interest rising above such conflict.

The Hughes formulation, however, was short-lived. The outline of an alternative scheme first appeared, implicitly, in *American Federation of Labor v. NLRB*.¹⁶⁰ The case was a political bombshell,

156. 301 U.S. at 33 (emphasis added).

157. What that source is we are never told, although in *Texas & N.O.R.R. v. Brotherhood of Ry. & S.S. Clerks*, 281 U.S. 548 (1930), Chief Justice Hughes denominated the right of railway workers to choose representatives for collective bargaining without employer interference as a "property interest." *Id.* at 571.

158. No doubt this announcement came as a surprise to working people, particularly those on the picket lines who were then facing a zenith of employer-inspired violence. For example, the Memorial Day Massacre, in which peaceful, demonstrating steel strikers were assaulted without warning, leaving ten dead and many wounded, see I. BERNSTEIN, *supra* note 7, at 485-90, occurred several weeks after the Court held the Act constitutional in *Jones & Laughlin*.

159. See Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282-83 (1976).

160. 308 U.S. 401 (1940)(Stone, J.).

because the Court, in effect, allowed Harry Bridges' International Longshoremen's & Warehousemen's Union (CIO) to have a Pacific Coast-wide bargaining unit over the outraged opposition of the rival International Longshoremen's Association (AFL), which stood to lose its small base on the Pacific coast. The Court's holding was that judicial review of Board decisions in representation proceedings was not available unless and until the employer was charged with an unfair labor practice and raised a section 9¹⁶¹ issue as a defense.¹⁶² This decision implicitly rested on the idea that the statutory scheme does not protect private entitlements but protects certain public interests. A private litigant was entitled to the orderly completion of the Board's processes, but it had no individual right, entitlement, or claim to the section 9 unit determination preferred by it. Thus, no deprivation of any right was involved in forbidding the courts to hear the claims of aggrieved private parties except under the circumstances provided by the statutory scheme. Under other circumstances, there was literally no claim to be heard.

The case was widely viewed as a prolabor victory, notwithstanding the wrath of the AFL, because the ruling put an end to one of the employers' favorite antiunion delaying tactics. But it had an unfortunate consequence, which CIO as well as AFL leaders were quick to see. If the party aggrieved in the section 9 proceeding was the union, for example, a union that later lost an election because of an improper definition of the bargaining unit, it would have *no* remedy under the Act because it would never be in a position to defend a refusal-to-bargain charge.¹⁶³

161. National Labor Relations (Wagner) Act § 9, 29 U.S.C. § 159 (1970) (empowering the National Labor Relations Board to certify the exclusive employee representative for purposes of collective bargaining).

162. See 308 U.S. at 406; *cf. Switchmen's Union v. National Mediation Bd.*, 320 U.S. 297 (1943) (federal courts lack jurisdiction to hear union's claim that National Mediation Board wrongfully certified bargaining representative under Railway Labor Act); *United Electrical Radio & Mach. Workers v. International Bhd. of Electrical Workers*, 115 F.2d 488 (2d Cir. 1940) (federal courts may not adjudicate union's claim that rival union conspired with companies to violate its statutory bargaining rights even though such remedies as the Board may grant would not be fully congruent with the wrongs allegedly suffered).

163. It soon became clear that this doctrinal system could lead to unacceptable results. The Court was pushed into a dialectical response, namely the creation of a new judicial remedy: a cause of action for the breach of the duty of fair representation. See *Steele v. Louisville & N.R.R.*, 323 U.S. 192 (1944) (Stone, J.). Note that once union unfair labor practices were added to the statutory scheme, it became possible to conceive of mechanisms by which an aggrieved union could seek review of section 9 decisions. For example, such developments have occurred under the Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, § 704(c), 29 U.S.C. § 158(b)(7) (1970). See *Lawrence Typographical Union v. McCulloch*, 349 F.2d

The new public right schema was explicitly articulated less than two months later in *Amalgamated Utility Workers v. Consolidated Edison Co.*¹⁶⁴ Alleged employer disobedience to a Court of Appeals enforcement order prompted the union to move that the employer be cited for contempt.¹⁶⁵ Although the *Board* had standing to make such a motion,¹⁶⁶ it had declined to do so. The issue, therefore, was whether a *private party* could vindicate its rights under the Act by this means. A unanimous Supreme Court said no. Chief Justice Hughes wrote,

The Board as a public agency acting in the public interest, not any private person or group, not any employee or group of employees, is chosen as the instrument to assure protection from the described unfair conduct in order to remove obstructions to interstate commerce.

When the Board has made its order, the Board alone is authorized to take proceedings to enforce it.

It is the Board's order on behalf of the public that the court enforces. It is the Board's right to make that order that the court sustains. The Board seeks enforcement as a public agent, not to give effect to a "private administrative remedy."¹⁶⁷

As a result, if a successful charging party was aggrieved but the Board refused fully to enforce its order through contempt proceedings, that party was without remedy to protect its rights or even to obtain a hearing.¹⁶⁸ The fundamental rights spoken of in *Jones & Laughlin* were transmuted in the space of three years into privileges created by the statute and therefore measured by the Board's discretion and largesse in administering the statutory scheme. The rights of employees were now conceived to be held and defined at the pleasure of an agency of the federal government.¹⁶⁹

704 (D.C. Cir. 1965); NLRB v. Local 182, Int'l Bhd. of Teamsters, 314 F.2d 53 (2d Cir. 1963).

164. 309 U.S. 261 (1940) (Hughes, C.J.). This case was a sequel to *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938). See note 124 *supra*.

165. See *Amalgamated Util. Workers v. Consolidated Edison Co.*, 106 F.2d 991 (2d Cir. 1939) (per curiam), *aff'd*, 309 U.S. 261 (1940).

166. See *Amalgamated Util. Workers v. Consolidated Edison Co.*, 309 U.S. 261, 264-70 (1940) (construing National Labor Relations (Wagner) Act § 10, 29 U.S.C. § 160 (1970)).

167. 309 U.S. at 265-69.

168. The rules of standing were liberalized in some respects by the Warren Court. Thus, successful charged and charging parties now have standing to intervene in enforcement or review proceedings in the court of appeals, see *UAW Local 283 v. Scofield*, 382 U.S. 205 (1965), and thereby the right to seek Supreme Court review even when the Board and the Solicitor General do not wish to apply for certiorari. See *THE DEVELOPING LABOR LAW* 877-78 (C. Morris ed. 1971). The *Utility Workers* rule still prevails, however, as to contempt proceedings. See *id.* at 875.

169. See generally Boudin, "Representatives of Their Own Choosing" (pts. 1-2).

Once launched, the public right doctrine exhibited a potent power to override private interests. The Court allowed the Board to adjudicate certain contract rights without requiring the Board to join or afford a hearing to one of the contractual parties,¹⁷⁰ employed the public right doctrine to justify its previously mentioned rulings that the technicalities of *respondeat superior* do not apply to section 8 proceedings,¹⁷¹ and invoked the doctrine to justify the breakdown of traditional concepts of remedies.¹⁷²

37 ILL. L. REV. 385, 38 ILL. L. REV. 41 (1943). Boudin was counsel for the petitioner (the Union) in *Utility Workers*. See 309 U.S. at 261.

170. In a proceeding so narrowly restricted to the protection and enforcement of public rights, there is little scope or need for the traditional rules governing the joinder of parties in litigation determining private rights. Ordinarily where the rights involved in litigation arise upon a contract, courts refuse to adjudicate the rights of some parties to the contract if the others are not before it.

Here the right asserted by the Board is not one arising upon or derived from the contracts between petitioner and its employees. The Board asserts a public right vested in it as a public body, charged in the public interest with the duty of preventing unfair labor practices.

National Licorice Co. v. NLRB, 309 U.S. 350, 363-64 (1940) (Stone, J.).

171. We do not doubt that the Board could have found these activities to be unfair labor practices within the meaning of the Act if countenanced by [the company], and we think that to the extent that [the company] may seek or be in a position to secure any advantage from these practices they are not any the less within the condemnation of the Act because [the company] did not authorize or direct them. . . .

The question is not one of the legal liability of the employer in damages or for penalties on principles of agency or *respondeat superior*, but only whether the Act condemns such activities as unfair labor practices so far as the employer may gain from them any advantage in the bargaining process of a kind which the Act proscribes. To that extent we hold that the employer is within the reach of the Board's order to prevent any repetition of such activities and to remove the consequences of them upon the employees' right of self-organization, quite as much as if he had directed them.

H.J. Heinz Co. v. NLRB, 311 U.S. 514, 520-21 (1941)(Stone, J.).

172. The problem of remedies had been troublesome for the Court. In keeping with the flexibility sought in the administrative process, section 10(c) provides great latitude for the Board to fashion remedies against the backdrop of public policies embodied in the Act. See National Labor Relations (Wagner) Act § 10(c), 29 U.S.C. § 160(c)(1970). Nonetheless, Chief Justice Hughes and Justices Stone and Roberts were reluctant to let go of the traditional conceptualistic notion that remedies are somehow logically deducible from or inherent in the rights they secure. In several early cases the Court reversed the Board for straying too far into the area of overbroad or unconventional remedies. See NLRB v. Express Publishing Co., 312 U.S. 426 (1941)(Stone, J.); Republic Steel Corp. v. NLRB, 311 U.S. 7 (1940)(Hughes, C.J.); NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240 (1939)(Hughes, C.J.); Consolidated Edison Co. v. NLRB, 305 U.S. 197 (1938)(Hughes, C.J.). But the realist view eventually triumphed in Justice Frankfurter's opinion in Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194

The culmination of the public right conception occurred in *Pittsburgh Plate Glass Co. v. NLRB*.¹⁷³ In that case, a CIO affiliate had an overall majority and a majority in each of five of PPG's six flat glass plants. An independent union, with a history of employer domination,¹⁷⁴ claimed a majority in the sixth plant. The Board found appropriate a single bargaining unit encompassing all six plants,¹⁷⁵ thus writing off the independent union for practical purposes. The Court affirmed the Board's action, relying in part on the view that it was permissible for the Board to consider in deciding the case that, if the sixth plant were placed in a separate bargaining unit, the employer could use it to maintain operations in the event of a strike in the larger unit and thereby tip the balance of economic power in its favor.¹⁷⁶

The Court's holding itself was of modest significance, especially since the Board had receded from its policy of certifying such massive units prior to the *Plate Glass* decision.¹⁷⁷ But the Court's conception of the Board's role under the Act was of preeminent importance. Read broadly, *Plate Glass* implied that determinations as to the appropriateness of bargaining units were strictly reserved to the Board's discretion¹⁷⁸ and that in making such determinations, the Board was authorized to include in its calculations a balancing of the relative economic power of the opposed class forces.¹⁷⁹ Presumably, the bal-

(1941) ("The Act does not create rights for individuals which must be vindicated according to a rigid scheme of remedies. It entrusts to an expert agency the maintenance and promotion of industrial peace."). See notes 249-75 *infra* and accompanying text.

173. 313 U.S. 146 (1941)(Reed, J.).

174. See *id.* at 150. See generally *Pittsburgh Plate Glass Co.*, 8 N.L.R.B. 1210 (1938) (providing for withdrawal of recognition from dominated union), *enforced per curiam*, 102 F.2d 1004 (8th Cir. 1939).

175. See *Pittsburgh Plate Glass Co.*, 10 N.L.R.B. 1111, 1115-22 (1939). See generally *Pittsburgh Plate Glass Co.*, 15 N.L.R.B. 515 (1939) (employer committed unfair labor practice by refusing to bargain as to unit including the sixth plant), *enforced*, 113 F.2d 698 (8th Cir. 1940), *aff'd*, 313 U.S. 146 (1941).

176. 313 U.S. at 164-65.

177. See, e.g., *Chrysler Corp.*, 13 N.L.R.B. 1303 (1939).

178. As Justice Reed stated,

The petitioners' contention that § 9(a) grants to the majority of employees in a unit appropriate for such purposes the absolute right to bargain collectively through representatives of their own choosing is correct only in the sense that the "appropriate unit" is the one declared by the Board under § 9 (b), not one that might be deemed appropriate under other circumstances.

313 U.S. at 152-53 (citations omitted).

179. An independent unit at Crystal City, the Board was justified in finding, would frustrate division-wide effort at labor adjustments. It would enable the employer to use the plant there for continuous operation in case of stoppage of labor at the other plants. We are of the view that there was

ancing of relative economic forces was deemed a matter of neutral, expert judgment, although the Court never explained how one might define or identify a public interest in one or another balance of power between capital and labor. In practice, *Plate Glass* placed enormous political power in the hands of the Board to delimit the contours of legitimate class struggle. Not only was the Board granted wide discretion in enforcing the Act, but it also had the power to define the balance of opposing economic forces on which the substantive outcome of collective bargaining depends.

Of course, it is not suggested that the Court granted the Board carte blanche to restructure American class relations; the historical impact of the case should not be exaggerated. Rather the effort here is to recover the Court's conceptualization of the statutory scheme, in which the Court recognized that as a practical matter the Board had the power dramatically to shape the terrain on which private-ordering will take place and thereby crucially to influence its outcome.¹⁸⁰ In *Plate Glass* the Court endowed this de facto power with the imprimatur of law. Although institutional and political considerations have led the Board generally to utilize this power discreetly over the years, in the context of the late 1930's, *Plate Glass* brought to fruition an intellectual movement to conceptualize employees' rights as public rights, measured by the discretion of the Board.¹⁸¹ Unavoidably, the decision in *Plate Glass* created an intellectual justification for the dependency of labor on the state, thereby reinforcing the cultural hegemony of liberal political theory.¹⁸² This dependence hindered labor from conceiving of itself, or acting, as an autonomous

adequate evidence to support the conclusion that the bargaining unit should be division-wide.

313 U.S. at 164-65 (footnote omitted). But see *Publishers' Ass'n v. NLRB*, 364 F.2d 293 (2d Cir.) (presenting as settled, and apparently never questioned, the proposition that the Board may not weigh the potential economic balance of power in making unit determinations), cert. denied, 385 U.S. 971 (1966). The *Plate Glass* dissenters launched a vitriolic attack on the Board's procedural conduct of the case, but apparently accepted the premise that the Board may permissibly sacrifice the wishes of the employees in the sixth plant in favor of the "greater effectiveness of employee bargaining through a division-wide representative." 313 U.S. at 173.

180. The significance of this power was overlooked by even the most acute observers. See, e.g., Boudin, *supra* note 169.

181. See generally Jaffe, *The Public Right Dogma in Labor Board Cases*, 59 HARV. L. REV. 720 (1946).

182. See note 12 *supra*. The doctrine's influence extended beyond the realm of jurisprudence into that of political theory proper, which experienced a crisis parallel to the one in law. The new jurisprudence was a precursor of, and provided intellectual support for, one particular version of liberal political theory that came to dominate the postwar scene, that is, "pressure group pluralism" as found, for example, in the work of Robert Dahl and David Truman. See R. DAHL, *WHO GOVERNS?* (1961); D. TRUMAN, *THE GOVERNMENTAL PROCESS* (1951).

movement capable of fundamentally transforming the established social relations of production. The public right doctrine created a justification in political theory for labor's dependence on government, thereby tending to transform a contingent historical relationship¹⁸³ into a moral destiny.¹⁸⁴

C. THE INHIBITION OF WORKER SELF-ACTIVITY

Labor was the beneficiary of an exciting series of legal victories in the early years of Wagner Act interpretation. In procedural matters, the scope of judicial review of Board findings under section 10 was narrowly confined,¹⁸⁵ and the courts were forbidden to review or interdict Board proceedings until they had run their proper course.¹⁸⁶ Thus, the Court made clear that it would protect the Board's processes from judicial invasion and employer stalling tactics. In substantive matters, the Court liberalized the law of picketing¹⁸⁷ and endowed ordinary union activities with immunity under the antitrust

183. Due to certain insurmountable historical weaknesses, such as its status as a minority movement, the conservatism and weakness of its leadership, and the great power and flexibility of its corporate adversaries, the American labor movement was dependent upon the federal government for legitimacy and protection in the late 1930's. Cf. Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959 § 2(a), 29 U.S.C. § 401(a) (1970) ("in the public interest, it continues to be the responsibility of the Federal Government to protect employees' rights"). This can be seen particularly in the contribution of the Labor Board to reversing the CIO's strategic defeat in the Little Steel Strike of 1937. See generally I. BERNSTEIN, *supra* note 7, at 432-98, 727-34.

184. As a postscript to this discussion and a prelude to the next section, it should be noted that the public right doctrine was applied selectively. That is, when the Court disapproved of the Board's action in a particular case, it suddenly reverted to the more exacting standards of traditional private adjudication. Most often, this latter approach was used to defend the property rights of employers from encroachment by the public rights supposedly protected under the Act. The result was severe limitations on the protection of employee concerted activity. See, e.g., *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941), discussed at notes 228-75 *infra* and accompanying text; *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939), discussed at notes 201-17 *infra* and accompanying text.

185. See *NLRB v. Link-Belt Co.*, 311 U.S. 584 (1941); *NLRB v. Bradford Dyeing Ass'n*, 310 U.S. 318 (1940); *NLRB v. Waterman S.S. Corp.*, 309 U.S. 206 (1940). *Waterman* and *Bradford* are cited disapprovingly by Justice Frankfurter in his seminal opinion in *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 478 (1951), though he concurred in both of the earlier decisions.

186. See *NLRB v. Falk Corp.*, 308 U.S. 453 (1940) (no anticipatory judicial review); *AFL v. NLRB*, 308 U.S. 401 (1940) (no anticipatory judicial review of Board's unit determinations); *In re NLRB*, 304 U.S. 486 (1938) (final order doctrine); *Newport News Shipbuilding & Dry Dock Co. v. Schaufler*, 303 U.S. 54 (1938) (exhaustion of remedies); *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938) (exhaustion rule). See also *Ford Motor Co. v. NLRB*, 305 U.S. 364 (1939).

187. See *Thornhill v. Alabama*, 310 U.S. 88 (1940); *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552 (1938); *Senn v. Tile Layers' Union*, 301 U.S. 468 (1937).

laws.¹⁸⁸ The latter action brought an end to what for generations had been one of the primary legal weapons used by employers against the labor movement.

Intermixed with these cases, however, were several decisions narrowing and limiting legally protected union activity and hampering the effective enforcement of the Act. Chief among these decisions were *NLRB v. Fansteel Metallurgical Corp.*,¹⁸⁹ condemning the sit-down strike; *NLRB v. Mackay Radio & Telegraph Co.*,¹⁹⁰ allowing permanent replacement of economic strikers; *NLRB v. Sands Manufacturing Co.*,¹⁹¹ withdrawing section 7 protection from certain strike activity in the context of an existing collective bargaining relationship; and *Phelps Dodge Corp. v. NLRB*,¹⁹² establishing the mitigation rule.

The early Wagner Act cases had a much more momentous consequence than can be captured in this simple tally of labor's immediate gains and losses. The unprecedented privileges granted to labor created discord in conventional legal thought. In generating doctrines to justify this new legal status, the Court was called upon to develop a conception of the proper role of unions in the reformed social order.

Two motifs are paramount in the Court's portrait of "legitimate" union activity. First was the fiduciary theme, the Court's view that unions have an institutional role setting them apart from their members. Initially this idea was but a conceptual corollary of the "quasitor" schema Hughes articulated in *Jones & Laughlin*, namely, the view that the union was something separate and apart from the employees and the purpose of the Act was to prevent unwarranted employer invasion of the privileged relationship between the employees and their "agent."¹⁹³ But the theme soon developed a life of its own. The delineation of legitimate forms of concerted activity contained the unstated proviso that unions wishing the protection of the Board had to keep their members in line. *Sands Manufacturing* and *Fansteel* were abrupt warnings that what, from a management perspective, were the more spontaneous or undisciplined forms of concerted activity, the midterm strike¹⁹⁴ and the sit-down strike, would not be protected by the Act. The public right doctrine implied that union conduct would not be judged solely against the backdrop

188. *United States v. Hutcheson*, 312 U.S. 219 (1941) (Frankfurter, J.). See also *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940).

189. 306 U.S. 240 (1939), discussed at notes 201-17 *infra* and accompanying text.

190. 304 U.S. 333 (1938), discussed at notes 116-20 *supra* and accompanying text.

191. 306 U.S. 332 (1939), discussed at notes 123-29 *supra* and accompanying text.

192. 313 U.S. 177 (1941), discussed at notes 228-75 *infra* and accompanying text.

193. See notes 107-10 *supra* and accompanying text.

194. Although a midterm strike is often an unauthorized or a wildcat strike, the strike in *Sands* was neither. See generally 306 U.S. at 336-39.

of competing employer and employee interests, but against the public interest in industrial peace as well. The ideological premise that there is such a general societal interest in the smooth operation of the industrial system was always taken for granted.¹⁹⁵ The union was seen not just as a private fiduciary vis-à-vis the membership of the bargaining unit, but also as a "trustee" of this public interest, and "responsible behavior" by unions became a quid pro quo for the legal privileges extended by the Act.¹⁹⁶

Second, the Court's wage-bargain theme represented, as the term implies, a conception that the function of a union was to make a wage-bargain; that is, its role was limited to the sphere of exchange.¹⁹⁷ The very power that unions had in arranging the sale of labor power signaled their inevitable participation in reproducing the alienation that characterized the work-process itself and negated the alternative historical and moral claims they might have advanced with respect to the sphere of production.¹⁹⁸

195. The idea of a general or public interest overriding private or group interest is a staple of liberal political thought, most brilliantly conceived in G. HEGEL, *PHILOSOPHY OF RIGHT* (T. Knox trans. 1965) (Berlin 1821), but with roots going back to T. HOBBES, *LEVIATHAN* (London 1651) and with contemporary reflections in so-called "policy science." But the public interest idea is a value-laden, indeed, ideological construct in societies that are, in fact, dominated by class power. *See generally* notes 34-49 *supra* and accompanying text.

196. The fiduciary theme has become a dominant aspect of the nation's labor policy. It is visible, *inter alia*, in the creation of a cause of action for breach of the duty of fair representation, *see Steele v. Louisville & N.R.R.*, 323 U.S. 192 (1944), and its progeny, in the regulatory scheme of the Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, Pub. L. No. 86-257, 73 Stat. 519 (codified in scattered sections of 29 U.S.C.), and in the doctrines bolstering the institutional power of unions vis-à-vis their members, *see, e.g.*, *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50 (1975); *Vaca v. Sipes*, 386 U.S. 171 (1967); *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953).

Unions should, of course, be obligated to act responsibly toward those they represent. Given the power of unions over unit members' lives, and the history of abuse in areas such as race and sex discrimination, it would be intolerable not to have protections such as the duty of fair representation. My point is only that it was not historically inevitable that unions would come to play such an institutionalized role in bureaucratic capitalism that their own internal political processes would be inadequate guarantees of responsible behavior, or that the legal rights of labor would be measured against a duty of unions to protect industrial peace as well as to represent their members. The early conceptualization of unions as entities apart from their members contributed to the historical process by which unions came to play this institutional role, thereby creating the need for massive state intervention in their internal affairs.

197. Although no case states this proposition in such bold relief, it is implicit in the totality of the Supreme Court opinions discussed in this Article.

198. Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control. Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in them-

The negative implications of these two themes provided the underpinnings of a narrow conception of the social relations of the workplace in three fundamental and interrelated ways. First, the treatment of workers as sellers of labor power and as consumers of commodities, but not as producers, hindered them from achieving an alternative perspective in which worker self-activity, the process by which workers produce value by embodying their labor power in things, services, and relationships, would be recognized as the basis of all production in, and reproduction of, society. The Court's vision countered the corollary of this alternative premise, that workers' organizations ought to affirm and advance the proposition that those whose collective efforts make social production possible should have a decisive say in the decisions that affect the process, that they pose themselves morally and institutionally as the authors of their own destinies in the workplace.

Second, since it was imagined that there was an overall societal interest in maintaining the prevailing industrial system, the Court's fiduciary theme encouraged responsible unions to accept the social order as given and to seek to defend and better the lot of their members only within its ground rules. Here again, the fact that the social fabric is itself produced and reproduced through the activity of society's members was obscured and denied.

Finally, since union activity was denominated as something separate from members' self-activity in the workplace, unions could not function as participatory institutions in which workers continuously articulated and redefined their aspirations for the governance and transformation of the work-process. The union was not expected to foreshadow the organizational form of a democratic workplace, nor to provide the workers with an "experiment . . . in self-organization, in initiative and collective decision-making, in short, an experiment in the possibility of their own emancipation."¹⁹⁹ In sum, the Court's narrowly restricted vision of legitimate union activity stood in every sense as a barrier to the possibility that labor would participate in bringing about fundamental social change.²⁰⁰

selves primarily about conditions of employment . . . If, as I think clear, the purpose of § 8 (d) is to describe a limited area subject to the duty of collective bargaining, those management decisions which are fundamental to the basic direction of a corporate enterprise . . . should be excluded from that area.

Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 223 (1964)(Stewart, J., concurring).

199. Gorz, *Reform and Revolution*, in THE SOCIALIST REGISTER 125 (1968).

200. The discussion in the preceding paragraphs has relied extensively upon the workers' control tradition within Western European socialism. See generally THE UNKNOWN DIMENSION: EUROPEAN MARXISM SINCE LENIN (D. Howard & K. Klare eds. 1972).

These themes are vividly illustrated by the extraordinary case of *NLRB v. Fansteel Metallurgical Corp.*,²⁰¹ which condemned the sit-down strike. In *Fansteel*, massive and undisputed employer unfair labor practices designed to defeat unionization of the plant provoked the employees to stage a sit-down strike in their factory. They were evicted by the police, and many strikers were fined or jailed under state law. The employer then encouraged the formation of a company union, continuing its course of illegal conduct.²⁰² The Board attempted to undo the effects of the employer illegality by ordering the company to bargain on request with the bona fide union and to reinstate the strikers.²⁰³ The Court agreed that the employer had committed unfair labor practices,²⁰⁴ but overruled the reinstatement of the sit-down strikers, holding that under the Act the company could legally discharge the strikers for occupying the plant and that the Board lacked authority under section 10(c)²⁰⁵ to order reinstatement.²⁰⁶ In the language of Chief Justice Hughes,

reprehensible as was that conduct of [the company], there is no ground for saying that it made [the company] an outlaw or deprived it of its legal rights to the possession and protection of its property. The employees had the right to strike but they had no license to commit acts of violence or to seize their employer's plant. . . . But in its legal aspect the ousting of the owner from lawful possession is not essentially different from an assault upon the officers of an employing company, or the seizure and conversion of its

Admittedly, this tradition was not strong in the United States prior to the 1930's, for reasons obviously nonlegal in nature. But to the extent that the crisis of the 1930's offered the possibility of a rupture in the historical continuum, legal practice contributed to reinforcing the traditional political culture.

201. 306 U.S. 240 (1939) (Hughes, C.J.). See also Hart & Prichard, *The Fansteel Case: Employee Misconduct and the Remedial Powers of the National Labor Relations Board*, 52 HARV. L. REV. 1275 (1939) (representative of the realist attack on formalism in the 1930's). Hart's name appears on the Government brief in a number of the cases discussed in this Article. E.g., Brief for Petitioner at 73, *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938); Brief for Respondent at 41, *Santa Cruz Fruit Packing Co. v. NLRB*, 303 U.S. 453 (1938); Brief for Petitioner at 55, *NLRB v. Pennsylvania Greyhound Lines, Inc.*, 303 U.S. 261 (1938). For Hart's subsequent contributions, see note 277 *infra*.

202. See 306 U.S. at 247-50.

203. See *Fansteel Metallurgical Corp.*, 5 N.L.R.B. 930, 952-53, *rev'd*, 98 F.2d 375 (7th Cir. 1938), *aff'd*, 306 U.S. 240 (1939).

204. See 306 U.S. at 251-52.

205. Section 10(c) states that "[i]f . . . the Board shall be of the opinion that any person named in the complaint has engaged in . . . any . . . unfair labor practice, then the Board shall . . . order . . . such person . . . to take such affirmative action including reinstatement of employees . . . as will effectuate the policies of this Act." National Labor Relations (Wagner) Act § 10(c), 29 U.S.C. § 160(c) (1970).

206. See 306 U.S. at 252-59.

goods, or the despoiling of its property or other unlawful acts in order to force compliance with demands. To justify such conduct because of the existence of a labor dispute or of an unfair labor practice would be to put a premium on resort to force instead of legal remedies and to subvert the principles of law and order which lie at the foundations of society.²⁰⁷

The extreme formalism underlying the *Fansteel* opinion is evident in Hughes' focus on the legal aspects of the discharge, rather than on the scope of the Board's remedial powers. Hughes reasoned that the strikers' tortious conduct was independent from the employer's unfair labor practices and an adequate basis for divesting them of their status as employees,²⁰⁸ notwithstanding the language of section 2(3), which provides for the continuation of employee status in contemplation of law notwithstanding its cessation in fact in connection with current labor disputes or unfair labor practices.²⁰⁹ Accordingly, it followed that the strikers could not avail themselves of the protection and remedies of the statute. Hughes, however, belatedly recognized that the remedial powers of the Board were not limited to the assistance of employees;²¹⁰ the ultimate test under section 10(c) was whether reinstatement would serve, under the circumstances, to effectuate the policies of the Act.²¹¹ Responding briskly in the negative, Hughes argued that reinstatement would only give license to tortfeasors and discourage the peaceful settlement of industrial disputes.²¹² Concluding this formalist tour de force, Hughes castigated the workers for their sit-down tactic:

It was a highhanded proceeding without shadow of legal right

. . . This was not the exercise of "the right to strike" to which the Act referred It was an illegal seizure of the buildings in order to prevent their use by the employer in a lawful manner and thus by acts of force and violence to compel the employer to submit.²¹³

207. *Id.* at 253.

208. See *id.* at 255-57.

209. See National Labor Relations (Wagner) Act § 2(3), 29 U.S.C. § 152(3) (1970).

210. Note, however, that Justice Stone concurred solely on the ground that, as nonemployees, the strikers were ineligible for remedial reinstatement under section 10(c). See 306 U.S. at 263-65. In an excess of formalism, he claimed that the statute did not withdraw the employer's right "to terminate the employer-employee relationship for reasons dissociated with the stoppage of work because of unfair labor practices." *Id.* at 264 (emphasis added).

211. See *id.* at 257.

212. See *id.* at 258.

213. *Id.* at 252, 256.

The realists bitterly counterattacked, contending that the real question was the Board's expert assessment, arguably proper under section 10(c), that the purposes of the Act would best be served by reinstating the strikers.²¹⁴ Since any unlawful acts committed by the strikers had already been punished quite severely under state law,²¹⁵ to impose the further penalty of allowing the company permanently to sever the employment relationship would permit employers to subvert the Act by provoking sit-down strikes or other tortious conduct and then reaping the benefits of their unfair labor practices by immunizing themselves from the Board's remedial powers. This, at any rate, was the Board's considered judgment.²¹⁶ The real issue of the case, brusquely avoided by the Court, was the soundness and legitimacy of this judgment of social policy.²¹⁷

The best that can be said for Hughes' view is that it blatantly ignored historical and social reality. The Court ignored the fact that the sit-down strikes were essentially a reaction to the widespread and often violent refusal by employers to obey the law between 1935 and 1940. The historical record is clear that the sit-down strikes were an indispensable weapon with which workers stemmed the tide of employer resistance to unions and to the law;²¹⁸ inferentially, they thereby helped create the political conditions for the Court's leftward shift in *West Coast Hotel Co. v. Parrish*²¹⁹ and *NLRB v. Jones & Laughlin Steel Corp.*²²⁰ That is, the sit-down strikes contributed to, rather than detracted from, whatever law and order existed in industrial life in 1939 when Hughes delivered *Fansteel*. Moreover, in sharp contrast to contemporary but traditionally conducted strikes, the sit-downs in 1936-1938 caused no deaths and little property damage.²²¹

The sit-down strike was important not only because it was so effective tactically, but also because it minimized the risks of picket-line violence. The traditional strike separates the employees from the workplace and from each other. Typically striking workers come together only serially, on the picket line. In the sit-down, however, workers posed themselves as collectively capable of organizing the workplace. The logistics of the sit-down required the constant parti-

214. See *id.* at 267 (Reed, J., dissenting in part).

215. See *id.* at 249.

216. See *Fansteel Metallurgical Corp.*, 5 N.L.R.B. 930, 949-51, *rev'd*, 98 F.2d 375 (7th Cir. 1938), *aff'd*, 306 U.S. 240 (1939).

217. See generally Hart & Prichard, *supra* note 201, at 1309-29.

218. See I. BERNSTEIN, *supra* note 7, at 499-501. See generally J. BRECHER, *supra* note 9, ch. 5.

219. 300 U.S. 379 (1937).

220. 301 U.S. 1 (1937).

221. I. BERNSTEIN, *supra* note 7, at 499.

cipation of all in decisionmaking and fostered a spirit of community, cooperation, and initiative. The sit-downs nurtured a new psychological and emotional experience: " 'The fact that the sit-down gives the worker in mass-production industries a vital sense of importance cannot be overemphasized.' "²²² The sit-downs were a utopian breach in the endless regularity and pessimism of everyday life, a "dereifying" explosion of repressed human spirit.²²³

By ignoring these social realities and condemning the sit-down strike, the Court interpreted the Act as standing against the possibility of emancipatory workplace experiments. *Fansteel* condemned a tactic designed to transcend the disjunction between the union and its members; it bolstered the forces of union bureaucracy in their efforts to quell the spontaneity of the rank and file. As such, it marked the end of the radical potential of the 1930's by demarcating the outer limits of disruption of the established industrial order that the law would tolerate. The utopian aspirations for a radical restructuring of the workplace, engendered by enactment of the Wagner Act and the intoxicating experience of the rise of the CIO, were symbolically thwarted by *Fansteel*, which erected labor law reform as a road-block in their path.

D. THE ROOTS OF MODERN LEGAL CONSCIOUSNESS

The contours of a more modern legal consciousness, hinted at in the earliest Wagner Act cases, were clearly visible by the beginning of the 1940's as the legal crisis of the previous decade drew to a close. The Court could be divided, somewhat schematically, into three groups. Chief Justice Hughes and Justices Stone and Roberts continued the conceptualist tradition. They were reluctant to abide by the Board's expert judgment and fearful, to some extent, of the new power of labor.²²⁴ Justices Black, Douglas, and Murphy, sometimes joined by Reed, formed the realist contingent. Their opinions evinced a purposive style of legal analysis and a willingness to defer to the discretion of the Board. There is a curious correlation between legal styles and these Justices' understanding of the fundamental purposes

222. Brecher, *The Sitdown Strikes of the 1930's: From Baseball to Bureaucracy*.
4 ROOT & BRANCH PAMPHLET 23 (n.d.) (quoting L. ADAMIC, *MY AMERICA* 408 (1938)).

223. "[The] potential of ordinary workers organizing their own action posed an implicit threat to every form of hierarchy, authority, and domination. For if the workers could direct a social enterprise as complex as, say, the Flint sitdown, why could they not reopen production under their own direction?" *Id.*

224. As late as 1941, Chief Justice Hughes and Justice Roberts still believed that unions could be attacked under the antitrust laws for engaging in ordinary secondary boycott activity. See *United States v. Hutcheson*, 312 U.S. 219, 243-46 (1941) (dissenting opinion).

of the Act. The conceptualist group persistently emphasized what is probably the most instrumental goal of the Act, industrial peace, whereas the realists stressed the more ethereal goal of employee free choice.²²⁵ Since bringing social policy explicitly into legal analysis was already disturbing to the more traditional judicial mind, the conceptualists probably felt most comfortable coming to grips with urgent and undiscriminating priorities rather than trying to elaborate on more philosophical themes requiring a more thorough-going transformation of their personal assumptions. On the other hand, in Douglas' and Black's emphasis on free choice, an abstract, highly conceptual term, can be seen an intimation of future movement away from their early realism. In the postwar period Black's labor opinions evinced a rigid contractualist formalism,²²⁶ whereas Douglas' disillusionment with Big Labor led him to adopt a stance of tenacious individualism or "anti-institutionalism."²²⁷

225. Compare *H.J. Heinz Co. v. NLRB*, 311 U.S. 514 (1941) (Stone, J.), *NLRB v. Fainblatt*, 306 U.S. 601 (1939) (Stone, J.), and *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939) (Hughes, C.J.), with *NLRB v. Link-Belt Co.*, 311 U.S. 584 (1941) (Douglas, J.), and *International Ass'n of Machinists v. NLRB*, 311 U.S. 72, 79 (1940) (Douglas, J.) (describing freedom of choice as "the essence of collective bargaining").

226. See *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970); *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965)(dissenting opinion); *Sinclair Ref. Co. v. Atkinson*, 370 U.S. 195 (1962). Black's formalism was most apparent, of course, in his treatment of the first amendment. His absolutism on free speech impacted on his labor opinions. He was prepared to hold that both the 1951 union security amendments to the Railway Labor Act, 45 U.S.C. § 152, Eleventh (1970), and certain portions of section 8(b)(4) added by the Taft-Hartley Act, 29 U.S.C. § 158(b)(4) (1970), were unconstitutional infringements of protected first amendment liberties. See *NLRB v. Fruit & Vegetable Packers Local 760*, 377 U.S. 58, 76 (1964) (concurring opinion) (construing 29 U.S.C. § 158(b)(4) (1970)); *International Ass'n of Machinists v. Street*, 367 U.S. 740, 791 (1961) (dissenting opinion) (construing 45 U.S.C. § 152, Eleventh (1970)). See also *American Communications Ass'n v. Douds*, 339 U.S. 382, 445-53 (1949) (dissenting opinion).

The liberal political thrust of Black's first amendment formalism as contrasted to the conservatism of pre-New Deal formalism on labor issues illustrates the fact that the political tendency of legal formalism, or legal realism, cannot be deduced a priori. See Kennedy, *supra* note 38, at 1777.

227. This attitude can be detected in *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50 (1975)(dissenting opinion); *NLRB v. Boeing Co.*, 412 U.S. 67 (1973)(dissenting opinion); *NLRB v. Granite State Joint Bd.*, 409 U.S. 213 (1972); *International Bhd. of Boilermakers v. Hardeman*, 401 U.S. 233 (1971)(dissenting opinion); *NLRB v. Industrial Union of Marine & Shipbuilding Workers*, 391 U.S. 418 (1968); *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967)(Black, J., joined by Douglas, J., dissenting); *National Woodworking Mfrs. Ass'n v. NLRB*, 386 U.S. 612 (1967)(Stewart, J., joined by Douglas, J., dissenting); *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965)(dissenting opinion); *UMW v. Pennington*, 381 U.S. 657 (1965)(concurring opinion); *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964) (Stewart, J., joined by Douglas, J., concurring); *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961)(concurring opinion).

It is appropriate to put Justice Frankfurter in a separate category. Though his opinions sounded the themes of legal realism, he was a legalist through-and-through, and the roots of his later attempt to mediate between realism and conceptualism were already apparent. Much sooner than Black's or Douglas', Frankfurter's work showed glimpses of the emerging "social conceptualism."

Phelps Dodge Corp. v. NLRB,²²⁸ the last Wagner Act case before Pearl Harbor, provides an excellent vehicle for delineating these disparate judicial styles and for sketching the emerging legal consciousness that came to dominate the postwar period. The case tendered four major questions:²²⁹ (1) Does an employer violate section 8(3) by refusing to hire job applicants because of their participation in union activity or affiliation with a union? (2) If so, is the Board authorized under section 10(c) to order the employer to offer jobs to such aggrieved workers? (3) Is the Board authorized to order reinstatement of aggrieved employees who have obtained "substantially equivalent employment" during the course of the litigation? (4) Must aggrieved employees mitigate their damages by seeking alternative work while awaiting redress before the Board? The Court, with some qualifications, answered each question affirmatively, although the respective majorities were formed by different Justices.²³⁰

The separate opinions in *Phelps Dodge* reveal the stages of development in modern legal thought. Justice Stone's opinion, joined by Chief Justice Hughes, was largely a dissent. It reveals both the woodiness of traditional formalism and Stone's tentative gropings toward the social conceptualist style most apparent in Justice Frankfurter's opinion. Stone and Hughes agreed that discrimination in hiring was a section 8(3) violation,²³¹ but denied that the Board could order an offending employer to offer jobs or pay compensation to the victims.²³² In their view, the employer could be punished by the stigma of a cease-and-desist order, but the aggrieved employee could get no personal redress.²³³ This was an odd result in light of the oft-repeated insistence that the Act was "remedial, not punitive,"²³⁴ and Stone reached it by a tortured path. He defined the issue to be whether section 10(c) allowed the Board to force a particular employee on an

228. 313 U.S. 177 (1941).

229. See *id.* at 181.

230. See generally Boudin (pt. 2), *supra* note 169, at 54-68.

231. Section 8(3) forbids discrimination that would "encourage or discourage membership in any labor organization." National Labor Relations (Wagner) Act § 8(3), 29 U.S.C. § 158(a)(3) (1970).

232. See 313 U.S. at 210.

233. See *id.*

234. *Id.* at 208; accord, *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10 (1940); *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 235-36 (1938).

unwilling employer, "a remedial power which few courts had ever assumed to exercise or had been thought to possess."²³⁵ He then proposed to answer this question by determining whether the words in section 10(c) granting the Board's remedial powers, "including" the power of reinstatement, implied that remedies not specifically mentioned were forbidden. The meaning of the word "including," he wrote, "must be determined by [reference to] the purpose of the Act."²³⁶ Though this sounds like realism, Stone immediately eschewed a purposive analysis by concluding that Congress probably did not intend to allow the remedy (a) because of "the traditional reluctance of courts to compel the performance of personal service contracts"²³⁷ and (b) because "an authority to order reinstatement is not an authority to compel the employer to instate as his employees those whom he has never employed."²³⁸ Point (a), with its attempted overlay of traditional contract doctrine onto the statute, is refuted by the fact that Congress overrode this precise reluctance in allowing the reinstatement remedy in the first place. Point (b) merely states the undisputed point that reinstatement is something different from an offer of new employment; the mere fact that they are different is not by itself a reason for a different conclusion of law.

Justice Stone was no more persuasive in his argument that the Board could not order reinstatement of aggrieved employees who obtained substantially equivalent employment because section 10(c) only authorized reinstatement of employees and because the definition of "employee" in section 2(3) excluded unfair labor practice victims who obtained substantially equivalent employment.²³⁹ Both statements represented mechanically restrictive readings of the statutory language. Section 10(c) provides that the Board's powers shall include the reinstatement of employees;²⁴⁰ section 2(3) provides that employees shall include those who are illegally discharged but who have not found other equivalent employment.²⁴¹ The words of the statute did not by themselves settle the question before the Court, and a construction—that is, a judicial act—was required. In keeping with the formalist style, Stone obscured the volitional elements of judicial action, thereby obscuring the political content of his decision.

Justice Murphy's opinion, joined by Justices Black and Douglas, was at the other end of the spectrum of legal analysis. The motif was

235. 313 U.S. at 210-11.

236. *Id.* at 211.

237. *Id.*

238. *Id.* at 212.

239. *Id.* at 208-10.

240. National Labor Relations (Wagner) Act § 10(c), 29 U.S.C. § 160(c) (1970).

241. *Id.* § 2(3), 29 U.S.C. § 152(3).

starkly realist: judicial deference to the Labor Board's decisions based on the latter's informed view of social policy; in other words, the abandonment of the rule of law as traditionally understood. Though more candid than Stone's, Murphy's opinion also obscured the political nature of judicial action by referring issues to the Board's expertise.²⁴² Murphy stated that the Board should be allowed to order reinstatement of employees who found new jobs because the Board might conclude that this was a good idea and the Act did not forbid it.²⁴³ On the mitigation question, he argued that (a) the Act does not require mitigation "in so many words,"²⁴⁴ (b) the Board has discretion not to require mitigation deductions,²⁴⁵ and (c) it is not the Court's business to displace the Board's judgment if it is, when "tested in the light of statutory standards . . . within the permissible range of the Board's discretion."²⁴⁶ This "standard," of course, tells us nothing. The phrases "statutory standards" and "permissible range" are without content apart from a judicial elaboration of the meaning of the Act. Thus, this ardent realist slid directly into the formalist trap of imagining that abstract principles decide cases. Murphy did tell us that the Board "might properly conclude" that mitigation should not be required, since such a position might well effectuate the purposes of the Act.²⁴⁷ But his analysis was not really about the Act's purposes; it boiled down to the view that the Board's rule would make things a little bit tougher for offending employers than Justice Frankfurter's rule.²⁴⁸ Murphy's approach was radically unstable as a model for judicial reasoning, and it helps to explain the birth of social conceptualism. To remain within the legalist institutional framework, which none of the realists had any manifest purpose to go beyond, the realist judge must eventually legitimate instrumental reasoning by reifying his or her core political and social values, by turning them into doctrines. That is, realism must evolve toward a species of formalism.

I have saved Justice Frankfurter's opinion, written for the Court, until last. It is a remarkable document, symbolizing the transition to a new phase in legal history. Rarely does one opinion traverse the entire spectrum of judicial styles with so little hesitation. At the outset, Justice Frankfurter sounded the realist theme of social

242. See 313 U.S. at 204-07.

243. See *id.* at 202-05.

244. *Id.* at 206. Justice Murphy correctly pointed out that the Act does not require a deduction from back pay for sums actually earned, let alone wages lost due to inexcusable failure to seek work, *see id.*; it was the Board's practice, however, to make this deduction, *see id.* at 198 n.7.

245. *See id.* at 206.

246. *Id.*

247. *Id.*

248. *See* text accompanying notes 271-75 *infra*.

policy analysis. His initial discussion of the purposes of the Act strongly resembled a memorandum that he had written for President Roosevelt in 1935.²⁴⁹ In each, Frankfurter portrayed the Wagner Act as the inevitable codification of settled principles of federal labor policy, citing the experience of the War Labor Board, the Railway Labor Act, and so on.²⁵⁰ This was interesting as intellectual history, but politically disingenuous, given the extraordinary opposition that greeted the Wagner Act.²⁵¹

Frankfurter's *Phelps Dodge* discussion of the Act's policies was somewhat jumbled. He earnestly argued that the Act did not take away the employer's freedom so long as the employer freely recognized the adverse claims of labor.²⁵² The Act "leaves the adjustment of industrial relations to the free play of economic forces but seeks to assure that the play of those forces be truly free."²⁵³ The Act does not interfere with the employer's rights so long as the employer does not abuse those rights by doing something the Act condemns. Protection of employees' right to organize "does not curtail the appropriate sphere of managerial freedom; it furthers the wholesome conduct of business enterprise."²⁵⁴ In sum, Frankfurter told employers that the first principle was always the "free market," but that the law would take away their freedom so as to make their freedom truly free. No doubt employers found scant reassurance in these contradictory and purportless phrases.

But reading the opinion in the light of the memorandum, one gets a glimpse of what Frankfurter really believed. In the opinion he implied that eventually all reasonable employers would accommodate themselves to collective bargaining.²⁵⁵ This was an echo of a sentiment in the earlier piece:

249. ROOSEVELT AND FRANKFURTER: THEIR CORRESPONDENCE, 1928-1945, at 603 (M. Freedman ed. 1967) [hereinafter cited as ROOSEVELT AND FRANKFURTER] (memorandum from Justice Frankfurter to President Roosevelt, dated 1941; its actual composition, however, is placed by the editor in early 1935, with revisions in 1936).

250. Compare *id.* at 604, with *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 183-85 (1941).

251. Frankfurter went so far as to cite the Erdman Act, ch. 370, 30 Stat. 424 (1898)(repealed 1913), as background evidence of a national consensus that discrimination in hiring should be suppressed, see 313 U.S. at 184, without pausing to note that the provisions of the Erdman Act most directly related to the issues of *Phelps Dodge* had been declared unconstitutional in the celebrated case of *Adair v. United States*, 208 U.S. 161 (1908). Frankfurter failed to mention his own stake in the political developments that he reviewed: one of his early positions in the federal government, launching a long career as a superlative corporate liberal technician, was as chairman of President Wilson's War Labor Policies Board.

252. See 313 U.S. at 182-83.

253. *Id.* at 183.

254. *Id.* at 182 (emphasis added).

255. *Id.* at 182-83.

The day of industrial absolutism is done. All our experience since the industrial revolution demonstrates that employers as a class cannot be relied upon, voluntarily and out of the goodness of their hearts, to give a square deal to unorganized labor; this has been precluded by the pressure of immediate self-interest and the inexorable workings of the competitive system. . . .

. . . Once the employer has ungrudgingly accepted the process of collective bargaining with the freely chosen representatives of his employees, differences as to wages and hours are more readily reconciled by negotiation or arbitration. Reasonableness begets reasonableness. On the other hand, stubborn refusal to deal with the representatives chosen by the employees, the irresponsible use of force or economic power, the maintenance of elaborate systems of espionage, black lists, and other familiar devices, to thwart efforts of employees to organize in their own way, only result in an accumulation of bitterness that sooner or later will break out in the most serious manifestations of industrial disturbance. The employers, and especially the leaders in the big association of employers, have a grave responsibility at this juncture. Mock heroics about preferring to go to jail rather than submit to this iniquitous statute, incitements to mass disobedience of its provisions, will tend to produce dangerous frustrations of labor's reasonable human aspirations and play into the hands of extremists who insist that nothing is to be gained by peaceful processes.²⁵⁶

As indicated, Frankfurter feared that initially some employers might not have had the good sense to arrange a *modus vivendi* with labor. Such recalcitrant employers were a threat and had to be dealt with for the good of the social order. He never quite said this in so many words, although he self-confidently asserted that a driving motive behind enactment of the NLRA was to remove obstacles to the prosperity of labor organizations,²⁵⁷ a goal that he saw as imperative to the survival of liberal capitalism. Frankfurter's position was almost a parody of the reason/fiat antinomy:²⁵⁸ if the employers of America were not persuaded by reason to work out an accommodation with collective bargaining, then they would be forced to be reasonable by the raw power of the law and the legions of organized labor. The breadth and self-confidence of this political vision are staggering.

Frankfurter's opinion proceeded to sing paeans to purposive legal reasoning, telling us that statutes cannot be interpreted like mathe-

256. ROOSEVELT AND FRANKFURTER, *supra* note 249, at 604-05.

257. 313 U.S. at 186. See note 56 *supra*.

258. The "reason/fiat antinomy" refers to the belief that the inherent character of law in societies dominated by legalist culture is a combination of reason and fiat, a combination of the "discovery" of an order and the "imposition" of an order. See Fuller, *Reason and Fiat in Case Law*, 59 HARV. L. REV. 376, 376-82 (1946).

matical symbols,²⁵⁹ that "verbal logic from which the meaning of things has evaporated"²⁶⁰ is anathema, and that industrial experience, history, and the social policy of the Act are the keys to interpretation, not judicial maxims.²⁶¹ He praised the Board's expert judgment and discretion, to which Congress had wisely entrusted front-line interpretation of the Act.²⁶² Based on his purposive analysis, in the light of the historical background, he concluded that discrimination in hiring was a section 8(3) violation remediable by an order to offer employment²⁶³ and that reinstatement of equivalently employed complainants was authorized by section 10(c).²⁶⁴

Frankfurter then performed an about-face so subtle that its implications are not visible until a second or third reading:

[T]he mere fact that the victim of discrimination has obtained equivalent employment does not itself preclude the Board from undoing the discrimination and requiring employment. But neither does this remedy automatically flow from the Act itself when discrimination has been found. A statute expressive of such large public policy as that on which the National Labor Relations Board is based must be broadly phrased and necessarily carries with it the task of administrative application. There is an area plainly covered by the language of the Act and an area no less plainly without it. . . . Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy. On the other hand, the power with which Congress invested the Board implies responsibility—the responsibility of exercising its judgment in employing the statutory powers.²⁶⁵

As far as it goes, this was an orthodox realist argument, but it produced a strange result. The Court remanded the case so that the Board could exercise its statutory responsibility by determining whether the Act's purposes would be effectuated by reinstatement of the particular complainants involved.²⁶⁶ While assuring the reader that he had no intention of invading the area of remedial policy assigned to the Board,²⁶⁷ Frankfurter nevertheless provided a list of

259. See 313 U.S. at 185.

260. *Id.* at 191.

261. See *id.* at 182-86, 188.

262. See *id.* at 188, 193-94.

263. See *id.* at 185-88.

264. See *id.* at 189-93.

265. *Id.* at 193-94.

266. See *id.* at 193-97.

267. See *id.* at 194, 195, 197.

factors for the Board to consider in reaching its policy decision.²⁶⁸

The only problem with all of this is that, on the record presented, the Board had already carefully and explicitly made a finding that the Act's purposes would be effectuated by reinstatement.²⁶⁹ Frankfurter's motive was not simply to reprimand the Board for supposedly having failed to make a considered policy judgment, but implicitly to pronounce that henceforth the Board would in all cases be required to consider a victim's obtainment of substantially equivalent employment before ordering an employer to make work available. Frankfurter thus read a major restriction into the broad remedial powers granted to the Board under section 10(c) and flatly overruled his own call for deference to the Board's expertise.²⁷⁰

Justice Frankfurter took a similar approach on the mitigation issue, although here his faith in the inherent superiority of judicial reasoning²⁷¹ was even more explicit. He stated,

268. See *id.* at 195.

269. See *id.* at 204 (Murphy, J., dissenting).

270. Although this rule is never explicitly stated, it is implicit in Frankfurter's discussion of the "three possible constructions" of section 10(c) in light of section 2(3). See *id.* at 190-91. Frankfurter rejected the view that section 2(3) prohibited the Board from ordering affirmative action with respect to an "equivalently employed" employee; but he also rejected a "completely distributive" reading of sections 10(c) and 2(3) "whereby the factor of 'regular and substantially equivalent employment' in no way limits the Board's usual power to require employment to be offered" to a discriminatee. *Id.* at 190. He opted instead for "an avoidance of this either-or reading" of the statute, *id.* at 190-91, that is, for a construction that appraised the relevance of the discriminatee's substantially equivalent employment in light of the Board's mandate to effectuate the policies of the Act. In other words, labor policy required that sections 10(c) and 2(3) be harmonized or balanced by an obligation upon the Board always to review the factor of equivalent employment before ordering reinstatement or similar affirmative action. Frankfurter offered no real analysis of social interests that made this the preferable approach. Moreover, the case did not even present this issue for decision. The Board had held that it had the power to order an offer of work notwithstanding the fact that equivalent employment had been obtained, see *Phelps Dodge Corp.*, 19 N.L.R.B. 547, 598, modified, 113 F.2d 202 (2d Cir. 1940), modified, 313 U.S. 177 (1941), and the Court explicitly sustained this power, see 313 U.S. at 193. But no party had sought review to determine whether it was proper for the Board to exercise that power without first making a finding as to the impact of the equivalent employment. The Board's posture was that it had in fact made such a finding. The Company challenged the adequacy of the Board's findings of fact and judgments of policy, and also the underlying question of the Board's power, but did not raise the abstract legal question whether the Board was duty bound to make a specific finding with respect to the impact of equivalent employment before exercising any remedial powers. There was a subsidiary dispute over whether certain of the discriminatees had in fact found equivalent employment. The Court of Appeals reversed the Board on this evidentiary issue, see *Phelps Dodge Corp. v. NLRB*, 113 F.2d 202, 205 (2d Cir. 1940), modified, 313 U.S. 177 (1941), but the Board did not seek review of this holding, resting on its view that vindication of the Act's purposes required affirmative remedial action here even if these individuals had found equivalent jobs, see 313 U.S. at 197.

271. Justice Frankfurter commented years later "that law represents the disin-

Making the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces. Since only actual losses should be made good, it seems fair that deductions should be made not only for actual earnings by the worker but also for losses which he willfully incurred.²⁷²

This unvarnished fiat flatly overruled a considered policy judgment of the Board and profoundly undercut effective enforcement of the Act.²⁷³ Having intoned the by now monotonous "public right" slogan, he introduced into federal labor law an absolutely classical private adjudication doctrine. His sole authority for the rule was the ancient maxim that mitigation doctrines serve the beneficent purpose of "promoting production and employment."²⁷⁴ By placing this strange construction on a statute passed in the midst of the worst depression in American history, Frankfurter made a mockery of his earlier injunction to interpret statutes in the context of the historical and social exigencies that led to their enactment, to avoid "verbal logic from which the meaning of things has evaporated."²⁷⁵

A microcosm of modern legal consciousness, *Phelps Dodge* contained a chaotic amalgam of conceptualism and realism, rulebound-edness and ad hoc balancing, deference to nonjudicial sources of law and unhesitating faith in the superiority of the judicial mind. This jurisprudential mélange transcended political lines and attitudes as to whether the proper judicial role is one of activism or restraint. I believe that all of modern legal consciousness partakes of this hodge-podge character. It is a consciousness in which contrasting styles of

tered processes of Reason, and particularly is this so when law is pronounced by the judiciary." Frankfurter, *Samuel Williston: An Inadequate Tribute to a Beloved Teacher*, 76 HARV. L. REV. 1321, 1322 (1963).

272. 313 U.S. at 197-98.

273. In effect, the burdens and costs of vindicating section 7 rights were placed on the victimized employees, not on the wrongdoer. Most discharged employees will be required to look for a new job just to survive. Allowing the employer the mitigation deduction, however, means that back-pay orders will be reduced to a minimal tariff far outweighed by the benefit of halting incipient union activity. Frequently the employee will only be able to find work at a great distance from home and, once having moved, will simply forget about the Board case. In addition, the mitigation rule reduces damages in times of rising employment, when union activity often heats up, and maximizes damages in times of high unemployment, when, due to the paralyzing barriers of cynicism and fear, unionization campaigns often experience difficulty getting off the ground.

On the mitigation issue, Frankfurter wrote only for himself and Justice Reed. Chief Justice Hughes and Justice Stone (who dissented as to other issues) concurred, making a majority against the Black-Douglas-Murphy dissent. Justice Roberts did not participate and Justice McReynolds had retired but was unplaced.

274. 313 U.S. at 200.

275. *Id.* at 191.

legal reasoning are simultaneously and unreflectively employed by the same court or even the same judge; in which the public/private distinction is invoked as the basis of judicial decisions, as though it were a concept of scientific precision and with no apparent recognition that the distinction has assumed formidable ideological and mystificatory functions in the welfare state; in which state regulation of private economic activity is assumed to be a legitimate and even compelling mode of achieving progressive reform, while the ideal of the free market is simultaneously upheld as the proper basis of social organization; and in which the antinomy of reason and fiat is understood to pervade the legal process while at the same time it appears to be a veritable public responsibility of the judge to obscure or veil this fact. The formalist and realist traditions are continued sub silentio in judicial decisions, but in a manner consistent with neither legal vision. The rule of law is preserved, though in an updated, more socially responsive form.

The full rehabilitation of legalism awaited the relative social stability of the Cold War era, when it again became possible to attempt a totalizing jurisprudence, a merger of realism and the social policies it imported into the law with the traditions of formalist jurisprudence.²⁷⁶ No doubt such attempts to revitalize legalism have dominated postwar American legal thought, to some extent quelling the residual disquiet left over from the legal crisis of the 1930's.²⁷⁷ For this

276. Central to the process of the mutual assimilation is the inevitable tendency of realism to evolve into a species of formalism. This tendency arises for several reasons. First, because liberal political theory and social science are unable candidly to confront the reality of class power and class domination in capitalist society, they necessarily serve an ideological and mystificatory role; in particular, the tendency of liberal social thought (which is harnessed by, but ultimately contributes to the transformation of, legal realism) is to present, as scientifically necessary, answers to questions involving choices between competing political values and interests. Second, and more generally, all legal decisions are necessarily made within a context of assumptions (i.e., a "conceptless" jurisprudence is an epistemological impossibility), and the historical tendency is for these underlying assumptions periodically to become reified. Finally, the aforementioned tendencies are exacerbated by the formal character of law itself in the liberal tradition, that is, its requirement that the grounds of decision in particular cases be capable of presentation in a general, suprahistorical rule-form. See note 195 *supra*. See also Blackburn, *A Brief Guide to Bourgeois Ideology*, in STUDENT POWER 163 (A. Cockburn & R. Blackburn eds. 1969); Horton, *The Dehumanization of Anomie and Alienation: A Problem in the Ideology of Sociology*, 15 BARR. J. SOC. 283 (1964).

277. The leading example of the postwar project of reviving liberal legalism is the school or current that developed the ideal of reasoned elaboration. The origins and rise of this jurisprudence are traced in White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279 (1973). See generally P. BATOR, P. MISHKIN, D. SHAPIRO, & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (2d ed. 1973); H. HART & A. SACKS, THE LEGAL

reason, it is appropriate to conceive of modern legal consciousness as a relatively unified whole, although this is a unity that consists chiefly in a willingness to merge approaches and methods that, if pushed only slightly, appear to be antagonistic. The preeminent characteristic of modern legal consciousness, transcending all political battlelines, is its unreflective and uncritical quality, its attempt to accommodate yet obscure the contradictions of legal thought, which reflect the contradictions of social life in late capitalist society.

IV. CONCLUSION AND POSTSCRIPT

Although certain concrete legal inhibitions were placed on worker self-activity in the period immediately preceding World War II, the primary role of the Court was to fashion and articulate a legitimating ideology for the emerging institutional system governing the workplace. In the postwar period, while continuing this ideological mission, the Court played an enormous role in elaborating the institutional structure of mature collective bargaining. To a degree unprecedented in the capitalist world, the judiciary directly and creatively intervened in the workplace and was crucially involved in designing the architecture of the modern, administered, and regulated system of class relations. It is again an irony that many of the leading developments in this process were widely perceived as victories for labor and intrusions upon the prerogatives of management. Many of the Court's rulings were, in fact, designed to bolster the institutional interests of labor unions. Often, however, this occurred at undue expense to the rights of individual employees and to the initiative of the rank and file. More and more, unions were treated as guarantors of productivity and enforcers of work-discipline, and the chasm separating union leadership from the rank and file was widened. Cases hailed as prolabor victories may therefore someday be regarded as long-run defeats for working people, particularly in an industrial world in which it is debatable whether the institutional interests of labor unions are entirely congruent with the needs and interests of working people.²⁷⁸

PROCESS (tent. ed. 1958); H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM (1st ed. 1953); Hart, *The Supreme Court, 1958 Term—Forward: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959); see also D. Kennedy, Utopian Rationalism in American Legal Thought (1970) (unpublished manuscript on file at MINNESOTA LAW REVIEW).

278. Central themes of postwar labor doctrine that will be explored in future essays include the following:

(a) the Court's chimerical attempt to keep the law out of the substance of collective bargaining, to separate substance and form in labor law, both as to the substantive terms of contracts and as to scrutiny of the legitimate economic weapons to be avail-

In retrospect, it should not be surprising that the attempt to ease the oppression of working people through legal reform ended by reinforcing the institutional bases of that oppression, however much it improved the material circumstances of organized workers.

In one sense, the problem of law is the same as the problem of labor. Producing goods and services in the workplace and making law in legislatures and courtrooms are both forms of objectification—that process “whereby human subjectivity embodies itself in products that are available to oneself and one’s fellow men as elements of a common world.”²⁷⁹ Because “[m]an and society exist only as *praxis*, outside themselves in the fluctuating interworld their actions compose together,”²⁸⁰ objectification is the ontological foundation of human freedom and self-actualization. But in the capitalist work-process, objectification takes on the character of alienation: the prod-

able to the parties, *see H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970); *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300 (1965); *NLRB v. Brown*, 380 U.S. 278 (1965); *NLRB v. Insurance Agents’ Int’l Union*, 361 U.S. 477 (1960); *NLRB v. American Nat’l Ins. Co.*, 343 U.S. 395 (1952);

(b) the exclusion of labor unions from bargaining over managerial decisions “which lie at the core of entrepreneurial control,” *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 223 (1964) (Stewart, J., concurring);

(c) the enhanced institutional role and responsibilities of labor unions, *see Vaca v. Sipes*, 386 U.S. 171 (1967); *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965); *Humphrey v. Moore*, 375 U.S. 335 (1964); *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953); *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678 (1944); *Order of R.R. Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342 (1944); *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944); *Leonard Wholesale Meats, Inc.*, 136 N.L.R.B. 1000 (1962); *Appalachian Shale Prods. Co.*, 121 N.L.R.B. 1160 (1958); *Deluxe Metal Furniture Co.*, 121 N.L.R.B. 995 (1958);

(d) the steady erosion of the section 7 right to engage in protected, concerted activity, *see note 53 supra*;

(e) the gradual metamorphosis of grievance arbitration from a voluntary and private mode of dispute resolution into a semicompulsory, institutional system for the management of complex enterprises, resulting in the dilution of statutory rights, *see Boys Mkts., Inc. v. Retail Clerks Local 770*, 398 U.S. 235 (1970); *Collyer Insulated Wire*, 192 N.L.R.B. 837 (1971); and

(f) the altered conception of labor unions whereby they are increasingly seen not as private associations within civil society, but as semigovernmental agencies whose acts border on “state action,” and that therefore may properly be subjected to the closest regulation, *see International Ass’n of Machinists v. Street*, 367 U.S. 740 (1961); *Steele v. Louisville & N.R.R.*, 323 U.S. 192 (1955); *Western Addition Community Organization v. NLRB*, 485 F.2d 917 (D.C. Cir. 1973) (Wyzanski, J., dissenting); *Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959*, §§ 2-611, 29 U.S.C. §§ 401-531 (1970); *Civil Rights Act of 1964*, tit. VII, 42 U.S.C. §§ 2000e to 2000e-17 (1970).

279. Berger & Pullberg, *Reification and the Sociological Critique of Consciousness*, NEW LEFT REV., January-February 1966, at 60.

280. Anderson, *Problems of Socialist Strategy*, in TOWARDS SOCIALISM 288-89 (P. Anderson & R. Blackburn eds. 1966).

uct, commanded and owned by another, is an estranged, alien power, over and against the producers, who have no way to recall that the world in which they live has been created by themselves.²⁸¹ The capitalist work-process, far from being an expression of human freedom, is a realm of unfreedom, of separation between the self and others, between consciousness and actuality, a realm in which no person can recognize him- or herself.

Lawmaking is governed by the same process of alienation. Its structure and function in liberal capitalism make it, too, a form of activity in which the "product," moral and allocational rules and decisions, cannot be recognized as having been created by its purported authors, the people. Law in our society is made by experts socialized in elite institutions and distant from the lived reality of everyday life in capitalist society. Its connection to official violence and coercion, its impersonal, antiparticipatory character, its insistence on the presentation of all moral judgments in the form of general, suprahistorical rules, and its exaltation of property over human dignity, all make it inevitable that the *form* of lawmaking must be a negation of the human spirit, even when the impulse to do justice and to accommodate to changing social priorities forces its way into the *content* of legal decisions.

One cannot expect that work will be emancipated from its alienated character without the abolition of the social relations, including legal relations, that produce that character. Alienation can only be transcended through a comprehensive historical metamorphosis of social and political relationships, a process that would profoundly transform the quality of legal arrangements, indeed, the very nature and form of law. Conversely, while legal practice remains a form of alienation, there can be no fundamental change in the character of work or any other aspect of social life. Until lawmaking becomes a quest for justice in each concrete historical setting, until the "rule of law" ideal (the separation of law and ethics) is abolished and ethics brought directly into daily life as a continuous, participatory practice of mediation and redefinition of relations among people who see in each other the possibility of their own fulfillment, that is, until lawmaking becomes a self-conscious, critical form of social practice,²⁸² there can be no hope of the emancipation of labor.²⁸³ The struggle to transform lawmaking in this manner is intimately linked to the strug-

281. See Berger & Pullberg, *supra* note 279, at 61.

282. See A. Fraser, *supra* note 13.

283. Though this is inevitably a call for the politicization of law, I do not mean to advocate the complete abolition of the distinction between public and private, which must continue to exist, generating a creative tension that will lead to the reaffirmation of the individual in and through community.

gle to make the workplace a realm of free self-activity and expression. Labor law reform in the 1930's served as a vehicle for the preservation of liberal capitalism and the alienated social relationships that constitute it. Henceforth, the struggle to emancipate labor must also be a struggle to emancipate law itself.

