Unions are a corporatist institution, and as such they cannot prosper in a competitive economy.

The Rise and Decline of Unions

By Michael Wachter
University of Pennsylvania

Union membership, as a percentage of the private sector workforce, has been in decline for 50 years. The cause of this unrelenting decline is a single, fundamental factor: the change in the United States economy from a corporatist-regulated economy to one based on free competition. Unions are central to a corporatist regime and are peripheral in a liberal pluralist regime.

To understand the causes of the decline in union membership, it is necessary to return to the period of the original growth in union power — that is, to the New Deal. In examining the differences in the political economy between today and the New Deal, one must look not only to labor law, but also to corporate and antitrust law. Unions were successful in the 1930s when the goals of labor law were consistent with the goals of corporate law and antitrust. Those goals are in conflict today.

Most labor commentators have explained the decline in union membership by a confluence of unrelated economic and legal forces. Labor economists typically stress economic explanations, which vary from compositional shifts in the job structure to increased competition both domestically and internationally. On the other hand, labor law commentators naturally focus on labor law explanations, such as the difficulty of controlling management opposition to unions. This article argues that both economic and legal forces have to be viewed through the same lens. What matters is the choice of the political economy. That political economy determines the role of unions.

Michael Wachter is the William B. Johnson Professor of Law and Economics and co-director of the Institute for Law and Economics at the University of Pennsylvania Law School.

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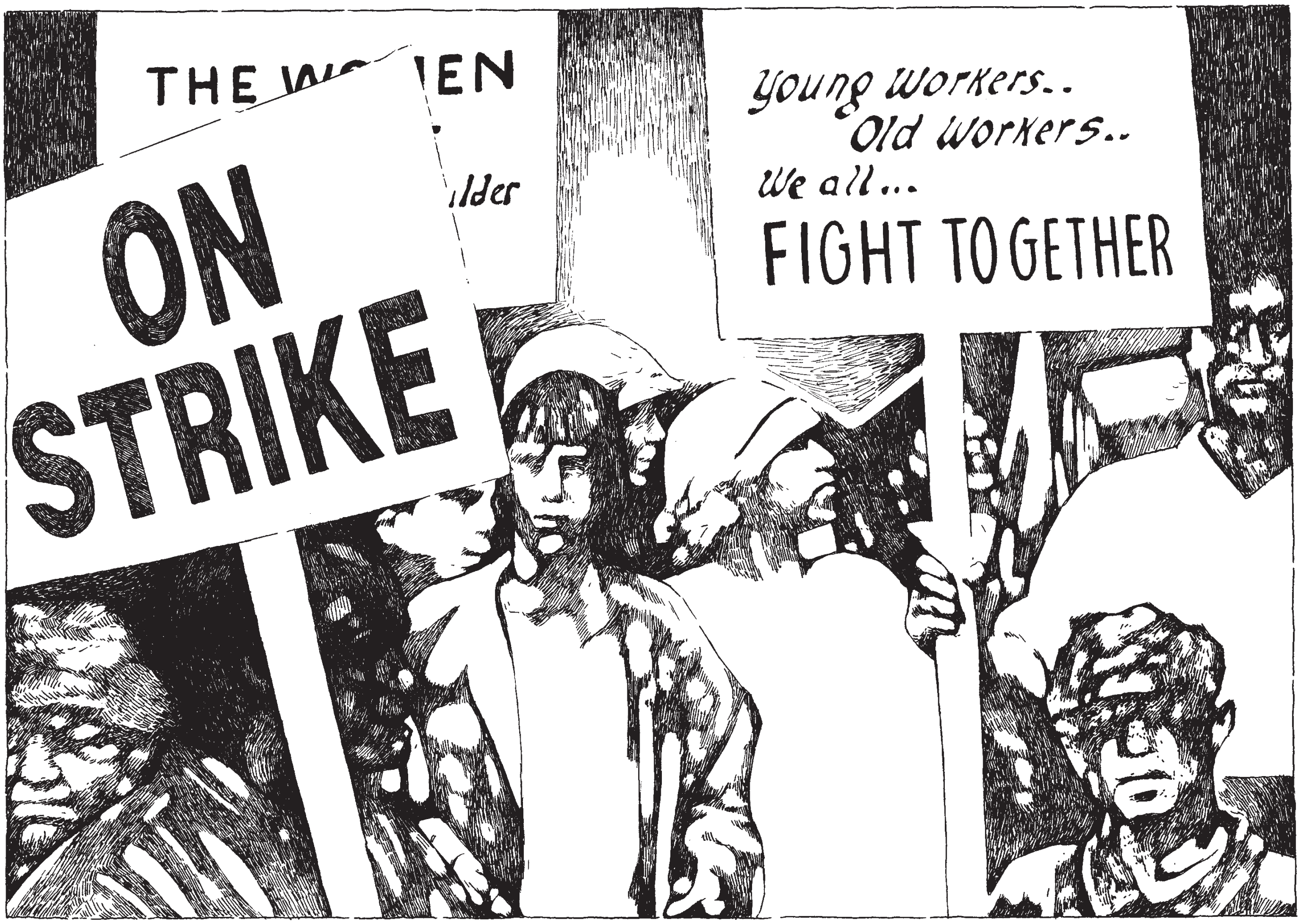
The historical story of U.S. unions plays out in two acts: the first of nearly exponential growth, and the second of decline. The theme of the first act is the Franklin Roosevelt administration's adoption of a corporatist economic policy, which was the key innovation of the National Industrial Recovery Act (NIRA). Corporatism views free competition as a destructive force that has to be both controlled and channeled through institutions that practice "fair competition" under the watchful, mediating power of the government. In corporatism, fair competition means the "stabilization of business" with prices at levels that support "fair" union wages, and an economic policy that responds to institutional actors such as unions and corporations rather than to individuals.

During the first act of the story, the union movement quickly came to a position of substantial strength and prominence. The goal of unions — to take wages out of competition — was a near perfect policy fit with corporatist ideology. Labor unions thus played a central and positive role, as a counterweight to the power of corporations and as a separate institutional force in the adoption of economic policy. In the structure of this period, unions were seen as acting in the public interest.

The second act began with the end of the Korean War. Although union membership, as a percent of employment, peaked after World War II, it remained at or near the peak through the end of the Korean War. In that sense, the first and second acts were separated by an eight-year intermission, where the groundwork was laid for the decline in unions.

The second act, unlike the first, was not marked by singular events such as the passage of NIRA or the adoption of price and wage controls to deal with the exigencies of World War II and the Korean War. Rather, the second act evolved in steps as the legacies of the corporatist past were gradually replaced with an economic policy that had but one primary theme: the country is best served by a competitive economy. In a com-



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petitive economy, nothing of importance is taken out of competition — not even labor costs. Consequently, as the nation's policies became pro-competitive, attempts to take wages out of competition became difficult to accomplish.

CORPORATIST STRUCTURE

What is corporatism? As described by one commentator, corporatism is one of the three great "isms" of the 20th century, along with communism and liberal pluralism (the regime in place in the United States today). Although pure forms of any of the three movements do not exist, pure forms serve as useful reference points. In terms of jurisprudence, the three can be differentiated in terms of a core question: whose preferences count when the sovereign makes its policy decisions?

Corporatism has a complex structure and unions figure prominently in its workings. The pivotal distinction between corporatism and pluralism is that in corporatism, groups as well as individuals are enfranchised. Individuals who belong to groups, in a sense, get to have two or more votes, and their "group votes" may be the most important. As one commentator described it, those outside the shield of a recognized negotiating group have only "the devalued currency of electoral representation." Rather than one person–one vote, it is the groups that hold sway in determining government policy, with the more powerful groups having the most votes.

Corporatism also seeks to limit the number of groups with access to the state. Where liberal pluralism envisions an unlimited number of interest groups acting essentially as so many atomistic actors creating a competitive political marketplace, corporatist theory sees a limited number of groups, each wielding substantial political power. Groups are assembled into hierarchies, with "peak associations" at the top holding the most influence with government policymakers. In corporatism, it is not the local unions but the national unions, and even more so the federations, that are expected to wield power.

Corporatism emphasizes a cooperative relationship among groups and between the state and different groups. This is based on two principles. The first is the conception of some sort of objectively cognizable "public interest" that is articulated by the government with consultation from the major groups. Once the public interest is expressed, the various groups are expected to adapt their policies to support the public interest. The peak associations are expected to exert discipline among their constituent local groups so as to maintain cohesive support for national policies.

THE GREAT DEBATES

Although the term "corporatism" is not well known in the United States, corporatist policies had been debated in European political circles since the late 1800s and were formally adopted by a number of countries in the 1920s and 1930s, most notably Italy. The term never became an articulated political theory or policy in the United States, even when the Roosevelt administration was adopting important planks of the theory's structure in the form of NIRA. But corporatism was the heart of Roosevelt's New Deal in his first term.

In the wake of the Great Depression, many key policy debates in the United States were being decided in favor of fair competition over free competition. Policymakers grappling with questions affecting labor, antitrust, and corporate law were in agreement that unregulated competitive forces were destructive and were the cause of the Great Depression.

In the labor market debate, Malthus' view that population growth would always lead to a pool of unemployed workers was still a strong force. John R. Commons, one of the original giants of industrial relations, argued that "cutthroat competition" among workers set the market wage at the wage that the "cheapest laborer" would be willing to accept. In Commons' view, unions or minimum wage legislation could help break the excessive competition without causing job losses because employers would respond to the higher wage by insisting on offsetting gains in productivity.

Those institutional theories took a holistic approach to labor markets that were appealing on one level, but highly confused on another. Commons lacked an equilibrating framework that allowed wages to rise with the productivity of the workforce or, if nothing else, to avoid a free fall to subsistence level. A modern theory of wages was being developed by Sir John Hicks, beginning with his then-controversial book *The Theory of Wages* in 1932. But Hicks' construct of competitive labor markets was far from popular, or even well-known, when NIRA was being drafted.

In the antitrust sphere, progressives were winning the debate. They believed antitrust should promote competition in the form of a large number of small, locally-owned firms. The progressives were concerned about the growth of large firms because of the political implications: large firms represented an accumulation of political power in a few, powerful hands. At the time of the New Deal, the Great Satan to the progressives was the grocery store chain known formally as the Great Atlantic and Pacific Tea Company, but more commonly known as A&P. A&P was efficient and had low prices, and it was precisely that efficiency that threatened to destroy numerous family-owned and small businesses.

The progressives' push for legislation to protect small business culminated in the passage of the Robinson-Patman Act of 1936. It is now received wisdom that the act was a product of the pessimistic view that unregulated competition meant destructive competition. More specifically, the act was grounded in the strongly held belief that the success of A&P in taking market share from small local stores had to be constrained.

For corporate law scholars like Adolf Berle, the Great Depression appeared to confirm their darkest fears. Berle was one of the architects of NIRA and had co-authored, with Gardner Means, the influential book *The Modern Corporation*. Berle and Means predicted that large corporations would amass enormous political power that would overshadow that of the government. The prediction reflected the authors' observation that the modern corporation, unlike earlier business organizations, was marked by a nearly complete separation of ownership and control. To the authors, this meant that the senior managers who controlled the corporations might well act to amass political power, even if such power had no economic rationale, because it was the shareholders' money that would be spent.

To solve this problem of managerial empire building, Berle wrote that the "rigid enforcement of property rights" of passive shareholders would give way in the face of a "convincing system of community obligations." Once developed, narrow shareholder interest in maximizing the value of corporations would need to give way to broader social concerns. Ultimately, Berle favored a federal fiduciary law principle that would require managers to pursue well-laid national goals, but were otherwise responsible to shareholders.

THE NIRA EXPERIMENT

The passage of NIRA represented the adoption of corporatism by the United States and was recognized at the time as drawing from Europe's corporatist models. At the core of NIRA was its codes of fair competition for individual industries. Trade associations, as the hierarchical peak groups, would be empowered to recommend codes of practices for their industries. The codes, once approved by the National Recovery Administration (NRA), were legally binding on all firms in the industry.

The codes offered business firms an unusual plum: legalized concert of action as a way out of the Depression-induced price cutting that had led to large numbers of bankruptcies. The tradeoff was that codes, in order to be approved, also had to provide strong support for unions. The intent was to allow corporations to charge "fair prices" rather than competitive prices so that they, in turn, could pay "fair wages" rather than competitive wages.

While the codes were binding in theory, they presented such an unworkable enforcement burden that, in practice, they were largely voluntary. In effect, the primary enforcement mechanism was the Blue Eagle, the prize awarded to companies that complied with the industry codes. The Blue Eagles could be displayed publicly to advertise the company's good standing with the NRA.

The unions were major beneficiaries of NIRA. The spur for the creation of the modern labor union movement was the act's Section 7a, which, besides restating the right of labor to organize, also established unions' freedom from employer interference. Even more importantly, unions now had a positive political role: unions were to be the force that would ensure that corporations used their price-fixing gains to pay the fair wages that were considered fundamental to economic recovery and long-term stability.

Roosevelt's goal of constructing a corporatist economy with requisitely strong unions was at odds with the 1932 reality that unions were weak and unimportant on the national scene. Things had to change quickly, and so they did. Unions campaigned for worker support on the platform that "the president wants you to organize." In the two months following the passage of NIRA, the American Federation of Labor added 340 new federal and local charters to their existing 307, and added an additional 1,196 charters over the next year. William Green, president of the AFL, credited Section 7a with adding 1.5 million new union members — a more than one third increase — by the time of the October 1933 AFL convention.

COLLAPSE NIRA got off to a fast start, but it fell apart almost as quickly. The internal contradictions and the unnatural alliances that supported the act were too great. To succeed in the new system, unions and business had to exercise self-restraint in their bargaining demands and to be "responsible," supporting national priorities over their own priorities. This did not happen. No sooner did industrial codes set fair prices then cartel members started cheating on the price to gain additional customers and profitable volume. Non-compliance begot further non-compliance, as code-abiding businessmen began to feel the pinch of competition from cheating firms. Meanwhile, labor unions were unsatisfied with putting the NIRA-defined public interest above their goal of improving members' economic position. The result was an increase in strikes and lockouts as labor unions fought for greater benefits.

The new social ethic propagated by the system — everyone working for the public good — had simply not caught on. The NIRA leadership wanted a system where "fundamentally decent businessmen would not be forced by competitive pressures to exploit their employees." However, the drafters forgot to train the fundamentally decent businessmen and labor leaders in the new cooperative etiquette that was the centerpiece of the system. Simply put, neither management nor labor was willing to play within the new corporatist structure. Corporations were unconvinced that the relaxation of the antitrust laws was sufficient to compensate them for the cost of Section 7a. Union leaders were in a similar position as members' aspirations and militancy paid little heed to the cooperative spirit required for corporatism to work. The numerous union organizing and bargaining conflicts with businesses overwhelmed the mediating capacity of the NIRA leadership.

Adding additional stress to the structure, the progressives' support for NIRA was declining. Progressives were unhappy with the growing concentration of power in Washington and with the cartel-inspired price increases permitted by the codes. Reflecting the internal contradictions of the system, the progressives in Congress began to challenge the codes' price-fixing practices as illegal under prevailing antitrust law.

Before NIRA could completely unravel on its own, it was declared unconstitutional by the Supreme Court. Today, NIRA rests in the dustbin of history, occasionally remembered as the United States' most well-formulated experiment with a corporatist ideology that made unions a public good and provided them with a seat at the highest tables of policymaking.

THE NLRA AND POST-NIRA INDUSTRY REGULATION

On the surface, the National Labor Relations Act (NLRA), which was quickly enacted to replace NIRA's labor policy, was modeled after NIRA. Although both were drafted by Sen. Robert Wagner (D-N.Y.), the NLRA was different from NIRA in three key respects: First, the NLRA replaced voluntarism with mandates and a new enforcement mechanism. Second, the NIRA system — containing integrated labor antitrust and corporate law policies — was replaced with a labor policy working in isolation. Finally, the passing of the baton from NIRA to the NLRA significantly reduced the policy role of unions because peak associations, including labor, were no longer seated at the government's policy table.

On balance, those key differences would eventually prove to be harmful to organized labor. While unions had won in the short term with stronger enforcement mechanisms against employers' ability to interfere with unionization and with statutory protection against a newly recognized list of unfair labor practices, they lost in the larger picture because their key supports — ancillary industrial policies and the government's need to foster its peak associations — were gone.

Labor commentators talk about the cooperative business/labor environment that Senator Wagner intended to create with the NLRA. However, absent the elaborate non-labor market policies of NIRA, it is difficult to imagine why Wagner or anyone else could believe that business leaders would now voluntarily cooperate and agree to pay a "fair" wage rather than a "competitive" wage when cooperation had already failed to work under NIRA. While companies could be expected to obey the mandates enforced by the National Labor Relations Board, voluntary cooperation was hardly to be anticipated.

REGULATION The adoption of the NLRA and the abandonment of a formal corporatist structure did not coincide with a new era of free competition. In its place was a host of industry-specific regulatory mechanisms. Indeed, from an administrative law perspective, the New Deal is best remembered for the creation or expansion in the powers of regulatory agencies. Examples include the Interstate Commerce Commission, an existing agency whose jurisdiction was extended from railroads to the trucking industry; the Civil Aeronautics Board for the fledgling aircraft industry; and the Federal Power Commission, whose jurisdiction was extended to natural gas and electricity.

The theories behind the regulation of individual industries were the natural progeny of NIRA. The key elements were all there: There was regulation on entry by new firms or exit of existing firms. To assure the firm's profitability, prices were set administratively, usually with heavy input from the regulated corporations. This prevented profit-threatening price competition that might jeopardize the ability of firms to pay the unionized wage rates. These regulated sectors became the most strongly unionized, with the highest union wage premiums.

Full-blown corporatist policies, including economy-wide wage-and-price controls, returned with World War II in response to the need for increased production of war machinery. Given the exigencies of the war, Roosevelt replaced the soft sanctions of NIRA with heavy-handed, authoritarian sanctions. The irony of corporatism is that the voluntarism that it preaches works best when "voluntarism" is backed by the threat and actuality of government sanctions.

The Roosevelt administration intervened in private sector labor/management relations with unprecedented frequency and severity to prevent labor/management disputes from affecting war production. When dispute resolution failed, the government had a new policy option to help the parties resolve their disputes: executive orders allowing the government to seize companies. From 1941 to 1945, more than one-third of the top 100 American corporations were seized either in whole or in part. Among those seized were railroads, coal mines, and even the Montgomery Ward department store.

HIGH-WATER MARK Union membership grew exponentially between the early days of the New Deal and the end of World War II. Union membership increased 33 percent from 1933 to 1935, when NIRA was in operation. Union density — the percentage of employees who were union members — jumped from 11 percent of the economy to 26 percent between 1932 and 1940. By 1945, union density reached its peak level of 34 percent — a percentage it would never reach again. Thus, the entire gain in union density occurred in a period of 13 years. In the same period, union membership increased nearly five-fold from 2.9 million in 1932 to 13.8 million in 1945.

By the end of World War II, however, unions were experiencing a downturn in political popularity. Unions were now less the underdog, and strike activity both during and after the war had changed public opinion. As early as 1941, 75 percent of people favored a complete ban on strikes — no matter the cause, no matter the effect on defense. After several wartime strikes, an angry Roosevelt condemned the "selfish preoccupations of civilians," and in 1944 he supported a National Service Act that would require Americans to either work or fight. The changing sentiment was captured in the passage of the Taft-Hartley Act in 1947.

The political backlash contributed to stagnant union membership from the end of World War II until the beginning of the Korean War. Once again, the need to mobilize the economy for a major war pushed the Truman administration and Congress into re-instituting, for the last time, integrated corporatist economic controls. The returning corporatist policies performed the magic they had done twice before. Union membership increased from 13.78 million in 1950 (slightly below the level reached in 1945) to 16.36 million in 1953, and union density, after falling from 34 percent to 30 percent during this period, climbed back to 33 percent.

THE LONG DECLINE

The central point of this article is that the decline in unions is due to one factor — the shift from a corporatist to a highly competitive economy. If that is the case, and if corporatism died with the Korean War, then there is a puzzle. Union density shot up to its peak in just 12 years, but took another 46 years to fall back down to pre-NIRA levels. Why has it taken half a century for unions to decline so that they are largely a niche movement in the private sectors of the economy?

The answer is that the dismantling of the corporatist economy was itself a long, drawn-out process, taking roughly half a century. Various economic controls remained popular through the 1960s, industry-specific regulation from the New Deal was not significantly rolled back until the 1980s, and — most fundamentally — it took time for the Great Debates to transition from pro-corporatist outcomes to pro-competitive outcomes.

For the purposes of this article, I cite a few major transformational political and legal events to demonstrate that it indeed did take a long time to arrive at what we take for granted today: a highly competitive United States economy.

TAFT-HARTLEY To most labor law scholars, the Taft-Hartley Act represents one of the key causal factors leading to the decline in unions. Taft-Hartley certainly represented a re-balancing in favor of management of the strike powers of the two sides by making certain union practices illegal.

However, the adoption of the Taft-Hartley amendments was not the cause; it was a symptom, one of the first indicators of the forces of change that were afoot. Economic policy was in the early stages of moving to support a highly competitive economy and the original Wagner Act was not in step with the changes.

POLITICAL INTERVENTION Presidential-level interference in collective bargaining outcomes — one of the hallmarks of a corporatist regime — was still an option in the 1960s when strikes or wage-and-price increases were at odds with public policy. One of the most notable incidents was President John F. Kennedy's 1961 clash with major steel producers. President Kennedy had intervened publicly in the stalled negotiations between the big steelmakers and the United Steel Workers, forcing the steel companies to agree to a wage increase higher than they favored. Afterward, the steel industry announced increases in steel prices that steel executives felt necessary to cover the wage increase, but Kennedy characterized the prices as "'irresponsible defiance' of the public interest." Within three days, and under intense pressure from both President Kennedy and Robert Kennedy's Justice Department, the steel industry announced a rollback of prices to the level allowed by the president.

In keeping with the legacies of corporatism, President Kennedy publicly stated his position that the government had the right to look over the shoulders of capital and labor, and to insist that any agreement they reached respect the national interest. The president, however, was looking to the past rather than the future.

President Reagan's intervention in the air traffic controller dispute in 1981 was entirely different in form and substance from President Kennedy's intervention in the 1961 steel negotiations. When union negotiations stalemated, nearly 13,000 of the 15,000 members of the Professional Air Traffic Controllers Organization (PATCO) walked off the job. President Reagan responded with a threat to fire the strikers for violating the no-strike clause of their federal employment contract if they did not return to work within 48 hours. Only 1,000 of the strikers returned to work, and the remaining 12,000 were fired.

Although the firing of the PATCO workers was allowed under federal law and had no direct implications for the private sector, it had enormous indirect effects. Ever since the Supreme Court's 1938 decision in *Mackay Radio*, unionized firms could permanently replace striking workers. Although this was a potentially successful strategy in cases where union workers were paid a premium over market wages, it was not used by major firms for fear of adverse pressure by the president. Once a president had himself used the strategy, however, firms were willing to adopt or threaten to adopt the strategy. Perhaps the most notable example occurred in 1992 when heavy-machinery manufacturer Caterpillar ended a five-month strike by 12,600 United Auto Workers members by beginning to hire replacements for the striking workers.

DEREGULATION The industry-specific regulations, the mini-NIRAs created during the latter half of the New Deal, were largely dismantled over the course of the 1970s and 1980s. These industries had been a key source of strength for labor unions because their full-cost pricing schemes allowed corporations to pay fair wages without suffering competitively.

The opening salvo in deregulation was announced on February 18, 1975, when President Gerald R. Ford disclosed that he would propose legislation deregulating the airline industry. Ford's proposal became law during the Jimmy Carter administration in the form of the Airline Deregulation Act of 1978. The act loosened controls and phased out the Civil Aeronautics Board. The Interstate Commerce Commission was similarly sunsetted through actions instigated by the Motor Carrier Act of 1980. Deregulation in the utility industry was instituted in 1978 with the Public Utilities Regulatory Act and the Natural Gas Policy Act, and it was finalized in the early 1990s through a series of Federal Energy Regulatory Commission orders.

The Justice Department was the moving force behind telecommunications deregulation when it called for the breakup of AT&T in 1981. Although the strongest supporters of a regulated telephone system had always been AT&T and the labor unions, it was believed to have strong public support as well. When AT&T settled and agreed to a deregulation plan under Judge Harold Greene, there was no longer much public support for cartel-like regulatory systems.

FIDUCIARY DUTY The last major event in the story of the decline of corporatism went largely unnoticed by labor law and labor relations experts because it occurred in a courthouse in Delaware. The case, *Unocal v. Mesa Petroleum*, involved a quintessential intersection of labor and corporate law: can the directors of a corporation reject a hostile tender offer on the grounds that a rejection was better for employees, customers, or other stakeholders, even when such actions might make shareholders worse off?

The Delaware Supreme Court's answer was no. In *Unocal*, the Court held that, although the directors could weigh other considerations and could use their own informed position as to what constitutes the best interests of shareholders, it was for the shareholders that the corporation was to be managed. This position was drawn even clearer in *Revlon v. MacAndrews and Forbes*, a case where the directors had decided to sell the corporation for cash. Because the shareholders would no longer have a claim on the corporation after the transaction was complete, no concern for the long-term interests of the corporation could be related to a shareholder benefit, leading the Court to conclude that management's fiduciary duties required the directors to sell to the highest bidder.

This battle over corporate law had major implications for organized labor. The board of directors' fiduciary duty is to manage the corporation so as to benefit the shareholders. Union pay premiums resulting from an interest in paying a "fair" rather than a "competitive" wage is antithetical to the interests of the corporation unless it can be shown that shareholders are better off when the company agrees to pay such a premium. As we see below, not even the most ardent supporter of unions makes this claim. Unions redistribute profits from shareholders to workers.

THE GREAT DEBATES REVISITED

While public policies were playing out the second act of the union story — replacing the 1930s-inspired corporatist policies with today's competitive policies — the great debates of the 1930s were also being resolved in favor of free rather than fair competition.

The dismantling of the corporatist economy was a long, drawn-out process, resulting in unions slowly declining over half a century.

The antitrust debate was the first to settle in favor of competition. One of the stress points in the Roosevelt administration from the very beginning of NIRA was its implications for antitrust policy. Once NIRA was out of the way, and with Roosevelt's progressive support base clamoring for an end to cartelization, Roosevelt appointed Thurman Arnold as chief of the Antitrust Division of the Department of Justice. Arnold was a strong believer in competitive outcomes, and his appointment signaled the end of both the cartelization experiment and the end of any serious intellectual debate that antitrust should be used to restrict competition rather than to promote it.

As noted above, Sir John Hicks' modern neoclassical theory of the labor market was being developed during the 1930s, but it did not become accepted wisdom until the 1950s. A key insight of his theory is that a competitive labor market is efficient in that one cannot generate higher wages without having lower employment. Consequently, while unions could raise wages above competitive levels, the result would be more unemployed workers. By now, it is generally accepted as an empirical matter that labor markets are generally competitive. In other words, the debate between the latter-day Malthusians such as John Commons and the neoclassical economists has been decided in favor of the latter.

By the end of the war, the first academic articles were appearing that saw the now-powerful unions to be as much or even more of a problem than large corporations. Henry Simons wrote the first major academic article arguing that unions, along with corporations, had become part of the problem of concentrated power. Friedrich Hayek weighed in with *The Road to Serfdom* and Milton Friedman, with *Capitalism and Freedom*, gave support to liberal pluralism. Although these books may appear extreme to some modern readers, they were of a time when public intellectuals and business and union leaders last debated the pros and cons of the three great "isms."

NEW PUSH By the late 1970s and early 1980s, most labor economists were documenting the fact that unions had raised wages above competitive levels, a clearly self-serving goal. In several respects, Richard Freeman and James Medoff's *What Do Unions Do?* is the last attempt to provide support for the fair- and union-wage viewpoint. Critical to the Freeman-Medoff thesis is the claim that unions are primarily capturing monopoly rents or managing to increase productivity, thus offsetting the higher union wage rate.

In a competitive economy, firms with high labor costs lose market share to firms with lower labor costs unless there are other, offsetting economic advantages such as increases in productivity. Do unions achieve offsetting productivity gains? There is little empirical support for the proposition and no support for the claim that any productivity enhancement effect is large enough to offset the wage premium. The decline of unions throughout the competitive private sectors of the economy further confirms that there are no offsetting features.

Industry-based regulation remained popular among commentators until the early 1970s. George Stigler's influential 1971 article "The Theory of Economic Regulation" began to change the debate. He criticized as idealistic and unrealistic the view that public regulation would benefit the public interest. Instead, he claimed that the main beneficiaries of regulation were the regulated companies, which is predictable given that regulation is created in the political process where politicians curry favor with interest groups, including the regulated companies. Stigler's article and Alfred Kahn's critique of regulation as being economically more costly than beneficial were factors that turned the tide in the debate about industry regulation.

An interesting feature of the debate is the change in the chords being sounded. Stigler's "capture" theory is just a sign of how far the corporatist ideal had faded in people's memory. In the corporatist economy, the regulated parties were supposed to help set the prices and wages. In Stigler and Kahn's analysis, the only benefits and costs that count are those of the consumer; the special interests of small businesses are given no weight. No special attention is paid to the goals of labor unions and fair wages. The only goal is achieving the competitive price in a competitive economy.

The great debates in corporate law ended when key predictions were proven wrong by actual economic and political developments. The Berle and Means position rested heavily on the assumption that economic power would continue to consolidate into a few extremely powerful corporations. That did not happen. Berle and Means also believed that the separation of ownership of control would create agency cost problems that would be nearly impossible to constrain, with the result that firms would be managed to amass managerial wealth and political power, rather than stockholder wealth. That did not happen either and even Berle was later to recognize that federal securities laws and state corporation law had become successful in controlling the agency costs of the modern corporation.

This left the normative question as to whether the corporation should be managed to take account of other constituencies, particularly employees. On this point, the academic answer is almost universally in favor of managing on behalf of shareholders. Indeed, much of the academic literature reaches the same conclusion as did the Delaware Supreme Court in *Revlon*: although other constituencies can be considered when directors discharge their responsibilities, those constituent interests can only be considered when they "are rationally related benefits accruing to the stockholders."

CONCLUSION

Both the rise and the decline of labor unions are remarkable events. Neither was caused by a lucky or unlucky confluence of factors that came together by happenstance to cause the two events. Both were caused by a single fundamental factor: the adoption and then abandonment of key elements of corporatism.

The United States' experiment with corporatism offered a coherent system. Labor, antitrust, and corporate laws were all to pull in the same direction. That coherent story, where unions had a clear and consistent public-supporting role, was not replicated when the political economy switched from corporatism to liberal pluralism. Unions still bargain for a fair wage, but antitrust or industrial regulation no longer provides for above-competitive prices to pay those above-market wages. In corporate law, the directors are asked to manage the corporation so as to maximize the value of the shareholders' interest. High wages that reduce corporate profits are arguably inconsistent with the fiduciary duties of faithful corporate directors.

The unraveling of the coherent corporatist theory leaves unions alone. Unions are a corporatist institution; they do not prosper when the forces of the competitive economy are unleashed. If my analysis is correct, then no change in labor law or labor market policies, absent changes in overall industrial policy, will allow unions to become the mass movement they were in 1945.

On the other hand, unions may be able to continue to prosper as a niche movement in the government sector, which is the sole remaining noncompetitive sector, and in sectors where individual firms or industries take advantage of either uninformed or immobile workers to enforce below-competitive pay packages. Neil Chamberlain, another one of the great figures in industrial relations, wrote in 1959 that "unions' chief contribution to their members' welfare has been to free them from the tyranny of arbitrary decision or discriminatory action in the work place." In those cases where individual firms exercise exploitative power to set wages below competitive levels, the same beneficial results emerge — unions can and should improve the functioning of labor markets. R