

Collective Rights as Human Rights: Fulfilling Senator Wagner's Promise of Democracy in the Workplace—The Blue Eagle Can Fly Again

By CHARLES J. MORRIS*

I AM HONORED TO have this opportunity to contribute a message in tribute to John de J. Pemberton Jr., who so selflessly devoted a long and distinguished career to the advancement of civil liberties and to the rights of employees. It is fitting that the subject of this essay deals with both of those interests, for my topic is collective rights as human rights, and in the course of this discussion I shall attempt to demystify a core feature of the statutory law that Senator Robert F. Wagner initiated seventy years ago by passage of the National Labor Relations Act¹ (“NLRA” or “Act”) with its implied promise to introduce and protect democratic values in the American workplace.

Collective rights are human rights because in the economies of today a meaningful exercise of democratic freedom necessarily includes the right of individuals to join with others in a common effort to achieve a lawful goal. The right of association is therefore an essential freedom in a democratic environment, and today it is widely recognized as a human right with moral underpinnings that embraces the right of individual workers to form and join labor unions and to engage in collective bargaining.² This is the accepted view of every advanced democratic country in the international community, including our own. Although that perception is little understood and rarely appreciated, it is actually the official position of the United States as

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1. Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended in 29 U.S.C. §§ 151-169).

2. See CHARLES J. MORRIS, *THE BLUE EAGLE AT WORK: RECLAIMING DEMOCRATIC RIGHTS IN THE AMERICAN WORKPLACE* 140-52 (2005) [hereinafter *BLUE EAGLE*]; *infra* at notes 28-34 & 39-47.

expressed in legally binding treaty obligations;³ it is also a concept that flows naturally from the right of association protected by the First Amendment to the United States Constitution;⁴ and, of prime importance, it is the basic right enshrined in section 7 of the NLRA, which declares this concept to be “the policy of the United States.”⁵

Is there a paradox here? If union membership and collective bargaining are current legal rights, how does one explain the recent Bureau of Labor Statistics report that union membership in America has now dipped to less than eight percent in the private-sector work force?⁶ And why did Human Rights Watch conclude that firing a worker for organizing in the United States “is illegal but commonplace”?⁷ And why has it been so difficult for unions to organize the unorganized, despite the fact that polls show that the majority of American workers favor union membership?⁸ Although the answers to these questions are varied and may seem complex, the one answer that is most important is really quite simple, as I shall explain shortly.

These questions and their assorted answers have been addressed in countless books and articles, and a variety of reasons have been advanced to explain why union membership in this country has shrunk so drastically.⁹ Among the familiar purported causes are the

3. See *infra* notes 115–19 and accompanying text.

4. U.S. CONST. amend. I.

5. 29 U.S.C. § 151 (2000).

6. A “Union Members Summary” by the Bureau of Labor Statistics dated January 27, 2005, found that 7.9 percent of private industry workers were unionized in 2004. See News Release, Bureau of Labor Statistics, Union Members in 2004 (2005), at <http://www.bls.gov/news.release/union2.nr0.htm> (last accessed Mar. 23, 2005).

7. LANCE COMPA, HUMAN RIGHTS WATCH, UNFAIR ADVANTAGE: WORKERS’ FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS 18 (2000).

8. See, e.g., *Annual Poll by Peter Hart Associates for AFL-CIO*, CZARNEKI’S LABOR EDUC. NEWSL., Sept. 9, 2002.

9. See, e.g., MICHAEL GOLDFIELD, THE DECLINE OF ORGANIZED LABOR IN THE UNITED STATES (1987); THOMAS A. KOCHAN ET AL., THE TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS 7–15, 51–55 (1986); CHARLEY RICHARDSON, THE ROLE OF TECHNOLOGY IN UNDERMINING UNION STRENGTH IN RESTORING THE PROMISE OF AMERICAN LABOR LAW 223–35 (Sheldon Friedman et al. eds., 1994); VICKI SMITH, CROSSING THE GREAT DIVIDE: WORKER RISK AND OPPORTUNITY IN THE NEW ECONOMY (2001); HOYT N. WHEELER, THE FUTURE OF THE AMERICAN LABOR MOVEMENT 3–14, 25–33 (2002); Frank Ackerman, *Globalization and Labor: Overview Essay*, in THE CHANGING NATURE OF WORK 61–68 (Frank Ackerman et al. eds., 1998); Kate L. Bronfenbrenner, *Employer Behavior in Certification Elections and First-Contract Campaigns: Implications for Labor Law Reform*, in RESTORING THE PROMISE OF AMERICAN LABOR LAW 75–89 (Sheldon Friedman et al. eds., 1994); Paul F. Clark et al., *Private Sector Collective Bargaining: Is This the End or a New Beginning?*, in COLLECTIVE BARGAINING IN THE PRIVATE SECTOR 1–13 (Paul F. Clark et al. eds., 2002); Phil Comstock & Maier B. Fox, *Employer Tactics and Labor Law Reform*, in RESTORING THE PROMISE OF AMERICAN LABOR LAW

following: changes in the structure and composition of the economy, especially the downsizing of traditional manufacturing industries; the advent of computer and robot technology; the impact of globalization, including the outsourcing of both production and jobs; changes in the nature of the employment relationship; workers' indifference or hostility toward unions; the apathy of American unions; and, of course, the intense opposition of employers to any unionization of their employees. These are indeed factors that have contributed to the decline. None of these, however, is the primary factor, either direct or indirect.

In my view, the primary *direct* factor responsible for the decline is the failure or inability of organized labor to replace members who have been lost through attrition or other causes, regardless of the immediate reasons for that loss. For example, although massive numbers of union jobs have disappeared in older and declining industrial sectors, unions have been unable to replace their numbers by successfully organizing employees in new and expanding sectors.¹⁰ Moreover, the primary *indirect* reason responsible for this replacement failure is that existing law, and the manner in which it is perceived and enforced, has made successful new organizing efforts extremely difficult—in fact, almost impossible. Had the legal process not been hostile to unions, union membership today—though it would be centered in different industries—would still be relatively high. Accordingly, it seems indisputable that the state of the law, including its perception and enforcement, is ultimately the principal culprit responsible for the decline of unions and collective bargaining. That being so, a vital ques-

90–102 (Sheldon Friedman et al. eds., 1994); Henry S. Farber & Alan B. Krueger, *Union Membership in the United States: The Decline Continues*, in *EMPLOYEE REPRESENTATION: ALTERNATIVES AND FUTURE DIRECTIONS* (Bruce E. Kaufman & Morris M. Kleiner eds., 1993); James A. Gross, *The Demise of the National Labor Policy: A Question of Social Justice*, in *RESTORING THE PROMISE OF AMERICAN LABOR LAW* 52–53 (Sheldon Friedman et al. eds., 1994); Arne L. Kalleberg, et al., *Nonstandard Work, Substandard Jobs: Flexible Work Arrangements in the United States*, in *THE CHANGING NATURE OF WORK* 181–75 (Frank Ackerman et al. eds., 1998); Dani Rodrik, *Consequences of Trade for Labor Markets and the Employment Relationship*, in *THE CHANGING NATURE OF WORK* 88–91 (Frank Ackerman et al. eds., 1998); Richard Epstein, *A Common Law for Labor Relations: A Critique of New Deal Labor Legislation*, 82 *YALE L.J.* 1357 (1983); Richard B. Freeman, *Contraction and Expansion: The Divergence of Private and Public Sector Unionism in the United States*, 2 *J. ECON. PERSP.* 63, 88 (1988).

10. See, e.g., News Release, Bureau of Labor Statistics, *Union Affiliation of Employed Wage and Salary Workers by Occupation and Industry* (2003–2004), at <http://www.bls.gov/news.release/union2.t03.htm> (last accessed Mar. 23, 2005) (showing that in 2004 just 5.8 percent of employees in “computer and mathematical” occupations were represented by unions).

tion facing American society today is whether there is any course of action that might credibly address this problem.

I submit that the answer is yes, and that answer does not depend on remedial congressional legislation—which obviously would be unobtainable in the foreseeable future. The answer is yes because the critical issue is not the present law. It is, however, the perception and enforcement of that law. I am of the opinion that what is needed is a clarification of a long-misunderstood core feature of the Act, a feature that I have been researching for the past several years. The fruits of that research are contained in my recently published book, *The Blue Eagle at Work: Reclaiming Democratic Rights in the American Workplace*.¹¹ I shall use part of this essay to briefly explain the book's legal thesis, but before doing so I want to examine that thesis in its appropriate historical context, for law has traditionally played a decisive role in the shaping of American labor relations.

I. History: The Interplay Between Legislative and Judicial Action

A principal factor governing the rise and fall of organized labor in this country has always been the nature of the law pertaining to unions and collective bargaining, including the manner of its interpretation and practice. Although various economic and political forces—including the often conflicting forces of public opinion and corporate or union pressure, or both—have tended to shape that law and the manner of its practice, ultimately it has been the contents of the law and its perception, however conceived, that proved to be the primary regulator of the range and extent of labor union activity. This was true throughout the formative years of trade union development, and it was also true during later years that were characterized by mature union organizing, collective bargaining, and attendant strike activity. Indeed, it is true today. Here are some of the highlights in that history.

During the early years of trade union growth, the applicable legal controls consisted almost exclusively of common law actions in the state courts.¹² During the nineteenth century, judicial findings of criminal conspiracy and combinations in restraint of trade in those cases were major factors impeding the development and influence of organized labor. Particularly in the states of Massachusetts and New

11. BLUE EAGLE, *supra* note 2.

12. See generally CHARLES O. GREGORY, LABOR AND THE LAW 52-82 (2d rev. ed. 1961).

York, however, the common law also evolved to embrace a more liberal approach to union activity, though in widely varying degrees. For example, the legality of strikes was sometimes adjudged on the basis of judicial perceptions of illegal purpose and sometimes on the basis of a more humane concept that stressed freedom of action.¹³ Of even greater importance was the courts' development of a judicial blockbuster, the *labor injunction*, which rapidly became the weapon of choice that employers regularly turned to in both state and federal courts as a sure means to curb strikes and boycotts.¹⁴ By the 1890s, the labor injunction had become such a well-established institution that many courts held economic coercive activity by organized labor enjoined without a finding of unlawfulness.¹⁵ As Charles O. Gregory pointedly observed: "Here was a device for the control of labor disputes that really worked."¹⁶

In the early part of the twentieth century, legal controls affecting labor union activity were characterized by an interplay of both judicial and legislative action, which were often mutually corrective, and the main locus of authority shifted from the states to the federal government. And it was during the years preceding our entry into World War I—a period often referred to as the progressive era¹⁷—that a perceptible change occurred in the public's attitude toward organized labor. That attitude had now become more favorable—a view that was reflected in congressional legislation, most conspicuously in the Clayton Act of 1914.¹⁸ That statute proclaimed that "the labor of a human being is not a commodity or article of commerce" and labor organizations "instituted for the purposes of mutual help" shall not be "construed to be illegal combinations or conspiracies in restraint of trade."¹⁹

The judiciary was nevertheless slow to adopt such an enlightened view, although the Supreme Court eventually wavered and changed direction. Before doing so, the Court struck down prohibitions of "yel-

13. *Id.* Parenthetically, the courts of New York were generally more permissive than those of Massachusetts.

14. *Id.* at 83–104.

15. *Id.* at 102.

16. *Id.* at 97.

17. FOSTER RHEA DULLES & MELVYN DUBOFSKY, *LABOR IN AMERICA: A HISTORY* 215–32 (4th ed. 1984).

18. Pub. L. No. 212, 38 Stat. 730 (1914) (codified at 15 U.S.C. §§ 12–27).

19. 15 U.S.C. § 17 (2000).

low dog" contracts,²⁰ narrowly interpreted the labor-antitrust exemption in the Clayton Act so that it would apply only to employees who were proximately related to a labor dispute,²¹ and held that workers who refused to work on "unfair" products violated the Sherman Antitrust Act.²²

In contrast, Congress continued to pass labor-friendly legislation. In 1926 it enacted the Railway Labor Act²³ ("RLA"), and during the Depression years it passed four other pieces of legislation supportive of the right of employees to organize and bargain collectively: the Norris-LaGuardia Act²⁴ in 1932, Section 7(a) of the National Industrial Recovery Act²⁵ ("NIRA") in 1933, several important amendments to the RLA²⁶ in 1934, and the extension of RLA coverage to the airlines in 1936.²⁷

Meanwhile, the Supreme Court began its change of direction. In 1921 Chief Justice Taft, in the landmark case of *American Steel Foundries v. Tri-City Central Trades Council*,²⁸ wrote that a labor union "was essential to give laborers an opportunity to deal on equality with their employer"²⁹ because employees need to unite in order to induce their employer "to make better terms with them."³⁰ Although the Court gave no indication that this workers' right of association was, or could be, protected by the First Amendment, Justice Taft's opinion may be regarded as the beginning of a judicial recognition that this right is a *fundamental right*, a term Chief Justice Hughes later used in 1937 in *N.L.R.B. v. Jones & Laughlin Steel Corp.*,³¹ the case that confirmed the constitutionality of the Wagner Act. Justice Taft characterized the

20. "Yellow dog" contracts obligated employees to agree that they would not join any union. See *Adair v. United States*, 208 U.S. 161 (1908); *Coppage v. Kansas*, 236 U.S. 1 (1915); *DULLES & DUBOFSKY*, *supra* note 17, at 188.

21. See *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 471-72 (1921) (interpreting section 20 of the Clayton Act).

22. *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n*, 274 U.S. 37, 53 (1927) (interpreting the Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (2000) (as amended)).

23. Railway Labor Act of 1926, ch. 347, 44 Stat. 577 (amended 1934).

24. 29 U.S.C. §§ 101-15 (1932).

25. Pub. L. No. 73-67, 48 Stat. 195 (1933). The entire statute was held unconstitutional in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), on grounds of unconstitutional delegation of legislative power and that its application to intrastate activities exceeded the commerce power.

26. 44 Stat. 577 (1934).

27. 49 Stat. 1189 (1936).

28. 257 U.S. 184 (1921).

29. *Id.* at 209.

30. *Id.*

31. 301 U.S. 1 (1937).

Act's guarantee of "the right of employees to self-organization and to select representatives of their own choosing . . . [as a] *fundamental right*."³² Earlier, in the 1930 case of *Texas & New Orleans Railroad Co. v. Brotherhood of Railway & Steamship Clerks*,³³ Chief Justice Hughes had declared that it "has long been recognized that employees are entitled to organize for the purpose of securing the redress of grievances and to promote agreements with employers relating to rates of pay and conditions of work."³⁴ These three cases exemplified the Supreme Court's change in direction and its committed acknowledgement of the right of workers to join labor unions and to engage in collective bargaining.

Returning to the legislative scene: We observe that the Norris-LaGuardia Act declared as "the public policy of the United States [that] it is necessary that [a worker] have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment."³⁵ This pattern would later be recycled, first into section 7(a) of the NIRA and ultimately into section 7 of the NLRA.³⁶ The direct impact of the Norris-LaGuardia Act, however, was to effectively outlaw the infamous labor injunction, and that feature supplied the impetus in 1940 for Justice Frankfurter's majority opinion in *United States v. Hutcheson*,³⁷ which restored the full labor exemption of the Clayton Act.³⁸

The foregoing highlights of congressional and judicial declarations prior to and immediately following passage of the NLRA underscore the historical role that law has consistently played in controlling the course of organized labor in America. Yet more important to our immediate concern is another conclusion to be drawn from this record, which is that the legal pronouncements contained in those early twentieth century cases and statutes confirm that even before the NLRA came into existence, the rights of employees to organize into labor unions and to engage in collective bargaining with their employers had become established and recognized legal concepts in both the Supreme Court and the Congress. These legal markers now set the stage for an examination of a key element in the legislative product

32. *Id.* at 33 (emphasis added).

33. 281 U.S. 548 (1930).

34. *Id.* at 570.

35. 29 U.S.C. § 151 (1932).

36. 49 Stat. 345 (1935).

37. 312 U.S. 219 (1940).

38. The court thus superseded the *Duplex* and *Bedford Cut Stone* decisions, referred to *supra* in notes 21–22 and accompanying text.

that Senator Wagner designed in order to make industrial democracy a standard feature in the American workplace.

II. The Ideological Roots of Industrial Democracy Through Collective Bargaining

Senator Wagner's vision of industrial democracy was the outgrowth of a venerable idea that stemmed from strong moral, political, and economic roots. The following are samplings of some of the historical statements that had given voice to the idea. At the beginning of the nineteenth century, Albert Gallatin, Secretary of the Treasury under Thomas Jefferson and James Madison, posited that the "democratic principle on which this nation was founded should not be restricted to the political process but should be applied to the industrial operation as well."³⁹ And illustrative of the deep moral underpinnings of the concept were the words of Pope Leo XIII in his 1891 Encyclical, *Rerum Novarum*⁴⁰ (Concerning New Things), where he recognized the need for workers' associations and agreements between workers and employers. To support that proposition, he cited several biblical verses as a basis for that right of association,⁴¹ particularly the work-related pronouncement in Ecclesiastes that "[t]wo are better than one, because they have a good reward for their toil. For if they fall, one will lift up his fellow; but woe to him who is alone when he falls and has not another to lift him up."⁴² That scriptural passage continues with what are truly strength-in-numbers justifications for modern-day labor unions: "though a man might prevail against one who is alone, two will withstand him,"⁴³ and "[a] three-fold cord is not quickly broken."⁴⁴ *Rerum Novarum* also provided a prescient rationale for the view that the right of association is a human right, for it asserted that

to enter into a "society". . . is the natural right of man; and the State must protect natural rights, not destroy them, and if it forbids its citizens to form associations, it contradicts the very principle of its own existence; for both they and it exist in virtue of the same principle, viz., the natural propensity of man to live in society.⁴⁵

39. MILTON DERBER, *THE AMERICAN IDEA OF INDUSTRIAL DEMOCRACY, 1865-1965*, at 6 (1970) (citing COUNCIL OF PROFIT SHARING INDUS., *PROFIT SHARING TRENDS: CHICAGO 3* (Mar.-Apr. 1959)).

40. Pope Leo XIII, *Rerum Novarum* (On the Condition of Labor), in *SEVEN GREAT ENCYCLICALS 1* (W. Gibbons ed., 1963) [hereinafter *Rerum Novarum*].

41. *Id.* at 2324, ¶ 37.

42. *Ecclesiastes* 4:9-4:10 (Revised Standard ed.).

43. *Id.* at 4:12.

44. *Id.*

45. *Rerum Novarum*, *supra* note 40, at 24, ¶ 38.

This statement underscored that the right of association can properly be labeled a human right and that it is the essence of democracy in the workplace. A final historical sample is found in Louis D. Brandeis's argument before the 1915 United States Commission on Industrial Relations in which he said:

[T]he end for which we must strive . . . involves industrial democracy as well as political democracy. That means that the problem of trade should be no longer the problem of the employer alone. The problems of his business, and it is not the employer's business alone, are the problems of all in it.⁴⁶

Senator Wagner, following in the tradition of expressions such as these, embarked on the task of fashioning legislation that could, through the medium of collective bargaining, allow industrial democracy to become a reality in America. He considered the "democratic method" to be the preferred method for coordinating industry, for "it places the primary responsibility where it belongs and asks industry and labor to solve their mutual problems through self-government."⁴⁷ It was his view that the "right to bargain collectively is at the bottom of social justice for the worker, as well as the sensible conduct of business affairs."⁴⁸ Wagner deemed collective bargaining to be a partnership that "presupposes equality of bargaining power,"⁴⁹ making it the ideal format for democracy in the workplace.

Those remarks by Senator Wagner express what he intended his bill to produce, and that intent was the intent of Congress, for unlike most other major legislation, this statute was the product of a single legislator. Although Wagner received assistance from various sources, he fully controlled the bill's contents from introduction to final passage.⁵⁰ The Wagner Act was assuredly *his* Act. His views therefore pre-

46. U.S. Comm'n on Indus. Relations, FINAL REPORT AND TESTIMONY 8:7659–82 (1916); see also DERBER, *supra* note 39, at 136.

47. Robert F. Wagner Address at National Democratic Club Forum (May 8, 1937), quoted in Leon H. Keyserling, *Why the Wagner Act?*, in THE WAGNER ACT: AFTER TEN YEARS 13 (Louis G. Silverberg, ed., 1945).

48. *Id.*

49. 1 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 1935, vol. 1, pt. 2 [hereinafter 1 LEGISLATIVE HISTORY], at 1318 (1949).

50. Although Leon H. Keyserling was the primary draftsman of both the legislative bill and of all of Wagner's public statements and materials—including his speeches and key committee reports—Wagner was kept fully advised at all stages of the work and was in total agreement with the final product. Kenneth M. Casebeer, *Holder of the Pen: An Interview with Leon Keyserling on Drafting the Wagner Act*, 42 U. MIAMI L. REV. 285, 302–03, 341–43, 361 (1987) [hereinafter Casebeer, *Holder of the Pen*]; Kenneth Casebeer, *Drafting Wagner's Act: Leon Keyserling and the Precommittee Drafts of the Labor Disputes Act and the National Labor Relations Act*, 11 INDUS. REL. L.J. 73, 76 (1989) [hereinafter Casebeer, *Drafting Wagner's Act*]; IRVING BERNSTEIN, *TURBULENT YEARS: A HISTORY OF THE AMERICAN WORKER 1933–1941*, at

sent a standard with which to measure and compare current interpretation and enforcement of the Act's organizational and bargaining provisions, for the core text of those passages are still in the Act, unaltered by subsequent Taft-Hartley⁵¹ and Landrum-Griffin⁵² amendments. Needless to say, however, the popular view of those core provisions and the record of their enforcement are clearly at odds with the original intent of Congress.

Despite the evisceration of much of the Act's protection over the years by both the National Labor Relations Board ("NLRB") and the Supreme Court,⁵³ there is one important area of this law where the administrative and judicial slate remains clean. It is an area that offers a means to restore a significant degree of protection for American workers who desire to organize into unions and to bargain collectively—a long-forgotten feature in the Act that is now ready for revival: members-only minority-union collective bargaining.

III. Members-Only Non-Majority Collective Bargaining

Members-only minority-union collective bargaining is a method of bargaining that is authorized and protected by the Act. Although conventional wisdom assumes that a union must represent a majority of the employees in an appropriate bargaining unit before it can claim the right to represent and bargain on behalf of any employees, such a notion is merely latter-day conventional wisdom. It was not the original wisdom, and it certainly was not the intent of Congress.⁵⁴ Congress mandated in unambiguous language a fourteen-word phrase in section 7—which I call the "Blue Eagle" text—declaring that "[e]mployees shall have the right to . . . bargain collectively through representatives of their own choosing";⁵⁵ this right was made enforceable under sec-

340 (1971); see also Leon H. Keyserling, *The Wagner Act: Its Origin and Current Significance*, 29 GEO. WASH. L. REV. 199, 215 (1960).

51. 29 U.S.C. §§ 141–187 (1947).

52. *Id.* §§ 401–531 (1959).

53. See, e.g., *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992); *Beck v. Communication Workers*, 487 U.S. 735 (1988); *NLRB v. Yeshiva Univ.*, 444 U.S. 672 (1980); *Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301 (1974); *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969); *NLRB v. Woster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956); *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938); *IBM Corp.*, 341 N.L.R.B. 148 (June 9, 2004); *Meyers Indus. (II)*, 281 N.L.R.B. 882 (1986); *Litton Sys., Inc.*, 173 N.L.R.B. 1024 (1968); *Livingston Shirt Corp.*, 107 N.L.R.B. 400 (1953).

54. See, e.g., *Latham, Legislative Purpose and Administrative Policy under the National Labor Relations Act*, 4 GEO. WASH. L.R. 433, 453–54, n. 65; *BLUE EAGLE*, *supra* note 2, at 81–85.

55. 29 U.S.C. § 157 (emphasis added).

tion 8(a)(1).⁵⁶ The only provision in the statute that qualifies this right is section 9(a), which provides that in the event a majority of the employees in an appropriate bargaining unit designate or select a bargaining representative, that representative shall be the exclusive representative of all the employees in the unit.⁵⁷ Congress made clear, however, in both statutory text and legislative history, that until such exclusive majority representative is selected, employees have the right to engage in non-exclusive collective bargaining—in other words, through less-than-majority unions that represent and bargain on behalf of their members only.

Such bargaining was commonplace when the Act was passed. And during the decade immediately following its passage, members-only bargaining was as prevalent as majority-exclusivity bargaining.⁵⁸ Indeed, it was widely accepted as an ordinary organizational procedure. This was how the steel and automobile industries were unionized in the late thirties and early forties, and members-only agreements were also common in many other industries.⁵⁹ For example, such contracts with an electric public utility provided the Supreme Court with an early opportunity to review and approve this very process. Writing for the Court in the 1938 case of *Consolidated Edison Company v. NLRB*,⁶⁰ Chief Justice Hughes declared that “in the absence of . . . an exclusive agency the employees represented by the [union] even if they were a minority, clearly had the right to make their own choice.”⁶¹ The Court confirmed—as it later reiterated in two other cases⁶²—that the resulting minority-union contracts were entirely legal.⁶³

56. *Id.* § 158(a)(1).

57. *Id.* § 159(a).

58. See BLUE EAGLE, *supra* note 2, at 82–85.

59. *Id.*; see also THE TWENTIETH CENTURY FUND, HOW COLLECTIVE BARGAINING WORKS: A SURVEY OF EXPERIENCE IN LEADING AMERICAN INDUSTRIES 24 (1942).

60. 305 U.S. 197 (1938).

61. *Id.* at 236–37 (emphasis added).

62. See *Int'l Ladies Garment Workers v. NLRB* (Bernhard-Altman Tex. Corp.), 366 U.S. 731, 736, 742–43 (1961); *Retail Clerks v. Lion Dry Goods, Inc.*, 369 U.S. 17, 29 (1962).

63. They were legal, not only under sections 8(1) (now 8(a)(1)) and 8(3) (now 8(a)(3)), codified at 29 U.S.C. § 158(a)(3)), which were directly in issue, but also under § 8(2) (now 8(a)(2)), codified at 29 U.S.C. § 158(a)(2)), for the Board had previously dismissed the charge of employer domination and interference under that section in *Consolidated Edison Co. of New York, Inc.*, 4 N.L.R.B. 71, 92 & n.3 (1937). Later, the Board again held in *The Solway Process Co.*, 5 N.L.R.B. 330 (1938), that an employer's execution of a members-only collective agreement does not violate § 8(2). In 1950, in *The Hoover Co.*, 90 N.L.R.B. 1614 (1950), the Board again expressed its approval of the members-only recognition process, declaring that an employer, faced with rival demands of two unions, “may, without violating the *Midwest Piping* doctrine grant recognition to each of the claimants on a members-only basis.” See also *Midwest Piping & Supply Co.*, 63 N.L.R.B. 1060 (1945)

During that first decade, unions generally viewed members-only bargaining as merely a temporary measure, as an organizational stepping stone on the way to majority-exclusivity bargaining, which was the ultimate congressional objective.⁶⁴ Unions soon discovered, however, that in most cases, an easier way to achieve bargaining was through NLRB representation procedures, which at the time included card checks as well as elections.⁶⁵ The Board's processes, then—in sharp contrast to its processes now—offered a relatively quick shortcut to majority representation. In fact, during the Board's first ten full fiscal years, the average win rate for unions filing representation cases was 85.5 percent.⁶⁶ As a result of this widespread success, in a relatively short period of time NLRB elections became habit forming, and organizing through the incremental process of members-only bargaining was abandoned and eventually forgotten. Consequently, most industrial-relations participants ultimately came to assume that majority-union bargaining was the only bargaining sanctioned by the Act. Although it was out of sheer convenience that unions originally favored NLRB representation procedures, their reliance on elections became routine. And management had no reason to question or object to such reliance, for employers recognized that elections provided them with an ideal forum in which to campaign aggressively against union representation. Thus, imperceptibly, the assumption that majority-union collective bargaining was the only valid form of union bargaining became entrenched as conventional wisdom.

A. The Plain Meaning of Statutory Text and Its Legislative History

In order to better understand the provisions of the Act that protect the right of non-majority employees to engage in members-only bargaining, the place to begin is with the previously noted fourteen-word Blue Eagle text, for that text was originally contained in section 7(a) of the NIRA,⁶⁷ the lead-off statute in President Roosevelt's New

(holding that it is an unfair labor practice under § 8(2) for an employer to recognize one of two competing unions after a representation petition had been filed with the Board).

64. See BLUE EAGLE, *supra* note 2, at 69.

65. Until the 1947 Taft-Hartley amendments, 61 Stat. 136 (1947), section 9(c) (codified as amended in 29 U.S.C. § 159(c)) allowed the Board, in addition to holding secret ballot elections, to "utilize any other suitable method to ascertain such representatives." 49 Stat. 453.

66. See BLUE EAGLE, *supra* note 2, at 86 (referencing data from 2–11 NLRB ANNUAL REPORTS (1937–1947)).

67. Section 7(a) of the NIRA reads as follows:

Every code of fair competition, agreement, and license approved, prescribed, or issued under this title shall contain the following conditions: (1) That *employees*

Deal administration. That text, as previously noted, had been based on similar language in the Norris-LaGuardia Act.⁶⁸ The complete text of section 7(a) contained the essence of what was later to emerge as the substantive law of the Wagner Act. Employers who conformed to the *codes of fair competition* referenced in section 7(a) were entitled to display a “Blue Eagle” poster or banner⁶⁹ signifying their compliance, hence the “Blue Eagle” designation that I have given this familiar fourteen-word phrase. That specific text is important here because its wording is the same as that which is currently contained in section 7 of the present Act. Congress knowingly borrowed this language verbatim, thereby reenacting the same basic substantive labor law that had pre-existed under the NIRA. The familiar “borrowed statute” rule of construction is therefore applicable. As Professor William Eskridge points out, “when Congress borrows a statute, it adopts by implication interpretations placed on that statute, absent express statement to the contrary.”⁷⁰

To oversee the operation of section 7(a), President Roosevelt created two rudimentary labor boards.⁷¹ Both boards accorded the fourteen-word phrase its literal meaning, including recognition of the right of less-than-majority union employees to engage in collective bargaining and the corresponding duty of employers to bargain with those unions. Even after adopting the practice of granting exclusive representation to unions that had won majority status through governmentally supervised elections, those boards continued to hold that employers had a duty to bargain with non-majority unions in work-

shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purposes of collective bargaining or other mutual aid or protection; (2) that no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing; and (3) that employees shall comply with the maximum hours of labor, minimum rates of pay, and other conditions of employment, approved or prescribed by the President.

Pub. L. No. 73-67, 48 Stat. 195 (1933). Emphasis added for comparison with section 7 of the Wagner Act, with the basic fourteen-word phrase highlighted. *See also supra* note 36.

68. Compare Section 7(a) of the NIRA with 29 U.S.C. § 102.

69. Lloyd K. Garrison, *The National Labor Boards*, 184 ANNALS AM. ACAD. POL. & SOC. SCI. 138, 145 (1936).

70. William N. Eskridge, Jr. & Phillip P. Frickey, *The Supreme Court 1993 Term, Forward: Law As Equilibrium*, 108 HARV. L. REV. 27, 100 (1994) (citing *Molzof v. United States*, 502 U.S. 301, 307 (1992); *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 65-66 (1987)).

71. The National Labor Board (“NLB”) and the National Labor Relations Board (“old NLRB”). *See BLUE EAGLE, supra* note 2, at 31-40, 46-52.

places where there had not been a majority determination through an election.⁷² Because there was no effective means to enforce section 7(a),⁷³ however, Senator Wagner and his supporters recognized the need to replace it with a new statute—one that would retain the basic substantive provisions of section 7(a) and also provide an effective means to require compliance from recalcitrant employers. As the chairman of the former National Labor Relations Board (“old NLRB”) described the procedural weakness of section 7(a),

There were only two means of enforcement, and neither was satisfactory. The first was, upon noncompliance by an employer, to refer the case to the NRA⁷⁴ for removal of his Blue Eagle. . . . But in most cases it meant nothing, and then the only recourse was to refer the matter to the Department of Justice for prosecution in the courts, which would have been too slow and cumbersome to accomplish anything, and it was not attempted by the Department except in a few ill-starred cases.⁷⁵

Senator Wagner’s 1935 bill clarified and slightly strengthened the substantive rights that were contained in the earlier statute and codified, as the new section 9(a),⁷⁶ the majority-exclusivity principle that had been generated by decision and practice under the old boards.⁷⁷ It also added an administrative mechanism with remedial authority, the National Labor Relations Board.⁷⁸

It should therefore be emphasized that the Wagner Act was not intended to create new law but rather to reestablish old law, though with clarity and teeth.⁷⁹ Its legislative history is replete with declarations to that effect. For example, on the very day the bill was introduced, Wagner told his Senate colleagues that “[t]he national labor relations bill which I now propose is novel neither in philosophy nor in content. It creates no new substantive rights.”⁸⁰

72. See cases cited *infra* note 84.

73. See BERNSTEIN, *supra* note 50, at 322.

74. This is a reference to the National Recovery Administration, the administrative agency created by and charged with enforcement of the NIRA.

75. Garrison, *supra* note 69, at 145.

76. 29 U.S.C. § 159(a) (2000).

77. See BLUE EAGLE, *supra* note 2, at 32–36 & 49–52.

78. 29 U.S.C. § 153.

79. This perception is widely recognized and accepted. See, e.g., MELVYN DUBOFSKY, *THE STATE AND LABOR IN MODERN AMERICA* 127 (1994) (confirming that the bill was “designed to clarify section 7(a) and create a permanent NLRB with enforcement powers”).

80. 1 LEGISLATIVE HISTORY, *supra* note 49, at 1312; see also statement of Professor Milton Handler, Columbia University Law School and Former General Counsel of the National Labor Board. *Id.* at 1611.

A review of the status of minority-union bargaining under section 7(a) sheds revealing light on the intent of Congress. Majority status was not a prerequisite for bargaining. The National Labor Board ("NLB"), the first board that Roosevelt created to implement that provision, routinely found breaches of the duty to bargain with less-than-majority unions. The NLB ordered elections for only three reasons: (1) when a dispute existed between two unions claiming representation (one of which was usually a company union),⁸¹ (2) when an employer questioned a union's claim of majority representation,⁸² or (3) when a substantial number of employees made the request.⁸³ In all other cases majority status was deemed irrelevant to the duty to bargain.⁸⁴ These practices and interpretations were reconfirmed by that board's successor, the 1934 old NLRB.⁸⁵

It is historically significant—though probably a surprise to most labor-law practitioners—to learn that the original Wagner bill did not contain a separate duty-to-bargain unfair labor practice provision. Indeed, when such a provision, section 8(5),⁸⁶ was belatedly added as an after-thought amendment, it never became the subject of separate congressional discussion or debate. Wagner and his legislative assistant, Leon Keyserling, the primary author of the bill, had been of the opinion that such a specific clause was unnecessary because an employer's duty to bargain was adequately covered by the broad collective-bargaining requirement contained in the familiar Blue Eagle fourteen-word clause in section 7.⁸⁷ Under that provision, a refusal to bargain represented an *interference* with the employees' right to bargain collectively, hence the employer's duty to bargain was fully en-

81. See Emily Clark Brown, *Selection of Employees' Representatives*, 40 MONTHLY LAB. REV. 1, 4-6 tbls.1-4 (1935).

82. See, e.g., *Denver Tramway Corp.*, 1 N.L.B. 64 (1934).

83. See Exec. Order No. 6580, C.F.R. cite (1934), *reprinted in* 1 N.L.B. vii (1933); BLUE EAGLE, *supra* note 2, at 34; see, e.g., *Republic Steel Corp.*, 1 N.L.B. 88 (1934).

84. Illustrative of this construction of § 7(a) were the cases of *National Lock Co.*, 1 N.L.B. (Part 2) 15 (1934); *Bee Bus Line Co.*, 1 N.L.B. (Part 2) 24 (1934); *Eagle Rubber Co.*, 1 N.L.B. (Part 2) 31 (1934)—all of which were decisions subsequent to *Denver Tramway*, 1 N.L.B. 64 (1934), the case in which the NLB established the principle of majority-exclusivity applicable to a union that had demonstrated its majority in a Board ordered election. See BLUE EAGLE, *supra* note 2, at 39.

85. See *Houde Eng'g Corp.*, 1 N.L.R.B. (old) 35 (1934); BLUE EAGLE, *supra* note 2, at 48-52.

86. The present § 8(a)(5), 29 U.S.C. § 158(a)(5)(2000).

87. 29 U.S.C. § 157.

forceable under section 8(1),⁸⁸ just as it had been under section 7(a) of the NIRA. This construction was emphasized in *Houde Engineering Corporation*,⁸⁹ a leading case under the old NLRB that Wagner cited when he testified before the Senate Committee on Education and Labor, stating:

The right of employees to bargain collectively implies a duty on the part of the employer to bargain with their representatives. . . . [T]he incontestably sound principle is that the employer is obligated by the statute to negotiate in good faith with his employees' representatives; to match their proposals, if unacceptable with counter proposals; and to make every reasonable effort to reach an agreement.⁹⁰

The bill's only limitation on the section 7 bargaining requirement was section 9(a), the pertinent part of which reads as follows:

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.⁹¹

As the text indicates, this section is activated only if, when, and after employees in an appropriate bargaining unit choose a majority representative, in which event the designated representative is automatically granted exclusive bargaining rights and thereafter no other union is authorized to bargain on behalf of any of those employees. Prior to such designation, however, union representation and bargaining for any group of employees remains available and protected, though on a nonexclusive basis, thus applicable to union members only.

Section 8(5) was not added until ten weeks after the original Wagner bill was introduced, and the legislative record is undisputed that it was not intended to change the substantive bargaining requirements of the original bill. Francis Biddle, chairman of the old NLRB, had lobbied long and hard for its inclusion.⁹² Although Wagner fi-

88. Section 8(1) (the present § 8(a)(1)) declares that it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." 29 U.S.C. § 158(a)(1).

89. 1 N.L.R.B. (old) 35 (1934).

90. 1 LEGISLATIVE HISTORY, *supra* note 49, at 1419 (quoting *Houde Eng'g Corp.*, 1 N.L.R.B. at 35). Several weeks later Wagner reaffirmed that position. 2 LEGISLATIVE HISTORY OF THE NLRA, 1935 [hereinafter 2 LEGISLATIVE HISTORY], at 2102 (1949). For the same view reconfirmed by Keyserling in an interview in March 1986, see Casebeer, *Holder of the Pen*, *supra* note 50, at 330.

91. 29 U.S.C. § 159(a).

92. BLUE EAGLE, *supra* note 2, at 58.

nally consented to Biddle's proposed amendment, he and the Senate and House committees made it expressly clear that the new section 8(5), together with the other three subject-specific unfair labor practices, were "*designed not to impose limitations or restrictions upon the general guaranties of the first* [section 8(1)], but rather to spell out with particularity some of the practices that have been most prevalent and most troublesome."⁹³ The four separate unfair labor practices were therefore meant to reinforce their respective prohibitions, not to diminish them. There was virtually no discussion of the new section 8(5) in the Senate committee,⁹⁴ where the amendment originated, and the Senate and House adopted it pro forma without debate.⁹⁵

Regarding the meaning of this amendment, a previously overlooked aspect of its legislative history shows that it was deliberately worded so as not to limit the bargaining duty to majority unions only, thereby clearly requiring bargaining with a non-majority union in workplaces where a section 9(a) majority union had not yet been selected. I discovered this historical artifact in a post-introduction draft of the Wagner bill that contained various proposed amendments.⁹⁶ After the original bill had been introduced and referred to the Senate Committee on February 21, 1935, Biddle presented for the committee's consideration—as indicated in this draft bill—alternative texts of his proposed new section 8(5) unfair-labor-practice provision.⁹⁷ Here are his two versions:

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).⁹⁸

or, (5) To refuse to bargain collectively with employees through their representatives, chosen as provided in section 9(a).⁹⁹

This dual presentation confirms that the addition of section 8(5) was not meant to confine an employer's bargaining duty to majority

93. 2 LEGISLATIVE HISTORY, *supra* note 90, at 2309 (explanation in Senate Committee Report) (emphasis added). See *id.* at 2333 and 2971, respectively, for comparable Wagner statement and the House Committee Report.

94. See Russell A. Smith, *The Evolution of the "Duty to Bargain" Concept in American Labor Law*, 39 MICH. L. REV. 1065, 1085 (1941) ("[T]here was little discussion of the bargaining concept at the committee hearings. Even the suggestion of Chairman Biddle of the old board that an express duty to bargain be inserted in the bill failed to stimulate discussion, though the suggestion was adopted.").

95. See 2 LEGISLATIVE HISTORY, *supra* note 90, at 2348 & 3216.

96. For a full discussion of this discovery, see BLUE EAGLE, *supra* note 2, at 62–63, 105–06.

97. 29 U.S.C. § 158(a)(5)(2000).

98. *Id.*

99. Casebeer, *Drafting Wagner's Act*, *supra* note 50, at 131; see also BLUE EAGLE, *supra* note 2, at 241 (appendix to Ch. 3) (emphasis added).

unions only. By adopting the first version—which is the text now found in the statute¹⁰⁰—Biddle, Keyserling, Wagner, and the Senate committee were consciously choosing language that would ensure that the duty to bargain with a majority union would not exclude the duty to bargain with a minority union prior to establishment of majority representation. Patently, had the drafters intended to exclude such minority bargaining they would have selected the second version, for it would have limited the bargaining obligation under section 8(5) to majority unions “chosen as provided in section 9(a).”¹⁰¹ Here then was the smoking gun that reinforces the literal reading of section 8(a)(5), which indicates that it contains no such limitation. Accordingly, as the combined texts of sections 8(a)(5) and 9(a) specify, the only limitation on the duty to bargain contained in section 7 is the *exclusivity* requirement that occurs *after* a majority of the employees in an appropriate bargaining unit select a representative. Until that happens, nonexclusive—i.e., members-only—collective bargaining is mandated whenever employees choose a union to represent them for such purpose.

The subject of minority-union bargaining prior to designation of majority representation was not even an issue in the congressional debates. Although the prevalence of less-than-majority and members-only bargaining was common knowledge at the time¹⁰²—and Wagner and Keyserling were well aware of the need to protect such bargaining¹⁰³—the practice was not viewed as controversial. There was considerable controversy, however, concerning the ultimate configuration of mature bargaining. Proponents of the bill believed that majority-exclusivity bargaining—the bill’s solution to the problem of dual unionism—would mean more effective bargaining, hence this was the goal sought by Wagner and his supporters.¹⁰⁴ On the other side of that debate, the employer lobby advocated plurality bargaining, opposed majority-exclusivity bargaining as a denial of the rights of minorities, and asserted that the Board’s authority to determine a bargaining unit

100. See 29 U.S.C. § 158(a)(5).

101. 29 U.S.C. § 159(a).

102. See BLUE EAGLE, *supra* note 2, at 26–31.

103. See *id.* at 26–30, 31 n.87, 42–46, 56–64, 69.

104. 1 LEGISLATIVE HISTORY, *supra* note 49, at 1419; Clyde Summers, *The Kenneth M. Piper Lecture: Unions Without Majority—A Black Hole?*, 66 CHI.-KENT L. REV. 531, 539 (1990) (“The history of the majority rule principle shows that its purpose was not to limit the ability of a non-majority union to represent its own members, but to protect a majority union’s ability to bargain collectively.”).

would lead to a closed shop.¹⁰⁵ In that limited context, employers thus defended the right of minority-unions to engage in collective bargaining.

Attention during the debates was concentrated on the assumed presence of multiple unions and on whether a minority union should have bargaining rights *after* a majority union had already been chosen. Although there was no debate about minority-union bargaining *prior* to establishment of majority representation, numerous statements by the proponents of the bill showed full recognition that the majority-rule provided by section 9(a) would apply only *after* employees had selected their majority representative.¹⁰⁶ There was never a question voiced about the nonapplicability of that restriction prior to majority selection. Furthermore, although elections were looked upon as one of the best means to settle disputes over union representation, the elections that were anticipated concerned the *choice* of which union would represent the employees, not *whether* the employees would be represented by a union.¹⁰⁷ Minority-union bargaining prior to the selection of a majority representative was a nonissue. Although the fanfare that surrounded the collective-bargaining process during the congressional debates was focused on the majority-exclusivity rule and on representation elections, members-only minority-union bargaining emerged intact from this same legislative process—though quietly and without fanfare.

It should be further noted that the Act's protection of minority-union bargaining is based not only on the combination of sections 8(a)(1) and 8(a)(5), but also on section 8(a)(1) standing alone. In the unlikely event—unlikely in my view because of the plain meaning of the text and its strong legislative history—that section 8(a)(5) were to be judicially interpreted as requiring bargaining *only* with representatives that achieve majority status under section 9(a), such a construction should nevertheless have no effect on an employer's duty to bargain with a minority union in workplaces where there is not a designated majority representative. That is so because even if the unfair labor practice defined in section 8(a)(5) were to be narrowly construed to compel employers to bargain only with unions that satisfy the majority conditions of section 9(a), an independent right to engage in minority-union bargaining for union members only would still be enforceable as *residual coverage* under sections 7 and 8(a)(1)—a

105. IRVING BERNSTEIN, *THE NEW DEAL COLLECTIVE BARGAINING POLICY* 109 (1950).

106. See BLUE EAGLE, *supra* note 2, at 70–79.

107. See *id.* at 71.

type of coverage commonly applied to other types of protected concerted activity. For example, section 8(a)(1) standing alone commonly affords protection to employees who are discharged for pre-union concerted activity even though such employer conduct is not deemed to violate section 8(a)(3), the specific unfair-labor-practice provision that covers most discharges relating to union activity.¹⁰⁸

B. Case Law and International Law

Having thus examined the text of the Act and pertinent parts of its legislative history, it is time to review the applicable case law—such as it is. Although the courts and the Board on numerous occasions have affirmed the legality of less-than-majority members-only bargaining and the collective agreements produced by such bargaining,¹⁰⁹ they have had no occasion to pass on the issue of whether the Act requires such bargaining. The only case references to majority status being a requirement for bargaining are some oblique allusions or dicta in a few decisions of two principal types. The first type are decisions where a minority union falsely or mistakingly claimed, either directly or indirectly, to be the exclusive majority representative. I found eight such cases,¹¹⁰ all of which only confirmed the obvious, that a minority union is not authorized to represent and bargain on behalf of all the employees in a bargaining unit. The occasional references in these cases to majority status being a prerequisite for bargaining related only to the subject union's effort to represent or bargain for all employees in the unit. None of these cases involved bargaining for union members only. The second type are decisions that involved section 7 mutual-aid-or-protection group grievances¹¹¹—not the duty to bargain with a minority union. I found four such cases, one in which the Board held that the employer had an affirmative duty to meet and

108. For full development of this separate § 8(a)(1) duty to bargain, see *BLUE EAGLE*, *supra* note 2, at 107–08.

109. See *BLUE EAGLE*, *supra* note 2, at 93–97 (citing *Retail Clerks v. Lion Dry Goods, Inc.*, 369 U.S. 17 (1962); *Int'l Ladies' Garment Workers' Union v. NLRB (Bernhard-Altmann Tex. Corp.)*, 366 U.S. 731 (1961); *Consol. Edison Co. v. NLRB*, 305 U.S. 197 (1938); *Consolidated Builders, Inc.*, 99 N.L.R.B. 972 (1952); *The Hoover Co.*, 90 N.L.R.B. 1614 (1950); *The Solvay Process Co.*, 5 N.L.R.B. 330 (1938)).

110. See *Int'l Ladies' Garment Workers' Union*, 366 U.S. 731; *Agar Packing & Provision Corp.*, 81 N.L.R.B. 1262 (1949); *Olin Indus., Inc.*, 86 N.L.R.B. 203 (1949), *aff'd*, 191 F.2d 613 (5th Cir. 1951), *cert. denied*, 343 U.S. 970 (1952); *Nat'l Linen Serv. Corp.*, 48 N.L.R.B. 171 (1943); *Brashear Freight Lines, Inc.*, 13 N.L.R.B. 191 (1939); *Mooresville Cotton Mills*, 2 N.L.R.B. 952 (1937), *enforced as modified by* 94 F.2d 61 (4th Cir. 1938) (modification unrelated to issue); *Wallace Mfg. Co.*, 2 N.L.R.B. 1081 (1937); *Segall-Maigen, Inc.*, 1 N.L.R.B. 749 (1936).

111. See *BLUE EAGLE*, *supra* note 2, at 156–58.

discuss grievances with a minority group of employees¹¹² and three others that casually repeated the conventional wisdom about majority bargaining—but only in *obiter dicta*, not in holdings.¹¹³ These cases establish that when the Board and the courts finally write on the pre-majority bargaining issue they will be writing on a clean slate.

Although the foregoing overview has concentrated on the statutory law, which is indeed our primary concern, I want to emphasize again that the right of employees to freely and easily join labor unions and effectively engage in collective bargaining—which implicitly includes the right of all employees, not just those who comprise a bargaining-unit majority—is deemed to be a fundamental human right. Although this right is supported both by international law and by the concept of freedom of association under the First Amendment to the United States Constitution, only a cryptic examination of the international obligation is appropriate here.¹¹⁴

Under applicable international law, the applicable workers' rights and their employers' complimentary obligations stem primarily from two sources, neither of which—to the shame of the American media—are well known to the public. The first is the *International Covenant on Civil and Political Rights*¹¹⁵ (“Covenant”), which the United States ratified in 1992 with certain reservations, none of which affect the labor union and collective-bargaining requirements of that Covenant.¹¹⁶ The second is the *Declaration on Fundamental Principles and Rights at Work* (“1998 ILO Declaration”),¹¹⁷ which the International

112. See *NLRB v. Lundy Mfg. Corp.*, 316 F.2d 921 (2d Cir. 1963) (*aff'g* 136 N.L.R.B. 1230 (1962)) (*cert. denied*, 375 U.S. 895 (1963)).

113. *Charleston Nursing Ctr.*, 257 N.L.R.B. 554 (1981); *Pennypower Shopping News, Inc.*, 244 N.L.R.B. 536, 538 (1979); *Swearingen Aviation Corp.*, 227 N.L.R.B. 228, 236–37 (1976). For another case—though in a different context—that repeated as pure dictum the latter-day conventional wisdom about employee-majority being a requirement for bargaining, see *Black Grievance Committee v. NLRB* (Philadelphia Elec. Co.), 749 F.2d 1072, *cert. denied*, 472 U.S. 1008 (1985) (stating that an employer's grant of privileged status to only one of two non-majority employee groups violates § 8(a)(1)).

114. For a fuller examination of both the international and constitutional dimensions of this issue, see BLUE EAGLE, *supra* note 2, at 140–52 and 110–30 respectively.

115. *International Covenant on Civil and Political Rights*, Dec. 19, 1966, art. 6 U.N. Exec. Doc. E, 95–2 (1978), 999 U.N.T.S. 171 (adopted in 1966, ratified by the United States in 1992).

116. These reservations related to such subjects as free speech, war propaganda, incitement to discrimination, capital punishment, and cruel and unusual punishment. See BLUE EAGLE, *supra* note 2, at 144–45.

117. *International Labour Organization Declaration on Fundamental Principles and Rights at Work*, International Labour Conference, 86th Sess. (June 1998), 37 I.L.M. 1233 (1998), *reprinted in* 144 CONG. REC. S6909-10 (daily ed. June 23, 1998) (statement of Sen. Moynihan).

Labor Organization (“ILO”) adopted in 1998 with the full support of the United States delegation, including its employer representatives.¹¹⁸ These two compacts recognize that the freedom to join a labor union and to engage effectively in collective bargaining are basic human rights—indeed, as previously noted, these rights are premised on a deep-seated moral foundation.

The intertwined texts of the Covenant and the 1998 ILO Declaration mandate a construction of the bargaining provisions of the National Labor Relations Act that will expressly *ensure in good faith that all workers have the right to form and join trade unions for the protection of their interests* and that the government will both *respect and promote the effective recognition of collective bargaining*. These italicized phrases are some of the controlling words contained in those compacts. For employees subject to the jurisdiction of the NLRA, these objectives can be attained when that Act is interpreted in accordance with the policy contained in the statute¹¹⁹—a policy that is basically the same as the aforesaid international law requirements, which is consistent with the Blue Eagle reading of sections 7 and 8(a)(5) that I have presented here. The NLRB and the courts thus have an obligation under international law to enforce the plain meaning of those statutory passages, which in the immediate context simply means recognizing that the Act grants employees the right to engage in collective bargaining in all workplaces, even where there is no exclusive majority representative.

IV. Conclusion: Balancing the Government’s Role in Supporting Collectivism for Both Shareholders and Workers

If workers under the NLRA succeed in organizing extensively, as the framers of the Act intended, they will have done so by taking advantage of the same type of governmental and legal assistance that corporations and shareholders have been accepting for ages. Congress was acutely aware of such governmental support for business organizations when it enacted the Norris-LaGuardia and Wagner Acts. The text of Norris-LaGuardia expressly called attention to the fact that

118. *Declaration Affirms ILO Principles*, DAILY LAB. REP. (BNA), July 6, 1998, at D-23; *Who Abstained from Voting?*, DAILY LAB. REP. (BNA), July 6, 1998, at D-24.

119. Such statutory purpose being “[e]ncouraging the practice and procedure of collective bargaining and . . . protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing.” 29 U.S.C. § 151 (2000).

the organization of property into “corporate and other forms of ownership association” was “developed with the aid of governmental authority”;¹²⁰ and the text of the NLRA emphasized “[t]he inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association.”¹²¹

Those declarations were congressional reminders of an often overlooked feature of American capitalism, which is that its vigor is heavily dependent on governmental support. In fact, the chief example of collectivism in this country is to be found in business, not in labor unions. The early builders of the American economy were not the rugged individualists usually credited by popular mythology—at least they were not rugged individualists acting alone.¹²² With the assistance of favorable law and supportive government, early American tycoons operated through various forms of collective enterprise, principally the ubiquitous limited-liability corporation.¹²³ Indeed, it was the collective ownership of capital, provided for and protected by both state and federal law, that allowed and encouraged the American economy to grow and flourish.¹²⁴ Ironically, Wal-Mart is vehemently opposed to the collective organization of its employees,¹²⁵ but it is not opposed to the collective organization of its shareholders and their joining together to pool their money for a common business purpose. Shareholders joining together to form corporations, which the government protects and encourages, is the essence of collective action. By the same token, Congress intended that the collective organization of employees would provide the other side of a viable partnership with management—to wit, labor unions through which employees could share and participate in decisions affecting their work and their livelihood.

The National Labor Relations Act was thus but one of a pair of legislative approaches that Congress employed during the New Deal administration to provide a measure of security and fairness for two essential but distinct populations in the American economy. One ap-

120. 29 U.S.C. § 102.

121. *Id.* § 151.

122. See generally GUSTAVUS MYERS, HISTORY OF THE GREAT AMERICAN FORTUNES (1936); THURMAN W. ARNOLD, THE FOLKLORE OF CAPITALISM (1938).

123. See ADOLPH A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 11–17 (rev. ed. 1968).

124. See, e.g., PETER F. DRUCKER, CONCEPT OF THE CORPORATION (1946); ROBERT L. HEILBRONER, THE NATURE AND LOGIC OF CAPITALISM (1985).

125. See BLUE EAGLE, *supra* note 2, at 202–09 and sources cited therein.

proach was designed to protect the collective organization of corporate shareholders and provide them with active governmental assistance through the Securities and Exchange Commission ("SEC") under the Security Acts of 1933 and 1934.¹²⁶ The other approach was designed to protect the collective rights of employees and provide them with similar assistance through the National Labor Relations Board under the National Labor Relations Act.¹²⁷ The federal government was thus guaranteeing basic freedoms to business and labor alike. The SEC and the NLRB, together with their respective enabling statutes, should therefore be viewed as interrelated regulatory programs. On the one hand they were similarly designed to protect individual and collective owners of capital vis-à-vis corporations and their securities agents, and on the other to protect individual workers and their unions vis-à-vis their employers—employers who are usually corporations. Bringing these workers and employers together through the medium of collective bargaining was Senator Wagner's dream of industrial democracy.

It is my hope that his dream will someday become a reality. And it is my belief that members-only non-majority collective bargaining, despite its absence from the labor scene for more than half a century, has the capacity to help make that happen. This renewed approach to union bargaining may make union organizing easier, but not easy, for most employers will undoubtedly continue to vigorously resist any unionization of their employees. Nevertheless, when the labor relations community ultimately realizes that neither a majority union nor an election is a prerequisite for bargaining under the NLRA, one major incentive for an employer to mount an aggressive anti-union campaign will have vanished.¹²⁸

The United States deserves a revitalized labor movement. It is deserved not only because workers' collective rights are human rights, but also because a strong labor movement can provide the counter-vailing force sorely needed to offset some of the unchecked economic power currently wielded by Wal-Mart and other giant corporations—power that is distorting the democratic decision-making process in many areas of American life. To assist in that endeavor, the Blue Eagle of section 7 is alive and well and ready to fly again.

126. 48 Stat. 74 (1933); 48 Stat. 881 (1934).

127. 49 Stat. 449 (1935).

128. But to learn how this unfamiliar organizational process can occur and function and what its likely outcome will be, see BLUE EAGLE, *supra* note 2 at chs. 10, 11, & 12.