

**Legal Ideology, Historical Contingency, and  
U.S. Labor Unions: Origins and Effects  
of Right to Work Laws**

Raymond L. Hogler  
Professor of Management  
Colorado State University  
Fort Collins, CO 80523 USA  
[Raymond.Hogler@colostate.edu](mailto:Raymond.Hogler@colostate.edu)  
970.491.5221

Submission to 2005 Critical Management Studies Conference  
Cambridge, UK

History Stream

## ABSTRACT

In 2003, union membership density in the United States stood at 12.9 percent of the nonagricultural workforce, down from a peak of 34.2 % in 1945. Labor relations experts offer various explanations for the decline, including employer opposition, workers' attitudes, technological change, and the legal environment (Bennett and Kaufman, 2002). An important environmental factor is the effect of "right to work" laws, which allow states to prohibit compulsory payment of union dues under collective bargaining agreements. Those laws, authorized by Section 14(b) of the Taft-Hartley legislation of 1947, reduce organizational membership in the range of 6-8 percent (Hogler, Shulman, and Weiler, 2004). During Congressional debates on the proposed rule, supporters repeatedly asserted that the right to work principle traditionally existed in American law, and Section 14(b) merely formalized that understanding. This paper argues that Section 14(b) speciously altered the basic structure of collective bargaining in the U.S. An examination of the historical context of union security in the National Labor Relations (Wagner) Act of 1935 (NLRA) and its modification in 1947 shows that the statutory justification for right to work is based on a fundamental misrepresentation of legal doctrine, with deleterious consequences for U.S. unions.

During the formative stages of the Critical Legal Studies (CLS) movement, Karl Klare described American labor law as an exercise in legal ideology. His influential articles (Klare, 1978; 1981) traced the judicial "deradicalization" of labor legislation and the reshaping of public policy toward workers' collective action. Klare's contributions focused scholarly attention on critical analysis and helped to articulate a new perspective on the ways in which law impacts attitudes and values. Among its more

significant insights, CLS emphasizes a historical and contextual approach to problems of public policy and doctrine. Right to work laws are particularly susceptible to such an analysis, because they rest on ideological premises that favor managerial property interests, individual liberties, and the notion of “free markets” in employment matters. Those fundamental notions continue to resonate with American workers, even though much of the middle class workforce suffers from deteriorating wages and benefits (Mishel, Bernstein, and Boushey, 2003).

In 1935, Senator Robert Wagner drafted the National Labor Relations Act, which remains the statutory framework for collective bargaining in the U.S. Wagner provided in his legislation that unions had the legal authority to negotiate for closed shops, by which employers agreed to hire only union members. Wagner’s rationale for this particular provision had to do with the economic power of unions to bargain for higher wages and redistribute wealth from corporations to workers (Barenberg, 1993; Kaufmann, 1996). Regarding workers’ freedom of choice, Wagner envisioned that workers would achieve their economic emancipation through collective power in the workplace. His objective throughout the statute was to strengthen group solidarity and union effectiveness, which demanded that individual preferences would be subordinate to organizational needs. On this view, closed shops served as the primary vehicle of collective security. Wagner further believed that state common law generally protected union action to obtain closed shops, and he therefore referred to state law in explaining how his statute should be interpreted. The historically unique conditions associated with the development of U.S. labor legislation led to the pivotal event in modern union decline — Section 14(b).

In 1947, the dominant political ideology promoted the rights of individual free choice at the expense of union goals. Lawmakers characterized unions as oppressive and corrupt organizations that deprived individuals of access to employment and burdened labor markets with monopolistic practices. The attack on unions coincided with a radical shift of political power in the U.S., as conservative Republicans captured large majorities in Congress in the 1946 elections. President Truman, a Democratic, vetoed the Taft-Hartley bill at the insistence of organized labor, but Congress overrode his veto. As one astute analysis of American labor concludes, the decline of unionism began with the shifting balance of political forces in the immediate post-war period (Goldfield, 1987). Coincident with growing anti-union sentiment, economic activity began to migrate to southern states having right to work laws and low union density. Both state development experts and industrialists ranked a right to work law as one of the top ten inducements for business locations in the late 1960s (Cobb, 1993). The consequence of allowing states to “opt out” of a crucial component of federal labor law was the growth of a competitive environment based on labor costs. Most economic analyses of right to work proceed from the premise that such legislation is associated with lower union density and lower wages; the assumption becomes that the passage of right to work attracts corporate development (e.g., Abrams and Voos, 2000; Dinlersoz and Hernandez-Murillo, 2002). Also of importance, labor cost competition induces major employers such as Wal-Mart to remain non-union through managerial tactics that manipulate and coerce workers (BusinessWeek, 2002; Kleiner, 2001; Rogers, 1990).

More recently, the state of Oklahoma in 2001 conducted a special ballot election on the issue of right to work. The election campaign reprised the same arguments made

in Taft-Hartley about individual liberties, state competitiveness, and union coercion (Greer and Baird, 2003; 2004; Hogler and LaJeunesse, 2002; 2003). Voters chose to adopt the legislation, making a present total of twenty-two right to work states. Right to work supporters plan new campaigns in other states, and a national bill is pending in Congress to create a federal rule prohibiting compulsory union support. As the strength of organized labor continues to wane in the U.S., union influence may reach a point of irrelevance (Troy, 2004). Right to work law was arguably the linchpin of capitalist control over U.S. employment relations in the post-war labor environment, and its development sheds considerable light on the importance of historical narratives to the analysis of economic and political power.

Applying the insights of critical theory to labor-management relations, this paper examines the way a specific legal rule shaped managerial power in U.S. workplaces. It uses a historical framework to trace the articulation of public policy toward collective workplace action in the U.S. between 1935 and 1947 and the consequences of those policy choices. Law figures instrumentally and symbolically in the relative balance of power between workers and employers. Right to work undermines union organizational effectiveness through ideologies of individualism, self-empowerment, and free choice. The result is an enfeebled labor movement and rising levels of income inequality in America.

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