

What Does Right to Work Mean?

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Introduction

In his introduction to *The Federalist*, historian Carl Van Doren opines that *Federalist* writers did not foresee the growth of a broad-based democracy from principles articulated in the Constitution. He notes, “Hamilton supposed (in 35) that the people would be represented in Congress chiefly by ‘landholders, merchants, and men of the learned professions.’ (...) Nothing like organized labor then existed in America. Many laborers and artisans could not read, and most of them were excluded from the vote by property qualifications fixed by the states in which they lived. Hamilton took it for granted that they had no separate interests which the Constitution ought to provide for.”

James Madison, foreseeing conflict between government and the governed, believed that rival interests were necessary to maintain balance. In 51, he concluded:

The provision for defence must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counter ambition. . .It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

In the centuries since the publication of *The Federalist* papers, democracy’s base broadened. Industrial workers organized and asserted demands. Conflict and rival interests characterized the American political process. Legislation, judicial opinion and executive orders all coalesced to define law within constantly changing circumstances. Only in this context do we approach the meaning of right to work statutes which are the subject of public debate today.

What does right to work mean? Simply put, a right to work statute prohibits compulsory union membership as a condition of employment. Workers who choose to forego union membership do not pay dues, but still benefit from the union's bargaining for wages and benefits in their place of employment. For a full understanding of the meaning of such statutes we must examine the labor movement, its history in the United States and the conflict between philosophies of individual liberty and collective prosperity.

Individual Liberty or Collective Bargaining?

In an 1859 address to the Wisconsin State Agricultural Association, Abraham Lincoln articulated his view of conjoined economic and political liberty:

The prudent, penniless beginner in the world labors for wages awhile, saves a surplus with which to buy tools or land for himself, then labors on his own account another while, and at length hires another new beginner to help him. This, say its advocates, is *free* labor—the just and generous, and prosperous system, which opens the way for all—gives hope to all, and energy, and progress, and improvement of condition to all.

Lincoln scholar Gabor Borritt has called Lincoln's premise that freedom of the individual to pursue economic opportunity is inextricably linked to personal liberty, the "right to rise".

Without the ability to attain economic liberty, Lincoln believed no individual in society could be confident of personal liberty.

Some seventy-five years later, subsequent to an Industrial Revolution which was in its infancy during Lincoln's life, the sponsor of the National Labor Relations Act of 1935, Senator Robert Wagner, remarked to a gasoline station attendant:

All I am trying to do, and I think you believe me when I say that, is to make the worker a free man to join any organization that he wishes to join and, at the same time, to have genuine collective bargaining.

Wagner believed that the advent of an industrialized and centralized workplace necessitated collective bargaining on behalf of workers. In Wagner's mind, the benefits, individually and to the national economy, more than offset any encroachment upon personal choice.

Enactment of his National Labor Relations Act began the federal government's regulation of collective bargaining between unions and employers. From the outset, the National Labor Relations Act laid bare the tension between the rival concepts of preservation of individual liberty and the need for collective bargaining due to a power imbalance between employers and workers. These philosophical battles continue today.

The National Labor Relations Act of 1935 (the Wagner Act)

Prior to the passage of the NLRA, labor relations were governed by state common law (that is, the collective law of state appellate courts' written opinions). The NLRA broke new ground. It asserted that the federal government, using its Constitutional power to regulate interstate commerce, controlled matters regarding private employment contracts. While many corporate legal counsel contended the NLRA both exceeded federal regulatory authority and infringed upon the constitutional rights of employees and employers, these arguments failed. In the 1937 case of *NLRB v. Jones & Laughlin Steel Corp.*, the United States Supreme Court held the NLRA constitutional in its regulation of private employment contracts.

What prompted Wagner to seek the expansion of federal power to include such regulation? Wagner's chief aide in drafting the bill, Leon Keyserling, provides insight: "the

tendency of modern industry toward integration and centralized control has long since overturned the balance of bargaining power between the individual employer and the individual employee.” Wagner believed such centralization of industry prohibited workers from obtaining adequate compensation for their work.

Wagner and Keyserling believed the diminished purchasing power of laborers was a substantial cause of economic depression, still evident in the mid 1930s. They felt that a restoration of the balance of power between employees and employers would cause wages (and thus, purchasing power) to rise resulting in increased economic activity and a better economy for all. Centralization of worker power through collective bargaining would balance against the authority of large employers.

The National Labor Relations Act of 1935 created federal regulation of employment contracts. Yet, contemporary battles over right to work statutes which impact the content of these contracts are fought in state legislatures. Why? The answers are found in history as well as in Senator Wagner’s drafting of the legislation.

A Brief History of Labor Legislation

Labor unrest proliferated in the 1910s and 1920s. Workers protested factory conditions, wages and many other issues. Many employers responded to this unrest and employees’ desires for collective representation by creating company unions. These company entities were created, and often directed, by management personnel within the corporation. Few were administered by hourly employees they allegedly sought to benefit. In fact, company unions’ primary purpose was to supplant outside labor unions, such as Samuel Gompers’ American Federation of Labor.

To combat such practices, President Franklin Roosevelt signed the National Industrial Recovery Act (NIRA), shortly after taking office in 1933. The NIRA included provisions to protect labor. In particular, Section 7(a) gave workers “the right to organize and bargain collectively through representatives of their own choosing.” It determined that no employee could be “required as a condition of employment to join a **company union** or to refrain from joining, organizing, or assisting a labor organization of his own choosing.”

Preliminary drafts of the NIRA reveal that it sought to prohibit an employer from requiring an employee’s membership in any “organization.” However, concern from AFL leaders about a restriction on unions entering into closed shop agreements (where all employees were contractually required to be members of the union) led to a modification of the final document, with the term “organization” changed to “company unions.” Henceforth, the issue of union security (that is, the ability to have a closed shop) was intertwined with representation and collective bargaining.

Company unions were not outlawed by the NIRA; employers were prohibited from demanding membership in them as a condition of employment. Still, they continued to be a tool used by management, with many companies asserting these entities were viable options for satisfying the requirements of NIRA Section 7(a) regarding the employees’ right to organize and bargain collectively. To combat this trend, Senator Wagner began to draft legislation in 1934.

Wagner introduced the final version of his proposed legislation in 1935 shortly after large portions of the NIRA were ruled unconstitutional. This bill, with few changes, became the National Labor Recovery Act. In his introductory remarks regarding the bill, Wagner asserted that earlier efforts to protect and preserve employees’ rights to bargain collectively were

insufficient, leaving them unable to participate in “our national endeavor to coordinate production and purchasing power. The consequences are already visible in the widening gap between wages and profits.” Wagner’s end was similar to that of Lincoln, “to make the worker a free man in the economic as well as the political field.” Unlike Lincoln, however, Wagner believed that workers would achieve these freedoms not by pursuing individual self interest, but by collective action.

The NLRA did not articulate a preference regarding the closed union shop. Throughout the bill’s debate in Congress, Wagner reassured members of Congress that it merely preserved the *status quo* found in the common law of the individual states. In states where closed shops were allowed, workers would be free to organize.

Section 8(3) of the NLRA preserved this *status quo* by stating: “nothing in this Act, **or any other statute of the United States**, shall preclude an employer from making an agreement with a labor organization ...to require as a condition of employment membership therein.” The intent of this section of the Act was not to make closed shop agreements legal at the federal level. It simply provided that the operation of state common law on the matter, whether it determined closed shop agreements legal or illegal, was unaffected. Thus, Wagner could confidently assure the public and his fellow Congressmen that no existing state law affecting the closed shop would be altered.

What motivated Senator Wagner, a champion of labor and workers, to craft language deferential to state common law? Likely, it was both politics and law. In the 1930s, State law addressing union security was defined by common law, that is, law articulated in the written opinions of appellate judicial bodies. In general, State common law of the time was becoming

more favorable to unions and their use of collective bargaining. Wagner had no reason to believe common law would serve as a deterrent to his goal of exclusive collective bargaining relationships for unions.

Nor is it likely he would have considered state legislatures a threat to union security. Beginning early in the 20th Century, the United States Supreme Court had issued a number of opinions which held that state legislatures could not enact laws which interfered with the “freedom of contract.” States’ attempts to regulate various types of contracts of employment did not survive Constitutional scrutiny.

Wagner likely saw no benefit in adding language to Section 8(3) which limited states’ powers to regulate union membership requirements. Both United States Supreme Court doctrine and State common law appeared to offer sufficient protection. There was little reason to offend fellow Congressmen, or risk failure of the bill, by extending the regulation to the states. However, as we are all aware, both the Supreme Court and state governance have altered substantially in the intervening three-quarters of a century.

Labor-Management Relations Act of 1947 (Taft Hartley)

Once the United States Supreme Court affirmed the constitutionality of the Wagner Act, opponents commenced work to repeal or dismantle it. In the decade after its passage, over 200 bills were introduced in Congress to either repeal or amend the NLRA.

In 1946, midterm elections produced large Republican majorities in both the U.S. House and Senate. This set the stage for national legislation directed at modifying the NLRA.

Shortly after these elections, Republican Senators Robert Taft and Fred Hartley introduced a bill which sought to amend the National Labor Relations Act. This bill, known as the Labor-Management Relations Act of 1947 or Taft-Hartley, set forth objectives markedly different from those enumerated by Senator Wagner for the NLRA. Taft-Hartley states in its title and declaration of policy:

Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that **neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.**

It is the purpose and policy of this Act [chapter], in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide **orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce**, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

Most notably, Taft Hartley sought to protect individual liberty via regulation of union membership. The legislative history of Taft Hartley during its review in the House Committee on Education and Labor (as House Resolution 3020) provides insight on the mindset of its supporters. The Committee's record reveals a belief that due to labor organizations the American worker's "economic life has been subject to the complete domination and control of

unregulated monopolists” and that the legislation was “formulated as a bill of rights for both American workingmen and their employers.”

Much of the language of both H.R. 3020 and its Senate counterpart sought to empower individuals. House Resolution 3020 addressed right to work in Section 13, providing that nothing in the bill should be “construed to invalidate any State law or constitutional provision which restricts the right of an employer to make agreements with labor organizations.” The section also provided that no basis existed upon which to challenge State right to work law under the doctrine of federal preemption.

Though the bill’s Senate counterpart contained no language regarding State jurisdiction, concepts contained in H.R. 3020’s Section 13 were added in Conference Committee and became Section 14(b) of the Taft Hartley Act.

It provided as follows:

(b) Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

This language left no doubt regarding Congress’ stance on the issue. It plainly ceded authority to States regarding matters of union membership in employment contracts. It remains in place today and sets the stage for the balance of our discussion.

Right-To-Work

Right-to-work legislation began to appear in Statehouses across the nation in the post-Taft Hartley era. By 1955, sixteen State legislatures had adopted right-to-work laws. All of these States were located in the Southern or interior Western United States. Little opposition

existed in these areas, as unions were not present in significant numbers. The adoption of right-to-work laws was a preemptory maneuver meant to impede the unions' entrance into the States. This was important in the South, as many elected officials believed union organization would inflame racial tensions.

In the decades between 1955 and 2012, little action was undertaken regarding the matter. In fact, only six States adopted right-to-work laws in these intervening years. Today, however, the matter has returned to the top of the political agenda. Stubbornly high unemployment, Republican gains in the 2010 midterm elections and States' pursuit of competitive advantages in economic development all served to reinvigorate right to work.

In December, 2012, Michigan became the twenty-fourth State to adopt right to work legislation. Its adoption of such a statute, along with Indiana's in February 2012, marks a new era. No longer is the matter confined to Southern and Western States. No longer is pursuit of the legislation meant to impede unions' entrance into a State's industries.

Michigan and Indiana reside in the Rust Belt, an aging, industrial area of the Middle United States. Both States have significant union memberships (Michigan is the fifth most unionized state in the Union) and industries which historically have enjoyed strong union support. Legislation in Indiana and Michigan faced strong opposition, yet prevailed. Michigan's statute, having an appropriations rider in it, will not be subject to voter referendum (as was Ohio's legislation restricting collective bargaining for public workers which was overturned via public referendum). Thus, barring a constitutional amendment or judicial invalidation, Michigan's right to work statute will stand.

And, last week Indiana's right to work statute survived a challenge in Federal District Court. Chief Judge Phillip Simon of the Northern District of Indiana Federal District Court dismissed the lawsuit filed in *Sweeney v. Daniels*, finding that many of the counts failed to state a claim upon which relief could be granted. Two of the counts were dismissed without prejudice in order to allow the plaintiffs to litigate the issues in state court. In fact, Indiana's statute is the subject of state litigation, as well. *United Steelworkers, et al. v. Mitch Daniels*, pending in Lake County Circuit Court, survived a motion to dismiss filed by the State of Indiana late last year.

Right-to-work laws, now as in decades past, prevent unions from requiring an employment contract demand union membership and union dues from all employees in the workplace. Unions are not outlawed by right to work legislation; they are restricted in their methods of obtaining members and dues-based funding.

Proponents of right-to-work legislation contend that compulsory union membership as a condition of employment is at odds with American individual liberty and freedom of association, forcing workers to pay without choice. They believe that compulsory union membership provides labor organizations undue power and influence in the workplace and, via their lobbying efforts, in the political sphere where often they support points of view not held by their membership.

And, in an economy struggling to emerge from the last recession, right to work advocates assert that adoption of such laws results in a market more attractive to new business. They believe that right to work statutes enhance a state's competitiveness, increase job growth, lower the rate of poverty and create stronger communities.

Union supporters decry right-to-work laws, contending they allow free riders to obtain benefits without participating in the process. They argue that right to work statutes diminish average wages, offer a reduced standard of living and subjugate workers. Union leadership often maintains that the true objective of right-to-work proponents is to weaken unions and to create tension among workers in unionized workplaces.

By examining each of these areas, average wages, job creation and economic development and union membership, we may be better able to determine the impact, if any, of right to work laws.

Union Membership in Decline

Labor unions have declined in national prominence and as a percentage of the American population. However, the right to work movement's role in labor's struggles is difficult to ascertain.

Union membership as a percentage of the working population in the United States peaked in 1954, when nearly 35% of workers were unionized. The total number of workers with union membership peaked in the late 1970s, with over twenty-one million American workers belonging to various private and public unions.

Since that time, membership in private workforce unions has steadily declined, though public sector unions continue to grow. 2012 Bureau of Labor Statistics numbers estimate that 14.8 million American workers are union members, a mere 12% of the workforce. This percentage is buoyed by unionization in the public sector, which stands at nearly 37%. Only about 7% of private sector workers claim union membership.

The continued decline of private sector union membership likely is multi-factorial. Gallup polls conducted over the last seventy years show that public support for unionized labor varied, but remained above 60% pro-union until about 1970. From 1970 through 2000, levels of public support stayed near or just below 60%. The beginning of the Great Recession in 2007 coincided with a precipitous decline in support for unionized labor, which currently rests at approximately 47%.

The decline in union membership, as well diminished support for labor among the general public, parallels many societal trends. Employment in many regions of the United States is no longer based upon manufacturing. Information and technology, as well as the service sector, are major forces in our economy. These job sectors have negligible union membership.

Globalization re-locates manufacturing, service and technology jobs from the United States to foreign countries with lower wages bases. Unions, whether based in the United States or Western Europe, have experienced limited success in attracting a global membership.

American workers in the 21st Century are less inclined to join organizations. As noted by Robert Putnam in his book *Bowling Alone* (so named because while Americans still bowl in sizeable numbers, they prefer to do so individually rather than in leagues), this finding is true across society and includes service organizations, recreational clubs and leagues, as well as unions. Americans participate less frequently in all civic activities.

Have right to work laws impacted levels of union membership? From their inception in the 1940s through 2000, these laws hindered the expansion of unions into new areas, primarily the South and interior West, preventing an increase in membership. Today, studies conducted to

measure the effect of right to work statutes on union membership conclude that such legislation “significantly reduces unions’ organizing efforts and successes in NLRB certification elections for at least a decade.” Such studies have estimated the number of free riders, those workers in union shops who choose to forego membership, at six to ten percent of the workforce.

Yesterday’s *Wall Street Journal* provides us with some initial data regarding the declines in union membership in Indiana and Wisconsin. Indiana’s union rolls shrank 18.5% in 2012, which economists attribute in part to its adoption of a right to work statute. And, Wisconsin’s union membership fell 13.5% after passage of its 2011 law restricting collective bargaining rights for public employees and providing choice on whether to join a union.

But, throughout the latter half of the 20th Century many, independent events occurred which gradually weakened labor unions. In 1964, subsequent to the election of President Lyndon Johnson, the AFL-CIO sought to repeal Section 14(b) of the Taft Hartley Act. A Senate filibuster by Senator Everett Dirksen stalled the legislation.

In the 1970s, an era of rampant inflation and economic stagnation, employers began to take the offensive against unions. In response, labor again attempted to pass legislation to improve its plight. It, too, failed. And, in 1994, with President Bill Clinton in office, labor pursued federal legislation which would preclude employers from replacing strikers with permanent workers. Again, the result was failure.

Declining memberships, diminished civic engagement, a changing economy, right to work and labor’s own political miscalculations all contributed to the weakening of labor unions in the late 20th Century and early 21st Century.

Right to Work and Economic Development

In this changing political and economic landscape, with increased competition for a shrinking number of manufacturing jobs, right to work movements again began to emerge. Much data exists which attempts to assess the impact of right to work statutes on the economies of States adopting them. Many opinions exist regarding the interpretation of the data.

The U.S. Bureau of Labor Statistics data for job creation shows a sizable advantage for job creation in right to work states. “Between 1982 and 2002 the average right to work state increased its jobs by 62%. By contrast, the average non-right to work state increased jobs by only 42%.” During the same twenty year period, the results are even more dramatic when isolated to manufacturing jobs. Right to work states created approximately 1.43 million manufacturing positions, while non-right to work states lost nearly 2.18 million jobs.

Opponents of right to work laws contend many variables provide explanation for these statistics: population shifts to the southern and western portions of the country, which are largely right to work states; states which have embraced right to work laws often have other policies in place which are anti-union and work to attract business.

While it is always difficult to isolate cause and effect, most data seem to suggest that, at least initially, right to work laws do impact job creation, employment and poverty. Of course, many other pro-business incentives often exist in these states. Lower tax rates, favorable environmental regulations, attractive workers compensation laws and many other components complete the package attractive to business. As more states adopt right to work laws, it is unclear

what impact they will have on relocation of business, since the issue would no longer differentiate between potential sites.

Right to Work and Wages

According to United States Department of Labor statistics for 2012, private sector workers in right to work states earned an average of \$738.43 per week. This sum is nearly 10% less than wages for workers in states without right to work statutes. However, unemployment rates in right to work states trend lower, on average, than states without such legislation resulting in a higher percentage of employed citizens.

Proponents of right to work agree that the average wage is somewhat lower in right to work states than in non-right to work states, but contend that to examine this statistic out of context is misleading. They argue that to calculate real spending power of workers, cost of living must be considered. When such data is included, right to work states, on average, have a somewhat lower rate of poverty than non-right to work states.

Right to work advocates also note that while average wages may be lower in their states, job creation can result, at least initially, in such disparity. For example, consider City A in a right to work state and City B in a non-right to work state have the same number of workers receiving the same wage base. If City A creates a job due to favorable economic conditions (an entry level job with a entry level wage), its average wage will be lower because it now has a new, entry level position. So, it has added a job to remove someone from the ranks of the unemployed, but because the job is new and entry level, the average wage for the community is lower than the non-right to work community with no new, entry level job.

This example illustrates the difficulty in relying upon statistics to ascertain whether right to work states create better economic conditions. Further muddying the waters are variables such as personal income tax rates, which tend to be lower in right to work states, providing more disposable income for workers. Union activists contend that the tax rate disparity is less meaningful than right to work advocates allege, as they believe workers in states with higher income tax rates receive more and better services.

Conclusion

The political and societal conflict surrounding right to work exposes the inherent tension between the values of collective prosperity and individual liberty. Proponents of right to work legislation contend that allowing individuals to choose whether to join a union is a fundamental requirement of individual freedom which leads to prosperity. They assert that States enacting right to work legislation are, in fact, protecting against union coercion of workers and promoting economic development. By extension, economic development serves to stabilize communities with jobs, prosperity and individual freedom.

Opponents of right to work laws argue that unions promote higher wages and create a more equal distribution of wealth. They contend that any infringement upon individual freedom or liberty which occurs because of mandatory union membership is offset by collective gains for the group. Moreover, union supporters allege that, as unions provide a measure of job security and wage equality, they also contribute to the stability of a community.

Given our polarized and highly charged political environment, conciliation is unlikely. In Indiana, a Supreme Court judicial opinion regarding the validity of the statute will provide an end only to the litigation. The philosophical battle will go on.

Such situations are not unique in American history. We can easily convince ourselves that our times are more acrimonious, our issues more complicated, our citizenry and government less capable. But, the American experiment has often involved radically opposed beliefs: gun control, abortions and family planning, affirmative action and gender equality, even whether to have a centralized federal government rather than a confederation of States. These radically opposed forces grind against one another over and over again, first in one direction and then in another, forging a new face of our democracy as the glaciers once forged our landscape.

So, in closing, a return to Lincoln's 1859 address in Wisconsin proves both hopeful and instructive. He stated:

It is said an Eastern monarch once charged his wise men to invent him a sentence, to be ever in view, and which should be true and appropriate in all times and situations. They presented him the words: "*And this, too, shall pass away.*" How much it expresses! How chastening in the hour of pride! How consoling in the depths of affliction! "*And this, too, shall pass away.*" And yet let us hope it is not *quite* true. Let us hope, rather, that by the best cultivation of the physical world, beneath and around us; and the intellectual and moral world within us, we shall secure an individual, social, and political prosperity and happiness, whose course shall be onward and upward, and which, while the earth endures, shall not pass away.

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