

## LABOR UNIONS: SAVIORS OR SCOURGES?

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### I. INTRODUCTION: LABOR RETURNS TO THE SPOTLIGHT

I am most honored to have been invited this past April 13, 2012, to join the distinguished list of Sullivan lecturers at Capital University Law School. I am also pleased that the law school invited my long-time friend and basketball buddy, Craig Becker, to comment on my remarks, which, as we both know, are not entirely to his liking. The new prominence that labor law receives today stands in sharp contrast to the widespread public indifference to the subject a generation ago.<sup>1</sup> A dozen years or so ago, I attended a meeting of the Labor Law Section of the Association of American Law Schools, only to hear this common complaint: enrollments in labor law were dropping, and the course was struggling to survive. That trend has continued so that today union membership in the private sector stands at about 6.6% of the workforce, down from about 35% in the 1950s.<sup>2</sup> At the same time, the percentage of unionized workers in the public sector rose for much of this period, but it too is now in decline for two reasons: first, many of the recent austerity layoffs; and second, in Wisconsin and Indiana in particular, the rapid decline in union members<sup>3</sup>

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<sup>1</sup> Charles Fried, *Individual and Collective Rights in Work Relations: Reflections on the Current State of Labor Law and Its Prospects*, 51 U. CHI. L. REV. 1012, 1012 (1984).

<sup>2</sup> Steven Greenhouse, *Share of the Work Force in a Union Falls to a 97-Year Low, 11.3%*, N.Y. TIMES (Jan. 23, 2013), [http://www.nytimes.com/2013/01/24/business/union-membership-drops-despite-job-growth.html?\\_r=0](http://www.nytimes.com/2013/01/24/business/union-membership-drops-despite-job-growth.html?_r=0).

<sup>3</sup> Douglas Belkin & Kris Maher, *Wisconsin Unions See Ranks Drop Ahead of Recall Vote*, WALL ST. J., May 31, 2012, at A1 (“Wisconsin membership in the American Federation of State, County and Municipal Employees—the state’s second-largest public sector union after the National Education Association, which represents teachers—fell to 28,745 in February [2012] from 62,818 in March 2011 . . .”). The overall union membership rate fell from 13.3% to 11.2% between 2011 and 2012. *Union Affiliation of Employed Wage and Salary Workers by State*, DEP’T OF LABOR (Jan. 23, 2013), <http://www.bls.gov/news.release/union2.t05.htm>.

once legislation stripped unions of the right to direct payment of union dues from workers' paychecks.<sup>4</sup> Until recently, unions in the public sector did not generate much by way of legal controversy because of two key features of public unions' basic structure.<sup>5</sup> First, public unions were recognized as of right.<sup>6</sup> Second, impasses in bargaining were generally resolved by compulsory arbitration and not by strike (or at least not by legal strike).<sup>7</sup> The real action therefore is in the area of employment discrimination, with its expanding docket of issues extending to everything from affirmative action and class actions for disparate impact cases, to sexual harassment, mandatory retirement, and much more.<sup>8</sup>

Employment discrimination continues to receive much attention today,<sup>9</sup> but the larger question of the role of unions in both the public and the private sector has generated massive controversy that has reached the mainstream press.<sup>10</sup> The major struggles in labor law started with the now-aborted efforts of labor unions to secure passage of the (misnamed) Employee Free Choice Act,<sup>11</sup> which would have done three things: allowed union recognition to take place by card check; imposed mandatory arbitration of initial two-year "contracts" if the parties failed to reach an agreement within 120 days of union recognition; and stiffened penalties for alleged unfair labor practices committed by employers during the course of an organizational campaign.<sup>12</sup> The inability to pass that proposed legislation did not stop the union pressure for an expansion of their rights. Instead, the campaign switched to the National Labor Relations Board, whose chairman is by law a presidential appointee and whose other four

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<sup>4</sup> The dues provision of 2011 Wisconsin Act 10, the so-called Budget Repair Bill, was later struck down. *Wis. Educ. Ass'n Council v. Walker*, 824 F. Supp. 2d 856, 869–70 (W.D. Wis. 2012).

<sup>5</sup> See RICHARD A. EPSTEIN, *THE CASE AGAINST THE EMPLOYEE FREE CHOICE ACT* 8 (2009).

<sup>6</sup> *Id.* at 8–9.

<sup>7</sup> *Id.* at 9.

<sup>8</sup> RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 281–82 (1992).

<sup>9</sup> See, e.g., *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

<sup>10</sup> See generally Belkin & Maher, *supra* note 3; Greenhouse, *supra* note 2 (both demonstrating mainstream media coverage).

<sup>11</sup> Employee Free Choice Act of 2007, S. 1041, 110th Cong. (2007); Employee Free Choice Act of 2009, S. 560, 111th Cong. (2009).

<sup>12</sup> EPSTEIN, *supra* note 5, at 4–6.

members are divided equally between Democrats and Republicans.<sup>13</sup> The polarization by party was evident during the Bush Administration on a wide range of substantive and procedural issues.<sup>14</sup> Once Barack Obama was elected President in 2009, the balance of advantage shifted, but the deep political divisions did not abate.<sup>15</sup> The Republicans mounted a long and determined campaign to block the confirmation of Craig Becker, who received a recess appointment by President Obama in March 2010 over ferocious Republican objections.<sup>16</sup> In June, the Supreme Court of the United States in *New Process Steel v. NLRB*<sup>17</sup> held that the NLRB could not operate with only two of its five members when the National Labor Relations Act required a quorum of three members.<sup>18</sup> Shortly thereafter, the NLRB general counsel Lafe Solomon initiated a suit against Boeing claiming that it unlawfully refused to bargain with its various unions when it announced that it was going to open a new plant in North Charleston, South Carolina.<sup>19</sup> The dispute was settled privately before the case reached the Board, but it generated once again a pitched battle over whether unions should be able to exert that degree of control over major management decisions.<sup>20</sup>

At the same time, the status of public unions has become far more controversial as well. Generous pensions for workers in public unions in states like California and Illinois have become the most divisive issue in state politics, with no short-term solution on hand.<sup>21</sup> Most dramatically,

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<sup>13</sup> 29 U.S.C. § 153(a) (2006); Richard Epstein, *The Tussle over Craig Becker*, FORBES (Nov. 10, 2009, 12:01 AM), <http://www.forbes.com/2009/11/09/craig-becker-nlra-nlr-john-mccain-nomination-opinions-columnists-richard-a-epstein.html>.

<sup>14</sup> Epstein, *supra* note 13.

<sup>15</sup> See, e.g., Meredith Shiner, *Senate Stops Craig Becker Nomination*, POLITICO (Feb. 9, 2010, 5:00 PM), <http://www.politico.com/news/stories/0210/32758.html>.

<sup>16</sup> *Id.*; Press Release, Office of the Press Sec'y, President Obama Announces Recess Appointments to Key Administration Positions (Mar. 27, 2010), <http://www.whitehouse.gov/the-press-office/president-obama-announces-recess-appointments-key-administration-positions>.

<sup>17</sup> 130 S. Ct. 2635 (2010).

<sup>18</sup> *Id.* at 2644.

<sup>19</sup> See Steven Greenhouse, *Labor Board Case Against Boeing Points to Fights to Come*, N.Y. TIMES, Apr. 23, 2011, at B1.

<sup>20</sup> Steven Greenhouse, *Labor Board Drops Case Against Boeing After Union Reaches Accord*, N.Y. TIMES, Dec. 10, 2011, at B3.

<sup>21</sup> Brian Chappatta & Michael B. Marois, *California Beating Illinois Shows Pension-Gap Cost*, BLOOMBERG BUSINESSWEEK (Sept. 4, 2012, 12:01 AM), *(continued)*

the issue reached a fever pitch in connection with the systematic efforts of Wisconsin Governor Scott Walker to limit the collective bargaining rights of public unions.<sup>22</sup> The effort to recall Governor Walker ultimately failed, resulting in serious negative fallout for union forces, but division of sentiment in the state has been so strong that people on opposite sides of the question have been literally unable speak to one another.<sup>23</sup>

This short summary of the complex events of the last half dozen years is in large measure a response to two factors. The first is the gradual but unmistakable overall decline in the standard of living in the United States and elsewhere.<sup>24</sup> Mutual recrimination is a common response in bad times, as each interest group seeks to cast blame upon the others. The second is that the labor movement has been unable to maintain its size and influence under the current set of laws, and has aggressively sought to change the legal rules of the game.<sup>25</sup> What is distinctive about the current initiative is that it has strong support from President Obama, whose self-conscious resurrection of the term “progressive” is consciously meant to bring back echoes of the successful push that organized labor made during the 1930s. During that period, in rapid succession the labor movement secured the passage of the Davis-Bacon Act of 1931,<sup>26</sup> the Norris-LaGuardia Act of

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<http://www.businessweek.com/news/2012-09-04/california-beating-illinois-shows-pension-gap-cost-muni-credit>.

<sup>22</sup> Michael Cooper & Katharine Q. Seelye, *Wisconsin Leads Way as Workers Fight State Cuts*, N.Y. TIMES, Feb. 19, 2011, at A1.

<sup>23</sup> Douglas Belkin, *Recall Stirs Passion in a Purple State*, WALL ST. J., June 4, 2012, at A4 (“Tuesday’s election on whether to recall Mr. Walker has so bitterly divided this state that many residents live in parallel societies, limiting themselves to like-minded friends, separate drinking holes and sympathetic media outlets.”).

<sup>24</sup> James Browne, *Living Standards During the Recession*, INST. FOR FISCAL STUDIES (2009), <http://www.ifs.org.uk/bns/bn117.pdf>; Ron Scherer, *A Long, Steep Drop for Americans’ Standard of Living*, CHRISTIAN SCI. MONITOR (Oct. 19, 2011), <http://www.csmonitor.com/Business/2011/1019/A-long-steep-drop-for-Americans-standard-of-living>.

<sup>25</sup> See, e.g., Dale Belman & Paula B. Voos, *Union Wages and Union Decline: Evidence from the Construction Industry*, 60 INDUS. & LAB. REL. REV. 67 (2006) (discussing the decline of American labor union representation over time and using the construction industry to illustrate the decline). See generally Henry H. Drummonds, *Reforming Labor Law by Reforming Labor Law Preemption Doctrine to Allow the States to Make More Labor Relations Policy*, 70 LA. L. REV. 97, 99–103 (2009) (arguing that there is a need to reform private sector labor relations law and that a “fundamental rebalancing” is needed).

<sup>26</sup> Ch. 411, 46 Stat. 1494 (codified as amended at 40 U.S.C. §§ 3141–3148 (2006)).

1932,<sup>27</sup> the National Labor Relations Act of 1935,<sup>28</sup> and the Fair Labor Standards Act of 1938,<sup>29</sup> all of which define the shape of current labor law. However, in the current setting, they met a determined public and business opposition, which led to the major union defeat in Wisconsin.

This Article does not stress these short-term controversies, but looks back to the basic structure of American labor law to explain why the seeds of the modern breakdown of the institution lay in the basic formation of the modern legal system. To do so, it is necessary to sketch an alternative vision of how this field should be organized, after which it is possible to draw comparisons between the two systems. For these purposes, this Article works off two benchmarks, which first appear to be sharply disparate. But, as this Article shows, these benchmarks tend to converge on a single unified vision that is wholly inconsistent with the current structure of American labor law. The first is the general social welfarist account of economics. The second is the common law of labor relations as it existed in the United States between 1890 and 1914, when it was subjected to relentless social criticism.

The first approach involves the usual standards of social welfare that are part and parcel of the general law and economics movement. The normative standard that this Article sets out is not regarded as particularly controversial in wide areas of legal work, for it involves the well-known first theorem of law and economics: “If every relevant good is traded in a market at publicly known prices . . . and if households and firms act perfectly competitively (i.e., as price takers), then the market outcome is Pareto optimal.”<sup>30</sup> To unpack this basic proposition, when persons are price takers, there is no room for them to negotiate the price upward or downward. In perfectly competitive markets, if a seller tries to raise the price by a penny, the seller loses all business to firms that retain the competitive price.<sup>31</sup> If the seller tries to take advantage of the situation by lowering the price by a penny, then the seller can no longer make a profit.<sup>32</sup> By pinioning that party to these unpleasant alternatives, transactions take place with great rapidity because there is no way either side will find it

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<sup>27</sup> Ch. 90, 47 Stat. 70 (codified as amended at 29 U.S.C. §§ 101–110, 113–115 (2006)).

<sup>28</sup> Ch. 372, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151–169 (2006)).

<sup>29</sup> Ch. 676, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201–219 (2006)).

<sup>30</sup> ANDREW MAS-COLELL ET AL., MICROECONOMIC THEORY 308 (1995).

<sup>31</sup> *See id.* at 315.

<sup>32</sup> *Id.*

beneficial to bargain for a collateral advantage.<sup>33</sup> In practice, this means that transaction costs tend toward zero as the velocity of transactions tends to become infinite.<sup>34</sup> That market is a Pareto optimal market because no person's position can be improved without worsening someone else's position.<sup>35</sup>

No market is ideally competitive, of course, but there are many markets in which the large number of participants (e.g., landlords, employers, and retailers) on one side of the market, and the even larger number of tenants, employees, and customers on the other side of the market create a very respectable first approximation to the competitive ideal. Under standard assumptions associated with the transaction cost work of Ronald Coase, the direct path to social improvements lies in reducing transaction costs in order to help speed this competitive process along.<sup>36</sup>

It is important to see the limitations associated with this model because they lead us back toward the common law rules. Thus, in the words of Alan Sykes, the definition just quoted requires the following explication:

In other words, in the absence of non-pecuniary externalities (the complete markets assumption) and with competitive allocation of resources (no market power), an unconstrained market equilibrium is economically efficient.

Nothing in this theorem limits its result to a particular type of market. Competitive exchange without non-pecuniary externalities is efficient whether the exchange involves goods, services, capital or labor. Likewise, any impediments to competitive exchange will generally create inefficiency under the assumptions of the first theorem. In particular, in the absence of non-pecuniary externalities, government restrictions on competitive labor markets—including immigration restrictions—create inefficiencies.<sup>37</sup>

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<sup>33</sup> *Id.*

<sup>34</sup> *See generally id.* (arguing that if a price-taking assumption is made, market power does not exist and market participants will have no incentive to depart from market prices).

<sup>35</sup> *Id.* at 313.

<sup>36</sup> *See generally* Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

<sup>37</sup> Alan O. Sykes, *International Cooperation on Migration: Theory and Practice*, 80 U. CHI. L. REV. (forthcoming 2013). *See also* Richard A. Epstein, *Free Trade and Free* (continued)

As will become evident, this definition maps very well the common law of labor relations, which has to address just these problems. The various doctrines of labor law are intended to bring the law into closer alignment with the conditions for successful welfare.<sup>38</sup> These include the prohibition against the use of force and fraud in labor relations, the prohibition against the inducement of breach of contract, and any form of combination that brings labor markets further from a competitive equilibrium.<sup>39</sup> The great utility of the common law approach is that it addresses, as general economic theorists do not, the various conditions that tend to undermine the efficiency of labor markets, which is seen only as an application—a very important application—of a general theory.<sup>40</sup>

In offering this double-barreled critique of modern labor law, I do not expect that it will be widely accepted as a desirable template for modern labor law reform. Opposing political forces are far too strong for that to happen, at least in the short run. However, it hardly follows that the inability to secure major revision of any field renders a principled critique irrelevant. Equally important is the way in which various principles set the stage of the discussion of incremental changes in the direction and reach of any field, including labor law. Small changes in legal doctrine and public administration can have large effects on the day-to-day operation of the economy.<sup>41</sup> It is for those reasons that this comparison is worthy of undertaking. Part II of this Article takes up the common law approach to this subject both in Great Britain and in the United States, with special reference to the interaction of labor and antitrust law. Part III addresses the structural weaknesses of the National Labor Relations Act as a response to the problem of monopolization. Part IV offers an overview of the current prospects of the union movement, both in the public and private sectors. There is no point in keeping anyone in suspense about my views. They are surely outside the mainstream of the academy. Further, they defend the proposition that from the perspective of social welfare, labor unions have

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*Immigration*, 80 U. CHI. L. REV. (forthcoming 2013) (noting that as a matter of general principle, the basic theorem applies in both domestic and international contexts).

<sup>38</sup> See EPSTEIN, *supra* note 5, at 113–14, 126; Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357, 1380 (1983) [hereinafter Epstein, *A Common Law for Labor Relations*].

<sup>39</sup> Epstein, *A Common Law for Labor Relations*, *supra* note 38, at 1357–58.

<sup>40</sup> See *id.* at 1359 (discussing that the state, through the common law, is entitled to regulate conditions such as force or fraud).

<sup>41</sup> See, e.g., *id.* at 1402 (discussing the impact of New Deal legislation on product and labor markets).

proved not a savior but a scourge. In some limited fashion, some unions might have productive uses. However, nothing in the history of labor law justifies the extraordinary set of legal privileges that they have received over the past 100 years.

## II. A COMMON LAW OF LABOR RELATIONS

One key feature of labor relations law is that in its inception it was not a separate body of law at all.<sup>42</sup> Consistent with the modern economic tendency toward a general unified theory, the great English and American cases that dealt with the rise of labor unions during the last part of the nineteenth century and the early part of the twentieth century did not put labor law into some separate box delineated by its own statutory framework.<sup>43</sup> Quite the opposite: the entire deliberation took place as part of the overall structure of private law, which sought to develop legal relations without worrying about setting out rules that were tied to the distinct roles of employer, worker, or union.<sup>44</sup> The postulates that undergirded this system were as follows. The first principle was one of individual autonomy whereby individuals owned capital or labor and could dispose of either in whatever fashion they saw fit.<sup>45</sup> Under this legal regime, individuals decided whether to make or not make any offer and by the same token to accept or reject any offer that came their way.<sup>46</sup> The simple corollary of that position is that the compensation and conditions associated with any offer were for the parties to determine, not for any outside party.<sup>47</sup> That position could be subject to limitations in cases of the aged and infirm, but would apply with equal force to markets in labor, goods, and capital.<sup>48</sup> The ostensible inequality of bargaining power of two sides was rejected as a ground for intervention, given that no difference in relative size could force one party to accept an offer that made it worse off than it was before.<sup>49</sup> Accordingly, these voluntary contracts between

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<sup>42</sup> *Id.* at 1357.

<sup>43</sup> *See id.*

<sup>44</sup> *Id.* at 1364.

<sup>45</sup> *Id.*

<sup>46</sup> Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 951–52 (1984) [hereinafter Epstein, *In Defense*]. *See also* Epstein, *A Common Law for Labor Relations*, *supra* note 38, at 1366.

<sup>47</sup> Epstein, *A Common Law for Labor Relations*, *supra* note 38, at 1368.

<sup>48</sup> *Id.* at 1359. *See also* Richard A. Epstein, *The Social Consequences of Common Law Rules*, 95 HARV. L. REV. 1717, 1748 (1982).

<sup>49</sup> Epstein, *A Common Law for Labor Relations*, *supra* note 38, at 1360.



parties were presumptively enforceable because of the gains from trade that they generated for all participants.<sup>50</sup>

The classical principle did not automatically enforce all agreements, most pointedly any contract that was in restraint of trade.<sup>51</sup> These contracts covered deals between two or more persons on the same side of any particular market, whose corporations could limit supply and drive up the price of goods and services above those that these sellers could command separately in a competitive market.<sup>52</sup> The benchmark of the competitive market is not idly chosen. In line with modern social welfarist theory, it represents a state of affairs that exhausts all the potential gains from trade, and thus maximizes a conception of social welfare that does not accord any privilege or pride of place to any individual or group.<sup>53</sup> On this view, collective refusal to deal by individuals on one side of the market would fall prey to the antitrust laws, whether the conduct was by industry or labor group.

The final principle sought to protect the voluntary contracts in competitive markets from improper forms of interference by third parties.<sup>54</sup> The nature and kind of this “actionable” interference requires some specification. Competition, in the form of more attractive terms, is always a form of “interference” that causes “harm.”<sup>55</sup> Yet by the same token, competitive harm is never actionable, for if it were, then the law would afford no protection to the competitive solutions that maximize levels of social welfare.<sup>56</sup> The modern term for this situation calls it a nonpecuniary externality, which gives no clue as to the relationship that it holds with respect to the operation of a competitive market. The ancient phrase *damnum absque iniuria* captured the same sense in the articulation of these rules at common law.<sup>57</sup> In both systems, pollution from smokestacks and higher prices from cartelization have real welfare losses so they are not just

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<sup>50</sup> See Epstein, *In Defense*, *supra* note 46, at 967–68.

<sup>51</sup> See, e.g., Richard Epstein, *On Wal-Mart: Doing Good by Doing Nothing*, 39 CONN. L. REV. 1287, 1297 (2007).

<sup>52</sup> *Id.* at 1298.

<sup>53</sup> See *id.* at 1299–1300.

<sup>54</sup> See Epstein, *A Common Law for Labor Relations*, *supra* note 38, at 1357.

<sup>55</sup> RICHARD A. EPSTEIN, *FREE MARKETS UNDER SIEGE: CARTELS, POLITICS, AND SOCIAL WELFARE* 18 (2008).

<sup>56</sup> See *id.* at 20.

<sup>57</sup> EPSTEIN, *supra* note 55, at 18 (explaining the Latin phrase translates to “harm without injury”).

pecuniary externalities. The loss to a superior competitor lies emphatically on the other side of the line.

In working through the implications of this position, the common law judges routinely held that only “unfair” competition was subject to legal prohibitions.<sup>58</sup> Unfair competition comes in two forms.<sup>59</sup> The first is the threat or use of force to disrupt voluntary relationships.<sup>60</sup> This principle applies not only to the disruption of existing contracts, but also to the threat or use of force with respect to *prospective advantage* in the form of possible contracts that were never consummated. The second is the *breach* of contract, which is actionable even if the threat or use of force is nowhere in the picture.<sup>61</sup> That principle received its authoritative nineteenth century

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<sup>58</sup> *E.g.*, Tuttle v. Buck, 119 N.W. 946, 947 (Minn. 1909). The court explained the evolution of unfair competition as follows:

For generations there has been a practical agreement upon the proposition that competition in trade and business is desirable, and this idea has found expression in the decisions of the courts as well as in statutes. But it has led to grievous and manifold wrongs to individuals, and many courts have manifested an earnest desire to protect the individuals from the evils which result from unrestrained business competition.

*Id.*

<sup>59</sup> See Epstein, *A Common Law for Labor Relations*, *supra* note 38, at 1357.

<sup>60</sup> See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 531–32 (1935). In striking down key provisions of the National Industrial Relations Act, a critical predecessor of the National Labor Relations Act, the Court stated:

The Act does not define “fair competition.” “Unfair competition,” as known to the common law, is a limited concept. Primarily, and strictly, it relates to the palming off of one’s goods as those of a rival trader. In recent years, its scope has been extended. It has been held to apply to misappropriation as well as misrepresentation, to the selling of another’s goods as one’s own,—to misappropriation of what equitably belongs to a competitor. Unfairness in competition has been predicated of acts which lie outside the ordinary course of business and are tainted by fraud, or coercion, or conduct otherwise prohibited by law. But it is evident that in its widest range, “unfair competition,” as it has been understood in the law, does not reach the objectives of the codes which are authorized by the National Industrial Recovery Act.

*Id.* (internal citations omitted).

<sup>61</sup> See Epstein, *A Common Law for Labor Relations*, *supra* note 38, at 1357.

formulation in *Lumley v. Gye*,<sup>62</sup> where action was taken against the inducer as well as against the party who succumbed to the inducement.<sup>63</sup> In the simplest case, it was always lawful to induce people to change firms.<sup>64</sup> It was not lawful for them to do so in breach of contract.<sup>65</sup>

There are of course delicate refinements that operate in each of these areas, but they need not be addressed here to outline the central features of the overall system. The key point to show here is how they mesh together to articulate a labor policy that maximizes the gain from cooperative behavior in ways consistent with the welfarist position. The classical position always accepted the standard autonomy principle in allowing all individuals the exclusive use of their labor or capital.<sup>66</sup> It did so without an examination of the wealth or status of these parties, conferring equal rights of disposition on both sides.<sup>67</sup> Next, it enforced all labor contracts in accordance with their terms. In some instances, the contracts of employment were for a specific term, at which point both parties had some short-term protection against competition from others—protection for which they had to pay, either in cash or by reciprocal covenants.<sup>68</sup> Next, the antitrust law came into play against unions to the same degree that it did against employers. The key case on this last point is *Loewe v. Lawlor*,<sup>69</sup> in which a secondary boycott—a boycott of a party that did business with the firm that the union hoped to organize—was actionable as a collective refusal to deal under section 1 of the Sherman Act, which applied with equal force to firms.<sup>70</sup>

As to interference with prospective advantage, the earlier cases held the use of pickets could amount to the use of force even though there were always questions as to whether the sole (or at least dominant) function of those pickets was to give information to third parties to induce them not to deal with the firm, which in the case of ordinary customers did not give

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<sup>62</sup> (1853) 118 Eng. Rep. 749 (Q.B.).

<sup>63</sup> *Id.* at 749.

<sup>64</sup> *Walker v. Cronin*, 107 Mass. 555, 567 (1871).

<sup>65</sup> *Id.*

<sup>66</sup> See generally Harry Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1000–02 (1955).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 1001.

<sup>69</sup> 208 U.S. 274 (1908).

<sup>70</sup> *Id.* at 306–08. The aftermath of this case sustained the collection of monetary damages from union members who supported the boycott effort. See *Lawlor v. Loewe*, 235 U.S. 522 (1915).

rise to the tort of inducement of breach of contract.<sup>71</sup> The major case on point is *Vegeahn v. Guntner*.<sup>72</sup> There, the union sought to convince current workers not to enter their place of employment, which counts as inducement of breach of contract, and to persuade potential employees not to enter either, which requires some threat or use of force to be actionable.<sup>73</sup> The divided Supreme Judicial Court of Massachusetts found that certain picketing amounted to intimidation and was thus actionable under common law principles.<sup>74</sup> That decision did not announce, nor could it defend, a per se rule that necessarily equated picketing with coercion. The law in this area starts from the premise that the distinction between coercion and persuasion is fundamental to the preservation of any well-organized society. Though that line is clear in most cases, it is often blurry in picketing cases, which can easily contain elements of each.<sup>75</sup> In *Vegeahn*, there is much to be said for Holmes's dissent.<sup>76</sup> However, just because two pickets marching before a building might be informational, squads of pickets brandishing signs may not be.

The obligations on outsiders are greater when they hope to upset not prospective advantage, but existing contracts. That issue, too, came to the fore in *Vegeahn*, when the pickets sought to induce employees not to report for work, which would be caught by the tort of inducement of breach of contract, even though their motive was not (as was the case in *Lumley*) to hire the workers themselves, but only to get them to side with the union and perhaps to join their ranks.<sup>77</sup> This larger issue surged to the fore in *Hitchman Coal & Coke Co. v. Mitchell*,<sup>78</sup> a 1917 Supreme Court decision that arose out of a strike in the West Virginia coal mines.<sup>79</sup> The mine ran on a "non-union" basis; the workers agreed that they would not join a union so long as they remained in the employ of Hitchman Coal.<sup>80</sup> The union then persuaded many of these workers to agree to join the United Mine Workers once the strike was called, but not to quit their

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<sup>71</sup> See, e.g., *Scofes v. Helmar*, 187 N.E. 662, 664 (Ind. 1933).

<sup>72</sup> 44 N.E. 1077 (Mass. 1896).

<sup>73</sup> *Id.* at 1077.

<sup>74</sup> *Id.* at 1078.

<sup>75</sup> See, e.g., *id.*

<sup>76</sup> *Id.* at 1079 (Holmes, J., dissenting).

<sup>77</sup> Compare *id.* at 1077, with *Lumley v. Gye*, (1853) 118 Eng. Rep. 749 (Q.B.) 752.

<sup>78</sup> 245 U.S. 229 (1917).

<sup>79</sup> *Id.* at 232–33.

<sup>80</sup> *Id.* at 233.

employment until that time.<sup>81</sup> The clear intention of that decision was to secure unified withdrawal under circumstances in which it would be difficult for the mine owners to resume production.<sup>82</sup>

One reason that mines (and railroads) are especially vulnerable to these collective actions is that their most valuable assets—coal and tracks—are fixed in place. The mine owners therefore could not move to another location once union organizers came. Firms in both of these industries, moreover, enjoy site-specific rents that allow the owner of a key resource to earn more than a competitive rate of return, even in highly competitive contexts. Those firms that can extract cheap coal can gain an economic rent on its sale that could not be captured by those mines whose coal was deeper in the ground, such that the cost of its production was closer to the market price.<sup>83</sup> The sale of the mine, moreover, would be at a positive price to reflect the present discounted value of that income stream. In the end, that new owner could only obtain a competitive rate of return, taking into account the cost of acquiring the asset. The fact of sale thus does not exclude the process of expropriation.<sup>84</sup> That new firm too remains vulnerable to strikes because it would pay for the firm to remain in operation *even if* the union were able to extract wage concessions that could not be covered from the profits of the firm.<sup>85</sup> The option remains for that firm to operate at a loss, albeit one smaller than it would suffer if it just shut down operations altogether. Put otherwise, the sale of the business for fair market value neither increases nor decreases the risks of expropriation.

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<sup>81</sup> *Id.* at 245–46.

<sup>82</sup> *Id.* at 247.

<sup>83</sup> Robert D. Tollison, *Rent Seeking: A Survey*, 35 *KYKLOS* 575, 577 (1982) (noting that an economic rent equals the difference between the amount that a party receives and the lowest sum that it would take for the asset, which is normally its cost of production).

<sup>84</sup> Note that a close parallel arises in cases of rate regulation where the public utility makes its investment in a plant before it receives compensation from its rate payers. Hence, the rate regulation could control monopoly rents, but it could not result in the confiscation of sunk costs. *See Fed. Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944). The difference in the two cases is this. With rate regulation, the public utility has a natural monopoly which allows it to charge super competitive rates, which regulation is needed to combat. But in this case, there is no need for any sort of regulation because the market in coal is intensely competitive. Competition of site-specific rents does not improve allocation, but does result in costly rent dissipation.

<sup>85</sup> *See Epstein, A Common Law for Labor Relations*, *supra* note 38, at 1385.

Given this situation, the site-specific rents become the source of contention unless the company can find a way by agreement to pay wages that reduce the likelihood that workers will organize to take some fraction of the surplus.<sup>86</sup> In this instance, any firm effort to achieve that result is socially desirable because it reduces the amount of rent dissipation that could take place through bargaining over surplus that could lead to strikes in the event that two sides could not reach agreement. Understood in this light, the so-called “yellow dog” contract was a sensible effort of management to preserve its site-specific rents.<sup>87</sup> It was therefore the case that the employer could insist on the exclusive loyalty of its worker during the period of employment.<sup>88</sup> Accordingly, it became a breach of contract for any worker to join a union while remaining at work under a contract at will, or even to promise to join a union at the beck and call of the employer.<sup>89</sup> At this point, one can see the genuine benefit that inures to the employer from this arrangement, which was not apparent in cases like *Lumley v. Gye*, which involved one opera singer, Johanna Wagner, whose services were sought by two impresarios.<sup>90</sup> Thus, the private injunction that Lumley was able to secure against Wagner in this instance mattered; and in fact, she went home singing for neither impresario.<sup>91</sup> The practical difficulties of securing either injunctions or damage remedies against the individual miners who breached their contract are evident. It is not that these remedies are worthless, but they are hardly adequate. The remedy that enjoins the union from approaching these workers is effective because it directs state force against a single responsible party and not against a diffuse mass of individuals. In so many areas of law, the key concern always revolves around transaction costs, and allowing this remedy is thus critical to enforcing the basic contract.

In response, it could be urged that the injunction should not be allowed because of its effects on third parties. Effects, there surely are, but they cut in the opposite direction. It was evident in *Hitchman Coal* that these workers desired the yellow dog contract as much as management did: the level of strike and discord was sufficient to disrupt the relationships to the

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *See, e.g., Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229, 239–40 (1917).

<sup>89</sup> *See, e.g., id.* at 254–55.

<sup>90</sup> *Lumley v. Gye*, (1853) 118 Eng. Rep. 749 (Q.B.) 752.

<sup>91</sup> *Id.* at 749–50.

workers' detriment.<sup>92</sup> It also prevented Hitchman Coal from fulfilling its contracts with the Baltimore & Ohio Railroad, with further ripple effects down the line.<sup>93</sup> Strikes and job actions always have these negative consequences on third parties, which are *not* the result of the operation of competitive forces, but consequential damages from the initial tort of inducement of breach of contract or interference with advantageous relationships—both of which were in play in *Hitchman Coal*.<sup>94</sup> If the coal miners are liable for breaching their contracts, they should surely treat these damages as recoverable against the union. Allowing the injunction cuts through that Gordian knot before it becomes tied. It avoids the valuation problem that is difficult, if not impossible, to solve. As in other contexts, one reason to grant injunctions is to get rid of the tangle of damage actions that might be needed if the disruption is allowed to take place.

In sum, the basic outlines of pre-1937 labor policy had all four elements needed for the system to work well: strong enforcement of labor contracts, backed by protection against tortious interference with contracts and prospective advantage, but limited by the application of the general antitrust law on both sides. However, this system generated substantial political resentment. Owing to the various means of mass production, the system was subject to attack on both sides, which explains why the issue was surely one of the two or three most contentious political issues from the late 1890s through the passage of the Taft-Hartley Act of 1947. It is therefore necessary now to turn briefly to an outline of the general labor reforms of the progressive era to show how they deviated systematically from the requirements of the welfarist position.

### III. THE RISE OF MODERN LABOR LAW

#### A. *The British Experience*

The reaction to the classical liberal synthesis on labor law took place in stages. The first major move in this regard took place under the British Trade Disputes Act of 1906, whose interconnected position exempted unions from all of the previously mentioned general prohibitions found in the common law.<sup>95</sup> Thus, in short order, the statute completely immunized

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<sup>92</sup> *Hitchman Coal & Coke Co.*, 245 U.S. at 239.

<sup>93</sup> *Id.* at 237.

<sup>94</sup> *Id.* at 235–36.

<sup>95</sup> Trade Disputes Act, 1906, 6 Edw. 7, c. 47 (Eng.) (consolidated in the Trade Union and Labour Relations Act of 1992).

unions from tort liability, which was the antithesis of *Loewe v. Lawlor*.<sup>96</sup> Next, the 1906 Act neutralized the law of conspiracy by providing that any action done by many people together would not be actionable unless it would be actionable if done by one person acting alone.<sup>97</sup> The point is critical because it meant that the collective refusal to deal—a per se violation under the antitrust acts—became perfectly legal, thereby reversing some earlier English precedents that had taken the opposite position.<sup>98</sup> Finally, the statute eliminated in the context of labor disputes both the torts of inducement of breach of contract and interference with prospective advantage “with the right of some other person to dispose of his capital or his labour as he wills.”<sup>99</sup> This provision overturned the decision of the House of Lords in *South Wales Miners’ Federation v. Glamorgan Coal Co.*,<sup>100</sup> allowing the action for inducement of breach of contract over the union defense that such was done with the honest intention to advance the welfare of union members.<sup>101</sup> Note that this rationale deals with the recurrent issue of the problem of double effect in that the desire to help workers is known by unions necessarily to hurt management.<sup>102</sup> That defense would have never been allowed in *Lumley*. Indeed, the last quoted phrase in the Trade Disputes Act is intended to reject the traditional view of the common law baseline with respect to both labor and capital.<sup>103</sup>

Thereafter, the English courts held that labor contracts were not generally enforceable because the parties did not intend to create legal relations.<sup>104</sup> In effect, all the economic weapons that were limited at common law were removed. In 1964, the English House of Lords decided *Rookes v. Barnard*,<sup>105</sup> which drove a huge gap in the 1906 Act by granting Rookes, who had been dismissed by British Overseas Airlines pursuant to its closed shop agreement with the Association of Engineering and

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<sup>96</sup> 208 U.S. 274, 293–96 (1908).

<sup>97</sup> Trade Disputes Act § 1.

<sup>98</sup> See, e.g., *Quinn v. Leatham*, [1901] A.C. 495 (H.L.) 542–43 (appeal taken from N. Ir.).

<sup>99</sup> Trade Disputes Act § 3.

<sup>100</sup> [1905] A.C. 211 (H.L.) (appeal taken from Eng.).

<sup>101</sup> *Id.* at 244.

<sup>102</sup> See, e.g., *id.* at 240.

<sup>103</sup> Trade Disputes Act § 3.

<sup>104</sup> See Trade Union and Labour Relations (Consolidation) Act, 1992, c. 52, § 179 (Eng.) (the current English statute governing labor disputes).

<sup>105</sup> [1964] A.C. 1129 (H.L.) (appeal taken from Eng.).



Shipbuilding Draughtsman, a victory over the union.<sup>106</sup> The House of Lords found the union guilty of intimidation, a tort outside the scope of the 1906 Act.<sup>107</sup> That decision, which came down just before I arrived at Oxford in 1964 for my first year, was vilified by the academic community at the time and left me astonished, as I had no sense of the size of the stakes in *Rookes*.<sup>108</sup> As a matter of first principle, the collective refusal to deal would have been actionable under the case law prior to the 1906 Act.<sup>109</sup> In retrospect, *Rookes* surely did amount to an unprincipled end run around the 1906 Act. At that point, the trade unions' position was stronger because the unions had a legitimate statutory claim that *Rookes* upset the explicit balance between management and labor that the 1906 Act had forged.<sup>110</sup> The Trade Disputes Act of 1965 promptly closed that gap.<sup>111</sup> The return to legal orthodoxy, however, did nothing to deal with the fundamental difficulties with the English labor regime. When Margaret Thatcher became Prime Minister in 1979, matters turned even more contentious and culminated in the confrontations between the trade unions and the British government over the operations of the coal mines.<sup>112</sup> The British experience offers no consolation for those who think it is possible to carve out a sustainable regime for labor disputes that works in systematic deviation from the common law rules.

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<sup>106</sup> *Id.* at 1197, 1207, 1209.

<sup>107</sup> *Id.* at 1207, 1209.

<sup>108</sup> See K.W. Wedderburn, Notes of Cases, *Stratford and Son Ltd. v. Lindley*, 28 MOD. L. REV. 205, 209 (1965) (referencing, inter alia, Innis Christie, Comments, *Rookes v. Barnard*, 42 CAN. B. REV. 464, 474 (1964); K.W. Wedderburn, *Intimidation and the Right to Strike*, 27 MOD. L. REV. 257, 280–81 (1964); K.W. Wedderburn, *The Right to Threaten Strikes II*, 25 MOD. L. REV. 513, 513 (1962); K.W. Wedderburn, *The Right to Threaten Strikes*, 24 MOD. L. REV. 572 (1961)).

<sup>109</sup> See EPSTEIN, *supra* note 55, at 68–69; J.J. Posner, *English Trade Disputes Act of 1906*, 10 CAL. L. REV. 395, 398 (1922).

<sup>110</sup> See David R. Lowry et al., *Legal Intervention in Industrial Relations in the United States and Britain—A Comparative Analysis*, 63 MARQ. L. REV. 1, 14–15 (1979).

<sup>111</sup> Trade Disputes Act, 1965, c. 48 (Eng.). See also Andrew Hodge, *The Curious History of Trade Union Law*, 4 DENNING L.J. 92, 106 n.75 (1989); William M. Rees & Harvey B. Minsky, *Labour Relations and the Law: Some Academic Reflections*, 6 CAMBRIAN L. REV. 20, 27 (1975).

<sup>112</sup> Paul Wilenius, *Enemies Within: Thatcher and the Unions*, BBC NEWS (Mar. 5, 2004, 1:15 PM), [http://news.bbc.co.uk/2/hi/uk\\_news/politics/3067563.stm](http://news.bbc.co.uk/2/hi/uk_news/politics/3067563.stm) (describing Margaret Thatcher as “the nemesis of the trade union movement”).

*B. The American Experience*

The historical development of antitrust laws in the United States was complicated by at least three factors that were absent in Britain.<sup>113</sup> First was the passage of the Sherman Act.<sup>114</sup> Second was the complexity of American federalism, which limited the scope of the antitrust laws to activities in interstate commerce.<sup>115</sup> Third were the constitutional protections that the United States Constitution allowed to employers to resist labor inroads, most notably in *Adair v. United States*<sup>116</sup> and *Coppage v. Kansas*,<sup>117</sup> which struck down collective bargaining statutes introduced at the federal and state level, respectively.

One early notable step in the American setting was the Supreme Court's 1908 decision in *Loewe v. Lawlor* that applied the Sherman Act to unions just as progressive political forces were moving sharply in the opposite direction.<sup>118</sup> The passage of the Clayton Act of 1914 marked the initial divergence in the antitrust treatment of corporations and labor unions.<sup>119</sup> On the firm side, section 7 extended the reach of the antitrust laws to mergers and acquisitions that might "substantially lessen" competition.<sup>120</sup> No longer did public officials in either the Justice Department, or under the 1914 Act, the Federal Trade Commission, have

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<sup>113</sup> See Bernard D. Meltzer, *Labor Unions, Collective Bargaining, and the Antitrust Laws*, 32 U. CHI. L. REV. 659 (1965) (giving one account of the early history of American antitrust laws).

<sup>114</sup> See Edward A. Adler, *Monopolizing at Common Law and Under Section Two of the Sherman Act*, 31 HARV. L. REV. 246, 250–51 (1917); Epstein, *A Common Law for Labor Relations*, *supra* note 38, at 1380 (referencing Ralph K. Winter, Jr., *Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities*, 73 YALE L.J. 14, 30–32 (1963)); Mark T.L. Sargent, *Economics Upside-Down: Low-Price Guarantees as Mechanisms for Facilitating Tacit Collusion*, 141 U. PA. L. REV. 2055, 2100 (1993). *But see* Felix H. Levy, *The Federal Anti-Trust Law and the "Rule of Reason,"* 1 VA. L. REV. 188, 190 (1913).

<sup>115</sup> See, e.g., *United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344, 409–13 (1922) (dealing with the distinction between "local" strikes and those intended to interfere with interstate commerce).

<sup>116</sup> 208 U.S. 161, 179 (1908).

<sup>117</sup> 236 U.S. 1, 26 (1914).

<sup>118</sup> 208 U.S. 274, 276, 280 (1908).

<sup>119</sup> Pub. L. No. 63-212, 38 Stat. 730 (codified as amended at 15 U.S.C. §§ 12–27 (2006), 29 U.S.C. §§ 52–53 (2006)).

<sup>120</sup> *Id.* § 7 (codified as amended at 15 U.S.C. § 18 (2006)).

to wait until the merger took place.<sup>121</sup> Instead, a preclearance procedure let them block mergers and acquisitions that were thought to violate the new substantive antitrust norm.<sup>122</sup>

At the same time, the Clayton Act contracted the scope of the antitrust laws in connection with both labor and agricultural markets.<sup>123</sup> The operative text, section 6, famously held that “the labor of a human being is not a commodity or article of commerce.”<sup>124</sup> This amendment has a long and complex history.<sup>125</sup> Its precise extent was much mooted,<sup>126</sup> and in *Duplex Printing Press Co. v. Deering*,<sup>127</sup> the Supreme Court of the United States held that section 6 did not insulate union activity taken in cooperation with nonunion businesses to unionize a particular facility.<sup>128</sup> The Court in *Duplex Printing* read the Clayton Act more narrowly than the dissent,<sup>129</sup> but it did not deny that section 6 had any operation whatsoever because it insulated union actions directed against the target firm even if it left *Loewe v. Lawlor* untouched insofar as it dealt with secondary

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<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> RICHARD A. EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION 85 (2006).

<sup>124</sup> Clayton Act § 6, 15 U.S.C. § 17 (2006).

That the labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

*Id.* The exemption of labor unions from the antitrust laws was long sought by American labor unions, and had been explicitly endorsed by the 1908 Democratic National Convention. Joseph Kovner, *The Legislative History of Section 6 of the Clayton Act*, 47 COLUM. L. REV. 749, 750–51 (1947).

<sup>125</sup> For my take on § 6, see EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION, *supra* note 123, at 84–89.

<sup>126</sup> See Kovner, *supra* note 124, at 750–51 (discussing strong support for a broad reading of the Act).

<sup>127</sup> 254 U.S. 443 (1921).

<sup>128</sup> *Id.* at 475–78. See also FELIX FRANKFURTER & NATHAN GREENE, THE LABOR INJUNCTION, 169–70 (1963) (one of the major influences that helped pass the Act).

<sup>129</sup> 254 U.S. at 479 (Brandeis, J., dissenting).

boycotts.<sup>130</sup> Even this short account shows that the general welfarist theorem—one that sees the superiority of competition in all business and labor settings—has been consciously been set aside.

The federal antitrust laws were also pressed into business to deal with the recurrent question of labor violence directed at firms for clearly anticompetitive ends. Thus, *United Mine Workers v. Coronado Coal Co.*,<sup>131</sup> decided in 1922, was the capstone of extensive litigation brought by an open shop miner whose property was destroyed by the District Union that had jurisdiction over his area.<sup>132</sup> Unlike *Duplex*, no one wanted to argue that the law protected acts of violence.<sup>133</sup> However, the harder question was whether these acts were protected solely at the state level by ordinary tort law or whether these acts were a violation of the antitrust laws because of their efforts to monopolize the interstate industry.<sup>134</sup> Given the relatively narrow scope at the time of federal power under the Commerce Clause, this issue was by no means easy.<sup>135</sup> In dealing with it in a later case, Chief Justice Taft tried to compromise in a way that had evident instability. He wrote:

The mere reduction in the supply of an article to be shipped in interstate commerce by the illegal or tortious prevention of its manufacture or production is ordinarily an indirect and remote obstruction to that commerce. But when the intent of those unlawfully preventing the manufacture or production is shown to be to restrain or control the supply entering and moving in interstate commerce, or the price of it in interstate markets, their action is a direct violation of the Anti-Trust Act.<sup>136</sup>

The first half of this proposition undeniably represented the legal understanding in the United States prior to the key decisions in *NLRB v. Jones & Laughlin Steel Corp.* in 1937<sup>137</sup> and *Wickard v. Filburn* in 1942.<sup>138</sup>

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<sup>130</sup> *Id.* at 478–79 (majority opinion).

<sup>131</sup> 259 U.S. 344 (1922).

<sup>132</sup> *Id.* at 398.

<sup>133</sup> Compare *id.* at 381–82, with *Duplex Printing*, 254 U.S. at 480 (Brandeis, J., dissenting) (defendants contending that their interference was justified under the common law of New York, by the Clayton Act, and in self-defense).

<sup>134</sup> See *Coronado Coal*, 259 U.S. at 396.

<sup>135</sup> See *id.* at 407–09.

<sup>136</sup> *Coronado Coal Co. v. United Mine Workers*, 268 U.S. 295, 310 (1925).

<sup>137</sup> 301 U.S. 1, 37 (1937).

However, the distinction turned on the question of authorization at the national level, which had to raise difficult questions of fact across the board. On this point, the Supreme Court beat a hasty retreat after the 1937 constitutional revolution made it clear that the Sherman Act applied to local acts of violence that disrupted shipments of goods into interstate commerce. However, the unmistakable message in *Apex Hosiery Co. v. Leader*<sup>139</sup> was that acts of union violence, which resulted from a sit-in strike that disrupted production for three months and prevented the shipment of any goods into interstate commerce, were “of a different kind and ha[ve] not been shown to have any actual or intended effect on price or price competition.”<sup>140</sup> Force, which is more dangerous than a collective refusal to deal, was thus outside the antitrust laws after the Commerce Clause was given far broader reach, even if it had been the *raison d’être* of federal action when the clause received a far narrower construction.<sup>141</sup>

This complex interplay between federalism and antitrust issues explains the divergent treatment of the antitrust law as it applies to commerce and to labor. The broad proposition contained in section 6 of the Clayton Act led, after many twists and turns, to widespread acceptance of the proposition that Congress could exempt labor from the antitrust law on the original ground that commodities and people were different.<sup>142</sup> This broad perception carried the day on the legislative front with the passage of, for example, the Norris-LaGuardia Act, whose central provisions outlawed the yellow dog contract and made it clear that federal courts could not issue injunctions in ordinary inducement of breach of contract cases in accordance with earlier common law principles.<sup>143</sup>

Ironically, even that last decision was subject to revision under the Taft-Hartley Act, which adopted elaborate rules to limit the reach of secondary boycotts.<sup>144</sup> The section was passed in response to the Supreme Court’s decision in *United States v. Hutcheson*,<sup>145</sup> which held that the

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<sup>138</sup> 317 U.S. 111, 124 (1942).

<sup>139</sup> 310 U.S. 469 (1940).

<sup>140</sup> *Id.* at 504.

<sup>141</sup> *Id.* at 512–13.

<sup>142</sup> See Kovner, *supra* note 124, at 757–61.

<sup>143</sup> Norris-LaGuardia Act, Pub. L. No. 65, §§ 7–8, 47 Stat. 70, 71–72 (1932) (codified as amended at 29 U.S.C. §§ 101–110, 113–115 (2006)).

<sup>144</sup> Labor Management Relations (Taft-Hartley) Act, Pub. L. No. 80-101, § 8(b)(4), 61 Stat. 136, 141–42 (1947) (codified as amended at 29 U.S.C. §§ 151–169 (2006)) (imposing restrictions without using the term “secondary boycott”).

<sup>145</sup> 312 U.S. 219 (1941).

public policy behind the Norris-LaGuardia Act not only prevented the federal courts from issuing injunctions in labor dispute, but also insulated unions from the criminal or civil enforcement of the antitrust laws.<sup>146</sup> “It would be strange indeed that although neither the Government nor Anheuser-Busch (the private complainant) could have sought an injunction against the acts here challenged, the elaborate efforts to permit such conduct failed to prevent criminal liability punishable by imprisonment or heavy fines.”<sup>147</sup> But why? The two remedial responses work in quite different ways. The injunction does not let the operation go, and thus could easily squash legitimate activities, often at the behest of a private party. Yet, once the defendant’s acts are completed, this element of uncertainty is removed from the case. In any subsequent proceedings, moreover, the defendant has the full set of criminal law safeguards.<sup>148</sup> Indeed, writing in 1930 about an earlier draft version of what became the Norris-LaGuardia Act, then-Professor Frankfurter and Mr. Nathan Greene noted that a substantially similar piece of proposed legislation “explicitly applies only to the authority of United States courts ‘to issue any restraining order or [ . . . ] injunction.’”<sup>149</sup> The distinction here is not all that different from the general rule that denies injunctions against the publication of a libel while allowing damage actions at least under some circumstances once it occurs.<sup>150</sup>

This complicated history shows that no one who wants to apply the antitrust laws (or the secondary boycott provisions of Taft-Hartley) to unions believes that people and commodities are the same thing, for their differences are reflected by the profound differences between the provision in labor and sales contracts, which are negotiated with a keen appreciation of these differences.<sup>151</sup> What is critical, however, is that the conventional wisdom in favor of a broad reading of section 6 of the Clayton Act never once came to grips with the central objection that any restriction on prices and output leads to a diminution of social welfare by moving the market

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<sup>146</sup> *Id.* at 234–35.

<sup>147</sup> *Id.* at 235.

<sup>148</sup> *See id.* at 235–36.

<sup>149</sup> FRANKFURTER & GREENE, *supra* note 128, at 220 (quoting Norris-LaGuardia Act § 1, 29 U.S.C. § 101 (2006)).

<sup>150</sup> *See, e.g.*, *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 283 (1964) (allowing damages at least in cases of actual malice); *Near v. Minnesota*, 283 U.S. 697, 716 (1931) (rejecting prior restraints).

<sup>151</sup> Kovner, *supra* note 124, at 757–61.

further from a competitive equilibrium.<sup>152</sup> That progressive blindness to the evident dangers of collective behavior made it easier for the defenders of the New Deal to give explicit protection to the entire process of collective bargaining under the National Labor Relations Act of 1935.

#### IV. THE NATIONAL LABOR RELATIONS ACT OF 1935

The huge expansion of union prerogatives ushered in before 1935 did not give unions all that they wanted in industrial relations. Most critically, even after passage of Norris-LaGuardia, employers were generally still entitled to refuse to deal with unions and could still fire workers for their involvement with union activities.<sup>153</sup> These defenses were still quite strong, and they were the explicit target of the National Labor Relations Act (NLRA) of 1935, which was upheld by the Supreme Court shortly thereafter against challenges that it involved a regulation of local manufacturing which was outside the scope of the federal power under the Commerce Clause.<sup>154</sup> The earlier objection that collective bargaining counted as infringement of freedom of contract, as urged in *Adair v. United States*<sup>155</sup> and *Coppage v. Kansas*,<sup>156</sup> had already disappeared without a trace in the litigation over the Railway Labor Act of 1926.<sup>157</sup> Chief Justice Hughes held then that the refusal to deal with the union should be treated as an interference with the right of workers to choose their own representatives.<sup>158</sup> The point presupposes that once the union members

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<sup>152</sup> Kovner, *supra* note 124, at 761.

<sup>153</sup> See Norris-LaGuardia Act of 1932, Pub. L. No. 72-65, 47 Stat. 70 (codified as amended at 29 U.S.C. §§ 101–110, 113–115 (2006)).

<sup>154</sup> NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 49 (1937).

<sup>155</sup> 208 U.S. 161, 162 (1908).

<sup>156</sup> 236 U.S. 1, 13–14 (1915).

<sup>157</sup> Pub. L. No. 69-257, 44 Stat. 577 (codified as amended at 45 U.S.C. §§ 151–188 (2006)).

<sup>158</sup> See *Texas & New Orleans R.R. Co. v Bhd. of Ry. & S.S. Clerks*, 281 U.S. 548, 570–71 (1930). Chief Justice Hughes wrote:

Thus 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. The petitioners invoke the principle declared in *Adair* . . . and *Coppage* . . . but these decisions are inapplicable. The Railway Labor Act of 1926 does not interfere with the normal exercise of the right of the carrier to select its employees or to discharge them. The statute is

(continued)

make their choice, it binds outsiders to deal with them, when the principle of freedom of association stands for the exact opposite proposition, namely, that all persons can decide whether to deal with others at their own choosing.<sup>159</sup> For these purposes, however, in this Article I do not revisit the constitutional issue, but examine the long-term impact that the operation of the NLRA has on the operation of labor markets, where all its effects are negative. The simple explanation is that any conscious deviation from the principles of competitive markets will always result in social losses. The longer story requires a closer look at the key moves made by the defenders of the NLRA, many of which remain all too common today.

The difficulty with the NLRA begins with the rationales used to secure its passage. The preamble to the statute laments that workers “do not possess full freedom of association or actual liberty of contract.”<sup>160</sup> “Full” and “actual” are useless epithets, for neither explains why workers do not have the same set of formal rights available to all others in terms of their ability to accept or reject any offer that they choose. Of course, they may be worse off if they cannot exert monopoly power, but by that logic employers are also denied full and actual freedom of contract because they too are not allowed to collude. Ironically, the Roosevelt administration believed that some small businesses at least did have the right to collude, which is why it went to such great length to pass codes of “fair competition,” all of which were intended to block open entry into what could have been competitive markets.<sup>161</sup>

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not aimed at this right of the employers but at the interference with the right of employees to have representatives of their own choosing. As the carriers subject to the Act have no constitutional right to interfere with the freedom of the employees in making their selections, they cannot complain of the statute on constitutional grounds.

*Id.* (internal citations omitted).

<sup>159</sup> It was just this point that started my interest in labor law as a student. See Richard A. Epstein, Note, *Individual Control over Personal Grievances Under Vaca v. Sipes*, 77 YALE L.J. 559, 563–64 (1968) (critiquing the apologia for collective bargaining offered by then-Harvard law professor Archibald Cox).

<sup>160</sup> National Labor Relations Act § 1, 29 U.S.C. § 151 (2006).

<sup>161</sup> See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 525–35 (1935) (discussing these codes).



The NLRA goes on to say that the want of unions “aggravate[s] recurrent business depressions,” when in fact the opposite is true.<sup>162</sup> Wages in competitive markets tend to move smoothly.<sup>163</sup> Strikes and lockouts create strong discontinuities and greater business uncertainty, which can only aggravate the social dislocations not only on the immediate parties to the dispute, but on everyone else as well.<sup>164</sup> The statute also praises the act for increasing “the purchasing power of wage earners,” which it does for union members, but for no one else.<sup>165</sup> Indeed, strong unions with monopoly power could reduce the wage prospects for nonunion workers of the same employer.<sup>166</sup> The increase in the purchasing power of some workers is offset by the decline in the purchasing power of others and of the capital available at the firm level for either dividends or reinvestment.<sup>167</sup> The correct analysis on purchasing power requires a global examination, which cannot extol the pluses of wealth transfer while ignoring the minuses. Last, the “stabilization of competitive wage rates and working conditions within and between industries”<sup>168</sup> contains the usual internal contradiction: stabilization is a polite word for monopolization that seeks to keep workers’ wages constant regardless of changes in external conditions, and thus exacerbates instability by placing a larger fraction of system-wide uncertainty on outside parties. The defenders of the NLRA see social welfare tied to union success.<sup>169</sup> They are half right. The two are connected, and that connection is negative.

The basic structure of modern labor law brings each of these difficulties to light. The basic structure of the NLRA first gives employees the right to bargaining collectively in section 7, the key portion of which provides:

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<sup>162</sup> National Labor Relations Act § 1, 29 U.S.C. § 151.

<sup>163</sup> EPSTEIN, *supra* note 5, at 123.

<sup>164</sup> *See id.* at 123–24.

<sup>165</sup> National Labor Relations Act § 1, 29 U.S.C. § 151.

<sup>166</sup> *See* EPSTEIN, *supra* note 5, at 142–43.

<sup>167</sup> *Id.* at 142.

<sup>168</sup> National Labor Relations Act § 1, 29 U.S.C. § 151.

<sup>169</sup> *Strengthening America’s Middle Class Through the Employee Free Choice Act: Hearing Before the Subcomm. on Health, Emp’t, Labor and Pensions of the H. Comm. on Educ. and Labor*, 110th Cong. 72 (2007) [hereinafter *Hearing*] (statement of Harley Shaiken, Professor, University of California-Berkley) (“As union membership slides, however, both unions’ ability to raise wages for their members and spin-off benefits for nonunion workers erode, wiping out the middle class dreams of many Americans.”).

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities . . . .<sup>170</sup>

Note that the Taft-Hartley amendments of 1947 added the last clause of the quoted material.<sup>171</sup> With or without that clause, section 9(a) confers a clear monopoly when it provides that:

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . .<sup>172</sup>

The term “exclusive” is what creates the legal monopoly for the union that gains recognition.<sup>173</sup> Section 9(a) thus contemplates what turns out to be a difficult and complex set of elections to see whether any union, and if so, which, shall be entitled to represent these workers.<sup>174</sup> Once that election is made, all dissenting workers are subject to agreements negotiated by representatives, which override prospectively all individual contracts entered into before the union gained recognition.<sup>175</sup> The effect of this provision is to create a durable legal monopoly that cannot be eroded by time. This extra power is then backed up by a set of unfair labor practices whose definition is broad enough to match the set of bargaining rights contained in the Act. The first of these provisions states that “[i]t

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<sup>170</sup> Labor Management Relations (Taft-Hartley) Act of 1947 § 7, 29 U.S.C. § 157 (2006) (amending National Labor Relations Act § 7).

<sup>171</sup> *Compare id.*, with National Labor Relations Act, ch. 372, § 7, 49 Stat. 449, 452 (1935).

<sup>172</sup> National Labor Relations Act § 9(a), 29 U.S.C. § 159(a) (2006).

<sup>173</sup> *Id.* See also *J.I. Case Co. v. NLRB*, 321 U.S. 332, 337 (1944) (explaining how even individual employees must adhere to exclusive bargaining rights of the certified union representative).

<sup>174</sup> National Labor Relations Act § 9(a), 29 U.S.C. § 159(a).

<sup>175</sup> See *J.I. Case Co.*, 321 U.S. at 337–38.

shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.”<sup>176</sup> The provision necessarily uses broad definitions of interference, restraint, and coercion, reminiscent of those adopted by Chief Justice Hughes in *Texas & New Orleans Railroad Co.*<sup>177</sup> insofar as it is set against the backdrop of a duty to bargain in good faith with the union under section 7 of the Act. To backstop this provision, section 8(a)(3) makes it an unlawful practice “[f]or an employer . . . [b]y discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .”<sup>178</sup> It is no longer possible to fire workers whose first loyalty is with the union.<sup>179</sup> It becomes difficult thereafter to determine whether any dismissal was for union activities or simple incompetence, or some combination of the above. The last provision in this critical trio is section 8(5), which makes it “an unfair labor practice for an employer . . . [t]o refuse to bargain collectively with the representatives of his employees, subject to the provisions of [section 9(a)]” which specifies the rules for union elections.<sup>180</sup>

In addition to the provisions that aid outside unions, the NLRA contains provisions intended to prevent employers from taking defensive measures by installing a union more to their liking.<sup>181</sup> It is to cut off this prospect that section 8(3) provides that the employer cannot “encourage” membership in a union.<sup>182</sup> That apparent oddity is designed to make sure that employers cannot steer workers to unions with whom they would prefer to deal.<sup>183</sup> That provision in turn is complemented by section 8(2), which makes it “an unfair labor practice . . . [t]o dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it.”<sup>184</sup> In effect, this prohibition on “company unions” is designed to make sure that the employer does not construct its

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<sup>176</sup> National Labor Relations Act § 8(1), 29 U.S.C. § 158(a)(1).

<sup>177</sup> *Texas & New Orleans R.R. Co. v. Bhd. of Ry. & S.S. Clerks*, 281 U.S. 548, 567–68 (1930).

<sup>178</sup> National Labor Relations Act § 8(3), 29 U.S.C. § 158(a)(3).

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* § 8(5), 29 U.S.C. § 158(a)(5).

<sup>181</sup> *Id.* § 8(1)–(3), 29 U.S.C. § 158(a)(1)–(3).

<sup>182</sup> *Id.* § 8(3), 29 U.S.C. § 158(a)(3).

<sup>183</sup> See Richard A. Epstein, *Senseless in Seattle*, *DEFINING IDEAS* (Apr. 26, 2011), <http://www.hoover.org/publications/defining-ideas/article/76501>.

<sup>184</sup> National Labor Relations Act § 8(2), 29 U.S.C. § 158(a)(2).

own union to block off employee participation in a trade union whose interests are adverse to the firm.<sup>185</sup> That prohibition can cost employees dearly because it makes it more difficult for employers to smooth over relations with workers before any union arrives on the scene. The enforced separation has the additional adverse effect of making it harder to share information with, and extend additional responsibilities to, employers—all of which are opportunities that could make it more difficult for unions to gain footholds.<sup>186</sup>

The combined effect of these provisions denies the employer the right just to say no to a union, which completely alters the bargaining in question from what it is in a competitive industry. At this point, the content of the duty to bargain in good faith becomes difficult to specify, as it is not easy to walk the fine line between forcing parties to make substantive concessions and allowing them to go their own way. The great advantage of the competitive market is that when the two sides cannot agree, they walk away and choose a trading partner with whom they prefer to deal. That cannot be done here, so the negotiations can be both protracted and divisive, where breakdowns can lead to strikes and lockouts, with obvious adverse effects on innocent third parties.<sup>187</sup> No longer is the objective to maximize the gains from transactions net of their costs;<sup>188</sup> instead, it is to increase transaction costs in ways that necessarily reduce gains from trade.<sup>189</sup>

No short article can hope to do justice to the immense amount of complex litigation that arises out of the operation of these provisions. For our purposes, the bottom line becomes clear without such a demonstration. The statute in effect uses exclusive right of representation to cut off the employer from all other sources of labor. The costs, both public and

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<sup>185</sup> Bruce E. Kaufman, *The Case for the Company Union*, 41 LABOR HISTORY 321, 321 (2000).

<sup>186</sup> Gerald L. Pauling II & M. Andrew McGuire, *The Implications of Crown Cork & Seal Co. for Employee Involvement Committees as Labor Organizations Under the NLRA: What Constitutes "Dealing with" Pursuant to Section 2(5) of the Act Since Electromation, Inc.?*, 18 LABOR LAW. 215, 226 (2002).

<sup>187</sup> Josh L. Eidelson, *The Employer Strikes Back*, AM. PROSPECT (Apr. 2, 2012), <http://prospect.org/article/employer-strikes-back>.

<sup>188</sup> Barry T. Hirsch & Jeffrey M. Hirsch, *The NLRA After Seventy Years: What Next?* 4 (Jan. 7, 2006) (unpublished paper prepared for LERA/AEA session at Allied Soc. Sci. Ass'n Meetings, Boston), [http://www2.gsu.edu/~ecobth/LERA\\_Proceedings\\_NLRA70\\_Jan06.pdf](http://www2.gsu.edu/~ecobth/LERA_Proceedings_NLRA70_Jan06.pdf).

<sup>189</sup> *Id.*

private, are far greater than those in competitive markets where there are continuous adjustments in wages and other terms of ongoing contracts and high rates of turnover as new firms enter and prosper in markets.<sup>190</sup> The central social question is whether the high administrative costs, borne only in small part by federal appropriations and needed to keep this monopoly structure afloat, are justified by any ostensible social benefits. In this case, the answer is clearly in the negative because the monopoly institutions put in place by the Act are less efficient than the far simpler mechanisms that they displace.

That simple fact goes a long way to explain the decline of unions in the private sector. In 1935, the structure of American industry was far more corporatist than it is today.<sup>191</sup> So long as businesses are protected by tariff walls and exclusive franchises, unions can target firms with monopoly profits.<sup>192</sup> However, once trade barriers relax in both domestic and foreign markets, it is far harder for unions to extract monopoly rents from firms that face stiff competition.<sup>193</sup> That information is not lost on current or prospective union workers who can see the decline of major union firms in such key industries as automobiles and steel, whose ranks have been decimated in past years.<sup>194</sup> The moment of truth comes when membership in a union—which has its own costs in both time and money—costs an employee more than the union can provide the employee in the new open environment.<sup>195</sup> As a result, union membership in the private sector started its inexorable slide from about 35% of the private workforce in 1954<sup>196</sup> to

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<sup>190</sup> Richard A. Epstein, *How to Stymie the Teachers Unions*, EDUC. NEXT (Oct. 1, 2012), <http://educationnext.org/how-to-stymie-the-teachers-unions/>.

<sup>191</sup> Erin Johansson & Julia Martinez Ortega, *The Employee Free Choice Act: Ensuring the Economy Works for Everyone*, AM. RIGHTS WORK (Dec. 2008), [http://www.americanrightsatwork.org/dmdocuments/ARAWReports/araw\\_efca\\_ensuring\\_the\\_economy\\_works\\_for\\_everyone\\_again.pdf](http://www.americanrightsatwork.org/dmdocuments/ARAWReports/araw_efca_ensuring_the_economy_works_for_everyone_again.pdf).

<sup>192</sup> D.T. Armentano, *The Failure of Antitrust Policy*, 44 FREEMAN 294, 296 (1994).

<sup>193</sup> Daniel Griswold, *Unions, Protectionism, and U.S. Competitiveness*, 30 CATO J. 181, 190 (2010).

<sup>194</sup> *Id.* at 193–94.

<sup>195</sup> See Barry T. Hirsch, *Unionization and Economic Performance: Evidence on Productivity, Profits, Investment, and Growth*, FRASER INST. (1997), [http://www2.gsu.edu/~ecobth/Fraser\\_Union\\_Performance.pdf](http://www2.gsu.edu/~ecobth/Fraser_Union_Performance.pdf).

<sup>196</sup> William T. Dickens & Jonathan S. Leonard, *Accounting for the Decline in Union Membership, 1950–1980*, 38 INDUS. & LAB. REL. REV. 323, 323 (1985).

less than 7% today.<sup>197</sup> No raft of well-crafted union organization campaigns could return unions to their glory days, even if the passage of the Employee Free Choice Act might have stemmed the rate of decline, or even reversed it by a few percentage points.

The point here is that this decline in labor union participation is an unalloyed good, which contributes to the overall health of the American labor markets. It does not, however, protect those markets from the next wave of regulation that includes the New Deal standby of the Fair Labor Standards Act of 1938,<sup>198</sup> whose coverage has been constantly extended over time, and the employment discrimination laws first adopted in the Civil Rights Act of 1964. All of these measures are widely hailed as a form of labor protection, but their logic proves otherwise. Labor markets work well when the costs of transaction are low enough to permit gains from trade.<sup>199</sup> The full range of labor statutes increases those transaction costs and thus helps contribute to the recent high levels of unemployment that have so hurt the economy in the recent slowdown.

#### V. LOOKING AHEAD

The status and power of unions have changed a great deal in the last thirty years, but the key question now is whether the low level of union concentration in the private sector renders unions irrelevant going forward. Unfortunately, the answer to that question is no. What is clear is that it is exceedingly difficult for unions to gain any advantage at the bargaining table today.<sup>200</sup> In most cases, the strike threat is no longer credible because firms can use a variety of substitutes to ease the burden.<sup>201</sup> The recent failures of the Communications Workers of America (CWA) to sustain its strike at Verizon Communications Inc. illustrate the basic pattern.<sup>202</sup> The CWA went on strike in the landlines division, a profiting-losing center, to

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<sup>197</sup> Patrice Hill, *Declining Number of Union Members Affects All Workers' Salaries*, WASH. TIMES (Jun. 7, 2012), <http://www.washingtontimes.com/news/2012/jun/7/declining-number-of-union-members-affects-all-work/?page=all>.

<sup>198</sup> Fair Labor Standards Act of 1938, Pub. L. 75-718, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201-219 (2006)).

<sup>199</sup> Richard A. Epstein, *The Road to Economic Perdition*, DEFINING IDEAS (Sept. 7, 2011), <http://www.hoover.org/publications/defining-ideas/article/91801>.

<sup>200</sup> Griswold, *supra* note 193, at 183.

<sup>201</sup> See, e.g., Richard A. Posner, *Some Economics of Labor Law*, 51 U. CHI. L. REV. 988, 997-98 (1984).

<sup>202</sup> See Steven Greenhouse, *Verizon Workers Plan to End Strike, Agreeing to Revive Talks Toward a Contract*, N.Y. TIMES, Aug. 21, 2011, at A14.

get a fraction of the profits from the more substantial wireless division.<sup>203</sup> Its political arm announced that Verizon refused to bargain seriously, and that Verizon could afford to pay higher wages given the company's net profits of \$6 billion from revenues of \$108 billion and its receipt of part of a \$10 billion dividend from its mobile unit.<sup>204</sup> But, the CWA lacked a credible threat for asking for a diversion of profits from a division that it did not represent. The strike added to the CWA's cost when it became clear that Verizon could maintain its wire line services without the CWA employees in the short run, and could thereafter start to hire permanent replacements.<sup>205</sup> At the outset of the strike, I predicted that it would be a fiasco for the CWA,<sup>206</sup> and three days later, it was over.<sup>207</sup>

The strike route, then, does not work. Yet, unions still have resort to political devices that help achieve their need for protected labor monopolies.<sup>208</sup> They can, and do, bring antidumping actions to forestall foreign competition.<sup>209</sup> They can, and do, participate in zoning decisions to prevent the construction of new projects without the use of union labor.<sup>210</sup> Their level of political support remains strong, but for reasons that depart from the institutions of collective bargaining.<sup>211</sup> Prominent union supporters have insisted that unions should be regarded as a bulwark of the "middle class," and that the struggles of the middle class are best explained

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<sup>203</sup> See generally Steven Greenhouse, *Customers Feel Some Ripples from the Verizon Strike*, N.Y. TIMES, Aug. 19, 2011, at B4.

<sup>204</sup> *45,000 Workers on Strike at Verizon*, COMM. WORKERS AMERICA (Aug. 7, 2011), [http://www.cwa-union.org/news/entry/45000\\_workers\\_on\\_strike\\_at\\_verizon#.T-SYYGjwnJA](http://www.cwa-union.org/news/entry/45000_workers_on_strike_at_verizon#.T-SYYGjwnJA).

<sup>205</sup> See Richard Epstein, *Collective Bargaining = Collective Suicide*, DEFINING IDEAS (Aug. 16, 2011), <http://www.hoover.org/publications/defining-ideas/article/89366>.

<sup>206</sup> See, e.g., *id.*

<sup>207</sup> Juan Gonzalez, *Decision to End Verizon Strike Baffled Many Members, Supporters*, N.Y. DAILY NEWS (Aug. 24, 2011, 4:00 AM), [http://articles.nydailynews.com/2011-08-24/news/29939658\\_1\\_cwa-15-day-strike-striking-unions](http://articles.nydailynews.com/2011-08-24/news/29939658_1_cwa-15-day-strike-striking-unions).

<sup>208</sup> See EPSTEIN, *supra* note 55, at 209.

<sup>209</sup> See Richard W. McGee, *The Case to Repeal the Antidumping Laws*, 13 NW. J. INT'L L. & BUS. 491, 497–98 (1993).

<sup>210</sup> See, e.g., Nancy Cleeland & Abigail Goldman, *Grocery Unions Battle to Stop Invasion of the Giant Stores*, L.A. TIMES, Nov. 25, 2003, at A1 (noting that unions are persuading local officials to adopt zoning laws that keep out Wal-Mart stores).

<sup>211</sup> See generally EPSTEIN, *supra* note 55, at 25–26 (noting the ability to persuade neutral decision makers).

by the reduction in the percentage of unionized workforce.<sup>212</sup> The argument is subject to the same basic objections that apply to the NLRA. The middle class does not consist solely, or even largely, of union members.<sup>213</sup> With private union membership so low, the middle class contains all sorts of small business owners and nonunion employees whose own positions are made less secure by strong unions.<sup>214</sup> The key question is how to get their activities going, which requires a system of deregulation of labor markets, not the return to union status. The one lesson from the rise of public unions is that their gains are not sustainable. Through a widespread movement in the 1960s, unions enjoyed the power to bargain collectively in most states.<sup>215</sup> New York's Taylor Law is one such law; it requires unions to forsake strikes in favor of arbitration.<sup>216</sup> Under that law, New York now finds that 75% of its public workers are unionized.<sup>217</sup> The combination of pensions and health care benefits has put the state into an unsustainable fiscal position.<sup>218</sup> However, as with all unions, renegotiation of existing contracts is a time-consuming and perilous project in which most of the concessions are to be borne by future union members, and thus do little if anything to ease the current crisis.<sup>219</sup> The issue is of no small importance because the number of public sector workers now exceeds the number of private sector workers.<sup>220</sup> Their ranks have been thinned in

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<sup>212</sup> See *Hearing, supra* note 169, at 63 (statement of Nancy Schiffer, Assoc. Gen. Counsel, AFL-CIO).

<sup>213</sup> Hill, *supra* note 197.

<sup>214</sup> *Hearing, supra* note 169, at 70 (statement of Prof. Harley Shaiken).

<sup>215</sup> Chris Edwards, *Public Sector Unions*, CATO INST.: TAX & BUDGET BULL., No. 61 (March 2010), [http://www.cato.org/pubs/tbb/tbb\\_61.pdf](http://www.cato.org/pubs/tbb/tbb_61.pdf).

<sup>216</sup> Public Employees' Fair Employment Act, N.Y. CIV. SERV. LAW § 209 (McKinney 2011).

<sup>217</sup> E.J. McMahon, *McMahon: Wisconsin Vote Empowers Cuomo*, NEWSDAY (June 6, 2012, 4:54 PM), <http://www.newsday.com/opinion/oped/mcmahon-wisconsin-vote-empowers-cuomo-1.3765993>.

<sup>218</sup> TERRY O'NEIL & E.J. MCMAHON, EMPIRE CTR. FOR N.Y. STATE POLICY, TAYLOR MADE: THE COST AND CONSEQUENCES OF NEW YORK'S PUBLIC-SECTOR LABOR LAWS 22 (Oct. 2007), [http://www.empirecenter.org/Documents/PDF/TaylorLaw\\_Final.pdf](http://www.empirecenter.org/Documents/PDF/TaylorLaw_Final.pdf).

<sup>219</sup> See, e.g., Theodore W. Kheel, *The Taylor Law: A Critical Examination of Its Virtues and Defects*, 20 SYRACUSE L. REV. 181, 183 (1968) (explaining that because the Taylor Law eliminated the threat of a strike as a bargaining mechanism, "negotiations inevitably languish[ed]").

<sup>220</sup> News Release, Bureau of Labor Statistics, U.S. Dep't of Labor, Union Members—2011, USDL-12-0094 (Jan. 27, 2012), <http://www.bls.gov/news.release/pdf/union2.pdf>.



Wisconsin, where the restriction on collective rights and the removal of dues protection has cut membership in the American Federation of State, County and Municipal Employees, the state's second largest public-sector union, from 62,818 to 28,745 during the period of March 2011 to February 2012.<sup>221</sup>

At this juncture, there is both a positive and a normative question. The former is whether the decline in unions will continue apace. There is no doubt that without major legislative intervention it will. Quite simply, under current conditions, union membership is at most a modest advantage to most union members in most businesses. The hard core will be difficult to remove because many of their members do see this advantage, which they will try to preserve. However, industries that are not now unionized will be able to resist the pressures at some private cost. The public sector is likely to prove more volatile, given the experience in Wisconsin, but we are just a few major budget crises from a long overdue overhaul of those practices.

The normative question is, I think, easier. The title of this Article asks the question of whether unions are saviors or scourges. At one time, unions offered attractive benefits to their members, but always at the cost of overall social welfare. At that point, they could be thought saviors to some and scourges to others. On balance, however, their economic activities have always been a significant negative for social welfare. The truly amazing feature of American labor history is the fact that politicians and judges were prepared to turn cartwheels to give unions special powers that only increased the total level of social dislocations. On this level, at least, the overall judgment should be clear. The union movement, defended with such passion for its lofty ideals, is better understood as a scourge, not a savior, not by some narrow theory that exalts management over labor, but by any systematic evaluation of the overall negative impact that unions have had on the social welfare of a great nation.

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<sup>221</sup> Belkin & Maher, *supra* note 3, at A1.