RIGHT-TO-WORK: A LEGAL RIGHTS PERSPECTIVE

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I. Introduction

In the next few years, about half of all U.S. citizens will be asked to decide if right-to-work laws are right for their state. Each time this issue is brought to the citizenry for a vote, intense lobbying and advertising takes place – both for and against. It becomes difficult to separate fact from fiction when sifting through the controversy concerning the proper level of union power versus employees' right to choose either to join or to not join a union. While substantial empirical research has been collected over the years, much of it conflicting (see, e.g., Farber, 1984 (higher wages in RTW states); [1] Moore and Newman, 1985 (weaker bargaining power and lower benefits in RTW states); [2] Zax and Ichniowski, 1991 (negative impact on unions caused by free-riders);[3] Kendrick, 2001 (higher taxes in RTW states);[4] Mishel, 2001 (lower wages in RTW states)),[5] this paper will focus on right-to-work from a legal rights perspective. Qualitative arguments center on legal issues such as freedom of choice, right to assemble, and property rights. While both sides of the arguments will be examined, an alternate solution – members only unionism – will be suggested as a potential middle ground for all factions in this debate.

II. History of Collective Bargaining and the Right-to-Work

By the time the United States entered World War I in 1917, the labor movement had grown to three million members.[6] In an effort to promote peace between labor and management, President Wilson created the National War Labor Board in 1918, which recognized employees' rights to organize in trade unions and to bargain collectively.[7] While the Board did not have enforcement powers, both labor and management agreed to refrain from lockouts and strikes, and to defer to mediation by the Board.[8] Unfortunately, the truce between labor and management ended with the conclusion of the war and the return of hostility between labor and management in the 1920s.[9] The Railway Labor Act[10] was passed in 1926, stressing the importance of collective bargaining as a means to minimize strikes and lockouts, giving railroad workers the right to organize in trade unions, and paving the way for a national labor policy.[11]

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[1] Henry Farber, *Right-to-Work Laws and the Extent of Unionization*, 2 Journal of Labor Economics 319 (1984).
[2] William Moore and Robert Newman, *The Effects of Right-to-Work Laws: A Review of the Literature*, 38 Industrial and Labor Relations Review 571 (1985).
[3] Jeffrey S. Zax and Casey Ichniowski, *Excludability and Effects of Free Riders: Right-to-Work Laws and Local Public Sector Unionization*, 19 Public Finance Quarterly 293 (1991).
[4] David Kendrick, *Midwest Right-to-Work States Still Outperform Forced Union States in Jobs and Real Income.* National Institute for Labor Relations Research (2001).
[5] Lawrence Mishel, *The Wage Penalty of Right-to-Work Laws*, Datazone, Economic Policy Institute (2001).
[6] NLRB, *Pre-Wagner Act labor relations*, http://www.nlrb.gov/who-we-are/our-history/pre-wagner-act-labor-relations (last visited Sept. 24, 2015).
[7] Id.
[8] Id.
[9] Id.
[10] 45 U.S.C. §§151 et seq. (1926).
[11] NLRB, *NLRB Celebrating 80th Anniversary*, http://nlrb.gov/sites/default/files/attachments/basic-page/node-1536/NLRB%2080th%20Anniversary.pdf at 16 (last visited Sept. 24, 2015).

A. The National Labor Relations Act

In 1935, Senator Robert F. Wagner introduced the National Labor Relations Act (the "NLRA")[12] to Congress, noting: "Democracy cannot work unless it is honored in the factory as well as the polling booth; men cannot be truly free in body and in spirit unless their freedom extends into the places where they earn their daily bread."[13] Also known as the "Wagner Act" for its author, the NLRA introduced the following national labor policy:

> It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.[14]

The NLRA applied to all private business enterprises other than those subject to the Railway Labor Act,[15] and provided employees working for those enterprises the right to organize and bargain collectively and to engage in other concerted actions for their mutual aid or protection.[16]

In addition to protecting these employee rights, the NLRA also restricted employer rights by prohibiting employers from doing any of the following:

1) interfering with employees' exercise of the rights guaranteed to them by the Act;
2) dominating or interfering with the formation or administration of any labor organization;
3) discriminating in regard to hiring or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization (although employers were permitted, under certain circumstances, to make an agreement with a labor organization to require as a condition of employment, membership in the organization);
4) discharging or otherwise discriminating against an employee because he filed charges or gave testimony under the Act; and
5) refusing to bargain collectively with the representatives of their employees (subject to other provisions of the Act).[17]

The NLRA also created the National Labor Relations Board (the "NLRB"), made up of members appointed by the President and confirmed by the Senate,[18] to enforce the NLRA.[19]

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[12] 29 U.S.C. §§151 et seq. (1935).
[13] NLRB, *NLRB Celebrating 80th Anniversary*, http://www.nlrb.gov/sites/default/files/attachments/basic-page/node-1536/NLRB%2080%20Anniversary.pdf at 10 (quoting Senator Robert F. Wagner in 1935, upon introducing the bill that was to become the National Labor Relations Act)(last visited Sept. 24, 2015).
[14] 29 U.S.C. §151 (1935).
[15] 29 U.S.C. §152 (1935).
[16] 29 U.S.C. §157 (1935).
[17] 29 U.S.C. §158(a) (1935).
[18] 29 U.S.C. §153 (1935).
[19] Id.

When opponents of the NLRA challenged it on constitutional grounds, the NLRB maintained that the NLRA's constitutionality rested in the Commerce Clause, which gives Congress the power to regulate commerce among the states.[20] This argument is based on the premise that employer interference with employees' rights to organize and employer refusals to engage in collective bargaining could lead to strikes which, in turn, could interfere with interstate commerce.[21] That notion was put to the test in 1937 in the case of *NLRB v. Jones & Laughlin Steel Corp.*,[22] where the U.S. Supreme Court did not hesitate to hold in favor of the NLRA, finding that

> Experience has abundantly demonstrated that the recognition of the right of employees to self-organization and to have representatives of their own choosing for the purpose of collective bargaining is often an essential condition of industrial peace. Refusal to confer and negotiate has been one of the most prolific causes of strife. This is such an outstanding fact in the history of labor disturbances that it is a proper subject of judicial notice and requires no citation of instances.[23] … We have no doubt that Congress had constitutional authority to safeguard the right of respondent's employees to self-organization and freedom in the choice of representatives for collective bargaining.[24]

Employer groups immediately mounted campaigns against the NLRA.[25] Employees, however, freely exercised their new-found rights and in the years following the passage of the NLRA, the country experienced "incessant strikes and fear-inducing economic instability."[26] In 1945, employee strikes resulted in an estimated thirty-eight million man-days of lost labor and the number nearly tripled the next year,[27] wreaking havoc on productivity.

B. The Taft-Hartley Act

In part because of the growing public sentiment against labor's excesses, "[b]y 1947, the public no longer regarded organized labor as an underdog, but rather as having too much economic and political power."[28] Since much of that power came from the NLRA, the NLRA needed to be changed.[29] Leading the charge against the NLRA in Congress in 1946 were Senator Robert Taft of Ohio, chairman of the Senate Labor Committee, and Representative Fred Hartley, Jr., the Republican chairman of the House Education and Labor Committee.[30] While the NLRA gave employees the right to organize and bargain collectively and proscribed certain employer labor practices that were deemed unfair, it did not address union labor practices. Seeking to balance the

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[20] U.S. CONST. art. I, §8, cl3.
[21] NLRB, *NLRB Celebrating 80th Anniversary*, http://www.nlrb.gov/sites/default/files/attachments/basic-page/node-1536/NLRB%2080th%20Anniversary.pdf at 23 (last visited Sept. 24, 2015).
[22] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).
[23] Id. at 42.
[24] Id. at 43.
[25] NLRB, *NLRB Celebrating 80th Anniversary*, http://www.nlrb.gov/sites/default/files/attachments/basic-page/node-1536/NLRB%2080th%20Anniversary.pdf at 26 (last visited Sept. 24, 2015).
[26] Id. at 25.
[27] Jordan Ludwig, *The Passage and Events Surrounding the Taft-Hartley Act: An Analysis* (2007), http://www.janus.umd.edu/issues/sp07/Ludwig_Taft-HartleyAct.pdf at 2 (last visited Sept. 24, 2015).
[28] NLRB, *NLRB Celebrating 80th Anniversary*, http://www.nlrb.gov/sites/default/files/attachments/basic-page/node-1536/NLRB%2080th%20Anniversary.pdf at 31 (last visited Sept. 24, 2015).
[29] Id. at 31.
[30] Id. at 32.

scales, in 1947 Taft and Hartley introduced a bill in Congress that would make certain union labor practices also unfair.[31] After nine days of debate, Congress passed the bill by a vote of 68 to 24.[32] Although President Truman vetoed the bill, calling it "dangerous" and "unworkable," Congress overrode the veto and the Labor-Management Relations Act of 1947, more commonly known as the Taft-Hartley Act, became law.[33]

The New York Times endorsed the Taft-Hartley Act, stating "(t)he limitations set on former union privileges have seemed to us to be a needed protection of the rights of management, the individual worker and the general public."[34] However, not everybody agreed. Some accused the congressmen of "using the suffering of workingmen as a ruse in order to accomplish their political agenda,"[35] and others referred to the Taft-Hartley Act as the "Slave Labor Act."[36]

The Taft-Hartley Act did much to balance the scales though, including:

1) giving employees the right to refrain from joining a labor organization and collective bargaining except to the extent that those rights may be affected by an agreement requiring membership in a labor organization as a condition of employment;[37]
2) protecting employees' rights not to join a union from restraint or coercion by unions[38] and providing that unions could not cause an employer to discriminate against an employee because that employee exercised his right not to join the union;[39]
3) imposing on unions the same obligation to bargain in good faith that the NLRA imposed on employers;[40]
4) Prohibiting secondary boycotts, making it illegal for a union that has a primary dispute with one employer to pressure a neutral employer to stop doing business with the first employer;[41]
5) Prohibiting unions from charging excessive dues or initiation fees;[42] and
6) Prohibiting unions from causing an employer to pay for services that were not actually provided or agreeing to pay for services that would not actually be provided (otherwise known as "featherbedding").[43]

The Taft-Hartley Act also authorized states to adopt **right-to-work laws** that would prohibit union security agreements requiring membership in a labor organization as a condition of employment.[44]

III. The Right-to-Work Controversy

[31] Id. at 32.
[32] Id. at 32.
[33] Id. at 32.
[34] Jordan Ludwig, *The Passage and Events Surrounding the Taft-Hartley Act: An Analysis* (2007), http://www.janus.umd.edu/issues/sp07/Ludwig_Taft-HartleyAct.pdf at 6 (last visited Sept. 24, 2015).
[35] Id. at 7.
[36] Id. at 7.
[37] 29 U.S.C. §157 (1947).
[38] 29 U.S.C. §158(b)(1) (1947).
[39] 29 U.S.C. §158(b)(2) (1947).
[40] 29 U.S.C. §158(b)(3) (1947).
[41] 29 U.S.C. §158(b)(4)(B) (1947).
[42] 29 U.S.C. §158(b)(5) (1947).
[43] 29 U.S.C. §158(b)(6) (1947).
[44] 29 U.S.C. §164(b) (1947).

The controversy surrounding right-to-work laws is rooted in disagreements about the proper level of union power and employees' rights to choose to join or to not join a union. As seen in the history recapped above, the level of union power and the perception of union efficacy and flexibility regarding worker rights have waxed and waned over the decades. During war time, government tended to give power to unions to control strikes and supply lines. In both World War I ("WWI") and World War II ("WWII"), workers' right to strike was restrained by their own unions. Additionally, before and during WWII, the National War Labor Board and the NLRA gave unions the right to have closed membership (a "closed shop") in exchange for maintaining labor discipline.[45] A *closed shop* meant that employees **must** be members of the union as a condition of employment. Under a closed shop, an employee who didn't pay dues or was stripped of membership as part of the union's internal discipline could be fired **by the union**. Being fired by the union had nothing to do with the employer's wishes or whether the employee violated any of the employer's rules.

When the nation was not at war, the government tended to exercise increased control over the labor relations process, and in particular, following WWII, did this through passage of Taft-Hartley. This followed a period when labor unions struggled to control the increasing dissatisfaction of union members, who chafed at the discipline imposed by unions, leading to illegal (wildcat) strikes.[46] After the Taft-Hartley Act outlawed the closed shop, other types of union security agreements emerged, such as the union shop and the agency shop. A *union shop* allowed for hiring non-union employees, provided that the employees joined the union within a certain time after they were hired. An *agency shop* required that employees pay the equivalent of union dues, but did not require them to actually join the union.

Although the Taft-Hartley Act gave states the right to outlaw union security agreements, only half have done so (See Table 1). This leaves citizens in one-half of the U.S. still subject to union or agency shop situations, where union membership or payment of union dues is compulsory in unionized workplaces.

[45] John T. Dunlop, *The Decontrol Of Wages and Prices*, in LABOR IN POSTWAR AMERICA 3 (Institute of Labor Studies ed.,1949).
[46] Peter F. Drucker, *What to Do About Strikes*, Collier's 13 (Jan. 18, 1947).

Table 1
State Right-to-Work Laws, as of January 1, 2016

State	Year Constitutional Amendment Adopted	Year Statute Enacted
Alabama		1953
Arizona	1946	1947
Arkansas	1944	1947
Florida	1968	1943
Georgia		1947
Idaho		1985
Indiana		1956-1965 (repealed) 1995 (school employees) 2012
Iowa		1947
Kansas	1958	1975
Louisiana		1976
Michigan		2012
Mississippi	1960	1954
Nebraska	1946	1947
Nevada	1952	1951
North Carolina		1947
North Dakota	1948	1947
Oklahoma	2001	2001
South Carolina		1954
South Dakota	1946	1947
Tennessee		1947
Texas		1993
Utah		1955
Virginia		1947
Wisconsin		2015
Wyoming		1963

Source: Employment Standards Administration/U.S. Department of Labor

The stakes for power and money are high, and so political and public lobbying by labor and business interests is intense. Often the two parties have opposite findings on the same issues. Using a framework of legal rights theory, this paper will examine the qualitative arguments for and against right-to-work, and attempt to distinguish between political hyperbole and fact.

A. Freedom of Choice: Majority Rights Versus Minority Rights

Since the Taft-Hartley Act outlawed the closed shop, the question of freedom of choice regarding the union shop and agency shop still remains. For that half of the states without right-to-work laws, if a workplace decision to unionize gained a majority vote, the law then forced all employees to join the union (union shop), and /or pay union dues (agency shop), or lose their jobs. This creates an ethical dilemma between majority rights (to unionize) and minority rights (to be

employed without joining a union). Both sides offer ethical and legal arguments to support their cause.

Union supporters contend that right-to-work laws violate the principle of majority rule in the workplace, since the birth of any union requires the democratic process of a majority vote. Creation of a union through majority rule comes directly from the National Labor Relations Act (NLRA), 29 U.S.C. § 159(a), stating "designat[ion] or select[ion] for the purposes of collective bargaining by the **majority of the employees** in a unit appropriate for such purposes." Union supporters point out that no one can force a person to join the union, even if the majority votes to unionize. While true, an employee would eventually be forced to join, and/or pay dues, or quit his job. In a country that prides itself on democratic principles, the majority vote is a culturally accepted group decision-making process.

In response, right-to-work proponents argue that constitutional democracy requires majority rule with minority rights. Thomas Jefferson addressed this ethical dilemma in 1801 during his first inaugural address when he said, "All… will bear in mind this sacred principle, that though the will of the majority is in all cases to prevail, that will to be rightful must be reasonable; that the minority possess their equal rights, which equal law must protect and to violate would be oppression."[47] Additionally, the U.S. Supreme Court questioned the efficacy of majority rule[48] in commenting on labor issues found in the Bituminous Coal Conservation Act of 1935,[49] invoking due process as a potential issue:

> The effect, in respect to wages and hours, is to subject the dissentiate minority…to the will of the stated majority….To "accept" in these circumstances, is not to exercise a choice, but to surrender to force. The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form, for it is not even delegation to an official or an official body…but to private persons….[A] statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this Court which foreclose the question.[50]

Proponents of right-to-work also claim that union shop and agency shop laws are oppressive, and point out that while the principle of majority rule is used in the U.S. Government, it is not required for internal affairs of private business. For example, Greer and Baird argued that "…the decision by the majority of businesses based in a small town to join and pay dues to the Chamber of Commerce doesn't give them the legal power, under any federal or state statute, to force the remaining businesses to join or pay dues."[51]

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[47] JOHN J. PATRICK, UNDERSTANDING DEMOCRACY: A HIP POCKET GUIDE 58 (2006).
[48] Carter v. Carter Coal Co., 298 U.S. 238 (1936).
[49] 15 U.S.C. §§801 et seq. (1935) [repealed].
[50] Carter v. Carter Coal Co., 298 U.S. 238, at 311 (1936).
[51] Stan Greer and Charles W. Baird, *The Phony Case Against Taft-Hartley and the Real One*, 55 Lab.L.J. 25, 29 (2004).

B. Freedom of Association: Right to Assemble Versus Right Not to Assemble

A large part of the conflict surrounding right-to-work laws has to do with the forced membership that is caused by majority rule. As noted above, the NLRA declared it to be the policy of the United States to eliminate certain obstructions to the free flow of commerce "…by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of **full freedom of association**, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."[52] The First Amendment to the United States Constitution also protects the right to assembly by providing that "Congress shall make no law…abridging…the right of the people peaceably to assemble."[53]

While pro-union supporters argue that the NLRA and the First Amendment protect their right of association, right-to-work supporters argue that the NLRA and the First Amendment also protect their right of *dis*association. In 1955, in the case of *Pappas v. Stacey*, the Maine Supreme Court agreed with right-to-work supporters when it held that "(f)reedom to associate of necessity means as well freedom **not** to associate."[54] Right-to-work proponents argue that forced union membership violates the freedom of **dis**association of workers who prefer to remain union-free, and leads to financial coercion and a disregard of freedom of choice.

C. Property Rights:

1. Forced Versus Voluntary Dues

There has been a long-standing doctrine of constitutionally allowing mandatory dues, even for employees that choose not to join a union. In an examination of cases involving First Amendment rights, it is clear that the Supreme Court does not consider the right to assemble (or not to assemble) an absolute right. As noted by William Volz and David Costa,

> The right to freely associate and the converse right not to associate are fundamental values protected by the First Amendment. But, these rights can be constrained where competing considerations are given great weight by the courts. Labor legislation authorizing mandatory union dues to be paid by all employees, whether union members or not, significantly interferes with the First Amendment rights of the employees who do not wish to join. Yet, the Supreme Court has been convinced that this is not too high a price to pay to promote labor peace, to streamline labor relation, and to eliminate the problem of nonmember, free riding employees receiving benefits from the union.[55]

Whether a workplace is unionized as a union shop or an agency shop, workers in states without right-to-work laws are required to pay union dues as a condition of employment in unionized workplaces. Union supporters argue that all of the employees in the workforce benefit from collective bargaining, and therefore all employees should pay. Unless all of the employees of a unionized company are required to pay dues, some could be 'free-riding' by gaining

[52] 29 U.S.C. §151 (1935) (emphasis added).
[53] U.S. CONST. amend 1.
[54] Pappas v. Stacey, 116 A.2d 497, 500 (Me. 1955) (emphasis added).
[55] William H. Volz and David Costa, *A Public Employee's 'Fair Share" of Union Dues*, 40 Lab. L.J. 131, 131 (1989).

advantages from union's collective bargaining regarding job security, wages, and other benefits without paying for them. In the past, unions agreed to "fair share" dues (either a full or partial amount of regular dues) for those employees that chose not to join a union.

Right-to-work proponents argue that taking the *right to associate/disassociate* plus the *right to property* to the end result, workers should not be required to pay even fair share dues. By requiring exclusive representation and/or a forced payment of dues, "1) workers are denied the right to manage their own affairs, 2) unions are allowed to take what doesn't belong to them, and 3) workers are prohibited from disposing of their services as they please."[56] This argument leads to the controversy over property rights. The central conflict revolves around the ability of the union manager to transfer property rights to him/herself at the expense of the owner. Not only is the transfer of funds non-voluntary, but the nonunion member paying the union has no say in how his money is spent. Although Bennett and Johnson's (1980) study of union managers' salary and nonpecuniary benefits showed no difference in right-to-work versus non-right-to-work states, they point out the lack of economic incentive for a union manager in a non-right-to-work state to be efficient, effective or responsive to the needs of members.[57]

2. Dues Used for Political Agenda

Unions often use dues for special interest political lobbying. A union's use of dues to support political agendas may force an employee to indirectly give money to a political organization with which they do not agree. However, the Supreme Court has held several times that union dues collected from dissenting non-members may not be used for political and/or ideological purposes outside of activities necessary for collective bargaining, and must be refunded.[58] Therefore, at least union *nonmembers* that are forced to pay fair share dues are not forced to support a union's political agenda.

[56] Stan Greer and Charles W. Baird, *The Phony Case Against Taft-Hartley and the Real One*, 55 Lab. L.J. 25, 33 (2004).
[57] James T. Bennett and Manuel H. Johnson, *The Impact of Right-to-Work Laws on the Economic Behavior of Local Unions: A Property Rights Perspective*, 1 Journal of Lab. Res. 1 (1980).
[58] See International Association of Machinists v. Street, 367 U.S. 740 (1961); Railway Clerks v. Allen, 373 U.S. 113 (1963); Abood v. District Board of Education, 431 U.S. 209 (1977); Ellis v. Brotherhood of Railway Clerks, 466 U.S. 435 (1984); Chicago Teachers Union v. Hudson, 475 U.S. 292 (1986); Communications Workers of America v. Beck, 487 U.S. 735 (1988); and Lehnert v. Ferris Faculty Association, 500 U.S. 507 (1991).

IV. An Alternate Approach: Members-Only Unions

Since 1935, national industrial relations policy in the United States has largely revolved around what is generally described as the Wagner Framework: an adversarial/confrontational approach to formalizing the collective bargaining process. While there have been efforts to change this approach, to date they have been unsuccessful.[59] The parties to the model, union and management, have fundamentally different philosophies, but both are based on self-interest. Unions are primarily looking at "getting a bigger piece of the employer's pie," while the employer is focusing on minimizing labor costs so as to maximize revenue. Maybe it is time to try something else: members-only unions.

Members-only unions are unions that represent only the actual members of the union; they do not necessarily represent all of the employees at a workplace. "Workers who do not wish to be members of the union are not forced to be represented by the union, and likewise, unions are not forced to provide these employees with any services."[60]

Members-only unions are not a new idea. Four years after passage of the NLRA in 1935, the U.S. Supreme Court heard a case involving Consolidated Edison employees who were members of the International Brotherhood of Electrical Workers union.[61] In that case, the Court recognized that the right "to join labor organizations and bargain collectively through representatives of their own choosing"[62] included the right to do so on a members-only basis unless and until a union is certified as the exclusive representative of the employees.[63] In doing so, the court acknowledged that the fundamental purpose of the NLRA is to "protect interstate and foreign commerce from interruptions and obstructions caused by industrial strife" and that purpose appeared to be well-served by the members-only union.[64]

The Court confirmed its position on members-only unions after the Taft-Hartley Act amendments to the NLRA when, in 1961, in a case involving the International Ladies' Garment Workers' Union,[65] the Court struck down a minority union but noted that the problem was not with the union itself but with the exclusive recognition that the employer had given the union because that exclusive recognition gave the minority union "a marked advantage over any other" union that tried to enter the workforce.[66] In his dissent, Justice Douglas agreed that, under the law, a minority union does not have standing to bargain for all employees. However, he pointed out that where there is no majority union, he saw "no reason" why the minority union should not be permitted to bargain for the members who had joined the union.[67] He noted that the court had indicated "over

[59] Daniel A. Wren, INDUSTRIAL GROWTH AND SYSTEMATIC MANAGEMENT IN EARLY MANAGEMENT THOUGHT 98 (1994).
[60] Exclusive vs. Focused: Members-Only Agreements, http://mackinac.org/20702 (last visited Dec. 16, 2015).
[61] Consolidated Edison Co. v. National Labor Relations Board, 305 U.S. 197 (1938).
[62] Id. at 236.
[63] Id. at 236.
[64] Id. at 236.
[65] International Ladies' Garment Workers' Union v. National Labor Relations Board, 366 U.S. 731 (1961).
[66] Id. At 738.
[67] Id. At 740.

and again that, absent an exclusive agency for bargaining created by a majority or workers, a minority union has standing to bargain for its members."[68]

Noting that "exclusive bargaining representative status based upon majority support is peculiar to North America"[69] in a statement before the Commission on the Future of Worker-Management Relations in 1994, William B. Gould IV, chairman of the National Labor Relations Board at that time, acknowledged that U.S. law permits members-only bargaining for employees and advocated the use of members-only unions when the union does not have the support of a majority of the employees.[70]

More recently, research by Fisk and Tashlitsky into union decline suggests that the members-only model could be a fair and legal alternative to the current system in dealing with membership losses.[71]

While unions may prefer exclusive representation because it gives union officials "uncontested power to negotiate" employees' terms and conditions of employment and an "effective tool for corralling employees into a union,"[72] exclusive representation is not without its problems.

From the union perspective, exclusive representation requires the consent of a majority of employees,[73] which, presumably, would be harder to get. From the employee perspective, while some employees may appreciate the strength that collectively bargaining provides them, the Supreme Court itself has recognized that some employees may be able to do better for themselves than a union can do for the whole.[74]

Some union supporters argue that federal law requires that unions represent all workers at a work-site in contract negotiations and in disputes with the employer[75] and that right-to-work laws encourage "freeloaders" (free riders).[76] On the other hand, others argue that "union 'represented' workers who are not union members, or have joined only under the duress of a compulsory-unionism contract clause, are best described as 'captive passengers'. "No matter how deeply convinced such workers are that union monopoly bargaining is to them a detriment, not a benefit,

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[68] Id. At 741.
[69] Statement of William B. Gould IV Before the Commission on the Future of Worker-Management Relations at 9: http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1350&context=key_workplace (last visited Dec. 16, 2015).
[70] Id. at 9.
[71] Catherine Fisk and Xenia Tashlitsky, *Imagine a World Where Employers Are Required to Bargain with Minority Unions*, 27 ABA Journal of Labor & Employment Law 1 (2011).
[72] Union 'Representation' is Foisted on Workers – Not Vice Versa at 4: http://www.nilrr.org/files/SKMBT_60009080411230.pdf (last visited Dec. 16, 2015).
[73] 29 U.S.C. §159(a) (1947).
[74] J.I. Case Co. v. National Labor Relations Board, 321 U.S. 332, 338-339 (1944).
[75] Right-to-work laws encourage freeloaders: http://www.newstimes.com/opinion/article/Right-to-work-laws-encourage-freeloaders-4170393.php (last visited Dec. 16, 2015).
[76] Right to work is bad for everybody: http://www.ky.aflcio.org/wkvaflcio/index.cfm?action=article&articleID=c3b82e63-9656-4112-bdaa-fd985da50c0e (last visited Dec. 16, 2015).

they cannot refuse it without also giving up their jobs."[77] Members-only unions address both concerns.

Members-only unions do not require unions to represent employees who do not want to be represented or require employees to accept union representation that they do not want.[78] Members-only unions permit workers who do not want to be members of a union to be truly non-union. Those workers do not have to pay union dues, are not covered by the collective bargaining agreement negotiated by the union, and are free to negotiate the terms and conditions of their employment with their employer.[79] Those workers that join a members-only union do not have to subsidize representation for their co-workers that are not part of the union,[80] and members-only unions, for their part, are not required to represent employees who don't want the representation and are not willing to pay for it.[81]

Unions and union supporters should not fear members-only unions. Because members-only unions do not force workers to pay for or accept unwanted representation and members-only unions do not have to represent employees who do not want to be represented, members-only unions may actually be stronger unions.[82] Besides, "[r]emoving the federal sanction for monopoly bargaining while safeguarding employees' freedom to form unions that represent members only would…return personal freedom to the workplace."[83] Isn't that what it's all about?

V. Conclusion

After a period of relative dormancy between the 1970s and the early 2000s, right-to-work has made a vibrant return to the labor scene in the past few years. With newly-passed RTW legislation in Indiana (2012),[84] Michigan (2012),[85] and Wisconsin (2015),[86] legal challenges in the

[77] Union 'Representation' is Foisted on Workers – Not Vice Versa at 6: http://www.nilrr.org/files/SKMBT_60009080411230.pdf (last visited Dec. 16, 2015).
[78] Exclusive vs. Focused: Members-Only Agreements at 1, http://mackinac.org/20702 (last visited Dec. 16, 2015).
[79] Labor at a Crossroads: In Defense of Members-Only Unionism at 3-4: http://prospect.org/article/labor-crossroads-defense-members-only-unionism (last visited Dec. 16, 2015).
[80] Id. at 4.
[81] Id. at 4.
[82] Exclusive vs. Focused: Members-Only Agreements at 3, http://mackinac.org/20702 (last visited Dec. 16, 2015).
[83] Union 'Representation' is Foisted on Workers – Not Vice Versa at 7: http://www.nilrr.org/files/SKMBT_60009080411230.pdf (last visited Dec. 16, 2015).
[84] Monica Davey, *Indiana Governor Signs a Law Creating a 'Right to Work' State*, THE NEW YORK TIMES (Feb. 1, 2012), http://www.nytimes.com/2012/02/02/us/indiana-becomes-right-to-work-state.html?_r=0 (last visited Dec.22, 2015).
[85] John Flesher and Jeff Karoub, *Michigan Right-To-Work Bill Approved By Republican-Dominated House*, HUFFPOST DETROIT (Dec. 11, 2012), http://www.huffingtonpost.com/2012/12/11/michigan-right-to-work-passes-house_n_2278021.html (last visited Dec. 22, 2015).
[86] Monica Davey, *Unions Suffer Latest Defeat in Midwest With Signing of Wisconsin Measure*, THE NEW YORK TIMES (Mar. 9, 2015) http://www.nytimes.com/2015/03/10/us/gov-scott-walker-of-wisconsin-signs-right-to-work-bill.html (last visited Dec. 22, 2015).

court systems of each of these states,[87] battlegrounds in Colorado (2013)[88] and Missouri (2015),[89] and a national right-to-work bill sitting in both houses of Congress,[90] the right to work is once again front page news. Both pro-union backers and RTW supporters have stepped up the rhetoric a notch, and created a boiling political issue.

In attempting to look at the landscape from an objective point of view, one can certainly see valid arguments on both sides. There is no doubt that forcing a worker to join a union and/or to pay union dues (or the equivalent) may be abhorrent to an individual who has no warm feelings about unionism, and can certainly be viewed as a diminishment of his or her constitutional rights. On the other hand, there is no denying that right-to-work legislation can have a negative impact on labor unions, most apparent in bearing the cost to represent workers who pay no union dues. The free-rider problem has long had a strong negative financial impact on unions. If the United States views unionism as the "norm" of the industrial sector (and the Wagner Model certainly can be said to have been institutionalized in American society), should society be attempting to aid unions rather than passing legislation that threatens their very existence?

Not unlike the Obamacare conundrum, where citizens may desire universal healthcare and acceptance of pre-existing medical conditions, but dislike being forced to buy health insurance even though that is the only way the system will work, some workers may dislike the concept of unionism and its interference with individual liberties, but may well recognize that unions are necessary for the protection of workers' rights. How can this problem be addressed?

This paper has attempted to show the problems that exist within the current system of unions versus the right-to-work movement, particularly as viewed from a legal rights perspective. Valid arguments are being made on both sides. It is possible that the union movement and RTW legislation cannot co-exist in the same economy, at least not without significantly impairing the representative functions of American labor unions. How can this ever be a "win-win" situation for *both* groups?

Perhaps this is where the concept of members-only unions can be a partial solution. If right-to-work legislation is viewed as incompatible with the American labor movement, leading to constant (and shrill) political battles, members-only unions can be that middle ground where both groups can co-exist. Workers who have no desire to join a union nor to pay union dues will never be put in that situation. Unions will not be charged with having to support free-riders, which will in part offset a loss of dues-paying members, and will have a more totally committed membership, leading to a more robust organization. A more robust organization can possibly lead to greater

[87] See, e.g., Curtis Skinner, *Unions Challenge Wisconsin's New 'Right-to-Work' Law in Court*, REUTERS (Mar. 10, 2015), http://www.reuters.com/article/us-usa-wisconsin-unions-idUSKBN0M706T20150311 (last visited Dec. 22, 2015).
[88] Ed Sealover, *Colorado Right To Work Bill Gets Quick Axing*, DENVER BUSINESS JOURNAL (Jan. 23, 2013) http://www.bizjournals.com/denver/blog/capitol_business/2013/01/colorado-right-to-work-bill-gets-quick.html (last visited Dec. 22, 2015).
[89] Alex Stuckey, *'Right To Work' Measure Dies in Missouri House*, ST. LOUIS POST-DISPATCH (Sept. 17, 2015) http://www.stltoday.com/news/local/govt-and-politics/right-to-work-measure-dies-in-missouri-house/article_99a9ee30-364c-5abc-8cd6-c1394cdc3435.html (last visited Dec. 22, 2015).
[90] *National Right To Work Act*, NATIONAL RIGHT TO WORK COMMITTEE, https://nrtwc.org/facts-issues/national-right-to-work-act (last visited Dec. 22, 2015).

union satisfaction among union members (something that has been questioned in non-RTW states).[91]

There are no easy answers to the union versus right-to-work groups, and the problem is not going away, based on the status quo. If an alternative model for labor-management relations can be found, it may be worth considering.

[91] Steven Lance Popejoy, *Effects of Right-to-Work Laws: Can They Include Higher Levels of Satisfaction for Union Workers?* 6 Journal of Business and Leadership 89 (2011).