THE LAW, ECONOMICS, AND POLITICS OF RIGHT TO WORK: COLORADO'S LABOR PEACE ACT AND ITS IMPLICATIONS FOR PUBLIC POLICY

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INTRODUCTION

In most states, unions and employers can legally negotiate labor agreements that require workers covered by the agreements to pay union dues as a condition of their continued employment; such provisions are typically referred to as "union security" clauses.[1] Individual members of the bargaining unit who fail to tender dues to the certified bargaining agent are subject to discharge at the union's request. As enacted in 1935, the National Labor Relations Act ("NLRA" or "Wagner Act") specified that union membership could be made a prerequisite to hiring, thereby legalizing these "closed shop" arrangements.[2]

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1. Union security takes different forms. One form, the "union shop," specifies that new employees must become union members after 30 days of employment. The "agency shop" form requires employees to pay an agency fee to the union for representational services, and the "maintenance of membership" form obligates an employee who is a union member as of a given date to remain a member for a designated period of time. *See generally* RAYMOND L. HOGLER, LABOR AND EMPLOYMENT RELATIONS 207-09 (1995). Even though the union shop refers to union membership, the Supreme Court limited an employee's obligation to a "financial core" requirement amounting only to a tender of dues, rather than actual membership. NLRB v. General Motors Corp., 373 U.S. 734, 742 (1963).

2. *See* National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (1994)), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 1935, at 3270-79 (1949) [hereinafter NLRA LEG. HIST.]. Section 8(3) stated in part that "nothing in this Act . . . or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition

Congress later outlawed those types of agreements in the Labor Management Relations Act of 1947 ("Taft-Hartley" or "Taft-Hartley Act"), which amended the Wagner Act and also added new provisions.[3] The Taft-Hartley Act allowed enforcement of compulsory union membership only after the thirtieth day of an individual's employment.[4] The rules presently governing union security are set forth in sections 8(a)(3) and 8(b)(2) of the NLRA, which incorporate the 1947 Taft-Hartley amendments.[5]

Section 14(b) of the NLRA, also added in the 1947 Taft-Hartley modifications, further authorizes any state to outlaw all forms of union security through legislation commonly known as a "right to work" law. By its terms, section 14(b) proscribes "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."[6] By allowing states to adopt right to work laws, section 14(b) constitutes a major, and historically controversial,[7] exception to the general preemptive effect of the federal labor law. At present, twenty-one states have right to work laws in effect.[8]

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of employment membership therein." 49 Stat. at 452, *reprinted in* 2 NLRA LEG. HIST., *supra*, at 3273-74. References to the Wagner Act are specifically to the 1935 legislation; the NLRA is the comprehensive labor law statute as variously amended.

3. In this article, "Taft-Hartley" refers to the modifications of the Wagner Act.

4. *See* Labor Management Relations Act of 1947, ch. 120, 61 Stat. 136 (codified as amended at 29 U.S.C. §§ 141-197 (1994)), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 1-30 (1948) [hereinafter LMRA LEG. HIST.].

5. *See* National Labor Relations Act § 8(a)(3), (b)(2), 29 U.S.C. § 158(a)(3), (b)(2) (1994).

6. National Labor Relations Act § 14(b), 29 U.S.C. § 164(b) (1994).

7. For examples of the historical debate about union security in this country, see JEROME L. TONER, THE CLOSED SHOP (1942). Toner observed, "Seldom in the history of the United States has a problem attracted so much attention—pro and con—as the question of the closed shop. It is one of the few major issues which has persistently defied adjustment." *Id.* at 1 (citation omitted); *see also* THE CLOSED SHOP (Julia E. Johnsen ed., 1942) (containing a collection of essays and an extensive bibliographic treatment of the topic).

8. *See* ALA. CODE §§ 25-7-30 to -36 (1992); ARIZ. REV. STAT. §§ 23-1301 to -1307 (1995); ARK. CODE ANN. §§ 11-3-301 to -304 (Michie 1987); FLA. STAT. ANN. §§ 447.01-.17 (West 1997); GA. CODE ANN. §§ 34-6-20 to -28 (1998); IDAHO CODE §§ 44-2001 to -2010 (1997); IOWA CODE §§ 731.1-.9 (1993); KAN. STAT. ANN.

Twenty-eight other states impose no restrictions on unions and employers with regard to the compulsory payment of dues and permit parties to enter into such arrangements at their discretion.

Colorado is an exception to both right to work and union security principles. Under existing Colorado law, a union must petition the state Division of Labor for a secret ballot election and obtain approval from a majority of the bargaining unit members eligible to vote, or three-quarters of those actually voting, whichever number is greater, before it can negotiate with an employer for a valid union security provision.[9] No other state has followed Colorado's approach to union security, even though Colorado law played an influential role in the evolution of federal labor legislation.[10] The Colorado Labor Peace Act ("Peace Act"), as enacted in 1943, mandated the union security election.[11] Congress followed that model in the 1947 Taft-Hartley Act, and between 1947 and 1951, federal law required a secret ballot election in which a majority of the bargaining unit had to vote in favor of union security as a prerequisite to a lawful union security provision.[12] Concluding that such elections were unnecessary, Congress repealed the requirement in 1951.[13]

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§ 44-831 (1993); LA. REV. STAT. ANN. §§ 23:981-:987 (West 1998); MISS. CODE ANN. § 71-1-47 (1995); NEB. REV. STAT. §§ 48-217 to -219 (1993); NEV. REV. STAT. §§ 613.230-.300 (1996); N.C. GEN. STAT. §§ 95-78 to -84 (1997); N.D. CENT. CODE § 34-01-14 (1987); S.C. CODE ANN. §§ 41-7-10 to -90 (Law Co-op. 1986); S.D. CODIFIED LAWS § 60-8-3 (Michie 1993); TENN. CODE ANN. §§ 50-1-201 to -204 (1991); TEX. REV. CIV. STAT. ANN. arts. 5154a, 5207a (West 1987); UTAH CODE ANN. §§ 34-34-1 to -17 (1997); VA. CODE ANN. §§ 40.1-58 to -69 (Michie 1994); WYO. STAT. ANN. §§ 27-7-108 to -115 (Michie 1997).

9. *See* COLO. REV. STAT. § 8-3-108(1)(c) (1998).

10. According to the definitive treatment of the Taft-Hartley Act, "[t]he fights for restrictive legislation in various states affected also the congressional election campaigns and were carried over into Congress. The correlation between these campaigns in the states and in Congress was marked, and success in the states helped then to bring results in Washington." HARRY A. MILLIS & EMILY CLARK BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY: A STUDY OF NATIONAL LABOR POLICY AND LABOR RELATIONS 316 (1950).

11. *See* Labor Peace Act, ch. 131, § 6(c), 1943 Colo. Sess. Laws 392, 400 (codified as amended at COLO. REV. STAT. § 8-3-108(1)(c) (1998)).

12. *See* Labor Management Relations Act of 1947, ch. 120, sec. 101, § 8(a)(3)(ii), 61 Stat. 136, *reprinted in* 1 LMRA LEG. HIST., *supra* note 4, at 6.

13. *See* Act of Oct. 22, 1951, ch. 534, 65 Stat. 601.

Because of uncertainty about federal preemption, the Labor Peace Act remained moribund until 1976, when the Colorado Supreme Court ruled that its union security requirements continued in force.[14] In response, the Colorado General Assembly adopted new legislation in 1977 that retroactively approved union security agreements then in effect and prospectively imposed the current election rules for future labor contracts.[15] Returning to the issue, the General Assembly's 1999 legislative agenda included a bill dealing with the subject of right to work.[16]

Because the Colorado "modified right to work" statute is unique in its union security election provisions, it offers a valuable comparative tool with which to assess right to work laws in general. Right to work legislation remains a timely and contentious issue of public policy on both the state[17] and federal

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14. *See* Communications Workers v. Western Elec. Co., 551 P.2d 1065 (Colo. 1976).

15. *See* Act of June 29, 1977, ch. 76, 1977 Colo. Sess. Laws 419.

16. On January 27, 1999, Representative May and Senator Owen of the Colorado General Assembly submitted a bill providing that after July 1, 1999, "no employer shall require any person, as a condition of employment or of the continuation of employment, to become or remain a member of any labor organization or to pay any dues, fees, assessments, or other sums of money to a labor organization." H.B. 99-1263, 62d Leg., 1st Reg. Sess. 2-3 (Colo. 1999). With the 1998 election of Republican Governor Bill Owens, right to work laws are less susceptible to veto than during Democrat Roy Romer's tenure. One political analyst, writing in early 1999, offered some speculations about Owens's approach to labor-management relations:

> Owens will also be taking on organized labor. His selection for head of the labor department, former state Rep. Vicki Armstrong, is viewed by labor as a fierce opponent; that appointment was perceived as a strong signal of his direction. And he's expected to champion "right-to-work" legislation that would prohibit union-only workplaces and to push for cuts in worker's compensation.

Michelle Dally Johnston, *Owens Hits the Ground Running*, DENV. POST, Jan. 3, 1999, at A1. The House passed H.B. 99-1263 on February 23, 1999. *See* Michelle Dally Johnston, *House OKs State Hiring, Union Bills*, DENV. POST, Feb. 24, 1999, at A14. The bill died in the Senate Business Affairs and Labor Committee on March 3, 1999. Acording to reports, however, "business lobbyists note that with a Republican governor taking over after 24 years of Democrats, they're only a few Senate votes away from getting the legislation passed." Mike Soraghan, *'Right-to-Work' Bill Gets Pink Slip in Committee*, DENV. POST, Mar. 4, 1999, at A4.

17. Surveying state right to work laws through 1997, one authority summarized developments as follows:

> On February 6, 1992, the New Hampshire House of Representatives rejected a right-to-work bill (GB 1432) by a vote of 211 to 134. During

levels. In March 1997, for example, Senators Paul Coverdell and Lauch Faircloth introduced a bill to repeal the sections of the NLRA legalizing union security.[18] The bill, known as the Coverdell-Faircloth National Right to Work Act of 1997,[19] in the opinion of its sponsors, would promote the economic well-being and political freedom of American workers. Senator Coverdell claimed that most of the strongest state economies in the nation are right to work states and observed, "Workers who have the freedom to choose whether or not to join a union have a higher standard of living than their counterparts in non-Right to Work States."[20] Senator Faircloth asserted that "compulsory unionism violates the fundamental principle of individual liberty—the very principle upon which this Nation

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legislative sessions from 1993 through 1996, proposed right-to-work legislation also failed to pass in California, Colorado, Maryland, Michigan, Montana, Nevada, New Hampshire, New Mexico, Oklahoma, Pennsylvania, Rhode Island, Wisconsin, and Wyoming. On April 4, 1997, the Colorado Senate again rejected a right-to-work bill.

1 THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT 579 (Patrick Hardin ed., 3d ed. 1992 & John T. Neighbours et al. eds., Supp. 1998) (citations omitted) [hereinafter THE DEVELOPING LABOR LAW].

18. *See* 143 CONG. REC. S2669 (daily ed. Mar. 20, 1997) (statement of Sen. Coverdell). Coverdell is a member of the Republican party and represents the state of Georgia. Faircloth is a former Republican Senator from North Carolina.

19. S. 497, 105th Cong. (1997).

20. *Id.* Coverdell cited research by Dr. James Bennett for the proposition that urban families in right to work states have approximately $2,852 more in annual purchasing power than their counterparts in non–right to work states when taxes and costs of living are taken into consideration. *See* JAMES BENNETT, A HIGHER STANDARD OF LIVING IN RIGHT TO WORK STATES (1994). Bennett's pamphlet was published by the National Institute for Labor Relations Research, whose self-described function is "to expose the inequities of compulsory unionism." Significantly, its publications are not subject to peer review procedures followed by most academic publishers. Economic data discussed *infra* Part II.E.2, show that per capita income in right to work states is significantly lower than in union security states. Higher levels of taxation may indicate higher levels of beneficial services, such as education, police and fire protection, and public amenities. The higher prices in union security states are due to many factors aside from the relative wage effects of unions (especially given that unions constitute such a small fraction of the workforce). Moreover, Bennett constructs his price indices based on a popular book whose authors make no claim to economic expertise. *See* DAVID SAVAGEAU & RICHARD BOYER, PLACES RATED ALMANAC: YOUR GUIDE TO FINDING THE BEST PLACES TO LIVE IN AMERICA (1993). Consequently, Bennett's conclusion that right to work states enjoy higher standards of living than union security states—a conclusion which flies in the face of historical experience and much other data—remains questionable.

was founded," adding that "nothing is more offensive to the core American principles of liberty and freedom."[21]

Underlying the senators' political rhetoric are two fundamental policy issues of concern to all citizens in this country. The first issue deals with the matter of individual free choice within the context of collective bargaining. Specifically, the inquiry focuses on the extent to which individuals should be compelled to financially support union activities, even though they might not choose to do so in the absence of coercion and would otherwise engage in "free riding."[22] The second policy issue addresses the economic effects of labor law. If right to work legislation is positively associated with a state's growth, that correlation offers a powerful incentive for states to adopt statutes prohibiting union security. These issues also drive political movements dealing with the enforced payment of union dues, including proposals requiring the individual's prior approval of any amounts of payroll deductions used for political purposes.[23]

This article analyzes the legal, economic, and political dimensions of right to work legislation with particular focus on the Colorado Labor Peace Act. Part I develops the historical context of the Peace Act, commencing with an overview of the 1935 federal labor legislation, followed by a discussion of Colorado's original 1943 Peace Act and its relationship to the Taft-Hartley modifications in 1947. That background is

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21. 143 CONG. REC. S2669 (daily ed. Mar. 20, 1997) (statement of Sen. Faircloth); *see also National Right to Work Act of 1995: Hearing on S. 581 Before the Senate Comm. on Labor and Human Resources*, 104th Cong. 11-14 (1996) [hereinafter *Hearings on the National Right to Work Act of 1995*] (statement of Reed Larson, president of the National Right to Work Committee).

22. As used here, the term "free rider" designates those individuals who will pay dues to avoid loss of their jobs. Workers who would leave employment rather than submit to enforced dues payments are not regarded as free riders. For a further discussion, see *infra* Part II.C.3.

23. Voters in California defeated a proposal in 1998 requiring individual employee approval for union dues deductions. Prior to the election, however, polls showed that the measure had strong support, but the final margin was 47% in favor and 53% opposed. *See* Glenn Burkins, *Union Win on California Dues-Notification Issue May Offer Successful Strategy for Fall Elections*, WALL ST. J., June 4, 1998, at A20. Observers called unions' strong mobilization effort "labor's finest hour in years." *Id.* Representative Bob Schaffer, Colorado's congressman from the Fourth District, introduced a bill providing for federal "paycheck legislation." 144 CONG. REC. H1748 (daily ed. Mar. 30, 1998). The House voted against that bill by a margin of 246 opposed to 166 in favor. *See id.* at H1765.

followed by a discussion of the 1977 amendments to the Peace Act. Part II assesses the policy arguments advanced by opponents and proponents of right to work laws. Those arguments revolve around the dominant themes of freedom of choice and economic efficiency. Two propositions inform our approach. First, we contend that regulation of employment should be based on clearly articulated social or economic objectives. Second, we argue that the benefits of regulation should be evident, measurable, and sufficient to outweigh the costs of regulation. Part III of the article deals specifically with the administration of Peace Act elections and the outcomes of those elections. As a result of our analysis, we recommend in Part IV that the Colorado General Assembly eliminate any restrictions on a union's right to bargain for union security agreements. We conclude by evaluating the implications of the Peace Act for right to work laws in general.

I. LEGISLATIVE EVOLUTION OF THE COLORADO LABOR PEACE ACT, 1935-1977

American labor law is a product of antagonistic economic interests, historical contingency, and cultural forces.[24] Our national labor legislation emerged out of the Depression era of the 1930s and derived its salient features from the imperatives of domestic crisis.[25] One political figure, Senator Robert Wagner, played the pivotal role in the enactment of the NLRA in 1935. By 1947, a new political climate prevailed, and the interests of business, rather than labor, became paramount. Conservatives undermined the Wagner Act's protections for unions, preferring instead to emphasize the rights of individuals and employers. To a significant degree, the political momentum against unions flowed from state legislatures to the post–World War II Congress; and some

24. For more comprehensive historical treatments, see DAVID BRODY, WORKERS IN INDUSTRIAL AMERICA: ESSAYS ON THE TWENTIETH CENTURY (2d ed. 1993); CHRISTOPHER L. TOMLINS, THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880-1960 (1985).

25. The definitive historical works on labor during this period are IRVING BERNSTEIN, THE LEAN YEARS: A HISTORY OF THE AMERICAN WORKER, 1920-1933 (1960); IRVING BERNSTEIN, THE TURBULENT YEARS: A HISTORY OF THE AMERICAN WORKER, 1933-1941 (1969) [hereinafter BERNSTEIN, THE TURBULENT YEARS].

states' labor laws, such as Colorado's, provided important models for the Taft-Hartley Act. In turn, Taft-Hartley's abdication of national jurisdiction in section 14(b) led to the revival of Colorado's idiosyncratic election rules for union security.

A. The Wagner Act and the Closed Shop

With the passage of the Wagner Act in 1935, for the first time in our history, American private sector workers gained federal rights to form unions, bargain with their employers, and engage in concerted activities.[26] Karl Klare, an influential labor law scholar, described the Wagner Act as "perhaps the most radical piece of legislation ever enacted by the United States Congress."[27] Among the statutory policies, Klare identified congressional aims of equalizing bargaining power between employers and employees, ensuring workers' rights of association, and stimulating the economy by increasing workers' earnings and purchasing power.[28] In view of those articulated purposes, Klare continued, "the Act by its terms apparently accorded a governmental blessing to powerful workers' organizations that were to acquire equal bargaining

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26. Section 7 was the cornerstone of the Wagner Act protections. It provided:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

National Labor Relations Act, ch. 372, § 7, 49 Stat. 449, 452 (1935) (codified as amended at 29 U.S.C. § 157 (1994)), *reprinted in* 2 NLRA LEG. HIST., *supra* note 2, at 3273.

27. Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 265 (1977) [hereinafter Klare, *Judicial Deradicalization*]. The thesis of Klare's article is that the Wagner Act failed to reach its social and economic potential for transformation because the United States Supreme Court weakened unions' ability to deal with employers from a position of relatively equal power. As a result, organized labor was increasingly co-opted and marginalized. Klare developed that theme in subsequent works, establishing "critical" labor law analysis as an important contribution to legal theory. *See, e.g.*, Karl E. Klare, *Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law*, 4 INDUS. REL. L.J. 450 (1981).

28. *See* Klare, *Judicial Deradicalization*, *supra* note 27, at 282-83.

power with corporations, accomplish a redistribution of income, and subject the workplace to a regime of participatory democracy."[29] Employers thus perceived the law as a threat to the existing system of industrial relations because its "plain language was susceptible to an overtly anticapitalist interpretation."[30] One of American employers' most cherished prerogatives was, after all, the unfettered discretion to hire and fire employees, a right emerging from eighteenth-century judicial doctrine and reaching its constitutional apotheosis in the early nineteenth century.[31]

When Senator Robert Wagner brought his labor bill to the Senate floor on February 21, 1935, he explained it as a redistributive measure aimed at both economic and political objectives.[32] Because workers lacked genuine rights to act collectively, Wagner said, they exercised little real power relative to employers and were unable to fulfill the macroeconomic role of stimulating industrial production and consumer demand.[33] That lack of power led to undesirable

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29. *Id.* at 285.

30. *Id.* For a contrary perspective on the meaning and interpretation of the Wagner Act, see Matthew W. Finkin, *Revisionism in Labor Law*, 43 MD. L. REV. 23 (1984).

31. On the common law background, see Christopher L. Tomlins, *The Ties That Bind: Master and Servant in Massachusetts, 1800-1850*, 30 LAB. HIST. 193 (1989). Tomlins traces the creation of a specific form of contractual relations that reduced employment to the "uniform and impersonal institution of wage labor." *Id.* at 196. Thus, the employment contract became "a doctrinal innovation which combined the contradictory features of a transaction between juridical equals and the exercise of power by a legally-denominated superior over a subordinate." *Id.* The decision in *Adair v. United States*, 208 U.S. 161 (1908), articulated a constitutional dimension of free markets and employment relations. The Supreme Court struck down federal legislation protecting railroad workers' rights to bargain collectively based on Fifth Amendment conceptions of property and liberty interests. For a modern affirmation of the principle of employment at will, see Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984). Epstein elaborates the free market attack on employment regulation in RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS (1992).

32. *See* 79 CONG. REC. 2371-72, *reprinted in* 1 NLRA LEG. HIST., *supra* note 2, at 1311-13; *see also* S. 1958, 74th Cong. (1935), *reprinted in* 1 NLRA LEG. HIST., *supra* note 2, at 1295-1310.

33. *See* 79 CONG. REC. 2371-72, *reprinted in* 1 NLRA LEG. HIST., *supra* note 2, at 1311-13. For a discussion of bargaining power in the labor context, see Bruce E. Kaufman, *Labor's Inequality of Bargaining Power: Changes over Time and Implications for Public Policy*, 10 J. LAB. RES. 285 (1989); Bruce E. Kaufman, *Labor's Inequality of Bargaining Power: Myth or Reality?*, 12 J. LAB. RES. 151

outcomes for the national economy; Wagner went on: "The consequences are already visible in the widening gap between wages and profits. If these consequences are allowed to produce their full harvest, the whole country will suffer from a new economic decline."[34] First and foremost, then, Wagner saw his bill as a means of spreading corporate profits more evenly to wage earners and consumers so as to stimulate greater demand for industrial output. Such policies, he thought, would stabilize the economy and help to promote growth.[35]

At the same time, Wagner anticipated criticisms that the bill promoted collectivism at the cost of individual liberties and subjugated workers to an oppressive trade union bureaucracy. He responded sharply to attacks that the legislation stifled individual liberties by asserting that "[t]here is not a scintilla of truth in the wide-spread propaganda to the effect that this bill would tend to create a so-called 'labor dictatorship.'"[36] In Wagner's view, the proposed legislation did not favor national unionism or express any preference for a particular form of industrial organization. Employees retained the right to deal individually with their employers if they chose; moreover, the law did not prohibit independent unions confined to one plant or location, so long as they were not dominated by the employer.[37] Of particular importance to union security,

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(1991). Kaufman contends that "equality of bargaining power exists when neither the employer nor the individual worker has the ability to raise or lower the rate of compensation (broadly defined to include wages, fringe benefits, and the implicit value of working conditions) beyond the level determined by the market." *Id.* at 153. During the Wagner Act era, employers attained greater bargaining power as a consequence of market imperfections, particularly high unemployment rates, and "the domination and control of the political and judicial process that employers and their allies frequently exercised at the local, state, and national levels." *Id.* at 160.

34. 79 CONG. REC. 2371 (1935), *reprinted in* 1 NLRA LEG. HIST., *supra* note 2, at 1312.

35. For an excellent treatment of this point, see Bruce E. Kaufman, *Why the Wagner Act? Reestablishing Contact with Its Original Purpose*, *in* 7 ADVANCES IN INDUSTRIAL AND LABOR RELATIONS 15 (1996).

36. 79 CONG. REC. 2371 (1935), *reprinted in* 1 NLRA LEG. HIST., *supra* note 2, at 1312.

37. Wagner's concern about employer-dominated company unions led to their prohibition in section 8(2) of the NLRA, which made it an unfair labor practice "[t]o dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it." National Labor Relations Act, ch. 372, § 8(2), 49 Stat. 449, 452 (1935) (codified as amended at 29 U.S.C. § 158(a)(2) (1994)), *reprinted in* 2 NLRA LEG. HIST., *supra* note 2, at 3273.

Wagner emphasized that the bill "does not force any employer to make a closed-shop agreement. It does not even state that Congress favors the policy of the closed shop. It merely provides that employers and employees may voluntarily make closed-shop agreements in any State where they are now legal."[38] Within the context of evolving legal doctrine, Wagner probably was attempting to protect states' rights to permit closed shops, rather than their right to prohibit them.[39]

Taken together, Wagner's statements develop a coherent vision of autonomy, collective action, and social welfare.[40] Representatives selected by a majority of workers enjoyed the right to speak for all employees, but those representatives had the corresponding duty to apply the terms of an agreement "without favor or discrimination to all employees."[41] As a consequence, freedom derived from collective power in both the economic and political realms. To illustrate that key idea, Wagner inserted into the Congressional Record a "very instructive" address by Francis Biddle that deftly summarized the essential conception.[42] Biddle contended that political liberties gained meaning only where economic security existed, arguing that the "freedom to work and live decently no longer means the theoretical freedom of a man to make a contract with the steel corporation. There is no freedom of contract where power is all on one side and the choice is to take what you get or starve."[43] Monopolistic bargaining and union power through group solidarity, on this view, liberated workers from

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The connection between company unions and Wagner's philosophy of freedom of choice is developed in Part II.A.

38. 79 CONG. REC. 2371 (1935), *reprinted in* 1 NLRA LEG. HIST., *supra* note 2, at 1313.

39. Wagner said that the bill did not change existing law in this area but "merely preserve[d] the status quo." *Id.* He indicated that state laws might be moving toward greater scope for labor's right to bargain for and enforce the closed shop. *See id.* As a result, one interpretation of the legislative history is that Wagner did not desire a standard federal rule that would stifle more expansive forms of union security.

40. *See generally* Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379 (1993).

41. 79 CONG. REC. 2371 (1935), *reprinted in* 1 NLRA LEG. HIST., *supra* note 2, at 1313.

42. *Id.* at 3183-84, *reprinted in* 1 NLRA LEG. HIST., *supra* note 2, at 1314-19.

43. *Id.* at 3184, *reprinted in* 1 NLRA LEG. HIST., *supra* note 2, at 1317.

industrial servitude and offered prospects of emancipation in the political realm.[44]

Despite its antibusiness orientation, the Wagner Act moved through Congress with relative ease. One explanation for the lack of overt opposition from the business community was a widespread belief that the law was unconstitutional. The United States Supreme Court had ruled in 1935 that Congress exceeded its constitutional power by enacting the National Industrial Recovery Act,[45] which authorized federal intervention in commerce and employment. Consequently, most employers did not risk outright hostility to a popular piece of legislation because they believed that the courts would invalidate any attempt to intrude into the states' domain of contract law.[46]

Contrary to the business community's expectations, however, the Supreme Court in May 1937 upheld the Wagner Act as a constitutional exercise of Congress's power to regulate interstate commerce.[47] From that moment forward, employers began a relentless campaign to repeal or weaken the NLRA, forcing labor into a defensive posture. Militant leaders within the Congress of Industrial Organizations ("CIO"), particularly, became more closely allied with the Roosevelt Administration in response to attacks from political conservatives and conflict between the CIO and the craft unionists of the American

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44. The theme is deeply rooted in American political history. A recent study develops the point as follows:

> To the contemporary ear, words like "independence" and "equal" convey mostly a political and not an economic meaning. But that was not the case for the founders of the country, for whom the term "independence" encapsulated an entire doctrine of political *economy* that they considered necessary to support a nation capable of nurturing and sustaining a free, stable, and moral republic.

JOHN E. SCHWARZ, ILLUSIONS OF OPPORTUNITY: THE AMERICAN DREAM IN QUESTION 22-23 (1997). Schwarz's thesis is that growing income inequality produces an opportunity deficit in this country and erodes the political participation of many individuals. The consequences include alienation from government and public affairs, a sense of personal insecurity, and racial and class antagonism.

45. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

46. *See* PETER H. IRONS, THE NEW DEAL LAWYERS 231 (1983).

47. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

Federation of Labor ("AFL").[48] Congressional support for the NLRA during the New Deal era forestalled major revision at the federal level, even though legislators introduced numerous bills to amend the law during the period between 1937 and 1947. The anti-NLRA factions proved more successful, however, in the state legislatures, and Colorado proved to be a particularly accommodating venue.[49]

B. A Prelude to Taft-Hartley: The Colorado Labor Peace Act

The 1947 Taft-Hartley changes to the Wagner Act generally attempted to weaken union power by limiting certain types of union behavior and by favoring individual rights over collective action.[50] Despite earlier support for the NLRA,

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48. On the political context of pre–World War II initiatives against the NLRA, see Gilbert J. Gall, *CIO Leaders and the Democratic Alliance: The Case of the Smith Committee and the NLRB*, 14 LAB. STUD. J. 31 (1989).

49. *See generally* MILLIS & BROWN, *supra* note 10, at 316-62.

50. Many labor relations experts in 1947 supported modifications in the NLRA to correct problems of union administration, such as jurisdictional strikes, race discrimination, high initiation fees, and similar abuses. *See* JAMES A. GROSS, BROKEN PROMISE: THE SUBVERSION OF U.S. LABOR RELATIONS POLICY 1947-1994, at 8-11 (1995). But the most invidious change worked by Taft-Hartley involved a shift in emphasis from workers' institutions as a guarantor of employment rights to individual workplace dealings. As Gross concludes:

> U.S. labor policy has been at cross-purposes with itself ever since. Congress incorporated into the Taft-Hartley Act in 1947 not only the Wagner Act statement that it is the policy of the federal government to encourage collective bargaining but also a new Declaration of Policy saying that the purpose of the act is to protect the rights of individual employees. Although there is no necessary conflict between the encouragement of collective bargaining and the protection of individual rights, experts at the time Taft-Hartley became law predicted correctly that the written affirmation of the protection of individual rights, particularly the right to refrain from engaging in collective bargaining, would be read as statutory justification for both the promotion of a policy of individual bargaining and employer resistance to unionization and collective bargaining.

Id. at 272. The ideology of individual choice likewise forms the backbone of proposals for paycheck protection legislation. In his testimony supporting the Worker Paycheck Fairness Act, for example, Roger Pilon of the Cato Institute declared:

> Freedom of association is our birthright as Americans. That right has two aspects. One is the right not to associate with others except on mutually agreed upon terms; second is the right to associate with others

Congress now believed that American labor laws had been "ill-conceived and disastrously executed," to the detriment of employers, workers, and the public.[51] These legislative impulses in Congress gained support from the successful efforts of several state governments to impose statutory restrictions on labor organizations, which, in conjunction with Republican electoral victories, formed the political backdrop for the Taft-Hartley Act.[52]

One of the most important precursors to Taft-Hartley was Colorado's Labor Peace Act of 1943, which contained provisions that were directly relevant to the regulation of union security at the federal level.[53] The Peace Act recognized the concept of union security by defining an "all-union agreement," whereby employees within a bargaining unit could be required "to be members of a single labor organization."[54] Unions enforced the agreement by requesting discharge of noncomplying employees, and the Peace Act incorporated the unfair labor practice language in section 8(3) of the Wagner Act authorizing employers to lawfully terminate attempted free riders.[55] Section 6(1)(c) of the Peace Act further specified that employers could enter into all-union agreements without unlawfully discriminating against employees so long as "three quarters or more of [the employer's] employees shall have voted affirmatively by secret ballot in favor of such all-union agreement in a referendum conducted by the [Colorado Industrial] Commission."[56] Another subsection made it an

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for peaceful purposes free from the interference of third parties. The National Labor Relations Act violates both those principles.

The Worker Paycheck Fairness Act: Hearing on H.R. 1625 Before the House Comm. on Educ. and the Workforce, 105th Cong. 13 (1997). Pilon favors outright repeal of the NLRA. *See id.*

51. H.R. REP. NO. 80-245, at 4 (1947), *reprinted in* 1 LMRA LEG. HIST., *supra* note 4, at 295.

52. The political milieu supporting Taft-Hartley is explored in R. ALTON LEE, TRUMAN AND TAFT-HARTLEY: A QUESTION OF MANDATE (1966). President Truman vetoed the legislation on the ground that it weakened unions and deprived labor of fundamental rights. But even as Truman read his veto message to the country, the House began a roll-call vote which overrode the veto by a margin of 331 to 83. *See id.* at 99-100.

53. *See* Labor Peace Act, ch. 131, 1943 Colo. Sess. Laws 392 (codified as amended at COLO. REV. STAT. §§ 8-3-101 to -123 (1998)).

54. Labor Peace Act, ch. 131, § 2(8), 1943 Colo. Sess. Laws 392, 396.

55. For the relevant language of section 8(3), see *supra* note 2.

56. Labor Peace Act, ch. 131, § 6(1)(c), 1943 Colo. Sess. Laws 392, 400.

unfair labor practice for an employer to deduct union dues from an employee's pay "unless the employer has been presented with an individual order therefor, signed by the employee personally, and terminable at any time by the employee giving at least thirty days' written notice of such termination."[57] The requirement of a state election to approve union security by a three-quarters supermajority after federal certification,[58] along with the payroll deduction authorization, had the effect of substantially weakening a labor organization's ability to obtain union security in the first place and to maintain solidarity within the bargaining unit.[59] Such anti-union effects were exactly what the Colorado General Assembly intended.

The reasons for the Peace Act's adoption are enmeshed in the historical context of wartime politics. Upsurges of union organizing and outbreaks of labor conflict in the early 1940s united different factions in opposition to union growth and power throughout the country.[60] Although most state legislatures considered anti-union legislation during 1943, the most important developments occurred in the more conservative South and West.[61] Colorado's political environment exemplified those trends. Republicans dominated Colorado's 1943 General Assembly, holding 79 out of 100 seats,

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57. Labor Peace Act, ch. 131, § 6(1)(i), 1943 Colo. Sess. Laws 392, 401. The imposition of a signed order for dues withdrawals fits nicely into Taft-Hartley's privileging of individual rights over union interests and foreshadows both the content and the design of current paycheck protection movements.

58. For an overview of the representation process and union certification, see generally 1 THE DEVELOPING LABOR LAW, *supra* note 17, at 337-446.

59. The language of the 1943 Peace Act stated that an employer could enter into an all-union agreement "where three-quarters or more of his employees" voted in favor of the clause. Labor Peace Act, ch. 131, § 6(c), 1943 Colo. Sess. Laws 392, 400. The phrase is ambiguous, and the Colorado Industrial Commission ruled that a three-quarters majority of those actually voting, rather than of those eligible to vote, satisfied the requirement. *See* Phillip Hornbein, Jr., *The Extent to Which Taft-Hartley Has Superseded State Labor Laws*, 28 DICTA 47, 50 n.29 (1951). The General Assembly eliminated any ambiguity in 1977 by stipulating approval by an "affirmative vote of at least a majority of all the employees eligible to vote or three-quarters or more of the employees who actually voted, whichever is greater." Labor Peace Act, ch. 76, sec. 2, § 8-3-108(1)(c)(II)(D), 1977 Colo. Sess. Laws 419, 421.

60. On strikes during the period, see generally JAMES B. ATLESON, LABOR AND THE WARTIME STATE: LABOR RELATIONS AND THE LAW DURING WORLD WAR II (1998).

61. *See* MILLIS & BROWN, *supra* note 10, at 317.

with many representatives from rural areas.[62] According to one study, "[t]his group had voted conservatively, fairly consistently, on all social security legislation . . . . It had also expressed concern about labor becoming too powerful."[63] Coupled with the ideological bent of the General Assembly, Colorado citizens feared that the production of war materials could be interrupted by labor conflict, thus generating public support for the Peace Act.[64]

In response, Colorado's labor movement mounted an intense, but largely futile, attack on the Peace Act. After Governor John Charles Vivian signed the bill on April 1, 1943, the Colorado State Federation of Labor immediately committed $25,000 to test the law's constitutionality.[65] The organization described the law as "the most vicious piece of antilabor legislation passed by any legislature in the history of the state."[66] Philip Hornbein, Jr., a Colorado labor attorney, characterized the motives underlying the law in unequivocal terms: "When we discuss and analyze this bill, the protestations of the sponsors to the contrary notwithstanding, we conclude that the purpose of this act is to destroy unions in this state."[67] The AFL joined in attacks on the legislation, describing it as a "compilation of the most reactionary, arbitrary and unconstitutional provisions ever to be enacted by any state."[68] Subsequently, the AFL sponsored a challenge to certain portions of the Peace Act dealing with internal union affairs and, after favorable rulings on those points, declared a victory in the litigation.[69] Despite labor's efforts, however, the

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62. *See* HARRY SELIGSON & GEORGE BARDWELL, LABOR-MANAGEMENT RELATIONS IN COLORADO 141 (1961).

63. *Id.*

64. Seligson and Bardwell note, "War-induced patriotism may have had some effect. There was much publicity about assuring supplies to our armed forces overseas." *Id.*

65. *See A.F.L. Unions Vote $25,000 to Fight Law*, DENV. POST, Apr. 11, 1943, at 1.

66. *Id.*

67. *Id.*

68. Joseph Padway, *Fascism Comes to America*, AM. FEDERATIONIST, May 1943, at 10, 12.

69. The General Counsel of the AFL initiated suits for declaratory judgment and injunctive relief in nine states which had passed antilabor legislation. The trial court in Colorado issued the first decision, striking down several provisions of the Peace Act. *See* Joseph Padway, *Colorado Victory*, AM. FEDERATIONIST, Oct.

bulk of the legislation remained intact, including the union security election provisions.[70] As the next section demonstrates, these provisions clearly influenced the Taft-Hartley Act.

C. The Taft-Hartley Act Elections

As noted above, the Wagner Act permitted employers and unions to agree to union membership as a condition of employment if state law did not prohibit such agreements.[71] In 1947, however, Representative Fred A. Hartley, Jr., introduced the House version of the Taft-Hartley Act, which substantially curtailed unions' latitude to negotiate and enforce union security at the federal level.[72] Although the bill conceded the principle of compulsory union membership, it abolished the "closed shop" by providing that employment could not be conditioned upon membership and instead required security agreements to become enforceable thirty days after an employee's hiring.[73] Directly following the Colorado Peace Act, another provision required unions to petition the National Labor Relations Board ("NLRB") for "a secret ballot of the employees in the bargaining unit concerned on the question of whether the employees in such unit desire to have such provision carried out."[74] In addition, the House bill slightly modified the Peace Act's electoral burden for union security by providing that union security would be valid if "a majority of all of the employees in the bargaining unit have voted in favor

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1943, at 8. The Colorado Supreme Court generally affirmed the lower court's rulings. *See* AFL v. Reilly, 155 P.2d 145 (Colo. 1944).

70. *See* Elizabeth Lee Dillon, *The Constitutionality of the Colorado Labor Peace Act*, 18 ROCKY MTN. L. REV. 52 (1945). For unions, the most offensive portions of the Peace Act were requirements that they incorporate and become subject to state regulation as corporate entities. *See* Labor Peace Act, ch. 131, § 20, 1943 Colo. Sess. Laws 392, 413-16.

71. Bernstein suggests that the federal provision was designed to encourage more permissive state rules: "Union security agreements were not legalized by this language [of section 8(3)]; it simply prevented them from becoming unlawful under this and other laws." BERNSTEIN, THE TURBULENT YEARS, *supra* note 25, at 328.

72. Representative Hartley introduced his bill on April 10, 1947. *See* H.R. 3020, 80th Cong. (1947), *reprinted in* 1 LMRA LEG. HIST., *supra* note 4, at 31-98.

73. *See id.* § 8(d), *reprinted in* 1 LMRA LEG. HIST., *supra* note 4, at 56-58.

74. *Id.* § 9(g), *reprinted in* 1 LMRA LEG. HIST., *supra* note 4, at 64.

thereof."[75] Senator Robert A. Taft's bill contained similar provisions for a thirty-day grace period and approval of union security by a majority of employees eligible to vote.[76] In the final version of the Taft-Hartley Act, sections 8(a)(3)(ii) and 9(e)(1) incorporated the Senate's language on union security.[77]

Just as the original Peace Act influenced the Taft-Hartley amendments, the federal experience with union security elections between 1947 and 1951 offers guidance in assessing Colorado's current law. Union shop elections required by passage of the Taft-Hartley Act imposed severe administrative burdens on the NLRB and were, for the most part, redundant. As of June 30, 1948, the NLRB had a backlog of 7,408 pending union shop election petitions.[78] The results of completed elections were overwhelmingly in favor of union security. According to Harry Millis and Emily Brown, unions won almost ninety-eight percent of the elections completed; and "[i]n only 357 elections out of 17,958 was the result adverse."[79] A telling example is the vote at Ford Motor Company, where the number of total eligible voters was 98,989, and 88,943 workers voted in favor of the union shop, while only 1,214 voted "no."[80] Repeated union victories and the administrative burdens on the NLRB led Congress in 1951 to repeal the union shop election provisions as unnecessary.[81] Federal law now allows employees to petition for an election to withdraw a union security provision,[82] but no election is needed for its approval.

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75. *Id.*, *reprinted in* 1 LMRA LEG. HIST., *supra* note 4, at 65.

76. *See* S. 1126, 80th Cong. § 8(a)(3) (1947), *reprinted in* 1 LMRA LEG. HIST., *supra* note 4, at 110.

77. *See* Labor Management Relations Act of 1947, ch. 120, sec. 101, §§ 8(a)(3)(ii), 9(e)(1), 61 Stat. 136, 141, 144-45, *reprinted in* 1 LMRA LEG. HIST., *supra* note 4, at 6, 10.

78. *See* MILLIS & BROWN, *supra* note 10, at 612.

79. *Id.* at 613. The authors comment that "all the evidence indicates that those who thought employees would generally vote against union-security agreements, after they had accepted union representation for collective bargaining, misinterpreted the temper of American workers." *Id.*

80. *See id.*

81. *See* Act of Oct. 22, 1951, ch. 534, 65 Stat. 601. One survey concluded that "in the four years since such elections had been required, of the 46,145 polls conducted by the board, 97 per cent resulted in authorization to negotiate a union-shop agreement. About 91 per cent of workers voting favored the union-shop clause." PAUL SULTAN, RIGHT-TO-WORK LAWS: A STUDY IN CONFLICT 50 (1958).

82. *See* 29 U.S.C. § 159(e)(1) (1994) (stating in part that if 30% of bargaining unit employees covered by a union security clause submit a petition "alleging they

Despite this federal precedent, Colorado lawmakers did not reconsider the Peace Act election provisions until 1977.

D. The 1977 Modification of Colorado's Labor Peace Act

After the 1947 Taft-Hartley amendments, the Colorado Peace Act's status under the new federal law and its continuing vitality were uncertain. Between 1943 and 1977, Colorado neither passed a new labor law nor repealed the Labor Peace Act. In 1958, however, proponents of right to work initiated ballot referenda in California, Ohio, Idaho, Kansas, Washington, and Colorado.[83] Voters defeated the measure in Colorado.[84] As to the relationship between the election provisions of the Peace Act and the Taft-Hartley Act, one careful analysis concluded that the state and federal governments exercised "concurrent" jurisdiction over union security. The result was that a collective bargaining security clause might be legal under state law but not federal law, and vice-versa.[85] Such inconsistent and illogical consequences created an ambiguous labor relations environment for three decades following enactment of the Taft-Hartley legislation.

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desire that such authorization be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer"). A simple majority determines the vote.

83. *See* GILBERT J. GALL, THE POLITICS OF RIGHT TO WORK: THE LABOR FEDERATIONS AS SPECIAL INTERESTS, 1943-1979, at 93 (1988).

84. The right to work amendment was the most widely discussed issue of the election. Democrats opposed the amendment, and Republicans adopted no official position. One study notes that "[s]everal Republicans seeking state office took a strong stand against 'right to work,' among them the GOP candidate for governor and the incumbent candidate for attorney general. The latter was the only Republican to win a state-wide office in the Democratic sweep." Curtis Martin, *The 1958 Election in Colorado*, 12 W. POL. Q. 301, 301 (1959). The amendment was defeated by a margin of three to two. *See id.*

85. Phillip Hornbein, Jr. said:

> In an election for the approval of a union-shop agreement, a majority of all eligible employees may vote in favor of such agreement, but this may be less than three-fourths of the employees actually voting, in which case the contract would be legal under Taft-Hartley, but illegal under the Colorado Act. In another case, three-fourths of the employees actually voting might vote affirmatively, but might not constitute a majority of all employees eligible to vote, in which case the contract would be legal under Colorado law but not under Taft-Hartley.

Hornbein, *supra* note 59, at 50. This problem, however, was removed in 1951 with Congress's repeal of the union shop election provisions.

During that time, many unions and employers carried out the practical task of negotiating and enforcing labor agreements on the assumption that contract provisions legal under the federal law also would be permissible under state rules.

The authoritative judicial pronouncement about the Peace Act's continuing vitality came in the 1976 case of *Communications Workers of America v. Western Electric Co.*,[86] in which the Colorado Supreme Court invalidated certain union security clauses negotiated by the parties. Between 1968 and 1971, the Communications Workers of America ("CWA") and Western Electric had agreed to contract clauses requiring covered employees to pay union dues and maintain their membership in the union for specified periods, but had not sought state elections to approve those clauses.[87] Some employees refused to comply with the clauses, and, despite repeated CWA requests, Western Electric declined to terminate those employees. Western Electric took the position that any form of union security was invalid unless employees had voted in accordance with the Peace Act provisions. Agreeing with the employer, the Colorado Supreme Court stated that the Peace Act's "language evinces an intent on the part of the legislature to protect the working man's right to freely chart his own course with regard to labor organization activities."[88]

While CWA contended that the state prohibited only closed shop agreements, the court reasoned that Colorado had the authority under section 14(b) of the NLRA to prohibit, and therefore to regulate, any form of union security.[89] In the majority's view, "[t]he provisions of [the Peace Act] are an important incident of the state's power to prohibit the application of union security provisions such as the ones here in issue. That power has not been supplanted by federal law."[90] Chief Justice Pringle dissented on the ground that "union and agency shops may be entirely prohibited by a state, but if there was to be regulation, that regulation must be uniformly applied throughout the country under the terms of the National Labor Relations Act, rather than apply 50 different standards as to

86. 551 P.2d 1065 (Colo. 1976).
87. *See id.* at 1068-73.
88. *Id.* at 1075.
89. *See id.* at 1079-80.
90. *Id.* at 1079.

how and when union and agency shops might be negotiated."[91] In Pringle's view, NLRB decisions supported his position.[92]

Following the *Communications Workers* decision, the Colorado General Assembly in 1977 enacted the modified right to work provisions now in effect.[93] While the court's opinion merely affirmed the continuing application of the Peace Act's union security provisions, labor relations practices between 1947 and 1977 had created a dilemma for both employers and unions within the state. The ambiguous preemptive effect of the Taft-Hartley Act had led to collective bargaining agreements that ignored the state requirement of a union security election. As a result, by 1977 some 5,000 collective bargaining agreements in Colorado contained union security clauses which were invalid under the Peace Act, and one official estimated that approximately 11,000 state elections would be necessary to correct the problem.[94] Moreover, Democratic Governor Richard Lamm vetoed one version of the 1977 legislation that prohibited union security for public employees, and he most likely would have rejected a plain right to work bill.[95] As one analysis noted, "The bill, which finally won bipartisan support in both houses, was one of the most controversial pieces of legislation considered by this legislature."[96]

With the 1977 amendments to the Peace Act, Colorado lawmakers struck a compromise between outright prohibition of union security and authorization of union security at the discretion of the negotiating parties. That compromise forces a labor organization to satisfy the burdensome requirement of a state election before it can require employees to support the organization financially, even though a majority of employees

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91. *Id.* at 1080 (Pringle, C.J., dissenting).

92. The NLRB decisions were based on the federal election provisions that were repealed in 1951. Pringle cites *Cyclone Sales, Inc.*, 155 N.L.R.B. 431 (1956); *Western Electric Co.*, 84 N.L.R.B. 1019 (1949); and *Northland Greyhound Lines, Inc.*, 80 N.L.R.B. 288 (1948), to support his conclusion.

93. *See* Act of June 29, 1977, ch. 76, 1977 Colo. Sess. Laws 419. The law is currently codified at COLO. REV. STAT. § 8-3-108(1)(c) (1998).

94. *See* Warren L. Tomlinson, *The Labor Peace Act: Colorado Now is a Modified Right-to-Work State*, 7 COLO. LAW. 1124, 1133 n.24 (1978).

95. *See* Sharon Sherman, *Legislature OKs Union Bill; Averts "Security" Votes*, DENV. POST, June 22, 1977, at 24.

96. *Id.*

voted for union representation in the first place.[97] Additionally, the standard for a union shop election was modified to require a majority of those eligible to vote, or three-fourths of those actually voting, whichever number is greater.[98] Neither the federal experience with union security elections nor the voters' rejection of a Colorado right to work referendum in 1958 dissuaded the 1977 Colorado General Assembly from reviving supermajority election procedures that have scant practical value and minimal policy justification. The next section of this article explores the legislative policies underlying why a state might choose to enact right to work legislation. That analysis is then applied to Colorado law. In turn, the final section discusses how the Colorado compromise helps to illuminate the ongoing debate about the rights of American workers to deal with their employers through collective activity.

II. ANALYZING THE POLICIES OF RIGHT TO WORK LAWS

An extensive body of scholarly literature surrounds the matter of union security and right to work. One major line of inquiry deals with the political implications of right to work laws. This approach, exemplified by Senator Faircloth's introductory remarks to his proposed 1997 National Right to Work Act, emphasizes individual free choice as the fundamental right to be protected.[99] It can be argued, for example, that ensuring workers' unfettered political voice in itself constitutes a necessary and sufficient justification for right to work laws; the policy rests on the civic values of individualism, liberty, and uncoerced political participation.[100] A second line of inquiry examines the economic effects of right to work legislation, the operative element of which is the impact of right to work legislation on a state's economic condition.

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97. *See* COLO. REV. STAT. § 8-3-108(1)(c)(I) (1998).

98. *See id.*

99. *See supra* text accompanying notes 18-21.

100. *See, e.g., National Right to Work Legal Defense Foundation, Inc.* (visited Mar. 5, 1999) <http://www.nrtw.org> (dedicating itself to "providing free legal aid nationwide to thousands of employees whose human and civil rights have been violated by compulsory unionism abuses").

For proponents of right to work laws, the two policy arguments are complementary, but categorically distinct, modes of argument. Standing alone, the idea of autonomous choice in matters of association warrants legislative sanctification. Likewise, economic growth is a potential benefit to all citizens and would in itself justify prohibiting payments of compulsory dues to a union representative. For opponents of right to work, however, the politics and economics of unionism can be seen as two sides of the same coin—only by gaining the economic benefits of collective action can workers realize genuine political participation. From this perspective, the definition of "liberty" takes on social dimensions. Such a conception underlies the basic framework of rights and obligations envisioned by the drafters of the NLRA.[101]

The first stage of our analysis deals with the animating conception of the Wagner Act. That legislation embodies a view of freedom that emanates out of, rather than exists apart from, group behavior. In contrast, the drafters of the Taft-Hartley Act exalted individualism as the primary object of legislative solicitude. After a comparison of these two laws, we summarize economic data about the contemporary state of American workers. That data provides a context for further discussion of freedom of choice and unionization. We then explore the research on the effects of right to work laws on economic development and conclude that no convincing theoretical or empirical arguments justify a ban on union security clauses. Right to work laws neither contribute to a state's growth nor to workers' financial well-being.

A. "Freedom" in the Debates About the Wagner Act

In his speeches advocating passage of national labor legislation, Senator Wagner combined a macroeconomic agenda with a political manifesto about the meaning of "freedom"

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101. One of Wagner's aides observed that, "Senator Wagner's central argument for his bill was always on general economic and social grounds. He never valued the measure primarily as a mere weapon for negating industrial strife, but rather as an affirmative vehicle for the economic and related social progress to which his life-long efforts were devoted." Leon H. Keyserling, *The Wagner Act: Its Origin and Current Significance*, 29 GEO. WASH. L. REV. 199, 218 (1960).

under American capitalism.[102] Wagner's position embodied a paradox concerning the nature of collective action. True freedom, Wagner insisted, could only be attained under conditions of economic sufficiency, and economic sufficiency could be attained only through workers' solidarity. Thus, individual will is best articulated through group action. That conception was most fully expressed in Wagner's repeated attacks on the internal systems of employee representation of the time: so-called "company unions," by means of which an employer dealt with all of his employees through a designated employee speaking on behalf of the work group.[103]

The company union schemes of worker participation emerged as a response to the National Industrial Recovery Act ("NIRA"), which President Roosevelt signed in June 1933.[104] Section 7(a) of the NIRA gave employees a right to form unions and bargain collectively, but the law lacked effective procedures for enforcement against recalcitrant employers.[105] Supporters of the company unions, which were used primarily as union avoidance techniques between the enactment of the

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102. Wagner introduced the first version of his bill in the Senate in March 1934. *See* S. 2926, 73d Cong. (1934), *reprinted in* 1 NLRA LEG. HIST., *supra* note 2, at 1-18. Explaining that legislation, Wagner said:

> The law has long refused to recognize contracts secured through physical compulsion or duress. The actualities of present-day life impel us to recognize economic duress as well. We are forced to recognize the futility of pretending that there is equality of freedom when a single workman, with only his job between his family and ruin, sits down to draw a contract of employment with a representative of a tremendous organization having thousands of workers at its call. Thus the right to bargain collectively, guaranteed to labor by section 7(a) of the [National Industrial] Recovery Act, is a veritable charter of freedom of contract; without it there would be slavery by contract.

78 CONG. REC. 3679 (1934), *reprinted in* 1 NLRA LEG. HIST., *supra* note 2, at 20.

103. During the debates on Senate Bill 2926 in March 1934, Wagner published an article in the *New York Times* explaining his bill. *See* 78 CONG. REC. 4229 (1934) (reading into the record Wagner's *New York Times* article from March 11, 1934), *reprinted in* 1 NLRA LEG. HIST., *supra* note 2, at 22-26. Wagner asserted, "At the present time genuine collective bargaining is being thwarted immeasurably by the proliferation of company unions." *Id.* at 4230, *reprinted in* 1 NLRA LEG. HIST., *supra* note 2, at 23.

104. *See* National Industrial Recovery Act, ch. 90, 48 Stat. 195 (1933) (repealed 1935).

105. On the problems with the NIRA and the need for a workable administrative platform, see BERNSTEIN, THE TURBULENT YEARS, *supra* note 25, at 172-85.

NIRA and the United States Supreme Court's 1935 decision in *A.L.A. Schechter Poultry Corp. v. United States*[106] finding the law unconstitutional, argued that employees should be allowed to choose those forms of representation freely if they so desired.[107] Wagner, however, repudiated the idea that individuals could of their own true volition submit to an entity controlled by the employer. He said, "to argue that freedom of organization for the worker must embrace the right to select a form of organization that is not free is a contradiction in terms. There can be no freedom in an atmosphere of bondage."[108] Underlying Wagner's criticism of company unions was the perception that individual and group interests necessarily aligned themselves through "natural associations."[109] True freedom of choice was inherent in the emancipatory effects of collective voice and not in individual decisions divorced from the overriding goal of union power.[110] It followed that workers'

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106. 295 U.S. 495 (1935).

107. As mentioned earlier, the Court's constitutional view of the NIRA facilitated passage of the Wagner Act. *See supra* text accompanying notes 45-46. In section 8(2) of the NLRA, Senator Wagner outlawed the employer-dominated systems of representation. *See* National Labor Relations Act, ch. 372, § (8)(2), 49 Stat. 449, 452 (1935) (codified as amended at 29 U.S.C. § 158(a)(2) (1994)). The literature on this section of the NLRA is voluminous. For an overview of the legal development and contemporary application, see generally RAYMOND L. HOGLER & GUILLERMO J. GRENIER, EMPLOYEE PARTICIPATION AND LABOR LAW IN THE AMERICAN WORKPLACE (1992).

108. *NLRB: Hearing on S. 1958 Before the Senate Comm. on Educ. and Labor*, 74th Cong. 41 (1935), *reprinted in* 1 NLRA LEG. HIST., *supra* note 2, at 1417.

109. Barenberg, *supra* note 40, at 1455.

110. Congressional debates about employee representation versus trade unionism track the same intellectual terrain as right to work arguments. In both cases, the value of individual volition is juxtaposed against some perceived collective coercion. This view, however, ignores structural inequalities that necessarily figure into any meaningful definition of "freedom." An illuminating exchange took place on the Senate floor on June 16, 1934, when Wagner responded to criticisms that his bill would lead to forced unionization. Senator Walsh asked Wagner if he knew, "of any way to prevent any employee from coercing another employee to join or not to join a union?" Wagner answered:

> Why, no. But we know there is no possibility that the same coercive power can be exercised by one employee against another that can be exercised by the employer against the employee. If the employee does not do what is wanted by the employer, he does not retain his job. To lump employers and employees together is to bewilder the listener and confuse the situation.

political interests were best served by their membership in organizations which provided economic security and stability.

Far from being a superannuated relic of New Deal politics, Wagner's ideas about freedom have at once a historical resonance in American thought and a strikingly modern turn. In the years immediately following the American Revolution, debates about the shape of American democracy occupied national attention, and two competing conceptions emerged. One conception, advanced notably by James Madison and Alexander Hamilton, focused on guaranteeing the security of private property rights as the proper function of government.[111] The "common good," according to this view, was the totality of individual private interests made immanent in the marketplace without government intervention. Thomas Jefferson, Thomas Paine, and other theorists advocated an opposing conception: a state in which government served not merely as a guarantor of property and markets, but as the vehicle by which all citizens would enjoy an equitable share in the country's economic wealth and, as a result, an equal chance to participate in the political sphere.[112] "Humans, according to Jefferson, had a substantive right to economic freedom, a right of access to the means of life."[113] Economic freedom, in turn,

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> What else happens? Suppose the worker says, "We would like to vote for a union to represent us. We feel that you, Mr. Employer, can hire lawyers and economic experts to prepare a perfect case for you upon all the economic questions which enter into a discussion of hours and wages and other conditions of work. Will you let us have an outside organization, free from economic coercion, which will hire lawyers and economic experts to prepare our case so that at least we may have the equality of bargaining power guaranteed under the Constitution and under a democracy? All we want is freedom. That is all we ask."

78 CONG. REC. 12042 (1934), *reprinted in* 1 NLRA LEG. HIST., *supra* note 2, at 1236.

111. *See generally* CHRISTOPHER TOMLINS, LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC 60-97 (1993) (providing an excellent study of the Constitutional debates surrounding issues of liberty and property).

112. Tomlins incisively summarizes the respective positions and historical research on the subject. *See id.* at 74-89. Among the various strands of revolutionary discourse, some popular writers of the time suggested that "the democratic control of the resource of government promised by the Revolution might enable mobilization of that resource in pursuit of egalitarian outcomes," in sharp contrast to unqualified rights of property. *Id.* at 82.

113. *Id.* at 84.

would enable citizens to pursue civic involvement in participatory democracy.

In the end, the influence of Madison and Hamilton prevailed over that of Jefferson and his followers, and the American legal regime became dedicated to securing rights of property over the "excess of democracy."[114] But even if they differed to some extent over the scope of government, both Jeffersonians and Madisonians agreed that opportunity played an essential part in the viability of the new republic. Indeed, one commentator concludes that opportunity was the necessary precondition to American democracy and a "first principle" for the creation of other political values: "[Opportunity] was essential to the building of a nation of virtuous people who could simultaneously be free, secure, and able to enjoy a basic equality of respect and feeling of inclusion."[115] The Founders intended that no citizen would be "subject to the control of anyone else, economically or politically."[116] Conversely, conditions of inequality could be expected to result in less participation in political activity, less trust in government, and less incentive to accept common civic values.

A similar discourse arose as a consequence of the two defining American crises of the twentieth century: the Depression and World War II. In reaction to catastrophic economic conditions in the 1930s, Wagner trusted powerful labor organizations to raise American workers' standards of living and provide a genuine voice in the workplace and in the political sphere. Guided by the conservative temper of the post–World War II era, Senator Taft, Representative Hartley, and their followers relied on individual participation in markets and politics to accomplish those same ends. Two competing visions of freedom thus emerged from the legislative environments of 1935 and 1947. In the latter, unions became

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114. *Id.* at 88. As Tomlins notes of Madison and Hamilton:

> Pursuers of security rather than happiness, they created a state whose discourse in crucial respects privileged law over politics. Faced with the problem of reconciling private rights and democracy the framers chose to confine tightly the scope of democratic politics by creating a highly mediated system of representation and a watchdog judiciary to stand guard over its legislative products.

Id. at 88-89.

115. SCHWARZ, *supra* note 44, at 39.

116. *Id.* at 23.

the oppressors of working people rather than their salvation. That theme was the dominant motif of the Taft-Hartley legislation, and it resulted in a legislative policy fundamentally at odds with Wagner's understanding of our national heritage.

B. "Freedom" and the Taft-Hartley Act

In direct contrast to Wagner's equation of economic equality and political democracy, the Taft-Hartley Act focused on individualism as its touchstone critique of the NLRA. In this respect, the legislative purposes of the Wagner Act and the Taft-Hartley Act flatly contradicted each other. No longer was the belief that workers might attain freedom of choice *through* unionism, but that they should be afforded freedom of choice *from* unionism. By this view, unions were perceived as the enemies rather than the liberators of American workers, exercising inordinate power over employers, the political machinery, and society in general. Compulsory union membership provided the indispensable tool for that domination.

Those sentiments were eloquently articulated during the congressional debates on May 9, 1947, when the Senate considered an amendment in the Senate version of Taft-Hartley that would have prohibited all forms of union security throughout the country.[117] Senator Joseph Ball of Minnesota proposed to delete the proviso to section 8(a)(3) of the bill that permitted agreements for union security and to strike out section 9(e) requiring union security elections.[118] Ball explained his amendment on the ground that employers were forbidden from using "yellow-dog" contracts, which forced employees as a condition of employment to refrain from unionization, and therefore, as a matter of mutuality of obligation, unions should be subject to the same restriction.[119] Moreover, Ball said, the "right to work and earn a living" was not enumerated in the Constitution because the Founders "knew that the right is so fundamental to any kind of political

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117. *See* 93 CONG. REC. 5087-91 (1947), *reprinted in* 2 LMRA LEG. HIST., *supra* note 4, at 1418-28.

118. *See id.* at 5086, *reprinted in* 2 LMRA LEG. HIST., *supra* note 4, at 1418.

119. *Id.* at 5087, *reprinted in* 2 LMRA LEG. HIST., *supra* note 4, at 1418.

freedom or civic rights that it did not really need to be spelled out in the Constitution."[120] In response, Senator Taft pointed out that the committee had carefully considered such arguments but also recognized a long tradition of the union shop.[121] Taft explained that his bill effectively abolished the closed shop by requiring a thirty-day period prior to compulsory membership.[122] Further, Taft said a vote on the issue ensured that employees, rather than the union alone, favored union security.[123] Taft concluded that the committee's compromise would not "violently tear apart a great many long-existing relationships and make trouble in the labor movement; and yet at the same time it will meet the abuses which exist."[124]

The most vocal supporter of Ball's amendment to abolish union security was Senator Albert Hawkes of New Jersey. In an impassioned speech, Hawkes quoted a letter describing threats to one worker who refused to join the union in his workplace. The worker's wife wrote Hawkes: "My daughter and I cannot sleep, because he has to walk a mile along the Passaic River Road on the way home, and we can never sleep until he gets home. So we are the ones who have asked him to join this union, and he has only done so because of that condition."[125] Hawkes continued that in one single year, unions collected more than "twice as much as all the business organizations in the United States" had collected for political purposes.[126] Hawkes then concluded with a plea for the protection of working people from union depredations:

> If we are sincere, if we love this country, and want to save it, let us decide that we are going to vote to sustain the inherent, sacred right of every man and woman in America to work and earn a living, and not to have to doff his hat

120. *Id.*, *reprinted in* 2 LMRA LEG. HIST., *supra* note 4, at 1419.

121. *See id.* at 5087, *reprinted in* 2 LMRA LEG. HIST., *supra* note 4, at 1420.

122. *See id.*

123. *See id.*

124. *Id.* at 5088, *reprinted in* 2 LMRA LEG. HIST., *supra* note 4, at 1420.

125. *Id.* at 5089 (quoting letter from wife of nonunion employee), *reprinted in* 2 LMRA LEG. HIST., *supra* note 4, at 1423.

126. *Id.* at 5090, *reprinted in* 2 LMRA LEG. HIST., *supra* note 4, at 1424. Hawkes mentioned "the little chart [he] sent to every Member of Congress, which showed that in the year 1943, $390,000,000 were taken out of the pockets of the working people of the United States and went into the coffers of the labor unions." *Id.*

> and get on his knees and beg some union labor leader for a right that belongs to him. If this great Congress does not make it safe for every man and woman in the country to go down the street from his home to his place of work, to go into the factory, and while at work feel assured that nothing harmful to him will be done in the factory, and that he will not be working day after day under fear, intimidation, and threat; . . . if we do not do that, Senators, very soon we shall have to say good-by to the great free-enterprise system of America, which is the foundation of our free life and all that makes the American system of freemen.[127]

Despite such heated rhetoric, the senators defeated Ball's amendment in favor of Taft's compromise. That compromise consisted of eliminating the closed shop, requiring approval of union security in a secret ballot election by a majority of eligible voters in the unit, and expressly recognizing a state's right to prohibit union security in section 14(b) of the Taft-Hartley Act.[128] Hawkes's statements nonetheless typify the overriding concern in the Taft-Hartley debates about an individual's right to contract for employment without union interference.

C. *Some Dimensions of Free Choice and Union Membership*

Individual free choice thus formed the backbone of the Taft-Hartley Act's policies. In this section, we discuss the implications of individual choice in different contexts and its relationship to a union's asserted power of coercion. The most basic level of choice is the decision whether or not to support unionization in the first place. Here, individual decisions determine whether a union gains representation rights, since

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127. *Id.*, *reprinted in* 2 LMRA LEG. HIST., *supra* note 4, at 1424-25.

128. Senator Taft contended that section 14(b) did not change the law as it existed under the Wagner Act. *Id.* at 6679, *reprinted in* 2 LMRA LEG. HIST., *supra* note 4, at 1596-97. But Senator Pepper accused the LMRA's drafters of dissembling by refusing to correct a weakness of the labor law that permitted state standards more severe than federal ones. Pepper pointed out that, "when there was something in the Wagner Act which was already restrictive of the rights of labor, they left it there. It is only the generous provisions of the Wagner Act that they have overturned . . . ." *Id.*, *reprinted in* 2 LMRA LEG. HIST., *supra* note 4, at 1597.

majority support is necessary for union recognition.[129] The second area is political activity, where individuals participate in the democratic process. In both cases, evidence and analysis suggest that privileging individual free choice can be highly problematic for the purported beneficiaries of such a policy. Put simply, the individual worker may have little ability to influence either her wages and working conditions or national politics, a factor which seriously undermines the logic supporting right to work laws.

1. Freedom of Choice About Unionization

Workers exercise a basic choice about their participation in unions because they can reject unionization in their workplaces altogether. Before a union can legally represent employees as their bargaining agent, the union must demonstrate its majority status by means of a secret ballot election or by other accepted methods of recognition.[130] Further, if employees are dissatisfied with their representation, they have a right to decertify or reject the union.[131] Any individual worker may petition the NLRB to conduct a secret ballot decertification election, and if thirty percent of the members in the bargaining unit support the request, the NLRB will conduct an election to determine whether the union will continue to act as the representative.[132] Workers also have an array of legislative protections to ensure democratic control over their unions,

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129. *See* International Ladies' Garment Workers Union v. NLRB, 366 U.S. 731 (1961).

130. Section 9(a) of the NLRA provides in part:

> 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 employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment.

National Labor Relations Act § 9(a), 29 U.S.C. § 159(a) (1994); *see also* NLRB v. Gissel Packing Co., 395 U.S. 575 (1969).

131. Section 9(c)(1)(A)(ii) of the NLRA allows a petition which asserts "that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section [9](a)." National Labor Relations Act § 9(a)(c)(1)(A)(ii), 29 U.S.C. § 159(c)(1)(A)(ii) (1994).

132. *See generally* 1 THE DEVELOPING LABOR LAW, *supra* note 17, at 378-80 (describing the rules governing election petitions by employees).

including rights to vote for union officers, attend union meetings and express their views, and have access to financial information regarding union affairs.[133] Finally, union affairs are conducted according to established governance procedures which delineate authority, rights, and obligations; in short, unions are themselves "governments" with their own regulatory apparatus.[134] In light of the many procedural and substantive safeguards for unionized workers, the threat of an oppressive union bureaucracy acting to stifle individual freedom of choice is relatively slight. Indeed, the most serious threat to workers' freedom of choice concerning representation arguably arises from *employers'* interference with workers' preference for unionization.

In 1998, union membership density of the nonagricultural workforce stood at 13.9%, a level historically comparable to the 1920s.[135] Union membership peaked in the mid-1950s at approximately 33.4% and began a gradual decline that continued through the 1970s.[136] Between 1980 and 1990, labor organizations suffered a 34% loss in membership.[137] One of the most widely accepted explanations for union decline is intensified employer opposition to unionization.[138] Employer

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133. *See* Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 401-531 (1994) (codifying the enumerated rights and others).

134. *See generally* JAMES WALLIHAN, UNION GOVERNMENT AND ORGANIZATION IN THE UNITED STATES (1985).

135. *See* Bureau of Labor Statistics, *Union Members Summary* (last modified Jan. 25, 1999) <http://www.bls.gov/news.release/union2.nws.htm> (providing the most recent membership data); *see also* MARICK MASTERS, UNIONS AT THE CROSSROADS: STRATEGIC MEMBERSHIP, FINANCIAL, AND POLITICAL PERSPECTIVES 44 tbl.2.1 (1997) (providing historical figures).

136. *See* MASTERS, *supra* note 135, at 44 tbl.2.1.

137. *See id.* That decline is only exceeded by the losses in membership between 1920 and 1930. *See id.*

138. *See* RICHARD FREEMAN & JAMES MEDOFF, WHAT DO UNIONS DO? (1984); Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983) (describing early and influential versions of this argument). A more recent survey of the literature notes, "There is growing recognition that employer opposition to unions is an increasingly important, if not dominant, determinant of changes in union density rates." Gary Chaison & Joseph Rose, *The Macrodeterminants of Union Growth and Decline*, *in* THE STATE OF THE UNIONS 22 (George Strauss et al. eds., 1991). For a contrary view of union doctrine, see Leo Troy, *Market Forces and Union Decline: A Response to Paul Weiler*, 59 U. CHI. L. REV. 681 (1992). Troy's thesis is that structural economic changes and international wage pressures reduced the demand for unionism.

opposition can be seen as a rational economic response to a threat of unionization because, by virtue of their bargaining power, unions shift a company's resources from owners to workers. And even though unions may actually improve productivity within an enterprise, those gains do not offset the union wage premium.[139] Because of employer opposition, however, current union density levels alone may not accurately reflect the extent to which workers desire representation. For a more comprehensive view of workers' attitudes toward representation, their expressed preferences should be compared to actual union membership. An important recent study documents the "representation-participation" gap in the American workplace.[140] In a survey of more than 2,000 nonmanagerial workers, 63% of the respondents said that they wanted more influence in the workplace. With regard to unionization, the study found that "a substantial minority of employees—several times the current level of union membership—want to join them."[141] Asked if they would favor unionization if an election were held, 32% said they would vote for representation.[142] In view of those findings, it is reasonable to conclude that uncoerced freedom of choice for workers would generate "normal" levels of unionization at least twice as great as they are at present.[143]

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139. One authority illustrates the point with a hypothetical case, in which he concludes: "In order for capital to prefer unionization, the ratio of revenue after unionization to revenue before unionization would have to be larger than 1.4286. Put differently, the productivity increase associated with unionization would have to exceed a whopping 42.86 percent." EDWARD LAZEAR, PERSONNEL ECONOMICS FOR MANAGERS 523 (1998). As a result, "[t]he amount that a firm might be willing to pay to stave off unionization is enormous." *Id*; *see also* Richard B. Freeman & Morris M. Kleiner, *Employer Behavior in the Face of Union Organizing Drives*, 43 INDUS. & LAB. REL. REV. 351 (1990).

140. *See* Richard Freeman & Joel Rogers, *Worker Representation and Participation Survey: First Report of Findings*, *in* INDUSTRIAL RELATIONS RESEARCH ASS'N, PROCEEDINGS OF THE FORTY-SEVENTH ANNUAL MEETING 336, 336-45 (1995).

141. *Id.* at 343.

142. *See id.*

143. The conclusion is supported by recent research comparing union organizing campaigns and successes in 1986-87 and 1994. According to the authors of the study:

> Employer campaigns have undergone the greatest change, not so much in the tactics being used but in the overall intensity. Just as they did a decade ago, the overwhelming majority of employers use a broad range of

The implications of this desire to unionize for right to work laws are straightforward and obvious. According to the AFL-CIO's analysis of membership data, states with right to work laws have an average union density of 7.6% compared to 16.8% in union security states.[144] If workers have a uniform preference for unionization across states,[145] the "representation gap"[146] is significantly higher in right to work states than in non–right to work states. The data thus demonstrate a noticeable bias toward union opposition in right to work states. Rather than providing more freedom of choice for workers, right to work states appear to create conditions in which workers have less recourse to union representation.

One indicator of union opposition is unfair labor practice charges filed with the NLRB. However, aggregate numbers cannot reveal the relative intensity of union opposition when states of different sizes and different levels of union activity are compared to one another. To show differences in the intensity of union opposition in right to work and union security states, we construct an index measuring the average number of unfair labor practice complaints for each union representation petition filed in the respective states over the period from 1980

> aggressive legal and illegal antiunion tactics, including discharging workers for union activity, giving workers illegal wage increases and imposing unilateral changes in benefits, conducting one-on-one supervisor meetings with employees, offering bribes, supporting antiunion committees, holding captive-audience meetings, establishing employee-involvement programs, holding social events, and mailing letters and distributing leaflets. And, just as in 1986-87, most of these tactics are associated with significantly lower win rates.

Kate Bronfenbrenner & Tom Juravich, *It Takes More Than House Calls: Organizing to Win with a Comprehensive Union-Building Strategy*, *in* ORGANIZING TO WIN: NEW RESEARCH ON UNION STRATEGIES 28 (Kate Bronfenbrenner et al. eds., 1998).

144. *See AFL-CIO, The Union Advantage* (visited Mar. 5, 1999) <http://www.aflcio.org:80/uniondifference/uniondiff7.htm>.

145. For evidence that attitudes toward unions are consistent across regions of the country, see THOMAS A. KOCHAN & HARRY C. KATZ, COLLECTIVE BARGAINING AND INDUSTRIAL RELATIONS: FROM THEORY TO POLICY AND PRACTICE 92 (2d ed. 1988).

146. Freeman and Rogers define this term as the difference "between what employees believe they can contribute at the workplace and what current work organizations allow them to do." Freeman & Rogers, *supra* note 140, at 339.

to 1990.[147] That decade represents the most substantial relative decline in union membership since the 1930s.[148] As the data show in Table 1,[149] right to work states averaged 4.25 unfair labor practice charges per representation petition, while union security states had a smaller average ratio of 4.04. Although that variation does not rise to the level of statistical significance, the data are nonetheless consistent with pertinent hypotheses about right to work. Importantly, states as governmental and demographic entities exhibit noticeable variations in their labor relations climates. West Virginia, a union security state, ranks highest on the index with a ratio of 7.65 unfair labor practice charges per representation petition.[150] North Dakota, a right to work state, ranks lowest with a ratio of 1.78.[151] But even if right to work laws are not the sole factor in anti-unionism, right to work states on average show greater union opposition.[152] Consequently, a logical inference is that state policies toward unions do matter in terms of labor conflict and right to work legislation would appear to influence those policies to some extent.

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147. Given the variables inherent in cross-state comparisons of union membership trends, such as population, kinds of economic activity, demographics, and many other factors, we chose a simple proxy for union activity—requests for certification elections—and a simple proxy for employer opposition—unfair labor practice charges against employers. The figures used in the analysis were compiled from National Labor Relations Board annual reports for the respective years. *See* NLRB, ANNUAL REPORT (1980-1990). We are grateful to Courtney Petros, Colorado State University College of Liberal Arts, for her assistance with the task of assembling and analyzing the statistics.

148. *See* MASTERS, *supra* note 135, at 44 tbl.2.1.

149. *See* Table 1, *infra* pp. 947-48.

150. *See* Table 1, *infra* pp. 947-48.

151. *See* Table 1, *infra* pp. 947-48.

152. Colorado ranks fourth on the union opposition index, behind West Virginia, Indiana, and North Carolina. *See* Table 1, *infra* pp. 947-48. For a study that demonstrates the role of cultural conditions in union membership losses, see MICHAEL GOLDFIELD, THE DECLINE OF ORGANIZED LABOR IN THE UNITED STATES (1987). Goldfield attributes union decline to the "changing relation of class forces" in this country, especially "[a] growing offensive of U.S. capitalists that has been meeting with increased success in defeating attempts at new union organizing." *Id.* at 231.

2. Freedom of Choice and Right to Work Laws

Another level at which workers exercise choice about union security is under section 14(b) of the Taft-Hartley Act. As noted above, section 14(b) provides that nothing in the NLRA authorizes agreements "requiring membership in a labor organization as a condition of employment in any State" which prohibits such agreements.[153] This feature of federal labor law allows citizens of a state to engage in political activity to influence their legislators to adopt right to work legislation or to participate in other forms of lawmaking, such as referendum elections on the right to work issue. Section 14(b) follows the Wagner Act's deference to state laws dealing with union security. A distinction to be emphasized once again, however, is that Senator Wagner intended primarily to preserve the legality of closed shops and union methods of attaining them. Wagner's intent is evident in his comment about union security: "The law on the question is in great confusion in the State courts, and any uniform rule as a federal statute would work hardship and injustice in many areas. This is accentuated by the fact that the law in many States is in a state of change."[154] By 1947, however, the labor environment was much different than during the Wagner Act debates and much less favorable to union security.

During World War II, compulsory union membership began to meet with public disapproval as wartime politics overtook labor policies. Between 1941 and 1945, the National War Labor Board ("NWLB") exercised exclusive federal control over labor relations, including union security issues.[155] The NWLB typically granted "maintenance of membership" clauses to unions, thereby requiring workers to remain members in good standing in exchange for a union's no-strike pledge. That practice proved to be controversial as union density and influence grew.[156] Relying on the Wagner Act's deferral to

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153. National Labor Relations Act § 14(b), 29 U.S.C. § 164(b) (1994).

154. 1 NLRA LEG. HIST., *supra* note 2, at 1354 (quoting memorandum from Senator Wagner comparing S. 2926 with S. 1958).

155. *See generally* ATLESON, *supra* note 60.

156. For the historical background, see Nelson Lichtenstein, *Ambiguous Legacy: The Union Security Problem During World War II*, 18 LAB. HIST. 214 (1977).

states on the issue of union security regulation, Florida, Arkansas, South Dakota, Nebraska, and Arizona enacted right to work laws between 1944 and 1946.[157] At the time of the Taft-Hartley Act's passage in 1947, twelve states had laws regulating union security, with nine more states eventually adopting similar legislation.[158] Since 1944, nineteen states have conducted elections regarding the passage of right to work laws; six states have had multiple elections; and altogether, citizens have cast a total of 22,396,226 votes on the question of union security.[159]

Studies of union security elections identify important correlates of voting behavior that fit into the discussion of union density trends. Aggregate data show that for all elections between 1944 and 1986, citizens voted against right to work laws by a margin of 13,038,715 to 9,357,511, or by a ratio of 58% opposed to 42% in favor.[160] Voters in the East rejected right to work most strongly (71% opposed) followed by the West (60% opposed) and Midwest (57% opposed). Only in the South did right to work ballot proposals carry a majority of votes (57% in favor).

Two main conclusions emerge from the demographics of right to work voting. The first and most obvious conclusion is that right to work measures enjoy much less support than their advocates usually claim. As a result, "[w]hile able to point to a number of public opinion polls for evidence to sustain their ideological position, and to successes in legislatures and referendums in certain regions, overall right-to-work advocates have failed to convince the majority of voters who have actually cast ballots on the question."[161] A second conclusion is that votes in favor of right to work are associated with a climate of antagonism toward organized labor in general, such as in the

157. *See* GALL, *supra* note 83, at 18-19.

158. *See* 2 THE DEVELOPING LABOR LAW, *supra* note 17, at 1528.

159. *See* Gilbert J. Gall, *Right to Work Referendum Voting: Observations on the Aggregate Historical Statistics*, 39 LAB. L.J. 805, 811 (1988).

160. *See id.* at 810.

161. *Id.* at 811. The recent California experience with a paycheck protection initiative bears out this conclusion. At the outset of the campaign, polls predicted support for the measure of about 70%. "Labor officials credit an unprecedented drive that mobilized tens of thousands of union households in California." Burkins, *supra* note 23, at A20. The strategy indicates a resurgence of labor's political influence.

South. This antagonism in turn leads to more employer opposition and less support for unionization. Thus, where opposition can be mounted effectively, anti-unionism feeds off its own success.[162]

Turning to the individual level, decisions about right to work are most strongly correlated with union membership, but other important factors include economic status, liberalism, and rural residency.[163] In Missouri's 1978 referendum election, for example, pre-election polls indicated that voters supported the right to work proposal by more than two to one; despite that, labor developed an effective campaign in which the ballot initiative was defeated by a margin of 60% to 40%.[164] The most convincing explanation for that outcome is that unions succeeded in allying themselves with other groups of voters, particularly members of the working class, small farmers, and liberals.[165] Accordingly, a successful political strategy for unions in opposing right to work elections is to generate a broad appeal across the political spectrum rather than to present labor as a faction acting in its narrow self-interest.[166] That strategy is pertinent to the next stage in our discussion of unionism and the meaning of "freedom."

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162. Goldfield offers the following historical insight about union decline:

> The central cause of the political weakness of U.S. labor unions, and the underlying reason for their generally defensive stance, is the failure to organize the South immediately after World War II. The failure to organize the South left both a political and economic bastion of reaction (represented by the control of the Senate and House committees by openly racist Southern Dixiecrats) and helped to stabilize a section of the country that represented both a source of cheap labor and an area of lower-than-union wages.

GOLDFIELD, *supra* note 152, at 238-39.

163. *See* Gilbert Gall, *Union Security Rights at the Polls: A Call for Modeling Right-to-Work Voting*, 9 EMPLOYEE RESPS. & RTS. J. 41 (1996).

164. *See id.* at 48.

165. *See id.* at 55.

166. *See* Gilbert Gall, *Thoughts on Defeating Right-to-Work: Reflections on Two Referendum Campaigns*, *in* ORGANIZED LABOR AND AMERICAN POLITICS, 1894-1994: THE LABOR-LIBERAL ALLIANCE 195, 212 (Kevin Boyle ed., 1998) (presenting study of labor victories in Ohio in 1958 and Missouri in 1978).

3. Freedom of Choice and National Politics

One of the persistent attacks on union security is that it allows labor organizations to compel political support for causes that individual workers may oppose.[167] This criticism is the justification for paycheck protection proposals requiring individual authorization for dues deductions used for political activities. It also furnishes a political rationale for curbing union power over "compulsory" unionism. Reduced to its core logic, the argument is that individuals constitute the ultimate political unit in our democratic system, and unions' coerced financial support from individuals undermines the political structure by frustrating free civic participation. Or, as Representative Bob Schaffer proclaimed during House debates on his paycheck protection bill, "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical."[168] Schaffer stated that the issue is whether Thomas Jefferson's "legacy is correct or whether it will be ignored and trampled by those who believe that union bosses should have their voices heard over and above the voices of common, everyday, hard-working Americans."[169] This rhetoric nicely summarizes the proposition that a worker's individual voice should always trump a union's collective political preferences. Schaffer's position and the critique in general, however, simply ignore the nature of our political process.

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167. Representative Harris Fawell, for example, stated: "The only thing the Worker Paycheck Fairness Act does is give individual workers the right to make the call as to how to spend their money—to decide themselves whether a particular cause, charity or activity beyond collective bargaining is worthy of being funded by their hard work." *The Worker Paycheck Fairness Act: Hearing on H.R. 1625 Before the House Comm. on Educ. and the Workforce*, 105th Cong. 51 (1997) (statement of Hon. Harris W. Fawell). But as a matter of law, workers cannot be forced to contribute to union political activities. In *Communication Workers v. Beck*, 487 U.S. 735 (1988), the Supreme Court held that labor organizations could compel workers to pay dues only for union activities which were germane to the process of collective bargaining; thus, dues payers could claim a rebate for any funds falling outside that function. For a recent case discussing rebate procedures, see *Miller v. Air Line Pilots Ass'n*, 108 F.3d 1415 (D.C. Cir. 1997).

168. 144 CONG. REC. H1754 (daily ed. Mar. 30, 1998) (statement of Rep. Robert Schaffer, quoting Thomas Jefferson).

169. *Id.*

Since the pathbreaking work of political scientist Robert Dahl, the crucial importance of interest groups has become an accepted part of American democratic theory.[170] Dahl asserts that the ideal of majority rule rarely holds true in the electoral process. Instead, competing groups of minorities jostle for political influence over their representatives and, as a result, the "American hybrid" system is accurately described as "polyarchal."[171] In Dahl's formulation: "A central guiding thread of American constitutional development has been the evolution of a political system in which all the active and legitimate groups in the population can make themselves heard at some crucial state in the process of decision."[172] Viewing all political actors as equivalent in terms of power and influence is misguided, Dahl contends. The "normal" process involves group pressure on leaders during the decision-making process and the leaders' efforts to placate diverse groups; as he summarizes, "the making of governmental decisions is not a majestic march of great majorities united upon certain matters of basic policy. It is the steady appeasement of relatively small groups."[173] Therefore, without participation in interest groups, such as unions, an individual's political voice counts for very little. Organized support of group objectives turns out to be the *sine qua non* of political action, rather than the antithesis of democratic government.

A somewhat different, but no less compelling case for collective action can be drawn from economic theory. Standard neoclassical microeconomic analysis assumes the superiority of individual rational choice in economic decisions, just as Representative Schaffer ascribes political primacy to individual voters; and, in theory, individual maximizing behavior will always produce superior aggregate economic outcomes.[174] This

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170. *See* ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY (1956).

171. *Id.* at 73-75. For a more detailed discussion of polyarchy, see ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 232-64 (1989).

172. DAHL, *supra* note 170, at 137.

173. *Id.* at 146.

174. In one guise or another, this principle drives the "free market" approach to employment regulation. For a typical market-based attack on unions, see MORGAN O. REYNOLDS, MAKING AMERICA POORER: THE COST OF LABOR LAW (1987). Reynolds assumes that unions are nothing more than a monopolistic interference with superior contracting arrangements between an individual worker and employer. In his words: "Expressed in blunt terms, U.S.-style unions

assumption informs not only economic theorizing, but much legal scholarship arising out of the law and economics movement.[175] Unfortunately for the theory, the conundrum of "public goods" available to all takers and the presence of free riders who shirk their share of costs refute the basic premise that market rationality eventually achieves a state of wealth maximization. As one scholar recently defined the problem, individuals confront the "cooperator's dilemma" when they attempt to acquire a benefit which is only attainable through collective action but which enables some beneficiaries to opt out of the group effort.[176] The dilemma can be resolved only through procedures that prevent individuals from receiving the benefit of the goods without incurring the costs of acquiring them. One efficacious solution is the contract, whereby participants "devise their own rules, institutions, and processes to avoid free riding, shirking, and opportunistic behavior."[177] Union security, of course, is precisely such an arrangement.

This solution to the free rider problem is persuasively developed in Mancur Olson's classic analysis of group action.[178] Olson argues that in the case of large groups, rational behavior by individual members does not result in the furthering of the

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are government-supported worker cartels that interfere with the price mechanism and therefore impede the advance of prosperity. A prime objection to unions is that they reduce the level of real wages, despite all the ostentatious struggle to raise the prices of union labor." *Id.* at 148.

175. For a critique of the law and economics movement, see generally MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987). A provocative recent attack on the theory is Jedediah S. Purdy, *The Chicago Acid Bath: The Impoverished Logic of "Law and Economics"*, AM. PROSPECT, Jan.-Feb. 1998, at 88. Purdy analyzes particularly the ideas of Judge Richard Posner and Richard Epstein as the foremost proponents of law and economics.

176. *See* MARK IRVING LICHBACH, THE COOPERATOR'S DILEMMA (1996).

177. *Id.* at 129.

178. *See* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965). Lichbach summarizes Olson's influence with the following comment:

> More than twenty-five years has passed since Olson first proposed a rational choice theory of [collective action]. The literature he spawned has influenced all of the social sciences . . . . The literature that deals with the [collective action] problem in one form or another is now so large that it can no longer be read, let alone mastered, in one academic lifetime.

LICHBACH, *supra* note 176, at vii-ix.

group's interest as a whole.[179] When groups undertake action to provide a common good, size affects participation in group effort. The larger the group, the more likely that any given individual will reduce her contribution to the effort, because rewards for action diminish with the size of the group, as do the perceptible results of individual effort.[180] Further, increased size leads to increased organizational costs in attaining group goals. Thus, Olson concludes:

> [I]n a large group in which no single individual's contribution makes a perceptible difference to the group as a whole, or the burden or benefit of any single member of the group, it is certain that a collective good will *not* be provided unless there is coercion or some outside inducements that will lead the members of the large group to act in their common interest.[181]

That argument has a direct bearing on the question of union security and political action.

Applying the above reasoning to compulsory union membership, Olson concludes that workers will not voluntarily support union activities that provide a common good, but workers will rationally try to force others to support such union efforts.[182] They do so because otherwise the collective benefit would not be available. Olson therefore contends that arguments about compulsory union membership and individual "rights" are fallacious and misleading. Although criticisms can be made against the practice, "none of them can rest alone on the premise that the union shop and other forms of compulsory

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179. Olson's thesis applies to firms and markets as well as individuals and groups. He shows how in a perfectly competitive industry, firms will not restrict output to increase price. Rather, the firm will increase production to gain market share. Thus, Olson summarizes: "*A lobbying organization, or indeed a labor union or any other organization, working in the interest of a large group of firms or workers in some industry, would get no assistance from the rational, self-interested individuals in that industry.*" OLSON, *supra* note 178, at 11.

180. *See id.* at 44.

181. *Id.*

182. Olson notes the paradoxical aspect of union participation versus union security. Most workers will not attend union meetings, but most workers "will vote to force themselves to belong to the union and make considerable dues payments to it." *Id.* at 86. That behavior, Olson says, is in fact a "model of rationality." *Id.*

unionism restrict individual freedom, unless the argument is extended to cover all coercion used to support the provision of collective services."[183] In other words, any form of taxation is subject to the same philosophical attack as on union security: individual citizens would not contribute voluntarily to the maintenance of city streets, but citizens willingly vote to impose a tax on themselves and all others to that end.[184]

The question that arises is whether collective action through unionism is fairly analogous to a public good, in that it provides outcomes beneficial to the entire group. Such an analysis must consider two different aspects of union organizations. One aspect deals with the collective bargaining dimension and material benefits of unionization. As discussed below, economists generally concede the existence of a union "wage premium" whereby workers covered under a collective bargaining agreement enjoy higher wages and more comprehensive fringe benefits than their nonunion counterparts.[185] The second aspect concerns the extent to which unions as political entities provide influence and power for their members beyond what a member might obtain through her individual participation. Generally, the labor movement claims to be a vehicle for the improvement of conditions for all workers across the spectrum of our national economy, which certainly constitutes a "public good."[186]

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183. *Id.* at 88.

184. The argument applies with particular force to the rationale of paycheck protection legislation, which requires individual approval for designated expenditures. If individuals should have a right to select which union political programs they wish to support, then individual taxpayers should have the right to allocate their tax dollars among government programs, such as education and not defense. No tenable distinction can be drawn between the coercive force of the state and the coercive force of a labor contract. Indeed, the latter is less coercive because union representation endures only at the pleasure of a majority of the bargaining unit. A majority of citizens cannot vote to disestablish civic government.

185. *See infra* Part II.D.

186. The AFL-CIO Committee on the Evolution of Work recently declared, for example: "Unions have sought as a first priority to take wages and working conditions out of competition and negotiate labor standards that temper the market with human values. But that has never been the limit of the labor movement's agenda for workplace change." AFL-CIO COMM. ON THE EVOLUTION OF WORK, *The New American Workplace: A Labor Perspective*, *in* UNIONS AND WORKPLACE REORGANIZATION 37, 37 (Bruce Nissan ed., 1997).

A careful empirical study by John Delaney and Susan Schwochau analyzes workers' representation in the United States political process as a means of effectuating workplace-related ends.[187] Using various data sources, the authors construct a model to measure individuals' interest and participation in political matters, as well as the effectiveness of group action in legislative activities. They find that across a range of different interest groups, "[u]nions have taken positions on many issues that do not directly benefit organized labor; those positions often benefit the job interest of workers or the general interests of disadvantaged segments of society."[188] The AFL-CIO, as labor's coordinating body, more broadly represents common issues of workers than any other major interest group. Moreover, organized labor has a better understanding of workplace issues than comparable interest groups, and it takes fewer ideological positions than those groups.[189] And while individual political action would appear to be an alternative to the unionist model, it is largely illusory as a practical matter. Delaney and Schwochau observe:

> For representation to occur, workers must be willing to join at least one group or to engage in intensive personal efforts to influence politicians and public policy. As joining a group provides strength in numbers—which may increase the likelihood of achieving favorable policy outcomes—and requires less time from individuals, we believe it is the most effective way for workers to secure representation.[190]

Consequently, political power is secured through representation, not individual effort.[191]

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187. *See* John Delaney & Susan Schwochau, *Employee Representation Through the Political Process*, *in* EMPLOYEE REPRESENTATION: ALTERNATIVES AND FUTURE DIRECTIONS 265 (Bruce Kaufman & Morris Kleiner eds., 1993).

188. *Id.* at 283.

189. For example, workers may share the views of the Americans for Democratic Action on certain work-related issues, but they may not support that group's opposition to the death penalty. *See id.* at 298.

190. *Id.* at 300.

191. Union political action committees ("PACs") invest heavily in election activities. Union fundraising activities, however, have probably failed to realize their potential. One study notes, "In real dollars, the unions raised less than $3 per-member over a two-year period encompassing the 1994 election cycle." MASTERS, *supra* note 135, at 131.

To summarize the argument to this point, Parts II.A through II.C above discuss some meanings of "freedom of choice" as related to membership in union organizations. We contend that workers have ample opportunity for choice in joining, dissolving, and governing their unions. Moreover, the efficacy of individual action, extolled particularly in the debates on the Taft-Hartley Act, has severe limitations from a practical standpoint. Collective action proves a superior method to achieve desirable political ends. The second policy dimension of right to work has to do with economic notions of freedom and equality. In Part II.D immediately below, we marshal evidence about growing income inequality in the United States and its relationship to American unions and workers. Part II.E then pursues the theoretical and empirical connections between economics and right to work laws.

D. Earnings, Income, and Inequality

One of the central domestic labor issues confronting national policymakers is the growing gap between rich and poor in the United States.[192] Since the 1970s, most workers in this country have experienced a substantial decline in real income. For production and nonsupervisory workers in the United States, who make up approximately eighty percent of the workforce, average real hourly earnings declined from $12.72 in 1973 to $11.46 in 1995.[193] In light of the steady advance in real wages over the three decades following World War II, when real average hourly earnings rose by 78.6% from 1947 to 1973,[194] the decline in workers' earnings over the past quarter-century is striking.

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192. For recent treatments of the subject, see JAMES K. GALBRAITH, CREATED UNEQUAL: THE RISE OF WAGE INEQUALITY IN AMERICA (1998); STEPHEN A. HERZBERG ET AL., NEW RULES FOR A NEW ECONOMY: EMPLOYMENT AND OPPORTUNITY IN POSTINDUSTRIAL AMERICA (1998); EDMUND S. PHELPS, REWARDING WORK: HOW TO RESTORE PARTICIPATION AND SELF-SUPPORT TO FREE ENTERPRISE (1997).

193. *See* LAWRENCE MISHEL ET AL., THE STATE OF WORKING AMERICA, 1996-97, 139-40 (1997). Earnings for production and nonsupervisory workers consist almost entirely of wages. Real earnings are adjusted for price changes and thereby reflect purchasing power. All figures are in 1995 dollars unless otherwise noted.

194. *See id.*

Wage changes vary by sex and income group. Male workers have fared more poorly than female workers with respect to wage growth; furthermore, low income groups have fared more poorly than high income groups. Between 1979 and 1995, the segment of male workers earning $15,000 and under "increased dramatically" according to the 1997 *Economic Report of the President*.[195] The percentage of male workers who earned between $15,000 and $30,000 also rose, while the share of male workers earning between $35,000 and $75,000 fell sharply, and the percentage of male workers earning more than $75,000 rose slightly.[196] Among male workers in the bottom fifty percent of the wage distribution, real wages fell by an average of 17.2% from 1973 to 1995; over the same period, workers in the sixtieth percentile suffered a 12.4% decline in real wages, and workers in the eightieth percentile experienced a 5.5% drop in real wages.[197] Only male workers at and above the ninetieth percentile enjoyed a wage increase, but of only 1.0%.[198]

The trend among female workers has been more positive, with the share earning under $20,000 per year falling and the share earning over that amount rising.[199] From 1973 to 1995, female workers in the bottom tenth and twentieth percentiles of the wage distribution suffered a drop in real wages of 16.8% and 8.5% respectively; over the same period, wages rose for all other female workers, albeit by small amounts for women in the middle three deciles of the wage distribution.[200] However, women in the eightieth and ninetieth percentiles enjoyed a wage increase of 18.0% and 21.5% respectively.[201] In fact, it is only the increasing participation of women, especially married white women, in the labor force that has held up household

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195. COUNCIL OF ECON. ADVISERS, ECONOMIC REPORT OF THE PRESIDENT 168 chart 5-3 (1997) [hereinafter ECONOMIC REPORT].

196. *See id.*

197. *See* MISHEL ET AL., *supra* note 193, at 144.

198. *See id.*

199. *See* Frank Levy & Richard J. Murnane, *U.S. Earnings Levels and Earnings Inequality: A Review of Recent Trends and Proposed Explanations*, 30 J. ECON. LIT. 1333, 1334 fig.2 (1992). The minimum wage increase and the earned income tax credit have especially benefited working women. *See* E.J. Dionne, Jr., *Up from the Bottom*, WASH. POST NAT'L WKLY. EDITION, Aug. 3, 1998, at 27.

200. *See* MISHEL ET AL., *supra* note 193, at 146.

201. *See id.*

incomes, which on average were about the same in 1995 as in 1979.[202] The average U.S. household has been working more hours to maintain its income, which in effect means that average standards of living have been falling.[203]

The stagnation or decline of real wages for most workers has been accompanied by a particularly striking increase in earnings inequality. For example, in 1992 the average household in the top one percent of the earnings distribution had a share of total earnings that was 211 times greater than the share of an average household in the bottom forty percent.[204] Virtually all technical measures of inequality show a steep rise in earnings inequality after 1980.[205] The same trends can be observed if total compensation (including benefits) is measured rather than just wages.[206]

Unions and collective bargaining procedures help to maintain relatively higher wages and benefits for workers. In 1997, union members had median weekly earnings of $640, compared with $478 earned by workers without union representation.[207] The figures are not adjusted for other factors that could cause unionized jobs to pay more than nonunionized jobs, but even more sophisticated analyses conclude that unions raise wages for workers covered under collective bargaining agreements by 10% to 15%.[208] The gap may be even larger when the impact of unions on benefits is considered.[209] Unions also help to reduce income inequality, though their

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202. *See* ECONOMIC REPORT, *supra* note 195, at 336 tbl.B-31. Median money income of all households in 1995 was $40,611 and in 1979 was $40,339 (figures in 1995 dollars). *See id.* Note that average household income stayed roughly constant even though the portion of all households headed by single women rose dramatically over this period.

203. *See* JULIET B. SCHOR, THE OVERWORKED AMERICAN: THE UNEXPECTED DECLINE OF LEISURE 17-41 (1992).

204. *See* Javier Diaz-Gimenez et al., *Dimensions of Inequality: Facts on the U.S. Distributions of Earnings, Income and Wealth*, 21 FED. RESERVE BANK OF MINNEAPOLIS QTLY. REV. 6, 36 tbl.1-3 (1997). Note that earnings includes profits, interest, and rent, as well as wages and salaries.

205. *See* Levy & Murnane, *supra* note 199, at 1343 tbl.2.

206. *See* MISHEL ET AL., *supra* note 193, at 133-35.

207. *See* Bureau of Labor Statistics, *supra* note 135.

208. For a good overview of research on the topic, see generally BARRY T. HIRSCH & JOHN T. ADDISON, THE ECONOMIC ANALYSIS OF UNIONS: NEW APPROACHES AND EVIDENCE (1986).

209. *See id.* at 153. See *infra* Part II.E.2 for a more detailed discussion of this issue.

impact in this regard is larger within firms and industries than for the economy as a whole.[210] Further, most scholars conclude that the decline in unionization has contributed to the inability of workers to achieve real wage gains even as productivity growth remained positive, a trend which has persisted until very recently.[211] Thus, as Senator Wagner suggested in the 1930s, equality of power in the workplace is indeed associated with trends toward equality in distribution of earnings.

To fully assess the implications of the economic changes that have swept the American landscape since the mid-1970s, two other trends must be considered in conjunction with the increase in earnings inequality. First, wealth has become far more unequally distributed than income. Between 1970 and 1990, the share of wealth owned by the top one percent of all households rose from 20% to over 35%.[212] By 1992, the share of total wealth held by an average household in the top one percent of the wealth distribution was an astonishing 875 times greater than the share held by an average household in the bottom forty percent.[213] Second, household income, the best measure of standard of living, also became much more unevenly distributed. Between 1979 and 1995, the share of total income going to the bottom eighty percent of all households fell by about 10% while the share of all income

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210. One analysis finds, "By itself the precipitous drop in the union share of the work force in the 1980s explains one-fifth of the growth in wage differentials or overall wage dispersion among male workers." Richard Freeman & Lawrence Katz, *Rising Wage Inequality: The United States vs. Other Advanced Countries, in* WORKING UNDER DIFFERENT RULES 29, 48 (Richard Freeman ed., 1994). However, Hirsch and Addison conclude that the impact of unions on inequality in the aggregate (as opposed to within and across firms) is small. *See* HIRSCH & ADDISON, *supra* note 208, at 177. Most economists put much more stress on technological change as the explanation for rising inequality. *See* ECONOMIC REPORT, *supra* note 195, at 175 box 5-3.

211. *See* Richard Freeman, *Is Declining Unionization of the U.S. Good, Bad or Irrelevant?, in* UNIONS AND ECONOMIC COMPETITIVENESS 143 (Lawrence Mishel & Paula B. Voos eds., 1992). The United States Census Bureau reported that the trend in earning declines reversed itself in 1996, when workers began to make slight gains in earnings. But other analysts point out that the overall movement toward inequality persists, and workers also work longer hours and experience greater job insecurity. *See* Economic Policy Institute, *Executive Summary, State of Working America, 1998-99* (visited Mar. 5, 1999) <http://epinet.org>.

212. *See* EDWARD N. WOLFF, TOP HEAVY: THE INCREASING INEQUALITY OF WEALTH IN AMERICA AND WHAT CAN BE DONE ABOUT IT 8 fig.3-1 (1995).

213. *See* Diaz-Giminez et al., *supra* note 204, at 6.

going to the top twenty percent of households rose by about the same amount.[214] The result is a growing schism between the upper middle class and the rich (meaning at most the top fifth of all households), and the vast majority who are middle class, working class, or low income (meaning at least the bottom four-fifths of all households). An influential commentator, writing at the end of the Reagan era, described the "triumph of upper America" as being accomplished by a transformation in the political economy of the nation.[215] Its main features included conservative politics, the waning influence of labor, and concentrations of wealth.[216] Wealth, he insisted, is strongly correlated with political participation and electoral success.[217]

Briefly, then, inequality stands as one defining characteristic of the contemporary American employment system. Senator Wagner said that freedom for working Americans emerged first and fundamentally from their relationship with employers, and unions offered a means of freedom through collective action. As labor's power began to decline in the mid-1970s, inequality increased; most economists agree that the two phenomena have a close and substantial connection.[218]

During the Taft-Hartley debates, however, a different view of economic liberty prevailed. According to that view, individuals rather than institutions deserved legislative solicitude, and rational, atomistic actors pursuing their self-interest in labor markets free from compulsory unionism would generate higher levels of economic rewards throughout the society.[219] Supporters of right to work therefore concluded that right to work jurisdictions would enjoy economic advantages over union security states.[220] If the market perspective is correct, then right to work laws should have some discernable

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214. *See* ECONOMIC REPORT, *supra* note 195, at 178 chart 5-8.

215. *See* KEVIN PHILLIPS, THE POLITICS OF RICH AND POOR: WEALTH AND THE AMERICAN ELECTORATE IN THE REAGAN AFTERMATH 55 (1990).

216. *See id.* at 56-57. Phillips compares the 1890s, the 1920s, and the 1980s as exemplary periods of capitalist power.

217. *See id.* at 25.

218. For a review of the literature, see Freeman & Katz, *supra* note 210.

219. The theme of individual rights figured prominently in the House Committee's justification of its proposed legislation. *See* H.R. REP. NO. 80-245, at 3-4 (1947), *reprinted in* 1 LMRA LEG. HIST., *supra* note 4, at 294-95.

220. *See supra* note 20.

impact on state-level economics. We next consider the reasoning and evidence used to support that position.

E. The Economics of Right to Work

The economic analysis of right to work legislation can be conducted in both theoretical and empirical terms. The theoretical arguments are primarily concerned with still another definition of "freedom"—the liberty to enter into contractual relations. Economists generally agree that voluntary, enforceable contracts are an important means of maximizing individual and social well-being.[221] From that perspective, right to work legislation can be viewed as a limitation on the freedom of employers and employees to enter into certain types of contracts. As a result, it necessarily reduces the efficiency of market mechanisms. Unions also interfere with free markets by creating monopolies, but in this respect right to work legislation is seen to solve one problem—a reduction in labor market competition—only by creating another—a reduction in contractual freedom. For this reason, theoretically consistent support for free markets criticizes both unions and right to work laws.

Conversely, those economists who are less enamored with the free market ideal are less concerned about contractual liberty, but by the same token they also tend to be supportive of unions.[222] In their view, weaker unions would undermine our system of political economy as the balance of economic power shifts toward capital.[223] By this logic, right to work laws should be opposed not because they inhibit contractual freedom, but

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221. Statements to this effect can be found in almost every standard text on microeconomics and macroeconomics. For a classic exposition written for a popular audience by a Nobel laureate, see MILTON FRIEDMAN, CAPITALISM AND FREEDOM (1962). A recent survey lists Friedman as one of the 15 most influential economists of the past millennium. *See* Kemba Dunham, *Best and the Brightest: Economic Thinkers Who Made a Difference*, WALL ST. J., Jan. 11, 1998, at R20.

222. For example, John Kenneth Galbraith, a well-known critic of laissez-faire philosophies and policies, famously argued that unions are part of a system of "countervailing power" in which big business, big government, and big labor offset one another. JOHN KENNETH GALBRAITH, AMERICAN CAPITALISM: THE CONCEPT OF COUNTERVAILING POWER (1952).

223. For a discussion of the history of this idea, see HOWARD DICKMAN, INDUSTRIAL DEMOCRACY IN AMERICA: IDEOLOGICAL ORIGINS OF NATIONAL LABOR RELATIONS POLICY (1987).

because they are inconsistent with sound macroeconomic policy. From either perspective, however, right to work legislation has little theoretical support in the economic literature.

The empirical arguments about right to work laws focus on economic efficiency, particularly on the impact of unionization and union wage premiums on employment growth.[224] Here economists are more divided. Some believe that right to work laws improve economic efficiency because they reduce the influence of unions, and thereby increase competition, in the labor market.[225] From this perspective, right to work laws are a type of antitrust measure.[226] Others oppose right to work laws because they think that unions improve economic efficiency by correcting market failures.[227] According to this position, the Wagner Act can be interpreted as a regulatory measure and right to work laws as an undesirable type of deregulation.[228]

As we illustrate below, empirical support can be found for both sides of this debate. The support for right to work laws is far from unanimous; furthermore, those studies which find evidence in support of right to work legislation do not show a sizeable impact on economic growth.[229] Consequently, there is no consensus that the benefits of right to work legislation can justify its administrative and economic costs.

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224. For a study tracing the emergence of nonunion employment systems during the 1970s and 1980s as a product of strategic management planning, see THOMAS KOCHAN ET AL., THE TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS (2d ed. 1994).

225. For one version of the argument, see SULTAN, *supra* note 81, at 6-7.

226. *See* HIRSCH & ADDISON, *supra* note 208, at 21-22.

227. James Kenneth Galbraith offers a trenchant criticism of the competitive labor market model in James K. Galbraith, *Dangerous Metaphor: The Fiction of the Labor Market*, *in* PUB. POLICY BRIEF NO. 36 (Jerome Levy Economics Institute of Bard College, 1997).

228. *See* Morgan Reynolds, *The Case for Ending the Legal Privileges and Immunities of Trade Unions*, *in* UNIONS IN TRANSITION: ENTERING THE SECOND CENTURY 221 (Seymour Martin Lipset ed., 1986) [hereinafter UNIONS IN TRANSITION].

229. *See infra* Part II.E.2.

1. Theoretical Issues

Economists tend to be either pro-union or anti-union depending upon their sympathy with the goals of the labor movement, their adherence to the ideal of a free labor market, and their reading of the literature on the effects of unions. It is not surprising that those economists who support unions tend to be hostile to right to work laws. Their opposition stems from their fear that right to work laws will weaken unions and thereby lower the standard of living of workers, weaken progressive political movements, and dilute the democratic process both within firms and in American society as a whole.[230] From this perspective, the passage of right to work laws is one component of the general "retreat from collective bargaining" that escalated in the early 1970s.[231] Whether right to work laws negatively impact unionization is an empirical matter that we discuss more fully below, but even if right to work legislation has only a small effect on unionization, the pro-union position rejects any diminution of union power as unacceptable.

A more unusual position, at least to those who are unfamiliar with economic theory, is put forward by anti-union economists who believe that unfettered market mechanisms yield the best possible economic outcomes. These scholars tend to be critical of unions and of right to work legislation for the same reason: both interfere with the normal operation of supply and demand in the labor market.[232] For labor supply and labor demand to function optimally, employees and employers must be able to establish contracts as they please, including contracts which include union security provisions. In other words, right to work laws are the wrong response to the

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230. *See generally* STANLEY ARONOWITZ, WORKING CLASS HERO: A NEW STRATEGY FOR LABOR (1983); BARRY BLUESTONE & IRVING BLUESTONE, NEGOTIATING THE FUTURE: A LABOR PERSPECTIVE ON AMERICAN BUSINESS (1992); Freeman, *supra* note 211.

231. *See* Richard C. Edwards & Michael Podgursky, *The Unraveling Accord: American Unions in Crisis*, *in* UNIONS IN CRISIS AND BEYOND: PERSPECTIVES FROM SIX COUNTRIES 19 (Richard Edwards et al. eds., 1986).

232. Under this view, any interference in the labor market will reduce economic efficiency and create social costs. For an example with respect to minimum wage legislation, see RONALD G. EHRENBERG & ROBERT G. SMITH, MODERN LABOR ECONOMICS: THEORY AND PUBLIC POLICY 86-87 (1994).

threat of unionism.[233] "Right-to-work legislation . . . deprives employers and unions of their freedom to contract . . . . Rather than allowing the parties to work out an arrangement satisfactory to themselves, right-to-work laws impose a solution by government fiat."[234]

Milton Friedman, one of the earliest and most influential of modern free-market economists, has commented on the theoretical dimensions of right to work laws. Writing in the early 1960s, when liberal politics prevailed with the Kennedy and Johnson Administrations, Friedman drew an analogy between right to work laws and laws prohibiting discrimination based on race. The antidiscrimination laws were enforced at the time by the Fair Employment Practices Commission ("FEPC"), which Friedman analyzed as follows:

> The principles involved in right-to-work laws are identical with those involved in FEPC. Both interfere with the freedom of the employment contract, in the one case by specifying that a particular color or religion cannot be made a condition of employment; in the other, that membership in a union cannot be. Despite the identity of principle, there is almost 100 percent divergence of views with respect to the two laws. Almost all who favor FEPC oppose right to work; almost all who favor right to work oppose FEPC. As a liberal, I am opposed to both . . . .
>
> Given competition among employers and employees, there seems no reason why employers should not be free to offer any terms they want to their employees. In some cases employers find that employees prefer to have part of their remuneration take the form of amenities [such as benefits or working conditions] rather than cash. Employers then find that it is more profitable to offer these [amenities] as part of their employment contract rather than to offer higher cash wages . . . . So long as there are many employers, all employees who have particular kinds of wants will be able to satisfy them by finding employment with corresponding employers. Under competitive conditions, the same thing would be true with respect to the closed shop. If in fact some employees would prefer to work

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233. That is, right to work laws as well as unions result in inefficient employment contracts. *See id.* at 493-98.

234. THOMAS R. HAGGARD, COMPULSORY UNIONISM, THE NLRB AND THE COURTS: A LEGAL ANALYSIS OF UNION SECURITY AGREEMENTS 277 (1977).

> in firms that have a closed shop and others in firms that have an open shop, there would develop different forms of employment contracts, some having the one provision, others the other provision.[235]

Friedman's analogy between right to work laws and antidiscrimination laws reflects his belief in the decentralized workings of the free market. Friedman undoubtedly opposes discrimination; however, he thinks that the forces of supply and demand, rather than bureaucratic intervention, are the best means of eliminating it.[236] By the same token, his critical attitude toward unions[237] does not lead him to advocate a bureaucratic and coercive means of resisting them. To the contrary, he would allow employers and employees to enter into any type of contract they please, including one with union security provisions, and then let market mechanisms demonstrate the results of such choices.[238] In this sense he is more intellectually consistent than the politicians who tout both small government and right to work legislation.

Friedman's argument presumes that workers enter into contracts with employers if and only if the utility they receive from both wages and amenities is greater than the opportunity

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235. FRIEDMAN, *supra* note 221, at 115-16. Friedman describes himself as a liberal rather than a conservative, in the sense that Adam Smith was a liberal. He elaborates: "As it developed in the late eighteenth and early nineteenth centuries, the intellectual movement that went under the name of liberalism emphasized freedom as the ultimate goal and the individual as the ultimate entity in the society." *Id.* at 5.

236. For an exposition of the point, see EPSTEIN, *supra* note 31. Epstein says, "The self-ownership of individual labor forms the cornerstone for freedom of contract in labor markets, with immediate political relevance to the antidiscrimination laws." *Id.* at 24. From that initial principle, it follows that law's only purpose is to eliminate force and fraud in contracting and to otherwise enforce contractual terms. Government intervention is seen to be unnecessary because discrimination results in an inefficient use of human resources. If discrimination increases the costs of production, then competition will automatically drive it out of the market. For a discussion of the debate about this issue, see RANDY ALBELDA ET AL., UNLEVEL PLAYING FIELDS: UNDERSTANDING WAGE INEQUALITY AND DISCRIMINATION 85-117, 178-202 (1997).

237. Friedman believes that unions increase the wages of unionized workers, but only at the expense of increased job competition and lower wages for nonunionized workers. *See* FRIEDMAN, *supra* note 221, at 123-25.

238. The distribution of income would be one such result. *See id.* at 161-76.

cost of their foregone leisure.[239] In other words, workers are motivated not simply by money, but by the entire range of satisfactions they get from work. Satisfaction comes not only from the wage (or more precisely, from the goods which the wage can purchase), but also from amenities such as benefits and working conditions. Because wages and amenities are tied together as a package of satisfactions from work, they trade off against one another. Amenities may result in lower wages if they are desirable, or higher wages if they increase risks or in other ways reduce the utility workers receive from work.[240] Two workers with equal skills may receive different paychecks, but because they also receive different amenities the satisfactions that they receive from work in return for their skills can be equal.[241] Such "compensating wage differentials" allow employers to offer different packages as incentives to attract applicants and motivate employees.[242] Workers then allocate themselves among jobs accordingly. The result is maximum satisfaction for workers, who have the widest possible range of choices, and maximum profit for employers, who are able to best utilize the available human resources.

By reducing the range of these choices, right to work laws actually reduce labor market efficiency. Friedman argues that union security provisions are no different than pension plans or any other benefit which workers may be required to acquire as a condition of employment.[243] Such requirements often reduce the per capita cost of participation in collective workplace action; thus, workers place a positive value on compulsory dues agreements. If job applicants dislike these requirements, they have an incentive to look for a different job offering a different wage-amenity package. The resulting distribution of workers among jobs yields maximum satisfaction for existing workers,

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239. For a formal analysis of the labor-leisure trade-off, see EHRENBERG & SMITH, *supra* note 232, at 169-87.

240. For example, professors get paid less than lawyers (all else equal) because they have more flexible work schedules, more job security and less responsibility, all of which compensate them for their lower earnings. On the other hand, miners tend to earn more than other workers with similar qualifications to compensate them for the special risks their jobs entail.

241. This is one reason why unequal earnings among equally qualified people does not necessarily indicate that the labor market is working improperly.

242. *See generally* EHRENBERG & SMITH, *supra* note 232, at 241-78.

243. *See* FRIEDMAN, *supra* note 221, at 115.

for new workers, and for employers who wish to develop a positive relationship with both. Right to work laws do nothing more than restrict this process and interfere with the optimal allocation of workers among jobs. The result is less satisfaction and less efficiency than would otherwise be achieved by unfettered market mechanisms. Consequently, economic theory argues against right to work legislation.

2. Empirical Issues

The proponents of right to work laws contend that it is in the economic self-interest of the public to prohibit compulsory union membership. They assert that right to work laws enhance job growth, thereby raising wages and reducing unemployment.[244] In contrast, the opponents of right to work laws conclude that unions benefit not only their members, but also create positive spill-over effects for all workers by implicitly pressuring nonunion firms to improve their wages, benefits, and conditions of employment. That economic factor is commonly referred to as the "threat effect" of unionization.[245] Further, unions undertake political efforts to promote legislation which benefits workers as a class, such as safety and health laws.[246] It follows, therefore, that right to work laws contradict the economic self-interest of the majority of citizens because they weaken unions and undermine the gains achievable through collective bargaining power.[247]

This section assesses the evidence for and against the competing economic arguments raised in the right to work debate. There is some empirical support for both of the

244. *See, e.g., Hearings on the National Right to Work Act of 1995, supra* note 21, at 5-8 (testimony of Sen. Lauch Faircloth and Rep. Bob Goodlatte).

245. Traditional labor economics considered the threat effect of collective bargaining—that is, the manifestation of workers' power through organization—as an essential institutional force in maintaining a stable industrial relations system. *See generally*, JOHN T. DUNLOP, INDUSTRIAL RELATIONS SYSTEMS (1958).

246. On the importance of organized labor in the development and implementation of safety and health laws, see David Weil, *Implementing Employment Regulation: Insights on the Determinants of Regulatory Performance, in* GOVERNMENT REGULATION OF THE EMPLOYMENT RELATIONSHIP 429 (Bruce Kaufman ed., 1997).

247. *See, e.g., Hearings on the National Right to Work Act of 1995, supra* note 21, at 1-5 (testimony of Sen. Ted Kennedy and Sen. Paul Simon).

respective positions. However, the magnitude of the economic effects of right to work legislation is small and causation is difficult to determine. According to the weight of the empirical evidence, right to work laws have at best a relatively small impact on the labor market. Furthermore, the discernable effects tend to cancel each other out with respect to their net impact on economic welfare. A review of the literature suggests that empirical arguments advanced in support of right to work laws are not persuasive. Arguably, any law which fails to further its asserted policy objective deserves abrogation.

Definitive empirical conclusions about right to work laws are more difficult to articulate than the theoretical conclusions discussed in the preceding section. Simple comparisons between right to work and union security states are unconvincing because various factors other than right to work laws contribute to economic performance. Take, as an illustration, the conventional argument that right to work laws are an important determinant of overall economic well-being. That argument is contradicted by a comparison of right to work states and union security states in terms of per capita income. Based on recent census data, no right to work state ranks among the top ten in per capita income in 1997.[248] Colorado, the only western state listed, ranks ninth.[249] Conversely, the ten states with the lowest per capita incomes include the right to work states of Idaho, Utah, North Dakota, Arkansas, and Mississippi.[250] The average national ranking of right to work

248. *See* U.S. Dep't of Commerce, Bureau of Econ. Analysis, *State Per Capita Personal Income and State Personal Income* (visited Mar. 5, 1999) <http://www.bea.doc.gov/bea/dr/spitbl-d.htm>. Data are tabulated in Table 2, *infra* pp. 949-50. See *supra* note 20 for a discussion of the impact of taxation and inflation on similar comparisons.

249. *See* U.S. Dep't of Commerce, Bureau of Econ. Analysis, *State Per Capita Personal Income and State Personal Income* (visited Mar. 5, 1999) <http://www.bea.doc.gov/bea/dr/spitbl-d.htm>. Despite Colorado's superior economic performance, not all areas of the state benefited from wage growth. For example, wages grew by 26.85% in Douglas County between 1996 and 1997, but fell by 2.89% in Dolores County. *See* Colorado Dep't of Labor and Employment, *Wage Summary Tables* (visited Mar. 5, 1999) <http://lmi.cdle.state.co.us/es202/97annual/wage_sum.htm>.

250. *See* U.S. Dep't of Commerce, Bureau of Econ. Analysis, *State Per Capita Personal Income and State Personal Income* (visited Mar. 5, 1999) <http://www.bea.doc.gov/bea/dr/spitbl-d.htm>. The respective rankings are as follows: Idaho, 43; Utah, 44; North Dakota, 45; Arkansas, 48; and Mississippi, 50. *See id.*

states with respect to per capita income was thirty-third.[251] Moreover, there is a statistically significant correlation between right to work states and union security states in terms of union density and per capita income.[252]

Problems of causation remain, however, as it might be the case that right to work laws do improve economic well-being, and the comparison of per capita incomes would be even more stark if they did not exist. In states with relatively low per capita incomes, the presence of right to work laws arguably attracts higher levels of employment than those states might otherwise have. The ability of economists to separate out right to work laws from the other factors that determine per capita incomes and other economic outcomes depends upon the choice of data and the specification of the statistical models which are used to process them. Neither of these decisions can be unambiguously correct or free from debate. We begin our survey of the empirical treatments of right to work's economic effects by assessing how those laws influence union density.

a. The Impact of Right to Work Laws on Unionization

The economic impact of right to work laws depends on the degree to which right to work laws affect unions and the degree to which unions influence economic outcomes. We begin with the former question. Right to work laws will reduce unionization rates if they encourage free riding and if they reduce the benefits gained by unions by weakening union bargaining power. Unionization rates are lower in right to work states. As noted above, union density rates in 1997 were 7.6% in right to work states, compared with 16.8% in union security states, and 10% in Colorado, a modified right to work state.[253] However, it does not automatically follow that lower

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251. *See id.*

252. *See* Table 2, *infra* pp. 949-50. A correlation matrix of the data presented there shows that per capita income and union density are negatively correlated with right to work status within conventional levels of significance (<.05). *See* Table 2, *infra* pp. 949-50.

253. State membership figures are based on the AFL-CIO's analysis of data in the Current Population Survey. *See* AFL-CIO, *Union Members by State, 1997* (visited Mar. 5, 1999) <http://www.aflcio.org/uniondifference/uniondiff16.htm>.

unionization rates in right to work states are due to right to work laws. It is possible that low unionization rates and right to work laws both arise from a general distaste for unions. In that case, right to work laws would have no independent effect on unionization rates even though the two are correlated.[254] For example, unionization rates in right to work states did not significantly change after the Taft-Hartley amendments to the National Labor Relations Act in 1947, contrary to what one would expect if right to work laws exerted an independent influence.[255] Instead, it appears that the same antipathy to unions which represses unionization rates also facilitates the passage of right to work laws.

Another potential problem concerns the direction of causality. It can be argued that low unionization rates cause right to work laws because unions lack the political muscle to prevent the enactment of those laws. If causality flows from union weakness toward an anti-union legal climate, then the correlation of right to work status and low unionization rights would not necessarily mean that right to work legislation is an effective means of weakening unions. Of course, an anti-union culture and weak unions may both be responsible for the passage of right to work legislation. Such an interpretation helps to explain the prevalence of right to work laws in southern states, where historical antipathy toward organized labor and historically weak unions led to their enactment.[256] A number of studies have attempted to account for these possibilities and have concluded that right to work laws have no independent impact on unionization rates.[257] If they are correct, then right to work laws can produce no conceivable benefit.

At the same time, other studies have come to the opposite conclusion. For example, Thomas Carroll used a four-equation system to show that "[w]hile right to work laws do not destroy

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254. *See* Henry S. Farber, *Right to Work Laws and the Extent of Unionization*, 2 J. LAB. ECON. 319 (1984).

255. *See* Keith Lumdsen & Craig Petersen, *The Effect of Right to Work Laws on Unionism in the United States*, 83 J. POL. ECON. 1237 (1975).

256. *See* GALL, *supra* note 83, at 32-34.

257. For a summary see William J. Moore & Robert J. Newman, *The Effects of Right to Work Laws: A Review of the Literature*, 38 IND. & LAB. REL. REV. 571 (1985).

existing unions, they do slow down or halt the rate at which unions are organizing."[258] Some authors have argued that the finding that right to work laws have no effect on unionization is biased by the reliance on a data set which includes workers who are not eligible for right to work, and once the sample is restricted to workers who can be affected by right to work laws, a statistically significant impact of right to work laws on unionization can be discerned.[259] Still others have shown that right to work laws lower union membership by encouraging free riding[260] and by decreasing the number of union certification petitions and successful certifications.[261]

More recent estimates of the negative impact of right to work laws on union membership range from about 10% to 30%.[262] Right to work laws reduce unionization levels in part because some existing union members cancel their memberships and become free riders. Primarily, however, right to work laws reduce unionization because they inhibit the ability of unions to organize workers at nonunion sites and to incorporate new members.[263] In periods, like the present, when

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258. Thomas M. Carroll, *Right to Work Laws Do Matter*, 50 S. ECON. J. 494, 508 (1983) [hereinafter Carroll, *Right to Work Laws Do Matter*; *see also* William J. Moore et al., *Do Right to Work Laws Matter? Comment*, 53 S. ECON. J. 515 (1986); Thomas M. Carroll, *Do Right to Work Laws Matter? Reply*, 53 S. ECON. J. 525 (1986) [hereinafter Carroll, *Reply*].

259. *See* Joe C. Davis & John H. Huston, *Right to Work Laws and Union Density: New Evidence from Micro Data*, 16 J. LAB. RES. 223 (1995).

260. *See* Joe C. Davis & John H. Huston, *Right to Work Laws and Free Riding*, 31 ECON. INQUIRY 52 (1993); Casey Ichniowski & Jeffrey S. Zax, *Right to Work Laws, Free Riders, and Unionization in the Local Public Sector*, 9 J. LAB. ECON. 255 (1991). For an argument that free riding is consistent with a small measured effect of right to work laws on unionization because "true" free riders constitute only about one-third of all covered nonunion members, see Russell S. Sobel, *Empirical Evidence on the Union Free-Rider Problem: Do Right to Work Laws Matter?*, 16 J. LAB. RES. 347 (1995).

261. *See* David T. Ellwood & Glenn Fine, *The Impact of Right to Work Laws on Union Organizing*, 95 J. POL. ECON. 250 (1987).

262. These estimates are consistent with the range cited nearly two decades ago by Gordon Bloom and Herbert Northrup in their classic text on labor relations. There they stated (without references) that right to work legislation "usually results in a loss of union membership varying from 10 percent to 40 percent." GORDON F. BLOOM & HERBERT R. NORTHRUP, ECONOMICS OF LABOR RELATIONS 227 (9th ed. 1981).

263. *See* Ellwood & Fine, *supra* note 261, at 252; Jeffrey S. Zax & Casey Ichniowski, *Excludability and the Effects of Free Riders: Right to Work Laws and Local Public Sector Unionization*, 19 PUB. FIN. Q. 293 (1991).

the expansion of unions is marginal even in union security states, the influence of right to work laws on union density is difficult to detect. As a result, the impact of right to work legislation on economic performance is also difficult to discern.

b. *The Impact of Unions on Labor Market Outcomes*

Assume that right to work laws do in fact reduce union membership levels within the ranges suggested above. Is an impact on the order of 10% to 30% great enough to alter economic outcomes? That depends on the power of unions to alter economic outcomes in the first place, which is a subject that economists have debated for many years.[264] It may seem intuitively obvious that workers would not consent to pay union dues if doing so did not yield the payoff of higher wages and benefits. Nonetheless, many economists believe that the economic impact of unions is negligible in the aggregate and over the long run. The scholarly literature offers four separate grounds for that conclusion.

First, unions may benefit their members at the expense of nonmembers.[265] If unions create barriers to occupational mobility, then they may increase job competition in the nonunion sector. As a result, wages may go down and unemployment may go up in the nonunion sector. The income gains for union members will then be offset by income losses to nonunion members, minimizing or eliminating the aggregate impact of unionization. In other words, unions may redistribute income without changing its overall level.[266]

Second, many economists view market mechanisms as the underlying current that carries everything else in their wake.[267] Unions, according to this reasoning, are constrained by market forces and eventually must succumb to the power of

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264. *See, e.g.*, FREEMAN & MEDOFF, *supra* note 138, at 3-25.

265. *See* HIRSCH & ADDISON, *supra* note 208, at 119.

266. For a nontechnical estimate of this effect, see FRIEDMAN, *supra* note 221, at 123-25.

267. For example, this belief is the basis for the argument that macroeconomic policy cannot affect unemployment over the long-run. For a critical examination of this view, see UNEMPLOYMENT, HYSTERESIS AND THE NATURAL RATE HYPOTHESIS (Rod Cross ed., 1988).

markets. If anything, unions are merely the institutional vehicles which give expression to market forces, like waves on top of the ocean's tide.[268] For example, when high unemployment weakens union bargaining power, unions are unable to raise wages regardless of their desire to do so. The impact of unions, in the sense of generating outcomes which differ from those created by an unfettered market, becomes merely trivial.

Third, unions may have limited impact because the state, through employment legislation, has usurped their function.[269] Governmental protection of workers' rights expanded dramatically between the mid-1960s and the present.[270] Those rights are legally enforceable through administrative and judicial channels.[271] The benefits traditionally provided by unions, in the form of job security, protection from discriminatory treatment, and safe and healthy workplaces, are now available to most workers regardless of unionization. By supplanting the positive role of unions with an extensive legal regime, the state undermines union efficacy.

Fourth, the apparent impact of unions on wages may in part be explained by differences in human capital. According to this perspective, more highly skilled workers migrate into the unionized sector to take advantage of wage differentials.[272] The union wage premium would then reflect, at least in part, economic factors that would result in wage inequality even in an unorganized labor market.[273] If better workers gravitate toward unionized workplaces, differentials then arise from individual attributes rather than institutional pressures.

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268. For an elaboration of the metaphor, see ALLAN CARTTER, THEORY OF WAGES AND EMPLOYMENT 20 (1959).

269. *See* Leo Troy, *The Rise and Fall of American Trade Unions: The Labor Movement from FDR to RR*, *in* UNIONS IN TRANSITION, *supra* note 228, at 103.

270. For an excellent recent overview of the subject, see the collection of essays in GOVERNMENT REGULATION OF THE EMPLOYMENT RELATIONSHIP, *supra* note 246.

271. Employment law now makes up a distinct area of legal study. *See, e.g.*, MARK A. ROTHSTEIN & LANCE LIEBMAN, EMPLOYMENT LAW: CASES AND MATERIALS (4th ed. 1998).

272. For an explanation of human capital theory in the employment context, see LAZEAR, *supra* note 139, at 133-65.

273. *See* HIRSCH & ADDISON, *supra* note 208, at 134.

To the extent that any or all of these arguments are valid, the actual economic impact of unions will be less, and conceivably much less, than the impacts evidenced by simple union-nonunion comparisons. Because the impact of right to work laws will only be a fraction of the total difference, right to work laws may contribute little in the way of economic benefits to workers. However, an important group of economists thinks that unions do create benefits for both members and nonmembers.[274] Unions may shift the distribution of income from profits to wages, thereby improving workers' standards of living and strengthening consumer markets. Unions can reduce inequality among unionized workers even if they increase inequality between unionized and nonunionized workers. Unions may even raise productivity if they improve morale, reduce turnover, and improve communication between labor and management.[275] To the extent that these consequences apply, the passage of right to work laws will be costly because they will inhibit the formation of unions and the realization of worker benefits. In this case, of course, right to work laws would be counterproductive from the standpoint of economic efficiency.[276]

The proponents of right to work laws generally take a less positive view of unionism. As noted above, unions may increase unemployment and reduce wages in the nonunion sector if they result in increased job competition. To the extent that unions do raise wages, they may also discourage job growth.[277] Employers may be union-averse for rational or ideological reasons and may choose to locate their firms away

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274. *See generally* Freeman, *supra* note 211.

275. *See generally* HIRSCH & ADDISON, *supra* note 208; FREEMAN & MEDOFF, *supra* note 138. For a more popular presentation of the same argument, see Aaron Bernstein, *Why America Needs Unions (But Not the Kind It Has Now)*, BUS. WK., May 23, 1994, at 70.

276. *See* Gasper A. Garofaolo & Devinder M. Halhotra, *An Integrated Model of the Economic Effects of Right-to-Work Laws*, 13 J. LAB. RES. 293 (1992) (finding that right to work laws lower the ratio of capital to labor, thereby negatively affecting productivity).

277. These two effects are related. Higher wages may result in a substitution of capital for labor in the union sector, reducing the number of jobs available for a given volume of aggregate production (this assumes that the increase in employment from producing the capital goods occurs outside the affected labor market or is insufficient to offset the decline in employment from automation).

from areas of union strength. For these reasons, the proponents of right to work laws believe that employment growth will be stronger in right to work states. In this case, right to work should result in economic benefits if they weaken unions, even if unions themselves have little independent impact on economic outcomes.

A third position is also tenable. It is possible that trends in both directions can coexist, offsetting each other and creating a mixed set of impacts for right to work laws. That, indeed, appears to be the case. The strongest evidence in favor of the pro–right to work faction concerns job growth.[278] Employers do appear to respond positively to right to work laws in their firm location decisions,[279] and states with right to work laws have lower unemployment rates[280] and higher rates of industrial growth. Nonetheless, the presence of right to work laws is only one factor among many in the firm location decision, and not necessarily the most important one at that.[281]

In a recent study, Thomas Holmes offers empirical support for the argument that right to work laws matter.[282] He finds "evidence that manufacturing activity increases abruptly when one crosses the border from an anti-business state to a pro-business state"[283] where the distinction is defined in terms of

278. *See* Moore & Newman, *supra* note 257, at 582.

279. Employers may attempt to weaken unions through geographical strategies because weaker unions enhance profitability. For a good treatment of this form of strategic anti-unionism, see KOCHAN ET AL., *supra* note 224, at 66-72.

280. Unemployment rates in right to work states are less than a percentage point lower than in non–right to work states. However, Carroll disagrees that right to work laws lower unemployment and suggests that the opposite may actually be the case. *See* Carroll, *Right to Work Laws Do Matter*, *supra* note 258, at 509. Other studies also conclude that right to work laws do not reduce unemployment. *See* ALLEN PONAK & DAPHNE TARAS, RIGHT TO WORK STUDY: SUBMISSION TO THE ALBERTA ECONOMIC DEVELOPMENT AUTHORITY JOINT REVIEW COMMITTEE (Working Paper No. 95-25, 1995). Here as elsewhere, it is important to bear in mind that many factors may cause unemployment, so that the association of low unemployment and right to work laws may be spurious.

281. For example, Newman finds that right to work states have faster rates of job growth, but that tax laws are more significant than right to work laws in their effect on job growth. *See* Robert J. Newman, *Industry Migration and Growth in the South*, 65 REV. ECON. & STAT. 76 (1983).

282. *See* Thomas J. Holmes, *The Effect of State Policies on the Location of Manufacturing: Evidence from State Borders*, 106 J. POL. ECON. 667 (1998).

283. *Id.* at 671.

the presence of right to work laws.[284] By comparing states at their borders, he automatically controls for geographic determinants which can influence manufacturing activity such as climate, location, and access to transportation. He concludes that manufacturing employment as a share of total employment increases by about one-third when one crosses from a non–right to work state into a right to work state, but he cautions that this estimate may overstate the average impact of right to work laws because the magnitude of the effect is inversely related to the distance from the border.[285] Further, the estimate incorporates the entire package of state policies and cannot isolate the effects of a single policy such as right to work.[286] In addition, the demographic characteristics of the labor force may vary between states, potentially affecting the distribution of economic activity.[287] Finally, the increase in manufacturing employment as a share of total employment may overstate the impact of right to work laws on job growth per se. Union security states may have slower growth in manufacturing jobs but faster growth in service jobs if unions raise wages and hence the demand for services.[288] Overall, one can conclude that right to work laws do have a positive effect on job growth in manufacturing, although the magnitude of that effect is certainly, and perhaps considerably, smaller than one-third.

Aside from job growth, the effects of right to work laws seem to be negligible. There do not appear to be discernable impacts of right to work laws on wage levels,[289] wage growth, or

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284. Holmes's hypothesis is that right to work legislation signals an environment conducive to the development of manufacturing activity and that empirical data will support a distinction between pro- and antibusiness climates. *See id.*

285. *See id.* at 673, 689.

286. Holmes presents some evidence that right to work is less important than another index of the business climate in determining manufacturing employment. *See id.* at 696-701.

287. *See id.* at 704.

288. Holmes does not make this last argument; however, it follows from his findings.

289. Again, Thomas Carroll disagrees, claiming that right to work laws weaken the bargaining power of unions, and hence lower wage levels in both the union and nonunion sectors. *See* Carroll, *Reply*, *supra* note 258, at 525. Another study found that in 1970, but not in 1980, right to work laws increased inequality and unionization reduced inequality. See Michael Nieswiadomy et al., *The Impact*

wage inequality, even though there is some evidence that the union-nonunion wage differential is actually greater in right to work states.[290] That differential perhaps arises because unions must act more aggressively to attract members, or because wages are lower in the nonunion sector in right to work states.[291] Right to work states typically have lower incomes and wages than union security states,[292] and the existence of right to work laws apparently does little to reduce this differential. Ordinarily, it might be expected that wages would rise as job growth increases the demand for labor. This raises a further question: why do right to work laws appear to have no impact on wages if they do influence job growth?

There are three possible explanations. One, based on the observation that the magnitude of the impact of right to work laws on job growth may be small, is that any subsequent impact on labor demand and wage growth is too weak to have measurable effects. The second is that right to work laws increase job growth because they weaken unions, and unions tend to raise wages. The positive impact of job growth on wages is canceled out by the negative impact of weaker unions on wages. The third possibility is that the type of job growth created by right to work laws is in the low-wage sector of the labor market where wages tend to stay stuck at low levels. Any or all of these explanations can account for the failure of right to work laws to influence wages.

We find no research that has attempted to disentangle all of these possibilities. However, the explanations all lead to the same conclusion: workers in states without right to work laws are unlikely to benefit from the imposition of right to work laws, at least those workers who are employed. The unemployed may benefit if job opportunities expand, but even in this respect we believe that that the positive effect will be minimal where labor markets remain at historically low levels

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of Unionization, Right-to-Work Laws, and Female Labor Force Participation on Earnings Inequality Across States, 12 J. LAB. RES. 185, 185 (1991), for a useful summary of this literature.

290. *See generally* PONAK & TARAS, *supra* note 280.

291. *See id.*

292. *See supra* text accompanying notes 248-52.

of unemployment, which is presently the case generally throughout the United States[293] and especially in Colorado.[294]

c. *Summary of Conclusions*

At best, the empirical research on the impact of right to work laws is equivocal. Much evidence supports the conclusion that such legislation has a negligible causative effect on a state's economic condition. There are no studies that make a strong empirical case to the contrary, despite the persistent rhetoric of right to work proponents about the purported economic advantages accruing to right to work states. Further, the theoretical basis of right to work legislation is inconsistent with the broader economic principle of freedom of contract between employers and employees. In brief, our conclusions about the economic literature on right to work can be summarized as follows:

First, right to work laws reduce the freedom of employers and employees to establish contracts as they see fit; consequently, such laws interfere with the free working of labor supply and labor demand. Economic theory therefore views right to work laws as just another example of counterproductive regulatory interference in the marketplace.

Second, there is a substantial body of literature arguing that right to work laws do not affect unionism. If this is true, right to work laws cannot affect economic outcomes.

Third, if right to work laws do reduce unionization rates, they do so within a range of 10% to 30%, and there is reason to believe that the impact is toward the lower end of this range. If right to work laws have only a small impact on unionization, then they will have only a small impact on the ability of unions to affect economic outcomes.

Fourth, some economists argue that unions do not affect economic outcomes in the aggregate and over the long term. If this is the case, right to work laws can have no economic effect.

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293. In December 1998, the national unemployment rate fell to 4.3%, "capping workers' best year since the 1960s." Jonathan Peterson, *Year-End Growth Spurt Boosts Employment*, DENV. POST, Jan. 9, 1999, at A1.

294. Colorado's unemployment rate was 3.4% in November 1998. *See id.*

Fifth, there is a substantial body of literature arguing that unions do have real economic effects, but this literature can be divided into those who see these effects as positive and those who see these effects as negative. If both tendencies exist (a reasonable supposition), then they will tend to cancel each other out. In this case, right to work laws may affect unionism and unionism may affect economic outcomes, but right to work laws will have little discernable impact on aggregate economic outcomes.

Finally, the direct evidence concerning the impact of right to work laws on economic outcomes shows a mild effect on job growth but no effect on wages, suggesting that right to work laws will do little to improve economic well-being, particularly in periods of low unemployment.

Based on these conclusions, we argue in the next section that the costs of Colorado's modified right to work laws outweigh any perceptible benefits of the law.

III. TWENTY YEARS OF THE LABOR PEACE ACT: AN ASSESSMENT

Majority rule is the bedrock of the American democratic process. With rare exceptions, a majority vote creates laws, selects lawmakers, and decides the most important questions of our political system.[295] The express premise underlying congressional attacks on union security during the Taft-Hartley debates was that individual freedom of choice is paramount.[296] Given those basic assumptions, the Colorado Labor Peace Act election requirement discussed in Part I rests on an inconsistency embedded in a contradiction. It is

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295. For an elaborate discussion of majority rule in democracies, see DAHL, *supra* note 171, at 135. According to Dahl, the rule has both weak and strong versions. In the weak version, a majority is necessary to enact binding rules; in the strong version, a majority is sufficient to do so. Dahl concludes that even if the idea of majority rule is problematic, "the alternatives to majority rule are also deeply flawed." *Id.* at 152.

296. As James Gross, one of the leading authorities on the NLRA, has concluded, congressional emphasis on individual rights undermines the basic structure of collective bargaining. *See* GROSS, *supra* note 50, at 272; *see also* James A. Gross, *The Broken Promises of the National Labor Relations Act and the Occupational Safety and Health Act: Conflicting Values and Conceptions of Rights and Justice*, 73 CHI.-KENT L. REV. 351 (1998).

inconsistent and antidemocratic to permit a minority in a free and open election to overrule the wishes of a majority.[297] As the history of the legislation shows, the only convincing explanation for the Peace Act's requirement of a supermajority is that it burdens unions' ability to maintain strong and stable organizations.[298] Moreover, government regulation of labor markets, as Milton Friedman convincingly argued, contradicts the libertarian agenda of limiting the state's role in capitalism.[299] The Labor Peace Act, therefore, lacks a coherent theoretical policy foundation. Turning to an analysis of the Act's costs and benefits, we argue that the administrative and economic costs of the law exceed its anticipated gains.

A. Union Election Data and Cost-Benefit Analysis

According to the records of the Colorado Department of Labor and Employment ("Department"), the State conducted a total of 351 Peace Act elections in the two decades between April 1978 and April 1998.[300] Recall that in order to negotiate for a union security clause, a union must receive a majority of votes from those eligible to vote, or three-fourths of those actually voting, whichever number is greater.[301] Under that supermajority standard, unions have won a total of 234, or 67%, of Peace Act elections.[302] If the rule were instead a simple

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297. Dahl acknowledges that many democracies in practice limit the principle of majority rule, sometimes by requiring a supermajority to enact collective policies. *See* DAHL, *supra* note 171, at 153. Yet the theoretical problems are sufficiently great "that judgments as to the best rule for collective decisions ought to be made only after a careful appraisal of the circumstances in which these decisions are likely to be taken." *Id.* at 162.

298. *See supra* text accompanying notes 60-70.

299. One response to Milton Friedman's position is the argument raised in the Taft-Hartley debates that because the law protects rights to unionize, society needs laws to prevent unions from abusing their power. *See supra* text accompanying notes 117-27. That response, however, simply destroys the libertarian premise of "less" government. If state intervention is justified to control union power over workers, then state intervention is likewise needed to control abuses of corporate power, such as race discrimination. As a matter of logic, either government intrusion in employment contracts can never be justified or it always can be.

300. The authors gratefully acknowledge the assistance of the Department, particularly Chester Burry, Labor Relations Officer, Division of Labor.

301. *See* COLO. REV. STAT. § 8-3-108(1)(c) (1998).

302. *See* Table 3, *infra* p. 951.

majority of votes cast, unions would have prevailed in 321 elections, or more than 91% of the time.[303] One indisputable conclusion is that Peace Act elections imposed a hardship on unions and supporters of union security by frustrating a majority's preferences in nearly one-quarter of those elections. Whether such a procedure can be supported in terms of the law's policy is questionable.

To undertake a cost-benefit analysis, we use data provided by the Department about the fiscal dimensions of the Peace Act elections. We then compare the putative benefits derived from those elections. According to the Department, the average cost of an election is approximately $615.[304] This figure incorporates certain assumptions about the number of employees involved, the parties' willingness to agree on procedures without a hearing, and the location of some elections outside the metropolitan Denver area.[305] Over the twenty-year life of the current Peace Act, the state has spent $215,865 on elections, for an average yearly expenditure of $10,793.[306] Management also incurs financial costs when it expends resources to deal with administrative matters associated with Peace Act elections, such as furnishing information to the Department and communicating with state officials.

In addition to the administrative costs above, the presence of right to work laws may also exacerbate labor-management conflict, particularly in the unionized sector. Such legislation can lead to antagonistic employment relations if unions believe

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303. Detailed figures are set forth in Table 3, *infra* p. 951. The data can be extended backward and forward. According to figures reported by Seligson and Bardwell, the Colorado Industrial Commission conducted 314 Peace Act all-union elections between 1945 and 1960. Unions won by simple majority vote 281 of those elections, for a win rate of approximately 90%. *See* SELIGSON & BARDWELL, *supra* note 62, at 147. Between May and November 1998, the Division of Labor held six elections, and unions won five of them. *See* Memorandum from Chester Burry, Labor Relations Officer, Div. of Labor, Colo. Dep't of Labor and Employment, to Elizabeth Robertson, Research Assistant, University of Denver College of Law (Jan. 11, 1999) (on file with authors).

304. *See* Letter from Chester Burry, Labor Relations Officer, Div. of Labor, Colo. Dep't of Labor and Employment, to Elizabeth Robertson, Research Assistant, University of Denver College of Law (July 17, 1998) (on file with authors).

305. *See id.*

306. *See id.*

that management takes advantage of the law to undermine unions' power and position by depriving them of necessary financial resources. Reduction in labor management cooperation can result in a reduction in productivity.[307] In addition, the work group may suffer organizational conflict if some workers support the union while others are permitted to shirk their dues obligations. Because right to work laws can destabilize industrial relations within firms, it can have negative economic effects on productivity.[308] Thus, maintaining the Peace Act procedures imposes economic costs on the state, employers, and workers.

Balanced against the costs are the possible benefits of the law. As shown above, the argument that right to work laws provide any measurable economic benefit is untenable.[309] What the evidence does clearly establish is that right to work legislation is associated with lower union membership density, lower per capita income, and higher levels of anti-union activity than in union security states.[310] Although it might be argued that lower union membership and lower per capita income make for an attractive business climate by providing a low-wage, unorganized labor force, that particular benefit of right to work legislation must be balanced against the overall economic welfare of a state's citizens. And because many factors influence a state's economic development, the advantages of a right to work law in promoting growth figure only marginally.[311]

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307. For evidence that productivity can be positively related to a healthy industrial relations climate, see U.S. DEP'T OF LABOR, FACT FINDING REPORT: COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS 29 (1994). The report cites a number of studies to the effect that worker participation and a positive workplace climate produce economic gains. *See id.* at 29-46.

308. For evidence that unions provide workers with "voice" and thereby reduce turnover and improve productivity, see generally FREEMAN & MEDOFF, *supra* note 138. *See also* Freeman, *supra* note 211, at 148-51. That argument has been criticized. *See* HIRSCH & ADDISON, *supra* note 208, at 207-08.

309. *See supra* Part II.E.2.a.

310. *See* Table 2, *infra* pp. 949-50.

311. Wyoming, for example, lags behind other Rocky Mountain states in job growth and wages. *See* Neal Templin, *Wyoming Opts to Lasso Path to Growth,* WALL ST. J., Oct. 6, 1997, at A2. Over a six year period between 1990 and 1996, employment increased 5.2% in Utah, 4.3% in Idaho, 4.2% in Colorado, 3.3% in Montana, 2.6% in Nebraska, and only 1.8% in Wyoming. *See id.* If right to work laws produced more jobs, Wyoming would presumably rank above Montana and Colorado. Median household income offers another economic comparison.

Further, the argument that the Peace Act promotes economic or political free choice is hardly persuasive. The economic principle used to justify right to work is that workers must be protected from union economic coercion. But, in fact, state intervention prevents workers from protecting themselves against the "cooperator's dilemma" of free riding.[312] Workers consistently support union security in Colorado by a strong majority, and the supermajority requirement has nothing to recommend it in terms of democratic principles or practical politics. The existence of a higher voting standard can be attributed to the historical context of the Peace Act, which was driven primarily by anti-union animus and an effort to eviscerate unions' economic and political power, and its 1977 incarnation derived from judicial eccentricity and political expediency.[313] The original Taft-Hartley Act enacted in 1947 contained a requirement for union security elections, but in 1951 Congress repealed the requirement because the federal experience showed that the extra elections served no useful purpose in the industrial relations system.[314] Election outcomes under the Peace Act suggest, likewise, that the union security election procedure does very little to effectuate free choice, if free choice is predicated on individual expression through secret ballots. Indeed, Peace Act elections simply allow a minority of workers to defeat the wishes of a majority.[315] Therefore, it is difficult to argue that the Peace Act

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Percentage differences in two-year moving averages show a 1.5% increase for the United States, 5.7% for Utah, 5.1% for New Mexico, 0.4% for Arizona and Colorado, but a 1.4% loss in Idaho. *See Income 1997* (last modified Oct. 8, 1998) <http://www.colorado.edu/libraries/govpubs/colonumb/in97med.html>. Thus, right to work laws appear to have no positive effect on increases in median household income.

312. *See supra* text accompanying notes 176-84.

313. The Colorado Supreme Court's reasoning in *Communications Workers v. Western Electric Co.* would permit every state to impose unique standards for administering union security. 551 P.2d 1065, 1079 (Colo. 1976). The language of section 14(b), quoted *supra* text accompanying note 6, allows states to *prohibit* union security provisions. *See* 29 U.S.C. § 164(b) (1994). Thus, Chief Justice Pringle's dissent in the case seems the more reasonable view. *See* 551 P.2d at 1080. Moreover, no other state has adopted the Peace Act approach as a labor relations policy.

314. *See supra* text accompanying notes 78-81.

315. As Dahl argues, some limitations on majority rule may be necessary to protect minority rights, but the supermajority voting procedures should be

serves an important policy purpose of ensuring free choice.[316] While it might claim to serve the undeclared but ideologically attractive policy of driving down union membership within the state, the law fails even in that regard. As a percentage of national union density, Colorado remains in approximately the same relative position in 1997 as it was in 1959.[317] Consequently, the purported benefits of right to work laws turn out to be largely illusory.

B. Recommendations for the Peace Act

The policy issue at stake is whether Colorado law should be changed and, if so, in what direction. The research presented here shows that the claimed justifications for right to work are disputable at best. If right to work laws have any appreciable effects, those effects would distinguish Colorado from other states in significant ways. But Colorado's economic growth, income, and levels of union membership are not importantly associated with its modified right to work law. The Peace Act clearly does not promote effective worker voice, since the law in nine cases out of ten enables a minority to frustrate the will of the majority on the issue of union security, which hardly exemplifies basic notions of democracy. Further, the Act's administration involves financial considerations. Although small, the amount of money spent on conducting elections might well be used for other purposes within the Department.[318]

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justified as an exceptional practice on a case by case basis. *See generally* DAHL, *supra* note 171, at 153-67.

316. To reiterate, the problem of free riders must figure prominently in any discussion of the economics of right to work legislation, because union security is an obvious means of dealing with that problem. Moreover, collective activity arguably facilitates rather than frustrates free political choice. *See supra* Part II.C.3.

317. Union density in Colorado's nonagricultural workforce in 1959 was 22.7%. *See* SELIGSON & BARDWELL, *supra* note 62, at 219. At the national level it was 33.2% in 1958. *See* GOLDFIELD, *supra* note 152, at 10. In 1997, the national density was 14.1% and the Colorado rate was approximately 10%. *See* AFL-CIO, *The Union Difference* (visited Mar. 5, 1999) <http://www.aflcio.org/uniondifference/index.htm>.

318. In any event, popularizers of conservative ideology assert three core tenets of the dogma: "[S]maller government, lower taxes [and] personal responsibility and accountability." Cal Thomas, Editorial, *Don't Try to Be a*

In light of the foregoing, we conclude that the General Assembly should repeal the Labor Peace Act's provisions dealing with union security and restore the state's status as a full union security jurisdiction. Colorado voters soundly rejected the idea of right to work in the past, and the electorate's mandate should be given effect. No proven gains—other than an oppositional stance toward unionism—result from right to work legislation. Despite some contrary belief, we contend that unions can serve such beneficial purposes as promoting political participation and reducing economic inequality. Under existing conditions, those purposes clearly outweigh ideological political predilections.

CONCLUSION

Compulsory union membership is an enduring point of contention in American labor law.[319] The juridical revolution worked in 1935 when the National Labor Relations Act provided a partial and temporary solution to the problem. The solution was partial because Senator Wagner did not insist on a uniform national standard ensuring the right of a union to bargain for compulsory union membership as a condition of employment.[320] It was temporary because congressional forces in 1947 incorporated some states' anti-union agendas—including Colorado's—into the federal labor statute.[321] The 1947 Taft-Hartley Act rejected outright the federal acceptance of union security in favor of a thirty-day grace period for union security enforcement, a second federal election in the bargaining unit to approve union security, and deference to

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Democrat, FORT COLLINS COLORADOAN, Jan. 10, 1999, at E2. The Peace Act inserts a governmental presence in the workplace, spends tax dollars, and destroys individual responsibility by allowing minority control over majority interests. Thus, the Peace Act can accurately be described as anticonservative.

319. In 1805, prosecutors indicted a group of shoemakers in Philadelphia for criminal conspiracy. One count of the indictment asserted that the shoemakers unlawfully formed a club or society and agreed than none of them would work for any master who hired a shoemaker not a member of their society. *See* Raymond L. Hogler, *Law, Ideology, and Industrial Discipline: The Conspiracy Doctrine and the Rise of the Factory System*, 91 DICK. L. REV. 697, 713 (1987).

320. *See supra* text accompanying note 38.

321. *See supra* text accompanying note 12.

state legislation outlawing union security.[322] Since 1947, the right to work issue has been a major theme in the conflict between American labor and employers. Despite extensive analysis, the policy grounds advanced in support of right to work remain ambiguous and unconvincing.

Colorado's modified right to work law offers a unique perspective on right to work legislation. The Labor Peace Act provided a model for the Taft-Hartley amendments dealing with union security, and the revival of Peace Act union security elections in 1977 continued experimentation on the state level with the theoretical and practical outcomes of right to work laws. Over the past twenty years, that ongoing experiment has confirmed the futility of right to work laws in conferring net positive benefits on a state's citizens. Colorado's law has not demonstrably contributed to economic growth or to workers' freedom of choice in matters affecting their working lives. With respect to union security elections, both the federal and state experiences show that workers overwhelmingly support their representative's right to negotiate for union security, a fact which led Congress to eliminate the requirement from federal labor law in 1951.[323] Colorado data reveal that in over ninety percent of all Peace Act elections, a majority voted in favor of compulsory dues payment.[324]

To conclude, right to work legislation is difficult to justify as sound legal policy. The rhetoric of right to work propounds such values as freedom from coercion and economic security for industrial citizens, but the law fails to deliver on those promises. Right to work statutes, nonetheless, do serve a purpose. They generally promote an environment of hostility to unions, as evidenced by lower union density rates and higher levels of employer opposition to organizing efforts.[325] Right to work movements, and their recent incarnation in the "paycheck protection" initiatives, thus function as iconography. They signal an attitude towards labor that appeals to certain segments of business and society; and, in that regard, the

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322. *See supra* text accompanying notes 71-77.

323. *See* Act of Oct. 22, 1951, ch. 534, 65 Stat. 601 (codified as amended at 29 U.S.C. § 158 (1994)).

324. *See* Table 3, *infra* p. 951.

325. *See* Table 2, *infra* pp. 949-50.

Colorado Labor Peace Act stands as a defining symbol of political power, but little else.

Table 1: Unfair Labor Practice ("ULP") Charges and Representation Petitions Between 1980 and 1990[326]

State	Number of ULP Charges	Number of Representation Petitions	Ratio of Charges to Petitions
West Virginia	4,400	575	7.65
Indiana	11,941	1,829	6.51
North Carolina*	3,817	593	6.44
Colorado†	4,587	748	6.13
Texas*	8,944	1,531	5.84
Nevada*	2,951	505	5.84
Tennessee*	6,396	1,148	5.57
Kentucky	5,132	956	5.42
Georgia*	5,784	1,094	5.29
Oklahoma	2,306	442	5.22
South Carolina*	1,421	278	5.11
Mississippi*	1,850	364	5.08
Louisiana*	2,630	519	5.07
Connecticut	5,769	1,044	4.95
Ohio	17,830	3,843	4.64
Virginia*	4,123	893	4.62
Wyoming*	398	91	4.37
Arizona*	3,291	755	4.36
Nebraska*	1,151	268	4.29
Maryland	4,850	1,152	4.21
Massachusetts	8,454	2,013	4.20
Rhode Island	1,105	263	4.20
Missouri	9,461	2,276	4.16
Michigan	15,732	3,852	4.08
California	34,461	8,492	4.06
Florida*	6,970	1,722	4.05
Illinois	16,551	4,097	4.04
Pennsylvania	17,072	4,281	3.99
Wisconsin	6,375	1,599	3.99

326. Data are compiled from the NLRB's annual reports. *See supra* note 147.

Vermont	450	114	3.95
Arkansas*	1,600	409	3.91
New Mexico	1,099	288	3.82
Kansas*	1,809	476	3.80
Washington	6,789	1,801	3.77
Alabama*	3,176	867	3.66
New Hampshire	589	165	3.57
Maine	956	274	3.49
Alaska	1,152	342	3.37
New York	23,446	7,232	3.24
Delaware	603	186	3.24
New Jersey	9,910	3,218	3.08
Oregon	2,899	1,000	2.90
Iowa*	2,097	750	2.80
Hawaii	1,395	531	2.63
Idaho*	767	297	2.58
Montana	1,100	437	2.52
Utah*	766	308	2.49
South Dakota*	228	102	2.24
Minnesota	3,157	1,471	2.15
North Dakota*	271	152	1.78

* Right to work state.

† Modified right to work state.

Average Ratios of Charges to Petitions:
Right to work states = 4.25
Union security states = 4.04

Table 2: Per Capita Income and Union Membership Density by State in 1997[327]

State	Per Capita Income ($)	Union Density (%)
Connecticut	36,263	17
New Jersey	32,654	22
Massachusetts	31,524	15
New York	30,752	26
Delaware	29,022	12
Maryland	28,969	15
Illinois	28,202	19
New Hampshire	28,047	10
Colorado†	27,051	10
Minnesota	26,797	20
Nevada*	26,791	19
Washington	26,718	21
California	26,570	16
Virginia*	26,438	7
Pennsylvania	26,058	17
Hawaii	26,034	26
Rhode Island	25,760	19
Michigan	25,560	23
Alaska	25,305	20
Florida*	25,255	7
Ohio	24,661	19
Wisconsin	24,475	19
Oregon	24,393	18
Kansas*	24,379	8
Georgia*	24,061	7
Missouri	24,001	15
Nebraska*	23,803	9
Texas*	23,656	6
Indiana	23,604	15
Vermont	23,401	9

327. Figures on state income are drawn from the Department of Commerce report. *See supra* note 248. Data regarding state union members are from an AFL-CIO analysis. *See supra* note 253.

North Carolina*	23,345	4
Iowa*	23,102	13
Tennessee*	23,018	9
Wyoming*	22,648	9
Arizona*	22,364	7
Maine	22,078	14
South Dakota*	21,447	7
Alabama*	20,842	10
South Carolina*	20,755	4
Louisiana*	20,680	7
Kentucky	20,657	12
Oklahoma	20,556	8
Idaho*	20,478	9
Utah*	20,432	8
North Dakota*	20,271	9
Montana	20,046	14
New Mexico	19,587	8
Arkansas*	19,585	6
West Virginia	18,957	16
Mississippi*	18,272	5

† Modified right to work state.

* Right to work state.

Table 3: Colorado Labor Peace Act Election Data from 1978 to 1998[328]

Year	Number of Elections	Number of Union Wins	Number of Elections with Union Security Majority
1978	39	32	37
1979	38	25	36
1980	47	27	45
1981	31	24	30
1982	21	12	19
1983	14	9	13
1984	12	9	11
1985	12	6	10
1986	10	4	7
1987	14	8	11
1988	17	12	15
1989	15	12	13
1990	13	8	11
1991	15	9	15
1992	14	10	12
1993	7	4	6
1994	6	5	5
1995	6	5	6
1996	6	4	6
1997	12	7	11
1998 (to April)	2	2	2
Totals	**351**	**234**	**321**

328. Data provided by the Colorado Department of Labor and Employment. *See supra* note 303.