In-Corporate In-Equality – Depression Thoughts on Bargaining Power - CRIMT 2012
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Since the Great Recession began till now is nearly as many years as from the 1929 Stock Market Crash to the time the United States Congress was debating the law that eventually became the National Labor Relations Act. From the moment the financial markets unraveled, causing people to lose their homes and jobs into our own Hoovervilles in the form of Occupy encampments and to attacks on unions, their members, and workers, we seem to face similar challenges and concerns – but, certainly, with many differences.

So now, with nearly five years mired in the Great Recession, life and law in the 1930's continues to seem relevant to our current state, it seems worthwhile to go back to the basics, to recall what our counterparts were thinking and saying when the National Labor Relations Act was being debated. They fought for – and produced – a law whose purpose was to create equality of bargaining power, industrial democratic governance, and broad prosperity. How do we articulate, for our day, the need for and benefits of equality of bargaining power so that we can have shared prosperity, labor peace, and more stable, thoughtful, and communally minded management of our workplaces, communities, and enterprises?

So far, no one today has been able to make that case. But, instead, large employers and financiers have continued to operate on a path of increasing their size and power, while claiming that this course benefits all of us. Not only that, they have been largely successful at persuading many of us that allowing employees to attain some semblance of employers’ size and power in order to maintain a balance of power is dangerous.

What were our ancestors’ secrets to their success to construct a broadly shared prosperity and communal vision that lasted for three generations until it began unraveling in the 1970s? Why are the tools that led to that success – high unionization rates, industrial democracy, and local ownership of community-minded businesses – ones that are no longer supported? Worse than that, they are repudiated.

So for a moment, why not listen to the words and ideas of those who set this country on a path that sustained families and communities and promoted democratic values. In the Senate of the United States on February 28, 1934, Senator Wagner introduced a bill to a bill that had a great deal to say about power and inequality. Its preamble observed, “The tendency of modern economic life toward integration and centralized control has long since destroyed the balance of bargaining power between the individual employer and the individual employee, and has rendered the individual, unorganized worker helpless to exercise actual liberty of contract, to secure a just reward for his services, and to preserve a decent standard of living, with consequent detriment to the general welfare.” Its solution was to encourage “the equalization of the

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bargaining power of employers and employees” leading to “the peaceful settlement of disputes.”

The theme that ran through the debates and testimony that followed the bill’s introduction – and that led to the enactment of the National Labor Relations Act – was a 3000 page meditation on equality and inequality, on power and the powerless, and the effects of each of these qualities on democracy and democratic governance. This paper explores the discussion on those themes as the debate played out seven decades ago.

On the Need for Equality of Bargaining Power

On March 1, 1934, when he introduced new legislation Senator Robert Wagner apparently thought that he was doing nothing more than clarifying and fortifying § 7 of the National Industrial Recovery Act. He described how employers had benefitted by being allowed to unite. He observed that this employer alliance had proved to be “fraught with great danger” because it was not “counterbalanced by the equal organization and equal bargaining power of employees.” Indeed, he argued, equality was the central need if there was to be a “wise distribution of wealth between management and labor.”

Wagner explained:

The primary requirement for cooperation is that employers and employees should possess equality of bargaining power. The only way to accomplish this is by securing for employees the full right to act collectively through representatives of their own choosing. The principle of collective bargaining has been attacked as a violation of the constitutional guaranty of freedom of contract, since it does not preserve for each employer the right to make contracts with each of his employees as individuals. Nothing could be more fallacious. The fathers of our Nation did not regard freedom of contract as an abstract end. They valued it as a means of insuring equal opportunities, which cannot be attained where contracts are dictated by the stronger party.

... The constant readjustments necessary to strike a fair balance between industry and labor cannot be accomplished simply by code revisions or by general exhortations. They can be accomplished only by cooperation between employers and employees, which rests upon equality of bargaining power and the freedom of either party from restraints imposed by the other.

In other words, equality of bargaining power was the foundation for true democratic participation and freedom. But what was required to achieve that equality?

William Green, President of the American Federation of Labor, said that labor asked to
“be placed upon a basis of equality with industry and with the employers of labor.” How was that equality to be achieved? Green responded:

[Labor] can only be placed upon that basis of equality when it is accorded the right to organize and select its own agency through which the workers may collectively bargain. It opposes paternalism as reflected and represented by company unions. It objects and protests against being placed in a position of inferiority, and that is the position in which it is placed when it is compelled to accept company unions, organized, formed, fostered, financed, and maintained by the company.  

Congressman Patrick Joseph Boland (PA-11), a former carpenter and contractor and, by 1935, the House Majority Whip, argued:

Having permitted industry to unite through merger and consolidation into powerful corporate units, and having encouraged business to form trade associations covering entire industries, Congress sought to effect an economic balance through collective bargaining and the free association of workers in labor organizations. Only in this way could the workers achieve even a meager sense of security.

Rep. George Schneider (WI-8), former vice-president of the International Brotherhood of Paper Makers and executive board of the Wisconsin State Federation of Labor, was re-elected to Congress in 1934 as a member of the Progressive Party. Schneider observed:

Since the great expansion of our industrial system, the laborer has become only a small cog in the vast industrial machinery, and an attempt is made here to preserve his right to stand on an equal footing with the employer in making a contract for the sale of his services and regulating the conditions under which he works. . . . All the bill intends is to provide that employers shall not interfere with the self-organization of workers. Certainly employers already possess the right of self-organization without interference by employees; thus the bill aims at equality, not inequality.

Some had argued for including in the legislation a prohibition on union coercion of workers. Schneider warned of courts’s tendency to issue decisions that had, by prohibiting “coercion” by employees, “banned peaceful picketing, the mere threat to strike, and even the circularization of banners, on the ground that they were ‘coercive.’ ” Including employee coercion, he argued, “would give new congressional sanction to those many old decisions and

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5 William Green, President of the AFL, at 98.

6 William Green, President of the AFL, at 98.

7 Representative Patrick Boland, at 2431.

8 Representative George Schneider, at 3229, 3234.
“instead of promoting the freedom of the worker would drive him back into the bondage that existed before that humane piece of legislation was enacted.”

Causes of Inequality and Obstacles to Equality of Bargaining Power

Inequality of bargaining power was the result of two forces – employer power that grew out of employers’ ability to become collective through the protections given to corporations and partnerships; by those corporations’ and partnerships’ ability to increase their power through joining trade associations; by court interpretations of laws, such as those that gave corporations personhood, or that interpreted anti-trust laws to apply to weaken unions while softening their effects on corporations; and by employer-dominated unions.

Employer Trade Associations

Senator Robert Wagner observed that workers needed the collective power of unions if they were ever to have any degree of equality with employers, yet the path to that equality was a difficult one for workers, given the greater power employers achieved through incorporation and partnerships:

Employers are allowed to unite in trade associations in order to pool their information and experience and make a concerted drive upon the problems of modern industrialism. If properly directed, this united strength will result in unalloyed good to the Nation. But it is fraught with great danger to workers and consumers if it is not counterbalanced by the equal organization and equal bargaining power of employees. Such equality is the central need of the economic world today. It is necessary to insure a wise distribution of wealth between management and labor, to maintain a full flow of purchasing power, and to prevent recurrent depressions.

Congressman Boland observed that the inequality between employers and employees meant that workers had no more than theoretical freedom of contract and the country suffered from the evils that resulted from the present regime built on inequality of bargaining power. “Having permitted industry to unite through merger and consolidation into powerful corporate units, and having encouraged business to form trade associations covering entire industries” had created gross imbalance and left workers economically insecure.

Courts and Judges with A Thumb on the Scales of Justice

The hearings on the enactment of the National Labor Relations Act described the failure of courts and judges to enforce antitrust laws enacted to prevent corporate concentrations of

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9 Id. at 3234.


11 Congressman Boland, 2431.
power. In one case, Chief Justice Taft described the value of unions in promoting a greater balance of power, while criticizing the lower courts’ failure to enforce the antitrust laws. Unions, he said, were essential if workers were to achieve some degree of equality with their employers. However, he said, that equality was increasingly threatened by economic concentration that was “fostering economic despotism.” This dangerous situation had led to the enactment of the Sherman antitrust laws. However, those laws had “withered under sustained assault in the courts. Whether it was due to the formidable battery of lawyers that the powerful could gather, or to the subconscious prejudices that judges carried over from their former associations, or to the fact that the laws themselves were not in harmony with the technique of modern industry are matters of relatively little moment today. The important fact is that the laws failed. . . .Thus the heavy hand of the courts paralyzed the enforcement of the antitrust laws” 12

Meanwhile, instead of focusing antitrust enforcement on corporate monopolies, the lower Federal courts had applied the antitrust laws to the activities of labor organizations, and the Supreme Court had approved that focus in 1908. As a result, the federal courts had extended antitrust laws to proscribe peaceful picketing instead of the practices Congress had targeted. Justice Taft concluded that the courts’ meddling was “not mere records of mock trials in moot courts. They are the external evidence of sweeping political and economic developments completely out of line with our professed desires to make opportunity equally available to all. The fragile resistance of the antitrust laws did nothing to prevent the compounding of business into larger and larger units.”13

Senator Wagner agreed that the courts had played a pernicious role with regard to corporate power. He charged the courts with having “enunciated so broad an interpretation of commerce” that the result had “been to frustrate the attempts of wage earners to better their economic conditions by collective action”.14

**Weak Unions and Collective Bargaining Laws**

To Arthur E. Suffern, economist and author of books on labor issues, the causes of inequality of bargaining power could be found in the failure to enact laws that created real rights for labor to organize and bargain collectively. Instead, the law had assured

the right of every employer to determine his own course as he will, regardless of the wishes of the workers. It means that the employer can say, “All right boys; come in and we'll talk it over”; hear the demands for higher wages and say, “Sorry – we can't pay more.” If the men object, he can answer: “We've had our collective bargaining. The act

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12 2322-23.

13 Wagner, 2324-25.

14 Wagner, 2339.
doesn't say anything about reaching an agreement.”

As a result, the only way to secure meaningful rights in our economic system is to have the economic power to enforce them. Suffern argued that the rules of the game would never be fair, “if those with power and selfish interests at stake are allowed to make them. If Government has any justification in modern civilization it is to be found in its duty to protect the weak against the strong and to define and enforce standards which list the level of human relations.”

Suffern saw the ease with which an employer could make labor’s rights ineffective, by simply refusing to refuse to recognize and deal with his workers’ representatives. For those who lacked funds to hold out without pay, the strike weapon was of little use. “The result is that labor's right to organize and bargain collectively is largely a fiction.”

Compare that weakness, he said, with the power employers had “through corporation organization, trade associations and now under code authorities are able to act as a unit in setting wage rates and establishing working conditions.” Rather than taking on the responsibilities that this power over others gave them, Suffern argued, employers shirked their responsibilities of so managing the economic system as to make it serve its main purpose of providing the population with the best possible living. In an industrial society worthy of the name, owners and employers should be leaders and builders as well as profit takers. Is there any way of holding them to these responsibilities as long as they are free to refuse to deal with their employees on a basis which enables their employees to protect their economic right to employment at the best possible terms?”

Even collective bargaining was of no benefit to workers, because, then, as now in our day, employers had been given veto power over this fundamental right As a result, acts and grants only as much power over wages, hours, working conditions, discipline. As a result, workers and their representatives feared to aggressively press their members’ claims.

Effects of Inequality of Bargaining Power on Democracy and Democratic Governance

Richard W. Hogue, former director of workers’ education for the Pennsylvania State Federation of Labor and Director of the Independent Legislative Bureau, argued that democracy and human rights cannot exist when there is “an owning and possessing and a dictating class in

15 Arthur E. Suffern, 315.
16 Arthur E. Suffern, 315-16.
17 Suffern 316.
18 Suffern 316.
19 Suffern 318.
the main, and either a subservient or a protesting and a rebelling class.”  Hogue observed that
the American industrial system had such a narrow focus on profit that it was unable to pay
attention to issues such as human rights. Under those conditions, he argued, democracy cannot
exist."  Hogue quoted British employer, B. Seebohm Browntree:

We tell people that they are members of a democratic nation. Yet when those to whom we
have been talking about democracy enter the factory gates, liberty ceases. Take the case of
a man who has been 20 or 30 years in a factory, a man of mature years. He sees a notice
about which he has never been consulted, making fundamental changes in his conditions
of work, and perhaps he demurs. He is told, "If you don't like it, you know what to do.
There are plenty of other places where you can look for a job."

All the conditions of work are determined in the manager's office, and then the
notices are put up on the wall. What about this democracy? Where does it come in? The
workers do not see it here, and yet the war taught them to live and die for it. They were
told that their country could not do without them, and that they had rights as well as
duties. Now, they are asking for a recognition of those rights and for a real voice
concerning the conditions under which they work, and not merely a few extremely
superficial details.  

Hogue continued, “The moment you allow masses of working people to become
educated, as we do, . . . you spoil a good worker and ruin a citizen unless you at the same time let
his mind function in his interest. You cannot put this portion of his life which occupies most of
his time and to which he gives most of his energy into a separate compartment from all the rest of
his compartments of his whole life, and tell him he cannot organize collectively and fight for
himself.”  And, yet, this – and worse – is exactly what this country was doing then and what we
have continued to do.

On March 1, 1934, when Senator Robert Wagner introduced the bill that would
eventually become the National Labor Relations Act, he observed:

The greatest barrier to freedom is the employer-dominated union, which has grown with
amazing rapidity since the passage of the Recovery Act.

The employer-dominated union generally is initiated by the employer. He takes
part in the determination of its rules, its procedure, and its policies. He can terminate it at
will and he exercises absolute veto power over its suggestions. Certainly there is no real
cooperation on an equal footing between employers and employees under such

20 Richard W. Hogue, 334-335.
21 Richard W. Hogue, 330.
22 Richard W. Hogue, 334-335.
23 Richard W. Hogue, 330-335.
Sources of Employee Power

Employee power lies, first, in the large number of people who are employees compared to those who are the employers. Senator Wagner, conceded that the power of those numbers could be used to force real bargaining by the employer; however, to be effective, that bargaining must take place through employee representatives who were not subservient to the employer:

No one would suggest that employers should not be allowed to employ outside lawyers, financial experts, or advisers. Secondly, only representatives who are not subservient to the employer with whom they deal can act freely in the interest of employees. Simple, common sense tells us that a man does not possess this freedom when he bargains with those who control his source of livelihood. For these reasons the very first step toward genuine collective bargaining is the abolition of the employer-dominated union as an agency for dealing with grievances, labor disputes, wages, rules, or hours of employment.

Wagner, however, made clear that more was needed to ensure that employees had democratic governance than merely having representatives who were independent of the employer. He had observed company unions that hired outside representatives but whose employers were still able to “exercise a compelling force over the collective activities of his workers.” Those dominated, he said, unions lacked the building blocks of democracy. What was needed to promote democratic unions was participatory unions:

A man inside his shop is not free to bargain for his fellows. If he presses his bargaining too hard, he loses his job. But the trade-union representative is paid by the union to do the union's bargaining-not by an employer whom he is trying to convince. Of course, employers dislike outside interference, and like to sneer at “walking delegates.” He cannot dominate them by the most effective means which every employer has, and is loath to give up-the fear of the man's losing his job.

Senator Wagner excoriated those who opposed actions that promoted equality of bargaining power and workplaces that supported democratic practices and values. Those who opposed majority rule came in for particular criticism. The Congress of American Industry and National Association of Manufacturers had approved majority rule by workers when their circumstances.

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24 Robert Wagner, 39.
25 Wagner 16.
26 Wagner 16.
27 1319.
representative was a dominated company union. Wagner, however, argued that “democracy in industry must be based upon the same principles as democracy in government. Majority rule, with all its imperfections, is the best protection of workers' rights, just as it is the surest guaranty of political liberty that mankind has yet discovered. How were the wishes of the majority to be ascertained? Frances Perkins, Secretary of Labor, observed, “The Labor Board has, moreover, by utilizing the principle so familiar to the American Commonwealth, of holding elections to determine what are the desires of individuals, has carried over into this field principles well established in American democracy, and a discipline well established in our lives, the discipline of elections and of the rule of the majority.”

The bill Senator Wagner championed also spoke to the challenge of protecting employees who exercised their right to make common cause with one another. Wagner observed: “The language restrains employers from attempting by interference or coercion to impair the exercise by employees of rights which are admitted everywhere to be the basis of industrial no less than political democracy. A worker in the field of industry, like a citizen in the field of government, ought to be free to form or join organizations, to designate representatives, and to engage in concerted activities.

Wagner promoted other protections in the bill:

The third unfair labor practice is one that the committee has considered with great care. There was presented to the committee much testimony from Government officers, workers, and representatives of labor to the effect that a few employers had dominated labor organizations of their own employees by dictating the terms of their constitutions and bylaws, by refusing to let these labor organizations amend their constitutions without the consent of the employer, by dictating to the organization officials the procedure or agenda for meetings, by indulging in unusual favors prior to or contemporaneously with an election of representatives by the workers, and by making financial contributions to one of several rival labor organizations with the intent of inducing the workers to join the subsidized organization. These practices and others of the same character are clearly abusive and should not be allowed to continue in the few instances where they have existed.

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28 Wagner 2337.
29 Wagner 2337.
30 Frances Perkins, Secretary of Labor 50.
31 1103.
32 1104.
Major questions of self-expression and democracy are involved. At a time when politics is becoming impersonalized and when the average worker is remote from the processes of government, it is more imperative than ever before that industry should afford him real opportunities to participate in the determination of economic issues.  

This story, then, is a story of standing amidst the wreckage of an economy and a nation and, yet, creating prosperity and democracy. It is a story of the power of the weak, when they organize and stand up for their rights. It is a story of the power of ideas and discussion, of concern for the welfare of the many, rather than for the welfare of the monied.

33 24.