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Duality and division: the development of American labour policy from the Wagner Act to the Civil Rights Act

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Introduction

The American labour movement is in a profound crisis (Modjeska, 1985; Edsall, 1988). Under the Republican administrations of Ronald Reagan and George Bush, organised labour suffered massive membership decline, faced a decidedly hostile National Labour Relations Board (NLRB) and a conservative federal court system (Doyle, 1985; Goldfield, 1987; Mishel and Voos (eds), 1992). These Republican administrations were so successful in restricting organised labour's power that in 1984 Lane Kirkland, the president of the AFL-CIO, began asking for the repeal of the National Labour Relations Act establishing the NLRB (Gould, 1986).

Though the Democrats in Congress have made little effort to undermine the Republicans' national labour policy, state courts and legislatures reacted to New Federalism and the crisis with organised labour by offering their own labour policy. With unions protecting fewer and fewer employees, state courts and legislatures developed individual employee rights for the non-union workforce (Gould, 1988; St. Antoine, 1988; Weiler, 1990; Stone, 1992). For instance, 39 states have adopted laws prohibiting unjust dismissal (Summers, 1988).[1]

The labour policy constructed by these state courts and legislatures, however, does not cover organised labour. Since the supremacy clause in the U.S. Constitution gives precedence to national over state laws, organised labour does not receive the same protection that the non-union workforce enjoys. Indeed, to ensure that the American labour movement did not share state-established individual employment rights, as Katherine Van Wezel Stone aptly demonstrates, the federal courts developed a broad pre-emption doctrine. Offering her own normative explanation, Stone contests the efficacy of replacing the New Deal labour-management framework, which had 'intended to create collective rights for workers and to empower organised labour', with individual employment rights (Stone, 1992). Stone argues that what she calls the New Deal system of 'industrial

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[1] Thirty-two states have prohibited unjust dismissal with public policy exceptions and 11 states have accepted covenants of good faith and fair dealing for such dismissal. At the same time, some states have outlawed unjust dismissal under specific circumstances such as retaliation for filing workers' compensation claims, and against whistle blowers.

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pluralism' or workplace self-governance has overemphasised the value of private contractural relations between unions and employers and should be reconstituted to accommodate these individual employment rights.

This article concurs with Stone's conclusion that collective bargaining should supplement individual employment rights. Without collective representation, workers have little voice at the workplace or within the polity (Freeman and Medoff, 1984; Fiorito *et al.*, 1988). But rather than focusing on the federal judiciary's trade-off between awarding state or national employment rights, this article explores the legislative dimension of these national rights in its historic perspective. It will be argued that partisan constraints imposed on the Democrats and Republicans alike contributed to the development of two types of administrative agencies—the quasi-judicial agency and the prosecutorial agency—which created a tension between collective bargaining and individual employment rights. Although neither administrative agency had preemptive powers, the emergence of such separate institutional forums, and the substantive distinction they made between bargaining and rights, weakened both collective bargaining and individual employment rights. By the late 1960s, this duality in American labour policy, which had first emerged during the New Deal, strained the relationship between collective bargaining and individual employment rights so severely that it began to divide the liberal Democratic community.

From the New Deal period onwards, the Democrats and Republicans cultivated the struggle between individual employment rights and collective bargaining when they constructed three critical administrative agencies—the NLRB, the Fair Labor Standards Administration (FLSA), and the Equal Employment Opportunity Commission (EEOC). First, the Democrats, who had long harboured ambivalence about organised labour's collective capacity, created the potential for conflict between collectivism and individualism during the New Deal by formulating a dualistic labour policy. To begin with, they crafted the National Labor Relations Act of 1935 or what is commonly called the Wagner Act. This Act erected the NLRB, a quasi-judicial agency which prohibited employers from committing unfair labour practices. It relied on impartial experts to investigate and adjudicate these practices. The NLRB, however, refrained from determining the conditions of a collective bargaining contract.

Then, in 1938, the Democrats passed the Fair Labor Standards Act which set minimum wages and maximum hours, among other individual employment rights. This Act established the Fair Labor Standards Administration which constituted the other half of the dualistic labour policy. The FLSA was an adversarial and prosecutorial, rather than a quasi-judicial, agency which protected the public by creating, for instance, a minimum wage. Unlike the quasi-judicial agency, this prosecutorial agency declared its bias for the individual worker. It established clear rules and standards and then determined who violated them. The FLSA could only investigate and conciliate, not adjudicate disputes, for instance, over minimum wages and maximum hours.

The Democrats' dual labour policy met with little opposition from the American labour movement during the New Deal. Although labour leaders from the American Federation of Labor (AFL) would later complain that the NLRB had too much

power and authority over determining collective bargaining units, the AFL and the Committee on Industrial Organization (CIO) supported the passage of the Wagner Act. They also backed the FLSA. In fact, the AFL and the CIO preferred a dualistic labour policy because it would not integrate individual employment rights and collective bargaining. Still adherents of the labour theory of voluntarism, union leaders from the AFL and the CIO insisted that collective contractual relations between unions and employers remain private. Individual employment rights, such as minimum wage and child labour restrictions, could be tolerated only if they did not interfere with organised labour's right to bargain.

Second, given the opportunity to try to dismantle the New Deal in the 1940s, the conservative coalition of Republicans and Southern Democrats recognised the conflict with the Democrat's dualistic labour policy and played one end against the other. In 1947, this coalition circumscribed organised labour's collective capacity by convincing most Democrats that as a quasi-judicial agency, the NLRB had been 'captured' by the CIO and that its partisan rulings gave the American labour movement too much power. Then, 17 years later, when the passage of the Civil Rights Act of 1964 was imminent, this conservative coalition again exploited the tension between individual employee rights and collective bargaining. At the last moment, the liberal Democrats, however, convinced enough moderate Republicans to bolt from this conservative coalition and help them pass the Act. They did so by conceding that the EEOC, among other provisions, would not have the powers of a quasi-judicial agency.

The construction of the EEOC, this article concludes, ushered in the era of 'new politics'. It tipped the balance towards individual rights. Thereafter, liberal Democrats abandoned most forms of collective empowerment and started building prosecutorial agencies like the Environmental Protection Agency (EPA), and the Occupational Safety and Health Agency (OSHA) which emphasised the utility of individual employment rights. With these agencies, it could be said that the reform-minded Democrats entered the rights discourse (Gabel, 1984; Lynd, 1984; Schneider, 1986; Rhode, 1990). The American state would decide what consituted a right, design legislation which protected this right for each individual autonomously, and thereby limit the possibility that groups of individuals within unions or other collective organisations would depend on one another and transform society. The ideology propagated by social regulatory agencies echoed the so-called rights claims within traditional liberalism, which being individualistic, undermined the worker solidarity necessary for collective action and effective collective bargaining.

This rights discourse further limited the opportunity for social change since it divided the liberal community (c.f. Harris and Milkis, 1989; Eisner, 1993). Organised labour became more and more distant from the pulse of reform as the advocates of social regulation sought public goods, such as clean air and water, without fully addressing their cost. That is, social regulation based on the theory of rights created a zero-sum game between consumers and producers which hardly took workers into account. Workers, particularly those in the organised workforce, were caught in the middle, not being able to completely align themselves with either consumers or producers. Though unions participated in a system of industrial self-governance with their employers, being the weak link within this type of

governance meant that organised labour lost its political autonomy. The American labour movement lacked the power either to compel the producers to abide by social regulation or 'to exit' in co-operation with the consumers.

A social movement credibility gap then surfaced because the erection of prosecutorial agencies had only compounded an ethic of individualism embedded in the existent labour-management relations framework. Since its creation, the NLRB never explicitly recognised the role union leaders could play as spokespersons for the workforce. Unions were regarded as exclusive organisations which had to be regulated by this state apparatus simply to ensure that they represented their own unionised workforce. Relying on rights claims, prosecutorial agencies more firmly entrenched the notion that individual employment rights *should* be placed above the rights secured by collective bargaining. Individual rights were associated with the public good, whereas collective bargaining increasingly became seen as a private good. But then, the structural design of the EEOC, as well as other social regulatory agencies, made these rights claims difficult to enforce. Hence, social regulation weakened private contractual relations unions and employers enjoyed, did not provide the champions of social regulation with the relief they sought, and divided the liberal coalition within the Democratic Party.

The Democrats formulate a dualistic labour policy

The liberal Democrats and the American labour movement have never been in complete agreement about reforming labour law. Beginning in the 1890s, progressives from both political parties as well as the Progressive Party promoted better work conditions and welfare reform, such as minimum wage and maximum hour legislation (Wiebe, 1962). By contrast, the AFL sought labour legislation, like anti-injunction relief, which freed organised labour from restrictive *or* protective state interference. Quite simply, the progressives and organised labour disagreed about whether individual employment rights or collective bargaining would better serve the workforce.

The progressive Democrats who could be distinguished as urban-liberal Democrats after the 'Al Smith Revolution' of 1928, sought state protection (Huthmacher, 1968; Buenker, 1973). They hoped that the state and federal governments would develop a list of equal rights and work conditions like the eight-hour day. Still clinging to their ideology of voluntarism, organised labour opposed all state-driven initiatives, favouring market-driven labour solutions. The AFL planned on using its power of collective action to force employers to establish better work conditions and higher wages and salaries.

Satisfying both the liberal Democrats and organised labour during the New Deal, President Franklin D. Roosevelt's administration passed the Wagner Act of 1935 and the Fair Labor Standards Act of 1938. First, the Democrats created the NLRB, a quasi-judicial agency which prohibited employers from engaging in unfair labour practices. Serving an exclusive clientele—organised workers and their employers—the NLRB empowered unions by offering them the opportunity to organise free of the anti-union employers' obstructive tactics. The NLRB investigated employers who committed unfair labour practices, passed judgements, and rendered what

would later be called partisan justice by its detractors. They protested that this Board had been 'captured' by its constituency of organised labour.

Second, the FLSA, which set minimum wages and maximum hours, constituted the other half of the Democrats' dualistic labour policy. While this Act, weakened by many exemptions, initially applied only to one-fifth of the workforce, it set *public* standards: employees deserved a wage calculated according to the value of their services, and should spend a limited amount of time at a workplace. The FLSA made minimum wages and maximum hours a public good since an adversarial agency, not a quasi-judicial agency, would safeguard them. This agency would investigate minimum wage violations, for instance, and then bring these violators before a federal court. Directly serving the public, not a specific clientele, the FLSA would be accused of practising partisan justice. Unlike a quasi-judicial agency, this adversarial and prosecutorial agency could not be captured by its constituency.

While liberal Democrats fought for both the Wagner Act and the FLSA, organised labour only reluctantly gave the latter its support. Union leaders realised that the Democrat's dualistic labour policy could erode organised labour's collective bargaining capacity. From the beginning, they feared, as William Green, the president of the AFL, explained, that 'the minimum [within the FLSA] tends to become the maximum' and collective bargaining would become redundant (Martin, 1976).

Green saw the danger of this type of protectionism because it prevented union leaders from becoming so-called functional representatives of the public good. That is, workers depended on the state, not organised labour, for the employment conditions they received. In fact, the Wagner Act itself, which facilitated collective bargaining, did not recognise the union's role as the workers' spokesperson. To understand why this Act stopped short of making organised labour a vehicle for social change, this next section reviews the history of its passage.

The Democrats' ambiguity about collective bargaining buried within the Wagner Act

In March 1934, Senator Robert F. Wagner, a liberal Democrat from New York, introduced a comprehensive labour-management relations Bill—the Trade Disputes Bill. This Bill was the precursor to the Wagner Act. It created a tripartite NLRB to investigate, mediate, arbitrate, and adjudicate labour disputes in all industries (Fine, 1963; Gross, 1974). Most importantly, the Trade Disputes Bill promoted unionisation by *de facto* as it upheld collective bargaining agreements. The NLRB supervised employee representation elections and certified employee representatives to forestall the outbreak of strikes and lock-outs that so often occurred over the issue of union recognition. The NLRB determined employee representatives by monitoring elections or using 'other appropriate method[s]' of determining which group would bargain collective trade agreements for employees (Fine, 1963).

The Democrats' discomfort with collective bargaining rights first surfaced shortly after the hearings about the Trade Disputes Bill. First, when Wagner initially

introduced this Bill, Roosevelt refused to lend his support (Wagner, 1935; Irons, 1982).[1]

Second, members of his administration and the bulk of pro-administration Democratic Congressmen also opposed the Trade Disputes Bill. Working behind the scenes during the hearings, the Department of Labor, the National Recovery Administration (NRA) administrators, and the pro-administration Democrats sabotaged the Trade Disputes Bill by offering a substitute Bill (Bernstein, 1950). This substitute Bill extended organised labour the civil liberty of freedom of association, but did not support collectivisation. Third, Wagner's second Bill, the National Labor Relations Bill, represented a compromise between individual employee rights and collective bargaining.

After the hearings about the Trade Disputes Bill, Roosevelt asked David Walsh, the Chair of the Senate Committee on Education and Labor, to have Charles E. Wyzanski, Solicitor General of the Labor Department, rewrite Wagner's Bill. Given this task, Wyzanski cut the heart out of the Trade Disputes Bill by eliminating the employers' duty to negotiate with employee representatives, which he claimed empowered organised labour (Bernstein, 1950). The substitute Bill was not grounded on the premise that collective trade agreements were preferable to individual trade agreements. As Wyzanski described it, the substitute Bill founded the employees' right to join a union, or any other labour organisation, on basic civil liberties: every individual has the right to belong to associations of their own choosing but the proposed NLRB could not promote collective contractualism (U.S. Congress, 1934).[2] Organised labour would not be endorsed as a vehicle for social transformation. The substitute Bill only supported the individual employee's right to choose representation.

Outraged that he had not been given the opportunity to revise his own creation, Wagner sponsored several amendments which would have restored the heart of his original Bill. Yet, by a vote of 9 to 2, the Committee approved Wyzanski's revisions without Wagner's amendments. Only Wagner and the progressive Republican Senator Robert M. LaFollette, Jr. voted against the Wyzanski Bill (Witte Papers, 1934).[3] Much to Wagner's chagrin, Roosevelt then pledged his support to the Walsh Bill. Before the Walsh Industrial Adjustment Bill came up for debate, events outside Washington spurred Roosevelt to re-examine his position on the Walsh Bill (Casebeer, 1989).[4] Thinking it would be too difficult to pass without excessive delay (since the congressional Democrats were divided), Roosevelt abandoned the Walsh Industrial Adjustment Bill and Wyzanski was to develop emergency legislation that would directly address the steel industry dispute.

After the congressional elections of 1934, which made Congress more prone to pass pro-labour legislation, Wagner brought another comprehensive labor relations Bill before the Senate Committee on Education and Labor. On February 21, 1935, Wagner introduced the National Labour Relations Bill on the Senate floor (Gross,

[1] Richberg wrote a letter to Wagner, indicating his opinion on the Trade Disputes Bill, S. 2248.
[2] Secretary of Labor Frances Perkins testified against the Bill during the hearings.
[3] The Walsh Bill failed to gain the support of the AFL, the CIO or the business community.
[4] A crisis in the steel industry loomed large in the spring of 1934.

1974). He thought that now, with or without Roosevelt's support, Congress had the electoral support to pass this Bill (Martin, 1976).[1]

The second Wagner Bill differed from the Trade Disputes Bill by clarifying the NLRB's role as a quasi-judicial agency (Gross, 1974; Casebeer, 1989). The NLRB would use majority rule to determine which organisation could be certified to represent employees at the collective bargaining table (Gross, 1974). Wagner facilitated collective bargaining, but emphasised that the NLRB would always protect the individual employee's rights by maintaining his or her opportunity to choose any collective bargaining agent. Wagner buried the fact that individual employee rights would always supersede organised labour's collective bargaining privileges. Organised labour could only be awarded the temporary privilege of representing employees. Employers might call for a decertification election, for instance, to challenge the union's authority to represent these employees. Certification and decertification elections therefore presented organised labour with a never-ending battle to gain and maintain the privilege to collective bargaining.

Hence, the structure of the NLRB provided that the American labour movement would always have to compete for the individual employee's loyalty. It promoted individual rights consciousness prevalent in rights claims. That is, employees depended on this state apparatus to protect their right to select employee representatives. The NLRB did not create a new theory of trade union legitimacy that recognised these employees' dependence upon organised labour. Majority rule essentially disengaged the individual employee from organised labour. By maintaining a competitive atmosphere between employers and unions, the NLRB implicity denied that the latters' interests could be mutually inclusive with the employees' interests. It was based on an adversarial system of justice, which combined with majority rule, cast suspicion on the legitimacy of organised labour. Although the second Wagner Bill stopped short of recognising the AFL or the CIO, for example, as the workers' exclusive bargaining agents, the NLRB was to foster collective bargaining and promote collectivisation. Once this quasi-judicial agency determined what unit had the authority to bargain, it safeguarded this unit's exclusive privilege to sit at the collective bargaining table with investigation and adjudication powers.

Despite Wagner's repeated requests, the president still refused to support his second attempt to pass a comprehensive labour-management relations policy (Bernstein, 1950). Important members from Roosevelt's administration preferred plurality to majority rule. They gave collectivisation no ringing endorsement even if majority rule did not make organised labour its recipient. This administration tried to defeat the Wagner Bill. First, Roosevelt suggested that such a policy was unnecessary (Madden, 1960).[2]

Second, he encouraged some Democrats to sponsor amendments which would have placed individual rights above collective bargaining rights (*Congressional*

[1] Wagner also lacked the support of Secretary of Labor Perkins.

[2] Despite its dismal record in resolving labour disputes, the president proposed that Congress should extend the life of the NLRB established by Public Resolution #44.

Record, 1935A; Leuchtenburg, 1963; Irons, 1982).[1] In particular, Roosevelt backed Senator Millard E. Tydings' effort, a Democrat from Maryland, to protect the individual employee's right to self-organisation, 'free from coercion or intimidation from any source' (Bernstein, 1950). Foreshadowing the Taft–Hartley Act, the Tydings amendment provided that unions, in addition to employers, would not be allowed to engage in unfair labour practices (Wagner, 1935B).[2]

Third, Roosevelt personally appealed to Wagner to change the main provisions in his Bill. The president called Wagner, Perkins, Richberg, Assistant Attorney General Harold M. Stephens, and union leaders, Green and Hillman to a White House meeting (Irons, 1982).[3] Again, in the name of partisanship, Roosevelt asked Wagner to work out a compromise with Stephens and Richberg, who among other things, supported the Tydings amendment.

Before Wagner could reject Stephens' and Richberg's suggestions, as he planned, the Supreme Court overruled the constitutionality of the National Industrial Recovery Act (NIRA) in the *Schechter Poultry Corp. v. United States* decision, causing Roosevelt to change his mind about the unamended Wagner Bill (*Schechter Poultry Corp. v. US*, 1935; Feinman, 1981). Roosevelt stopped all negotiations about the Bill and suggested that Congress pass it post haste, thinking it would make an excellent test case for challenging the Supreme Court's authority to undermine the New Deal with the *Schechter* opinion. Less that one month after the Supreme Court rendered the *Schechter* decision, the House and Senate passed the Wagner Act (*Congressional Record*, 1935B; Bowman, 1942; Bernstein, 1950; Irons, 1982).

With its passage, the Wagner Act would facilitate collective bargaining in the United States. But the operation of this Act was also to develop a duality in American working-class consciousness. In other words, the NLRB, not organised labour, would be credited with safeguarding the public good of maintaining the individual employees' right to select representatives of their own choosing. The non-union employee and the public at large would identify with this dominant value propagated by the NLRB. At the same time, they would be subscribing to the subtext underlying the value of self-selection: like employers, unions must be regulated to ensure that they can be trusted to uphold such an individual right. Meanwhile, organised employees, who directly benefited from unionisation, would have to defend what became a deviant value of equating unionisation with the public good. Over time, a duality in working-class consciousness or a rift between the non-union worker, the union worker and the union would surface.

Individual employment rights surface: the Fair Labor Standards Act of 1938

Three years after the passage of the Wagner Act, Roosevelt and the Democratic Congress passed the Fair Labour Standards Act. Unlike the battle over the Wagner

[1] Helping Tydings with strategy, the Senate Democratic leadership suggested that he wait several days before putting the amendment up for a vote. Tydings, however, immediately called for a roll-call, and the amendment failed by a vote of 50 to 21.

[2] Arguing that Tydings' amendment would nullify the Norris–LaGuardia Act, the bipartisan progressive coalition of almost all the Democrats elected after 1932 and the progressive Republicans opposed it.

[3] The meeting at the White House was called for May 24, 1935.

Act, Roosevelt and his administration sponsored this legislation, going to great lengths to secure its passage. Indeed, the Secretary of Labor, Frances Perkins, had made minimum wages and maximum hours a legislative priority since the beginning of the New Deal (Perkins, 1937; Martin, 1976). As an urban-liberal Democrat from New York, Perkins had long advocated state protection like child labour laws.

Knowing that the Supreme Court might rule the National Industrial Recovery Act (NIRA), which included regulations about minimum wage and maximum hours, unconstitutional, Perkins had two separate labour standard Bills drafted before the Court handed down the *Schechter* decision in 1935 (Perkins, 1946). The first Bill—the Walsh–Healey Bill—made employers with federal contracts abide by minimum wages and maximum hours, passed Congress in 1936 (*Congressional Record*, 1936).[1] Roosevelt and Attorney General Homer Cummings, however, believed that the second labour standards Bill, which covered the public at large, would have little chance of being upheld by the Supreme Court.

After Roosevelt threatened to 'pack' the Supreme Court and the Court rendered the *NLRB v. Jones & Laughlin Steel Corporation* and the *West Coast Hotel v. Parrish* decisions in 1937 upholding the constitutionality of the Wagner Act and state wage standards, respectively, the president had urged Perkins to introduce a Fair Labor Standards Bill (*West Coast Hotel v. Parrish*, 1937; *National Labor Relations Board v. Jones & Laughlin Steel Co.*, 1937). Roosevelt then alerted the public and Congress about his strong support for this Bill by attaching a public statement that 'no self-respecting democracy' could possibly explain the 'existence of child labor, no economic reason for chiseling workers' wages or stretching workers' hours' (quoted from Martin, 1976). Roosevelt, moreover, thought that this Bill would meet with the congressional Democrats' hearty approval and would help reunite the party after the divisive Supreme Court packing scheme.

First appearing before the House Committee on Education and Labor, the Fair Labor Standards Bill proposed by the Roosevelt Administration established a five-member board with the authority and jurisdictional power to fix minimum wage and maximum hours by balancing a real value for services rendered according to the prevailing wage (U.S. Congress, 1937; *Congressional Record*, 1937A). Likewise, the board determined maximum hours by deciding what constitutes a productive and healthful work week. By assigning value and determining living wages and healthy hours, the Fair Labor Standards Bill made minimum wages and maximum hours a public good (*Congressional Record*, 1937B; Morton, 1965). This Bill concluded that neither the employer, the employee, nor the public profited from exploiting labour.

Aside from the predictable opposition by the business community, Roosevelt was surprised that organised labour did not support the Fair Labor Standards Bill (*Congressional Record*, 1937C). Organised labour initially opposed this Bill because William Green, the president of the AFL, and John L. Lewis, leading the CIO, worried that it might undermine rather than complement organised labour's struggle for worker loyalty and solidarity. Fair labour standards would be

[1] David I. Walsh (D-Mass) held hearings on the Senate Committee on Education and Labor three weeks after the Supreme Court ruled the NIRA unconstitutional. See *Congressional Record*, 75th Cong., 1st sess. (1936), 80 pt 9: 10003 for the vote in the House of Representatives. The Bill became 49 Stat. 2036 on June 30, 1936.

state-driven, as opposed to market-driven, if a quasi-judicial agency were to set minimum wages and maximum hours. Neither employers, employees, nor their collective bargaining agents would be involved in establishing these work conditions. For different reasons, the AFL, the CIO, and the business community, stood in opposition to the idea that such a regulatory agency could intervene in private contractual relations.

Holding tight to their ideology of voluntarism, the AFL Executive Committee said it could endorse such state protection for helpless women and children, but not men (American Federation of Labor, 1937). The AFL thought the free-market forces and private collective bargaining agreements should determine wages and work conditions. Lewis also expressed his trepidation about the Fair Labor Standards Bill. But unlike the AFL Executive Committee, he had no problem with the principle of minimum wage. Instead Lewis worried about how the power and authority invested in the proposed quasi-judicial independent regulatory board could affect organised labour (Lewis, 1937).

Realising the inevitability of the Fair Labor Standards Bill with Roosevelt's strong support, Green finally agreed to lobby for this Bill provided that it included six amendments (U.S. Congress, 1938). Each of these amendments stipulated that organised labour must retain the opportunity to bargain for better than standard work conditions (Green, 1937; Horowitz, 1978). Minimum wages and maximum hours must be regarded as the floor from which organised labour could begin bargaining with employers. Expressing his deep suspicion of any form of state interference or protection, Green insisted that at all times fair labour standards be considered secondary to those standards established by private collective bargaining agreements.

Directly addressing organised labour's constructive complaints, the House Committee on Education and Labor included all of Green's amendments in the Fair Labor Standards Bill (U.S. Congress, 1938). The Bill, however, never made it out of the Rules Committee. Five Southern Democrats and four Republicans consistently opposed the five Northern Democrats who sought a rule to bring the Bill to the House Floor (*Nation*, 1938B). A drive for a discharge petition to release the Bill from the Rules Committee also failed.

In response, Roosevelt brought the battle for the Fair Labor Standards Bill to the public's attention. He made minimum wage and maximum hours the topic of a fireside chat, used the Fair Labor Standards Bill to help Democratic congressional candidates in the South trounce their conservative contenders, and finally called a Special Session of Congress in November 1937, in part, to secure the passage of the Bill (Anderson, 1938; *Nation*, 1938D; *Congressional Record*, 1938).

During this Special Congressional Session, the Fair Labor Standards Bill lost by a vote of 162 to 131 in the House of Representatives. While Congress had been adjourned, organised labour's opposition to this Bill had mounted. In particular, the AFL and the CIO began asking that the Bill not erect a quasi-judicial, independent regulatory agency. The AFL proposed that the Department of Justice administer minimum wages and maximum hours and submitted their own Bill (*Nation*, 1938E). When this Bill also fell to defeat, the AFL backed the House Fair Labor Standards Bill which, as a concession to organised labour, provided that the

Department of Labor administer the legislation (*American Federationist*, 1938A). Again, the Southern Democrats and Republicans trounced the measure. After the House and Senate rendered more concessions to organised labour and more exemptions to the business community, the Fair Labor Standards Bill finally passed Congress and Roosevelt signed it into law on June 25, 1938 (Anderson, 1938; *New Republic*, 1938; *American Federationist*, 1938B; *Nation*, 1938E; *Congressional Record*, 1938).

In contrast with the tussle over the Wagner Act in 1935, Roosevelt and his administration had sponsored the Fair Labor Standards Act from the start. Clearly, Roosevelt and the urban-liberal Democrats felt more comfortable with protecting individual employee rights than they did with providing collective bargaining. Aware of the Democrats' preference and concerned about the compatibility of individual employment rights and collective bargaining, organised labour had compelled Perkins to provide for a weaker enforcement mechanism than established by the Wagner Act.

Unlike the NLRB, the FLSA could not investigate, try and judge all those suspected of violating its standards. It could only bring these violators before federal courts (*Monthly Labor Review*, 1938). These courts could then find them innocent or guilty of such charges. The American labour movement thought that having the Department of Labor administer labour standards, rather than an independent quasi-judicial agency with cease and desist orders, would make it less effective and therefore less threatening to organised labour.

Advocating the construction of the first prosecutorial agency in 1937, organised labour did not anticipate how it could be used to weaken the NLRB. Nor did union leaders foresee how the court enforcement provision would provide the FLSA with more credibility and legitimacy than the NLRB. As a quasi-judicial agency, the NLRB protected individual employees and unions from unfair labour practices by issuing cease and desist orders: it could deliver expedient justice. But like all other New Deal quasi-judicial agencies, the NLRB would be placed under suspicion of being captured by its constituency. Certification and decertification elections, moreover, created the illusion that the NLRB issued partisan justice. Depending upon the NLRB's ruling, employers, the AFL, and the CIO, among others, would protest that the NLRB had been captured by the victor of such an election.

Dismantling the New Deal: the Republicans restrict collective bargaining and restructure quasi-judicial agencies

After World War Two, Republicans and Southern Democrats formed the conservative coalition (*Congressional Digest*, 1946A, 1947A). They began questioning the efficacy of the New Deal quasi-judicial agencies. The idea that these agencies could be captured by their constituencies and rendered partisan justice was addressed with concern (*Congressional Record*, 1946A).[1] Republicans such as Robert Taft insisted

[1] The Republicans used former President Franklin D. Roosevelt's statement that 'the practice of creating independent regulatory commissions, who perform administrative work in addition to judicial work, threatens to develop a 'Fourth Branch' of the government for which there is no sanction in the Constitution' to emphasise their fears.

that these New Deal administrative state agencies violated due process. He said quasi-judicial agencies should not investigate and adjudicate labour disputes, for instance.

To separate the investigatory from the adjudicatory powers within all quasi-judicial agencies, the conservative coalition passed the Administrative Procedures Act of 1946 (*Congressional Record*, 1946B, 1946C). This coalition, however, only significantly amended the NLRB—the exceptional quasi-judicial agency. Unlike all other quasi-judicial agencies, the NLRB did not regulate one industry. Rather, this board cut across industry lines by regulating all employers and employees negotiating (or attempting to negotiate) collective bargaining agreements. The conservative coalition found their general criticism of the New Deal administrative state more persuasive than simply an attack on organised labour (Tomlins, 1985).

The conservative coalition therefore fought for the passage of the Taft–Hartley Bill amending the Wagner Act on the grounds that as a quasi-judicial agency, the NLRB had unfairly empowered organised labour. While this quasi-judicial agency did not give organised labour legitimacy in theory, members of this coalition claimed it did so in practice. They explained that the American labour movement must be made 'responsible' for its heretofore thoughtless collective capacities and actions (*Nation*, 1947A; *New Republic*, 1947; Baldinger, 1947).

The Taft–Hartley Bill was to rectify the supposed imbalance of power between business and organised labour incurred by the NLRB's bias. This Bill provided that unions, like employers, be made liable for 'unfair labour practices'. Further, it outlawed the closed shop, restricted organised labour's political activities, required union leaders to provide proof that they did not belong to the Communist Party, and gave the president the authority to impose a sixty-day cooling-off period to end national labour disputes (*Monthly Labor Review*, 1947; Lee, 1960; Tomlins, 1985; Pemberton, 1989; Rogers, 1990).

Knowing that the Truman Administration and some regular and liberal Democrats would tacitly support such legislation if it stopped short of stripping organised labour's powers as a collective organisation, Taft and Hartley only regulated the American labour movement (Baldinger, 1947). To impose these regulations, Taft and Hartley moreover realised that they would not have to alter the legislative intent of the Wagner Act. With the NLRB certifying all employee representatives on the basis of majority rule, Taft and Hartley found that they could simply require more extensive governmental intervention in internal union affairs (Levitan and Loewenberg, 1964). The door of state scrutiny was opened wider: the NLRB would cast doubt on more of organised labour's activities, and would make it less difficult for business to challenge these activities. The Taft–Hartley Bill made unions register with the Department of Labor, file annual financial reports, and submit affidavits assuring that the union leaders did not belong to the Communist Party.

Further, the Taft–Hartley Act did not have to stretch the notion of employee representation to create the idea that unions, like employers, could be held liable for unfair labour practices. In 1935, the authors of the Wagner Act purposely refrained from assigning collective bargaining agency to organised labour. The

Wagner Act protected the individual worker's right to choose a collective bargaining agent—it did not protect the rights of these agents *per se*. Building upon this rationale that individual rights always supersede collective bargaining privileges, the Taft–Hartley Act provided that organised labour could commit unfair labour practices by coercing a worker to exercise his or her right to self-organisation, for example (Slichter, 1947). The same type of reasoning also led Taft and Hartley to stipulate that individual states could outlaw the closed shop (*Congressional Digest*, 1947B).

The AFL and the CIO lobbied hard to prevent the passage of the Taft–Hartley Act. Union leaders called this Act the 'slave labour law'. They protested that it unfairly curbed their power to organise, establish collective bargaining agreements, and participate in the political process. For the most part, their protests went unheeded (Millis and Brown, 1950; McClure, 1969; Tomlins, 1985). Indeed, in hindsight, Democratic support for organised labour peaked in 1935 with the passage of the Wagner Act (*New Republic*, 1947).

After World War Two, Republicans and Democrats alike sought legislation to curb organised labour's collective power. In his 1947 State of the Union address, President Truman gave credence to this legislative quest by proposing that Congress amend the Wagner Act so that organised labour could not commit unfair labour practices (*Congressional Digest*, 1946B, 1946D; *Nation*, 1947; Baldinger, 1947). In private, Truman pledged his support for the Taft–Hartley Act. As he explained to James J. Reynolds, a member of the NLRB,

> everybody thinks I am pro-labor, and I am—but they've [labor leaders] gone too far in many, many ways. I'm convinced Taft–Hartley is a pretty good law. I've had a head count made on the Hill, and I know that if I veto it my veto's going to be overridden. So we're going to have a pretty good law on the books in spite of my veto, and if I veto it, I'm going to have labor support in the election next year (quoted from Gross, 1981).

Further, accentuating the conflict with individual employment rights, Truman also suggested that other social legislation, such as a higher minimum wage, be passed to offset the problems associated with labour insecurity (Baldinger, 1947). He thought that the state-run FLSA should award higher wages to undermine organised labour's collective bargaining capacity. Hence, few were surprised that the Taft–Hartley Bill passed Congress with large majorities in the House and Senate from non-Southern Democrats, as well as Southern Democrats and Republicans (*Congressional Record*, 1947; *Congressional Digest*, 1947C).

The restrictive Taft–Hartley Act circumscribed organised labour's power and placed it in a defensive position. The AFL-CIO repeatedly tried and failed to have this legislation repealed. The Democratic Party, moreover, only half-heartedly supported the repeal of this Act during the 1948 presidential election and thereafter (Hamby, 1973). Much to organised labour's dismay, the Landrum–Griffin Labor Management and Disclosure Act passed in 1959 with Democratic support which further restricted the American labour movement's organisational autonomy (U.S. Congress, 1958; Cox, 1960; Kennedy, 1960; McCellen, 1962). Moreover, senator John F. Kennedy, whose bid for the presidency organised labour would support in 1960, had been instrumental in drafting this legislation. As George Meany, the

president of the AFL-CIO, said 'God save us from our friends!' (Sorensen, 1962; Parmet, 1980).[1]

The Equal Employment Opportunity Commission: the prosecutorial model for social regulation

When the passage of the 1964 Civil Rights Act seemed imminent after President John F. Kennedy's assassination, moderate Republicans within the conservative coalition, who had helped change the NLRB with both the Taft–Hartley and the Landrum–Griffin Acts, again adopted the defensive position that quasi-judicial agencies could be captured by their constituencies and therefore should not be erected to enforce any part of this Act. The Republicans, led by Everett Dirksen, the minority leader of the Senate from Illinois, convinced President Lyndon B. Johnson as well as the Democratic Congress to compromise and model the enforcement mechanism of Title VII—the EEOC—after the Fair Labor Standards Administration of 1938 (Graham, 1990).

This legislative compromise between the liberal Democrats and the moderate Republicans revolved around creating a prosecutorial agency that would have less power than a quasi-judicial agency. On one hand, the liberal Democrats argued that they had passed a partial agency which had a broad substantive mandate to protect individual workers from employment discrimination. On the other, they realised that their compromises with the Republicans meant that this agency would not be as effective as a quasi-judicial agency (Alexander, 1968). As Michael Sovern, a legal expert about employment law warned, 'letting the complainant sue was one of the original modes of anti-discrimination law enforcement (criminal prosecution was the other) and it has never worked' (quoted from Harvey, 1973).

President John F. Kennedy had taken office in what has been described as the 'politics of expectation' (Parmet, 1976). After the 1960 election, a new generation of liberal reform-minded Democrats, who had been frustrated by the Republican Eisenhower administration, eagerly rallied around President Kennedy.

Trying to revitalise the Democratic Party as the party of reform, the liberal Democrats created the 'new politics' agenda which sought social and civil rights regulations, rather than economic regulation like those identified with the New Deal era of reform (*Congressional Digest*, 1960, 1961C; Burns, 1961). They pressed the newly elected president to sponsor and pass legislation, such as expanded public housing, which Dwight D. Eisenhower had vetoed. The liberal Democrats also wanted federal aid to education increased, unemployment compensation raised, welfare services expanded, and civil rights legislation with strong enforcement powers enacted (*Congressional Digest*, 1961D).

Since Kennedy won the White House without an electoral or popular mandate and the Democrats maintained only a small majority in Congress, the conservative coalition of Republicans and Southern Democrats still commanded a good deal of legislative influence. No one appreciated this situation better than Kennedy himself. Afraid of jeopardising his chances for re-election in 1964, Kennedy would not go as

[1] According to Sorenson, Kennedy sat on the Senate Labor Committee to prevent Senator Strom Thurmond, a vehemently anti-union Southern Democrat, from sitting on this Committee.

far as the liberal Democrats hoped with the 'new politics' legislative agenda. The president amended the Fair Labor Standards Act in 1961, which pleased most liberal Democrats and organised labour, but he would not risk sponsoring legislation constructing new regulatory agencies (*Congressional Digest*, 1961A, 1961B, 1962, 1963A). Kennedy preferred wielding his executive powers, like rendering executive orders to create the Presidential Commission on the Status of Women and the Commission on Equal Employment Opportunity, and ignored the liberal Democrats' pleas for him to become a legislative leader. Only after the civil rights riots in Birmingham, Alabama, did Kennedy change his political strategy and back the 'new politics' legislative agenda (*Nation*, 1963B; *Congressional Quarterly*, 1963A, 1963F).

First, Kennedy sponsored the Equal Pay Act of 1963. Esther Peterson, who led the Presidential Commission on the Status of Women, convinced Arthur Goldberg, the Secretary of Labor, that the Kennedy administration should fight for this legislation. Initially, the Equal Pay Bill provided that an independent board with cease and desist authority like the NLRB be erected (*Nation*, 1963C; *Congressional Quarterly*, 1962, 1963B, 1963G; Reeves, 1963). Yet, the Kennedy administration, as well as the Republicans, the Southern Democrats, and organised labour opposed the construction of such a board. To gain the support of the Kennedy administration, Peterson amended the Equal Pay Bill so that it relied on existing Department of Labor mechanisms for enforcement and merely amended the Fair Labor Standards Act (Graham, 1992).

Second, Kennedy supported an omnibus Civil Rights Bill with enforcement powers (*Congressional Record*, 1963A, 1963B; *Congressional Digest*, 1963D, 1963C). Speaking before Congress in 1963, Kennedy endorsed this Bill and added that it was his 'hope that administrative action and litigation will make unnecessary the enactment of legislation with respect to union discrimination' (*Congressional Quarterly*, 1963H). Kennedy wanted union leaders to handle the problem of racial discrimination with the NLRB instead of putting their unions under the jurisdiction of a civil rights agency which would monitor the workplace. In so doing, Kennedy expressed his belief that organised labour could become a collective voice in civil rights. If an international union convinced its locals to integrate, with the help of the quasi-judicial NLRB, the American labour movement could be a vehicle for securing civil rights, offering their membership protection from the discriminatory practices propagated by business. Even if the locals were to refuse to comply with the anti-discriminatory rulings of the NLRB, this quasi-judicial agency could use its cease and desist orders to forestall discrimination. In this case, the NLRB would have been insisting that individual rights superseded the wishes of a discriminatory collective, but these rights would have been extended to all those within this collective and not enforced on an *ad hoc* individual case by case basis.

In part, Kennedy had placed his hopes in the hands of organised labour because he thought a fair employment agency could not be included in his 1963 Civil Rights Bill (Graham, 1990). Given the Southern Democrats' opposition to this legislation, which they viewed as a threat to their 'way of life', Kennedy realised that he would need Republican support to pass it (Bernstein, 1991). The Republicans, however,

hoped to thwart the construction of a fair employment agency. Since World War Two, they had been fighting to diminish the power of the independent regulatory agencies that had been erected during the New Deal.

After Kennedy's assassination in 1963, President Johnson declared that he would carry on the former president's legislative agenda. Johnson fought for the passage of civil rights legislation in 1964, though he dropped the possibility of exempting organised labour from it, and more importantly, constructed what would become the EEOC. Like Kennedy, Johnson understood the difficulties associated with passing civil rights legislation in face of the conservative coalition's opposition. However, as a former majority leader of the Senate, Johnson was more adept at developing successful legislative strategies than Kennedy. The Civil Rights Act of 1964 passed as Johnson and the Democratic leadership in Congress broke the ranks of the conservative coalition: they counterbalanced the southern Democrats' opposition with the support of a number of moderate Republicans.

To begin with, President Johnson, Mike Mansfield of Montana, the Senate majority leader, and Senator Hubert H. Humphrey, a liberal Democrat from Minnesota, who ushered the Civil Rights Bill of 1964 as floor manager through the Senate, anticipated exactly how the Southern Democrats would try to obstruct and delay this Bill. The real battle over this legislation would take place in the Senate, they thought, since the southern Democrats could rely on their power to filibuster it to death. Thus, Mansfield exercised his prerogative powers as majority leader and placed the Bill directly on the Senate calendar. He bypassed the Judiciary Committee, governed by Senator James Eastland of Mississippi, which had long been called the 'graveyard of civil rights legislation' (Garrettson, 1993). Then, when Senator Richard Russell of Georgia initiated a filibuster, Mansfield banned all-night sessions and established a quorum watch so that the liberal Democrats would not be surprised by a vote (Garrettson, 1993). The Democratic Party leadership also kept the pro-civil rights rank and file informed of daily activities with the publication of a special newspaper about the Civil Rights Bill.

More importantly, Humphrey gained the moderate Republicans' backing without jeopardising organised labour's support for the Civil Rights Bill. During the 1964 debate, Humphrey had noted that unions, like employers, perpetuated discrimination at the workplace (*Congressional Digest*, 1963B). He said:

> at present time Negroes and members of other minority groups do not have [an] equal chance. . . . they are treated unequally by some labor unions and are discriminated against by many employment agencies (*Congressional Quarterly*, 1964A).

Thinking that relations between the liberal Democrats and labour leaders would be strained by such comments, the Southern Democrats solicited the latter's support. Senator Lister Hill of Alabama, among others, underscored how a commission for fair employment practices would interfere with business's right to hire, fire, and promote employees and this would undermine organised labour's seniority rights structure (*Congressional Quarterly*, 1964C). But, Humphrey maintained labour support, in part, by paying homage to important labour leaders, like George Meany, the AFL-CIO president, and Walter P. Reuther, the head of the United Auto Workers, both of whom endorsed the Civil Rights Bill despite the discriminatory

record of their locals. The liberal Democrats, moreover, danced lightly around these issues, making categorical statements like 'it is clear that the Bill will not affect seniority at all'. (*Congressional Record*, 1963C).

Finally, Humphrey gained the moderate Republican vote with a successful appeal to Senator Everett Dirksen of Illinois, the minority leader (*Congressional Digest*, 1963F, 1963G; *Congressional Quarterly*, 1964B). Dirksen was placed in a special position since the civil rights advocates needed a two-thirds majority for cloture on the filibuster. The Democratic leadership thought Dirksen, who commanded great respect among those within the moderate branch of the GOP, held the key to the Bill's passage (Johnson, 1971). If he agreed to pass the Civil Rights Bill, the necessary votes for cloture would follow. Hence, Humphrey spoke with Dirksen every day, building up his sense of legislative propriety and decorum with statements like '[this Bill will provide the Republican party with] the biggest boost since emancipation proclamation' (Bornet, 1983).

Aware of the legislative power he wielded in this pivotal position, Dirksen informed Humphrey that he would vote for cloture and the Civil Rights Bill if it included his amendments. One of the primary amendments Dirksen proposed was that the liberal Democrats substitute the EEOC in Title VII for the Federal Employment Practices Commission (FEPC) (*Congressional Digest*, 1963E, 1963D; *Congressional Record*, 1964A). Unlike the FEPC, the EEOC was modelled after the FLSA, not the NLRB. That is to say, the EEOC would investigate and prosecute, but not judge, all discriminatory employers and unions. Dirksen also insisted that the EEOC not have the power to alter the practices of the already existent state fair employment agencies (Witherspoon, 1985).

Dirksen, in what became known as the Dirksen amendments, lobbied for a prosecutorial administrative agency because it separated investigative and adjudicative powers (*Congressional Record*, 1963D). Most notably, the Republicans had joined forces with the southern Democrats to pass the Taft–Hartley Act amending the Wagner Act in 1947, which distinguished between these powers in order to weaken the quasi-judicial NLRB. As discussed earlier, the Republicans, led at that time by Senator Robert Taft, insisted that regulatory agencies should not be quasi-judicial powers because this violated the Madisonian spirit of separation of powers. A regulatory agency should investigate and police *or* adjudicate, not both.[1]

The Republicans, however, had not been the first to develop the idea of making a regulatory agency responsible only for prosecution, rather than adjudication. As shown earlier, liberal Democrats had first formulated this type of agency in 1938 when they created the FLSA. Progressive Democrats like Frances Perkins stood behind establishing regulatory agencies which set standards and then relied on the federal courts to enforce them, as opposed to quasi-judicial agencies which rendered decisions about compliance of such standards. While Perkins knew that the FLSA's standards only covered one-fifth of the American workforce, she celebrated the idea that this agency had the power to institute broad standards. Similarly, in 1964, the liberal Democrats downplayed the problems associated with this type of prosecutorial agency and underscored how they had constructed an administrative agency

[1] William Rehnquist, assistant Attorney General, stated that 'administrative agencies are inferior to courts as finders of fact'.

to enforce fair employment practices. President Kennedy had ultimately decided against including such an agency, maintaining that it put his civil rights legislation in jeopardy (Graham, 1990). These Democrats also highlighted how the EEOC, being partial and protective, rather than an impartial quasi-judicial agency, would remedy injustices.

Partisan constraints imposed upon the liberal Democrats triggered legislative compromises that gave shape to the EEOC as a prosecutorial agency. But, understanding the party leaders' motives does not explain how this type of agency could undermine collective bargaining. Could minority rights have been better balanced with the majoritarianism underlying American labour policy? Given the ethos of individualism underlying the NLRB, how could the EEOC have been constructed to complement it? What policy options did the Republicans and the liberal Democrats turn away from during the legislative debate in 1964? The following sections show that two alternative paths, aside from endowing the EEOC with cease and desist authority, stood before them: first, the liberal Democrats could have integrated individual employment rights with collective bargaining grounding the constitutionality of the EEOC on the state agency doctrine in the Fourteenth Amendment; and second, they might have given this commission pre-emptive powers by providing it with jurisdiction over the NLRB.

Unions as state agents under the Fourteenth Amendment?

The liberal Democrats thought the EEOC should be a protective agency which promoted individual employment rights rather than a quasi-judicial agency that was governed by impartial experts. To do so, it set standards about what constituted equal opportunity in employment and would then help prosecute all those who violated these standards on a case by case basis. Like the FLSA, the EEOC defended an individual worker's rights by bringing the employer who violated his or her rights before a federal court. This type of agency was to cultivate a new relationship between the individual and the American state by seeking such a substantive conception of justice.

At the same time, the legislative authors of the EEOC thought the agency should be partial or politically accountable, unlike the quasi-judicial agencies which had been made relatively independent of the executive branch. Thus they decided not to staff this new agency with impartial experts serving terms that would not coincide with presidential administrations. Instead, they made the EEOC an independent executive agency rather than an independent regulatory agency. That is, the EEOC was established to serve each president of the United States. Although the commission could not be stacked with members from one political party, it was accountable to the president because of his or her power over appointment and personnel policies.

Because this new type of administrative agency fostered a new bond between the individual and the American state, did this mean that no other intermediaries could help secure justice? During the hearings of the Civil Rights Bill of 1963 before the Senate Commerce Committee, a less exclusive means for preventing discrimination in public accommodations was discussed. Initially, the Republicans were reluctant

to base this Bill on the Commerce Clause of the Constitution. Instead, it was suggested that the Civil Rights Bill derive its primary constitutional authority from the Fourteenth Amendment (Graham, 1992).

Section 1 of this Amendment stipulates that no State shall 'deny to any person within its jurisdiction the equal protection of the laws'; and Section 5 provides that 'Congress shall have power to enforce, by appropriate legislation, the provisions of this article' (quoted from Herbert Weschler's brief, U.S. Congress, 1963). Since the Supreme Court rendered the *Civil Rights Cases* in 1883, three levels of enquiry have been recognised to assess whether this Amendment was violated. First, who had the capacity to act as a state agent? Second, what state activities denied equal protection and due process under law? And third, when do such activities constitute a violation of the Fourteenth Amendment?[1] (U.S. Congress, 1963). If the Civil Rights Bill of 1963 used this Amendment for legislative operation, it could have relied on state licensing laws as a means of recognising a restaurant with a liquor licence as a state agent and therefore in violation of the Bill if it refused to serve minorities. As Archibald Cox described, 'one who follows a public calling—is performing a function of the state; he is therefore a State instrumentality and his acts are acts of government . . . [then] A priori it is possible to treat any enterprise which has significant public consequences as if it were the government for the purposes of the Fourteenth Amendment . . . ' (Cox, 1968).

By the same token, collective bargaining might have supplemented individual employment rights because unions could have been regarded as state agents and compelled to stop discriminatory practices. In fact, Paul Freund, a legal expert, who offered the Commerce Committee his opinion, stated that 'this application of the 14th Amendment has already been recognised without legislation, in connection with the duties of a union holding an exclusive bargaining position under the law. . .' (U.S. Congress, 1963; *Steele v. Louisville and Nashville R.R. Co.*, 1944; *Boman v. Birmingham Transit Co.*, 1960). In 1944, the Supreme Court ruled that the Railway Labor Board must impose a 'duty of fair representation' upon unions as well as employers to prevent discrimination (*Steele v. Louisville R.R. Co.*, 1944). A few years later, Cox elaborated:

> [i]nitially a voluntary association and always partly dependent upon its economic power, the labor union, once chosen by a majority, has a status as exclusive bargaining representative of the employees that is conferred by law; and it is by law that the union's undertakings govern the working conditions, and loose and bind the obligations, of employees in the bargaining unit, without their individual consent. Inasmuch as the status and power of a union are thus derived partly from government, should one say that the union's action is or is not governmental action for the purposes of the Fifth or Fourteenth Amendment? (Cox, 1968).

These legal experts also recognised that this Amendment in Freund's words would be 'spacious in its guarantees'. A broad application of the state agency doctrine could all but destroy the distinction between public and private life protected by the Constitution.

Oddly enough, it was Attorney General Robert Kennedy who emphasised how resting the Civil Rights Bill on source of constitutional authority would open a

[1] Brief from Professor Paul A. Freund.

pandora's box of federal governmental intervention in law (Graham, 1990). Kennedy persuaded the Republicans, who thought twice about making the Commerce Clause the operating reference for this Bill, that the Fourteenth Amendment would have given it much more expansive and invasive powers in private enterprise. Thus, the Republicans quickly backed away from relying on this Amendment. After all, Dirksen supported the Civil Rights Bill on the condition that the public accommodation and the fair employment titles be less far-reaching. With the EEOC, for instance, he thought that a prosecutorial agency, in principle, embraced more stringent standards than a quasi-judicial agency, but in practice, would be less effective in applying these standards and therefore less invasive of private employment rights.

This extended discussion reveals that the Civil Rights Bill, including the EEOC in the 1964 Bill, could have been based on the Fourteenth Amendment. It might have either regulated discriminatory employment practices through state licensing laws or inflicted a statutory obligation upon the NLRB. In 1961, the Supreme Court, led by Earl Warren, had rendered a broad definition of state action in *Burton v. Wilmington Parking Authority* and found a private restaurant in violation of the Fourteenth Amendment (*Burton v. Wilmington Parking Authority*, 1961; *Jackson v. Metropolitan Edison*, 1974; Sullivan, 1987).[1] But since the AFL-CIO and the Four Railroad Brotherhoods had been less than enthusiastic about the *Steele* decision, there is little evidence to support the hypothesis that they would have rallied behind applying the Fourteenth Amendment to labour law. Organised labour feared that employers would exploit the union's duty to fair representation as an unfair means of curbing unionisation. At the same time, the moderate Republicans needed to pass the Civil Rights Act of 1964 and undoubtedly would have rejected it. Despite their support for legislation that restricted and regulated organised labour, they would not accept this legislation if it also threatened to impose more regulations upon the business community. Rather than tackling this legislative problem of reconciling collective bargaining and individual rights, the liberal Democrats simply gave the NLRB and the EEOC concurrent jurisdiction.

Pre-emptive measure?

Another method of integrating individual employment rights with collective bargaining would have been to provide the EEOC with pre-emptive powers. Before the construction of the EEOC, the NLRB and the Railway Labor Board were the only two agencies which could oversee employment discrimination. As cited above, the Supreme Court had ruled in *Steele* that the Railway Labor Board must impose a 'duty of fair representation' upon unions as well as employers to prevent discrimination (*Steele v. Louisville and Nashville R.R. Co.*, 1944). A few years later, the Taft–Hartley Amendments of 1947 outlawed the closed shop. This provision could have been employed to prevent organised labour from segregating its unions. By the early 1960s, neither the precedent established by the *Steele* decision nor the

[1] In *Burton v. Wilmington Parking Authority* the Court declared that this restaurant had violated the state action provision of the Fourteenth Amendment when it refused to serve minorities. The restaurant's activities were seen as state action since it leased space from a public agency. By 1974, the Supreme Court narrowed its definition of state agency in *Jackson v. Metropolitan Edison*.

Taft–Hartley Act provided minorities with relief (Hill, 1985). The NLRB did little to enforce these legal and legislative precedents. And many unions, particularly the traditional AFL craft-based unions, still relied on the majority rule provision to exclude minorities from joining their shops, in addition to bolstering their collective bargaining strength with employers.

Hence, in the legislative debate over the Civil Rights Bill, the Republicans could have given the EEOC exclusive jurisdiction over employment discrimination as a means of preventing discrimination in labour organisations. The EEOC might have been awarded the authority to order the NLRB to decertify a union for discriminatory practices. The federal courts enforcing the collective bargaining agreement could have also made an agreement negotiated by a discriminatory union void. After all, the majority rule provision, and the certification and decertification elections that resulted from it, only gave unions a temporary authority, not a right, to bargain collectively for workers. The Taft–Hartley Act carried the majority rule logic one step further. It stated that workers must be protected from the unfair labour practices committed by unions as well as employers. This Act compelled the NLRB to file reports on union activities, mandated that union leaders sign affidavits, and made collective bargaining agreements enforceable in federal courts. Indeed, Robert Kennedy, the Attorney General during the passage of the Civil Rights Bill, had helped his brother John, then a member of the Senate, draft the Landrum–Griffin Act. This Act extended the accountability provisions under the Taft–Hartley Act, ensuring that unions respect individual employee rights.

The EEOC, however, was not provided with exclusive powers over employment discrimination. The liberal Democrats and moderate Republicans combined forces to prevent the conservative coalition from making discrimination an unfair labour practice. They defeated an amendment in the Senate proposed by John Tower of Texas which stipulated that 'where a union is enjoying the benefits of union shop contracts and discriminated in its acceptance of members on the ground of race, creed, and color, national origin, or sex, such contracts would be void' (*Congressional Record*, 1964B).[1] A similar amendment introduced in the House by William T. Cahill, a Republican from New Jersey, was also voted down (*Congressional Record*, 1964C).

Clearly, the liberal Democrats maintained organised labour's support for the Civil Rights Bill of 1964 in defeating these amendments. The NLRB and the Railway Labor Bill still retained their authority over organised labour and employers negotiating collective bargaining agreements. The Bill provided that a union member or a potential union member who suffered discrimination had two avenues for recourse: the EEOC and the NLRB. They could rely on a prosecutorial or a quasi-judicial agency for relief (*University of Pittsburgh Law Review*, 1974). But by agreeing to the Dirksen amendments, they also ensured that organised labour could not become a positive voice for its members. One part of these amendments had stipulated that 'the authority to bring a charge on behalf of a person claiming to be aggrieved is deleted' (Alexander, 1968).

[1] This amendment was defeated by a vote of 62 to 26 with Republicans and Southern Democrats in favour of it.

An unwieldy agency

The EEOC in the final Civil Rights Bill, consisted of a five-member commission with powers over most private employers to receive complaints and investigate charges of discrimination, including the authority to subpoena witnesses, require employers to maintain records and present periodic reports (Alexander, 1968). Although the EEOC could not issue cease and desist orders, it could file a suit in the federal courts for injunctive relief against an employer from committing future violations. The federal courts could also mandate reinstatement and compensation for backpay provided that they upheld a discriminatory appeal (*Congressional Record*, 1964D, 1964E, 1964F).

As some members of the civil rights community predicted, the prosecutorial EEOC erected was unwieldy. During 1968, the EEOC received 15,000 complaints over an existing backlog of 30,000 complaints and only conciliated 513 complaints (Graham, 1990). It took 18 months for one complaint to be processed. As a result, by the late 1960s, liberal Democrats advocated strengthening the EEOC's enforcement powers. But, the catalyst for change occurred in 1971 when the conservative coalition discovered the hidden strengths of the prosecutorial agency. The EEOC brought the *Griggs v. Duke Power Co.* case before the Supreme Court with the hope of transforming its legislative charter enabling the commission to prove discrimination at the workplace by demonstrating the lack of equal result (*Griggs v. Duke Power Co.*, 1971). Before the Supreme Court handed down this decision, discrimination could only be proven if an employer intended not to offer equal treatment of minorities and women. After the Supreme Court rendered the *Griggs* decision, the EEOC could ask for proportional representation of minorities and women at the workplace (Blumrosen, 1972).

Since the civil rights movement had long been asking for stronger enforcement powers and the *Griggs* decision alarmed conservative Republicans, Southern Democrats, and organised labour, amendments for the EEOC were introduced on the House and Senate floors (*National Journal*, 1972C). Again, controversy resulted over whether or not to model the EEOC after the NLRB. And as Hugh Davis Graham, a civil rights historian, amply demonstrates, the Nixon Administration and the conservative coalition worked together to prevent this agency from being endowed with the NLRB's cease and desist authority. Union leaders worked with the Chamber of Commerce to place the OFCC within the Labor Department after the *Griggs* decision. The constitutionality of the EEOC remained grounded on the Commerce Clause. This Commission did not gain pre-emptive powers over the NLRB or the Railway Labor Board.

Collective bargaining vs. individual rights: the unintentional consequences of social regulation

One can only speculate whether or not the EEOC would have been more effective if it had been endowed with the NLRB's cease and desist authority, based on the state agency doctrine of the Fourteenth Amendment, or given pre-emptive powers forcing unions and employers to systematically reconcile minority with majority

rights. The civil rights community would have been pleased with the first or the second alternatives since they might have strengthened the enforcement apparatus underlying the EEOC. On the other hand, the American labour movement would have been disturbed by the implementation of the second and third alternatives. Most unions would have resisted any further scrutiny of their internal organisation. They feared that the business community would use the EEOC's pre-emptive power to undermine the labour movement (Meltzer, 1974; *University of Pittsburgh Law Review*, 1974).

Clearly, to prevent employers from practising this type of exploitation would not have been an easy legislative task. But, this is not to say that the absence of a policy integrating individual employment rights and collective bargaining would help organised labour. The duality of the Democratic labour policy, which emerged because of the legislative history of the NLRB, the FLSA, and the EEOC, proved detrimental to both organised labour and advocates of rights claims. Creating separate institutional forums for labour and civil rights underscored the difference between bargaining and rights. Union members supposedly benefited from their position within an exclusive organisation, whereas victims of discrimination relied on the help of an all-inclusive state agency. On one hand, the former had a more effective agency than the latter. On the other, the civil rights community had a more powerful moral prerogative. Rights superseded collective bargaining because they embodied the American state's conception of substantive justice while bargaining only involved due process or procedural justice. Rights claims, moreover, became associated with the 'new politics', and organised labour remained part of the old order. Hence, codifying individual rights put organised labour on the defensive and helped erode collective bargaining. But, it also weakened the civil rights community and would diminish the possibility of a collective societal transformation.

First, the EEOC became the prototype for other regulatory agencies. Between 1960 and 1976, liberal Democrats passed 34 new regulatory agencies for implementing social legislation, most of which enforced their measures by bringing violators before federal district courts (Vogel, 1981; Melnick, 1983; Durant, 1985). While all these regulatory agencies had different enforcement and compliance strategies, they were unified by their view of rights. The collective voice of organised labour was no longer needed since these state agencies granted individuals occupational health and safety standards, limited environmental dangers and consumer problems, as well as protected civil rights. Second, the structure of these social regulatory agencies further legitimised individual employment rights as the preferred avenue for change and conversely downplayed the virtues of collective bargaining and collective movements for change. Unlike a quasi-judicial agency, which the New Deal Democrats had constructed because it would be neutral (since the Republican-dominated federal courts could not be considered impartial), the liberal Democrats insisted that the prosecutorial agency should be partial and protective. The liberal American state would decide what rights deserved protection and would then prosecute all those who encroached these rights. By contrast, quasi-judicial agencies like the NLRB first heard and then decided whose rights had been violated. By advocating state protection as opposed to collective action, the

Democrats implicitly endorsed the idea, which first surfaced with the Wagner Act of 1935, that the union could not be trusted to protect individual rights. Only the state and its regulatory apparatuses could safeguard the individual from social ills such as discrimination in society. The Democrats, in effect, abandoned the idea of collective action.

Third, prosecutorial agencies practised a type of administrative discretion that eroded the exclusive power of collective bargaining. Lacking cease and desist orders, prosecutorial agencies developed rule-making powers which set specific standards and guidelines for industry and organised labour to follow. While the quasi-judicial NLRB would prevent certain activities, prosecutorial agencies would direct activities. If organised labour had helped make these rules, this type of administrative direction could have integrated individual employee rights with collective bargaining. But because these prosecutorial agencies were not created in co-ordination with the NLRB, their rule-making powers controlling civil rights, the environment, the workplace, and the production of consumer goods, social regulation undermined collective bargaining. Individual employee rights established by OSHA, for example, had to be included in all private collective bargaining agreements (Summers, 1988). It was futile for collective organisations like unions to bargain for more environmental protection or stronger safety and health regulations when it was individual employment rights that became identified with the public good.

Moreover, while Congress gave social regulation great jurisdictional powers, it was vague about what specific goals this regulation should accomplish, and this vagueness gave prosecutorial agencies more administrative discretion which further eroded organised labour's collective bargaining capacity. Indeed, both encroachments that directly helped individual employees, such as safe work conditions, and those which indirectly benefited them, such as cleaner environment, hurt organised labour. When social regulatory agencies established better work conditions, organised labour could not claim the credit for such conditions. And when these agencies provided stronger protection for the public from externalities like clear air, since organised labour dominated the 'dirty' industries like coal, its membership paid the heaviest toll (U.S. Congress, 1975A, 1977, 1978, 1989A). Organised labour was vulnerable to the will and whim of these prosecutorial agencies.

Meanwhile, the creation of this so-called 'rights society' gave employers the opportunity to stand tall against the supposed evils of organised labour. As shown earlier, in constructing the NLRB, the federal government had gone as far as encouraging collective bargaining, but without explicitly endorsing organised labour. The NLRB safeguarded collective bargaining as a process and a procedure that all employees could enjoy, but unlike social regulatory agencies, it did not posit an end goal like protecting the ozone layer. While the NLRB could repeatedly recognise a national labour union as the employees' chosen representative, it could never make this union a permanent bargaining representative. Having to be certified by their membership meant that these representatives could also be decertified.

Offering organised labour only the temporary privilege to represent employees at the collective bargaining table, American labour policy issued one clear message: the union, like the employer, threatened the individual employee's right to choose a representative and therefore should be watched by state-operated regulatory

agencies and regarded by these agencies, their membership, and their potential membership with suspicion. This message surfaced explicitly in 1947 and determined the discourse about the Taft–Hartley Act, which amended the National Labor Relations Act of 1935. The legislative subtext underlying the Taft–Hartley Act was again that unions could not be trusted. In 1959, the Landrum–Griffin Act also underscored the need for state protection and individual rights as it supposedly made unions more democratic and free from internal corruption. Thus, what could be called a legitimacy and credibility gap existed between the social regulatory agencies created in the 1960s and 1970s and the NLRB that would help weaken collective bargaining.

Finally, the redistributive and distributive nature of the social regulation implemented by these prosecutorial agencies threatened organised labour. Since social regulations such as clean air standards cost millions of dollars, industry would insist that organised labour bear part of the cost, sometimes scaring their employees into participating in a zero-sum game of protest. Employers would emphasise how environmental regulation, for instance, would cost a community employment opportunities. These employers would then convince their employees that they could best represent the conflict between jobs and the environment (U.S. Congress, 1982A, 1982B, 1986, 1989B, 1989C). Well aware of the dangers the redistributive and distributive aspects of social regulatory legislation, the liberal Democrats behind this regulation tried lessening its impact upon union employees. They would demand, for instance, public hearings when an industry threatened to close a plant rather than comply with the EPA's standards (*National Journal*, 1972A, U.S. Congress, 1977). For their part, most national union leaders supported occupational health and safety regulations, environmental protection that did not pose a direct conflict of interest, and civil rights (*Nation*, 1963A, U.S. Congress, 1975, 1979; *Congressional Quarterly*, 1970, 1972). Organised labour, for instance, uniformly backed the provisions within social regulation which tried to soften the redistributive blow upon unionised and non-unionised workers alike offered by the liberal Democrats. But in addition to being too minimal, these provisions could not change the fact that organised labour would always be vulnerable to the redistributive and distributive aspects of social regulation unless its leaders were included in the implementation of this regulation (*National Journal*, 1972C, *Congressional Quarterly Almanac*, 1977).

Conclusion

Though organised labour endorsed most social regulation, the emergence of the prosecutorial agency and social regulation posed a grave threat to the American labour movement by dividing the liberal community. The ideology of rights claims and the structure of the prosecutorial agency which elevated individual employment rights, administrative rule-making, and gave employers more avenues for protest against unionisation, all combined to curb the power of the American labour movement.

More importantly, social regulation that relies solely on individual rights does not offer American society effective recourse for social transformation. As Elizabeth

Schneider explains about rights claims in general, 'this process thus gives people a sense of "substitute connection" and an illusory sense of community that disables any real connection' (Schneider, 1986). A so-called rights society makes most people passive as they become dependent upon the state and the opportunity for change diminishes. In the case of labour-management relations, as Katherine Van Wezel Stone shows, individual employment rights should 'mutually reinforce' collective bargaining (Stone, 1992).

Through his appointment powers, President Bill Clinton could turn anti-union institutions like the NLRB around. The inroads that individual employee rights have made upon collective bargaining, however, will be more difficult to change. If the Clinton Administration does not make a conscious effort to nationalise these individual employee rights, making them complimentary with collective bargaining, the 1990s could ring in the death knell for organised labour and stymie labour-related collective action in American society.

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