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Legal Limits on Labor Militancy: U.S. Labor Law and the Right to Strike since the New Deal

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Since passage of the Wagner Act in 1935, U.S. labor law has guaranteed workers the right to strike. Three years later, the same system of law assured the employer's right to continue production in spite of a strike. This paper explores how the Wagner Act and its subsequent developments have simultaneously empowered workers and constrained their collective capacity to exercise control over the workplace. Historical legal analysis of Wagner and its applications, interpretations, and amendments indicates that the law has diminished the effectiveness of the strike, reduced the likelihood of its occurrence, and limited its legitimate forms, all the while sustaining the right to strike. I argue that by this careful balance of empowerment and constraint, the state has found the means of reconciling the structural constraints of capitalism—the imperatives of accumulation—with those of democracy—the demands of legitimacy.

The U.S. labor historian Irving Bernstein (1969:786) has written that the New Deal period " . . . witnessed a change in American law so profound as to constitute a revolution." The most significant and long-lasting changes in U.S. worker-employer relations came with the New Deal's National Labor Relations (Wagner) Act, passed by Congress in 1935 and affirmed by the Supreme Court in 1937. The act, which provides the legal foundations of present-day labor-employer relations, grants workers a legal right to organize trade unions, to bargain collectively with employers, and to strike. It also established the National Labor Relations Board (NLRB), a federal agency, to act as a formal mediator in industrial disputes.

There is general consensus among scholars that Bernstein's characterization of this restructuring of industrial relations, class conflict, and the state's regulatory role in them is not overstated (e.g., Cox 1960; Montgomery 1979; Brody 1980). What is far less clear is whether the expansion of the state's role and the rights provided to workers have been to the benefit or the detriment of the labor movement. The industrial pluralist school has long held that the New Deal labor policies promised and provided greater power for organized labor in the workplace by granting to workers bargaining arenas in which they could interact with employers on a more equal footing (e.g., Cox 1960; Dunlop 1958; Chamberlain and Kuhn 1986). Others, working within a critical legal studies framework, are quite skeptical of this view (Klare 1978; Stone 1981; Atleson 1983; Tomlins 1985). They argue that the New Deal legislation has not enhanced the power of workers precisely because these developments in the law have constrained and even impeded the ability of workers to organize and to act collectively.

But the consequences of the Wagner Act for workers are better understood through dialectical rather than dualistic reasoning. The Wagner Act did not simply help *or* hinder the labor movement. Rather, the act and the institution of collective bargaining that emerged from it simultaneously enhanced *and* diminished the collective capacities of workers (Hurd 1976; Klare 1983). The more interesting and certainly less simple question, then, is how the

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Wagner Act and its interpretations and applications over time have simultaneously worked in these opposing ways to shape the capacities of workers to organize and act in their common interests.

In this paper I examine the legal regulation of the strike, a collective act that clearly threatens the profit-making potential of capitalist production. The strike is a breakdown in the organization of the economic exchange of labor power for a wage, an exchange that defines capitalist social relations of production. It therefore, arguably, is workers' most powerful form of collective action. Perhaps because of this, there is a rich legislative and legal case history concerning the regulation of the strike that I examine in this analysis.

I argue that the law has empowered workers by granting them the right to strike, but also simultaneously has constrained this right by defining strike action as legitimate—and thus permissible—only in specifically defined circumstances. This "structuring" of collective possibilities clearly has had consequences for the balance of power between capital and labor in the U.S. industrial economy. The argument proceeds in three steps. First, I introduce a theoretical framework to explain how and why class relations and struggles within a capitalist democracy shape state action, and explore within the specific historical context of the post-New Deal years the general form of regulatory policy regarding strike action that emerged out of the Wagner legislation. In the second and third steps of the argument, I demonstrate, through analysis of the law concerning strike activity, that the law's design and its applications have permitted some forms of worker action but have regulated and excluded others. More specifically, the second step in the argument shows how the law has limited the effectiveness of the strike both by allowing employers to hire replacement workers for striking workers and by regulating the ability of unions to picket and to levy union fines. The third step in the argument demonstrates how the law has altered the frequency and the form of strike activity by fostering the exchange of workers' no-strike pledge for an employer's agreement to arbitrate disputes.

Labor Law in a Capitalist Democracy

The potential for conflict is structured into the very nature of the economic and social relationship between workers and employers under capitalism (Przeworski 1985). Their interests, historically, often have not coincided on matters concerning wage, profit, and productivity levels. When industrial disputes arise, labor frequently has utilized the strike to make its demands heard. When states act to resolve such instances of overt conflict, intervention can take a variety of forms, ranging from direct repression to outright accommodation.

In a capitalist democracy such as the United States, struggles among classes in both economic and political arenas shape the nature of state intervention in industrial disputes (Poulantzas 1980 [1978]; Przeworski 1985). Legal policies regarding strike activity are one result of such struggles. In a capitalist economic context, state policies typically will reflect and reproduce unequal class relations (Poulantzas 1980 [1978]; Block 1987; Offe 1974). State policies will generally be designed to structure class struggles and relations in such a way that the organization of capitalist production and the capacity of capital to accumulate profits are not severely threatened over the long term. This is not to suggest that state policies will inevitably serve the interests of capital, only that policies are a product of struggle, and in struggles in a capitalist context, employers and those representing their interests usually secure the advantage.

The formulation, implementation, and enforcement of legal policies concerning strike activity are components of class struggle in which state managers play a prominent role. Struggle in a political realm is shaped and constrained by class forces. But political struggles are also guided by the political "rules of the game," giving politics, to a degree, its own speci-

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ficity (Block 1987:84). State managers act for reasons not entirely reducible to the interests of groups in civil society. In a representative democracy, politicians must build and retain constituencies. In doing so, they define political platforms to distinguish themselves from the political opposition. Once in power, these managers strive to maintain their political legitimacy and thus their electoral support through forming and implementing "effective" policy.

Thus democratic political and capitalist economic structures ultimately both shape and limit the policies formulated by state managers. Tension in policy making between the outcome of democratic processes and the demands of capital can and does arise. Policy initiatives designed to enhance state legitimacy can conflict with steps needed to sustain or augment capital accumulation. But the activities of state managers to fulfill what are sometimes referred to as the legitimation and accumulation functions (Poulantzas 1968 [1973]; O'Connor 1973) do not have to be contradictory. I argue, for example, that labor relations law since the New Deal generally has developed to permit those forms of the strike that can be accommodated to capitalist relations of production, i.e., forms that do not threaten or undermine the existence of private property or the ability of capital to generate profits from the ownership and control of property. In contrast, forms of worker action that can or do threaten capitalist production over time have been increasingly excluded from what is legally permissible. Thus, within limits established by the law, workers are empowered to act collectively. In legally providing for and protecting these workers' rights, the state in part establishes for itself the legitimacy necessary to a democratic state.

To support this argument, I explore precisely where the legal boundaries of workers' collective action lie and how these boundaries have developed since the New Deal. These boundaries are the product of ongoing struggles within and among classes and their representatives in the state. The paper therefore attempts not only to delineate these boundaries over time but also to examine the kinds and degrees of constraint imposed on them by class struggle.

State theorists do not agree on the extent to which capitalist productive relations structure state policy. Skocpol (1980:200), for instance, argues that "capitalism in general has no politics, only (extremely flexible) outer limits for the kinds of supports for property ownership and controls of the labor force that it can tolerate." The structuralists and instrumentalists, on the other hand, argue that political actors have far less independence from the imperatives of the economic system or its actors, and are only "relatively autonomous" from capitalist economic relations (Poulantzas 1980 [1978]) or are directly, that is, interpersonally, linked to and guided by the corporate community (Domhoff 1983). Most empirical research on the links between the economy and the polity (e.g., Skocpol 1980; Domhoff 1987; Goldfield 1989) tends to emphasize only the origins of legislative policy, with little or no attention to its historical development—that is, the law's implementation, interpretation, and application over time. Ongoing struggles among classes are continually changing the legal boundaries of legitimate worker action. Where much of the previous research on the state and class struggle has missed this unfolding of class history by focusing only on the law's origin, this study takes a more dynamic approach attending to the ongoing revision and even redefinition of the law's meaning and utilization.

In what follows I deal exclusively with the law itself and with decisions handed down by the Supreme Court, the federal appeals courts, and the NLRB. The interpretation of a law can change rapidly, particularly if the decisions of district and state courts are also taken into account. The legislation of federal law and the interpretation of these laws by the NLRB and their enforcement in the Supreme Court and federal appeals courts, however, are taken to represent national policy in the area of labor relations law. National legal policy is the product of conflicts in society over issues of power and control. The state's construction of the regulations that ultimately appear in the law are often based on "successful" industrial practices already in existence between particular employers and workers. What the law accom-

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plishes then is the institutionalization of the practices and thus very likely their widespread and continued use in industrial relations. Moreover, in that the state legally sanctions a particular practice, it also establishes its capacity to *regulate* that practice. The specific origin of each particular industrial practice, however, is beyond the scope of this paper. Here I am concerned with the content and development of legal policy.

The Legal Management of Strike Action

In the early 1930s the U.S. economy was in a state of crisis. By 1932 one-quarter of the labor force was without employment and total manufacturing production had dropped by nearly half (U.S. Bureau of the Census 1975). The economic crisis unleashed unprecedented mass protest. Mob lootings, street marches, and rent riots surged as many individuals and families protested and acted on their economic hardships (Piven and Cloward 1979; Jenkins and Brents 1989). The economic turmoil also produced a massive electoral realignment in 1932 that put Roosevelt in the presidency and gave Democrats a clear majority in both the House and Senate. One of the earliest legislative attempts by the new Democratic administration to rescue the economy was the National Industrial Recovery Act (NIRA), a law providing business leaders with the authority to regulate economic competition. The law also contained a labor provision, Section 7(a), that granted workers a legal right to organize unions and to bargain collectively. The logic behind Section 7(a) was that a strong labor movement would ultimately bring about greater purchasing power among workers, the lack of which was believed to be one of the underlying causes of the depression (Bernstein 1969). In early 1935, however, the Supreme Court in the *Schecter* case ruled that the NIRA was unconstitutional on the grounds that the law wrongly delegated to the executive branch legislative power to regulate interstate commerce (Cortner 1970).

Although the NIRA was in place only two years, it significantly altered the course of conflict between workers and employers. It ignited a surge of militancy among thousands of industrial workers based upon their belief that now workers indeed had a right to organize unions of their own choosing. Employers at the time viewed the law quite differently. The National Association of Manufacturers (NAM) stated that employers were not obligated to bargain with worker unions, but instead might choose to bargain with individuals or company unions. In fact, the number of company unions soared during this period (Bernstein 1969:39-40), and employer resistance to the organizational and bargaining demands of workers grew. As a result, between 1932 and 1933 the number of strikes doubled while the number of workers participating in strike activity nearly quadrupled, and the figures climbed even higher in 1934 (U.S. Bureau of the Census 1975).

It was in this context that Congress enacted the Wagner Act in 1935, immediately following the Supreme Court's ruling on the NIRA. Section 7(a) of the new law read: "Employees shall have the right to self-organize, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection" (29 U.S.C. Sec. 141-169). Moreover, Section 8(a)(2) stipulated that "the domination or interference with the formation or administration of any labor organization or contribution of financial or other support to it" was a violation of the new law. This provided substantially greater restrictions on the use of company unions. In addition, Wagner offered protection for the right of workers to strike. Section 13 of the Act stated: "Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike."

Although the legislators of the Wagner Act had various aims, perhaps their greatest priority was to reduce the high levels of strike activity (Klare 1978; Goldfield 1989). Its first statement read:

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> The denial by employers of the rights of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce. . . . Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption . . . (Section 1).

Thus one of the key ingredients to economic stabilization coming out of the Wagner Act was an attempt to minimize the number of strikes, not a surprising response to the militant wildcat strikes of 1933 and 1934.

This intent may appear incongruent with the legal protection for strike activity granted in Section 13. It is not. Congress granted the right to strike primarily in order to make collective bargaining work (U.S. Senate, Subcommittee on Labor-Management Relations 1951 cited in Bakke, Kerr, and Anrod 1960:246-48). In effective bargaining, each party must approach the negotiating table with a form of leverage or control over a resource necessary to the interests of the other party. For labor this resource is labor power; their leverage is their ability to withdraw it from production. Thus the right of workers to strike is provided by the law in order to make collective bargaining effective, and the reason to make bargaining effective, as is evident in the wording of the law above, is to stabilize and preserve the basic relationships of production.

But in the immediate aftermath of its enactment, the Wagner Act did not appear at all successful in its goal of reducing worker unrest. The number of strikes in 1937 reached an historic high. A dynamic similar to that following the passage of the NIRA came into play. Workers again viewed the change in law as a clear signal of their right to organize, but their organizational campaigns, led in particular at this time by the CIO, were met by intense, often violent, employer resistance. Workers in the mass production industries (most notably rubber, auto, and steel) responded with spontaneous sitdown strikes, most of which occurred over the issue of union organizing (Bernstein 1969; Edwards 1981; Rubin, Griffin, and Wallace 1983). Employers not only resisted workers in the workplace, but also attempted to fight the Wagner Act and the rulings of the NLRB in the courts. Legal proceedings were brought against the NLRB alleging its use of Wagner to be unconstitutional and injunctions were sought to prevent the Board's "interference" in industrial relations (Gross 1974). As a result, the NLRB spent much of its first years contesting these charges.

Finally, in the 1937 *Jones and Laughlin* case, the Supreme Court affirmed the constitutionality of the Wagner Act. The court's 5-4 decision in favor of the act was also based on the current "facts of industrial relations" and Roosevelt's strong urging that if the Act was not affirmed the court would be "thwarting the national will" (Gross 1974:225-27). With this important decision Wagner was set in place as law, and the legal proceedings concerning the constitutionality of the board's activities and employers' overt resistance to worker organization in the workplace began to taper. The *Jones and Laughlin* decision in time directed employers away from attempts to strike down the Board and Wagner, and away from open resistance in the workplace. Instead, they concentrated on lobbying efforts aimed at persuading or pressuring Congress to amend the Wagner Act.

The changes in the labor-capital relationship that Wagner brought about were significant, but its architects were not attempting to fundamentally restructure the U.S. economy (Klare 1978; Montgomery 1979). Wagner's enactment left basic capitalist property relations unaltered. On the other hand, beyond granting new collective rights to workers, Wagner did bring about two important changes in the labor-employer relationship and in these ways altered the terms of class conflict at the point of production. First, the state established legally sanctioned structures—unions and collective bargaining—in which employer-worker disputes would be resolved. Unions and collective bargaining both had existed before the New Deal (Montgomery 1979), but with Wagner they were legally *authorized* by and thus subject to *regulation* by the state. These new structures and the rules governing them were to be imple-

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mented by the NLRB and enforced by the courts. These two governmental bodies would then define the legitimate form and content of industrial conflict, which, in turn, allowed the state the capacity systematically to shape class conflict.

The terms of conflict were altered significantly in a second way. Workers were given the legal right to participate, through their own representatives, in decision making concerning the workplace. This was, for good reason, perceived by capital as a threat to its right to manage production. For workers, however, the establishment of collective bargaining, something they long had struggled for, truly represented an opportunity to participate. But the system of bargaining implemented in the 1930s was to be managed by the state. Worker participation in this system, as Przeworski (1985) explains, necessarily entails *consent* to the right of the state to manage the system. Wagner meant not only that the state had established the means by which to manage class conflict, but also that it had established these means so as to acquire the consent of organized workers to them.

The State Manages Strike Effectiveness

Replacement workers. In the years following the enactment of Wagner, a continuing process of adjustment and definition of the law took place in all branches of government. One area of concern in this process dealt with an employer's response to a strike. In keeping with the recognized sanctity of private property (Klare 1978), legal interpretations of Wagner did not infringe on the right of employers to use strategies to avoid being shut down during a strike. Employers historically have attempted, quite successfully, to continue production during a strike (Herman and Kuhn 1981). They prepare in anticipation of a strike by stockpiling inventories. They shift to or intensify production at other facilities within the company that are not being struck. They subcontract the work with another company, or they continue to operate the plant with either nonunion or replacement personnel. Only on the question of whether employers can hire permanent replacements for striking workers has an elaborated legal case history developed. But even here, the law has helped employers continue operations, not impede them. In what follows, I examine how this happened.

Almost immediately after it ruled the Wagner Act constitutional, the Supreme Court handed down a decision that undermined the potency of the strike. In 1938 the court ruled in the *Mackay Radio and Telegraph Co.* case that employers had the right to hire permanent replacements to do the work of striking employees. After a strike at the Mackay Radio Company all but five of the striking workers were reinstated by the employer. These five employees, active union members or officers, were told that their jobs were no longer available because the strikebreakers had been hired as permanent replacements. The union filed an unfair labor practice charge with the NLRB against the employer for discriminating against the five employees. Both the board and later, through appeal, the Supreme Court ruled in favor of the strikers that the employees had been discriminated against and unfairly discharged.

The charge and the final ruling, however, overlook a particular statement in the decision that had an important impact for the efficacy of strike activity:

> Nor was it an unfair labor practice to replace the striking employees with others in an effort to carry on the business. Although Section 13 of the act provides, "Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike," it does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers (*Mackay Radio and Telegraph Co.* 304 U.S. 345, 346, 1938).

The court in this case clearly discerned the necessary conflict between the legal right of employees to strike and the right of capital to uninterrupted production. In order to resolve the conflict and to relieve employers' fears that Wagner would undermine their right to "carry on

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the business," the court chose to alter the efficacy of labor's legal right to strike but not the property right of an employer. Although workers have a legal right to strike, they do not have a right to interrupt production.

Voting rights. Immediately after the *Mackay* decision, a dispute came before the NLRB concerning the voting rights of strikers and their replacements in union election proceedings. In *Sartorius* (1938) the board ruled that strikers but not replacements possessed the right to vote in representation elections. But three years later, in *Wurlitzer* (1941), the board altered its position, holding that both strikers and strikebreakers had voting rights, weakening the position of strikers. This set the stage for a major reworking of the legal grounds underlying voting rights by the Taft-Hartley Act in 1947.

If the Wagner Act was a federal policy giving workers an opportunity to participate in the governance of the workplace, the Labor-Management Relations (Taft-Hartley) Act, a set of amendments to Wagner, was a significant stride in the other direction. The enactment of Taft-Hartley was not an abrupt reversal in the law; the temporary War Labor Disputes Act of 1943 contained elements that would appear in Taft-Hartley; in addition, various employer associations and their "friends in Congress" had been working for its revision since the passage of Wagner (Stryker 1989). Conditions for enacting such legislation were ripe immediately after the Second World War.

With the end of the war the nation was hit hard by a large number of protracted reconversion strikes. Sparked by high levels of inflation, they also were a playing out of the battle between unions and employers over basic issues of workplace control. Workers were practicing "aggressive bargaining," seeking to include issues such as personnel, production, and financial matters that previously had been management prerogative (Brody 1980:178). The protracted General Motors-United Auto Workers strike that began in 1945 is a clear example. The union called upon GM to raise wages without raising prices and demanded that the account books be made available for union scrutiny.

In the years following the Second World War the economy was not in a state of deep crisis as it had been during the 1930s, and the large strikes in key industries alarmed the nation (Millis and Brown 1950). Employer associations, such as the NAM and the Chamber of Commerce, played on these public fears with an intensified media campaign calling for legislation to amend Wagner, to "equalize" the law by restricting "the monopolistic practices of unions and various types of strikes" (Millis and Brown 1950:288). The general shift in public sentiment was manifested in the Congressional elections of 1946 in which the Republicans were able to reclaim majorities in both the House and Senate, and in 1947 the Republican-dominated Congress enacted Taft-Hartley.

The new amendments seriously narrowed the content and structure of the collective bargaining process. Content was narrowed in that secondary boycotts and picketing, closed shops, jurisdictional strikes, recognition strikes where a previously certified union exists, and union organizing among foremen, all became unfair labor practices under Taft-Hartley. The prohibition of secondary activity is particularly interesting because it limits demonstrations of widespread solidarity among workers, e.g., among workers from different firms (see Weiler 1983; Rogers 1984 for elaboration on the fragmenting effects of the law). Taft-Hartley also narrowed the structure of labor relations by defining the only legitimate collective bargaining relationship as that between an employer and an NLRB certified bargaining unit.

An immediate consequence of Taft-Hartley was to undercut the power of strikers by prohibiting those for whom permanent replacements had been hired from voting in union representation elections. This was accomplished with fifteen words appended to Section 9 of the Wagner Act: "employees on strike who are not entitled to reinstatement shall not be eligible to vote" (29 U.S.C. Sec. 141-187). Labor unions labeled it a "union-busting" device (Benetar 1961). If a decertification election were called during a strike, it was in the interest of

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the strikebreakers to vote against the union to maintain their jobs. The strikers, with no voting rights, had no opportunity to continue the strike and, perhaps ultimately, to preserve their union. Whereas previous to Taft-Hartley there had been no union decertification proceedings, in 1948 there were 97, 62 of which were successful decertifications (NLRB *Annual Reports* 1936-49). There is, however, no way to know how many of these resulted from petitions filed by strikebreakers. In the next year the numbers were even higher (132 decertification elections and 82 decertifications).

For 12 years unions that exercised the right to strike did so under these conditions. The Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959 restored strikers' right to vote, but with a qualification: it lasted for only 12 months after the beginning of the strike. In addition, in *United Aircraft* (1971), the NLRB, by this time controlled by Nixon appointees, ruled that the job rights of replaced workers could be limited. This decision compromised earlier judgments (*Fleetwood Trailer* [1967] and *Laidlaw* [1968]) in which replaced workers were guaranteed reinstatement when and if their jobs opened up again following a strike. In *United Aircraft* the board ruled that it was acceptable for a union to "agree," in an effort to bring a strike to an end, to a time limit on replaced workers' reinstatement rights. In that case it was four and one-half months after the end of the strike.

Landrum-Griffin did reduce the immediate threat of decertification, an ironic consequence because in many other ways the law placed substantial restrictions on unions (Taylor and Witney 1987:584-626). Landrum-Griffin was part of a larger offensive against unions during the late 1950s and early 1960s as employers, reacting to the recession in 1957-8, sought to destabilize union power in the workplace (Davis 1986). The seeming benefit of the Landrum-Griffin provision that returned voting rights to strikers, however, should be weighed against the fact that the law did not do away with the legal means to weaken the economic impact of the strike. Ultimately this succession of laws and decisions concerning permanent replacements and their voting and job rights continues to give employers, if they desire and are able to take advantage of it, a legal means to render a strike virtually powerless to impede production and, in the extreme case, even to break a union.

Unfortunately, no comprehensive data on the extent to which employers use replacements exists (Estreicher 1987). One study of fifteen employers who continued to operate with replacement workers during strike action supplies some information about their use. Perry, Karamer, and Schneider (1982) find that employers do not always turn to replacement workers, but do so when economic circumstances raise the cost of nonoperation. During the early 1960s and again in the early 1970s, employers in their sample, reacting to increased economic competition during periods of low growth, stepped up their efforts to continue operating during a strike. The popular literature suggests that in recent years employers are again increasing their use of strikebreakers to continue production (e.g., Michelson 1978; *Business Week* 1978; English 1983; Hoerr 1984; Satchell and Golden 1987; *Labor Today* 1989) Perry and his colleagues conclude that companies remaining in operation during a strike benefit economically by reducing the economic losses that strikers attempt to levy against the firm, and thus it is in the economic interest of employers to continue operations.

It appears that the law provides a legal means for rendering the strike economically less effective, but other factors—the state of the economy and the general tone of labor relations—affect when employers actually use strikebreakers. The law establishes a context in which employers enjoy certain opportunities to promote their interests , and workers confront certain barriers as they attempt to promote theirs.

Picket lines and union fines. Developments in the law have reduced the strike's effectiveness in two additional ways: first, through regulation of the picket line and, second, through regulation of the ability of unions to fine members who return to work during a strike. In both cases the dialectic of the law is again evident. Whereas the issue of permanent replace-

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ments resulted in the law's modulation between property rights and the right to strike, the issues of picketing and union fines put individual rights and collective rights in conflict, one originating in the amendments to Wagner found in Taft-Hartley.

A prominent feature of Taft-Hartley is that it attends to individual motivations so as to produce collective consequences that disadvantage organized labor. Section 7 of Taft-Hartley reaffirms workers' right to organize and bargain collectively, but adds the clause, "and shall have the right to refrain from any or all of such activities." This clause in Taft-Hartley recasts workplace conflict in terms of individual rights versus collective rights, restricting the collective rights of organized labor to protect the rights of the individual. This ultimately serves to enhance the position of capital, as can be seen in the regulation of worker picket lines and union fines.

To uphold the sentiment of Section 7 of Taft-Hartley the NLRB has ruled that particular forms of picket line behavior interfere with the rights of individual workers. Specifically, workers have the right to work during a strike, including going to and from work without "restraint or coercion" (*Sunset Line and Twine* 1948). This wording, however, leaves many questions about picketing unanswered. While a ban on picketing that physically prevents workers from entering and exiting the workplace is unambiguous, the board's interdiction of "mass picketing" in *Cory Corp.* in 1949 is much less clear. By the terms of this ruling, mass picketing is banned even when it does not obstruct access to the workplace, but the board did not specify how many pickets constitute mass picketing and what degree of coercion might prevent employees from going to work. The lawfulness of picket action is thus left to be determined on a case-by-case basis. Yet the penalties for unlawful picketing are quite serious: unions can face an injunction that prohibits the strike and individual employees may lose their jobs.

The law also restricts the ability of a union to fine a member who decides to return to work during a strike. In 1967 the Supreme Court ruled in *Allis-Chalmers* that a union has the authority to protect the integrity of the picket line by fining members who cross that line to return to work during a strike. In 1972, however, the Nixon court ruled in *Granite State Joint Board* that under Taft-Hartley if the member resigns from the union and then returns to work, the union may not fine the worker. The minority opinion of Justice Harry Blackmun disputes both the court's attention to the right of the individual to resign and the court's blindness to the consequences of this action for the collective strength of workers:

> I cannot join the Court's opinion, which seems to me to exalt the formality of resignation over the substance of the various interests and national labor policies that are at stake here. Union activity, by its very nature, is group activity, and is grounded on the notion that strength can be garnered from unity, solidarity, and mutual commitment. This concept is of particular force during a strike, where the individual members of the union draw strength from the commitments of fellow members, and where the activities carried on by the union rest fundamentally on the mutual reliance that inheres in the "pact" (*Granite State Joint Board* 409 U.S. 213, 1972).

By upholding the individual worker's right to work unpenalized during a strike, the court endorses individual interest while overlooking the collective consequence of the decision.

The *Granite State* case did not deal with the legality of union provisions that restrict members' resignations, either by forbidding resignations during times of strike activity or, more generally, by delaying actual resignation for a period after the letter of resignation has been filed. In 1982, however, in the *Dalmo Victor* case, the NLRB upheld a union's right constitutionally to require a member to wait 30 days after submitting his or her notice before resigning. This ruling was quickly overturned in *Neufeld Porsche-Audi* in 1984, by which time the majority of the board were Reagan appointees. In this case the board stated that such restrictive action by the union abridged the individual's right to resign from union activities at will. In fact, Davis (1986:139) points out that one of the stated policies of the Reagan board was the "repeal of those NLRB provisions which establish collective rights as paramount to

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individual rights." The dialectic in the application of the law concerning the collective capacities of workers is again apparent in that individual rights are given precedent over collective rights.

The impact on strike effectiveness. It is difficult to assess whether the regulation of picket lines, the capacity of employers to hire permanent replacements, and the inability of unions to fine members who return to work have genuinely reduced the strike's effectiveness. Studies of the economic effect of recent strikes on business operation or on the marketplace show that strikes do not negatively affect prices, the quantity of goods produced, and even indirect effects on suppliers (Neumann and Reder 1984). A study of strikes in the auto industry (Gunderson and Melino 1987) shows that in the short run a strike may have a negative effect, but that in the long run the impact can be minimal. The fact that the law allows employers to hire strikebreakers, to limit picketing, and to encourage workers to break union ranks and return to work during a strike appears to be important in mediating the impact of the strike.

Whether these developments in the law have reduced the effectiveness of the strike is an important question, but how might that effectiveness be evaluated? One approach is to ask whether striking workers have achieved their stated goals. Today nearly three-quarters of all strikes occur over compensation-related issues (U.S. Bureau of Labor Statistics 1949-1980). Those who have examined the relationship between wages and strikes (e.g., Rubin 1986; Ashenfelter, Johnson, and Pencavel 1972) find that throughout this century, workers have usually been able to enhance their material well-being through strike action. On the other hand, if greater collective control in the workplace is the goal of striking workers, the historical record suggests a very different conclusion about the effectiveness of strikes.

Greater control in the workplace might be measured by level of union membership. Although not a perfect measure by any means, unions historically have been the most viable means of organizing resources toward greater collective control over the conditions of work for U.S. workers (Perlman 1928; Przeworski 1985). But research by Rubin, Griffin, and Wallace (1983) shows that strikes have not translated into greater union membership since 1947, the year in which Taft-Hartley was enacted. While only suggestive, the law does appear to reduce the effectiveness of the strike when measured in terms of increased union membership.

These two measures of strike effectiveness—increases in wages and in union membership—show very different results. One suggests that the strike has been consistently successful in raising the wages of organized workers, the other that strikes have become less successful in translating strike action into greater union membership. If the law has indeed had an impact on the strike's effectiveness, these seemingly disparate results indicate the contradictory and dialectical impulses in the law, empowering workers in one manner but constraining their capacity to act collectively in another. There is substantial historical evidence, which I discuss in the next section, that labor law since the New Deal has carefully distinguished between issues that might alter the property relations of capitalism and those that would not, that is, between issues that are zero-sum and non-negotiable and those that are positive-sum and thus more readily negotiable; between issues like workplace control and the wages of labor. These issues are clearly separated in the law as "permissive" and "mandatory," and the capacity of workers to bargain and to strike over each is quite different.

The State Manages the Frequency and Form of the Strike

Today's labor law emphasizes collective bargaining as a peaceful and pluralist means of resolving disputes between workers and capitalists. With the Wagner Act's assurance of labor's right to strike, the integrity of the collective bargaining system is thought to be preserved. I have argued that although workers have the right to strike, the strike in fact may be

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ineffective in the face of the legal structures that regulate strike activity and allow employers to protect their interests in response to that activity. But beyond these restraints and regulations, labor relations law further shapes collective worker action by directing grievances away from disruptive acts of militancy and into predictable and nondisruptive forms of class conflict. In consequence, both the frequency and the form of the strike have been altered.

The no-strike pledge. The labor contract that emerges from the collective bargaining process is a contradictory, but often highly useful document for capital (Edwards 1979; Klare 1983). It makes the worker-employer relationship very predictable; it reduces and sometimes completely eliminates interruptions to production, facilitating long-term business planning for capital. Moreover, the labor contract establishes a set of workplace rules that carry the consent of unionized workers because of the union's role in negotiating the contract. The contract is based on an apparent *quid pro quo* arrangement: in exchange for labor's no-strike promise, management agrees to arbitrate disputes that cannot be resolved by regular methods. Approximately 95 percent of current labor contracts contain such an agreement (Taylor and Witney 1987:439).

The widespread use of the no-strike pledge can be historically dated to the Second World War. To contribute to the war effort, union leadership (particularly in the CIO) made the no-strike promise in exchange for a "maintenance-of-membership" program established by the National War Labor Board that required all union members to remain members for the duration of the contract (Lichtenstein 1975). Today the no-strike clause is traded for an arbitration agreement. Workers relinquish their legal right to strike in exchange for a guarantee from capital that when grievance disputes over contract violations break down, an outside arbitrator will be called in to settle the disagreement.

Prior to 1957, arbitration as an alternative to direct negotiations between workers and employers was not frequently used (Lynd 1979; U.S. Bureau of the Labor Statistics 1949-1956). In 1957 the Supreme Court, applying Taft-Hartley in the *Lincoln Mills* case strengthened the role of arbitration as a means to peaceful settlement of labor-capital disputes. This decision and decisions in the "Steelworkers Trilogy" cases of 1960 (*Warrior and Gulf Navigation, American Manufacturing Co.*, and *Enterprise Wheel and Car Corporation*), which strengthened and expanded the *Lincoln Mills* decision, reflected a political climate of growing opposition to the organizational and disruptive power of labor unions. Opposition to the strength of labor was compounded in 1957 as the economy slowed and employers attempted to reduce labor costs through layoffs, work speed-ups, and automation (Davis 1986). Such employer endeavors triggered greater worker unrest, most prominently the steel strike of 1959 in which President Eisenhower intervened under provisions in Taft-Hartley. Davis (1986:123) says of the late 1950s and early 1960s: "It is generally forgotten how close American industrial relations came to a raw re-opening of the class war in those years."

The *Lincoln Mills* case was a political response to industrial unrest. The court ruled that if a labor contract stipulates that grievances will be arbitrated and either party refuses, the refusing party can be sued and thus forced to arbitrate under Section 301 of Taft-Hartley. The specific goal of the ruling was to reduce industrial unrest by promoting a federal policy supporting the exchange of a no-strike pledge for an employer's agreement to arbitrate, as evidenced in the court's decision:

> Plainly the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike. Viewed in this light, the legislation does more than confer jurisdiction in the federal courts over labor organizations. It expresses a federal policy that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can be best obtained only in that way (*Lincoln Mills* 353 U.S. 455, 1957).

The judiciary here clearly acted to reduce industrial unrest by establishing a framework in which disagreements could be resolved without disruptive adversarial action, even when dis-

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putes between labor and capital had come to an impasse. In doing this, the court importantly altered the nature of class conflict. Requests for arbitrators by employers and unions showed a five-fold increase between the early 1960s and late 1970s (U.S. Federal Mediation and Conciliation Service 1961-1979). Labor disputes henceforward were likely to be channeled into nondisruptive modes of conflict.

Voluntary and mandatory bargaining issues. Judicial assumptions of *quid pro quo* notwithstanding, the contractual exchange of the no-strike pledge for an arbitration agreement is not an equal exchange (Lynd 1979; Stone 1981; Klare 1983). Although workers are legally and absolutely bound to their no-strike pledge, there are a number of issues over which management may refuse to arbitrate or bargain. The law reserves these to capital's discretion as "voluntary" or "permissive," in contrast to "mandatory," bargaining issues. In *Borg-Warner* (1958), the Supreme Court upheld the right of the NLRB to make these distinctions.

When management prohibits permissive issues from appearing on the bargaining table or in arbitration proceedings it is not an unfair labor practice. These issues are considered by law to be "management prerogatives," too close to production concerns to be within the legitimate purview of labor. Permissive issues are those involving investment decisions or anything at the "core of entrepreneurial control" (a term coined in *Fibreboard* 1964), such as decisions about technological innovation, changes in the production process, liquidation of assets, sales and advertising, mergers, and, since the court's decision in *First National Maintenance* in 1981, plant closings. Legal scholars show that the scope of permissive items has been gradually expanding in recent years (Sockell and Delaney 1987). Even if a permissive issue is voluntarily laid on the bargaining table by management, it cannot be negotiated to an impasse, and workers cannot legally strike over such an issue. Mandatory bargaining issues, on the other hand, must be negotiated at the bargaining table if either party so desires, can be bargained to an impasse, and may be legal grounds for a strike. But mandatory issues are restricted to concerns of "wages, hours, and other terms and conditions of employment" (Section 8(d) of Taft-Hartley).

Legal provisions for permissive and mandatory issues can structure conflict between labor and capital to be positive- rather than zero-sum. Disputes over wages, for instance (75 percent of strikes today are over compensation-related issues), can be negotiated, and employers can accommodate worker demands without jeopardizing their control of business. Thus the law attempts to structure workplace decision making such that many of its rules are not equally determined by both labor and capital. The law also is designed so that negotiations involving labor deal with issues where employers can agree to worker demands without risking their unilateral control of enterprise.

Moreover, arbitration itself—capital's part of the no-strike bargain—is an unequal proposition for labor. The arbitrator's mediating role in industrial conflict is not neutral in remedying disputes (Stone 1981). The purpose of arbitration is to prevent a breakdown in communication between labor and capital and to preserve the continuity of production. But it is through the disruption of production that labor exerts its power in the workplace. The arbitrator's actions, therefore, work in the interests of capital and to the detriment of the structural capacity of labor to achieve its collective goals. In that the law fortifies and legitimates the arbitration framework, it often works to the detriment of organized labor.

The wildcat strike. The institutionalization of the no-strike-arbitration agreement ultimately transforms the midcontract or wildcat strike into a deviant act in industrial relations (Klare 1983). In the past the wildcat strike fell through the cracks of the collective bargaining edifice, especially so in the Supreme Court's *Fansteel* decision (1939) where sitdown strikes were ruled unprotected activity, thereby leaving workers with no rights to reinstatement.

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The Wagner Act, however, did provide workers with a legal right to strike, and spontaneous strike action continued to be a legal choice.

Today labor relations law has a very sophisticated mechanism, put into place by the Taft-Hartley amendments, for rendering the wildcat illegal. Section 301 of Taft-Hartley makes a wildcat strike a breach of the labor contract when that contract contains a no-strike clause. When a union is in breach of such a clause, it can be sued by an employer and employees can be punished or discharged. The no-strike clause in the labor contract serves to shift legal discussions of labor disputes from the relatively ill-defined grounds of the rights of labor and capital to the much better-defined, commerce-dominated domain of contracts. It also introduces the assumptions attendant upon contracts, particularly the notion that contracts are voluntary and equal agreements between free and equal negotiants. The labor *contract* evokes those assumptions in spite of evidence to the contrary: when, in pursuit of a contract, labor relinquishes the right to strike, capital surrenders no equivalent right to not produce, but only agrees to arbitration on disputes deemed legitimate within the legal conception of labor and capital rights.

A number of cases (in addition to those previously discussed, see *American Manufacturing Co.*, *Enterprise Wheel and Car Corp.*, *Lucas Flower Co.*, and *Gateway Coal Co.*) have come before the Supreme Court since *Lincoln Mills* concerning the no-strike clause and the limits on employer actions to prevent a wildcat strike. The Supreme Court's 1960 *Warrior and Gulf Navigation* decision has had far-reaching consequences. This decision expanded that in *Lincoln Mills* by ruling not only that arbitration is a legitimate arena for class negotiations, but that when a labor contract does not explicitly exclude a disputed issue from arbitration, the courts should assume by default that the issue is subject to arbitration. The Supreme Court stated simply that "[d]oubts should be resolved in favor of coverage" (*Warrior and Gulf Navigation Co.* [United Steelworkers Of America v.] 363 U.S. 583, 1960). The court, however, carefully excluded "[m]atters which are strictly a function of management." These matters remain the prerogative of capital, are not subject to arbitration, and are not issues over which labor can legally strike.

The labor injunction. In 1970 another landmark case was decided by the Supreme Court concerning the no-strike pledge. Prior to 1970, an employer or union that failed to arbitrate when so directed by the contract was subject only to litigation at the hands of the other party to the contract (*Sinclair Refining Co.* 1962). In 1970 the Supreme Court ruled in the controversial *Boys Markets* case that the party breaching the contract not only could be sued, but that, in the event that employees struck when the labor contract contained a no-strike clause, a labor injunction could also be issued to block the strike.

The impetus for the decision in *Boys Markets* largely may have come from the growing number of rank and file job actions—often wildcat strikes—during the late 1960s as workers responded to moves by capital to enhance productivity through speed-ups and changes in work rules (Wallace 1989). In the *Boys Markets* case, workers disagreed with management concerning what was and was not union work and struck in protest. The striking workers were clearly in violation of the no-strike pledge in the labor contract, and the employer sought an injunction to block the strike. The Supreme Court upheld the enforceability of the contract and the validity of a labor injunction to enjoin the strike, stating that:

> the very purpose of arbitration procedures is to provide a mechanism for the expeditious settlement of industrial disputes without resort to strikes, lockouts, or other self-help measures. This basic purpose is obviously largely undercut if there is not immediate, effective remedy for those very tactics that arbitration is designed to obviate (*Boys Markets* 398 U.S. 249, 1970).

The decision reinstituted an anti-strike weapon that had been outlawed in 1932 by the Federal Anti-Injunction (Norris-LaGuardia) Act. An injunction could now be used for immediate relief from a strike in violation of an arbitration agreement, but the use of the injunction alters

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the context in which arbitration takes place. If an employer secures an injunction, labor's economic leverage—that is, the strike—or even the power that the threat of a strike might mean—is removed, and thus the balance of power can and likely will shift in favor of capital. The status quo is maintained as workers continue to work under the disputed conditions.

Beyond the inequity that the *Boys Markets* decision built into the law, the injunction also tends to be applied unequally. As implied by the Supreme Court's mention of lockouts as well as strikes, unions as well as employers can have recourse to the injunction as an immediate remedy. In fact "reverse *Boys Markets* injunctions" have been sought and won to restrain employer action (Waye 1985; but also Atleson 1985:106-7). No national-level data are available on the number of labor injunctions granted by federal courts, but a number of researchers show that when employers seek labor injunctions they are rarely refused by the courts, that these injunctions are not infrequently granted on weak evidence, and that when unions apply for injunctions against employers they are much more often refused (Aaron and Levin 1951; Aaron 1964; Shatz 1977; Schatzki 1984). Moreover, between 1960 and 1980 the number of injunctions against unions sought by the NLRB was over 25 times the number sought against employers (NLRB *Annual Report* 1960-1980).

The impact for the frequency and form of the strike. Beginning in 1970, the year of *Boys Markets,* until 1978, the U.S. Bureau of Labor Statistics reported the number of strikes terminated by injunction. The first column in Table 1 shows that by the mid-1970s, the peak years of injunction use, around 190 strikes annually were disbanded by injunction, double the number in 1970. This is roughly between 3 and 4 percent of all strikes. If one assumes that these injunctions were used almost exclusively against wildcat strikes—and this is reasonable given the substance of *Boys Markets*—then by the mid-1970s 10 to 12 percent of all wildcat strikes ended by injunction (where the percent is the number of strikes terminated by injunction divided by the number of strikes taking place during the term of a contract; number of all wildcats not shown).[1] *Boys Markets* appears to have had its largest impact in the manufacturing sector where a downward trend in wildcat strike frequency begins between 1969 and 1970 and continues until at least 1980 (see column 3; strike frequency is the number of strikes per million wage and salary earners). This is not, however, the pattern in mining (column 5) where 1978 appears to be the pivotal year, a point to which I will return below.

The extent of the legal right of an employer to use the injunction to block strike action was tested in the *Buffalo Forge* case in 1976. Following the breakdown of negotiations over a labor contract with their employer, office employees struck. Production workers in the same union and in the same company struck in sympathy; their contract, however, contained the no-strike-arbitration agreement. The employer filed for an injunction to halt the production workers' sympathy strike. The case ultimately came before the Supreme Court, which ruled that the arbitration provisions in the production workers' contract did not apply to sympathy strikes because injunctions could be issued only when the dispute over which workers struck was *arbitrable.* The sympathy strike does not fall into this category and cannot be negotiated between union A and employer A because the dispute is between union B and employer A. The court ruled that under these circumstances an injunction could not be issued to block strike action. Otherwise, the *Boys Markets* ruling set legal precedent and strike activity will be enjoined.

The Supreme Court's ruling in *Buffalo Forge* held an implicit message regarding an injunction to halt any form of wildcat strike action, including particularly a sympathy strike: em-

1. A wildcat strike is not precisely the same thing as a strike taking place during the term of a contract (Byrne and King 1986). Wildcats are explicitly those without the support of the national or international union, whereas some strikes during the course of a contract are permitted by the contract and are thus legitimate in the eyes of the union. Because most contracts contain no-strike clauses, however, most intracontractual strikes are in fact wildcat strikes. Data specifically for wildcats are not available. Operationalizations and data sources are provided in Table 1.

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Table 1 • *Number and Frequency of Strikes during Term of Contract (Referred to here as "Wildcats"), for All Industries and for Manufacturing and Mining, 1961–1980*[a]

Year	*Number of strikes terminated by injunction*	*Number of wildcat strikes in MFG*	*Frequency of wildcat strikes in MFG*	*Number of wildcat strikes in mining*	*Frequency of wildcat strikes in mining*	*Percent of all strikes that are wildcat strikes*
1961	—[b]	426	26.1	115	171.1	32.2
1962	—	408	24.2	124	190.8	29.8
1963	—	430	25.3	127	200.0	35.8
1964	—	480	27.8	115	181.4	36.0
1965	—	479	26.5	153	242.1	34.7
1966	—	668	34.8	151	240.8	36.5
1967	—	664	34.1	201	327.9	33.9
1968	—	675	34.1	259	427.4	31.3
1969	—	758	37.6	457	738.3	34.5
1970	96	593	30.6	508	816.7	33.4
1971	118	488	26.3	607	996.7	33.1
1972	155	484	25.4	964	1542.4	39.8
1973	195	402	20.0	1046	1642.2	33.9
1974	210	331	16.6	989	1425.1	26.6
1975	168	217	11.8	1134	1508.0	34.4
1976	169	262	13.8	1385	1777.9	34.5
1977	54	265	13.5	953	1172.2	26.5
1978	41	228	11.1	236	277.3	15.5
1979	—	217	10.3	405	422.8	16.2
1980	—	134	6.6	257	250.2	13.4

Notes:

a. Operationalizations and data sources by column: (1) Number of strikes terminated by an injunction granted to an employer, AWS MLR; (2) Number of wildcat strikes in manufacturing, AWS; (3) Number of wildcat strikes in manufacturing/million wage and salary earners in manufacturing, AWS HS HLS MLR; (4) Number of wildcat strikes in mining, AWS; (5) Number of wildcat strikes in mining/million wage and salary earners in mining, AWS HS HLS MLR; (6) Number of wildcat strikes/number of all strikes, AWS SA. Abbreviations (all printed in Washington, D.C. by the U.S. Government Printing Office): *AWS* U.S. Bureau of Labor Statistics, Analysis of Work Stoppages, various years; *HLS* U.S. Dept. of Labor, Handbook of Labor Statistics, various years; *HS* U.S. Bureau of the Census, Historical Statistics of the United States: Colonial Times to 1970, 1975; *MLR* U.S. Bureau of Labor Statistics, Monthly Labor Review, various years; *SA* U.S. Bureau of the Census, Statistical Abstract of the United States, various years.

b. Data not available.

ployers should expressly include the sympathy strike in the language of the labor contract's no-strike pledge. Alternatively and perhaps more simply, employers could merely insert provisions in the contract to prohibit sympathy strikes altogether; for instance, that any participation in an "unofficial" strike would result in discharge. Either way, the law again provided employers a means of disabling the strike. It was precisely conflict over this issue that triggered the coal miners' strike in 1977.

Following the developments in *Buffalo Forge* in 1976, it is not difficult to derive the logic that led to the coal miners' strike in 1977, a dispute that drew national attention and involved thousands of organized mine workers. Rank and file members of the United Mineworkers rejected a contract that would have allowed mine owners to prohibit any form of a wildcat strike, including particularly the sympathy strike, a form of action not uncommon in mining. The proposed contract permitted the employer to fire workers who had "picketed or otherwise

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been actively involved in causing an unauthorized work stoppage or sympathy strike" (cited in Lynd 1978:16). Throughout the 1970s wildcat strikes over health hazards and employer disciplinary policies originating in a single mine and evoking sympathy strikes in other mines had caused problems of "worker instability" in the mining industry (see Table 1, columns 4 and 5; Nyden and Nyden 1978). Injunctions under *Boys Markets* had not hindered this practice. Mine owners sought to remedy the problem by prohibiting unofficial strike action in the labor contract. The miners' strike lasted nearly four months, but in the end was broken by the strength of the opposition, and the union's membership accepted the contract that contained stiff penalties for wildcat strike action. Wildcat strikes in the mining industry fell off noticeably after the *Buffalo Forge* ruling in 1976 (see Table 1, column 5), but dropped appreciably more with the defeat of the mine workers in 1978.

The events of 1976 to 1978—the ruling in *Buffalo Forge* and the national publicity given to the defeat of the mine workers—greatly reduced the number and frequency of wildcat strikes in the mining industry (Table 1, columns 4 and 5). They also noticeably reduced the overall number of wildcat and sympathy strikes. Prior to the ruling in *Buffalo Forge* roughly a third of all strikes took place during the term of a labor contract (Table 1, column 6). By 1980 this percentage had fallen by over 60 percent so that only about 13 percent of all strikes were wildcat strikes. Sympathy strikes (almost but not quite a subset of wildcat strikes) have historically been a very small proportion—between one and two percent—of the total number of strikes (U.S. Bureau of Labor Statistics 1949-1980); however, during 1976 and 1980 the percentage of sympathy strikes fell almost 100 percent, particularly dropping off between 1977 and 1978 with the defeat of the miners' union. Interestingly, after 1976, again the year of *Buffalo Forge*, the number of injunctions used against striking workers to end the strike fell off (Table 1, column 1), possibly because injunctions had been partially replaced by contract provisions barring unofficial strikes.

In retrospect, these legal developments limiting the wildcat strike are not surprising. The law seeks to suppress the wildcat strike not just because this type of strike has become a breach of the labor contract, but because a wildcat strike is constituted of workers acting on their collective interests and using their most powerful economic weapon: a spontaneous and unpredictable disruption of production. It is action that is not immediately routed into "legitimate" and peaceful channels by management or union leadership. The wildcat strike is a pure and unrestrained demonstration of the structural power of collective worker solidarity.

The suggestion to employers that they prevent wildcat strikes by forbidding them in labor contracts, the ratification of such an agreement with organized miners in 1978, and the entire judicial development of the law that narrowed the "problem" of wildcat strikes to this juncture, contributed to changes in strike action in two ways. First, these developments in the law have contributed at least in some measure to a decline of strike activity in this country. Wallace, Rubin, and Smith (1988) find that the passage of Taft-Hartley and Landrum-Griffin, in particular, served to reduce organizational and wage strikes, respectively. Figure 1 plots annual levels of strike frequency for all strikes and for strikes over wages and over union organizing between 1881 and 1980. The plot of frequencies for all strikes shows that strike occurrence was higher in the years prior to the enactment of Wagner, Taft-Hartley, and the institutionalization of collective bargaining than in later years.[2] The average annual strike frequency between 1881 and 1920 is 132 strikes per million workers. Between 1935 and 1980 the level is 39 percent lower at 80 strikes per million workers; between 1947 and 1980, the period since Taft-Hartley, the figure declines to 73 strikes per million workers annually.

But the critical decline in strike frequency has not occurred for strikes over wages, bene-

2. Employer repression of worker organization and action that took place during the 1920s, often with the aid of the state, may explain the dramatic drop in strike frequency during this exceptional period (Griffin, Wallace, and Rubin 1986). Data for the number of all strikes are available over this entire period, but data for various types of strikes are not available between 1905 and 1914.

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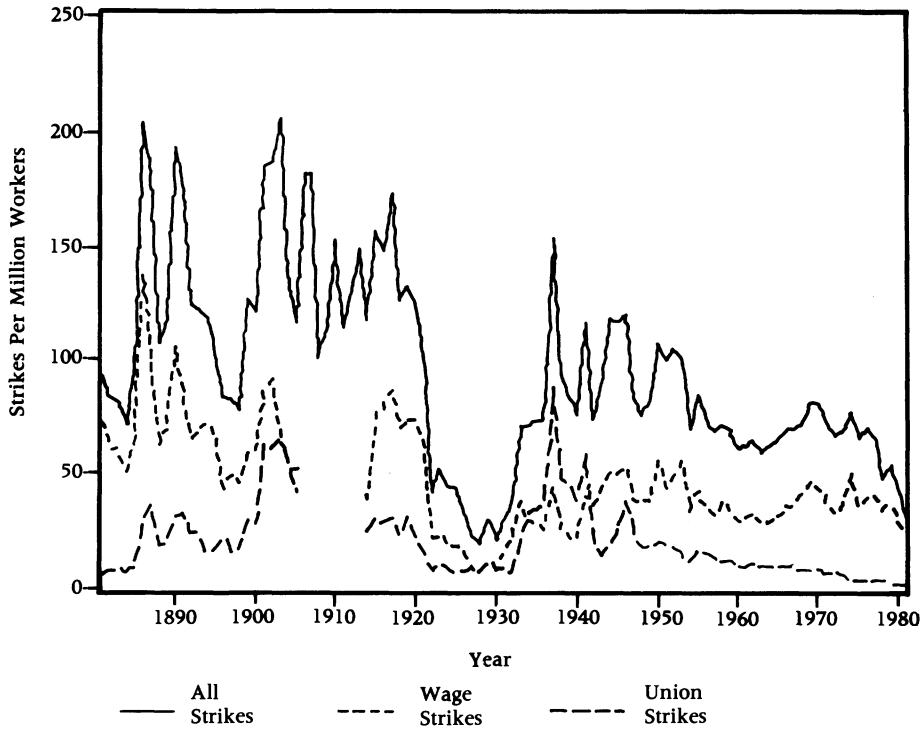

Notes:

a. Operationalization and data sources: strike frequency = number of strikes/wage and salary earners, AWS ERP HS SA. Abbreviations: (see Table 1) *ERP* Economic Report of the President, various years, Washington, D.C. U.S. Government Printing Office.

Figure 1 • ***Frequency of All Strikes, Strikes over Wages, and Strikes over Union Organizing, 1881–1981***[a]

fits, hours, and other terms of employment. The level of these strikes has hovered around 40 strikes per million workers annually since the 1940s (see Figure 1). Rather, the declines have occurred for strikes concerning issues of workplace *control,* and this points to the second outcome of developments in the law. The law has contributed to changes not only in the overall frequency of strikes, but also in the form or goal of the strike: strikes are far less likely today to occur over issues concerning workplace control and are far more likely to be about wages and wage-related demands than they were in the 1930s and 1940s.

Following Montgomery (1979:98), control strikes are defined here as strikes concerning "enforcement of work rules, union recognition, discharge of unpopular foremen or retention of popular ones, regulations of layoffs or dismissals, and actions of sympathy with other groups of workers." Unfortunately, pre-1947 data are available for only one component of control strike activity: strikes concerning unionization issues such as recognition, certification, and strengthening of bargaining position (see footnote 2). This subset of control strikes, after being quite high between 1933 and 1947, has continued to decline in frequency since.

It is too simple to see this decline as a result of the empowerment of workers by the Wagner Act and its protections of worker organization and action. Wagner did empower workers in this sense by giving them the legal right to organize unions. But worker organizational power as measured by union density has declined dramatically since the mid-1950s, falling by roughly 40 percent between then and 1980, and the decline continues up to the present (Griffin, McCammon, and Botsko forthcoming). Moreover, as I have argued, the sub-

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sequent interpretation, application, and amendments of the Wagner Act have in many other ways removed from labor's repertoire forms of collective action that could greatly enhance the power of organized workers.

A more encompassing measure of control strikes, including, for example, strikes over union organizing, job security, plant administration issues and sympathy strikes available after 1946, confirms that the frequency of control strikes has been dropping since Taft-Hartley. Between 1947 and 1980 the frequency of control strikes dropped by nearly 80 percent with a strong downward time trend for the entire period ($b = -.80$). In the late 1940s there were roughly 40 strikes over control-related issues annually for every million workers; by 1980 this figure had fallen to nine. Correspondingly, the percentage of all strikes over control issues fell from nearly 50 percent in 1947 to 20 percent in 1980, while the percentage of strikes over wages and similar matters rose during this period from 46 to 71 percent.[3]

This substantial decline in control strikes can be directly linked to the decline in wildcat strikes. Roughly 85 percent of strikes taking place during a contract (a measure of wildcat strikes; see footnote 1 above) concern issues of workplace control, whereas roughly the same large percentage of strikes occurring between labor contracts are over wages and related issues (U.S. Bureau of Labor Statistics 1970-1980). In short, the developments in the law that effectively ban the wildcat strike from U.S. labor-capital relations also nearly completely ban strikes over issues concerning workplace control.

By 1980 both the level and content of U.S. strike action had been substantially altered. Labor relations law is assuredly implicated in this transformation. The makers and interpreters of the law, prompted both by the political interests of the state and by the course of labor-capital struggle, have constructed a narrow arena for class struggle. Potentially disruptive disputes between workers and employers are generally defused through formal legal procedures, such as bargaining and arbitration, that assure the continuity of production. The issues of legitimate dispute, chiefly the terms of the sale of labor power, are closely circumscribed; unavoidable disruptions of production over those few legitimate issues are made as predictable as possible to the virtual elimination of the wildcat strike. U.S. labor law since the New Deal has undeniably empowered U.S. workers by guaranteeing them the right to strike. But the manner in which the law has been interpreted and applied has constrained that right and the power it implies even as it is granted, regulating workers' collective action in ways designed to protect the continuity of production.

Discussion

I have attempted to demonstrate two things in this paper, one historical, the other theoretical. First, while empowering workers by granting legal rights to organize and to strike, labor law since the New Deal has also diminished and substantially constrained workers' collective power. Critical legal scholars and others have seen these constraints in the law (e.g., Stone 1981; Tomlins 1985). The industrial pluralists, on the other hand, have long argued that the law has empowered workers (Leiserson 1959; Cox 1960). In this paper, I have tried to show that the New Deal labor relations policies concerning strike action have not been designed and interpreted either simply to empower *or* to repress workers. Rather, the Wagner Act, its interpretation, and application have accomplished both—workers are simultaneously

3. Wallace (1989) argues that today only plant administration strikes can be said to represent worker attempts to achieve greater control over the conditions of employment, suggesting that trends in this measure must be examined to discern the current state of control strikes. Plant administration strikes surged during the early 1970s, but sharply tapered off beginning in 1976, the same year as *Buffalo Forge*. Also, the correlation between frequency of plant administration strikes and frequency of wildcat strikes in the mining industry between 1961 and 1980, the years for which data are available, is very high ($r = .85$). It appears that the surge and decline in these control strikes was largely driven by the circumstances in the mining industry discussed above.

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strengthened and weakened by the law. This is achieved by an implicit acceptance by the law's custodians that the purpose of the strike is to facilitate bargaining between organized workers and employers but not to interrupt production. In fact, the law's framers clearly realize the harm of interrupted production for capital accumulation and have thus designed and implemented the law such that the right to strike provided in it serves to foster collective bargaining but not the structural power of workers.

This is the historical argument of this paper. But the paper also builds on a theoretical argument about the state in a capitalist democracy. State policy making is a product of class struggle, struggle taking place in both economic and political arenas. One way in which capitalism—an economic system based on the private ownership and control of property by a few—can coexist with democracy—a political system based on public decision-making about the public welfare—is that the premises of one of those systems are compromised. Since capitalism and democracy have coexisted since the Second World War in relative stability in most of the advanced industrial nations (Therborn 1977), one can ask whether and to what extent one set of principles has been compromised.

This study shows that labor law in the United States promises to workers a set of rights to give them equal power in their negotiations with capital over the conditions of work. The law establishes a set of procedures—the recognition of elected union representatives as partners to capital in collective bargaining and arbitration proceedings, each party's rights of appeal, and labor's right to strike to give teeth to its demands—to rectify a past imbalance of power. But while the law guarantees rights to certain *processes*, it does not guarantee the *substance* of these legal processes. For example, the Wagner Act does not specify that all strikes are legal; it does not specify that workers always have legal recourse to the strike; and it does not specify that an employer's action may never interfere with a strike. To workers' detriment, there is instead a separation in the law between procedure and substance. This has allowed a political space in which adjustments in the law can be made. Time and again, as this paper has shown, the courts, the NLRB, and Congress have adapted the law to the exigencies of capitalist production, and it is these adjustments that have gradually delineated the legal boundaries of collective worker action. Through all of this, the strike has been rendered negotiable, predictable, less effective, and less likely.

Workers can strike, but only over a narrow, legally defined spectrum of issues concerning the conditions of the sale of their labor power and not over issues concerning control of production generally. Restricting strike action to the first set of issues makes conflict between an employer and workers negotiable, often positive-sum, but non-threatening to the unilateral control of production by capital. Workers can strike, but some forms of the strike—those typically initiated spontaneously by workers during the term of a labor contract and which are frequently over issues concerning workplace control—have been defined as illegal. In this way, strike action has been made more predictable, allowing employers to plan strategies to avoid the negative economic consequences of a strike if it does occur. Workers can strike, but only under provisions in the law that render the strike less effective. Employers have the right to hire permanent replacements, union picketing is highly regulated, and unions have only limited rights to fine union members who cross picket lines. Workers can strike, but the law tends to channel industrial disputes into nondisruptive modes of behavior such as collective bargaining and arbitration, reducing overall the likelihood of a strike.

The structural power of employers in a capitalist system, as Block (1987) explains, is their capacity to withdraw their investment capital. This capacity constrains state actions. States, materially dependent on a share of the profits generated by capitalist investments, will implement policy to promote a stable climate for business investments. Workers, as full participants in the economy, have structural power as well. They can collectively withdraw their labor power and, thus, should be able to constrain the actions of the state and of capital as well. In the 1930s in this country workers vividly demonstrated this collective capacity, and

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they won not just a legal right to organize, to bargain, and to strike, but they forced the practical acceptance of these rights by capital. Today, workers have a legal right to strike, but since the enactment of the New Deal legislation, the structural power of the strike has been severely crippled, if not negated, through the practice of U.S. labor relations law. As a result, workers may be left with little real power in the workplace to shape future conditions of work.

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