OPENING ACCESS BY ENDING THE VIOLENCE TRAP

LABOR, BUSINESS, GOVERNMENT AND THE NATIONAL LABOR RELATIONS ACT

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1. Introduction

Open access to the corporate form of organization in the United States occurred in the 1840s (North, Wallis, Weingast 2009). Yet open access to labor organization took nearly a century more, occurring as part of the New Deal in the mid-1930s. Moreover, during the century previous to the New Deal, firms and governments actively suppressed labor organization, firing workers who struck, firing and arresting labor leaders (and deporting those who were immigrants). Many firms employed private armies or Pinkertons until at least the end of the turmoil of the 1930s. Ford's "Service Department," composed of underworld thugs and mercenaries was infamous for its intimidation tactics and violence (Bernstein 1971, 735-751). Governments used the police, National Guard, and the U.S. Army at times to crush nascent labor organization,

leading frequently to mass beatings and shootings. Since the New Deal legislation, specifically the passage of the National Labor Relations Act (NLRA) and the creation of the National Labor Relations Board (NLRB) in 1935, labor violence has been far lower and labor-firm cooperation far higher. In the words of Taft and Ross (1969:292), "The sharp decline in the level of industrial violence is one of the greatest achievements of the National Labor Relations Board."

This history raises several questions that remain unanswered in the literature. Why was the labor violence so intractable? What exactly did the NLRA/NLRB do that – somehow – solved the problem of violence? And, if this legislation solved the problem, why didn't Congress do so earlier, thereby saving the deadweight losses associated with nearly a century of violence, strikes, and a considerably lower level of cooperation between firms and their workers?

The purpose of this paper is to develop a new perspective on labor organization and violence that address these questions. We claim that violence resulted from an inability to solve a series of commitment problems. The traditional view misses labor's existential threat to business. We are now so used to the post-NLRA peaceful equilibrium that most scholars implicitly assume that it was ordained once the new laws took effect. In particular, the legislation channeled labor-business conflict to focus on wages and conditions, an outcome that was not pre-ordained. In fact, prior to this legislation, unions and labor organization threatened both business and society. Would labor advocate socialism and demand major changes in the economic system? Would labor force business to share managerial power, as some unions advocated, e.g.,

Knights of Labor and the Industrial Workers of the World (IWW)? Would labor force transfers of capital?

Once labor was legalized, its membership would swell, making labor far more powerful in a manner that could not easily be undone.

Business, fearful of labor's threat to its control over the labor force and to corporate profits could not commit to eschew violence. Nor could government commit to being a neutral arbiter instead of being an agent of firms against labor. Too often, government officials associated labor organization with anarchy and revolution, and it considered business a source of stability and economic growth.

The stakes were therefore high. Legalization would foster the growth of powerful actors in opposition to business, making labor demands more pressing. Without solving the commitment problem, business was rationally reluctant to support legislation that would authorize unions. The result was on-going violent suppression of labor with considerable foregone gains from cooperation between labor and business.

Our thesis is that the NLRA succeeded because it finally solved the commitment problems underlying the century of labor violence. Once legalized and its ranks presumably grown dramatically, labor was unable to refrain from advocating socialism or demanding control of firms. And none of the parties could commit to refrain from using violence.

Per traditional wisdom, legislation solved the existential problems for unions. Beyond this, however, the legislation accomplished several other ends that are largely unrecognized in the literature.

First, the legislation dramatically lowered the stakes for firms. It narrowed considerably the legitimate range of bargaining between labor and business, focusing on wages and conditions; the legislation removed labor's threat to business management and firm capital; it also prevented unauthorized strikes, helping unions control their more radical and extreme elements. All these features of the legislation lowered the stakes for firms, an aspect of the legislation too often ignored in the literature.

Second, the legislation provided obvious advantages for labor. It legitimized unions and solved their existential problem, allowing labor organization to form and to grow; it transformed government from an advocate of business using violence against labor into a neutral arbiter, punishing either side for failing to uphold the rules. By allowing union ranks to swell considerably, the legislation ensured labor would become an important political force, able to support its position in a manner not previously possible. In particular, by counterbalancing business, labor provided new and substantive support for the NLRA a neutral arbiter.

Third, to accomplish these ends, organizational and legal innovations were necessary to create a new form of regulatory delegation that sat comfortably within the constitutional framework. Put simply, for the new system to work, political officials and the courts had to solve the principal agency problem that we now take for granted: how do you create a regulatory agency that implements the intentions of Congress while not transgressing the due process rights of citizens and firms? We argue that the NLRA did so by drawing on two sets of experience: (i) previous delegations to relatively successful agencies such as the Interstate Commerce Commission (ICC), Federal Trade

Commission (FTC), Federal Radio Commission, and Federal Railway Commission (FRC), and to regulatory failures, such as the 1933 National Industrial Recovery Act (NIRA), the NRA, and the first NLRB; and (ii) the intense and controversial constitutional battles between the Supreme Court and the political branches, resulting in a political compromise in which both the Court and elected officials accepted important demands of the other. The result was a blueprint for future regulation and a necessary condition for the post-WWII expansion of the national regulatory state.

This framework affords answers to each of the questions we asked at the outset. Labor violence proved long-lived and intractable because no one knew how to solve the commitment problems, and none of the three parties – labor, business, and government – were willing to unilaterally eschew violence. The key to the success of the new NLRA in ending a century of violence was that it solved the commitment problems. Finally, this legislation could not have been implemented earlier because it required significant innovation in public organization that occurred only in the context of the multi-pronged regulatory framework of the New Deal.

This paper proceeds as follows. Section 2 explains how, prior to 1930, the law favored business over labor, leading the government to protect property and hence to side with business. Section 3 discusses labor's tactics during this period. Section 4 and 5 provide a simple game theoretic analysis. The first presents the "labor organization game I" explaining how, given the institutional setup prior to the 1930s, violence was the equilibrium. The second the "labor organization game II" showing how the NLRA's new regulatory framework solved the commitment problems and ended labor violence. In section 6, we present our implications and conclusions.

2. The Law

Prior to the New Deal, the law systematically favored employers against labor. The police powers were designed to protect life and property. In general, "Even where the police were not directly suborned by employers, their primary duty was the defense of the employer's property, and in this sense they participated in industrial disputes as partisans. The very presence of the police or troops at a struck plant carried with it the implication that the strikers were lawbreakers. It signified that strikers were the enemies of public order, for quite obviously the police had not been summoned to protect them, but company property from them" (Gitelman 1973:17).

General incorporation laws worked positively to support business organization and to further a range of legitimate business purposes, such as their right to use the courts to protect their interests. The same did not hold for labor. In the late 19th and early 20th centuries, "The common law legality of unionism, however, did not confer a right to organize. It merely left workingmen free to form unions when and if they could" (Gitelman 1973:6). The absence of a legitimate way to organize meant that striking workers were often seen as a mob potentially threatening employer property, which the law was designed to protect.

The absence of legislation legitimizing labor and, especially, labor organization, had a series of implications. While labor interpreted strikes and walkouts as temporary absences, many firms interpreted strikes as a permanent disruption of employment, making it legal for them to hire new employees (seen by workers as strikebreakers). As Gitelman explains (1973:9), "The expectation of returning to work at the conclusion of a

strike was jeopardized by the legal and popularly sanctioned right of employers to hire and fire at will."

Moreover, the legal system in the late 19th and early 20th centuries tolerated what we would today think of as “unorthodox” – indeed, illegitimate – means of resisting labor’s attempts to organize and bargain with firms. Firms used armed men against strikers, fired labor organizers, and dismissed workers for joining unions; firms also refused to listen to workers' complaints or grievances, suppressed worker free speech, and widely used spies and agent *provocateurs* who, for example, sought to incite workers to use violence and even initiated violence.

The government and employers also used legal tools against labor. These included antitrust laws used against labor organizations, as discussed in section 5. Injunctions became a staple used to prevent strikes and reduce labor’s leverage (Frankfurter and Greene 1930). Forbath (1991) presents the following table of estimated labor injunctions over time:

Table 2.1. Labor Injunctions By Decade, 1880-1929.

Decade	Injunctions
1880s	105
1890s	410
1900s	850
1910s	835
1920s	2130

Source: Forbath (1991, Appendix B)

The table provides evidence of the frequency with which employers and governments used this legal tool to suppress labor activity and organization.

In sum, the law favored employers, placing a large number of varied constraints against labor organization.

3. A Brief History of the Labor Movement

The first workers who organized to demand better wages, hours, and treatment were sailors, who engaged in several notable uprisings in the late eighteenth century. The most famous was the Mutiny on the Bounty in 1789, but there were many earlier incidents. Highly interdependent and confined together for long periods, sailors had a relatively easy time overcoming free rider problems. However, strikes—and even most collective demands—were defined as mutiny and carried heavy penalties, including the possibility of death. Other workers did not generally face a court-administered death penalty for organizing, but they often faced punitive action by employers. They could legally be dismissed at will, and they were subject to extra legal beatings and even murder by police, national guardsmen, and private armies engaged by employers, such as the Pinkertons. The barriers to organizing were high and remained insurmountable for most workers in the United States until the 1930s. [1]

The earliest recorded U.S. strike was in 1786 by Philadelphia printers refusing to work for less than $6 a week. The first unions were in the 1790s when "skilled journeymen in several cities converted their mutual aid societies into trade unions…" (Foner 1947, 70). Craft workers were the first to succeed at legal organization through

[1] For accounts of the history of American labor unions in the nineteenth and early twentieth century, see Montgomery (1989), Hattam (1993), Voss (1993), Perlman (1928), and Foner (1947). For accounts that extend into the early 1940s, see Bernstein (1969, 1971, 1985) and Lichtenstein (2002). Also, see Brecher (1997) for a provocative history of strikes in the United States.

their control of jobs and accreditation, achieving the acceptance of employers and government by the end of the nineteenth century. The craft unions monopolized the supply of labor through an apprenticeship system and hiring halls, effectively requiring employers to come to the unions and pay the union-set rates. The founding of the American Federation of Labor (AFL) in 1886 further consolidated the craft workers' legal and political position but at the expense of the unskilled workers and the newer immigrants:

> Down to "boom' period brought on by the World War, the Federation did not comprise to any great extent either the totally unskilled, or the partially skilled foreign-speaking workmen, with the exception of the miners and the clothing workers…the new accretions to the American wage-earning class since the eighties, the East and South Europeans, on the one hand, and the ever-growing contingent of 'floaters' of native and North and West European stock, on the other hand, were still largely outside the organization. (Perlman 1928, location 1860)

AFL victories derived largely from agreements with employers in a given industry; the Federation seldom appealed to government to set minimum wages or maximum hours. Its self-stated mantra was "voluntarism", "..relying on their own voluntary organizations… defended the autonomy of the craft union against the coercive intervention of the state" (Rogin 1962, 521-2).The Federation lobbied but most determinedly to reduce job competition; among its major campaigns was immigration restriction. Even during the 1930s, it expressed cautious support of social security and considerable nervousness about all legislation, including the National Labor Relations Act and other legislation that might interfere with its internal affairs (Eidlin 2009, 253).

By contrast, industrial unions had a far more difficult time establishing themselves. Employers and governments often met large-scale strike waves, generally

coinciding with the cycle of depressions that began in the mid-nineteenth century, with violence. Industrial unions also experienced numerous stops and starts. The Knights of Labor was the first large-scale labor American organization; it experienced a period of rapid growth after its founding in 1869 but was dead by the 1890s (see, especially, Voss 1993 and Foner 1947). Labor activism intensified at the end of the nineteenth century and again in the teens of the twentieth century, but the same pattern prevailed: worker mobilization followed by repression.

The rise of the Industrial Workers of the World (IWW) or “Wobblies” created a new kind of political threat. The IWW goals were revolutionary, and it believed in direct action over political action (cf Adler 2011, Kimeldorf 1969). It used strikes to disrupt the economy, not just to improve working conditions. A militant union that organized all workers, craft and industrial, IWW’s presence was particularly strong among miners, lumberjacks, and dockworkers. Its name became associated with violence in the public mind when its leadership, most notably “Big Bill” Haywood, who was also on the executive committee of the U.S. Socialist Party, was accused of masterminding the assassination of Governor Frank Steunenberg of Idaho in 1905, presumably in retaliation for putting down an 1899 miners’ strike the governor had labeled an “insurrection.” The prosecution was secretly bankrolled by the mine owners, but Clarence Darrow’s defense led to the acquittal of the accused (Lukas 1997). Haywood was also among the hundred or so IWW members convicted in 1918 under the Espionage Act of 1917, but he escaped prison by fleeing to the Soviet Union where he lived his remaining years.

The “Red Scare” of 1919 closed a chapter in American labor history. While “the

Great War" raged in Europe, but also in its immediate aftermath, the United States experienced multiple major strikes, considerable labor organizing, violent confrontations between police and unions, terrorist acts (including bombings and assassinations) by revolutionary anarchists, and Socialist electoral victories. Some of these actions were illegal and violent; others, such as the Seattle General Strike of 1919 (Johnson 2008) and the Boston Police Strike of the same year (Levi 1977), were peaceful but illegal; and some, such as the electoral strategy of Eugene V. Debs and the Socialist Party, were non-violent and legal. But all ultimately got tarred with the same brush, as fear of mayhem and revolution became widespread among the public.

Although President Woodrow Wilson proclaimed his support of labor during the Versailles discussions (Lichtenstein 2002, 4), the United States simultaneously attempted to rid the labor movement of its militant leadership. The Espionage Act of 1917 and the Immigration Act of 1918 increased the power of the federal government to deport any persons it deemed dangerous to the national interest. The "Palmer Raids" of 1919 that bear the name of the attorney general Wilson appointed, permitted jailing of leaders and members of radical organizations and the closing down of their offices. Newspapers, business leaders and government officials fueled "the rationality of fear" (deFigueiredo and Weingast 1999), and Americans, as a rule, feared the violent revolution they had come to believe was possible if its perpetrators were not repressed.

This fear resurfaced in the 1930s but with significant differences. The Great Depression created a large pool of dispossessed, unemployed, and disgruntled citizens. The Communist Party offered an alternative vision of the future with promises of economic security and equity that the present United States did not seem capable of

delivering—economically or politically. Although committed in principle to the violent overthrow of the United States, the Party did not use violence, was legal until the 1940s, and worked with and through numerous other organizations, including unions. Deportation was no longer an effective weapon given that almost all the workers, militant social reformers, and Communists were American-born citizens. However, repression was still in use by both employers and governments. The Minneapolis Teamster strike of 1934 exemplifies the times: A more radical local was put down by a combination of the international union and the federal government, which jailed some of the strike leaders in part for being Trotskyists (Ahlquist and Levi 2013).

The rise of large-scale industry, which had begun in the late nineteenth century, was wide-spread, and automobile manufacture had become one of the biggest. The assembly line that began with the Ford Motor Company put workers side by side in huge factories. The assembly lines were dehumanizing, but they also gave workers new power to disrupt production.

The new industrial unions, too, differed from those that had preceded them. John L. Lewis, head of the mineworkers, first proposed what was to become the Congress of Industrial Organizations (CIO) in 1928. Although not actually established until 1935, the strategies and ideologies of its leaders were the dominant influence on the big strikes of the 1930s. The leaders were, as rule, committed social democrats—even those affiliated with the Communist Party lacked the revolutionary fervor of earlier radical leadership, and some, such as Lewis himself, were relatively conservative politically and strongly anti-communist (Bernstein 1969, 126). Leaders focused on organizing all the workers within their factories and industries, be they skilled or

unskilled, but also on forming effective alliances across industries. Willing to engage in large-scale strikes, the industrial unions also began to develop new tactics to shield them from accusations of being perpetrators of violence. The most famous instance was the Flint sit-down strike in 1936-7 at General Motors. The workers locked themselves in and simply sat down, engaging in no work while eschewing violence.

The Flint Strike proved a pivotal moment (Bernstein 1969, 519-551). The United Auto Workers (UAW) found a way to ensure that strikers could not be accused of initiating violence against persons during a labor struggle; any violence would be initiated by the employers or government. Moreover, the negotiations, led by John L. Lewis as president of the new CIO, were not only with the company but involved, as well, the governor of Michigan and, most importantly, Frances Perkins, the Secretary of Labor, who was throughout in close touch with President Roosevelt. When the Governor of Michigan did consider enforcing an injunction by calling in the National Guard, the Roosevelt administration prevented that move, signaling the beginning of a new era, with the federal government intervening but neutrally in employer-union conflict instead of siding with employers.

New York Senator Robert Wagner, a long-time supporter of labor legislation, was a key actor in this process, working hard to craft the National Labor Relations Act of 1935 that bears his name. But forging the coalition to pass the bill was no easy task. Several factors made it possible.

The first was the growth of the labor movement. By 1939, in the aftermath of labor legislation, there were more than 9 million union members (Katznelson 2006, 56), but the numbers mobilizing in unions and as voters started growing in the early 1930s.

And these were largely democratic voters with union leadership deeply engaged in mobilizing their votes. Increasingly the unions, especially those affiliated with the CIO, made demands of government to recognize unions and their representation of workers, regulate labor conflict, and provide social insurance. Lichtenstein documents their demands for "industrial democracy;" for the workers "…the new unionism represented not just a higher standard of living but a doorway that opened onto the democratic promise of American life" (Lichtenstein 2002, 30).

> The second factor stimulating change was fear and anxiety. The 1930s was: …an anguish-filled environment. In such a world, the most constant features of American political life continually threatened to become unstable , if not unhinged. The ability of leaders to cope with menacing economic, ideological, and military threats never could seem quite sure. (Katznelson 2013, 10).

There was fear of communism and revolution, and some federal officials and legislators came to feel the labor unions and recognition of labor rights was a good bulwark against that threat (Bernstein 1950, 102). Indeed, Goldfield argues:

> New Deal labor legislation was a result of interaction between labor movement growth and activity, the increasing strength and influence of radical organizations, particularly the Communist party, liberal reformers with both immediate and historical corporate ties, and government officials (or state managers) with primary concern for preserving social stability and assuring the continued electoral success of the Roosevelt-led Democratic party (1989, 1268-1269)

The other key to success of the legislation, well documented by Katznelson (2006, 53-67; 2013, 228-32) was the support of the Southern Democrats. Part of the New Deal coalition, this faction of the Democratic Party went along with important labor

legislation. Unions were largely unheard of in the South, so this was a fairly easy trade of votes, but it did come at the price of exclusion of occupations that might attract African-Americans: agriculture and housework.

The changes in unions, the government, and business, during and partially as a consequence of the Depression, combined to set the stage for new equilibrium among labor, employers, and government. The resulting compromise at once provided gains for each while solving the problem of violence. The unions were willing to play by the rules and eschew revolutionary aspirations and violence, but in return they expected union recognition, collective bargaining, and improved working conditions and social benefits from both employers and government. Business management -- fearful of the disruptive effects of large-scale strikes and worried that disorder and revolution were possible -- became willing to accept terms with the unions they previously rejected as the price of labor peace and productivity. The government under the leadership of the Democratic Party came to recognize that it could gain electoral support through union growth if it came to play a more neutral, if still interventionist, role by establishing a regulatory framework for labor-employer strife and enforcing the rules.

4. NLRA and NLRB

Congress passed the National Labor Relations Act (NLRA) in 1935 in part to stem a rising tide of industrial violence of the 1930s. The National Industrial Recovery Act (NIRA) of 1933, intended to foster economic recovery, inadvertently spurred unrest by providing symbolic support for worker organizing, but without the institutional machinery necessary to implement and protect that right. NIRA encouraged a major

organizing drive by labor unions, but a lack of enforcement implicitly encouraged employers to resist. Increasing disparity between labor's *de jure* and *de facto* rights led to unprecedented levels of industrial conflict, which impeded the already fragile economic recovery. As written in Section 1 of the Wagner Act,

> …[t]he denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial unrest, which have the intent or the necessary effect of burdening or obstructing commerce[.]

The NIRA suspended antitrust law and permitted industry and trade associations to formulate codes of competition that would regulate production within industries. Recognizing that allowing economic combination of firms would greatly advantage business relative to workers in the labor market, language was added to strengthen the position of labor. Section 7a required all industry codes to meet three conditions: provide a right for employees to organize and bargain collectively through representatives selected without interference from their employer, prohibit compulsory membership in company unions, and require employers to comply with minimum wage rates, maximum hour limitations, and other regulations on working conditions as approved by the President. Labor interpreted this provision as a call to organize, and launched an unprecedented organizing drive in 1933.

Yet no means were provided for the enforcement of these rights, and employers intensely resisted labor organizing, refusing to recognize workers' organizations or bargain with their representatives. Strike activity, which had declined to historic lows in the 1920s, surged. As both economic activity and organizational drives increased, man-days lost to work stoppages jumped, from fewer than 603,000 monthly in the first half of

1933 to 1,375,000 in July and 2,378,000 in August, threatening the fragile economic recovery (Bernstein 1950, 58).

The NLRA was the final step in a series of efforts made in the wake of NIRA-inspired unrest to improve and make permanent a set of institutions to encourage the peaceful resolution of labor disputes. The Act was drafted

…with input from the legal staff of the NLRB. AFL input was minimal, the DOL was consulted on only peripheral matters, and the NRA was excluded from the drafting process entirely. The new bill drew on the failures of the previous incarnations of the law (Bernstein 1950). Section 1 continued:

> Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes…and by restoring equality of bargaining power between employers and employees.

What did the NLRA do?

Broadly, the NLRA accomplished two ends. First, It asserted a federal right for workers to organize and bargain collectively, via a representative of their own choosing. Second, section 3 established the National Labor Relations Board (NLRB), an independent, quasi-judicial agency to adjudicate disputes arising under the law. Yet neither of these institutions originated in the NLRA. As noted, the right to organize was first asserted in NIRA (the language of section 7 of the NLRA was drawn directly from section 7a of the NIRA), and precursors to the NLRB had existed since August of 1933. These measures failed, however, to stem the violence problem that pervaded labor relations in the 1930s and earlier. How, then, did the NLRA differ?

The NLRA succeeded where prior attempts had failed because it went beyond earlier legislation in four ways: (1) It defined a number of unfair labor practices that by nature interfered with the meaningful enjoyment of the organizing and bargaining rights created in the law, imposing clear and uncontestable constraints on employers; (2) it provided a Board-controlled process for election of representatives, effectively constraining employees as well; (3) it provided the NLRB with the power and independence necessary for effective enforcement of those constraints upon both workers and their employers; and (4) it created a regulatory process that the Supreme Court held constitutional and hence legally binding on employers.

Constraints on Employers

The unfair labor practices defined in Section 8 provided explicit statutory support for NLRB prosecution of one general and four specific employer practices that undermined workers' right to organize and bargain freely. To provide the Board with the flexibility to address practices not anticipated during the writing of the legislation, section 8(1) included a blanket prohibition on "interference with, restrain[t], or coerc[ion]" of employees in their exercise of rights guaranteed in section 7. Sections 8(2) through 8(4) banned employer dominated (company) unions, discrimination of any sort to encourage or discourage membership in unions, and discrimination or retaliation against workers who testified or filed charges under the NLRA. Section 8(5) addressed the most common and disruptive reason for labor conflict during this period, by making the refusal to bargain collectively with elected representatives an unfair labor practice.

The definition of unfair labor practices provided, for the first time, a statutory basis for NLRB intervention in a set of employer practices that undermined workers' stated right to organize. The NLRB's predecessor boards had established precedents for such intervention, but the lack of a clear legislative mandate and contradictory statements by the National Recovery Administration (NRA) and Roosevelt had encouraged employers to challenge or ignore these decisions. Under the NIRA, counsel for the National Association of Manufacturers, then (as now) the largest manufacturing trade association

> …advised its members that the Act permitted: individual bargaining; company unionism; refusal to bargain with alleged employee representatives; questioning prospective workmen on union affiliation; denial of leave to engage in union activities; barring company premises to unionists; advising employees not to join; individual, company union, and trade union bargaining within the same plant; and inducements to join company unions. The closed shop was alleged to be illegal and it was hinted that 7(a) itself was unconstitutional. (Bernstein 1950, pg. 57)

A coordinated campaign among employers of noncooperation with the predecessor boards began by October 1933, just months after NIRA's passage. Further, Roosevelt frequently undermined board decisions by negotiating agreements that violated board precedents relating to company unions and union recognition. Members of the predecessor boards thus insisted that that the new law must provide an explicit statutory basis for Board intervention against the practices that contributed to the bulk of labor disputes during the 1930s: employer's refusal to recognize or bargain with unions, and company unionism.

Constraints on Workers

The 1935 NLRA defined only employer-side unfair labor practices; prohibitions on union-side activities would be added more than a decade later in the 1947 Taft-Hartley amendments. On its face, New Deal labor policy thus appears to impose limits on employers without constraining the behavior of unions. We argue, however, that the law provided meaningful limits on both employers *and* unions. The election process and rules defined in section 9 of the NLRA provided a standardized process for acquiring the benefits of NLRA-protected collective bargaining. This process, and the gatekeeping role of the NLRB in certifying the outcome, effectively constrained the behavior of workers and their unions as well as employers.

Section 9 of the NLRA established the rules and procedures for the election of bargaining representatives, and the role of the NLRB in this process. First, section 9(a) codified two important principles that had been the source of many legal challenges to bargaining: majority-rule elections and an exclusive right to representation for the winner of such an election. Under NIRA, employers had challenged the results of union elections by arguing that majority-rule elections deprived the minority of the right to be represented by an organization of their choice. Both employers and unions, when they lost an election, asserted that representatives preferred by minority groups should have standing to bargain as well. The authors of the NLRA, many of whom were members of the NLRB's predecessor boards, feared that the fracturing of bargaining authority would undermine the goal of collective bargaining and exacerbate the problem of inter-labor disputes. Bernstein writes: "The experience of the Auto Board [an industry-specific labor board that had allowed for multiple representatives] convinced the draftsmen that

pluralism provoked confusion and strife, defeating collective bargaining (1950, 96)." Section 9(a) of the Act therefore declared that "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining[.]"

Second, section 9(b) gave the NLRB the right to define the scope of the bargaining unit. This issue was the source of significant opposition from the AFL, since it moved decision-making power on a critical strategic problem to regulators. Because elections take place within the bargaining unit, the definition of the unit has the potential to make- or- break outcomes. These decisions are highly strategic-- unions want the unit to be big enough to have leverage against the employer, but election campaigns are easier to manage within a smaller unit. Because the selection of the bargaining unit size and composition has important implications for the relative strength of employer versus union, the drafters placed this power in a neutral party: the NLRB. Bernstein writes,

> [T]hey sought to avoid placing the authority in the employer, which might invite violations of the act, and to employees, who might use it to defeat the majority principle, and, by the creation of small units, impede the employer in running his plant (1950, 96).

This authority meaningfully limited union activity, as is evident by the growing hostility of the AFL to the Board after the passage of the Act. The authority to determine bargaining units had the unintended effect of putting the NLRB in the center of the quickly growing intra-labor fight between craft and industrial organizing. By all accounts, the decision to give this power to the Board was made before

anyone anticipated the split between the AFL and the CIO in 1937. Yet by the convention in that year, the AFL was so incensed by the Board's perceived favoring of industrial organizing that it unanimously adopted a resolution to "assemble evidence in proof of the maladministration of the [Wagner] act, recommend that William Green and the Executive Council be authorized to petition the president of the United States "for prompt and adequate relief," and also recommended that the Wagner Act be amended. (Gross 1974, 251)." The AFL would later join forces with opponents of the NLRA to support the Taft-Hartley amendments.

Section 9(c) gave the Board the right to oversee and certify the election of representatives, while section 10(a) provided it with the right to prevent the commission of unfair labor practices defined in section 8. The Board was thus empowered to issue legally enforceable orders for employers to bargain with unions. The obverse is that this also empowered the Board to *withhold* certification and bargaining orders when unions engaged in unacceptable behavior. And indeed, the Board has on multiple occasions withheld bargaining orders from otherwise entitled unions when they have been found to have engaged in severe violence (Gitto 1982).[2]

On the labor side, the NLRA provided a set of benefits to unions and an institutional structure to protect those benefits. But it also created a gatekeeper with the right and ability to withhold those benefits for misbehavior. Unions that wanted

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[2] The Board has only rarely withheld bargaining orders, and the first time they did so appears to be in 1963, in the *Laura Modes Co.* case, well after the union-side unfair labor practices were added. It is not clear whether the Board could have done this prior to Taft-Hartley.

access to the protections and bargaining status provided by the NLRA thus had to take care not to antagonize the referee by engaging in the type of violent unrest the Act was designed to prevent.

Empowering a Neutral Arbiter

Perhaps most importantly, the Act provided the Board with the structure and powers necessary to enforce the constraints on both sides. The explosion in industrial unrest after the passage of NIRA stemmed largely from the disconnect between the rights promised to labor under section 7(a) and those actually realized. This disconnect was the result of a virtually complete lack of enforcement. Gross writes,

> Failure of enforcement of decisions "amounted to 'complete nullification of the law' and had resulted in 'increasing unrest in labor circles' due to a 'belief on the part of labor that the Government is not interested in enforcing the law on their behalf, and a belief on the side of employers that the law cannot be enforced (1974, 129).'"

Section 3 of the NLRA empowered the NLRB, a quasi-judicial, independent agency of the federal government, to oversee elections, certify representatives, and investigate and prevent unfair labor practices. Yet the Board established by the NLRA was in fact the 3rd incarnation of such an institution; the design of an effective NLRB involved two different processes. First, a process of learning, in part through trial and error; and second, a more careful study of the regulatory and administrative structure and process previously sanctioned by the Supreme Court, such as the Federal Trade Commission (1914) and the Interstate Commerce Commission (1887), as Irons (1983) emphasizes.

Between 1933 and 1935, the Roosevelt administration, officials from the NRA and the Department of Labor, and interested parties from Congress experimented with the agency structure. The first National Labor Board (NLB) was established in August of 1933, to adjudicate, mediate, and conciliate disputes arising under section 7(a) of NIRA. But the board had limited investigatory powers, and relied upon other agencies, often with conflicting interests, for enforcement. At the request of NLB chairman and Senator Robert Wagner, Roosevelt issued a series of Executive Orders to strengthen the Board by reducing the level of review that other agencies had over NLB decisions and giving the Board authority to oversee representation elections. Yet the Board still had no enforcement power of its own, and overlapping jurisdictions between the NLB and the NRA let to contradictory statements of policy and encouraged employers to ignore the Board's orders. Reliance on the Department of Justice for access to the courts caused further bureaucratic and administrative problems.

Following an unsuccessful attempt to pass a precursor the NLRA, Congress instead passed Public Resolution 44, which replaced the NLB with a new board called the National Labor Relations Board (hereafter the Old NLRB). This Board had a non-partisan structure, greater investigatory powers, and more independence through non-reviewable findings of fact. Yet, the Board's election orders were reviewable by circuit courts, which allowed employers to delay elections through court challenges, and the Board still relied upon outside agencies for enforcement of its decisions.

The final incarnation of the NLRB solved a number of the problems that plagued the prior versions and had undermined the effectiveness of the institution. The most important innovations concerned three aspects of the Board's power: (1) strengthening

investigatory powers, (2) providing exclusive jurisdiction, and (3) removing barriers to enforcement of Board decisions. Like the definition of unfair labor practices and the election and bargaining unit provisions, these aspects of the Board's structure were product of prior boards' members' experiences in battling with employers to enforce section 7(a) of the NIRA.

Section 11 of the NLRA outlined the Board's investigatory powers, providing it with the authority to subpoena witnesses and evidence, the ability to appeal to District Courts for enforcement of subpoenas, and requiring that other government agencies provide information upon request. Section 12 provided for substantial penalties, including up to 1 year of jail time, for interference with or resistance to Board investigations. Prior boards' lack of subpoena power had two adverse affects: it allowed employers to impede investigations by simply ignoring Board requests to testify; and it impeded enforcement, as the pre-NLRA boards had to rely on either the National Recovery Administration or the Department of Justice for enforcement; the DOJ required cases referred by the Board to be complete in all legal details before it would accept them, and since the Board had no subpoena powers, it could not meet this requirement.

Section 10(e) allowed the Board to bypass these middlemen entirely and petition the circuit courts for enforcement of orders directly; it also made the Board's findings of fact conclusive. Enforcement through the DOJ and NRA had been ineffective for reasons greater than the Board's lack of evidence gathering powers. The NRA's only enforcement tool was to rescind business' Blue Eagles, the license allowing them to operate under NIRA industry codes. Removal of Blue Eagles had little effect, and the

agency was disinclined to do so, since its own mandate was to promote economic activity rather than inhibit it. Similarly, the DOJ was unenthusiastic about enforcing board orders, and initiated all proceedings *de novo*, due to the weakness of the boards' own investigatory powers. Board members thought the DOJ staff to be "unsympathetic, lax, and in many cases incompetent (Gross 1974, pg. 129)", and the duplicative investigations slowed down enforcement to the point of total nullification: between July 1934 and March 1935, for example, no judgments were obtained in any of the 33 NIRA noncompliance cases referred to the DOJ by the board (Bernstein 1950, 87).

Direct appeal to the courts increased the autonomy of the board by removing the effective, if informal, veto power that the NRA and the DOJ exercised over the Board's judgments. Section 10(a) gave the NLRB an exclusive right to prevent unfair labor practices. The law's authors sought to make the NLRB the "supreme court" of labor, to prevent the confused jurisdiction over labor disputes that had arisen under NIRA as the board, the NRA, and Roosevelt himself all sought independently to solve labor disputes arising under Section 7(a). Without exclusive jurisdiction, the board's decisions were frequently undermined by contradictory statements of policy from the NRA. Roosevelt himself often got involved in negotiations to try to bring major work stoppages to an end, and to that end carved whole industries out of the early boards' jurisdiction in order to give them dispensations from board principles.

Summary

To summarize our argument: the NIRA asserted various labor rights to organize, but failed to create an effective set of administrative structure and process to enforce them:

- NIRA provided no clear mandate, command structure, or process to create rules and precedents with which to regulate union activity and labor-firm bargaining. For example, it failed to define adequately the type of acceptable organizations designed to represent union members, created no process or substance by which a firm could be found not in compliance with the law.
- Unclear lines of authority created bureaucratic and administrative problems: The law required that the NLB rely on the NRA and DOJ for enforcement, each of which had their own priorities that conflicted with those of the NLB.
- President Roosevelt intervened in ad hoc ways inconsistent with the NRA.
- The constitutional status of the law and hence NLB regulations remained uncertain, affording employers the ability to delay and resist NLB authority. In the face of this confusion, the absence of clear constitutionality, and the inability of the government to enforce the rules, employers resisted at every turn. The disparity between promise and actuality in the context of the Depression generated unprecedented labor unrest.

The NLRA solved each of these problems. It granted the NLRB a clear mandate with substantially more effective mandate and effective structure and process. The act clarified lines of authority. It also gave the Board the direct ability to enforce its rulings without relying on other organizations, including subpoena powers. By making the NLRB the sole legal authority in its area, the Act also removed the ability of the president to intervene within the agency's jurisdiction. In stark contrast to the 1933 legislation, the act was consciously designed to maximize the likelihood that the Supreme Court would find it constitutional. Finally, the Supreme Court's acceptance of

the NLRA's constitutionality led to enforcement of the act, employer compliance, and an end to violence associated with labor.

5. A Dialogic Reinterpretation of the Constitutional Controversies over the New Deal

As noted in section 4, the NLRA was the culmination of several decades of legal innovation, innovation that is largely responsible for contemporary public law jurisprudence. Politics were an obvious component of the eventual finding of New Deal laws as constitutional beginning in 1937. But the traditional account of the New Deal Constitutional controversies over-emphasizes politics and under-emphasizes the role of the development of the technology of administrative delegation. The standard wisdom is that after FDR threatened to "pack the court," Justice Roberts made his famous "switch in time," and the Justices acquiesced to his New Deal legislation. Although a caricature, this brief summary of the standard wisdom in constitutional law books captures their essence.

We argue that a far more complex and interesting story hides in legal doctrine (Cushman 1998 makes a similar claim). The NLRA was a clear and direct attempt to respond to concerns about the New Deal's constitutionality as articulated by the Court in the early New Deal cases. By doing so, Congress invented new structures and processes that the Court would hold in *National Labor Relations Board v. Jones & Laughlin Steel Corporation* (301 U.S. 1, 1937) as satisfying constitutional restrictions. We assert that Congress and the Court engaged in a dialogue concerning issues of delegation, political control, oversight, and the means of ensuring rights of due process.

By trying new structures and processes and having them, at times, struck down and, at times, upheld, Congress and the Court jointly created a major expansion of administrative law.

In the two precedents most relevant to the NLRA, *Panama Refining* and *Schechter*, the Supreme Court analyzes two constitutional issues with great care: 1) the structure and process of regulatory delegation; and 2) Congress' regulatory authority under the commerce clause. In these precedents, we see Congress, the President, and the Court struggling to interpret the commerce clause and to define the bounds of proper regulatory delegation.

Both *Panama Refining* and *Schechter* were decided prior to the passing of the NLRA in Congress. While *Panama Refining* was decided on January 7, 1935, prior to Congress' consideration and passage of the Wagner Act; *Schechter* was decided on May 27, 1935, between the Senate and House debates of the Act. And while they were not the only precedents that the drafters of the NLRA had to contend with, they were the latest and representative of the general issues plaguing the New Deal Acts.

So as to better understand the dialogic nature of the relationship between the Court and Congress in constitutional cases, we take a closer look at these cases and how Congress responded to them in the NLRA. Lastly, we will look at how the Court responded to Congress' implementation of its guidelines through its decision in *Jones & Laughlin Steel*.

A. The Delegation Issue

Panama Refining Panama Refining Co. v. Ryan (293 U.S. 388,1935) was the constitutional challenge to the regulation of petroleum goods under the National Industrial Recovery Act (NIRA). The Court held this regulation unconstitutional, as it was an improper delegation of legislative power (431). In *Panama Refining*, the Court gets around the commerce clause issue as a majority of the Justices agreed to the unconstitutionality of the regulation based on the delegation question. However, the Court did not simply rule Congress' actions as outside the bounds of constitutionality. It explained why through a careful analysis of previous instances of delegation that it had approved in prior cases.

The NIRA incorporated many provisions now considered outlandish in their failure to assure due process and to prevent arbitrary and capricious actions. As Irons (1983) and others suggest, the authors of this legislation paid little attention to constitutional issues; specifically, they made little effort to assure that the legislation would meet the standards set in recent cases approving regulatory delegations by the national government. For example, they: 1) delegated authority without sufficient definition of terms or limits on authority; 2) delegated regulatory authority to private groups; 3) paid little attention to legal decisions about existing legislation with which the New Deal legislation interacted (such as the Federal Trade Act); and 4) did not ensure respect for rights of due process, as it did not require that the president make a finding prior to acting.

The Court pointed out these delegation failures in *Panama Refining*. It explains:

> We look to the statute to see whether the Congress has declared a policy with respect to that subject; whether the Congress has set up a standard for the President's action; whether the Congress has required any finding by the President in the exercise of the authority to enact the prohibition.
>
> Section 9(c) is brief and unambiguous. It does not attempt to control the production of petroleum and petroleum products within a state. It does not seek to lay down rules for the guidance of state Legislatures or state officers. It leaves to the states and to their constituted authorities the determination of what production shall be permitted. It does not qualify the President's authority by reference to the basis or extent of the state's limitation of production. Section 9(c) does not state whether or in what circumstances or under what conditions the President is to prohibit the transportation of the amount of petroleum or petroleum products produced in excess of the state's permission. It establishes no criteria to govern the President's course. It does not require any finding by the President as a condition of his action. The Congress in § 9(c) thus declares no policy as to the transportation of the excess production. So far as this section is concerned, it gives to the President an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit. And disobedience to his order is made a crime punishable by fine and imprisonment (415).

The Court then argued that, to approve this new set of regulations, Congress needed to set clear guidelines and procedures to the agency.

Schechter also raised the delegation issue. In *A.L.A. Schechter Poultry Corp. v. United States* (295 U.S. 495, 1935), a unanimous Court ruled that the Act was unconstitutional as it was both an invalid delegation of legislative power and an improper regulation of interstate transactions with only an indirect effect upon intrastate commerce.

As in *Panama* Refining, in *Schechter*, the Court was critical of Congress' haphazard delegation of power. It held that:

> Section 3 of the Recovery Act is without precedent. It supplies no standards for any trade, industry, or activity. It does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. Instead of

> prescribing rules of conduct, it authorizes the making of codes to prescribe them. For that legislative undertaking, section 3 sets up no standards, aside from the statement of the general aims of rehabilitation, correction, and expansion described in Section 1. In view of the scope of that broad declaration and of the nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered. We think that the code-making authority thus conferred is an unconstitutional delegation of legislative power (541-42).

However, the Court went further in *Schechter,* not only describing the failures on the NIRA delegation scheme but also comparing it to a proper administrative delegation scheme, that of the Federal Trade Commission. In *Schechter,* the Court compared the administrative delegation in the Federal Trade Commission Act (FTCA) and the NIRA and found that while the FTCA contains adequate safeguards and limits, the NIRA lacked them. The Court explained:,

> In providing for codes, the National Industrial Recovery Act dispenses with this administrative procedure and with any administrative procedure of an analogous character. But the difference between the code plan of the Recovery Act and the scheme of the Federal Trade Commission Act lies not only in procedure but in subject-matter… (534-535).

If one of the main failures of the drafters of the NIRA was that they paid little attention to legal decisions about existing New Deal legislation, the drafters of the NLRA proved to be not only attentive to preceding legal decisions but also directly responsive to them. From the very beginning the proponents of the Wagner Act were "[C]ommitted to the model of a full blown, full fledged judicial agency like the Federal Trade Commission." (Bernstein 1950, 228). This is a model that had been previously accepted by the Court (*see Federal Trade Commission v. Gratz*, 253 U.S. 421, 1920).

Further, unlike the NIRA, the Wagner Act is meticulous in delineating the agency's power. For example, Section 10 of Act provides that: "[T]he Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor affecting commerce." Every part of that declaration is defined and limited. The "Board," "person," "unfair labor practice," "affecting commerce," and "commerce" are all defined in the Act thus delineating under which circumstances and on whom the administrative agency has authority. Furthermore, the authority is delegated to an administrative agency, not industry boards.

This attention to the New Deal precedent and concerted effort to address the Court's concerns paid off. In *Jones & Laughlin Steel,* holding the Wagner Act constitutional, the Court acknowledged that Congress had fixed the delegation issue under the NIRA. After declaring that the *Schechter* case is "not controlling here," (41) the Court goes on and found that,

> The Act establishes standards to which the Board must conform. There must be complaint, notice and hearing. The Board must receive evidence and make findings. The findings as to the facts are to be conclusive, but only if supported by evidence. The order of the Board is subject to review by the designated court, and only when sustained by the court may the order be enforced. Upon that review, all questions of the jurisdiction of the Board and the regularity of its proceedings, all questions of constitutional right or statutory authority, are open to examination by the court. We construe the procedural provisions as affording adequate opportunity to secure judicial protection against arbitrary action in accordance with the well settled rules applicable to administrative agencies set up by Congress to aid in the enforcement of valid legislation (47).

Furthermore, the Court declared that the Act properly defines and delineates the scope of the Board's authority.

> We think it clear that the National Labor Relations Act may be construed so as to operate within the sphere of constitutional authority. The

> jurisdiction conferred upon the Board, and invoked in this instance, is found in section 10(a), 29 U.S.C.A. 160(a), which provides: 'Sec. 10(a). The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 (section 158)) affecting commerce.' [301 U.S. 1, 31] The critical words of this provision, prescribing the limits of the Board's authority in dealing with the labor practices, are 'affecting commerce.' The act specifically defines the 'commerce' to which it refers (section 2(6), 29 U.S.C.A. 152(6))... (30)

The NIRA 1) delegated authority without sufficient definition of terms or limits on authority; 2) delegated regulatory authority to private groups; 3) paid little attention to legal decisions about existing legislation with which the New Deal legislation interacted; and 4) did not ensure respect for rights of due process. Therefore, the Court ruled it unconstitutional. However, the Wagner Act sought to remedy that and it 1) delegated authority with sufficient definitions of terms and limits on authority; 2) delegated authority to the National Labor Relations Board, a government administrative agency; 3) responded to concerns expressed by the Court in previous New Deal cases and modeled the administrative schema on an existing and established agency; and 4) ensured due process rights through delineating the processes through which the agency was to exercise its authority. It learned from the Court's previous decisions and when drafting the NLRA, Wagner and his writers placed the new agency comfortable within constitutional bounds.

B. Congress' Regulatory Authority under the Commerce Clause

In the delegation issue, the Court communicated clear criteria to Congress.[3] It explained in both *Schechter* and *Panama Refining* what was proper and what was

[3] This section is the most preliminary and should be considered a work in progress.

improper delegation of power. The dialogue between the Court, the President and Congress on the issue of the commerce clause was less clear. For several decades, the Court struggled with what should be the constitutionally proper bounds of federal power; at times sending conflicting messages to Congress. However, like in the delegation cases, the Court and Congress engaged in a bargaining process that ultimately determined the constitutional bounds of the commerce clause.

This dialogue concerning the commerce clause has always been present. Yet, in the issue of labor and labor violence, it picked up in 1895. At that time, one of the main laws where Congress sought to exercise its commerce clause power was the Sherman Act (15 U.S.C. §§ 1-7, 1890). In 1895, the Sherman Act was applied to labor struggles. In *In re Debs* (158 U.S. 564,1895), the Court tested and upheld the validity, under the commerce clause, of the labor injunction to stop strikes in the railways. After the Pullman strike ended, Debs and six others were charged with contempt of court for violating a labor injunction. They perpetrated no violence but were found guilty of communicating with strikers. For that, they were sentenced to 6 months in prison. The Court upheld the prison sentence holding that it was proper for the Sherman Act to apply to labor injunctions as railway labor struggles impeded the interstate movement of goods. Thus, these struggles were under Congress' commerce clause power. *In re Debs* was a broad reading of federal powers and expansion of the application of the Sherman Act.

This decision followed a narrow reading of the Sherman Act in *United States v. E. C. Knight Co* (156 U.S. 1, 1895). This case was decided just five months before *In re Debs*. In *E.C. Knight*, the Court interpreted the Sherman Act very narrowly, ruling that

the Sherman Act did not cover manufacturing as it only indirectly affected interstate commerce. Thus, manufacturing was beyond Congress' commerce clause power, which covered only direct effects to interstate commerce. The Court's indecision on how broadly to define the commerce clause led to many years of inconsistent jurisprudence. Between *E.C. Knight* and the New Deal cases, the Court tried several different tests to determine the bounds of the commerce clause. For example, constitutionality in *E.C. Knight* hinged on the direct vs. indirect test. This case held that the effects of the regulated matter on interstate commerce need to be direct, and not accidental, secondary, or remote. However, in *Stafford v. Wallace* (258 U.S. 495,1922), the Court broadened the test and argued that the entire "stream of commerce among states" was under the regulatory power of the commerce clause. It explained that, "streams of commerce among the states are under the national protection and regulation, including subordinate activities and facilities which are essential to such movements, though not of interstate character when viewed apart from them (519)." The Court's struggles about the narrowness of the commerce clause arose in response to Congress' attempts to use the commerce clause to regulate different aspects of commerce. As Congress tried new regulatory technologies through different legislation, the Court upheld or struck down these new technologies, thus continually refining the complex definition of the commerce clause.

While *In re Debs* was an application of the Sherman Act to railway strikes, an inherently interstate venture, *Loewe v. Lawlor* (1908) broadened the Act's application to labor. *Loewe* involved the United Hatters of North America's charges of restraint of trade under the Sherman Act due to their boycott activities. The workers were not involved in

interstate commerce and did not obstruct the movement of goods, as had happened *In re Debs.* Even so, the Court concluded that their acts must be considered as a whole and thus found that the purpose of their conspiracy was to prevent manufacture and inhibit interstate commerce. In yet another reading of the commerce clause since *E.C. Knight*, in *Loewe*, the Court found that the Sherman Act does apply to manufacturing as it concerns labor. The loss in *Loewe* led labor unions to demand legislative changes. In particular, they wanted to be excluded from coverage under the Sherman Act. Labor unions obtained an attempt to create this exclusion with Section 6 of the Clayton Act (15 U.S.C. § 12-27, 1914). However, in *Duplex Printing Press Co. v. Deering* (254 U.S. 443, 1921), the Court reaffirmed its prior ruling in *Loewe* by rejecting a blanket exclusion of labor from antitrust laws.

The writers of the NLRA drafted the Act in the shadow of this inconsistent commerce clause jurisprudence. In his legislative history of the Wagner Act, Bernstein explains that even as the drafters worked on perfecting "the bill's substantive and procedural provisions," they were aware of the "constitutional quicksand on which they rested" (229). Ultimately, regardless of the delegation issue, the drafters knew that "the Wagner Act was bottomed on the commerce clause" (229). Therefore, believing that the Supreme Court would ultimately give an expansive reading to the clause, the drafters heavily borrowed legal language from the Supreme Court's decisions in favorable commerce clause cases. In the bill's carefully crafted Declaration of Policy, they made sure to argue that the denial of the rights to organize and bargain collectively necessarily led "to strikes and other forms of industrial strife and unrest," which in turn constricted the flow of goods into the "channels of commerce" and adversely affected

level of employment and wages" (229-230). This language comes directly from *Gibbons v. Ogden* (22 U.S. 1, 1824) and *Stafford v. Wallace*, two of the broader readings of the commerce clause.

However, while drafts of the NLRA were being circulated in Congress, *Schechter* was decided. While the Court abstained from the commerce clause issue in *Panama Refining*, it engaged with it directly in *Schechter* finding that Congress' power under the commerce clause did not reach into what the Court held to be intrastate matters. It explained that, "the authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce 'among the several States' and the internal concerns of a state... We are of the opinion that the attempt through the provisions of the code to fix the hours and wages of employees of defendants in their intrastate business was not a valid exercise of federal power" (549-50).

Concerned about the Court's most recent narrow reading of the commerce clause, the drafters of the NLRA immediately changed the language of the act so as to accommodate the Court's objections in *Schechter*. Bernstein describes these changes, stating that

> Wagner felt that changes were necessary and instructed his team of writers to prepare them. "They submitted amendments to the declaration of policy to make a showing by explicit language of the direct relationship between industrial disputes and commerce, of emphasizing this by reversing the order of paragraphs and by basing authority exclusively on the commerce clause by striking out reference to the general welfare. In addition, they altered the definitions of 'commerce' and 'affecting commerce' to attain the same objectives" (122).

In response to *Schechter,* Wagner had the Declaration of Policy rewritten before the House debate. “It was revised, to emphasize the effect of labor disputes on interstate commerce and to de-emphasize the mere economic effects which had been rejected by the Court… For example, the bill’s definition of the term ‘affecting commerce’ was changed from acts ‘burdening or affecting commerce’ to those ‘burdening or obstructing commerce.’”(n.16, internal citations omitted). Their efforts paid off.

The NLRA was challenged in *National Labor Relations Board v. Jones & Laughlin Steel Corporation* (301 U.S. 1, 1937). In *Jones & Laughlin Steel*, the Court held that the Act’s purpose was proper under the commerce clause. It stated that

> There can be no question that the commerce thus contemplated by the act (aside from that within a Territory or the District of Columbia) is interstate and foreign commerce in the constitutional sense. The act also defines the term 'affecting commerce' section 2(7), 29 U.S.C.A. 152(7): 'The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce' (31).

Wagner’s borrowing of favorable commerce clause cases and changes to the Declaration of Policy worked. The language used, language that was previously found to be constitutional by the Court, ensured that the NLRA would be upheld. In the NLRA, Congress took the lessons learned from previous unsuccessful legislations to heart. In *Jones & Laughlin Steel*, the Court settled on the bounds of constitutionality as it related

to the commerce clause. Following, *Jones & Laughlin Steel*, the Court made a concerted effort to clean up its inconsistent commerce clause jurisprudence.[4]

The Court's inconsistency and Congress' efforts to pass new and creative laws are different sides of a dynamic dialogue and bargaining process around constitutional issues. At the same time that the Court was trying to determine the new bounds of federal power, Congress is trying to figure out what exercise of that power will survive constitutional muster. Instead of seeing the Court as stubbornly obtuse and only willing to change once threatened, it is more advantageous to see it as a conservative body trying to keep order at times of great uncertainty. Rather than interpret the 1937 "switch" as a strictly political move by a bullied Court, we should see it as the beginning of the settling of new constitutional doctrines in which Congress and the president accommodated many of the Court's concerns, especially with respect to the delegation of political authority to regulatory agencies. And, reciprocally, the Court accommodated the political branches' authority to address national crises through the delegation of regulatory authority. The Court, the President and Congress tried, rejected and accepted new configurations of political control and oversight. By the end of the 1930s,

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[4] This point is illustrated by one of the last cases in this line of cases, *United States v. Darby Lumber Co.,* (312 U.S. 100, 1941). In *Darby*, the Court upheld the Fair Labor Standards Act holding that Congress' commerce clause power allowed it to regulate employment conditions. *Darby* was a unanimous decision and it explicitly overruled some of the earlier commerce clause cases thus making clear which commerce clause precedents were still valid precedents. In particular, the Court clearly limits the applicability of its narrow reading of the commerce clause recognizing that that those decisions are "inconsistent" with the now established commerce clause jurisprudence (123). It also explicitly overrules another case- something the Court very rarely does and doesn't like to do.

beginning of 1940s, they have worked out the new technology of delegation. This new technology of delegation is one solution to the commitment problems in the labor violence case.

6. The Labor Organization Game, 1880-1930.

From the late 19th century through the early 1930s, the United States faced a "violence trap" (Cox, North and Weingast 2014) with respect to labor. None of the key players – the government, labor, and business –had the ability to commit not to use violence. Although we assume that each player preferred legalization, negotiation, and no violence to violence, commitment problems prevented the three players from obtaining this outcome.

To understand the commitment problems, we model the union (*U*), business (*B*), and government (*G*) interaction as a 3 player game. We use variants on a game to represent three different periods: between roughly 1880-1930; 1933-36, and 1937-forward. In focusing on these three players, we abstract from differences among unions, among business, and within the government. In doing so, we gain greater analytic power to derive important implications about labor violence and some of the major mechanisms that helped solve the problem of violence.

Period 1: 1880-1930

The sequence of play in the first game (1880-1930) is as follows. *U* has the initial move and must choose from three choices (see figure 1). First, *U* can strike within limits; meaning that *U* avoids violence and that *U* limits its demands to wages and

working conditions. Second, *U* can strike without limits, possibly using violence and possibly demanding more from employers than just wages and better conditions (such as representation in management or a seat on the corporate board). Finally, *U* can choose to revolt, possibly leading to a better political compromise for labor but, more likely, to disorder, repression, and large scale violence. Specifically, if *U* chooses this option, nature (*N*), a non-strategic player, chooses between two outcomes: with probability p_1, *N* chooses *A*, in which *U* wins an attractive political compromise; and with probability $(1 - p_1)$, *N* chooses outcome *C*. The subscript on *p* indicates the period. We define L_{31} as the implied lottery following *U* choice of revolt, where the first subscript indicates the lottery number (in this case, 3) and the second subscript indicates the time period (1 for 1880-1930, 2 for 1933-36, and 3 for 1937-forward); thus, $L_{31} = p_1A + (1 - p_1)C$.

If *U* chooses to strike (either within or without limits), *B* has the next move and must choose between responding with violence or by negotiating with *U*.

Finally, consider *G*'s decisions between siding with business and doing nothing. If *U* strikes (with or without limits) and *G* sides with *B* to fight *U*, *N* chooses an outcome. If *U* has chosen to strike within limits, then with probability q_1, *N* chooses outcome *D* representing attractive concessions from *B* to *U*; and with probability $(1 - q_1)$, *N* chooses outcome *E*, resulting in violence against workers, destruction of the union organization, and no concessions. These three choices by *U*, *B*, and *G* yield lottery $L_1 = q_1D + (1 - q_1)E$. If, in contrast, *U* chooses to strike without limits, then *N* chooses between *D* and *E*, but the probability of *D* (concessions from B) is q_2 while the probability of *E* is $(1 - q_2)$. The implied lottery of *N's* choice is $L_2 = q_1D + (1 - q_1)E$. We assume that $q_2 > q_1$;

that is, *U* has greater leverage when it ignores limits on its actions and hence *U* is more likely to prevail if it does not adhere to limits on its demands.

Based on the history presented above, the players' preferences are as follows (but note: we do not present complete preference orders, only the subset of preference orders necessary to solve the game) First, *U* prefers *D* (concessions) to *E* (destruction of the union). Second, it prefers L_2 to L_1. To see this, notice that if *U* chooses to strike within limits, the lottery L_1 ensues; if strike without limits, the lottery L_2 ensues. The only difference between the two lotteries is the probability of the concessions to labor. Because $q_2 > q_1$, *U* prefers L_2 over L_1; technically, we have $L_2 = q_2D + (1 - q_2)E > q_1D + (1 - q_1)E = L_1$. Third, given the relatively low likelihood (p_1) of a successful revolt during this period, *U* prefers L_2 to L_{31}.

Next consider *B's* preferences. If *U* strikes (with or without limits), *B* is best off fighting. The reason is that *B* prefers L_1 to *I* and L_2 to *F*. Because *U* cannot commit to refrain from violence, negotiation means that *B* gives concessions, while *U* cannot commit to honoring any concessions it makes.

Finally, consider *G's* preferences. The period under consideration, 1880-1930, is a largely Republican era in which that party typically held the presidency and a majority in both houses. Republicans favored business generally and, particularly, the protection of property rights and freedom of contract. Both union organization and labor violence threatened business through restriction of property rights and freedom of contract. Hence, during this era, *G* prefers to support business and use violence to suppress labor. Specifically, *G* prefers L_1 to outcome *I*; and L_2 to outcome *F*.

We can now solve for the equilibrium of the game using backward induction. Consider the first terminal node in which *U* has chosen to strike within limits and *B* has chosen to fight. Because *G* prefers L_1 to *I*, *G* will choose to side with *B*. If *U* chooses to strike without limits and *B* chooses to fight, *G* will also choose to side with *B* (*G* prefers L_2 to *F*). Working backwards one node to *B's* decisions. If *U* has chosen to strike (with or without limits), *B* will choose fight since it prefers L_1 to *J* and L_2 to H. Finally, consider U's choice at the initial node of the game. We established that *U* prefers L_2 to L_1; and because p_1 is low, it prefers L_2 to L_{31}. Hence *U* will choose to strike without limits. Along the equilibrium path, then, *U* chooses to strike without limits; *B* chooses to fight; and *G* sides with *B* against *U*.

Put simply, the equilibrium of this game represents an on-going and sometimes violent conflict between business and labor, with the government siding with business against labor. Labor strikes without limits and hence violent confrontations between business and labor are on-going, and the government actively attempts to suppress labor organization and bargaining with firms.

Period 2: 1933-36

The Great Depression represented a massive change in circumstances particularly for workers who were unemployed or who feared losing their jobs. A surprisingly large portion of workers were out of jobs for years, and pro-labor movement grew. Moreover, as we explained in section 3, sympathy for more radical change has grown among workers and within organized labor. In addition, the dominant party is now the Democrats, whose support draws from labor as well as business. These changes

affect the preferences of the players, so that those in period 2 differ from those in period 1.

We model this change in circumstances by assuming that the probability of a successful result has risen. The danger of a revolt is larger and potentially appealing to labor. If the country fails to address labor problems, labor may well choose radical action and defect from the Democratic Party. Thus $p_2 > p_1$, where p_2 is the probability of a successful revolt in period 2.We do not analyze period 2 in detail. Instead, we focus on a particular comparative static result reflecting the rise in probability of success if *U* chooses to revolt. We observe that there exist a critical probability threshold, p^*, such that if $p_2 > p^*$, *U* will choose revolt over striking. We assume for this period that p_2 is less than p^*, but approaching it. Hence revolt and disorder have become a real threat. In the absence of appropriate commitment technologies, this option is not feasible. Outcome *J*, as discussed in the game in period 1 allows unions to take advantage of firms.

In terms of the model, the value of the outcome of cooperation and negotiation between *U* and *B* has risen for all the players. During periods 1 and 2, commitment problems mean that this outcome cannot be implemented. Specifically, because the Supreme Court has failed to give constitutional sanction to *G's* labor regulation, *G* has no way to enforce a set of neutral rules governing union-business negotiation.

Period 3: The NLRB comes on-line: 1937 and Beyond

The final period we study begins in early 1937 with the Supreme Court's ruling that the NLRA and its progeny, the NLRB, were constitutional, allowing the NLRB to enforce its rules. Circumstances differ from period 2 in several ways. Because of the

threat of disorder, many businesses came to favor compromise, as represented in the NLRA, which gained far more than majority support in Congress. For our purposes, the main implication of this ruling is that the government has gained the ability to sanction both labor and business if they fail to play by the (NLRA/NLRB) rules. As we show, the ability of *G* to sanction both business and labor for failing to play by the rules allows the three players to implement cooperation between *U* and *B* that involves mutual respect for the rules and hence an absence on violence.

To see how this cooperative equilibrium works, we modify the game to reflect *G's* enforcing the NLRB rules. As before, *U* has three choices, though they differ somewhat from U's choices in period 1. First, *U* may choose to play by the rules; second, it can continue striking without limits, hence retaining violence potential; and third, it can choose to revolt. We assume that the probability of a successful revolt (from *U's* standpoint) is p_2, close to p^*, but not quite; but, as before, if the Depression continues and labor sees too few concessions, it becomes a possibility (see figure 2). As in game 1, if *U* chooses to revolt, then nature chooses whether labor is successful (outcome *W*) or if disorder results (outcome *X*). The implied lottery is $L_{33} = p_2W + (1 - p_2)X$.

If *U* chooses to play by the rules or to continue striking without limits, then *B* has the next move and may choose from among 3 options: fight (continue to use violence against *U*), contest *U* within the system, or to play by the rules, here meaning recognize the union and negotiate with it in good faith. Finally, if *B* chooses to fight or contest *U*, then *G*, now in the form of the NLRB, must choose whether to enforce the rules.

We make the following assumptions about the players' preferences. *U* prefers the result when it plays by the rules and *B* chooses to also play by the rules (outcome

O) to two other outcomes: (i) the outcome of revolting *($L_{33} = p_2W + (1 – p_2)X$)*; and (ii) the outcome when it chooses continuation of the status quo (striking without limits, *B* contests *U's* actions, and then suffer punishment by *G*). For *B*: If *U* chooses to play by the rules, *B* prefers to play by the rules. If *U* chooses to continue striking without limits, it prefers to contest *U's* actions. For *G*: reflecting its expectation of electoral gain by having solved the problem of labor violence, *G* prefers enforcing the rules over doing nothing. In terms of the model, this means that *G* will punish either or both parties if they fail to play by the rules. As with the failed NIRA, if *G* fails to implement the rules, it will not gain electoral support as the violence between labor and business continues, possibly allowing p_2 to rise above p^*, leading *U* to choose revolt instead of cooperation.

As before, we solve the game using backward induction. At each decision node involving *G*, *G* will choose to enforce the rules. Doing so gains it electoral support and forestalls potential revolution. Working back a node, *B* has three choices: if *U* has chosen to play by the rules, fighting risks punitive actions by *G* so *B* is best off choosing to play by the rules. If, instead, *U* chooses to continue striking without limits, then *B* is best off contesting *U's* actions and *G* will impose sanctions on *U*. We now come to the first choice of the game, *U's* decision among playing by the rules, striking without limits, and revolting. If *U* chooses to play by the rules, outcome *O* occurs in which both *U* and *B* play by the rules and hence negotiate in good faith. In contrast, if *U* chooses to continue to strike without limits, then B will contest *U's* strikes and *G* will then rule against *U*. Where as if *U* chooses to revolt, the outcome is the lottery $L_{33} = p_2W + (1 – p_2)X$. Among these three options, *U* prefers to play by the rules. Hence the equilibrium

path of this game is for *U* to choose to play by the rules and *B* to choose to play by the rules.

7. Implications

The games modeling the interaction of labor, business, and government reveal important insights about labor history, and, more generally, about open access. These games allow us to answer all three major questions asked at the outset: why did labor violence persist for so long; what did the NLRA do that solved the problem of violence; and why did the government have incentives to design the NLRA and to become a neutral player in the NLRB regulatory process?

The model shows why the violence associated with labor persisted for so long. In the absence of a neutral government, neither *U* nor *B* could commit to foreswear violence and, instead, to negotiate in good faith. Each side could take advantage of the other by continuing to use violence even if the other has stopped using violence.

The design of the NLRA, in combination with the Supreme Court's sanction of the law, altered both the set of moves available to the players and their incentives. This legislation gave the government the ability to behave as a neutral party overseeing the rules involving recognition of unions and to punish both parties for violating the rules.

The key to the new, post NLRA equilibrium is thus threefold. First the on-going and lengthening Depression increased the likelihood of success of a revolt by labor, making this action more plausible. This outcome would make both *B* and *G* much worse off. The potential attractiveness of revolt to *U*, in turn, raises the value of compromise to *B* and *G*, so it helped design a new system. Third, the new system involved *G* creating

the new regulatory process, including the ability to sanction firms and labor unions. Democrats in control of the national government gained electorally from a law that at once solved the problem of violence and allowed it to become a neutral player, enforcing the rules against either party in the event that they break the rules.

This logic also explains why the NLRA was able to solve the problem where previous administrations could not. The threat of revolt was not present. Further, the Republican Party dominating control of the national government from 1880-1930, did not believe it could gain electorally by legalizing unions and creating a neutral regulatory process governing the labor process. In the wake of the Great Depression, Democrats took control of the national government in 1933.

We now turn to the larger issues in the construction of open access. Open access to labor organizations seemed impossible as long as the commitment problems remained unsolved and the violence problems continued. Our approach highlights problems with open access faced by other civil society organizations, such as the civil rights and women's movements. In these and similar cases, the demands for recognition threatened powerful interests who had the political and economic clout to inhibit open access. The American experience with open access to business corporations therefore occurred decades earlier.

The perspective of this paper has implications for several of the other papers studying open access to business organizations. Until recently few worried about the timing or explanation of these, as if the value of the corporate form itself was sufficient explanation for its existence. The common view has no explanation for why new business forms emerged, the timing of that emergence, or the administrative apparatus

designed to support open access to these business forms. Many questions remain. Why do we see so much experimentation and hesitation with the legislation? This suggests that the proponents of the new legislation were trying to solve problems – what were these? Put another way, the history of the evolution of open access to the corporate form was likely to be characterized by problems whose solution was not obvious in the beginning.

Figure 1:

1880-1930.

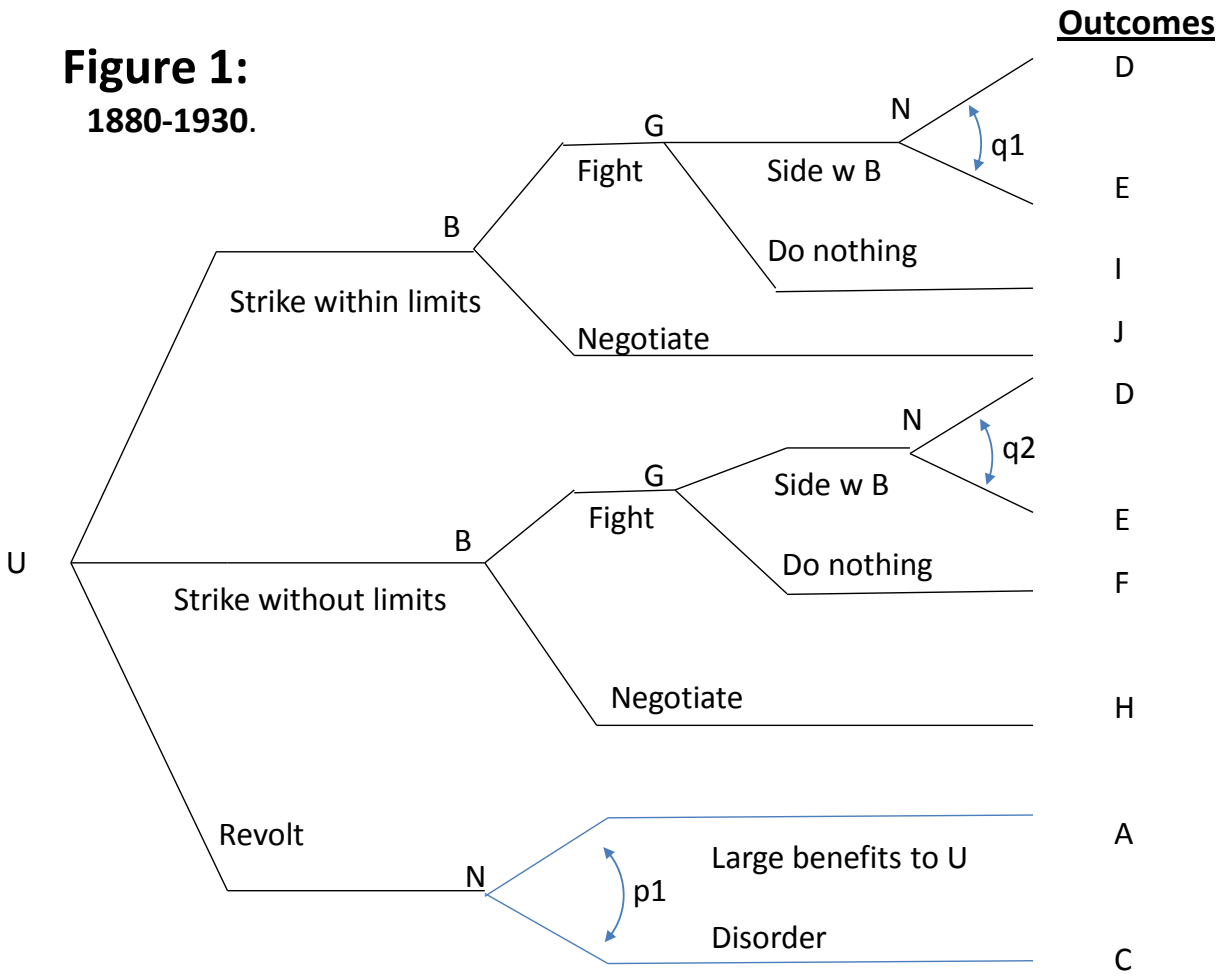
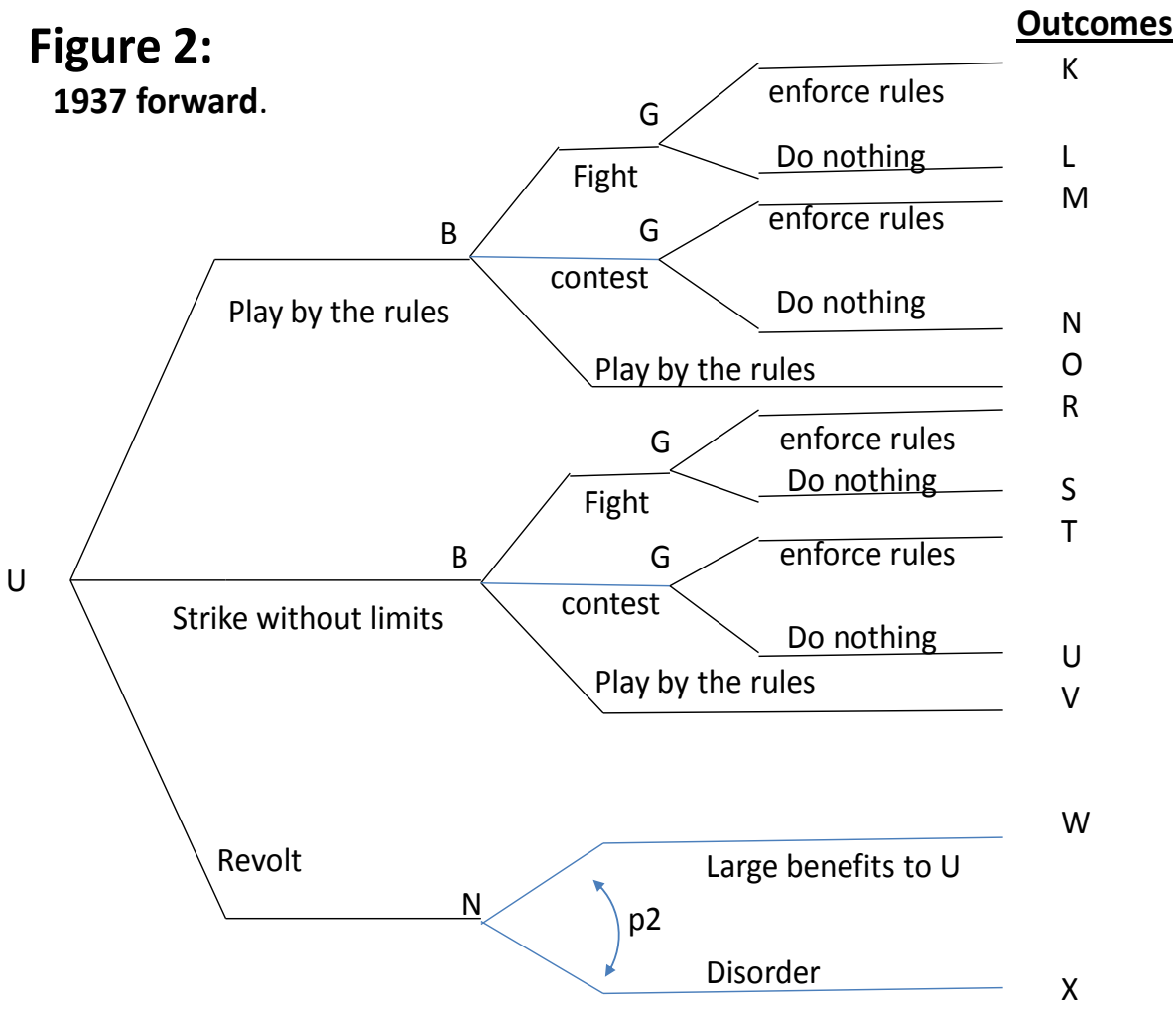


Figure 2:

1937 forward.



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