Reconstructing The Wagner Act

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This paper discusses the analysis presented in the first two chapters of *State of the Union*: "Reconstructing the 1930s," and "Citizenship at work".

TO READERS FAMILIAR WITH Nelson Lichtenstein's previous work, *State of the Union* is an important book because it seems to be a milestone revealing a move away from the New Left perspective established in *Labor's War at Home*. Key to this perspective was the idea that in the 1940s, unions had curbed workers' militancy to bring them into the realm of corporate order, thereby accommodating the needs of a capitalist state. Not so anymore: the promise of industrial democracy no longer seems ambiguous, for Lichtenstein rehabilitates both liberal policy makers and unions, showing that they collaborated in the 1930s to foster and establish citizenship on the workplace. A radical idea, the notion of industrial democracy eroded over the 20th century—especially during the 1950s and 1960s—because it was embattled, moderated and abandoned. The ambition of *State of the Union* is to historicize this process—it is in many ways the history of the nullification of the Wagner Act.

I'm thoroughly convinced by this reevaluation of the role of American liberals, although I beg to disagree with the terms on which it is

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carried out. The first two chapters, "Reconstructing the 1930s" and "Citizenship at Work," are critically important because they restore the idea that the New Dealers revolutionized the lives of American workers, and thus depict the objectives from which liberals subsequently strayed. Yet, in focusing exclusively on the notion of industrial democracy, and in equating the Wagner Act with a new definition of citizenship, these two chapters paint a somewhat optimistic picture of the law, leaving its weaknesses in the background.

I would argue that the phrase "industrial democracy," because it meant different things to different people in the 1930s, is too vague to help us recapture the logic underlying the drafting and adoption of the Wagner Act. As we reconstruct the reform wrought by liberals, it is essential to distinguish between their objectives (industrial democracy) and their methods. In this paper, I would like to focus on the ways and means of New Deal liberalism, and highlight its inherent limits, which were most apparent in the failure of the institution it created—namely, the National Labor Relations Board. In the end, I would like to suggest that there are lessons to learn from this failure, lessons that are relevant to the current effort to rejuvenate American unions.

An Ambiguous Right

I will first review the salient points of Lichtenstein's analysis of the adoption of the Wagner Act. The National Labor Relations Act, he explains, was the product of two concurring liberal endeavors. The first one was to offset the underconsumption that was deemed to have caused the Great Depression. For years overproduction and cutthroat competition had stifled the American economy, both in "old" industries such as lumber and in the consumer-oriented ones, such as the automobile sector, leaving many farmers and workers in dire economic conditions. As a result, even as the economy grew in the 1920s, a large section of the population was left out and did not enjoy the benefits of prosperity. Hence, to liberals, empowering unions was seen as a method of enforcing minimum wage standards—an "American" standard of living (21-25).

As Lichtenstein explains, however, "if the New Deal State and the newly vigorous trade unions had only been successful as wage-fixing institutions designed to solve the problem of 'underconsumption,' their appeal would have been diminished considerably."(30) Indeed, liberals,

workers and policymakers alike were at work redefining the very notion of American citizenship both from the top down and from the bottom up. Along with an American standard of living, the liberals' other objective was to democratize the American workplace to put an end to "industrial tyranny," by giving unions legal recognition as well as state protection. According to Wagner, the right to organize was concomitant with the right to vote—there was to be industrial democracy as well as political democracy. In the 1930s, Lichtenstein argues, the right to organize became "American."(35)

Thus, there were two readings of the Wagner Act—an economic reading and a philosophical one. These two readings, however, were scarcely compatible: for a group of liberals, such as Frances Perkins, President Roosevelt, and reform-minded businessmen, the right to organize was mostly a means to an end, there was nothing fundamental about it—they saw it as one measure that could bring about a way out of the Depression. Indeed, and the case of Franklin Roosevelt is illustrative, many liberals did not trust labor organizations, and did not want to strengthen them. Notably, there were no labor provisions in the first drafts of the NLRA bill.[1]

Other liberals, however, disagreed. According to them, the right to organize had compelling philosophical justifications—it was a goal in and of itself. As Leon Keyserling—the drafter of the Wagner Act—once remarked, the Act was based on the idea that "collective bargaining is an essential attribute of a free society." To him, the Act was the last stage in the workers' journey from oppression to freedom.[2] Senator LaFollette concurred, arguing that the Wagner Act had elevated the right to organize to a civil liberty.[3]

Could the NLRA move simultaneously in two different directions? It seems highly unlikely. In his opening statement to Congress, Senator Wagner chose to emphasize the economic, not the philosophical reading of the Wagner Act, explaining that cooperation between employer and employee was key to achieving recovery.[4] The report of the Committee of

[1] See Leon Keyserling, Oral Interview, Truman Library.

[2] See Leon Keyserling, "Why the Wagner Act?", in Louis G.Silverberg (ed), *The Wagner Act after Ten Years* (Washington, DC : BNA, 1945), 5-33. The quote is on page 12.

[3] In 1936, Senator La Follette conducted hearings on the violations of workers' civil liberties. See Jerold S.Auerbach, "The LaFollette Committee: Labor and Civil Liberties during the New Deal," *Journal of American History,* vol 151, n°3 (December 1964): 435-459.

[4] *Congressional Record*, March 1, 1934, 3525-6.

Education and Labor, otherwise extremely supportive of the bill, sounded no other theme, arguing that collective bargaining was necessary to improve workers' wages and remedy the economic situation.[5] The notion of citizenship was conspicuously absent from the debates held in Congress. From the beginning, I'd like to argue, the economic reading of the Act prevailed over the philosophical one.[6]

Moreover, a close look at the Wagner Act shows the true nature of the revolution brought about by the Act. The act stated that it was the public policy of the US to promote industrial peace and avert strikes. Hence it promoted collective bargaining on the grounds that such protection would enhance the economy. The Act did make a passing reference to freedom of association, but it protected no substantive right. The right to organize was subservient to a public policy—sustaining consumption and preserving industrial peace. Interestingly, in 1938, in the aftermath of the constitutional crisis of the 1930s, the Supreme Court announced that from now on, it would differentiate between laws regulating the economy and laws affecting fundamental rights—the latter would be submitted to heightened judicial scrutiny. Tellingly, however, it did not list the right to organize as a fundamental right.[7] The Wagner Act, in other words, promoted not a civil right, but rather what I would call a "public right"—a right whose philosophical underpinnings were not as strong as its economic ones.

Indeed, the act neither applied to citizens nor to workers, but to "*employees*"—a term that is taken for granted in this part of the book. Yet, an economic—not philosophical—concept, the term "employee" reminds us of Pierre Bourdieu's admonition that historians must pay close attention

[5] *Senate report* N°573, 74th Congress, 1st Session, May 1st, 1935, 3-4.

[6] In his interview with legal scholar Kenneth Casebeer, Leon Keyserling, the drafter of the Act, emphasized the economic reading of the Act. Notably, he remarked that Wagner dealt with the economic objectives of the Act in most of his speeches and reports on the law. See Kenneth M.Casebeer, "Holder of the Pen: An Interview with Leon Keyserling On Drafting the Wagner Act," 42 U. Miami L.Rev.285 p.316. The records of the debates in Congress largely support Keyserling's claim. A useful guide to these debates is Irving Sloan, *The National Labor Relations Act of 1935* (New York: Oceana, 1983).

[7] In the famous footnote four to its decision in the case *United States v. Carolene Products Co,* 304 U.S. 144, the Court announced that it would employ a double standard to review the constitutionality of laws. The Court would now make a rule of *presuming* the constitutionality of Federal laws. However, the Court listed several legal areas in the realm of Civil liberties, where this presumption might not be appropriate. Laws dealing with civil liberties would thus be subjected to a higher standard of judicial scrutiny.

to "performative speeches," which are a way to shape social reality.[8] A foreign import, the term "employee" entered mainstream American English in the post-civil war era at a time when American businessmen were busy trying to ward off the development of national unions, and when the Courts were developing a jurisprudence based on liberty of contract. Later, the term found much purchase in the welfare capitalism programs of John D. Rockefeller and others.[9] All along, the use of the term "employee" was part of an attempt to convince workers that their interests were the same as those of their "employers"—its use amounting to a negation of class rhetoric. To be sure, Wagner and his aides probably defined it differently, but both the history of the term "employee" and the fact that its closest synonym in the law was not *worker*, but *wage earner* alerts us to the economic objectives pursued by the law.

Thus, notwithstanding the ubiquitous deployment of the industrial democracy rhetoric in the 1930s, the empowerment of the "employees" was not akin to a real democratization of the workplace. In no way did the law acknowledge the social stratification of American society. The class struggle was treated more as an economic pathology than as a social and political reality warranting a *reconstruction* of American democracy.

More importantly, the vision of industrial democracy promoted by the Wagner Act stood in sharp contrast to earlier definitions and visions of the right to organize. Samuel Gompers, for example, argued in his autobiography that the ever-larger number of injunctions issued against the AFL were unconstitutional because they deprived the workers of their constitutional rights as citizens.[10] And, as we have learned from the scholarship of William Forbath and James Gray Pope, early in the 20th century the AFL tried to use the 13th amendment and the 1st amendment to develop a constitutional argument securing the legitimacy of unions.[11] Yet

[8] Pierre Bourdieu, *Ce que parler veut dire* (Paris : Fayard, 1982).

[9] I am relying here on my own research in progress on the history of the term "employee." On the rise of Welfare capitalism, see the following works : David Brody, "The Rise and Decline for Welfare Capitalism," in *Workers in Industrial America,* 2nd ed. (New York : Oxford : 1992), 48-81; Daniel Nelson, *Managers and Workers: The Origins of the New Factory System in the United States, 1880-1920* (Madison: University of Wisconsin Press, 1975); For an edifying example of the use of the term by a public official see the "Report on Strike of Textile Workers in Lawrence, Ma., in 1912." 62nd Congress, 2nd Session.

[10] Samuel Gompers, *Seventy Years of Life and Labor,* edited by Nick Salvatore, Ithaca : ILR Press, 1984, pp. 168-169.

[11] James Gray Pope, "Labor's Constitution of Freedom", 106 *Yale Law Journal,* 941 (1997); William Forbath, *Law and the Shaping the American Labor Movement* (Cambridge: Harvard University Press, 1991).

the AFL's constitutional reading of the right to organize was never endorsed. Not only did it run afoul of the progressive belief that laws should benefit the public interest, and not a special class, but it was also opposed by liberal reformers, who believed that the AFL's voluntarism was no solution to industrial disputes, and crafted alternative and competing institutional schemes. In the 1930s, those reformers were able to impose their vision of reform, a vision predicated on a denial of the constitutional dreams of the AFL.[12]

Now, I'm not trying to argue that the 1930s were not turbulent years full of radical possibilities. Nor am I trying to defend the conservative interpretation of the New Deal that you rightfully lay to rest in State of the Union. Rather I'd like to suggest that we need to understand how New Deal liberals could simultaneously reject the constitutional right to organize for which the AFL had been calling for and believe they had achieved both moral and political victory with the Wagner Act.[13] To do that, we must also look at the 30s and 40s from a state-oriented perspective, and emphasize the role of actors that remain in the background in State of the Union—legal reformers and the NLRB.

The State's visible hand

The significance of the passage of the Wagner Act lay as much in the growth of the administrative powers of the Federal State as in its protection of the right to organize. To be sure, it afforded unprecedented protection to unions and empowered millions of workers in the workplace. Yet the true revolution of the law was its new reading of the commerce clause of the Constitution, which enabled the Federal State to promote collective bargaining, and to set up an administrative agency, namely, the NLRB, to administer that policy.[14] The members of the NLRB were to be at once the judges, the prosecutors and the legislators of the common law of labor.

[12] For the struggle between the two groups of reformers, see Daniel Ernst, "Common Laborers? Industrial Pluralists, Legal Realists, and the Law of Industrial Disputes, 1915-1943," *Law and History Review*, vol. 11, n°1 (Spring 1993): 59-100; and Christopher Tomlins, "The triumph of industrial pluralism."

[13] "They knew that an ersatz industrial democracy could never provide a sound basis for the kind of vibrant shop representation and collective bargaining necessary to propagate the union idea and alter management behavior", *State of the Union*, 38.

[14] The Wagner Act is based on Art 1, Sec 8 of the Constitution.

Notably, the creation of the NLRB was an important milestone in the history of delegation, that is, the idea that the powers of the executive, the legislative and the judiciary could be concentrated in one independent agency for the sake of efficiency.[15] Its members were granted the power to determine the size of bargaining units, and enforce the unfair labor practices clauses of the Act, which, ipso facto, meant that they could directly influence the strength and cohesiveness of the labor movement.

The NLRB was therefore the State's visible hand on labor relations. It was a Progressive institution whose forebears were not the industrial commissions pioneered by the industrial pluralists earlier in the century, but rather the ICC and the Federal Trade Commission. Underlying its creation was a political theory that harkened back to the political thought of progressives such as Herbert Croly, Frank J. Goodnow, and Woodrow Wilson, who early in the century, had argued that independent agencies were the best way to further the public interest. Staffed with virtuous and disinterested experts insulated from political pressure, such agencies would devise scientific and impartial policies to deal with the social and economic problems confronting the nation.[16] Thus, the American state would overcome the limitations imposed by the separation of powers. Popularized by James Landis's *The Administrative Process* in 1938, this theory was revived in the 1930s, by the New Dealers, who believed it afforded the only way to deal with the flaws of the free market.[17] As Landis explained, "The administrative process is, in essence, our generation's answer to the inadequacy of the judicial and legislative processes."[18]

Key to understanding the emergence and preeminence of the delegation doctrine was the full participation of legal realists in the shaping of New Deal liberalism. Like many advocates of regulation (Louis Jaffe,

[15] Theodore Lowi, *The End of Liberalism: The Second Republic of the United States* (New York : Norton, 1969), chapter 5.

[16] In *Progressive Democracy* (New York: McMillan, 1912), Croly argued that the legislatures were beholden to business interests and could not be trusted, hence the need for independent agencies working in the public interest. For a strong advocacy of impartial expertise see also Frank J.Goodnow, *Politics and Administration* (New York: Russell & Russell, 1900) and *Social Reform and the Constitution* (New York: McMillan, 1911). Woodrow Wilson was one of the harshest critics of the separation of powers theory; see his famous article "The Study of Administration," *Political Science Quarterly,* vol. 197 (1887): 213.

[17] On the rebirth of the regulation theory, see Thomas McCraw, *Prophets of Regulation* (Cambridge: Harvard UP, 1984), 210-221 and Alan Brinkley, *The End of Reform : New Deal Liberalism in Depression and War* (New York: Vintage, 1995), chapter 3.

[18] James Landis, *The Administrative Process* (New Haven: Yale UP, 1938), 41.

Thurman Arnold, Jerome Frank, etc.) James Landis was a lawyer who had accepted the basic tenets of legal realism, that is, the idea that the purpose of the law's objectives should be to bring about just social results, not adhere to abstract principles. While they sought to introduce the use of social science in law, the realists saw the courts in general, and the Supreme Court in particular, as an obstacle to social reform in the 1920s and 1930s. Hence they favored the development of administrative law through the creation of regulatory agencies. Equally important, the realists largely inspired themselves from the work of Thorstein Veblen and his calls for a technocratic management of society. In the words of Roscoe Pound, the realists' intellectual father, lawyers should become "social engineers".[19]

The role of the legal realists in the shaping of the New Deal was not simply intellectual, but also logistical. Throughout the New Deal, Felix Frankfurter, the head of the wartime NWPB, and one of the closest advisers of President Roosevelt, channeled many young lawyers from Harvard and other elite institutions to Washington.[20] Thus, the reemergence of the regulation theory was also the product of a quest for authority—the quest of lawyers who sought to recast themselves as disinterested and impartial public servants.

The creation of the NLRB was in many respects the product of this quest for a new institutional order. Legal realists had long considered collective bargaining to be a major public interest.[21] The Wagner Act was drafted by three lawyers, Leon Keyserling Thomas Emerson, and Philip Levy, with the help of Milton Handler and Clavert Magruder—two well-known advocates of legal realism.[22] Keyserling—the main drafter—was a particularly important figure. An economist who had studied with Rexford Tugwell at Columbia (one of the seedbeds of legal realism), Keyserling had been involved in the drafting of the NLRA, and had and pushed for and drawn up section 7a. To him, the protection of the right to organize was a compelling public imperative, because it was the only alternative to

[19] Quoted in Daniel Ernst, "Common Laborers ?", 74.

[20] See Brinkley, *The End of Reform*.

[21] "Can we not have the wisdom to reorganize our government into an industrial democracy… in the common interest of all people?" Donald Richberg asked in 1917. Quoted in Joseph McCartin, *Labor's Great War,* p.65. (Later, however, Richberg moved to the conservative side of the spectrum.)

[22] For records of the drafting of the NRLA, see Kenneth Casebeer, "Holder of the Pen", but also the accounts given by Paul M.Herzog and Thomas Emerson in Katie Loucheim, ed, *The Making of the New Deal: The Insiders Speak* (Cambridge: Harvard UP, 1983), 205-218.

industrial chaos or a fully government-administered economy.[23] Above all, he understood that it was important to emphasize the public's interest, and not labor's, for the law to be declared constitutional. Throughout the drafting process, the lawyers resisted Frances Perkins's attempts to create a mediation agency located in the labor department, and also refused to put the Courts in charge of the enforcement of the law. Rather, they used the Federal Trade Commission as a model to make the NLRB an independent, quasi-judicial agency.

Thus, as we reconstruct the Wagner Act, the true ways and means of this political project become clear. True, the law's objective was to operate an important change in the relations of power in American society. But in my view, no new definition of citizenship was involved in this legislative effort. Rather, the law resorted to regulation and disinterested expertise to change society in the name of the public interest. The adoption in 1947 of the Taft-Hartley Act showed that this attempt was a failure.

The Limits of Regulation

If one were to find a phrase to capture the essence of the NLRB's work from 1936 to 1947, none would be more appropriate than affirmative action. Not only was that phrase coined and included in the language of the Wagner Act, but the NLRB actively sought to put an end to the anti-union practices of employers and their effects.[24] This vigorous promotion of industrial unionism included classifying as "employees" as many classes of workers as possible (foremen, plant protection employees, agricultural workers) and devising specific rules to curb employer's interference with the law.[25]

While its enforcement of the law was successful, the NLRB failed to establish the legitimacy of its work, and the legitimacy of the regulation of labor relations as a whole. Indeed, by the end of the 1940s the NLRB was

[23] Oral history interview with Leon Keyserling, Truman Library. See also Kenneth Casebeer, « Holder of the Pen."

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[24] The NLRB was authorized to order the offending party "to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of the Act," NLRA, 5 July 1935, sec 9c.

[25] The best account of the implementation of the law prior to Taft-Hartley is James Gross, *The Reshaping of the National Labor Relations Board.*

derided as a biased agency that exemplified the economic problems facing the nation. Labor unions had become too strong, and needed to be checked just like the agency that defended them. Most important of all, conservatives were not alone in voicing this criticism; liberals ranging from Walter Lippman to President Truman also joined the chorus.

Not surprisingly, this criticism was given a legislative transformation in the Taft Hartley Act. Not only did the act restrain the right to organize, but, as Lichtenstein remarks, it deprived supervisors of protection of the law, thereby denying both the impartiality of the NLRB and its vision of the public good. Finally, in a severe blow, Taft-Hartley separated its judicial from investigative procedures by making the General Counsel and independent actor, thus making it much more difficult for the agency to develop a coherent policy. NLRB members protested—to no avail—that the agency was no different from other regulatory agencies, and could not do its work properly with an independent General Counsel. In many ways, the Taft Hartley law marked an important departure from the delegation doctrine of the 1930s.

How can we account for this failure? In the end, I would argue, the Wagner Act worked well, indeed too well for its own good. The NLRB simply delivered what the Wagner Act implied—a redefinition of the power structure of American society. True, the Act sought to foster industrial peace, but such a peace, as Senator Wagner explained, could only come when the right to organize was fully respected.[26] The problem, however, was that in the realm of labor relations, things did not play out according the scheme envisioned by the New Dealers. Let us remember that according to James Landis, regulation was an activity conducted by experts insulated from political controversies, working for the public good. The controversy that attended the NLRB's definition of foremen as employees under the law, its decisions regulating employer behavior, the excessive power of unions in general shows that the NLRB never acquired this authority—in the area of labor relations, the delegation theory simply broke down in the 1940s.

First and foremost, contrary to what Landis and other proponents of the delegation doctrine expected, devising an "impartial" policy in the realm of labor relations is a quixotic quest. In the 1940s the decisions protecting the right to organize did not alleviate class conflict; rather, they nourished it and reinforced it. Second, there is no easily definable, lasting

[26] Leon H.Keyserling, "Why the Wagner Act?," 17.

definition of what the "public interest" is. While in the 1930s liberals mostly sought to foster consumption, at the end of the war their main concern was to sustain production and employment, which led them to lend much more importance to industrial peace than they had previously done.[27] Overall, because it was defined in political and economic terms from the start, the notion of "public interest" proved incompatible with the goal of allowing an independent agency to craft a lasting common law for labor.

Finally, the NLRB lacked legitimacy because of the language on which it relied. In an attempt to be a close as possible to judicial adjudication, the agency relied on a legal discourse in its proceedings and organization. In spite of the preeminence of the notion of the "rule of law" in America, however, this legal discourse jeopardized its authority because the NLRB had no monopoly on it. Its every decision was analyzed and dissected by supporters and dissenters alike. In an ironic twist of history, the agency became even weaker institutionally than the Courts it was supposed to supplement.

Thus, in the 19430s and 40s, the main process at work in labor relations was a process of politicization of labor expertise and regulation. This politicization was evident in Roosevelt's decision to name a businessman from Kansas —John M. Houston—to the NLRB in 1943, in the legal battles that pitted union lawyers against those of corporations, and in the many calls for a revision of the law. Far from being the place of consensus that James Landis had envisioned, the NLRB became a place of conflict—a conflict that in the end the NLRB was too weak to manage.

In many ways, New Deal liberals were the victims of what Louis Jaffe—one of the leading advocates of administrative agencies—was to call the "illusion of the ideal administration."[28] The NLRB failed for one reason—its work, indeed, its very existence, was not the product of a strong social contract. Significantly, upon the creation of the EEOC twenty years later, the liberals had this "place of conflict" in mind, and they used

[27] The 1945 labor Management conference is illustrative of this shift in public policy. The records of the conference can be found in the collection of the Department of Labor library. For a clear statement of the emphasis on production and employment, see the Letter of Marriner Eccles (then on the Board of Governors of the Fedearal Reserve System) to President Truman, Truman Library, HST Papers, box 1114, Folder: Taft-Hartley Bill, 1947-1948; See also the memo "Points" in Clark Clifford's papers, Box 6, Fodler "Case Bill-Miscellaneous," in which he says that "the main objective is to obtain production. Must have it or we will have ruinous inflation."

[28] Louis L. Jaffe, "The Illusion of the Ideal Administration," *Harvard Law Review,* vol 86 (1973): 1182-1199.

the NLRB as a counter-model, limiting the new agency to investigatory powers.[29]

By way of conclusion, I'd like to make two related points. The first one is historical. I fully agree that the liberals, who pushed for the adoption of the Wagner Act, should be rehabilitated because theirs was indeed a radical idea that could have altered the very social structure of American society. Yet, there was an inherent weakness in their project. Although it was not apparent to many actors, by the late 1940s they had met with failure. The NLRB was a much weaker institution, which no longer enjoyed the support of the Courts. No longer liberalism's workshop, the NLRB was unable to defend the law and adapt it to a changing economic environment. All that was left of the Wagner Act was its "economic reading," a weak base that evaporated in the 70s with the advent of neo conservative economics. Thus in the 1960s, liberals still believed in an institutional arrangement that was actually obsolete. In that sense, the rights revolution of the 1960s, which might have afforded the possibility of recasting the law in more philosophical terms, was a missed opportunity instead.

This leads me to Lichtenstein's call for the creation of a "civil right to organize." I agree that in the American context, deploying a rights discourse is probably the only venue to revive unionism. Yet, faced with a constitution that in the words of Justice O'Connor, "protects persons, not groups," the task of shaping a meaningful right to organize from the Bill of Rights will be difficult.[30] *Roe v. Wade*—the court decision protecting the right to abortion—shows that interpreting the Bill of Rights in light of modern needs can be done, even if that means enforcing a right not specifically spelled out in the Constitution.[31] The subsequent qualification of that right, however, should remind us that no right is really meaningful unless it is predicated on a strong social contract. This is precisely what the NLRB lacked in the 1940s, and what the EEOC and the Supreme Court lacked in the 1970s and 80s to develop affirmative action programs. Unfortunately, none is in the offing right now. If liberals fail to build this social contract, even the enactment of a civil right to organize will ring like a hollow hope.[32]

[29] Hugh Graham, *Civil Rights and the Presidency*, 71-72.
[30] *Adarand Constructors Inc. v. Pena*, 1995, opinion at 25.
[31] 410 U.S. 113, 1973.
[32] I am borrowing the phrase from Gerald Rosenberg, *The Hollow Hope: Can the Courts Bring About Social Change?* (Chicago: University of Chicago Press, 1993).