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LETTING THE PUPPETS SPEAK: EMPLOYEE VOICE IN THE LEGISLATIVE HISTORY OF THE WAGNER ACT

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Professor Kenneth G. Dau-Schmidt, in his keynote address in this Symposium, *Promoting Employee Voice in the American Economy: A Call for Comprehensive Reform*,¹ joins a chorus of other scholars when he identifies a lack of employee voice in the workplace as a fundamental deficiency of contemporary American labor relations and recommends initiatives to remedy the problem.² Today's scholarly critiques and proposals directed at the problem of employee voice echo a flurry of commentaries that appeared in the late 1980s and early 1990s. These earlier critics bemoaned the absence of employee workplace voice, viewed Section 8(a)(2) of the National Labor Relations Act (NLRA)³ as a barrier to that voice, and, as a remedy, sought reinterpretation⁴ or revision⁵ of the provision. Those efforts failed. Today, the text of Section 8(a)(2) still remains unchanged from when the NLRA was enacted in 1935, making it an unfair labor practice for an employer:

To dominate or interfere with the formation or

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1. Kenneth G. Dau-Schmidt, *Promoting Employee Voice in the American Economy: A Call for Comprehensive Reform*, 94 MARQ. L. REV. 765 (2011).

2. See, e.g., STEPHEN F. BEFORT & JOHN W. BUDD, INVISIBLE HANDS, INVISIBLE OBJECTIVES: BRINGING WORKPLACE LAW & PUBLIC POLICY INTO FOCUS 108–13 (2009); CYNTHIA ESTLUND, REGOVERNING THE WORKPLACE: FROM SELF-REGULATION TO CO-REGULATION 162–85 (2010).

3. National Labor Relations Act, § 8(a)(2) (1947) (codified as amended at 29 U.S.C. § 158(a)(2) (2006)).

4. See, e.g., Thomas C. Kohler, *Models of Worker Participation: The Uncertain Significance of Section 8(a)(2)*, 27 B.C. L. REV. 499, 538–45 (1986); see also ESTLUND, *supra* note 2, at 250 n.28. See generally Robert B. Moberly, *The Story of Electromation: Are Employee Participation Programs a Competitive Necessity or a Wolf in Sheep's Clothing?*, in LABOR LAW STORIES 315 (Laura J. Cooper & Catherine L. Fisk eds., 2005).

5. The Teamwork for Employee and Managers (TEAM) Act, H.R. 1529, 103d Cong. § 3 (1993), would have added a second proviso to § 8(a)(2) of the NLRA that would have permitted employers to establish employee involvement structures to address quality, productivity, and efficiency.

administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to [section 6], an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.⁶

Contemporary scholarly advocates for enhanced employee voice and earlier advocates for revision of Section 8(a)(2) all share the conviction that the NLRA was at fault, either because it failed affirmatively to promote employee voice or that its text created, in Section 8(a)(2), an impediment to the promotion of employee voice. The purpose of this essay is to reflect on the origins of the NLRA in the 1935 Wagner Act to explore whether, and if so what, its drafters thought about the question of employee voice, and what re-engaging their conversation about employee voice might contribute to the current discussion of reform proposals, including those offered here by Professor Dau-Schmidt. As we shall see, that history tells a somewhat ironic story: Employee voice was abundantly present in the legislative history of the NLRA, but members of Congress failed to heed those voices, paternalistically dismissing the employees who spoke to them as mere puppets of their controlling employers. This reconsideration of what those employees had to say allows us to hear the “puppets” speak in their own voices and allows us to reflect on what policy makers might have done differently had they listened then.

This review of the legislative history of the NLRA will focus on the relationship between employee voices and the role of New York Senator Robert F. Wagner in shaping the Act that justifiably bears his name. Wagner played an extraordinarily powerful role in crafting the legislation that became the NLRA. He was “in ‘effective control of the legislation’ at all times.”⁷ Wagner did not involve the Department of Labor, the staff of the National Recovery Administration, or the White House until he was ready to introduce his bill.⁸ The Chairman of the Senate Education and Labor Committee, David I. Walsh, was so

6. National Labor Relations Act, § 8(a)(2) (1947) (codified as amended at 29 U.S.C. § 158(a)(2) (2006)). No substantive changes have been made in the provision since enactment, although the section and its internal cross-references have been renumbered.

7. 1 JAMES A. GROSS, *THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD: A STUDY IN ECONOMICS, POLITICS, AND THE LAW* 139 (1974) (quoting an oral history interview with Leon Keyserling, Wagner’s legislative assistant).

8. IRVING BERNSTEIN, *THE NEW DEAL COLLECTIVE BARGAINING POLICY* 88 (1950).

deferential to Wagner, who was not even a member of the Committee, that Walsh “delegate[ed] full responsibility to Wagner without asserting his own views.”⁹ Wagner’s control was so complete that his legislative assistant, Leon Keyserling, wrote not only the report of the Senate Committee on the bill that became the NLRA,¹⁰ but also the report of the House Committee on Labor.¹¹

The basic contours of the origins of the NLRA are well known. President Franklin D. Roosevelt was inaugurated in March 1933, in the midst of the Great Depression, with a pledge to revive the economy and get Americans working again.¹² The legislative path that might achieve these objectives was, however, far from clear. President Roosevelt looked to Senator Wagner to develop his legislative agenda for recovery.¹³ Wagner, working with an advisory committee including economists and representatives of business and labor, began crafting legislation that would combine self-regulation of business through trade associations, a public works program, and protection of the right of employees to bargain collectively.¹⁴ Labor rights were seen as a necessary counterbalance to business that could otherwise have “unfettered control over wages and hours.”¹⁵ Wagner’s drafting group joined forces with another and the bill that emerged became the National Industrial Recovery Act (NIRA), signed into law on June 16, 1933.¹⁶ The NIRA suspended the antitrust laws to permit establishment of trade associations with the power to create codes of industrial self-government, allowing member companies jointly to set production quotas and fix prices.¹⁷ Section 7(a) of the NIRA required that any such code include specified labor protections:

Every code of fair competition, agreement, and license approved, prescribed, or issued under this title shall contain the following conditions: (1) That employees shall have the right to organize and bargain

9. *Id.* at 112.

10. GROSS, *supra* note 7, at 139.

11. Kenneth M. Casebeer, *Holder of the Pen: An Interview with Leon Keyserling on Drafting the Wagner Act*, 42 U. MIAMI L. REV. 285, 343 (1987).

12. BERNSTEIN, *supra* note 8, at 29.

13. *Id.* at 31.

14. *Id.* at 31–32.

15. *Id.* at 30.

16. *Id.* at 37.

17. GROSS, *supra* note 7, at 9.

collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; (2) that no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing¹⁸

Administration of the NIRA by the National Recovery Administration (NRA) soon revealed the weaknesses of the articulated labor protections in Section 7(a). Section 7(a) provided no enforcement powers or procedures for selection of employee representatives. There was no specific list of prohibited employer actions or requirement for employers to bargain with organizations that represented their employees. Ambiguities in the Act could be interpreted to sanction employer-controlled company unions, allow proportional rather than exclusive representation, and permit individual rather than collective bargaining.¹⁹

The NRA immediately found itself in the middle of controversies between employers and unions about how Section 7(a) should be interpreted and applied. In the words of labor historian Irving Bernstein, Section 7(a) "lifted the lid of Pandora's box."²⁰ The NRA's first four months of interpreting Section 7(a) were a disaster: "In the attempt to maintain a formal neutrality as between the claims of capital and labor, vague, confusing, and sometimes meaningless statements had been put forward."²¹ Meanwhile, the first few months of the NIRA's life also brought an unanticipated outburst of strikes, fueled by hopes that the NIRA would bring greater prosperity that employers could share with their workers, and by vigorous union organizational efforts spurred on by the sense that, with enactment of Section 7(a), the government

18. National Industrial Recovery Act, § 7(a), Pub. L. No. 73-67, 48 Stat. 195, 198-99 (1933) (formerly codified 15 at U.S.C. § 703).

19. GROSS, *supra* note 7, at 11. For a definition of a company union, see *infra* text accompanying note 29.

20. BERNSTEIN, *supra* note 8, at 38.

21. LEWIS L. LORWIN & ARTHUR WUBNIG, LABOR RELATIONS BOARDS: THE REGULATION OF COLLECTIVE BARGAINING UNDER THE NATIONAL INDUSTRIAL RECOVERY ACT 83 (1935).

was encouraging and supporting workers' efforts to unionize.²²

In the face of the worst outbreak of strikes since 1921,²³ President Roosevelt, on August 5, 1933, made a public plea for industrial peace and created the National Labor Board (NLB).²⁴ It conveys a sense of the desperation and sometimes haphazard speed of the New Deal to note that the NLB had no statutory authority and was not even the subject of a formal executive order until December 16, 1933.²⁵ The President appointed Senator Wagner as Chairman of the NLB, which also included three labor representatives and three employer representatives.²⁶ Roosevelt had looked to the NLB to settle the troubling rash of labor disputes by mediation and conciliation, but the Board, in the absence of formal authority and with the press of events, assumed a much larger role that included adjudicating cases interpreting and applying Section 7(a).²⁷

In its short life, which ultimately lasted only eleven months, the NLB issued decisions in many cases and, in them, articulated basic principles of labor policy as it interpreted the language of Section 7(a) of the NIRA.²⁸ As noted, one of the questions that Section 7(a) had left unanswered was whether the establishment of company unions was consistent with its terms.

The very definition of a "company union" was contested. The term was sometimes intended to include independent unaffiliated trade unions dealing with a single employer, but the term was more commonly applied to an employee representation plan without union affiliation confined to a single employer that was usually initiated by the employer who provided its sole or overwhelming financial support.²⁹ I will use here this latter understanding of the term "company union."

The earliest company unions, established in the first two decades of the twentieth century, were generally benevolent efforts by employers to enlist employee cooperation, offer personal attention, and promote

22. *Id.* at 88–90.

23. GROSS, *supra* note 7, at 15.

24. *Announcement on Peace Labor Board*, N.Y. TIMES, Aug. 6, 1933, at A1.

25. Exec. Order No. 6511, Dec. 16, 1933; LORWIN & WUBNIG, *supra* note 21, at 93.

26. GROSS, *supra* note 7, at 16–17.

27. LORWIN & WUBNIG, *supra* note 21, at 93–94.

28. *Id.* at 138–208.

29. Robert F. Wagner, *Company Unions: A Vast Industrial Issue—Senator Wagner Sets Forth the Growth of Employer-Dominated Organizations, Tells of Their Effect on Collective Bargaining, and Discusses His Bill, Which is Designed to Prevent Economic Warfare*, N.Y. TIMES, Mar. 11, 1934, at A1.

employee welfare.³⁰ They were not initially designed “to engage in collective bargaining, settle grievances, or forestall trade unions.”³¹ While some of these earlier, more benevolent, company unions continued into the 1930s, the landscape of company unionism changed radically with the enactment of the NIRA in June 1933. Senator Wagner reported in a *New York Times* article, reprinted in the *Congressional Record*, that, by the fall of 1933, 45% of workers in mining and manufacturing were covered by company unions, more than four times as many as were then represented by trade unions.³² He stated that there had been a 169% increase in the number of employees covered by company unions between 1932 and 1933, from 432,000 to 1,164,000 workers.³³ Wagner noted, “More than 69 per cent of the company-union schemes now in existence have been inaugurated in the brief period since passage of the Recovery Act.”³⁴ Post-NIRA company unions were designed in large part to demonstrate purported compliance with Section 7(a)’s promise of the employees’ right to representation, while at the same time discouraging organization of the workers by independent outside trade unions.³⁵

The NLB evolved an approach to the company union that neither prohibited nor endorsed all company unions. Rather, the NLB considered a company union consistent with the employer’s obligations under Section 7(a) if either the idea originated with the employees, or, if it originated with management, that it was accepted by a majority of the employees in a secret ballot election.³⁶ The NLB conducted elections in which employees voted whether to be represented by a trade union or a company union, as well as elections in which employees voted whether they wished to have a company union or no representation plan.³⁷

30. Daniel Nelson, *The Company Union Movement, 1900–1937: A Reexamination*, 56 BUS. HIST. REV. 335, 339–47 (1982). For a comprehensive history and analysis of the company union movement prior to 1935, see generally Bruce E. Kaufman, *Accomplishments and Shortcomings of Nonunion Employee Representation in the Pre-Wagner Years: A Reassessment*, in NONUNION EMPLOYEE REPRESENTATION: HISTORY, CONTEMPORARY PRACTICE, AND POLICY 21 (Bruce E. Kaufman & Daphne Gottlieb Taras eds., 2000) [hereinafter NONUNION EMPLOYEE REPRESENTATION].

31. Nelson, *supra* note 30, at 340.

32. Wagner, *supra* note 29. Senator Wagner reported that only 9.3% of employees were represented by trade unions. *Id.* Professor Nelson calculated the number of company union members substantially differently than did Wagner. *See infra* note 84 and accompanying text.

33. Wagner, *supra* note 29.

34. *Id.*

35. Nelson, *supra* note 30, at 337.

36. LORWIN & WUBNIG, *supra* note 21, at 155.

37. *Id.* at 155, 161.

While the NLB had some initial successes in settling strikes and conducting elections, its structural and legal weakness left it defeated and ineffectual when some major employers, and then the judicial branch, refused to recognize its authority.³⁸ Although industry noncompliance and sometimes ambivalent presidential support precluded the NLB's decisions from directly achieving its objectives, its decisions did establish a "common law" of labor relations that subsequently had "a profound effect upon legislative and administrative policy."³⁹

Frustrated by the failure of the NLB to effectuate Section 7(a), Wagner now realized that the goals of Section 7(a) would only be achievable with legislation establishing a new agency with clear legal authority and strong enforcement powers.⁴⁰ Wagner introduced his bill, S. 2926, entitled the Labor Disputes Act (LDA), on March 1, 1934, with these words: "The bill which I am introducing is designed to clarify and fortify the provisions of section 7(a) of the National Industrial Recovery Act, and to provide means of administering them through the legislative establishment of a national labor board with adequate enforcement powers."⁴¹ Although the proposal for the LDA was later substantially amended and then withdrawn in the face of opposition from industry, labor, the press, and the President,⁴² legislative hearings on the LDA commenced the conversation about the form of the legislation that would emerge in 1935, more than a year later, as the NLRA.

From the perspective of twenty-first century academics identifying the absence of employee voice as a principal contemporary defect of the NLRA's labor regime, it is surprising to find an explicit reference to employee voice among the very first words with which Senator Wagner introduced the LDA. The reference to employee voice was made in the context of Wagner's condemnation of the company union. While

38. *Id.* at 99–114. The Weirton Steel Company was prominent among the resisters. It rejected an NLB interpretation of an agreement it had signed, conducted an election for employees to serve as representatives under its employee representation plan despite a NLB order to postpone the election, and engaged in protracted litigation with the NLB. *Id.* at 102–05. Employee representatives from Weirton were prominent among those who testified to urge Congress not to make company unions illegal. *See infra* text accompanying notes 90–91.

39. BERNSTEIN, *supra* note 8, at 60, 62.

40. *Id.* at 62–63.

41. *Amendment of National Recovery Act – National Labor Board*, 78 CONG. REC. 2442 (1934), reprinted in LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 1935, at 15 (1949) [hereinafter LEGISLATIVE HISTORY].

42. BERNSTEIN, *supra* note 8, at 72–73, 75–78.

company unions today play essentially no role in labor relations law,⁴³ Wagner, in the midst of diverse anti-union employer conduct that he sought to outlaw, singled out the phenomenon of the company union as the “greatest barrier” to employee freedom.⁴⁴ Introducing the LDA, Wagner identified a list of negative consequences for employees resulting from company unions, including among them that they deprive workers of wider cooperation with other workers necessary “to exercise their proper voice in economic affairs.”⁴⁵

Hearings on the Labor Disputes bill and the subsequent NLRA offered an opportunity for workers to articulate their own voices. While many of the witnesses who testified before the congressional committees in 1934 and 1935 came from the ranks of the prominent and powerful—including lawyers and economists, union and company presidents, government officials, and heads of trade associations—there were also more than thirty witnesses who were ordinary employees.⁴⁶ Among them were office workers, a gas station attendant, employees of

43. In the most recent annual report of the National Labor Relations Board, for fiscal year 2009, charges against employers for violation of Section 8(a)(2), *see supra* text accompanying note 6, which outlaws employer-dominated labor organizations, constituted only 2.7% of charges filed against employers. By comparison, charges against employers for discriminating against employees because of their union activities constituted 38.8% of charges against employers. 74 NLRB ANN. REP. 94 tbl.2 (2009). While the standard remedy in cases in which the Board finds a violation of Section 8(a)(2) is an order requiring the employer to disestablish the employer-dominated union, there was not a single case nationally in fiscal year 2009 in which the Board issued an order of disestablishment. *Id.* at 99 tbl.4. While claims of violation of Section 8(a)(2) are relatively rare, there is evidence that the phenomenon of company unions is not. *See* John Godard & Carola Frege, *Union Decline, Alternative Forms of Representation, and Workplace Authority Relations in the United States* 32, 33 (Nov. 10, 2010) (unpublished paper to be presented at the January 2011 meeting of the Labor and Employment Relations Association) (stating that 34% of non-union employees surveyed in 2009 reported that their companies had a management-established system in which representatives of employees met with employers about workplace issues; in 80% of these, employees reported that the consultation included wages and benefits, suggesting the extent to which violations of Section 8(a)(2) were occurring). An earlier study, based on a 1996 survey, estimated that 15% of non-union employees in the United States were covered by a formal non-union employee representation plan. Seymour Martin Lipset & Noah M. Meltz, *Estimates of Nonunion Employee Representation in the United States and Canada: How Different Are the Two Countries?*, in NONUNION EMPLOYEE REPRESENTATION, *supra* note 30, at 223, 225.

44. *To Create a National Labor Board: Hearing on S. 2926 Before the S. Comm. on Education and Labor*, 73d Cong. (1934) (statement of Sen. Wagner), *reprinted in* LEGISLATIVE HISTORY, *supra* note 41, at 39.

45. *Amendment of National Recovery Act – National Labor Board*, 73d Cong. (1934) (statement of Sen. Wagner), *reprinted in* LEGISLATIVE HISTORY, *supra* note 41, at 15; *see infra* notes 138–145 and accompanying text.

46. *See generally* LEGISLATIVE HISTORY, *supra* note 41.

telephone companies, and employees from factories producing ships, steel, and agricultural and electrical equipment.⁴⁷ What did these workers say when they had the opportunity to speak to legislators in the process of designing America's labor policy? If one of the objectives of that labor policy was to give voice to the workers, how did individual workers use their voice in the legislative process and what effect, if any, did their voices have on the legislation that emerged from the process?

Although their circumstances and the details of their messages varied, the workers who testified before Congress came largely for a single uniform purpose—to ask that the legislation not outlaw their company unions. One of the first to testify was Edward R. Fiske, Jr., an office worker from Leeds & Northrup Co., a Pennsylvania company manufacturing electrical measuring devices. He appeared at the hearings with a manual worker from the firm. They appeared on behalf of the Cooperative Association of Employees of the Leeds & Northrup Co. Fiske told the legislators that he and his fellow worker had been sent by their organization “to plead with you that, in some way, provision be made to prevent the destruction of a form of employee representation which, in our experience over a long term of years, has proved entirely satisfactory and adequate.”⁴⁸ Fiske testified that his association feared that the Labor Disputes bill would “legislate our organization out of existence.”⁴⁹ The provision of the bill that Fiske thought would threaten his organization was one that would make it an unfair labor practice for an employer to “contribute financial or other material support to any labor organization by compensating anyone for services performed in behalf of any labor organization, or by any other means whatsoever.”⁵⁰

Fiske explained how the scope of the Association's activities and its means of financial support put it directly in the crosshairs of the bill. First, the scope of the Association's activities made it a “labor organization” within the terms of the statute.⁵¹ He noted that the

47. *Id.*

48. *To Create a National Labor Board, Hearing on S. 2926 Before the S. Comm. on Education and Labor, 73d Cong. (1934)* (statement of Edward R. Fiske, Jr., Leeds & Northrup Co.), reprinted in *LEGISLATIVE HISTORY, supra* note 41, at 450.

49. *Id.*

50. *To Create a National Labor Board, Hearing on S. 2926 Before the S. Comm. on Education and Labor, 73d Cong. (1934)*, (Labor Disputes Bill) reprinted in *LEGISLATIVE HISTORY, supra* note 41, at 32.

51. The Bill intentionally defined a “labor organization” broadly as “any organization, labor union, association, corporation, or society of any kind in which employees participate to any degree whatsoever, which exists for the purpose, in whole or in part, of dealing with

Association, which had existed since 1918, dealt with both broad company policies and individual grievances related to “wages, hours, safety, working conditions, and any other matters which concern the employees.”⁵² Fiske said that the Association was “consistently consulted by management in the development of all policies affecting the employees.”⁵³ The organization also met the second criteria for illegality under the bill because the employer provided it financial and other support.⁵⁴

The Leeds & Northrup employees’ Association provided a diversity of benefits to the workers beyond the ability to address workplace conditions and grievances with the employer. It operated employee welfare and benefit programs including “a pension plan, a savings plan, an unemployment relief fund, an educational plan and an athletic association.”⁵⁵ The Association was not a paper tiger. When the employee Association recommended that the employer reinstate discharged employees, or transfer workers to other departments, the employer complied.⁵⁶ Employees had an opportunity to develop a collective voice by consulting with one another and developing their positions in private, without the presence of management officials.⁵⁷

The Association at Leeds & Northrup offered employees some measures of choice beyond that which current labor law affords. Hourly manual and salaried office workers could be represented in a single employee organization.⁵⁸ Employees could choose foremen as their

employers concerning grievances, labor disputes, wages, or hours of employment.” *Id.* § 3(5), reprinted in LEGISLATIVE HISTORY, *supra* note 41, at 32.

52. *To Create a National Labor Board, Hearing on S. 2926 Before the S. Comm. on Education and Labor, 73d Cong. (1934)* (statement of Edward R. Fiske, Jr., Leeds & Northrup Co.), reprinted in LEGISLATIVE HISTORY, *supra* note 41, at 450.

53. *Id.*

54. *Id.* at 451.

55. *Id.*

56. *Id.* at 453. From a neutral academic perspective, Professor Nelson offers an equally positive description of some of the benefits and successes of the Leeds & Northrup employee representation plan, describing it as “among the company union elite.” Nelson, *supra* note 30, at 347–52.

57. *To Create a National Labor Board, Hearing on S. 2926 Before the S. Comm. on Education and Labor, 73d Cong. (1934)* (statement of Edward R. Fiske, Jr., Leeds & Northrup Co.), reprinted in LEGISLATIVE HISTORY, *supra* note 41, at 453.

58. *Id.* at 453–54. Fiske asserted that such broad employee inclusion made the organization stronger because it could “prepare recommendations which properly balance the interests of the employees as a whole” and could preserve a “unified body of employees.” *Id.* at 454.

elected representatives if they wished.⁵⁹ Fiske concluded his remarks by asking that the proposed legislation permit employees to vote on whether they preferred to be represented by an organization such as theirs, rather than by an outside trade union.⁶⁰

The Senate Committee on Education and Labor considering Wagner's Labor Disputes bill heard testimony from others arguing in favor of Fiske's request to allow employees the power to choose for themselves between an employee organization with a measure of employer involvement, such as that at Leeds & Northrup, and an independent labor organization. One such speaker was Henry S. Dennison, owner of Dennison Manufacturing Co., a stationery manufacturer.⁶¹ Dennison was also a member of the NLB chaired by Senator Wagner.⁶² Dennison told the senators that he was also speaking for Mr. Leeds of Leeds & Northrup whose views were the same.⁶³ Dennison thought that the legislation should continue the policy of the NLB of seeing employer-supported employee representation plans as "an essential supplementary and a necessary competing type of unionism."⁶⁴ Dennison asserted that a single system of employee organization would not be sufficient "to cope with the complexities of a modern industrial civilization."⁶⁵ He said that Senator Wagner's attitudes had been soured as a member of the NLB by having been presented with the worst examples of employer-domination, but that there were hundreds of other companies that had "a sound system of joint and mutual participation in management."⁶⁶ Dennison asked that these positive forms of labor-management cooperation not be outlawed but rather "cultivated as seeding ground or laboratories from which we may learn."⁶⁷ Dennison thought that, if the law provided for employee

59. *Id.* at 452, 455.

60. *Id.* at 454-55.

61. *Id.* at 434-35 (statement of Henry S. Dennison, Dennison Manufacturing Co.).

62. *Id.* at 434-44.

63. *Id.* at 435. The "Mr. Leeds" to whom Dennison referred was evidently Morris L. Leeds, described by Professor Nelson. Nelson, *supra* note 30, at 349.

64. *To Create a National Labor Board, Hearing on S. 2926 Before the S. Comm. on Education and Labor, 73d Cong. (1934)* (statement of Henry S. Dennison, Dennison Manufacturing Co.), reprinted in LEGISLATIVE HISTORY, *supra* note 41, at 435.

65. *Id.* at 436.

66. *Id.* at 437.

67. *Id.* A witness employed in the credit and collection office of the American Rolling Mill in Ohio was apparently of a similar mind to Dennison. He said, "May we suggest, gentlemen, if you feel legislation is necessary that before you take this step you make a survey of the employee-representative plans which have been functioning successfully and then develop your legislation from the result of this side of the question." *Id.* at 860 (statement of

free choice between independent trade unions and alternative employer-financed organizations, the truly "evil" employer-dominated organizations would be "short-lived" because they would either evolve into genuinely independent employee representation plans or into outside trade unions.⁶⁸

Dennison's observation that there existed a diversity of employer-supported employee organizations that provided real opportunities for enhancement of employee welfare benefits and workplace voice and representation is borne out in the descriptions of such organizations offered by workers who testified before the congressional committees that considered the Labor Disputes bill and its successful successor, the 1935 Wagner Act, the NLRA. These testifying employees, like Mr. Fiske, pleaded for a legal environment that would allow their own organizations to continue.

The employees who testified before House and Senate committees on both bills spoke on behalf of employee representation plans with diverse organizational structures.⁶⁹ Their diversity supported Dennison's notion that employee representation systems, if allowed to develop in the absence of government-mandated uniformity, would display different forms adapted to match the needs of their varied settings.⁷⁰ For example, while the Leeds & Northrup plan described by Fiske included manual and office workers in a single organization,⁷¹ and permitted foreman to participate,⁷² other plans excluded office workers⁷³ and foremen.⁷⁴ While most plans required elected employee representatives to be current employees,⁷⁵ sometimes with employment

Paul D. Berry, American Rolling Mill Co).

68. *Id.* at 437 (statement of Henry S. Dennison, Dennison Manufacturing Co.).

69. For an overview of the general diversity of structures of company unions prior to enactment of the Wagner Act, see Kaufman, *supra* note 30, at 27-29.

70. See *To Create a National Labor Board, Hearing on S. 2926 Before the S. Comm. on Education and Labor*, 73d Cong. (1934), reprinted in LEGISLATIVE HISTORY, *supra* note 41, at 436.

71. See *supra* notes 55-58 and accompanying text.

72. See *supra* note 59 and accompanying text.

73. *To Create a National Labor Board, Hearing on S. 2926 Before the S. Comm. on Education and Labor*, 73d Cong. (1934) (statement of Jack Larkin, Weirton Steel Co.), reprinted in LEGISLATIVE HISTORY, *supra* note 41, at 810.

74. *Id.* at 504 (statement of John Collins, Sobol Bros. Inc.).

75. See, e.g., *Labor Disputes Act, Hearing on H.R. 6288 Before the H. Comm. on Labor*, 74th Cong. (1935) (section III.1., Qualifications of Representatives and Voters, Truscon Steel Co., Pressed Steel Div., Cleveland, Ohio, Plan of Employees' Representation, requiring representatives to have been on the payroll at least 90 days in order to be a nominee) reprinted in LEGISLATIVE HISTORY, *supra* note 41, at 2633; *id.* at 2612 (section III.1.,

of a minimum duration,⁷⁶ some plans permitted non-employees to be the employees' elected representatives.⁷⁷ While it was typical for the organization to encompass employees working at only a single facility, the employees of the American Telephone & Telephone Company (AT&T) had a nationwide organization with 200 branches, large enough to require a national secretarial office under the supervision of the employees.⁷⁸ The representation plan at New York Telephone Co. covered 2,200 plant, construction, and maintenance employees in all areas of the state of New York except New York City.⁷⁹ Although plans were commonly structured with a central employee council and issue-based committees, the plan at Goodyear Tire & Rubber Co. adopted the structure of the United States Congress with precincts electing representatives to serve in a "House" and districts electing senators to serve in its "Senate."⁸⁰ In most cases, all organization operating costs were paid by the employer, but, here too, there were some differences.

Qualifications of Representatives and Members, Articles of Association of the Hudson Industrial Association, requiring only that representatives be on the payroll on the day of nomination).

76. See, e.g., *id.* at 2633 (section III.1., Qualifications of Representatives and Voters, Truscon Steel Co., Pressed Steel Div., Cleveland, Ohio, Plan of Employees' Representation, requiring 90 days of employment prior to nomination); *To Create a National Labor Board, Hearing on S. 2926 Before the S. Comm. on Education and Labor*, 73d Cong. (1934) (section II.1., Butler Armco Plan of Employee Representation for the American Rolling Mill Co., requiring employment of at least one year as of December 1st prior to the election), *reprinted in* LEGISLATIVE HISTORY, *supra* note 41, at 864.

77. *To Create a National Labor Board, Hearing on S. 2926 Before the S. Comm. on Education and Labor*, 73d Cong. (1934) (statement of Jack Larkin, Weirton Steel Co.), *reprinted in* LEGISLATIVE HISTORY, *supra* note 41, at 804. To emphasize the eligibility of non-employees, Larkin noted that even Italian Fascist leader Mussolini received a couple of votes. *Id.* See also, *National Labor Relations Board, Hearing on S. 1958 Before the S. Comm. on Education and Labor*, 74th Cong. (1935) (statement of Guy E. Mitchell, Wheeling Steel Corp.), *reprinted in* LEGISLATIVE HISTORY, *supra* note 41, at 1803. See generally Wagner, *supra* note 29.

78. *National Labor Relations Board, Hearing on S. 1958 Before the S. Comm. on Education and Labor*, 74th Cong. (1935) (statement of T.V. Conway, Long Lines Department, American Telephone & Telegraph Co.), *reprinted in* LEGISLATIVE HISTORY, *supra* note 41, at 1858, 1860.

79. *To Create a National Labor Board, Hearing on S. 2926 Before the S. Comm. on Education and Labor*, 73d Cong. (1934) (statement of Francis C. Maloney, New York Telephone Co.), *reprinted in* LEGISLATIVE HISTORY, *supra* note 41, at 711.

80. *National Labor Relations Board, Hearing on S. 1958 Before the S. Comm. on Education and Labor*, 74th Cong. (1935) (statement of A. B. Trembley, Goodyear Tire & Rubber Co.), *reprinted in* LEGISLATIVE HISTORY, *supra* note 41, at 1928-29. This model for company unions, modeled after the structure of the U.S. government, was known as the Leitch plan, popularized by management consultant John Leitch. Kaufman, *supra* note 30, at 27.

At United Railways, thousands of dollars were derived from sources other than the employer including twenty-five-cent weekly employee dues, rebates of commissions on the sale of coal sold at market rates to employees, sales of Christmas candy, interest on a savings account, and proceedings from an employee "moonlight excursion."⁸¹ At Goodyear, the organization's activities committee used funds derived from employee sports activities and dances to pay the expenses of their six representatives coming to Washington, D.C. to testify.⁸²

While several employees testified to Congress about employer-supported employee committees that were only a few months old and evidently created in an effort to demonstrate employer compliance with Section 7(a) of the NIRA,⁸³ many employees testified about long-standing organizations whose creation had been motivated by other reasons. Business historian Daniel Nelson estimated that there were 2.5 million workers represented by company unions in 1932, before the enactment of the NIRA.⁸⁴ A representation plan at American Rolling Mill Co., had existed since 1904,⁸⁵ an era in which company unions were established as a progressive personnel management practice designed to enhance employee welfare and further employee cooperation with management objectives.⁸⁶ Many representation plans had been founded during and immediately after World War I,⁸⁷ when federal agencies,

81. *To Create a National Labor Board, Hearing on S. 2926 Before the S. Comm. on Education and Labor, 73d Cong. (1934)* (statement of Edgar Woolford, United Railways), reprinted in LEGISLATIVE HISTORY, *supra* note 41, at 704-05.

82. *National Labor Relations Board, Hearing on S. 1958 Before the S. Comm. on Education and Labor, 74th Cong. (1935)* (statement of A. B. Trembley, Goodyear Tire & Rubber Co.), reprinted in LEGISLATIVE HISTORY, *supra* note 41, at 1927, 1936-37.

83. Several witnesses noted that their organization had existed since June 1933, the very month in which the NIRA was enacted. See, e.g., *To Create a National Labor Board, Hearing on S. 2926 Before the S. Comm. on Education and Labor, 73d Cong. (1934)* (Republic Steel Corp.), reprinted in LEGISLATIVE HISTORY, *supra* note 41, at 880; *id.* at 918 (Tennessee Coal, Iron & Railroad Co.); *National Labor Relations Board, Hearing on S. 1958 Before the S. Comm. on Education and Labor, 74th Cong. (1935)* (Spang Chalfant & Co., Inc.), reprinted in LEGISLATIVE HISTORY, *supra* note 41, at 1807. For the text of Section 7(a), see *supra* note 18 and accompanying text.

84. Nelson, *supra* note 30, at 338 tbl.1. *But see supra* note 32 and accompanying text (discussing Senator Wagner's significantly smaller estimate of the number of employees covered by company unions in 1932).

85. *National Labor Relations Board, Hearing on S. 1958 Before the S. Comm. on Education and Labor, 74th Cong. (1935)* (statement of Robert F. Colley, American Rolling Mill Co.), reprinted in LEGISLATIVE HISTORY, *supra* note 41, at 1814.

86. Nelson, *supra* note 30, at 339-40.

87. See, e.g., *To Create a National Labor Board, Hearing on S. 2926 Before the S. Comm. on Education and Labor, 73d Cong. (1934)* (statement of Edward R. Fiske, Jr., Leeds & Northrup Co., founded in 1918), reprinted in LEGISLATIVE HISTORY, *supra* note 41, at 450;

including the War Labor Board, mandated their creation.⁸⁸ A number of employees who testified represented company unions, particularly in steel plants, with origins in the 1920s, a decade or more before enactment of the NIRA.⁸⁹

The company unions described in the employees' testimony to Congress generally offered employee representatives opportunities to discuss with management representatives broad workplace policy issues, as well as opportunities to pursue individual and group grievances challenging specific employer decisions. The employee witnesses described in some detail the kinds of issues that had been addressed at their companies. Witnesses extolled the breadth of the issues they had worked on with their employers and some suggested that such breadth was beyond either the scope of issues that employers would be required to negotiate with regular unions under the proposed act or beyond the scope of issues that regular unions would want, as a practical matter, to be concerned about. For example, C. William Conn, a helper in the open hearth department at Weirton Steel Co. in Ohio, told the Senate committee that his organization's "broad field of accomplishments" was "absolutely impossible under the national union plan."⁹⁰ He said that unions focus on wages, hours, and working conditions, while his organization had addressed those issues, as well as questions of sanitation, medical service, housing, recreation, public relations, safety, health, economy and waste prevention, education, relief, workmen's compensation, education, publication, athletics, and recreation.⁹¹ John

National Labor Relations Board, Hearing on S. 1958 Before the S. Comm. on Education and Labor, 74th Cong. (1935) (statement of T. V. Conway, Long Lines Department, American Telephone & Telegraph Co., founded in 1919), reprinted in LEGISLATIVE HISTORY, supra note 41, at 1859; National Labor Relations Board, Hearing on S. 1958 Before the S. Comm. on Education and Labor, 74th Cong. (1935) (statement of A. B. Trembley, Goodyear Tire & Rubber Co., founded in 1919), reprinted in LEGISLATIVE HISTORY, supra note 41, at 1933.

88. Nelson, *supra* note 30, at 336–37.

89. *See, e.g., To Create a National Labor Board, Hearing on S. 2926 Before the S. Comm. on Education and Labor, 73d Cong. (1934) (statement of Ellwood H. Smith, Bethlehem Steel, founded in 1920) reprinted in LEGISLATIVE HISTORY, supra note 41, at 836; id. at 850–51 (statement of Thomas Cleary, Youngstown Sheet & Tube Co., founded in approximately 1925); id. at 872 (statement of Guy E. Mitchell, Wheeling Steel Corp., founded in 1921).*

90. *To Create a National Labor Board, Hearing on S. 2926 Before the S. Comm. on Education and Labor, 73d Cong. (1934) (statement of C. William Conn, Weirton Steel Co.) reprinted in LEGISLATIVE HISTORY, supra note 41, at 884; see supra note 38 (discussing Weirton Steel's resistance to the NLB).*

91. *To Create a National Labor Board, Hearing on S. 2926 Before the S. Comm. on Education and Labor, 73d Cong. (1934) (statement of C. William Conn., Weirton Steel Co.), reprinted in LEGISLATIVE HISTORY, supra note 41, at 884–85; see infra notes 106–109 and accompanying text (explaining what Conn meant by "public relations").*

Collins, a service station employee in the Bronx, similarly said that his organization's discussions with management not only covered issues such as wages and hours but also "things which an outside union would not touch."⁹² A Chicago employee of the Long Lines Department at AT&T described his organization as placing no limits on the topics it would seek to negotiate with management, and as not having found, in the fifteen years of its existence, any issue on which management was reluctant to negotiate with employee representatives.⁹³ Frank Oliver testified that the Industrial Works Council at International Harvester Co. had obtained for the workers vacations, pensions, a "made-work program," employees' benefit associations, safe shops for working, a loan plan and a wage rate of 97% of the 1929 hourly rates, well above the NIRA code requirement of 85%.⁹⁴ William Westlake, a bricklayer at a Jones & Laughlin Steel Corporation plant in Pennsylvania, testified about the successful settlements the employees' organization had achieved regarding pay, working hours, sanitation, safety, and working conditions, as well as reductions they had achieved in bus rates and house rents.⁹⁵ He then asked and answered his own question: "Would an outside organization consider these matters worthy of their consideration? I do not think so."⁹⁶ Jacob F. Madden, a tinplate department roller at Weirton Steel Co., considered in his testimony the same question that Westlake had posed rhetorically, but from the perspective of one who had previously been a member of the Amalgamated Association of Iron, Steel and Tin Plate Workers Union that was then actively seeking to organize steelworkers.⁹⁷ Madden said

92. *National Labor Relations Board, Hearing on S. 1958 Before the S. Comm. on Education and Labor*, 74th Cong. (1935) (statement of John Collins, Sobol Bros. Inc.), reprinted in LEGISLATIVE HISTORY, *supra* note 41, at 1722.

93. *Id.* at 1859, 1861-62 (statement of T. V. Conway, Long Lines Department, American Telephone & Telegraph Co.).

94. *To Create a National Labor Board, Hearing on S. 2926 Before the S. Comm. on Education and Labor*, 73d Cong. (1934) (statement of Frank Oliver, McCormick Works, International Harvester Co.), reprinted in LEGISLATIVE HISTORY, *supra* note 41, at 959.

95. *National Labor Relations Board, Hearing on S. 1958 Before the S. Comm. on Education and Labor*, 74th Cong. (1935) (statement of William Westlake, Jones & Laughlin Steel Corp.), reprinted in LEGISLATIVE HISTORY, *supra* note 41, at 1845. Jones & Laughlin Steel was one of the many companies that challenged the constitutionality of the NLRA shortly after its enactment, GROSS, *supra* note 7, at 192-93, and it was the respondent in the case in which the Supreme Court upheld the Act's constitutionality, *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

96. *National Labor Relations Board, Hearing on S. 1958 Before the S. Comm. on Education and Labor*, 74th Cong. (1935) (statement of William Westlake, Jones & Laughlin Steel Corp.), reprinted in LEGISLATIVE HISTORY, *supra* note 41, at 1845.

97. *To Create a National Labor Board, Hearing on S. 2926 Before the S. Comm. on*

that the Amalgamated was “never interested in the general welfare of the workers” and that it could “never be in the position to get the many things before the management which are just as important to the working man as his wages.”⁹⁸ He said that wages were of little solace to men who get sick or injured unnecessarily and that when, as during the Depression, working hours are reduced “proper recreation becomes more and more important.”⁹⁹

In addition to offering an opportunity to address broad workplace issues and individual grievances, company unions described in the workers’ testimony sometimes were instrumental in delivering employee benefit packages, some of which would look quite attractive to a twenty-first century employee. Edgar Woolford, President of the United Railways Employees’ Association in Maryland (Railways Association) came to testify accompanied by twenty-nine employees, the entire membership of their general committee.¹⁰⁰ He described the benefits employees received in 1933, in the midst of the Depression. They had a group insurance plan, pensions, death benefits, and a sick benefit of \$10 a week; they had free physicians, surgeons, and specialists; they had hospitals and nurses who would visit employees and their families in their homes when requested.¹⁰¹ The Railways Association would provide additional relief to employees whose needs exceeded their sick benefit, such as a needed ton of coal.¹⁰² Other representatives of employee associations provided further examples of ways in which their organizations had responded to the special needs that employees confronted in the face of the extreme economic challenges of the Depression. Neil Gordon of Youngstown Sheet & Tube Co. noted that their association managed cooperative stores that offered lower prices and extended credit to employees, as well as organizing athletic programs and gardening projects.¹⁰³ An employee at International Harvester said that his organization made loans to unemployed workers so that “not a single one of our men or his family . . . suffered from lack of food, clothing, or shelter during this period of depression,”¹⁰⁴ and that

Education and Labor, 73d Cong. (1934) (statement of Jacob F. Madden, Weirton Steel Co.), reprinted in LEGISLATIVE HISTORY, *supra* note 41, at 903.

98. *Id.* at 904.

99. *Id.*

100. *Id.* at 704 (statement of Edgar Woolford, United Railways & Electric Co.).

101. *Id.*

102. *Id.*

103. *Id.* at 847 (statement of Neil Gordon, Youngstown Sheet & Tube Co.).

104. *Id.* at 960 (statement of Daniel J. Sullivan, International Harvester Co.).

they established a revolving loan fund so employees could borrow money "instead of going out to loan sharks."¹⁰⁵ Some of the more unusual adaptive programs occurred at Weirton Steel. Weirton employee representative C.W. Conn noted that one of the issues the group addressed, which he referred to as an issue of "public relations," concerned the problem of wage attachments.¹⁰⁶ Merchants in West Virginia were garnishing the wages of workers and recovering court and constable costs two or three times the amount of the outstanding debt, even though the portion of the remaining debt was small and even though the worker was making regular payments.¹⁰⁷ The workers hired an attorney to advise them, and representatives appeared with the workers in "hundreds of cases" in the justice of the peace court to successfully release wages from attachment.¹⁰⁸ The organization went on to request their state legislator to propose legislation that would limit the proportion of earnings subject to attachment to protect low-wage workers.¹⁰⁹ The employee organization worked with the local Kiwanis Club to persuade a private trust to use its funds for a park and swimming pool, and the organization influenced Weirton to provide a high school athletic field and furnish it with sports equipment when the high school lost its field to industrial development.¹¹⁰

The workers who testified before Congress in defense of their employee representation plans and the texts of the plans introduced into the record of legislative committee hearings make clear that many such plans offered protections for employees that in some cases only became commonplace in collective bargaining agreements decades later. Section 7(a) of the NIRA explicitly required employers covered by industrial codes to refrain from discriminating against employees because of their union membership or activities.¹¹¹ Employee representation plan documents often extended non-discrimination promises well beyond that required by Section 7(a). The language in the employee representation plan at the National Tube Co. in Pennsylvania was typical, including a clause providing that "[t]his plan shall in no way discriminate against any employee because of race, sex, or creed, or abridge or conflict with his or her right to belong or not to

105. *Id.* at 961.

106. *Id.* at 885 (statement of C. William Conn, Weirton Steel Co.).

107. *Id.*

108. *Id.* at 885-86.

109. *Id.* at 886.

110. *Id.*

111. For the text of Section 7(a), see *supra* note 18 and accompanying text.

belong to any lawful society, fraternity, union, or other organization.”¹¹²

It appears that some representation plans accomplished a measure of industrial desegregation long before it was legally mandated.¹¹³ Senator David I. Walsh of Massachusetts, Chairman of the Senate Committee on Education and Labor, who was conducting the hearings on Senator Wagner’s proposed LDA, specifically questioned the employee representative from the Tennessee Coal, Iron & Railroad Co. from Alabama about the racial composition of employees at his mill and their participation in the plan.¹¹⁴ The employee representative, Ben B. Gillespie, told Walsh that half of the members of his own department were “colored people,” and that some of the elected representatives were also, although none from Gillespie’s own department.¹¹⁵ Plans included provisions prohibiting the employer from retaliating against employees for actions taken in their role as representative, and some offered resolution by a mutually-selected arbitrator should any claims of retaliation arise.¹¹⁶ Some plans went even further in protecting representatives from employer retaliation. The 1934 revision of the Plan of Employees’ Representation at the National Tube Co. permitted

112. *To Create a National Labor Board, Hearing on S. 2926 Before the S. Comm. on Education and Labor*, 73d Cong. (1934) (section III.4., Revised Plan of Employees’ Representation—National Tube Co., McKeesport, Pa.), *reprinted in* LEGISLATIVE HISTORY, *supra* note 41, at 1061. An identical provision appears as Section II.4. of the Butler Armco Plan of Employee Representation for the American Rolling Mill Co. *Id.* at 864. The Acme Steel Co. plan also included a provision prohibiting discrimination on the basis of race and sex. *National Labor Relations Board, Hearing on S. 1958 Before the S. Comm. on Education and Labor*, 74th Cong. (1935) (statement of Louis E. Haht, Acme Steel Co.), *reprinted in* LEGISLATIVE HISTORY, *supra* note 41, at 1847.

113. The text of the NLRA, in 1935 or thereafter, did not prohibit unions from discriminating on the basis of race or sex, although judicial interpretations defining the duty of fair representation, and, subsequently, Title VI of the Civil Rights Act had that effect. *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337 (1953) (holding that the NLRA implicitly imposes on unions a duty of fair representation); 42 U.S.C. § 2000e-2(c) (2006) (prohibiting gender and race discrimination by labor organizations).

114. *To Create a National Labor Board, Hearing on S. 2926 Before the S. Comm. on Education and Labor*, 73d Cong. (1934), *reprinted in* LEGISLATIVE HISTORY, *supra* note 41, at 919.

115. *Id.* at 919 (statement of Ben B. Gillespie, Tennessee Coal, Iron & Railroad Co.).

116. *Id.* at 869. Section IX., Representatives’ Guaranty, Butler Armco Plan of Employee Representation for the American Rolling Mill Co. provided that if a representative’s claim of discrimination was not settled satisfactorily to the employee by the company president, the “question shall be settled by an arbitrator selected by mutual agreement.” *Id.* For another non-retaliation provision including arbitration, see *National Labor Relations Board, Hearing on S. 1958 Before the S. Comm. on Education and Labor*, 74th Cong. (1935) (Articles III; V, Sec. 2, and VI, Agreement Between Twin City Rapid Transit Co. and the Employees’ Cooperative Association of Twin [City] Lines, September 15, 1934), *reprinted in* LEGISLATIVE HISTORY, *supra* note 41, at 2143–45.

representatives to take any claims of retaliation for their plan activities to final and binding arbitration before either the United States Secretary of Labor or the state department of labor, and the plan promised that the company would furnish any such arbitrator "with every facility for the determination of the facts."¹¹⁷

While one tends to think of management's willingness to subject its decision-making to the review of a neutral arbitrator as an employee protection only achievable through a union's strength in collective bargaining, many non-union employee representation plans included some opportunity for arbitration. While some of the employee representation plans referenced in congressional testimony offered arbitration only for claims of discrimination against employee representatives,¹¹⁸ others afforded access to arbitration for a broad range of employee grievances. Although some of these arbitration protections were weak, allowing significant employer influence in whether grievances went to arbitration, many were surprisingly strong.

Strong arbitration systems took a variety of forms. At Bethlehem Shipbuilding Corporation, grievances could be referred to the U.S. Secretary of Labor if the grievance was not first resolved through a series of joint committees composed of employee and management representatives.¹¹⁹ At the Carter Oil Co., grievances were considered by a joint conference with an equal number of employee and management representatives. If the joint conference did not reach a unanimous decision on a fair adjustment, appeal could be made to the company's board of directors. A quarter or more of the members of the joint conference had the power to take a grievance beyond the board of directors to a board of arbitration with one member selected by management, one by employee representatives, and a third by mutual

117. *To Create a National Labor Board, Hearing on S. 2926 Before the S. Comm. on Education and Labor, 73d Cong. (1934) (section X., Revised Plan of Employees' Representation—National Tube Co., McKeesport, Pa.), reprinted in LEGISLATIVE HISTORY, supra note 41, at 1064.* The same provision was part of the employee representation plan at the Quincy, Massachusetts facility of Bethlehem Shipbuilding Corp. *To Create a National Labor Board, Hearing on S. 2926 Before the S. Comm. on Education and Labor, 73d Cong. (1934) (statement of William G. McDermott, Bethlehem Shipbuilding Corp.), reprinted in LEGISLATIVE HISTORY, supra note 41, at 843.*

118. *National Labor Relations Board, Hearing on S. 1958 Before the S. Comm. on Education and Labor, 74th Cong. (1935) (Article IV., Agreement Between Twin City Rapid Transit Co. and the Employees' Cooperative Association of Twin [City] Lines, September 15, 1934), reprinted in LEGISLATIVE HISTORY, supra note 41, at 2144.*

119. *To Create a National Labor Board, Hearing on S. 2926 Before the S. Comm. on Education and Labor, 73d Cong. (1934) (statement of William G. McDermott, Bethlehem Shipbuilding Corp.), reprinted in LEGISLATIVE HISTORY, supra note 41, at 843.*

agreement of the other two arbitrators.¹²⁰ The Articles of Association of the Hudson Industrial Association at the Hudson Motor Co. broadly allowed submission of grievances over “[a]ny matter which in the opinion of any member requires adjustment” and made binding arbitration the sixth and final step of its grievance procedure:

If the member of the board of directors fails to effect a satisfactory settlement within a reasonable time, the aggrieved employee or his representative may file a written request that the matter be referred to a board of arbitrators composed of three members, one arbitrator to be appointed by the employee or his representative, one by the management, and a third to be selected by the two already chosen arbitrators. The decision of the arbitrators shall be final and binding on all parties.¹²¹

Weaker plans purported to establish an arbitration procedure, but then essentially afforded the employer veto power over access to arbitration. The Plan of Employee Representation at the Butler, Pennsylvania, plant of American Rolling Mill Co. provided for grievances to be considered by increasingly higher levels of supervisors, a joint committee, and next the company president. Only if the company president and the employees’ executive committee concurred, could the matter be referred to “one or more arbitrators to be agreed upon at the time according to the nature of the discussion.”¹²² At the Warren District of the Republic Steel Corporation, a grievance would only go to arbitration upon concurrence of the company president and a majority of employees on the joint appeals committee.¹²³

120. *National Labor Relations Board, Hearing on S. 1958 Before the S. Comm. on Education and Labor, 74th Cong. (1935) (Articles 4, 5, Joint Agreement Adopted by the Conference of Representatives of the Carter Oil Co. and the Employees), reprinted in LEGISLATIVE HISTORY, supra note 41, at 2046.*

121. *Labor Disputes Act, Hearing on H.R. 2688 Before the H. Comm. on Labor, 74th Cong. (1935) (Section X, Procedure for Adjustments, Articles of Association of the Hudson Industrial Association), reprinted in LEGISLATIVE HISTORY, supra note 41, at 2615.*

122. *To Create a National Labor Board, Hearing on S. 2926 Before the S. Comm. on Education and Labor, 73d Cong. (1934) (Section VIII, Procedure for Adjustments, Butler Armco Plan of Employee Representation for the American Rolling Mill Co.), reprinted in LEGISLATIVE HISTORY, supra note 41, at 869.*

123. *National Labor Relations Board, Hearing on S. 1958 Before the S. Comm. on Education and Labor, 74th Cong. (1935) (statement of Edward J. Mulligan, Republic Steel Corp.), reprinted in LEGISLATIVE HISTORY, supra note 41, at 1788.* A similar provision appears in the plan at Truscon Steel Co. Section X.I.2., Procedure for Adjustment, Truscon Steel Co., Pressed Steel Division, Cleveland, Ohio, Plan of Employees’ Representation.

While not all employee representation plans described by the testifying employees had arbitration provisions, the programs that they described at the congressional hearings consistently afforded employees an opportunity to submit grievances to be considered in a hierarchical structure with unresolved disputes rising to higher level company officials or joint employee-management committees. Workers testified with evident pride about the successes achieved in their grievance procedures, often providing specific statistics about the types of grievances considered in various categories and the proportion of matters resolved in favor of the workers. Such successes were described, even in representation plans that had been promulgated in response to the NIRA, and thus had been in effect for only a few months. The numbers they presented made clear that, even in the absence of potential arbitration, employees were willing to submit grievances in significant numbers and employers under these plans were willing to reverse initial management decisions or policies and resolve a significant proportion of the disputes in favor of employees. For example, a witness from the Canton, Ohio, works of the Republic Steel Corporation said that their plan, which had been in operation for fewer than eight months, had already considered ninety-one grievances, of which approximately two-thirds had been resolved in favor of the employees.¹²⁴ At a Weirton Steel Co. plant in West Virginia, in the first six months of the employee representation plan, 505 cases addressing wages, safety, and working conditions, had been concluded, with 59% resolved in favor of the employee.¹²⁵ A witness from the employee representation plan at the Bethlehem Shipbuilding Corporation in Massachusetts reported that over the eleven-year life of their plan, about 2,500 cases had been satisfactorily resolved.¹²⁶ An employee from the Wheeling Steel Corporation, whose plan had also been in operation eleven years, reported that their committees had handled 116 cases in the previous year, with more than 90% resolved in favor of the

Labor Disputes Act, Hearing on H.R. 6288 Before the H. Comm. on Labor, 74th Cong. (1935), reprinted in LEGISLATIVE HISTORY, supra note 41, at 2636.

124. *To Create a National Labor Board, Hearing on S. 2926 Before the S. Comm. on Education and Labor, 73d Cong. (1934)* (statement of Eugene R. Roderick, Republic Steel Corp.), reprinted in LEGISLATIVE HISTORY, supra note 41, at 878. The total did not include oral grievances resolved by foremen and not reduced to writing. *Id.*

125. *Id.* at 884 (statement of C. William Conn, Weirton Steel Co.). Working condition cases included sanitation, medical service, housing, recreation and public relations. Compromise settlements were reached in 6.3% of the cases. *Id.*

126. *Id.* at 842 (statement of William G. McDermott, Bethlehem Shipbuilding Corp.).

employees.¹²⁷

It is surprising to discover that some of the employer-promulgated employee representation plans described and presented to congressional committees in 1934 and 1935 provided employees with a measure of protection against improper employee discipline when, even today, the common law still generally considers employment to be "at will."¹²⁸ In the Hudson Motor Company plan, management asserted a "right to hire, suspend, or discharge for a proper cause" and to relieve employees from duty only "because of the lack of work or other legitimate reasons."¹²⁹ Nearly identical language appears in the plan at Truscon Steel Co. of Cleveland, Ohio.¹³⁰ In the representation plan for the Twin City Rapid Transit Co., while management agreed only to arbitrate those disciplinary disputes asserting discrimination on the basis of employees' participation in the employee association, it did agree to consider grievances related to other cases of employee discipline and to reinstate suspended or discharged employees and restore their seniority if the investigation concluded that the employee was not "sufficiently at fault to warrant such suspension or discharge."¹³¹ The employee representation plan from the Carter Oil Co. included an entire page of rules regarding employee discipline. The plan listed thirteen specific categories of offenses for which employees could be discharged without prior notice, such as stealing and sleeping on duty.¹³² The plan then stated, "for other offenses, not on the above list, an employee shall not be discharged without first [being] notified that a repetition of the offense will make him liable to dismissal."¹³³

In summary, in 1934 and 1935 congressional committees heard the testimony of dozens of employees who urged the senators and

127. *National Labor Relations Board, Hearing on S. 1958 Before the S. Comm. on Education and Labor, 74th Cong. (1935)* (statement of Guy E. Mitchell, Wheeling Steel Corp.), reprinted in *LEGISLATIVE HISTORY, supra* note 41, at 1801.

128. BEFORT & BUDD, *supra* note 2, at 87-88.

129. *Labor Disputes Act, Hearing on H.R. 6288 Before the H. Comm. on Labor, 74th Cong. (1935)* (Section V.2., Management's Representative, Articles of Association of the Hudson Industrial Association), reprinted in *LEGISLATIVE HISTORY, supra* note 41, at 2613.

130. *Id.* at 2634 (Section V., Management's Representatives, Truscon Steel Co., Pressed Steel Div., Cleveland, Ohio, Plan of Employees' Representation).

131. *National Labor Relations Board, Hearing on S. 1958 Before the S. Comm. on Education and Labor, 74th Cong. (1935)* (Article V., Agreement Between Twin City Rapid Transit Co. and the Employees' Cooperative Association of Twin [City] Lines, September 15, 1934), reprinted in *LEGISLATIVE HISTORY, supra* note 41, at 2144.

132. *Id.* at 2047 (Amplifications, Agreement Adopted by the Conference of Representatives of the Carter Oil Co. and the Employees).

133. *Id.*

representatives not to enact legislation that would impair the continued existence of their diverse company unions. While these employee representation plans had in common opportunities for participation in workplace policy development and pursuit of employee grievances, they varied in their structures and the extent to which employee disputes could be taken to arbitration. Plans regularly conferred on employees protections from discrimination far broader than then-existing legal rights, and some even had protections against unjust discipline. Some plans offered welfare programs that offered relief to economically desperate Depression-era employees. Some had employee benefit programs that would be the envy of contemporary workers. It was clear that these programs, even those recently promulgated in response to the NIRA, had conferred tangible benefits upon employees, including changes in employer policies and positive resolution of employee grievances.

Yet, the congressional committees that listened to the voices of these workers nevertheless declined to take them seriously or to respond to their pleas that the labor legislation being drafted not impair the viability of their programs. The congressional committees recommended, and the Congress enacted, the NLRA with a provision, now Section 8(a)(2), that made all of their programs illegal.¹³⁴ Why would Senator Wagner, who professed to be focused on the welfare of the American worker and the facilitation of employee freedom and workplace voice, reject the pleas of the testifying employees?

It appears that Senator Wagner's mind was made up before the first worker even had an opportunity to speak to a congressional committee. Before the first hearings on Wagner's Labor Disputes bill commenced on March 14, 1934, Wagner published an article in the *New York Times*, for Sunday, March 11, making the case for his bill by focusing almost entirely on why the company union should be outlawed.¹³⁵ It was not that Senator Wagner dismissed entirely the idea that a company union could offer benefits to workers. He wrote, "The company union has improved personal relations, group-welfare activities, discipline, and the other matters which may be handled on a local basis."¹³⁶ Although he asserted that his bill was crafted to address "[m]ajor questions of self-

134. See *supra* note 6 and accompanying text.

135. Wagner, *supra* note 29. The article was entered into the Congressional Record the following day. 78 CONG. REC. 4229 (1934).

136. *Amendment of National Recovery Act – National Labor Board*, 73d Cong. (1934), reprinted in LEGISLATIVE HISTORY, *supra* note 41, at 23; accord Wagner, *supra* note 29.

expression and democracy,” he nevertheless came down firmly against permitting company unions even to be in competition with independent trade unions in government-conducted elections.¹³⁷ He argued that the New Deal initiative to improve wage levels could not be successful if company unionism were permitted because an employee organization limited to a single employer deprived workers of critical information about national labor markets and business conditions and because employee representatives could never be wholly free to bargain with the employer who controlled their livelihood.¹³⁸

In his article, Wagner made many generalizations about the inherent nature of company unions that are belied by the testimony of the workers that followed. He said workers represented by company unions would be unable to raise wages and gain benefits because they would be unaware of labor market rates, yet some of the workers who testified on the Labor Disputes bill and the proposed NLRA referenced wage comparisons and were able to demonstrate where their wages exceeded those of others.¹³⁹ Wagner asserted that “the company union is generally initiated by the employer,”¹⁴⁰ but the record of the hearings includes descriptions of company unions created in response to requests of the employees.¹⁴¹ Wagner wrote that with a company union “decisions are

137. *Id.* at 24–25; accord Wagner, *supra* note 29. For a discussion of how Wagner’s ideology sought to resolve the tension between employee freedom and denying employees the right to make a choice between company unions, independent trade unions, and no union, see Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379, 1444–61 (1993).

138. See generally Wagner, *supra* note 29.

139. See, e.g., *To Create a National Labor Board, Hearing on S. 2926 Before the S. Comm. on Education and Labor*, 73d Cong. (1934) (statement of C. William Conn, Weirton Steel Co.), reprinted in LEGISLATIVE HISTORY, *supra* note 41, at 886–87.

[W]e visited other mills and have obtained access to the rates and working conditions of the other mills of our district and have in some few cases been able to obtain wage increases for our men wherever we could show the management that in other plants a higher rate was being paid for the same class of work. In most all cases we found that our men were getting better pay than the men doing the same class of work in other plants.

Id.

140. *Amendment of National Recovery Act – National Labor Board*, 73d Cong. (1934), reprinted in LEGISLATIVE HISTORY, *supra* note 41, at 24; accord Wagner, *supra* note 29.

141. See, e.g., *To Create a National Labor Board, Hearing on S. 2926 Before the S. Comm. on Education and Labor*, 73d Cong. (1934) (statement of Thomas Cleary, Youngstown Sheet & Tube Co.), reprinted in LEGISLATIVE HISTORY, *supra* note 41, at 850–51. The plan covering statewide employees of New York Telephone Co. was written by employees without interference from management. *To Create a National Labor Board, Hearing on S. 2926 Before the S. Comm. on Education and Labor*, 73d Cong. (1934)

subject to [the employer's] unimpeachable veto,"¹⁴² yet workers in the subsequent hearings described some employer decisions subject to review by arbitrators and state and federal labor officials.¹⁴³ Although Wagner asserted that employees could not freely negotiate with employers on whom they were economically dependent, his article elsewhere acknowledged that in some cases company unions permitted employees to choose non-employees as their representatives.¹⁴⁴ Wagner painted a particularly dark and threatening prediction of the consequences of allowing company unions to continue:

If the employer-dominated union is not checked, there are only two likely results. One is that the employer will have to maintain his dominance by force, and thus swing us directly into industrial fascism and the destruction of our most-cherished American ideals; the other is that employees will revolt, with wide-spread violence and unpredictable conclusions.¹⁴⁵

Yet, in the hearings that followed, many workers testified positively about their experience in company unions that had existed for decades and that had brought the workers demonstrable benefits rather than fascism and violence.¹⁴⁶

When Wagner was present in the congressional hearing rooms during the workers' testimony in support of their company unions, Wagner cross-examined them in a hostile and condescending tone.¹⁴⁷ Among other things, Wagner regularly told these workers that

(statement of Francis C. Maloney, New York Telephone Co.), *reprinted in* LEGISLATIVE HISTORY, *supra* note 41, at 712.

142. *Amendment of National Recovery Act – National Labor Board*, 73d Cong. (1934), *reprinted in* LEGISLATIVE HISTORY, *supra* note 41, at 24; *accord* Wagner, *supra* note 29.

143. *See supra* notes 117–123 and accompanying text.

144. *Amendment of National Recovery Act – National Labor Board*, 73d Cong. (1934), *reprinted in* LEGISLATIVE HISTORY, *supra* note 41, at 24; *accord* Wagner, *supra* note 29; *see also supra* note 77 and accompanying text.

145. *Amendment of National Recovery Act – National Labor Board*, 73d Cong. (1934), *reprinted in* LEGISLATIVE HISTORY, *supra* note 41, at 25; *accord* Wagner, *supra* note 29.

146. *See supra* notes 84–110 and accompanying text.

147. *See, e.g., National Labor Relations Board, Hearing on S. 1958 Before the S. Comm. on Education and Labor*, 74th Cong. (1935) (Wagner's questioning within the testimony of Mark Murphy, Republic Steel Corp.), *reprinted in* LEGISLATIVE HISTORY, *supra* note 41, at 1777–85; *id.* at 1802–06 (Wagner questioning Guy E. Mitchell, Wheeling Steel Corp.); *id.* at 1808–10 (Wagner questioning Charles Davis, Spang Chalfant & Co., Inc.); *id.* at 1813–20 (Wagner questioning Robert F. Colley, American Rolling Mill Co.).

employees could not be effective representatives of their peers if they received their wages, and their association its funding, from the employer. For example, he said to a Republic Steel employee:

I never could myself understand how one could effectively represent workers in his activities if he is paid by the very person from whom he expects to get the best terms possible for his fellows. To me it always looked like the plaintiff lawyer paying the attorney fees for the defendant¹⁴⁸

Later, in the same hearing session, Jack Larkin, the general chairman of the employee organization at Weirton Steel Co. where he was employed as a roller at the mill, was not afraid to offer a challenge to Wagner's analogy and Wagner's objection to employer financial support:

You would think to hear the arguments that are advanced criticizing the fact that the company pays the expenses of the employee organization that it had the power to pay one man and not another, or to pay or withhold pay, as it saw fit, for the purpose of influencing the votes of the representatives. This is absurd. The ultimate source of the money paid in by the members of a labor organization is from the employer and I cannot see what difference it makes whether the company turns over a lump sum each year, according to a fixed arrangement, or whether the men pay a check-off which is the system which the American Federation of Labor wants. In the latter case it comes off the men's salaries. A Federal judge gets a fixed salary. It comes from the United States. Would anyone say that he was prejudiced in favor of the United States in deciding a case because his salary happens to come out of the United States Treasury? As long as his salary is fixed and it cannot be taken away from him, he is independent. It is the same

148. *Id.* at 1781 (statement of Wagner within the testimony of Mark Murphy, Republic Steel Corp.). Senator Wagner repeats the same analogy in another colloquy. *National Labor Relations Board, Hearing on S. 1958 Before the S. Comm. on Education and Labor, 74th Cong. (1935)* (statement of Wagner within the testimony of Clifford U. Cartwright, Oklahoma Pipe Line Co.), *reprinted in* LEGISLATIVE HISTORY, *supra* note 41, at 2041.

situation with our representatives.¹⁴⁹

Employees offered members of Congress evidence of why reliance on employer funding for institutional support did not undermine their independence. At Weirton Steel, the employer paid the employee organization fifty cents per year for each member to cover its institutional expenses. The organization chairman testified, "After that money is paid to us on the first of January each year, it belongs to us and we can do with it as we please. We have used it to employ attorneys for services sometimes adverse to the interests of the company."¹⁵⁰ The employee organization at AT&T, in operation for fifteen years, had received from the employer a lump sum of about \$72,000 for the previous year, an extraordinary amount in the midst of the Depression, to pay the expenses of their nationwide organization of 200 branches.¹⁵¹ The funds thereafter were entirely vested in the association, and it used the money for such things as meeting and travel expenses and "maintain[ing] a large secretarial headquarters in New York . . . under the supervision entirely of the organization of employees."¹⁵²

At one point, when Senator Wagner was aggressively questioning Clifford U. Cartwright, an instrument man at the Oklahoma Pipe Line Co., about the ability of a worker, paid by the employer, to serve as an honest advocate for other workers, the Chairman of the Senate Committee on Education and Labor, David I. Walsh, intervened and asked: "Haven't you got to rely somewhat upon evolution, that in these company unions they may pay the representatives, and if the representatives are influenced by it the workers themselves are going to turn them out and form another union?"¹⁵³ Senator Wagner replied, "Yes; if they are able to do it."¹⁵⁴ Then, the following interchange

149. *National Labor Relations Board, Hearing on S. 1958 Before the S. Comm. on Education and Labor, 74th Cong. (1935)* (statement of Jack Larkin, Weirton Steel Co.), reprinted in *LEGISLATIVE HISTORY, supra* note 41, at 1798.

150. *Id.* at 1797.

151. *National Labor Relations Board, Hearing on S. 1958 Before the S. Comm. on Education and Labor, 74th Cong. (1935)* (statement of T. V. Conway, Long Lines Department, AT&T), reprinted in *LEGISLATIVE HISTORY, supra* note 41, at 1858, 1860.

152. *Id.* at 1860.

153. *National Labor Relations Board, Hearing on S. 1958 Before the S. Comm. on Education and Labor, 74th Cong. (1935)* (question from David I. Walsh within the testimony of Clifford U. Cartwright, Oklahoma Pipe Line Co.), reprinted in *LEGISLATIVE HISTORY, supra* note 41, at 2042.

154. *Id.* at 2042 (statement of Wagner within the testimony of Clifford U. Cartwright, Oklahoma Pipe Line Co.).

occurred between Mr. Cartwright and Senator Wagner that suggests the reason why Senator Wagner was so willing to dismiss the testimony of the company union employees generally—a confidence that they were speaking from a false consciousness.¹⁵⁵

MR. CARTWRIGHT. Do you think the average working man under modern conditions, and so forth, could for very long swallow this company domination of representatives?

Senator WAGNER. They have been swallowing it.

MR. CARTWRIGHT. Don't you think, today, with all of the other organizations about, they would not stand it for long?

Senator WAGNER. They have no alternative. . . . Those elections are held under circumstances where it is very obvious it is not a free expression of choice in many cases.¹⁵⁶

This characterization of Wagner's attitudes as disrespectful and dismissive toward employees in company unions derived from his conduct in public view in committee hearings is reinforced by the view he expressed in private. Leon Keyserling, Wagner's legislative assistant who was largely responsible for drafting the text of the NLRA, recalled Wagner's attitude toward company unions this way: "He made fun of the company union, which he called the marionette of the employer, and the dictator of the terms of the labor agreement."¹⁵⁷

Senator Wagner's rejection of the authenticity of the workers'

155. For an extended discussion of the ideological centrality for Senator Wagner of his belief that employee advocacy of company unionism was derived from false consciousness, see Barenberg, *supra* note 137, at 1442–55.

156. *National Labor Relations Board, Hearing on S. 1958 Before the S. Comm. on Education and Labor, 74th Cong. (1935)* (statements of Wagner and Clifford U. Cartwright within the testimony of Clifford U. Cartwright, Oklahoma Pipe Line Co.), *reprinted in LEGISLATIVE HISTORY, supra* note 41, at 2042.

157. Casebeer, *supra* note 11, at 329. Professor Nelson's article on the history of the company union movement includes a cartoon from the United Rubber Workers Council, published in approximately 1934, that depicts a meeting of a company union in which the employees are actual marionettes whose votes in favor of the employer's nonsubstantive proposal are gained by the employer literally pulling a string that simultaneously raises all of the marionettes' hands. Nelson, *supra* note 30, at 351.

opinions seems based on a belief that they were not sufficiently sophisticated to know the difference between a company union and an independent trade union. The testimony of many of the workers, however, made clear that they had personal experience with trade unions, such as having been union members or even union officers, and that other former and current union members actively participated as representatives.¹⁵⁸

There is poignancy in what the workers asked of Congress. One service station worker said to Congress "maybe [the Government] should have considered the company union and built it up and tried to strengthen it, help it along; instead of denouncing the little people and denouncing it, they should have built it up."¹⁵⁹ The workers asked for amendments to the proposed labor legislation that would have permitted employer financial support if funds were awarded to employee organizations a year in advance¹⁶⁰ and which would have permitted continuation of the policy, already established by the NLB,¹⁶¹

158. For example, a representative from International Harvester had been, for twelve years, a member of a railroad union affiliated with the American Federation of Labor. *To Create a National Labor Board, Hearing on S. 2926 Before the S. Comm. on Education and Labor*, 73d Cong. (1934) (statement of Daniel J. Sullivan, International Harvester Co.), reprinted in LEGISLATIVE HISTORY, *supra* note 41, at 961. The chairman of the employee committee at Weirton Steel Co., in the midst of his testimony, handed the Senate committee chairman his union card. *To Create a National Labor Board, Hearing on S. 2926 Before the S. Comm. on Education and Labor*, 73d Cong. (1934) (statement of Jacob F. Madden, Weirton Steel Co.), reprinted in LEGISLATIVE HISTORY, *supra* note 41, at 902. The employee chairman at American Rolling Mill had previously been secretary of a patternmaker union local. *Id.* at 859 (statement of Paul D. Berry, American Rolling Mill Co.). At Republic Steel in Youngstown, Ohio, members of the Amalgamated Steel Workers, including the president of the local Lodge, served as employee representatives in the employee representation plan. *National Labor Relations Board, Hearing on S. 1958 Before the S. Comm. on Education and Labor*, 74th Cong. (1935) (statement of Mark Murphy, Republic Steel Corp.), reprinted in LEGISLATIVE HISTORY, *supra* note 41, at 1776.

159. *National Labor Relations Board, Hearing on S. 1958 Before the S. Comm. on Education and Labor*, 74th Cong. (1935) (statement of John Collins, Sobol Bros. Inc.), reprinted in LEGISLATIVE HISTORY, *supra* note 41, at 1724.

160. The employees of AT&T, even offered Congress language for a specific amendment that would have declared it lawful for:

[A]n employer or anyone acting in his interest to contribute [financial or material support to a labor organization] provided that an agreement is made between the employer and the labor organization covering such material support by the employer for a definite period of not less than 1 year subsequent to the date of making the agreement.

Id. at 1862 (statement of T. V. Conway, Long Lines Department, American Telephone & Telegraph Co.).

161. See *supra* notes 36-37 and accompanying text.

of allowing employees to vote in a government-conducted election whether they wished to have an employer-supported employee representation plan.¹⁶² If the law were drafted to permit employees freely to choose an employer-financed employee organization under rules providing such organizations independence in the dispersal of their funds, the government could still be able, on a case-by-case basis, to outlaw company unions that violated a statutory prohibition on employer domination.¹⁶³ Congress, however, did not even seriously contemplate these possibilities.¹⁶⁴

Where might we be today with regard to employee rights, representation, and voice in the workplace if Congress had adopted the amendments proposed by the employees who testified in 1934 and 1935?¹⁶⁵ The workers in their testimony often noted that their plans were not perfect, but that they hoped for the opportunity to allow their programs to evolve and improve over time in response to perceived

162. *To Create a National Labor Board, Hearing on S. 2926 Before the S. Comm. on Education and Labor, 73d Cong. (1934)* (statement of Edward R. Fiske, Jr., Leeds & Northrup Co.), reprinted in LEGISLATIVE HISTORY, *supra* note 41, at 454; *National Labor Relations Board, Hearing on S. 1958 Before the S. Comm. on Education and Labor, 74th Cong. (1935)* (statement of A.B. Trembley, Goodyear Tire & Rubber Co.), reprinted in LEGISLATIVE HISTORY, *supra* note 41, at 1933–34.

163. See, e.g., *To Create a National Labor Board, Hearing on S. 2926 Before the S. Comm. on Education and Labor, 73d Cong. (1934)* (statement of Henry S. Dennison, Dennison Manufacturing Co.), reprinted in LEGISLATIVE HISTORY, *supra* note 41, at 434–35.

164. The only change made in the NLRA in the Senate to Wagner's initial bill was the addition of an employer duty to bargain. GROSS, *supra* note 7, at 139. The only significant amendment made in the House of Representatives was to place the National Labor Relations Board within the Department of Labor, *id.* at 143, a provision that was removed in Conference, *National Labor Relations Board, Conference Report to S. 1958 Before the H.R., 74th Cong. (1935)*, reprinted in LEGISLATIVE HISTORY, *supra* note 41, at 3263.

165. Canada provides somewhat of a natural experiment for what might have been the nature today of non-union worker representation plans in the U.S. had they not been outlawed by the Wagner Act. Canadian law neither encourages nor prohibits non-union representation (so long as it is not used to deprive workers of their right to join unions and engage in collective bargaining). A. Tarik Timur, Daphne Taras & Allen Ponak, "Shopping for Voice": *Do Pre-Existing Nonunion Representation Plans Matter when Employees Unionize?*, BRIT. J. INDUS. REL. (forthcoming). The authors compared unionization and collective bargaining in Canadian firms that did, and did not, have previous experience with non-union employee representation systems. *Id.* They found that non-union representation systems did not effectively immunize employers against unionization and that they trained employees for future roles in union leadership. *Id.* They suggested, however, that unions that emerged from non-union representation plans tended to have less attachment than other unions to the national union movement. *Id.*; see also, Daphne Gottlieb Taras, *Portrait of Nonunion Employee Representation in Canada: History, Law, and Contemporary Plans, in NONUNION EMPLOYEE REPRESENTATION, supra* note 30, at 121, 139–43 (tracing the subsequent history of employee representation in Canadian firms that had company unions in the first half of the twentieth century).

needs in their own workplaces.¹⁶⁶ Had they been listened to, might we today see more employees with access to grievance procedures? Might we see a diversity of employee representation structures well adapted to particular workplaces without regard to rigid statutory notions of who is an employee and what is an appropriate bargaining unit? Might we see employee participation in the co-determination of workplace policy issues well beyond the narrow confines of agency-defined “mandatory subjects of bargaining”?¹⁶⁷ Might we see employees enjoying accessible protections for nondiscrimination without the need for litigation and protections beyond those which the law mandates? Might we have seen protections against wrongful discharge and opportunities to take grievances to impartial arbitrators in workplaces without independent unions? Might we have seen a far greater union density as a result of employee representation plans evolving into or providing an impetus for independent trade unions?

166. *To Create a National Labor Board, Hearing on S. 2926 Before the S. Comm. on Education and Labor*, 73d Cong. (1934) (statement of Thomas Cleary, Youngstown Sheet & Tube Co.), reprinted in LEGISLATIVE HISTORY, *supra* note 41, at 851; *National Labor Relations Board, Hearing on S. 1958 Before the S. Comm. on Education and Labor*, 74th Cong. (1935) (statement of John Collins, Sobol Bros. Inc.), reprinted in LEGISLATIVE HISTORY, *supra* note 41, at 1728; *id.* at 2041 (statement of Clifford U. Cartwright, Oklahoma Pipe Line Co.).

167. The Supreme Court held in *NLRB v. Wooster Div., Borg-Warner Corp.*, 356 U.S. 342, 349 (1958), that an employer’s duty to bargain in good faith with a union representing its employees only extended to matters determined, as a matter of law, to be within the scope of statutory language limiting the duty to bargain to “wages, hours, and other terms and conditions of employment.” National Labor Relations Act, § 8(d) (1947) (codified as amended at 29 U.S.C. § 158(d) (2006)), making only such topics mandatory subjects of bargaining.