

Draft of July 13, 2006
Word Count: 15,539

Compulsory Unionism as a Fraternal Conceit?
Free Choice for Workers: A History of the Right to Work Movement,
By George C. Leef, Jameson Books, 2006.

Harry G. Hutchison*

In the flaring parks, in the taverns, in the hushed academies,
your murmur will applaud the wisdom of a thousand quacks.
For theirs is the kingdom.¹

Introduction

One candid reporter offers this assessment, “I honestly believe it, and I’m ashamed to say it: the Labor movement is on life support.”² He later notes, “Where the hell is Moses when you need him? I mean parting the Red Sea is nothing compared to the challenges we face as a [labor] movement.”³ This bracing appraisal corroborates evidence pointing to a steady decline in the unionized share of the U.S. work force – 7.9% of the private sector in 2004.⁴ After experiencing a steady increase in both wages and productivity over several decades, it appears that only 35 percent of non-unionized workers are interested in unionizing their workplace and only 16 percent would definitely vote to unionize.⁵

*Professor of Law, George Mason University School of Law. For helpful comments on earlier drafts, I am grateful to: Elizabeth McKay, Jane Barton, David Bernstein, Byron Cooper, Leon Lysaght, Jeffrey Parker, and James Ross. This article was enriched by discussions at an estate generously placed at my disposal by the Randy & Kesti Suggs Foundation, Divide, Colorado. My research was entirely supported by funds provided by the Law & Economics Center at George Mason University School of Law. The usual caveat applies. © Harry G. Hutchison.

¹ Kenneth Fearing, *Conclusion*, in THOMAS SOWELL, *VISION OF THE ANOINTED: SELF-CONGRATULATIONS AS A BASIS FOR SOCIAL POLICY* v (1995)[hereinafter, SOWELL, *VISION OF THE ANOINTED*].

² Laborers president, Terence O’Sullivan, New York Sun, May 10, 2005 as cited in UnionFacts.com available at www.unionfacts.com/articles/unionQuotes.cfm [accessed April 15, 2006].

³ Laborers President, Terence O’Sullivan, Chicago Tribune, May 13, 2005 as cited in UnionFacts.com available at www.unionfacts.com/articles/unionQuotes.cfm [accessed April 15, 2006].

⁴ Dale Franks, *Disorganized Labor*, Tuesday, July 26, 2005 available at <http://www.qando.net/details.aspx?entry+2306> [accessed on April 15, 2006] (citing the Wall Street Journal).

⁵ TIM KANE, *THE AFL-CIO’S DISINTEGRATION AND IT’S POSSIBLE IMPLICATIONS*, WEB MEMO, available at <http://www.heritage.org/Research/Labor/wm808.cfm?renderforprint+1> accessed July 28, 2005.

Membership woes⁶ generate growing fears of looming union irrelevance despite extensive counterfactual evidence substantiating persistent growth in union political influence⁷ and economic wealth.⁸ Notwithstanding the counterfactuals, academic observers offer similar pessimism⁹, implying that many of the hopeful proposals for labor “reform” are nothing more than attempts to reshuffle the deck chairs on the Titanic.¹⁰ Such despondency has led some labor union proponents to contemplate the abolition of the National Labor Relations Act¹¹ (NLRA). There appears to be gloom regarding labor’s future, and this gloominess is attached to the expectant belief that unions exemplify and secure communal progress. Labor’s current difficulties correspond with despair over the failure of the progressive agenda, and signify that it is time to start over¹², as the economic¹³ and political¹⁴ conditions which have enabled the NLRA to succeed in the past have come to an end.¹⁵

⁶Harry G. Hutchison, *Reclaiming the Labor Movement Through Union Dues? A Postmodern Perspective in the Mirror of Public Choice Theory*, 33 UNIV. OF MICH. J. OF LAW REFORM, 447, 450 (2000)[hereinafter, Hutchison, *Reclaiming the Labor Movement*].

⁷ See William J. Moore et al., *The Political Influence of Unions and Corporations on COPE Votes in the U.S. Senate, 1979-1988*, 16 J. LAB. RES. 2003, 218-19 (1995) (the evidence fails to show a decline in the political influence of unions).

⁸ From the period 1991 through 1995, for instance, total receipts by several of the major international unions, which make up the AFL-CIO actually increased while membership declined. Kenneth R. Weinstein & Thomas M. Wielgus, *How Unions Deny Workers Rights*, The Heritage Foundation, at <http://www.heritage.org/library/categories/regulation/bg1087.html> (July 18, 1996).

⁹ See e.g., Charles B. Craver, *The Labor Movement Needs a Twenty-First Century Committee for Industrial Organization*, 23 HOFSTRA LAB. & EMP. L. J. 69, 69 (2005) (“American labor movement is in a moribund state.”), and Sanford M. Jacoby, *Reflections on Labor Law Reform and the Crisis of American Labor*, 69 CHI.-KENT. L. REV. 219, 219-227 (skeptically considering the efficacy of labor reform proposals in dealing with the labor crisis).

¹⁰ See, e.g., Charles B. Craver, *Rearranging Deck Chairs on the Titanic: The Inadequacy of Modest Proposals to Reform Labor Law*, 93 Mich. L. Rev. 1616 (1995).

¹¹ See e.g., Ellen Dannin, *At 70, Should the National Labor Relations Act Be Retired?: NLRA Values, Labor Values, American Values*, 26 BERKELEY J. EMP. & LAB. L. 223, 274 (2005) (arguing that we should make the NLRA values America’s values as part of the war “between those who support collective values and well-being for all and those who support unbridled individualism”).

¹² Michael H. Gottesman, *In Despair, Starting Over: Imagining a Labor Law for Unorganized Workers*, 69 CHI.-KENT. L. REV. 59.

¹³ *Id.* at 61.

¹⁴ Clarence B. Carson, *Unionism Revisited*, 34 THE FREEMAN: IDEAS ON LIBERTY (1984) (accessed on May 12, 2006 at page 4 in online version) available at <http://www.fee.org/publications/the-freeman/article.asp?aid=1058&print-view=true>.

¹⁵ Gottesman, *supra* note ____ at 61.

From a global perspective, these dire developments were foreseeable.¹⁶ More than 50 years ago, Jacques Ellul saw unions as largely technical entities which predictably trapped workers in compulsory organizations that diminished both their personalities and independence, despite the earlier hope by some that unions would act as a revolutionary force that would free workers from the bureaucratic power wielded by large organizations.¹⁷ Ellul insists that labor unions are best understood as institutions led by hierarchs who have an inadequate understanding of the unorganized workforce and the necessity of human liberty.¹⁸ Ellul’s verdict—coupled with data on union density rates and other evidence justifying the labor movement’s melancholy—substantiates Epstein’s forecast that private sector unions will continue to lose ground because they no longer provide their membership with benefits that exceed their costs.¹⁹

With the publication of *Free Choice for Workers: a History of the Right to work Movement*, George Leef reexamines labor unions and contests the justification offered in support of America’s labor laws. Leef’s perspective delegitimizes compulsory unionism on ethical and empirical grounds. “One dominant feature of this system is the necessary abrogation of the contract at will,” notes Richard Epstein, “for an employer is not allowed to dismiss any worker for engaging in union activities or expressing union sympathies.”²⁰ Such arrangements are customarily attached to progressive principles and ideals, and are “typically justified by an appeal to ideas of economic duress, employer exploitation, and inequality of bargaining power.”²¹ Demonstrating that statutory compulsion fails to lead society on a pathway to progress, the book reveals that the road to serfdom can often be paved by bureaucratic regulation.²² Carefully

¹⁶ JACQUES ELLUL, *THE TECHNOLOGICAL SOCIETY*, 357-358 (1954) (translated from the French by John Wilkinson, 1964).

¹⁷ ELLUL, *supra* note ___ at 357-58.

¹⁸ *Id.* at 358.

¹⁹ Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation* 92 *YALE L. J.* 1357, 1407 (1983) [hereinafter, Epstein, *A Common Law for Labor Relations*].

²⁰ RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD*, 163 (1995) [hereinafter, EPSTEIN, *SIMPLE RULES*].

²¹ *Id.*

²² On this point, *see e.g.*, ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA*, Part II, Book IV, chap. Vi, (predicting a new kind of servitude as government takes each member of the community in its powerful grasp, and fashions him at will, and then the supreme power covers the surface of society with a network of small complicated rules, minute and uniform, through which the most original minds and the most energetic characters cannot penetrate.) as cited in F.A. HAYEK, *THE ROAD TO SERFDOM*, xli (preface to 1956 edition)(1944) (1994 edition) .

examining history and contemporary events, Leef contributes to the richly textured debate about the normative role of unions in a putatively free society. Although F.A. Hayek is spot on when he notes that “[c]ontemporary events differ from history in that we do not know the results they will produce,²³” he is equally correct in understanding that we can discern tendencies.²⁴ Leef’s book provides a historical appraisal that helps society learn from the past²⁵, and explicates the capacity of principled ideals, embedded in fearless individuals, to trump historical tendencies favoring privileged and entrenched autocracies. George Leef’s reassessment offers an essentially contractarian and liberal model of labor relations that focuses on a vision of individual rights which have a clearly defined, independent existence predating society.²⁶ From this perspective, Leef specifies liberty as a desirable good in and of itself, which is then placed in harm’s way by progressive ideals and constructs. In the essay that follows, I offer neither a meta-narrative on contractarianism nor a comprehensive refutation of the criticism of the contractarian model. Nevertheless, I contend that Leef supplies a highly pragmatic and strongly theoretical (if incomplete) argument against the tendency to see government as the solution to the “labor problem.”

In Part I, I consider the origin of the Right to Work law movement and Right to Work laws, as a response to the establishment of the Railway Labor Act, the shrinkage of the common law, the creation of the National Labor Relations Act, and other labor laws. While human freedom and negative liberty may constitute a first-order good, it is possible that the extent of freedom and liberty (including freedom of speech and association) remains a contingent, not absolute, good. The contingency of the good depends on whether there is some principled basis for diminishing the good itself.²⁷

²³ HAYEK, *supra* note ____ at 3.

²⁴ *Id.*

²⁵ *Id.* at 3. (Hayek suggests we can learn from the past and thereby avoid repeating the same process).

²⁶ ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT*, 4 (1975).

²⁷ Consistent with that intuition, Larry Alexander presents an elegant case that no universal right of freedom of expression and perhaps, association, can be found to exist at either the level of constitutional theory or the level of human rights. LARRY ALEXANDER, *IS THERE A RIGHT OF FREEDOM OF EXPRESSION?* 185 (2005). (one searches in vain for an argument that would support a human right of freedom of expression).

In Part II, I offer analysis. This focus inevitably concentrates on the eternal conflict between human freedom and government intervention aimed at ameliorating inequality, income disparity and human suffering. While historically this quarrel has been attached to notions of justice that originated with Socrates, and has continued until the time of John Stuart Mill and John Rawls, this debate must also consider the purportedly positive benefits associated with industrial peace as well.²⁸ It seems clear that George Leef's perspective supplies a persuasive case that suggests that the Right to Work movement has contributed to human liberty while diminishing the allure of government regulatory power.

I. The Origin of the Right to Work Movement and Right to Work Laws.

Free Choice for Workers vindicates the commitment of courageous Americans to certain freedoms, such as freedom of conscience, freedom of association and freedom to say no to groups, values and actions that individuals find incompatible with their own beliefs.²⁹ Implicit in this understanding of liberty is the notion of freedom from coercion, authoritarianism, violence and intimidation from those who hold contrary views. This understanding can be seen as controversial when the source of coercion is the government itself. More controversially, Leef shows that the source of coercion is not direct government power but private, putatively voluntary associations of workers that have attained legal rights and privileges.³⁰ Labor organizations can, under federal and various state laws, condition employment on the payment of union dues, or alternatively agency fees and workers are given the stark choice of paying up or losing their job.³¹ Since 1955, however, "there has been one organization dedicated to the principle that Americans should not be compelled to support unions and accept their supposed

²⁸ If industrial strife imposes external costs on society as an example of market failure, perhaps government intervention can be justified to ensure that labor peace as a desirable good is not under produced. "Market failure is often the justification for political intervention in the marketplace . . . The standard argument is that if market allocations are inefficient, everyone can and should be made better off." John O. Ledyard, *Market Failure*, in *THE NEW PALGRAVE, ALLOCATION, INFORMATION, AND MARKETS*, 185, 185 (eds. John Eatwell, Murray Milgate & Peter Newman, 1989). There is reason to doubt the efficacy of this maneuver. *See infra*, Part III,B.

²⁹ LEEF, *supra* note ____ at xiii.

³⁰ *Id.* at xiv.

³¹ *Id.* at xv.

services against their wills,”³² the National Right to Work Law Committee (NRWLC) and its progeny.

Free Choice for Workers breathes life into the contention that autocratic labor unions require a dedicated opponent. Consider Rod Carter. While working for UPS, he declined to participate in a 1997 strike that Teamsters Local 769 and the national Teamsters union called against his employer. “Top union officers ordered all drivers to cease working and support the strike, no matter their personal circumstances.”³³ Ignoring threats, he continued to work in order to support his family, which led to an attack by union militants. They jumped him, punched and beat him severely and then finally stabbed him in the chest with an ice pick several times.³⁴ How did the United States become a country in which citizens can be beaten up for working for a living? In responding to this question, George Leef describes the evolution of America’s labor cartel. This evolution includes the rejection of the common law, and the extension of various privileges and immunities to labor organizations as part of a movement aimed at allowing unions “to be freer of the constraints that bind businessmen and everyone else, thereby allowing unions more latitude to use their aggressive tactics.”³⁵ Essential vehicles for the formation and preservation of labor cartels are statutory rules that: (1) grant unions the right of exclusive representation³⁶, (2) allow unions to deploy a selective incentive³⁷ — compulsory dues payments in the form of an agency, union or a closed shop and (3) subordinate individual workers’ interest to the tyranny of the majority.

Once a union has been certified as the bargaining agent for a group of workers it typically has the power to bind all workers to a contract. Leef identifies this authority as the grant of monopoly status to unions, and the elimination of the freedom of workers to make their own contracts.³⁸ This practice operates contrary to the prudential judgment of Justice Brandeis, a long-time supporter of organized labor, who nevertheless supported restrictions on union power.³⁹

³² *Id.* at xvi.

³³ *Id.* at 1.

³⁴ *Id.* at 1-3.

³⁵ *Id.* at 7 (citing MORGAN O. REYNOLDS, MAKING AMERICA POORER, 19-20, (1987)).

³⁶ LEEF, *supra* note ___ at 14. *See also*, NLRA § 9(a).

³⁷ LEEF, *supra* note ___ at 15.

³⁸ *Id.*

³⁹ *Id.*

Justice Brandeis stated: “The union attains success when it reaches the ideal condition and the ideal condition for a union is to be strong and stable, and yet to have in the trade outside of its ranks an appreciable number of men who are non-unionists . . . Such a nucleus of unorganized labor will check oppression by the union as the union checks oppression by the employer.”⁴⁰ The notion of competition within the labor market sector functions consistently with a principled conception of liberty, but is incompatible with America’s labor history and labor laws.

A. Transforming the Common Law: American Labor History

Free Choice for Workers examines the creation and implementation of an interventionist and prescriptively collectivist model in American labor relations. Leef argues that “under the common law, there was no need for a special set of rules for labor relations because the law of contract and property rights was sufficient to handle any dispute that arose.”⁴¹ Individual workers were “free to join labor organizations and seek to bargain as a group if they wanted to do so”⁴², and employers were permitted to “choose whether or not they would bargain with the representatives of a labor organization.”⁴³ While “union officials had sought preferential laws even before the era of the Great Depression,”⁴⁴ the depression triggered numerous proposals aimed at delimiting the common law within and outside the labor law arena. Herbert Hoover is frequently referred to as a clumsy *laissez-faire* proponent who refused to initiate government action needed to prop up the crumbling economy from 1929 to 1932.⁴⁵ Reality is quite different. President Hoover was an interventionist who set the stage for even greater government involvement during the Roosevelt administration.⁴⁶ He approved the Norris-LaGuardia Act that gave union officials a good deal of what they wanted.⁴⁷ The centerpiece of the legislation was its anti-injunction provision.⁴⁸ Although some academic observers assert that “injunctions were unfairly suppressing workers in their attempt to improve their conditions . . . the empirical evidence. . . [shows] that injunctions were seldom issued except where there had been violence

⁴⁰ *Id.*

⁴¹ *Id.* at 3.

⁴² *Id.* at 4.

⁴³ *Id.*

⁴⁴ *Id.* at 5.

⁴⁵ *Id.* at 7.

⁴⁶ *Id.* at 7-12.

⁴⁷ *Id.* at 7.

⁴⁸ *Id.* at 7.

associated with a strike.⁴⁹ Consistent with that observation, after the passage of the act, “the number of strikes, repeatedly accompanied by violence, *doubled* from 1932 to 1933 and continued to rise in following years.”⁵⁰

Free Choice for Workers offers additional evidence that government intervention backfires in other ways as well. First Franklin Roosevelt was elected with energetic backing from union leaders.⁵¹ Second, Roosevelt’s “Brain Trust” consisted of men who were admirers of European collectivism, in which strong unions were regarded as socially beneficial.⁵² Members of the “Brain Trust” were captivated by the paradoxical idea that high prices caused prosperity, and hence believed that high wages would help the economy by giving workers more purchasing power.⁵³ While Richard Vedder and Lowell Gallaway demonstrate the absurdity of this view,⁵⁴ it is unmistakably clear that cartelization—both of business and labor—became an accepted article of faith during the Roosevelt period.⁵⁵ As Leef puts it, “The year 1934 was marked by numerous violent strikes in which the heads of unions sought to compel management to recognize and deal with them.”⁵⁶ This effort solidified and accelerated measures aimed at bringing cartelization to the labor market. Disruption in an already weak economy provided an attractive “industrial peace” rationale for the passage of new labor laws that culminated in the enactment of the Wagner Act of 1935.⁵⁷ Explicitly attached to these laws were the contestable claims that the

⁴⁹ *Id.* at 8.

⁵⁰ *Id.* (emphasis added).

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴Richard K. VEDDER & LOWELL E. GALLAWAY, *OUT OF WORK: UNEMPLOYMENT AND GOVERNMENT IN TWENTIETH-CENTURY AMERICA*, 142 (1993) (“New Deal Wage cost-enhancing policies more than doubled the amount of abnormally large unemployment [during the middle of the depression era]”). *See also id.* at 129-149; *see also id.* at 138-139 (“The Wagner Act can be viewed as a continuation of the underconsumptionist, high wage policy initiated by Hoover and developed further by Roosevelt.”). This approach led to prolonged unemployment related to unionization, social security and other New Deal policies which taken together suggest that wage-cost-enhancing policies more than doubled the amount of abnormally large unemployment during 1937. *See id.* at 141-142.

⁵⁵ LEEF, *supra* note ____ at 8-10. Among the New Deal efforts were the enactment of the National Industrial Recovery Act (NIRA) grounded in the mistaken belief that America’s economic troubles were rooted in the free market system itself. Thus NIRA moved the United States toward a planned economy replete with “codes of fair competition.” The law in effect promoted business cartels. Cartelization was then extended to labor. *See id.* at 9.

⁵⁶ *Id.* at 10.

⁵⁷ *Id.* at 10-12.

“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 substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions . . .”⁵⁸ Proponents of the NLRA also claimed that industrial peace would be advanced through compulsory union activity. Leef exposes the transformation of “industrial peace” reasoning into constitutional cover in the form of congressional power to regulate interstate commerce within the meaning of Article I, Section 8 of the United States Constitution.⁵⁹

The NLRA subordinated workers’ freedom to choose their own employment arrangements to the insistent demand of union hierarchs for “union security.”⁶⁰ The Wagner Act, while proclaiming the employees right to self-organization, illogically “gave absolutely no legal protection to workers to *refrain* from participating in labor unions or collective bargaining.”⁶¹ The Wagner Act also granted unions exclusive representation⁶², thus providing them with monopoly status and shredding “another basic American liberty—the freedom to make your own contracts.”⁶³ Although, “[m]onopolies rarely last very long unless government intervenes to prevent competition with them,”⁶⁴ the Wagner Act authorized labor organizations to treat workers as a captive market to be exploited⁶⁵ to benefit the preferences and self-interest of union hierarchs and outsiders with whom the union leadership has fashioned an ideological bond.⁶⁶ In sum, the NLRA contained a number of provisions – union security provisions, the right to exclusive representation, the absence of effective union democracy and the vindication of

⁵⁸ *Id.* at 11.

⁵⁹ *Id.* at 11-12.

⁶⁰ *Id.* at 13. Unquestionably, union security provisions, ensure a steady flow of money into union treasuries irrespective of whether workers desire or alternatively, are content with union services or not. *Id.* at 12-14.

⁶¹ *Id.* at 13.

⁶² *Id.* at 14. “Section 9(a) says, “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 . . .” *Id.* at 14-15.

⁶³ *Id.* at 15.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Harry G. Hutchison, *A Clearing in the Forest: Infusing the Union Dues Dispute with First Amendment Values*, 14 WILLIAM & MARY, BILL OF RIGHTS J 1309, 1391-1394 (2006) [hereinafter, Hutchison, *A Clearing in the Forest*].

majoritarianism – that vitiate workers’ freedom of association and free speech rights.⁶⁷ Furthermore, the United States Supreme Court, far from acting as a guardian of freedom of speech, instead permitted the National Labor Relations Board (NLRB) to enact rules that “stifle real speech by employers.”⁶⁸ Additionally, the NLRB restricted the property rights of employers through questionable statutory interpretations.⁶⁹ Leef adverts to a number of Wagner Act deficiencies that imperil workers’ freedom to choose—including the fact that once a union has been certified as the workers’ bargaining agent, it tends to act as such indefinitely, without having to face periodic reelection campaigns.⁷⁰ Although decertification is possible,⁷¹ “[m]ost American workers who have union representation have never had the opportunity to vote on it themselves, since the union was certified before they were hired.”⁷² Taken together, these debatable rules expurgate common law principles while at the same time prove that workers’ autonomy and liberty interests were not the central concern for neither those who drafted the legislation, nor the National Labor Relations Board (NLRB).

B. Right to Work Laws and the Origins of the Right to Work Movement

In light of the benefits they received through the passage of the Norris-LaGuardia Act and the Wagner Act, unions flourished in the period between 1935 and 1947⁷³, and membership soared from three to fifteen million.⁷⁴ In some heavily industrialized sectors, union membership comprised eighty percent of the workforce.⁷⁵ This vision of expansive labor union power reached

⁶⁷ See e.g., Hutchison, *A Clearing in the Forest*, *supra* note ___ at 1395. Stewart J. Schwab, *Union Raids, Union Democracy, and the Market For Union Control*, 1992 U. ILL. L. REV. 367, 368-370 (1992) (“Even staunch union supporters blanch over the autocracy, entrenchment, and corruption of some union leaders . . . [Other evidence] suggests “union elections provide members with little real control over leaders” . . . [and, that unions are possibly, if not probably, inherently undemocratic).

⁶⁸ LEEF, *supra* note ___ at 19.

⁶⁹ *Id.* at 19.

⁷⁰ *Id.* at 19.

⁷¹ *Id.* at 19 (“It is possible for workers to oust a union they no longer want to continue to represent them . . . [but] [d]ecertification elections are relative rare, for two reason. . . . First, company management is not allowed to do anything to promote decertification Second, few workers know about the possibility, and among those who do, not many have the fortitude to risk anger and reprisals from union bosses for trying to end their domination.”).

⁷² LEEF, *supra* note ___ at 19.

⁷³ THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS AND THE NATIONAL LABOR RELATIONS Act 35 (Patrick Hardin & John E. Higgins, Jr. eds. 4th ed. 2001).

⁷⁴ *Id.*

⁷⁵ *Id.*

its pinnacle when John L. Lewis led coal miners in two prolonged and devastating strikes during World War II.⁷⁶ In “response to the postwar deregulation of wages and prices in August 1945, ‘major unions immediately demanded huge raises, thirty percent and more . . . [and] union leaders . . . threatened to shut the country down.’”⁷⁷ During and after World War II, the labor movement thus acted consistently with the objective of augmenting its power and expanding “its forced-dues empire.”⁷⁸ Illustrating the incoherence of the industrial peace justification for the NLRA, “[d]uring the war, union [leaders] ordered more than 13,000 strikes--many of them having nothing to do with wages and working conditions, but simply to expand their control over the labor market.”⁷⁹

On the other hand, an embryonic movement led by opponents of “compulsory unionism succeeded in getting referenda placed on the 1944 general election ballots in Florida and Arkansas, asking voters to approve laws that would make contracts, which forced workers to choose between paying union dues and losing their jobs, illegal.”⁸⁰ Both measures were approved.⁸¹ A few years later, three more states added Right to Work protection for workers, and six additional states followed suit in 1947.⁸² The labor movement was horrified and filed suit culminating in two decisions by the United States Supreme Court to uphold state Right to Work law protection.⁸³ Justice Hugo Black in a concurring opinion in one case stated,

There cannot be wrung from a constitutional right of workers to assemble to discuss improvement of their own working standards, a further constitutional right to drive from remunerative employment all persons who will not or cannot participate in union assemblies.⁸⁴

With successful state referenda ratified by the United States Supreme Court, a vibrant grassroots movement aimed at blocking compulsory unionism in America began. This movement was reinforced by the passage of the Taft-Hartley Act in 1947 via a Congressional override of

⁷⁶ Hutchison, *Reclaiming the Labor Movement*, *supra* note ____ at 451.

⁷⁷ DAVID FRUM, *WHAT’S RIGHT: THE NEW CONSERVATISM AND WHAT IT MEANS FOR CANADA* 84 (1996).

⁷⁸ LEEF, *supra* note ____ at 27.

⁷⁹ *Id.*

⁸⁰ *Id.* at 29.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 29-30.

⁸⁴ *Id.* at 30 (citing Justice Hugo Black).

President Truman's veto.⁸⁵ George Leef observes that the passage Taft-Hartley Amendments had little immediate effect on the growth of unionization.⁸⁶ Instead, unions grew to comprise 36 percent of private sector workers by 1953.⁸⁷ Therefore, claims that the Taft-Hartley Act withdrew nearly all union advantages and reduced union density rates, are not sustained by the empirical record. While the Taft-Hartley Act attempted a more balanced approach to labor relations than the Wagner Act by adding a list of union unfair labor practices such as coercion, discrimination and the use of secondary boycotts, the statute did not withdraw federal support for *most* of the characteristics of compulsory unionism.⁸⁸

Nonetheless, crucial for the right to work law movement was the addition of the following language:

Nothing contained in the amendment made by subsection (a) shall be construed to as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.⁸⁹

Leef argues, however, that the rights of workers to refrain from unionism could have been effectuated more effectively by simply abolishing the original (Wagner Act) statute.⁹⁰ Although free rider claim have been used to maintain union coercion, Leef eviscerates such arguments by demonstrating that worker interests are not uniform.⁹¹ Without consent, or interest uniformity among workers, the free rider pretext collapses.⁹² Because only the individual can assess the subjective benefits of union membership⁹³, represented workers who prefer to remain independent of a union are likely to become *forced* riders via union security agreements. Further,

⁸⁵*Id.* at 30.

⁸⁶ *Id.* at 30-31.

⁸⁷ *Id.* at 31.

⁸⁸ *Id.* at 31.

⁸⁹ *Id.*

⁹⁰ *Id.* at 32.

⁹¹ *Id.* at 33.

⁹² *Id.* at 33 (for instance, a recently hired worker may realize that if the union negotiates a large wage increase, he will only enjoy it until he fired or alternatively a worker who is highly productive, may force to comply with union rules that contribute to inefficiency and thus in the long run depress his income. Further, the union's political activities may be repugnant to the worker). Today, the wisdom of Leef's economic claim is particularly evident in America's domestic automobile industry.

⁹³ John C. Moorhouse, *Compulsory Unionism and the Free Rider Doctrine*, VOL. 2 CATO JOURNAL, 629 (fall 1982) as cited in LEEF, *supra* note ____ at 34.

contrary to contentions by labor union advocates, Leef shows that unions have continued to exist in Right to Work law states despite the fact that workers can legally withdraw their support. Additionally, Leef convincingly argues that unions might act more responsibly if they had to compete for resources provided by working people.⁹⁴

Persistent union autocracy and violence continued to fuel the Right to Work movement. In 1953, the Teamsters Union organized taxicab companies across the nation and called a strike in Wichita, Kansas. The companies resisted and workers continued to go to work. The Teamsters responded by targeting such workers with stink bombs, bottles, paint, and gasoline bombs. The union continued to issue threats and the dispatch office of one company was dynamited. Violence continued to escalate. On the night of December 12, 1953, cab driver Deering Crowe was beaten with repeated blows to the face. This assault burst a malignant tumor. The operation required to repair Crowe's tumor was delayed and he died leaving a widow and two children. This act of violence coincided with an ongoing debate in Kansas over a Right to Work bill that had been introduced in the legislature. Before his death, Crowe had become a compelling spokesperson for the law, and his story provoked Reed Larson⁹⁵ to become the driving force in the American Right to Work Law movement.⁹⁶

In 1955 the National Right to Work Committee proclaimed both its existence and its sole objective – the elimination of compulsory unionism.⁹⁷ The committee announced the following goals: educate the public about the threats posed by compulsory unionism; encourage and support both employers and employees who resist the adoption of union shops; assist workers who were fighting in the courts to protect their jobs from union initiated discharges; and provide information and material to the various state groups that were engaged in the fight against compulsory unionism.⁹⁸ The Right to Work movement had to overcome the failure of politicians and large corporations to take a principled stand in favor of the liberty of workers. This failure contributed to funding problems, which were solved through direct mail efforts. Direct mail

⁹⁴ LEEF, *supra* note ____ at 34-35.

⁹⁵ *Id.* at 40.

⁹⁶ *Id.* at 48-52.

⁹⁷ *Id.* at 43-44.

⁹⁸ *Id.* at 44.

efforts produced hundreds of small individual contributions from workers and small businesses.⁹⁹ The Right to Work Movement, however, lost five of six referenda campaigns during 1958.¹⁰⁰ Because of these difficulties, some considered the Right to Work effort dead, yet both the movement and its organization experienced a revival during the 1960s.¹⁰¹

C. Defending Government Employees From Forced Unionism.

Because it seemed impossible to bargain collectively with government in the 1950s, the labor movement focused much of its energy on unionizing the private sector workplace.¹⁰² This attitude changed in the 1960s.¹⁰³ Labor hierarchs realized that they had overlooked “a gold mine of workers who might become union dues payers.”¹⁰⁴ Union leaders decided not “to rely on persuasion to get more workers to join voluntarily.”¹⁰⁵ Leef illustrates the NRWLC’s struggle to counter these efforts. The reluctance of politicians to place the liberty of interests of individual workers ahead of short-term political expediency contributed to the thorniness of this conflict. For example, in an effort to improve efficiency and take small steps toward privatizing the U.S. Postal service during the Nixon administration, Postmaster General Winton Blount¹⁰⁶ agreed to compulsory unionism for postal workers.¹⁰⁷ This agreement, if ratified, would have provided a foothold for unions to “install compulsory unionism throughout the federal government.”¹⁰⁸

With 750,000 workers, the Post office “was the largest civilian employer in the United States.”¹⁰⁹ Approximately “20 percent [of the workforce] had chosen not to join a union, a right that was protected under Executive Order 10988 issued by President Kennedy in 1962.”¹¹⁰ This

⁹⁹ *Id.* at 45-46.

¹⁰⁰ *Id.* at 47.

¹⁰¹ The NRWLC mobilized opposition to an effort to promote compulsory unionism in companies involved in the aerospace industry and help defeat an effort to spread union shops to four out of five major aerospace contractors. *See* LEEF, *supra* note ____ at 54-58. In addition, the NRWLC helped defeat an effort to repeal the Taft-Hartley provision providing for the preservation of state right to work laws. *Id.* at 61-78.

¹⁰² *Id.* at 81.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 82.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

order “had been reiterated by President Nixon’s Executive Order 11491. . . . in 1969.”¹¹¹ Nonetheless, Blount concealed his capitulation to AFL-CIO demands.¹¹² After discovering this surrender, the NRWLC launched an effective counterattack within the United States Chamber of Commerce, in similar business groups, and among significant contributors to Republican candidates.¹¹³ While the “postal service remains inefficient and mailing costs escalate faster than the rate of inflation, Congress with the assistance of the NRWLC, has continued to ban compulsory unionism within the Postal Service, and to advance the principle of individual liberty.”¹¹⁴ Although the NRWLC has not always triumphed¹¹⁵, its vigilant efforts against attempts to expand compulsory unionism within the federal government sector have been largely successful.¹¹⁶

D. Rent Seeking in the Construction Industry and the Battle for “Reform.”

Union activities in the construction industry included efforts to maximize both the number of job classifications and the number of jobs. Together these efforts would maximize profits for union treasuries while providing economic rent for the labor movement.¹¹⁷ In cooperation with these objectives, unions turned their attention to common situs picketing¹¹⁸, and other efforts¹¹⁹ aimed at stifling competition from nonunion shop operators. Most of these efforts, as John

¹¹¹ *Id.* at 83.

¹¹² *Id.* See also *id.* at 84-85.

¹¹³ *Id.* at 87.

¹¹⁴ *Id.* at 90.

¹¹⁵ *Id.* at 93 (suggesting mixed success with respect to homeland security).

¹¹⁶ *Id.* at 90-103.

¹¹⁷ *Id.* at 105-06.

¹¹⁸ *Id.* at 106—123. Evidently, in private-sector construction settings union leaders picket the entire work site if a non-union competitor is chosen and thus common situs picketing could shut down the whole construction site since crossing the union picket line was often met with violence or other forms of retribution. *Id.* at 106.

¹¹⁹ *Id.* at 106 (other efforts include federal and state prevailing wage statute).

Gray¹²⁰ might describe, involved politics in pursuit of special interests.¹²¹ In the past, labor officials used common situs picketing until “it was declared to be an unfair labor practice by the Supreme Court’s ruling in *NLRB v. Denver Building & Construction Trades Council* in 1951.”¹²² Craving the capacity to inflict economic damage on parties with whom the union did not have a dispute (site owners), unions sought a legislative solution. However, the National Right to Work Law Committee’s fierce opposition led to the defeat of common situs picketing bills in 1975 and 1977.¹²³

Among other “reform” efforts, labor unions supported campaign finance initiatives. Clearly, “government financing of elections might tilt the playing field” because “union officials would still be free to support their favored candidates with hundreds of millions of dollars worth of ‘in kind’ services such as phone banks and get-out-the-vote drives.”¹²⁴ The NRWLC took action to prevent this initiative by working to intercept this legislation. Additional “reform” efforts included the enactment of laws, making it easier for unions to prevail in certification efforts before the National Labor Relations Board.¹²⁵ Skillfully supporting legislative filibusters, the NRWLC facilitated the defeat of these “reforms.”

E. Legal Defense Efforts.

While the accomplishments of the NRWLC in the legislative arena have been noteworthy, its work in the litigation arena has been equally impressive. The latter arena remains crucial because autocratic union officials, often snub the law.¹²⁶ “Over the years, thousands of workers have suffered violations of their rights, including physical violence and even death, because they

¹²⁰ JOHN GRAY, *POST-LIBERALISM: STUDIES IN POLITICAL THOUGHT* 11(1993, 1996) [hereinafter, GRAY *POST-LIBERALISM*] (“Contrary to the classical theory of the state as the provider of public good—goods, that is to say, which in virtue of their indivisibility and non-excludability must be provided to all or none—*modern states are above all suppliers of private goods.*”). As thus understood, Rather than provide simply the pure public good of civil peace, it is increasingly likely that the mission of the modern state is to satisfy the private preferences of collusive interest groups whether or not the pursuit of such aims is cloaked in language implying some pure public purpose or alternatively infused with the language of market failure. Hutchison, *A Clearing in the Forest*, *supra* note ___ at 1339-1340.

¹²¹ LEEF, *supra* note ___ at 106.

¹²² *Id.* at 106-07.

¹²³ *Id.* at 123.

¹²⁴ *Id.* at 129.

¹²⁵ *Id.* at 130-133.

¹²⁶ *Id.* at 147.

... put their own desires and welfare above the demands of union autocrats.”¹²⁷ Union hierarchs discover the irresistible temptation to engage in subordination while workers fall victim to intimidation. Archibald Cox describes this quandary clearly:

Most men are reluctant to incur the financial cost in order to vindicate intangible rights. Individual workers who sue union officers run enormous risks, for there are many ways, legal as well as illegal, by which entrenched officials can ‘take care of’ recalcitrant members.¹²⁸

Union bullying requires an opponent with ample resources and sufficient motivation to lessen the odds. The National Right to Work Law Committee catalyzed the formation of a new entity – the National Right To Work Legal Defense Foundation (LDF).¹²⁹ They are separate organizations, each with its own staff and sources of funding¹³⁰, but neither takes a partisan political position.¹³¹ The LDF takes cases involving misuse of compulsory union dues for political and ideological purposes as well as cases involving violations of workers’ constitutional rights of free speech,¹³² assembly and other civil rights; violations of the merit principle in public employment and academic freedom in public education; injustices in the compulsory union hiring hall referral system; violations of existing protections against compulsory unionism¹³³, and cases involving union violence.¹³⁴

Among the LDF’s most famous Supreme Court cases are *Abood v. Detroit Board of Education*¹³⁵ and *Beck v. Communication Workers of America*.¹³⁶ In *Beck*, the District Court ultimately found that “the collection and disbursement of agency fees for purposes other than

¹²⁷ *Id.*

¹²⁸ Archibald Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959*, 58 MICH. L. REV. 819, 852 (1960) (as cited in LEEF, *supra* note ____ at 148).

¹²⁹ LEEF, *supra* note ____ at 148.

¹³⁰ *Id.* at 149.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* at 149-150.

¹³⁴ *Id.* at 149-150. Among the cases involving union violence include *Kirkland v. Operating Engineers* in which Kirkland a backhoe operator was brutally beaten after being cornered by 100 union thus and suffered three broken ribs, steel shavings were ground into his eyes and he was threatened with a knife. After a lawsuit was filed on his behalf by the Legal Defense Foundation, the union, Operating Engineers Local 675 agreed to an out-of-court settlement in the amount of \$165,000. *See id* at 152.

¹³⁵ *Abood v. Detroit Board of Educ.*, 431 U.S. 209 (1977).

¹³⁶ *Communications Workers of Am. V. Beck*, 487 U.S. 735 (1988).

collective bargaining violated the First Amendment rights of workers.”¹³⁷ Moreover, a special master appointed by the court found that the union spent nearly 80 percent of its income on political activities and other matters having nothing to do with collective bargaining.¹³⁸ This finding is vital because such evidence, along with similar proof¹³⁹, extirpates persistent union free rider arguments in favor of compulsory unionism and mandatory dues payments.¹⁴⁰

The Supreme Court decision in *Beck*, upheld the district court’s decision, but rested largely on the narrower claim that the union breached its duty of fair representation.¹⁴¹ The *Beck* decision provides a starting point for dissenting workers to take such claims either to court or the NLRB. In light of the imbalance in economic resources favoring unions, the vindication of employee rights is rare. This is particularly true at the administrative agency level, since the NLRB appears driven by a political calculus that favors compulsory unionism. Accordingly, the Board has been reluctant to support workers’ duty of fair representation rights — even when the United States Supreme Court has previously vindicated them.¹⁴² Indeed, the NLRB delayed for eight years before issuing its first post-*Beck* decision, *California Saw*.¹⁴³

¹³⁷ LEEF, *supra* note ____ at 167.

¹³⁸ *Id.*

¹³⁹ *See e. g.*, ROBERT P. HUNTER, PAUL S. KERSEY & SHAWN P. MILLER, THE MICHIGAN UNION ACCOUNTABILITY ACT: A STEP TOWARD ACCOUNTABILITY AND DEMOCRACY IN LABOR ORGANIZATION 4-15 (2001), *available at* The Mackinac Center for Public Policy, 140 West Main Street P. O. Box 568 Midland, Michigan 48640. (The United States Supreme Court apparently approved, a detailed examination of union financial records that found no basis to disagree with the following: (A) in *Communication Workers of Am. v. Beck*, the record indicated that 79% of union dues were not chargeable to collective bargaining and related activities and (B) in *Lehnert v. Ferris*, the union spent 90% of its dues revenue on non-representational activities.).

¹⁴⁰ *See e.g.*, Hutchison, *A Clearing in the Forest*, *supra* note ____ at 1380-1381.

¹⁴¹ *See e.g.*, Hutchison, *Reclaiming the Union Movement*, *supra* note ____ at 463 (Discussing the Supreme Court’s decision in *Beck*).

¹⁴² *See e.g.*, Robert Hunter, *Compulsory Union Dues in Michigan: The Need to Enforce Union Members’ Rights, and the Impact on Workers, Employers and Labor Unions*, 12 May 1997, Mackinac Center for Public Policy (arguing that the NLRB has operated at a “snail’s pace” in enforcing *Beck* protections). *See also*, LEEF, *supra* note ____ at 169.

¹⁴³ When the NLRB decides, workers, apparently, are likely to receive little protection or relief. Raymond J. LaJeunesse, *McCain-Feingold-Cochran’s So-called “Codification” of Beck: In Reality a Trojan Horse*, ISSUE BRIEFING, 1,2 (January 30, 2001), *available with the author*. *See also*, *Tempers Flare at Hearing on Beck Rights to not Pay for Nonrepresentational Activities*, Vol. 69, THE UNITED STATES LAW WEEK, No. 44, pg. 2712 (May 2001) BNA (presentation of divergent views on whether a significant problem exists for workers trying to exercise *Beck* rights).

Despite the challenges it faces, the Right to Work movement has been very effective. Verification comes in the form of counterattacks by America's labor hierarchy, with similar efforts by the American government's bureaucracy. The counterattack has taken the following forms: (A) a lawsuit filed by thirteen union and the AFL-CIO asserting "Right to Work organizations were financing workers' lawsuits against unions with funds provided by 'interested employer,' conduct allegedly . . . prohibited by the Landrum-Griffin Act"¹⁴⁴; (B) a labor union suit that sought to compel the disclosure of Right To Work contributors despite a Supreme Court decision preventing such disclosures in *NAACP v. Alabama*¹⁴⁵; (C) an Internal Revenue Service challenge the LDF's charitable status which threatened the tax deductibility of contributions¹⁴⁶; (D) an aggressive effort led by the Chairman of the Federal Election Commission (FEC) who formerly served as the AFL-CIO's associate general counsel, who, "used the powers of office"¹⁴⁷ to impede the Right to Work movement.

Among the NRWLC's cherished objectives is to pass statutes that extend the Right to Work principle to more states while concurrently defending statutes that are already in place. The AFL-CIO recognizes the benefits of combat through exhaustion—its allies have introduced bills to repeal Right to Work laws in eight to ten states per year.¹⁴⁸ On the litigation side, the LDF is embroiled in important efforts to prevent "top-down organizing."¹⁴⁹ Since union leaders recognize that they are likely to lose fifty-percent of union certification votes and even if they prevail they may fail to successfully negotiate a collective bargaining agreement, labor leaders "have taken to pressuring management into forcing unionism on their employees whether they want it or not."¹⁵⁰ In essence, labor and management join together and agree they will support

¹⁴⁴ LEEF, *supra* note ____ at 182.

¹⁴⁵ *Id.* at 182-187.

¹⁴⁶ *Id.* at 187-190.

¹⁴⁷ *Id.* at 190. Among other things the NRWLC sued the FEC to enforce the law against the National Education Association because this union had illegally used a reverse check-off procedure as part of its political collection scheme. Subsequently, the NRWLC was sued by the FEC. *Id.* at 190-196.

¹⁴⁸ *Id.* at 252-253.

¹⁴⁹ *Id.* at 253.

¹⁵⁰ *Id.* at 253.

unionization.¹⁵¹ LDF lawsuits attack the legality of this trend in union organizing.¹⁵² On the legislative front the Right to Work Committee has remained vigilant against recent proposals to approve “unionization without a secret ballot vote of the workers”¹⁵³ while continuing to support efforts aimed at protecting “workers against union coercion and abuse.”¹⁵⁴ Such efforts vindicate the observation that compulsory unionism is “antithetical to the American tradition of liberty and individual choice.”¹⁵⁵ Eighty percent “ of the public believes that workers should not be compelled to belong to a union in order to hold a job.”¹⁵⁶ Nevertheless, the Right to Work movement will face persistent difficulty in translating the preferences of most Americans into a reality enjoyed by all workers. An examination of the justification, the origin of the opposition to the workers’ liberty interests and the correlative desire to impose labor organizations on workers frames the discussion in the next section.

II. Analysis.

What has always made the state a hell on earth has been
precisely that man has tried to make it his heaven.¹⁵⁷

James Madison once argued: “if industry and labor are left to take their own course, they will generally be directed to those objects which are the most productive, and this in a more certain and direct manner than the wisdom of the most enlightened Legislature could point out . . . [A]ll are benefited by exchange, and the less this exchange is cramped by Government, the greater are the proportions of benefit to each.”¹⁵⁸ The Madisonian perspective was premised on the idea that limited constitutional government constitutes a bulwark for individual liberty. Conversely, alternative conceptions of government, reify unlimited democracy and allow

¹⁵¹ *Id.* at 254 (discussing a case involving the United Steelworkers of America and Heartland Industrial Partners under which the employer would remain “neutral” with respect to union organizing drives.).

¹⁵² *Id.* at 254.

¹⁵³ *Id.* at 256.

¹⁵⁴ *Id.* at 257.

¹⁵⁵ *Id.* at 262.

¹⁵⁶ *Id.* at 262.

¹⁵⁷ F. Hölderlin, (as cited in HAYEK, *supra* note ____ at 28).

¹⁵⁸ James Madison, Speech in First Congress, April 9, 1789 as cited by James A. Dorn, *Public Choice and the Constitution: A Madisonian Perspective*, in *PUBLIC CHOICE AND CONSTITUTIONAL ECONOMICS* 57 (ed. James D. Gwartney & Richard E. Wagner, 1988) Padover (1953, pp. 269-70).

government to take sides and augment the sharpness, if not the death rate, of the war of *all against all*. Although, Madison and the framers favored a modest conception of government, this view has lost of its luster in an era that is drawn to progressive ideals and postmodern identities. On an individual and collective basis, modesty and self-restraint has limited appeal for contemporary individuals who are captivated by the expansive claims of the likes of Rorty¹⁵⁹, Sweeney¹⁶⁰ or Shklar.¹⁶¹ Further, an expansive and progressive self-conception compels or, at the very least, implies an expansive government. Accordingly, government power, becomes essential to attain and secure various identities that humans can imagine for themselves and others. Government power is positioned as a bureaucratic preference fulfillment apparatus in which resources are redistributed so as to contribute to collective satisfaction while incommensurability qualms are overlooked. Whether they are the actual, or inadvertent intellectual heirs of Mill¹⁶² or Bentham, the central concern of progressives is to achieve the “greatest good for the greatest number of individuals.”¹⁶³ Mill certainly expressed support for the claim that human beings should be free to form opinions, and to express their opinions without reserve as part of what

¹⁵⁹ See e.g., RICHARD RORTY, *CONTINGENCY, IRONY AND SOLIDARITY*, xii-xvi, (1989) (Describing among other things, his version of human utopia). Notably, Rorty rejects attempts to find some collective or individual account of truth and instead he suggests that we should be attracted to self-recreation. See e.g., RORTY, *supra* note ____ at 5, 17, and 29. Nonetheless, he contends that “we liberals” can be defined as being dedicated to creating an ever larger and more variegated ethnos that is aimed to diminishing cruelty. See *id* at 197-198.

¹⁶⁰ LINDA CHAVEZ & DANIEL GRAY, *BETRAYAL: HOW UNION BOSSES SHAKE DOWN THEIR MEMBERS AND CORRUPT AMERICAN POLITICS*, 19 and 49(2004) (In his run for the presidency of the AFL-CIO labor federation, John Sweeney, sought to mobilize the more active leftist members by joining the Democratic Socialist of America, and by working to expand the socialist agenda).

¹⁶¹ See e.g., Bernard Yack, *Liberalism without Illusions: An Introduction to Judith Shklar*, in *LIBERALISM WITHOUT ILLUSIONS: ESSAYS ON LIBERAL THEORY AND THE POLITICAL VISION OF JUDITH N. SHKLAR*, 3-4 (ed. Bernard Yack, 1996) (Shklar in her concern for human cruelty rejects the limited state as a form of a liberal politics of fear and instead argues for a rather broad conception of government that rescues us from the concentration of power in the form of corporations, which seems to operate consistently with at least some of rationales offered in connection with the enactment of the Wagner Act). Shklar rejects the libertarian approach to government because “it rests on a completely unjustified faith that governmental power is always more threatening to our freedom and security than the power of private actors.” *Id.* at 3-4.

¹⁶² Patrick Haden, *Introduction*, in *ON LIBERTY, JOHN STUART MILL*, xii, (2004). It has been argued that Mill as distinguished from Bentham does not succumb to the criticism that “liberty cannot be treated as something good in itself for it may be the case that it will produce detrimental consequences for some people. . . . [because] [I]n Mill’s opinion, happiness cannot result from seeking pleasure as an end in itself, but must result from the pursuit of higher goals.” *Id.*

¹⁶³ *Id.* at xii.

might be called liberty.¹⁶⁴ It is unclear whether Mill successfully resolved the tension between liberty and utility. Nonetheless, it seems obvious that utilitarianism and the persistent “appeal to utility must be ‘grounded on the permanent interests of man as a progressive being.’”¹⁶⁵

Whatever the risk to human freedom associated with NLRA and other New Deal legislation, such laws arrived at a time when Americans were increasingly receptive to progressive ideas.

A. A Progressive Conception of Labor Law and Labor Unions.

While the various labor statutes enacted during the 1930s likely operate as paragons of majoritarianism, consider briefly the progressive case for government regulation. Progressives of various stripes, as early as the 1930s, both within and outside the labor market context, produced a large number of claims that are either premised on the market failure presumption¹⁶⁶, or alternatively attached to labor solidarity aspirations.¹⁶⁷ Senator Wagner, the lead drafter of the NLRA, relied on similar claims. He invoked market failure and labor solidarity claims (along with an industrial peace rationale) to argue that statutorily protected unionism provides freedom and dignity, through cooperation with others for workers caught in the labyrinth of modern industrialism and dwarfed by the size of the corporate enterprise.¹⁶⁸ Missing in the “equality of bargaining” component of this claim is an understanding central to union membership disputes: the fact that *cooperation* in the form of dues payments or membership, are premised on statutory

¹⁶⁴ JOHN STUART MILL, ON LIBERTY, 58 (2004)

¹⁶⁵ Hayden, *supra* note ____ at xii (describing Mill).

¹⁶⁶ WILLIAM C. MITCHELL & RANDY T. SIMMONS, BEYOND POLITICS: MARKET, WELFARE, AND THE FAILURE OF BUREAUCRACY, 1 (1994) (The vision underlying the expansion of regulation and bureaucracy is that the government succeeds where markets fail). It is possible that welfare economists have dethroned markets in western countries, and have administered the coronation of government premised on the claim of undersupplied public goods, exorbitant and ubiquitous social costs of private action and attached to the notion of unfairly distributed wealth and income. *Id.* at 3. Thus federal government regulation of the labor market expands the supply of collectively determined wage outcomes. It is doubtful that this process actually improves social welfare given the well known proclivity of governments to fail to actually improve the market. For an expansive discussion of some of these issues, see Hutchison, *A Clearing in the Forest*, *supra* note ____ at 1348-1401.

¹⁶⁷ See e.g., Charles W. Baird, *Henry Hazlitt on Unions: Part II*, THE FREEMAN, 47, 48 (March 2005) (discussing and dismissing the logical fallacy of labor solidarity).

¹⁶⁸ 79 CONG. REC. 7565 (1935) (statement of Senator Wagner) (quoted in THE DEVELOPING LABOR LAW, *supra* note ____ at 28).

mandates that are coercive on their face¹⁶⁹ Conversely, the 1947 Taft-Hartley Amendments recognized the NLRA's coercive effects, and commenced the process of protecting the freedom of association rights of workers by providing workers with explicit permission to refrain from engaging in concerted activity.¹⁷⁰ These changes were limited because workers were still bound by majority rule and exclusive representation rules that enhance the power of labor cartels. George Leef clarifies: the NLRA continues to restrict individual human freedom and liberty in a number of ways. Labor law mandates human association in the form of a compelled collectivity (labor unions) that retains priority in its inevitable conflict with classically liberal understandings of human identity and human authenticity which are connected directly to the constitutional values of freedom of speech and association.¹⁷¹

By contrast, labor movement advocates conceive of labor freedom as a collective construct, grounded in the notion of obligatory fraternity, as opposed to an individualized entity – negative liberty – that is a defensible good for its own sake. Compulsory association as a desirable objective has benefited from its connection with ideas of justice. Justice happens to be a compelling trump card, because some observers equate capitalism and its emphasis on the individual with barbarism. As thus understood, socialism becomes the catalyst for freedom.¹⁷² Conversely, impartial observers with questionable manners conclude that human barbarity tends

¹⁶⁹ See e.g., Charles W. Baird, *Toward Voluntary Unionism* Vol. XVII J. OF PRIVATE ENTERPRISE, 77-96 (2001) [available at www.cbe.csueastbay.edu/~sbesc/volunion.html]. (“American trade unionism is based on coercion embodied in the [NLRA]. Its authors justified the coercion on the grounds that the interest of workers and employers are naturally in conflict that individual workers have an inherent bargaining power disadvantage with respect to employers, which unions can redress, and that unionization leads to peaceful labor relations. The principal instruments of coercion in the NLRA, are exclusive representation (from which emerges union security), and mandatory good faith bargaining.”).

¹⁷⁰The Taft-Hartley Act amended Section 7 to ensure that employees had “the right to refrain from joining a union.” RAY et. al, *supra* note ____ at 426. “Section 8(b)(1)(A) makes it an unfair labor practice for a labor organization to ‘restrain or coerce . . . employees in the exercise of the rights guaranteed under section 7.” *Id.* See also Thomas C. Kohler, *Setting the Conditions for Self-Rule: Unions, Associations, Our First Amendment Discourse and the Problem of Debartholo*, 1990 WIS. L. REV. 149, 186 (1990).

¹⁷¹ For a discussion of some these issues, see, Harry G. Hutchison, *Diversity, Tolerance and Human Rights: The Future of Labor Unions and the Union Dues Dispute*, 49 WAYNE L. REV. 706, 706-712 (2003)[hereinafter, Hutchison, *Diversity, Tolerance and Human Rights*].

¹⁷² See e.g., ZYMUNT BAUMAN, *WORK, CONSUMERISM AND THE NEW POOR*, 79-81 (1998).

to perform rather splendidly under socialism.¹⁷³ Consider Hayek’s intuitive understanding of history: “the rise of fascism and nazism was not a reaction against the socialist trends of the preceding period but a necessary outcome of those tendencies.”¹⁷⁴ Unimpressed with the logic of Hayek’s claim, progressive commentators return to the language of justice. Insufficiently convinced by simple welfare claims embedded in the statutory language of the NLRA, for example, they are often drawn to the expansive notion that workers must receive certain entitlements. These rights, they argue, include a so-called fair wage in an egalitarian sense that comports with the notion of equal dignity.¹⁷⁵ Indeed, for some, it may be possible to conclude that society’s failure to guarantee fair wages, or alternatively to ensure the conditions under which fair wages flourish constitutes governmental complicity in human cruelty.¹⁷⁶ Although few of these goals are attached explicitly to the NLRA, such provocative contentions ensure that labor unions remain an indispensable catalyst for progressive societal transformation.¹⁷⁷ Consistently with that aspiration, and despite the presence of ongoing ameliorative approaches (pro-union statutes and the welfare state itself), some observers contend that workers have been left at the mercy of global employers. Such workers have been deprived of basic and necessary substantive equality.¹⁷⁸ On one account, the work ethic becomes part of the battle for control and subordination in which working people are required to accept a working life that neither is noble

¹⁷³ See e.g., HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM*, 460-472 (1951) (1973) (discussing the evolution of Darwin’s theory in the hands of and as adapted by Marx and his socialist heirs as part of the so-called natural law of the survival of the fittest that led ultimately to the creation of state terror, which culminated in Stalin’s excesses).

¹⁷⁴ F.A. HAYEK, *THE ROAD TO SERFDOM* 6 (1944) (1994 edition).

¹⁷⁵ See e.g., Charles Taylor, *The Politics of Recognition*, in *Multiculturalism: Examining the Politics of Recognition* 25, 27 (Amy Gutmann ed., 1994) (dignity refers to the inherent dignity of human beings).

¹⁷⁶ For a discussion of philosophy driven by a focus on human cruelty, see Yack *supra* note ____ at 1—12. Among other things such a focus implies that the pursuit of rights is secondary. *Id.* at 3.

¹⁷⁷ See e.g., Karl Klare, *Workplace Democracy & Market Reconstruction: An Agenda for Legal Reform*, 38 *CATH. U. L. REV.* 1, 3-7 (1988) (seeking to expand the reconstruction logic of the New Deal labor law system beyond its self-imposed limited and arguing that instead, the NLRA should be reconceived as a vehicle to mobilize democracy on virtually all aspects of the employment relationship); Klare also argues for a systematic program of egalitarian market reconstruction. *Id.* at 23.

¹⁷⁸ BAUMAN, *supra* note ____ at 10 (arguing that whatever claims are made for the ongoing process of globalization, there can be no universality in the social world without substantive equality).

nor responds adequately to their own standards of moral decency.¹⁷⁹ Globalization allows the old welfare state (as a societal good) to be demolished as employers “shift the cost of the ‘recommodification of labour’ to the Treasury.”¹⁸⁰ Sympathetic American observers have argued that the union movement ought to be reenergized as a “robust engine of collective insurgency against globalization, hierarchy, unwarranted management power, class-based injustice, and increasing disparities income.”¹⁸¹

This view appears to resist the notion of “negative” liberty as well as its struggle against intrusive government and majoritarianism.¹⁸² The progressive outlook amounts to a tangible thirst for meaning in life despite an inability to articulate convincingly what that might entail. This dream of liberation is seen (by some) as part of a movement that fashions progressive human advancement in the form of egalitarianism and solidarity.¹⁸³ This vision operates in harmony with the AFL-CIO’s objectives that include making the most “of the solidarity and energy of the 2004 presidential election campaign . . . by helping workers form unions and building the most dynamic labor political program in [its] history.”¹⁸⁴ In order to achieve these goods, contemporary labor union organizations must command the mobilization of all workers in the battle to transform society, and the market, as part of its elusive search for class-based justice.¹⁸⁵ Progressives admit reluctantly that the Taft-Hartley Act of 1947 reframed the NLRA to allow employees some degree of “choice” with respect to unionization and collective bargaining.¹⁸⁶ The Taft-Hartley Act manifested Congress’ intent to de-emphasize self-

¹⁷⁹ BAUMAN, *supra* note ____ at 7-8.

¹⁸⁰ *Id.* at 52.

¹⁸¹ Hutchison, *Reclaiming the Union Movement*, *supra* note ____ at 448-449.

¹⁸² Hayden, *supra* note ____ at xi (discussing Mill’s concern for negative liberty as against intrusive government and the tyranny of the majority).

¹⁸³ Hutchison, *Toward a Robust Conception of “Independent Judgment”* *supra* note ____ at 368-69 (critiquing this view). *See also* Hutchison, *A Clearing in the Forest*, *supra* note ____ at 1331-1348.

¹⁸⁴ *Strengthening Our Union Movement*, accessed May 12, 2006, available at www.aflcio.org:4664/aboutaflcio/outfuture/index.cfm.

¹⁸⁵ George Feldman, *Unions, Solidarity and Class: The Limits of Liberal Labor Law*, 15 BERKELEY J. EMPLOYMENT & LAB. L. 187, 193 (1994). (suggesting that the law fails to protect workers in their search for class-based justice).

¹⁸⁶ Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUMBIA L. REV. 1527, 1534 (2002).

organization and group action.¹⁸⁷ Critics respond to such admissions by contending that the act constitutes a slave-labor act.¹⁸⁸ Before 1947 “it was possible to imagine a continuing expansion and vitalization of the New Deal impulse. After that date, however, labor and the left were forced into an increasingly defensive posture.”¹⁸⁹ These complaints have two emphases: (1) the sharp drop in contemporary labor union penetration rates—particularly within the private employment sector—contributed to a loss of labor’s bargaining power¹⁹⁰ and (2) a correlative drop in labor’s political and social influence.¹⁹¹

These developments diminish the likelihood that labor can reshape America as a utopian enterprise borne of collectivist ideals. These ideals in their propositional form posit that a desirable form of “civil association” will only be attained when individuals act collectively (and coercively) in pursuit of their common ends.¹⁹² This conception of coercive human association

¹⁸⁷ James J. Brudney, *Reflections on Group Action and the Law of the Workplace*, 74 TEXAS L. REV. 1563, 1567 (1996). In addition to intentionally de-emphasizing group action within the parameters of the Taft-Hartley Act, Congress, apparently, continued to emphasize individual rights in the form of workplace statutes that focused on individual interest. *Id.* at 1568.

¹⁸⁸ Nelson Lichtenstein, *Taft-Hartley: A Slave-Labor Law?* 47 CATH. U. L. REV. 763, 765 (1998).

¹⁸⁹ *Id.*

¹⁹⁰ In response to the decline, private sector unions have increasingly joined forces with public sector unions. For example, the AFL-CIO federation has for a very long time accepted public sector unions as part of its umbrella labor federation. A recent example of such efforts includes the recent decision by the AFL-CIO to partner with the nation’s largest teachers union, the National Education Association. *See e.g.*, AFL-CIO to Partner with NEA, Associated Press, February 27, 2006, available at <http://www.newsmax.com/archives/ic/2006/2/27/174223.shtml?s=ic>. *See also*, AFL-CIO to form partnership with largest teachers union, USATODAY, February 28, 2006, at p. 7D (leaders express the hope that the AFL-CIO will give teachers more muscle when they campaign for political candidates).

¹⁹¹ For instance, the leaders of one of America’s largest union organizations, the AFL-CIO, recently met with the Chairman of the Democratic Party to plan political strategy amid calls for a major shakeup in labor union organizations and union organizing. Christina Almedia, *AFL-CIO Leaders, Howard Dean Plan Political Strategy in Las Vegas*, 1-2 (March 1, 2005). available at www.truthout.org/issues_05/030205LB.shtml (March 1, 2005). Although the AFL-CIO has maintained its political power despite the nosedive in its membership, few union or Democratic Party leaders believe that labor unions can maintain their political relevancy unless change is in the offing. Ron Fournier, *Unions’ grip on political relevance slips*, THE DETROIT NEWS, May 29, 2005 available at www.detnews.com/2005/autoinsider/0505/29/E03-196519.htm. As a response to disquiet within the union leadership coupled with the fear of looming political irrelevance. *See e.g.*, *id.* John Sweeney, president of the AFL-CIO proclaimed that labor unions would tie their politics to union organizing. Almedia, *supra* note ____ at 2.

¹⁹² Chandran Kukathas, *The Fraternal Conceit: Individualist versus Collectivist Ideas of Community*, Occasional Papers 33, Multiculturalism Research Program, Centre for Independent Studies 2 (1991) (available with the author).

contra a principled conception of liberalism grounded in individual autonomy, complements the belief that politics and government power form the proper vehicle to attain the transformation of society. From a Bickelian perspective, this approach to labor or any other law is grounded in the notion that the values society adheres to evolve over time.¹⁹³ While limits are set by culture as well as time- and place-bound conditions, the task of government informed by the present state of values is to make a peaceable, good, and improving society.¹⁹⁴ Expansively defined, human progress is the goal. Law—and specifically labor law (as conceived by union hierarchs and labor movement proponents¹⁹⁵) – is seen as the principal vehicle through which this society can assert its values.¹⁹⁶

It is possible that reality is quite different. Human progress and fraternal associations are possible, but at what costs? Stalin’s efforts to attain a proletarian dictatorship have proved that fraternity, as well as the average wage rates, can indeed rise when, and if, some workers are simply liquidated. In a purely materialistic universe, both America and the World may seem to be of trivial significance across a time and space continuum that provides no source of meaning. If life has meaning, and if we live in a universe in which meaning is possible, Stalin and Hilter’s naturalism will be (I believe) unappealing. Still, the dream of progress—the radical transformation of society and humankind—has found support in various quarters. “Since Condorcet, the philosophy of Progress has promised to eliminate war, disease, and need, and various ideologies have announced a radiant future.”¹⁹⁷ It is possible that some notion of compulsory progress operates as a contemporary belief legitimating government protection and statutory encouragement of labor unions.

¹⁹³ BICKEL, *supra* note ____ 4.

¹⁹⁴ *Id.*

¹⁹⁵ *See infra* Part III, B, discussing Ellen Dannin’s conception of the values that are embedded or should be embedded in America’s understanding of the NLRA.

¹⁹⁶ *See* BICKEL, *supra* note ____ at 5.

¹⁹⁷ CHANTAL DELSOL, *ICARUS FALLEN: THE SEARCH FOR MEANING IN AN UNCERTAIN WORLD*, xxiii (2003) (explaining but not necessarily agreeing with this view). *See also*, EDWARD O. WILSON, *CONSILIENCE*, 8 (1998) (. . . .”I believe that the Enlightenment thinkers of the seventeenth and eighteenth centuries got it mostly right the first time. The assumptions they made of a lawful material world, the intrinsic unity of knowledge, and the potential of indefinite human progress are the one we still take most readily into our hearts, suffer without and find maximally rewarding through intellectual advance.”).

B. Examining the Evidence

Leef's book presents a persuasive case that the Right to Work Movement is congruent with American ideals. Both the movement and its opponents require context and an examination of the evidence that either sustains or refutes the progressive case for human compulsion. The Right to Work movement and its progressive adversaries are fluent in the language of human freedom and equality. Differences arise because the Right to Work movement, following Hayek, seeks equality in negative liberty, while proponents of obligatory progress seek equality in restraint and servitude while claiming they offer "new freedom."¹⁹⁸ To repeat a paradox, despite the language of freedom, the labor statutes, as they are interpreted and administered, communicate compulsion. The various statutes and administrative rulings which regulate labor, make manifest, workers who are not union members, as well as workers who are members are obliged to pay either union dues or agency fees as a condition of employment, if the union-management contract requires such payments.¹⁹⁹ Contemporary labor law resonates with majoritarianism which cannot be differentiated fully from authoritarianism. If this understanding of the inherent tendency of labor law is correct, something inevitably must give. Hayek forecasts, and Leef verifies, that individual human freedom is the casualty. Leading proponents of labor law and the labor movement concede as much while frequently misstating the case. Consider the following understanding of the America's contemporary labor conflict:

The war is between those who support collective values and well-being for all and those who support unbridled individualism; between those who value workplace and social democracy and those who promote workplace and governmental totalitarianism.²⁰⁰

First, charity commends the following concessions: Professor Dannin, following Bickel, correctly acknowledges that (A) that failure to recognize any "values at all is to deny a difference between

¹⁹⁸ Hayek, *supra* note ____ at 29 (progressives like proponents of socialism increasing make use of the language of, and the promise of "new freedom" thus changing the meaning of such words as freedom and equality).

¹⁹⁹ See e.g., Beck v. Communications Workers of Am., 468 F. Supp. 93, 96 (D. Md. 1979). See also, Hutchison, *Diversity, Tolerance, and Human Rights*, *supra* note ____ at 706.

²⁰⁰ Dannin, *supra* note ____ at 274.

ourselves and other particles that tumble in space”²⁰¹, and (B) that law is the principal institution through which well-socialized Americans can assert their values.²⁰² Secondly, while Dannin adverts correctly to the existence of the fundamental conflict between those who support collectivist values and those who support individual ones, her comments misstate Madison’s conception of human freedom and liberty grounded in consensual exchange. Although recent history verifies that government power is placed regularly at the disposal of union hierarchs and majoritarian hegemony, Dannin’s commentary misplaces governmental totalitarianism by situating it incorrectly on the side of the individual as opposed to the collective interest. In reality, her perspective implies that workers’ freedom and liberty must be subjugated to the collective (majoritarian) interest that reflects a collective conception of the good. In doing so, Dannin relies on her understanding of the values embedded in a quintessentially majoritarian instrument – the NLRA, itself. While it is doubtful that the law contains Professor Dannin’s preferences, the substance of her approach appears, ironically enough, to echo Robert Bork’s contestable position, which “suggested that “individual rights should be banished from our political discourse . . . Political majorities have . . . the right to define and ‘suppress’ moral harms even if doing so thwarts what some people take to be individual rights or liberty.”²⁰³ Moreover, it is possible that lumping governmental totalitarianism in with the side that actually favors worker freedom operates consistently with Marxism’s deployment of the term “bourgeois culture” as a way of lumping together anything and everything intellectuals despise.²⁰⁴ Rorty explains:

Such linkages help us intellectuals to associate ourselves with the ideals of democracy and human solidarity. These linkages let us have the best of both worlds: we have been able to combine the traditional disdain of the wise for the many with the belief that the present, degenerate bourgeois many will be replaced by a new sort of many – the emancipated working class.²⁰⁵

²⁰¹ BICKEL, *supra* note ____ at 5.

²⁰² *Id.*

²⁰³ See e.g., Stephen Macedo, *Majority Power, Moral Skepticism, and the New Right’s Constitution*, in *ECONOMIC LIBERTIES AND THE JUDICIARY* 111, 113 (ed. By James A. Dorn & Henry G. Manne, 1987) (citing Bork).

²⁰⁴ RICHARD RORTY, *TRUTH AND PROGRESS: PHILOSOPHICAL PAPERS, VOLUME 3*, 230 (1998).

²⁰⁵ *Id.* at 230-31.

Assuming the descriptive appeal of Rorty's analysis, as I have argued elsewhere, workers, exemplify a prephilosophic – even antediluvian – blank slate that requires direction in order to acquire sufficient moral intuition.²⁰⁶ In contrast, union hierarchs and their intellectual associates, see themselves as members of the philosophic vanguard and they function as forerunners of a preordained future destination that workers' innate (but still inchoate) intellect guides them to.²⁰⁷ Critically, this *in loco parentis* perspective deploys the language of “democracy” arguing that the core of American labor law has been essentially sealed off from both democratic revision and contemporary renewal and from local experimentation and innovation.²⁰⁸ If this perspective is valid, the aspirational premises of the New Deal labor regime²⁰⁹ are at risk.

A “benevolent guardian that bargains against management in the workers' best interest” might be found to lead a union.²¹⁰ If this is true, and assuming that all workers' “best interests,” are uniformly identical, then free riding may resurface as a possibility²¹¹, that justifies compulsory payments to unions. Many commentators remain skeptical that such a guardian can be found.²¹² Doubts are “elevated both by virtue of the existence of dues objectors, and a comprehensive understanding of the human diversity embedded within the present-day workforce.”²¹³

If one accepts that progressives have failed substantially to sustain their idealistic case for compulsion to this point, if progressive proponents see vibrant unionism as a critical component of government planning that is necessary to ideally redistribute resources²¹⁴, and if

²⁰⁶ Hutchison, *A Clearing in the Forest*, *supra* note ____ a 1375.

²⁰⁷ *Id.*

²⁰⁸ Estlund, *supra* note ____ at 1530. Consistent with this claim, Estlund, among other things, also adverts to changes in the labor force claiming that racial, ethnic and gender diversity has burgeoned since the passage of the NLRA. *Id.* at 1535-36. This contention, at least with respect to the employment of African Americans and other members of non-white is dubious since African American labor-force participation and employment declined after the passage of NLRA and the nonwhite–white unemployment differential widened. Such empirical evidence may be consistent with less not more racial diversity. *See* VEDDER & GALLAWAY *supra* note ____ at 272-280.

²⁰⁹ Estlund, *supra* note ____ at 1530.

²¹⁰ Schwab, *supra* note ____ at 373.

²¹¹ Hutchison, *A Clearing in the Forest*, *supra* note ____ a 1393.

²¹² Schwab, *supra* note ____ at 373 (discussing the unlikelihood of this possibility).

²¹³ Hutchison, *A Clearing in the Forest*, *supra* note ____ at 1393.

²¹⁴ On the necessity of government planning with respect to redistributing resources, *see* HAYEK, *supra* note ____ at 39.

regulation of labor markets is viewed as a public good, as some aver²¹⁵, what empirical evidence now remains to justify compulsory unionism? Because concrete moral judgments often turn on contingent circumstances as well as on general moral norms²¹⁶, we must inspect the costs and benefits associated with the usual suspects, including: (A) industrial peace; (B) notions of justice; and (C) the necessity of fraternal association. Because the evidence shows that Americans have been content to go bowling alone²¹⁷, it is possible that this isolation may give rise to a yearning for community. If so, fraternal association likely resonates with some observers.

Nonetheless, consider the empirical case that supports the industrial peace rationale. If labor peace constitutes a public good, the presumed market correcting benefits of this good might outweigh the absence of voluntariness in the current labor law regime. Recall that “[t]raditional collective bargaining under common law prior to the 1930s, in both the public and private sectors, was *voluntary*.”²¹⁸ Voluntary by definition implies a form of individuated consent as a necessary predicate. Since Herbert Hoover, “collective bargaining under statutes and court decisions has been compulsory.”²¹⁹ Free collective bargaining requires “negotiations between willing parties on both sides: employees freely choose unions to bargain for them; and employers freely choose to bargain with those unions rather than individual employees.”²²⁰ Putting aside collective action problems that tend to plague large organizations, the current labor paradigm which delegates power to private groups cannot result in free collective bargaining, given the absence of worker unanimity and employer choice. Admitting as much, the United States Supreme Court in *A.L.A. Schechter Poultry Corp. v. United States* “unanimously declared the NIRA [National Industrial Recovery Act] an unconstitutional delegation of legislative power to

²¹⁵ On public goods of this variety, see Peter H. Aranson, *Bruno Leoni in Retrospect*, 11 HARV. J. OF L. & PUBLIC POLICY, 661, 664 (1988).

²¹⁶ Thomas C. Berg, *John Courtney Murray and Reinhold Niebuhr: Natural Law and Christian Realism*, (page 6 in online version) U OF ST. THOMAS LEGAL STUDIES RESEARCH PAPER NO. 05-20 J. OF CATH. SOCIAL THOUGHT, Vol. 3, 2006 available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=847985 [accessed on May 13, 2006].

²¹⁷ Ron Fournier, *Unions' Grip on Political Relevance Slips*, ASSOCIATED PRESS, May 29, 2005, available at <http://www.detnews.com/2005/autosinsider/0505/29/e03-196519.htm> at page 2.

²¹⁸ Edwin Viera, Jr. *Poltroons on the Bench: The Fraud of the "Labor-Peace" Argument for Compulsory Public-Sector Collective Bargaining*, 18 GOVERNMENT UNION REV. 1, 2 (1998).

²¹⁹ *Id.*

²²⁰ *Id.*

private parties.”²²¹ Hence *Schechter* and *Carter v. Carter Coal Co.*, are among the most important cases of the 1930s demolishing one of the main pillars of the Roosevelt New Deal effort to cartelize private industry.²²² Still, since the Supreme Court’s holding in these cases, the Court has enforced labor union compulsion.²²³ Indeed, it is argued that in the mid-1940s the Supreme Court appeared to “reinterpret the NLRA and RLA so as to preclude individual employment contracts in most circumstances,”²²⁴ while justifying exclusive representation on labor-peace grounds against constitutional claims to the contrary.²²⁵

Despite little empirical evidence supporting the Court’s interpretation, the question becomes, how does one confront the Supreme Court’s empirical claims if we live in a world where we cannot agree on what counts as empirical, or even what constitutes an empirical claim? It is doubtful that the Supreme Court would consider itself necessarily bound by its own empirical assertions. On my reading of evidence, however, the Supreme Court’s industrial peace claim finds its support in consequentialist assertions made by drafters and advocates of the NLRA, regardless of the absence of empirical evidence that supports these various contentions. Unvaryingly with an earlier observation²²⁶, industrial peace actually declined *after* passage of the 1930s labor legislation²²⁷, thus deflating the industrial peace rationale for compulsory unionism.

If the available evidence refutes the industrial peace rationale, it might be possible to justify compulsory union on grounds of justice. The empirical evidence is not promising. Recall, Katz and Summers’ demonstration that most economic rents generated in the United States

²²¹ *Id.* at 6.

²²² Viera, *supra* note ____ at 8.

²²³ *Id.* at 14-53 (citing among other case, *NLRB v. Jones & Laughlin Steel Corp* for this proposition).

²²⁴ Viera, *supra* note ____ at 15.

²²⁵ *Id.* at 16.

²²⁶ LEEF, *supra* note ____ at 8 (The number of strikes, often accompanied by violence doubled in the year after the passage of the Norris-LaGuardia Act and continued to rise thereafter).

²²⁷ See e.g., Charles W. Baird, *Toward Voluntary Unionism* (published in THE JOURNAL OF PRIVATE ENTERPRISE, Volume XVII, No. 1 (Fall 2001) available at <http://www.cbe.csueastbay.edu/~sbesc/volunion.html> (accessed on May 2, 2006) (“The incidence of strikes and strike violence escalated dramatically after 1935”). See also, ARMAND J. THIEBLOT, THOMAS R. HAGGARD, AND HERBERT R. NORTHDRUP, *UNION VIOLENCE: THE RECORD AND THE RESPONSE BY COURTS, LEGISLATURES, AND THE NLRB* (1999); Thomas DiLorenzo, *The Myth of Voluntary Unions* available at <http://www.mises.org/story/1604> [accessed on May 2, 2006].

economy accrue to labor.²²⁸ Second, labor unions evidently do well at the expense of minorities²²⁹, contribute to the rise of the “underclass,”²³⁰ and generally “redistribute income to their well-paid white members at the expense of groups with lower incomes.”²³¹ All redistributive efforts are challengeable on ethical grounds²³², and of course, the empirical record suggests that unions redistribute income regressively, therefore raising another layer of objections. We should not conclude that redistributive efforts associated with compulsory unionism can be only challenged on empirical grounds because Nozick shows that any “attempt to impose an approved pattern on the social distribution of goods requires continuous interference with individual liberty, since gifts and free exchange will constantly subvert the pattern.”²³³

There is still another ground that might sustain compulsory unionism. This remaining ground may or may not be fully refutable on empirical grounds because compulsory unionism, often, constitutes a normative demand that government alter the terms of civil association.²³⁴ This perspective is attracted to government regulation because it sees “political society as a form of association that has value only insofar as it serves to unite men in a community in which the bonds of social solidarity are strong.”²³⁵ The language of human freedom is invoked to argue that solidarity “will be attained only when civil association [commands] that individuals act collectively in pursuit of their [hierarchically mandated] common ends.”²³⁶ This approach extends the bounds of mandatory collectivity to unions as statutory instruments of the polity in

²²⁸ Lawrence F. Katz & Lawrence H. Summers, *Industry Rents: Evidence and Implications*, in BROOKINGS PAPERS ON ECONOMIC ACTIVITY: MICROECONOMICS 209, 209-10 (1989).

²²⁹ REYNOLDS, *supra* note ____ at 29. See also, Marion Crain, *Feminizing Unions: Challenging the Gendered Structure of Wage Labor*, 89 MICH. L. REV. 115, 1157 (1991) (noting that male-dominated unions remain insensitive to many of the concerns of women).

²³⁰ David E. Bernstein, *Roots of the ‘Underclass’: The Decline of Laissez-Faire Jurisprudence and the Rise of Racist Labor Legislation*, 43 AM U. L. REV. 85, 101 (1993) (For instance, after racially motivated strikes failed in the southern railroad industry, white trainmen who often sought to exclude blacks from unions, engaged in terrorism, killing several black trainmen.).

²³¹ Harry G. Hutchison, *Through the Pruneyard Coherently: Resolving the Collision of Private Property Rights and Nonemployee Union Access Claims*, 78 MARQ. L. REV. 1, 35-36 (1994).

²³² See e.g., BERTRAND DE JOUVENEL, *THE ETHICS OF REDISTRIBUTION* (1952) (1989).

²³³ John Gray, *Introduction*, in BERTRAND DE JOUVENEL, *THE ETHICS OF REDISTRIBUTION* xv (1952) (1989).

²³⁴ Kukathas, *supra* note ____ at 2.

²³⁵ *Id.*

²³⁶ *Id.*

the quest for presumptively common objectives.²³⁷ Meanwhile, classical liberalism shows that a defensible form of association consists of consenting “individuals bound by rules of just conduct which by specifying the terms of cooperation, regulate their behaviour and ensure peace.”²³⁸ Ideally “civil association has no purpose other than to preserve order so that the individual might pursue his own (private) ends together with others or alone.”²³⁹ If we accept these philosophic claims, then the case for compulsion finds its theoretical refutation.

Still, if social solidarity is to function as a public good, there is more to be said. Against this background, a keen observer asserts that many progressives, liberals and unionists might “say that our problems stem from lack of political power. But our lack of power has its roots in something even more important and that is our inability to capture the hearts and minds of the people.”²⁴⁰ Capturing hearts and minds can operate in one of two ways – either as a defensible association grounded in voluntary consent, or premised on coercion that employs government power to attain this desirable objective. Labor unions and labor laws that command an association in order to form this desirable collectivity are teleological instruments.²⁴¹ This association allows those of us who are captivated by progressive ideals to foster, presumably, a form of brotherhood and community that has been missing in our lives. Brotherhood, as identified herein, may also be required to comply with the necessities of deontic logic requiring obligation – mutual obligation. Labor movement advocates see unions as communal institutions that must thrive in order to create a society imbued with the value of industrial and social democracy, equality, social and economic justice, fair wages and working conditions, and industrial and social peace.²⁴² Workers give up their individuality for a compelled exchange wherein dues payments and freedom of association are traded for speculative utilitarian and emotional benefits resulting from a socially transformed community led by autocrats. The

²³⁷ Hutchison, *A Clearing in the Forest*, *supra* note ____ at 1344.

²³⁸ Kukathas, *supra* note ____ at 2.

²³⁹ Kukathas, *supra* note ____ at 2.

²⁴⁰ *Unions-Firms Markets: Labor Movement Debates*, October 11, 2005 available at http://industrialrelations.typepad.com/unionsfirmsmarkets/labor_movement_debates/index . . . (accessed on April 15, 2006).

²⁴¹ As used here, teleology refers to a doctrine that is part of vitalist philosophy, that holds that phenomena are guided not only by mechanical forces but they also move toward certain goals of self-realization. SEE WEBSTER’S NEW UNIVERSAL UNABRIDGED DICTIONARY, 1460 (1994, Barnes & Noble Books).

²⁴² Dannin, *supra* note ____ at 274.

brehtaking weakness of this argument— mandating communal representation—may verify the seductive attractiveness of self-congratulations as a substitute for clear-eyed policy²⁴³, or promote skepticism.

Skepticism suggests there is little evidence that workers are despondent about their current lack of representation.²⁴⁴ This perspective functions in concert with the lack of evidence that compulsory union regimes conduce to consequentialist objectives such as “fair wages”²⁴⁵ and “industrial peace.”²⁴⁶ American experience provides few reasons for workers to obligate themselves willingly to either union hierarchs or the principles of exclusive representation and majority rule. Given worker unwillingness, it is *unlikely* that the civil associations desired by progressives can be obtained without compulsion. Conversely, progressives attracted to an imperative that requires them to achieve the “greatest good for the greatest number,” freed from necessity of taking differences between persons seriously²⁴⁷ and animated by the belief that appeals to utility must be tied to the permanent interest of man as a progressive being, have become despondent in the face of the reluctance of workers to bind themselves to a labor union collectivity. Progressives see the present-day state of the labor movement rightly as the crystallizing apogee of *their* discontent.

In a free society that values individual liberty wherein worker interests are not uniform, such discontent *should* be seen as illegitimate. Leef intimates that labor unions can be legitimated *only* when they act as purely voluntary associations that *require* individual consent before the obligations of membership attach.²⁴⁸ George Leef opts for a classical liberal approach to civil

²⁴³ My debt to Thomas Sowell, should be obvious. *See e.g.* THOMAS SOWELL, VISION OF THE ANOINTED: SELF-CONGRATULATIONS AS A BASIS FOR SOCIAL POLICY (1995).

²⁴⁴ One reason why unions have declined includes the fact “American workers born after World War II are less inclined to favor collective and statist solutions.” Samuel Estreicher, *The Dunlop Report and the Future of Labor Law Reform*, 12 LAB. LAW 117, 118 (1996).

²⁴⁵ VEDDER & GALLAWAY, *supra* note ____ at 280 (they show the emptiness of the fair wage rationale by summarizing data that shows that “governmental policies have raised the reservation wage of nonwhite Americans relative to the reservation wage of white American, increasing the relative duration of nonwhite unemployment and nonwhite-white unemployment-rate differential.”).

²⁴⁶ *See Baird, Toward Voluntary Unions, supra* note ____ (“The incidence of strikes and strike violence escalated dramatically after 1935”).

²⁴⁷ *See e.g.*, WILLIAM A. EDMUNDSON, AN INTRODUCTION TO RIGHTS, 109 (2004) (suggesting that contractualist *contra* utilitarian and other consequentialist approaches take seriously the difference between persons).

²⁴⁸ Hutchison, *A Clearing in the Forest, supra* note ____ at 1344.

association which is bounded by contractarianism. While the liberal contractarian model is not without justifiable criticism – particularly in view of presumptions that are derived from speculative enlightenment premises – the assertion that the contractarian model is strong on morals and theory, but weak on both pragmatism and the capacity to resist authoritarianism²⁴⁹, requires the context. *Free Choice for Workers* provides context that demonstrates the vulnerability of such claims – these asserted deficiencies, as an empirical and ethical matter, are more accurately attributable to a society grounded in progressive principles and ideals. History and Hayek have shown that adherence to the gospel of government enforced progress tends to lead us down the road of compulsion and ultimately toward authoritarianism, if not totalitarianism. This possibility exposes the majority of the population to suppression by the few. Consistent with that intuition, David Bernstein shows: legislation benefiting labor unions suppressed the economic status of African Americans while failing to contribute positively to the wage earned by nonunion white workers.²⁵⁰ In fact no historical correlation between union membership and overall wage growth exists,²⁵¹ which signifies that compulsory unionism privileges some individuals with disproportionate benefits at the expense of others. By contrast, a society defined by liberal values requires that we take seriously differences between persons, and agrees that human progress, if it exists at all, is largely individual, often gradual and not necessarily permanent since a government grounded in principle cannot privilege one group in the war of *all against all*. Properly understood, *Free Choice for Workers* exposes contemporary unionism as a variety, and progressive ideals as a victim, of “the ‘fraternal conceit’: the fanciful notion that community and social solidarity can be secured” by compulsory forms of “political association.”²⁵²

Resisting this impulse within the confines of any liberal democracy will be difficult and must acknowledge the possibility that any liberal-legalist order consisting of adversarial individuals and groups will not be sustainable.²⁵³ Such a democracy runs the risk of aggravating

²⁴⁹ See e.g., BICKEL, *supra* note ____ at 5.

²⁵⁰ DAVID BERNSTEIN, ONLY ONE PLACE OF REDRESS, 116 (2001)

²⁵¹ *Id.*

²⁵² Kukathas, *supra* note ____ at 2.

²⁵³ MARTIN LOUGHLIN, SWORD & SCALES: AN EXAMINATION OF THE RELATIONSHIP BETWEEN LAW & POLITICS, 5 (2000).

precisely those points of tension which a vibrant political process should aim at alleviating.²⁵⁴

The demand for workplace compulsion and state-sponsored fraternity, illustrates an ultimate danger: Democracy, if unchecked by a renewed emphasis on individual liberty “may bring about the precise end – despotism – which it is designed to avoid.”²⁵⁵

III. Conclusion

America’s labor laws suggest a principled basis for asserting “America suffers from a great many laws that should never have been passed—laws that are at odds with both the Constitution and with our tradition of individual liberty.”²⁵⁶ It is likely that one cannot understand America without understanding the importance of ideals such as liberty, freedom of association and speech, no matter how frequently the nation has failed to live up to them.²⁵⁷ It is also true that “the design of the American system shows an equally deep recognition of the limits of human ideals and the need to balance power and minimize risks of abuse.”²⁵⁸ In its concern for abuse of the individuals by the privileged, Leef’s book operates reliably with ongoing efforts in Congress²⁵⁹, and private efforts sponsored by organizations like Center for Union Facts²⁶⁰ and the Mackinac Center for Public Policy.²⁶¹ These efforts aim to expose union corruption, unfair labor practices, undemocratic leaders and questionable efforts to expand union power and influence through the use of coercive transfers from unwilling or poorly informed workers.²⁶² Suggestive of

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ Steve Forbes, *Foreword*, in *FREE CHOICE FOR WORKERS*, ix (2006).

²⁵⁷ Berg, *supra* note ___ at 19.

²⁵⁸ *Id.*

²⁵⁹ *See e.g.*, Joe Knollenberg, *The Changing of the Guard: Republicans Take On Labor and the Use of Mandatory Dues or Fee for Political Purposes*, 35 *HARV. J. ON LEGIS.* 347, (1998) (discussing congressional efforts to expose the fact that “[e]mployees who know their rights and decide to take on the union establishment find the process . . . marked by threats of life, family, intimidation, insults and coercion.”). *See also*, CHAVEZ & GRAY, *supra* note ___ at 26 (“The record of union-orchestrated violence is frightening, but even more disturbing is the fact that the U.S. government lets these terrorists acts go unpunished. In short, the unions have carved out for themselves a form of legalized terrorism.”).

²⁶⁰ This institution can be found at <http://www.unionfacts.com>, (last accessed on May 1, 2006).

²⁶¹ *See e.g.*, Robert Hunter, *Compulsory Union Dues in Michigan: The Need to Enforce Union Members’ Rights and the Impact on Workers, Employers, and Labor Union*, May 1997 available at the Mackinac Center for Public Policy.

²⁶² *See e.g.*, www.unionfacts.com (accessed on February 20, 2006).

authors like Linda Chavez and Daniel Gray²⁶³, George Leef supplies an impressive case that union leaders have betrayed the American worker, distorted the founding principles of the labor movement, and the betrayed the American public in their pursuit of power.²⁶⁴

Far from operating as an anti-union document, *Free Choice for Workers* functions as a pro-union manuscript grounded in the conclusion that unions operate as defensible institutions and laudable associations, when they represent workers who join voluntarily. The book underscores Charles Baird's assessment that "forced bargaining is never justified."²⁶⁵ *Free Choice for Workers* not only verifies Baird's conclusion, it proves that compulsory unionism characterized by compulsory dues, exclusive representation, and autocracy, ought to be a continuing source of controversy. Finally, George Leef makes evident an enduring corollary: freedom is much too valuable to be entrusted to politicians of *either* political party.

²⁶³ See generally, CHAVEZ & GRAY, *supra* note ____ .

²⁶⁴ CHAVEZ & GRAY, *supra* note ____ at 26.

²⁶⁵ Charles W. Baird, *Henry Hazlitt on Unions*, THE FREEMAN: IDEAS ON LIBERTY, 47, 47 (November 2004).