The Contested Origins and Future of ‘Right to Work’ Laws

Everything about so-called ‘right to work’ is contested. Its history, purpose, promoters, effects, even its name all remain unsettled. Contrary to how it may sound to one not steeped in the nuances of American labour history or law, ‘right to work’ is not a reference to the right to one’s job or the right to employment, or a rebuke to the norm of American at-will employment. Rather, ‘right to work’ means the right of a worker to be represented by a union, but not pay any union dues or fees. Though it is a relatively obscure issue, especially now that private sector labour density is at its lowest since joining a union became a protected right in 1935, it has become a central tenet of American conservatism and one of the primary battlefields of contemporary labour law.

The US is today at a point where ‘right to work’ is quickly becoming the norm. States have been permitted to pass ‘right to work’ laws since the Taft-Hartley Act amended the Wagner Act in 1947. At the time of writing, a majority of states (28) have adopted such laws. Most recently, states long-known as union strongholds in the industrial Midwest, such as Indiana, Wisconsin, and Michigan, have passed ‘right to work’ laws. In Kentucky, individual counties began passing ‘right to work’ laws, and the Sixth Circuit Court of Appeals has recently held that the laws were permissible.

The story of the development of ‘right to work’ is one of divergent beginnings. On the one hand, there was a string of early railroad cases, where African-American workers challenged the closed shop as a means of gaining rights on the job, arguing that the Constitution guaranteed black workers the right to be full members of majority white unions. On the other hand, a more cynical push for ‘right to work’ was developed by business and racist interests, arguing that the Constitution gave white workers the right not to be a member of a union with black workers. These two strands – represented by contemporaries Ed Teague and Vance Muse – both provide the legal beginnings of ‘right to work’, but it is this latter strain that has persisted.

A Conservative ‘Magna Carta’

The beginnings of the concept of ‘right to work’ can be traced to the American Civil War, and in the labour battles that followed. But the modern proponents of ‘right to work’ – chief among them, The National Right to Work Committee and Legal Defense Foundation (NRTW) – trace the concept to an editorial by the Dallas newspaperman William Ruggles on Labor Day 1941. Entitled ‘Magna Carta’, Ruggles’ editorial consciously re-appropriated labour’s use of the phrase to describe the Clayton Antitrust Act of 1914, which declared that ‘the labor of a human being is not a commodity or article of commerce’, and thereby opened the door for workers to legally organise.

Ruggles’ editorial began with a suggested 22nd Amendment to the Constitution, enshrining the concept of right-to-work in the nation’s founding document. Published as Europe and Asia were crumbling under the weight of World War II, Ruggles explained that the right-to-work issue ‘is a greater crisis than the international situation, for on its solution may depend our ability to face the dark international future’.

Ruggles and the NRTW have spread the idea that right-to-work ‘both as a legal principle and a title’ was Ruggles’s ‘brainchild’, and that it spread organically among disaffected workers. However, decades earlier, one can find articles with titles such as ‘Right to Work’ and ‘Right to Work: The Story of the Non-striking Miner’. These appeared for decades prior to Ruggles’ editorial, always posing the right as one between pro-union and anti-union workers, with employers ostensibly on the sidelines open to whatever the workers decide. By 1930, management organisations, such as the Merchants’ and Manufacturers’ Association had an ‘Open Shop Labor Temple’ and ‘free employment bureau,’ which ‘guarantees to the independent worker the right to work… guarantees to the employer the right to employ…[and] guarantees to the public a continuity of production, construction and service’.

Right-to-work was promoted as a tonic for all workers for all their problems, often with antithetical rationales. The idea was held out to white ethnic workers as a way to distance themselves from workers of other ethnicities and races, while being held out to black workers as a way of achieving full equality in the workplace. Indeed, the 1903 article, ‘Right to Work’, was filled with quotes by rank and file miners such as JR Gorman of West Pittston, who proclaimed to the reporter, ‘I don’t join a union because I object to having some Dago I never saw before coming and ordering me to stop work or to go to work again’.

Ruggles took sole credit for coming up with the idea of right-to-work and described how the idea was quickly picked up and promoted by a notorious Texan named Vance Muse. Muse was famous for fighting against women’s suffrage, against restrictions on child labour, against the 8-hour workday, and for the ‘Americanisation of the Supreme Court’ to counter liberal foreign jurists like Felix Frankfurter.
Muse and his group adopted the right-to-work mantle and set out to explain that without such a law that would allow workers not to join a duly elected union, ‘white women and white men will be forced into organisations with black African apes whom they have to call ‘brother’ or lose their jobs’.

(In)Equality in the Closed Shop

At approximately the same time that right-to-work was being spread by Muse and others, the first ‘right to work’ lawsuits were being brought forth on exactly the opposite premise. In Teague v. Brotherhood of Locomotive Firemen and Engineers, a black railroad fireman named Ed Teague was similarly challenging the structures of the closed shop.

Teague argued that as a member of the union, he was entitled to equal treatment and rights in the union and on the job. However, as a black employee, Teague suffered discrimination in the union and at the job, and equality in the union would be a source of power for disenfranchised workers. In District Court, Teague couched his case in statutory construction, arguing that the Railway Labor Act (RLA) created a duty on the part of the union.

Teague’s attorney, Charles Hamilton Houston, who was a prominent black attorney and law professor (and pro-labour and pro-New Deal) filed subsequent cases on behalf of black railroad workers that relied more and more on constitutional arguments. Two of these cases, Tunstall v. Brotherhood of Locomotive Firemen and Engineer 10 & Steele v. Louisville and Nashville Railway Co. 11, were granted cert by the US Supreme Court and became known as the ‘Railroad Cases’. Penn Law Professor Sophia Lee has succinctly summarised the crux of Houston’s argument in these cases as follows: ‘Industrial democracy, like political democracy, must enfranchise black workers’. 12 Importantly, these cases were not anti-union. Houston – along with the National Association for the Advancement of Colored People (NAACP) and American Civil Liberties Union (ACLU) which joined on as amici – believed that labour offered black workers their best immediate chance to gain a voice and equality in the workplace. They were simply arguing that black workers must have a voice and equality in the union.

Challenges to Fair Share Fees

The alternative to ‘right to work’ laws are fair share or agency fees that enable workers represented by the union to choose not to join or pay for the political or social activities of the union, but oblige them to still pay for those activities that are germane to collective bargaining. These arrangements have been subject to repeated judicial challenge in recent years.

Supreme Court Justice Alito has issued a string of stinging decisions in the last few years that have laid the groundwork to overturning the Court’s 1977 Abood v. Detroit Board of Education precedent, which permitted fair share fees in the public sector. Starting with Knox v. SEIU in 2012, Alito cast doubt on the Court’s precedent regarding fair share fees as having ‘recognised that such arrangements represent an ‘impingement’ on the First Amendment rights of non-members’. In extensive dicta, Alito questioned the Constitutionality of agency fees, as well as the opt-out regime (whereby objectors have to opt out, rather than having members opt in), and explained that the Supreme Court had never critically examined these issues. Alito essentially invited new first amendment challenges to the very issue of agency fees in the public sector.

The National Right to Work Legal Defense Foundation, which brought Knox, was paying attention. Two years later, they were before the Supreme Court again in Harris v. Quinn, a case involving home healthcare personal assistants. 13 This class of workers were excluded from coverage under the 1935 National Labor Relations Act (NLRA), and the case involved state laws that categorised them as public employees for the purpose of granting them union rights. The majority opinion in Harris held that these home healthcare workers in Illinois and every other state that had a similar programme are only ‘partial’ or ‘quasi’ public employees—as opposed to ‘full-fledged public employees’. As such, the Court was unwilling to extend Abood to cover these workers. In paragraph after paragraph, Alito wrote that the Abood Court’s ‘analysis is questionable…seriously erred…fundamentally misunderstood…failed to appreciate…does not seem to have anticipated…did not foresee the practical problems…[and] a critical pillar of the Abood Court’s analysis rests on an unsupported empirical assumption’. Alito was essentially begging for someone to petition the Court with a case that would allow the justices to address the First Amendment issues involved in fair share agreements.

In 2015, the Supreme Court accepted such a case in Friedrichs v. CTA. Based on the cases leading up to Friedrichs, as well as the oral arguments, there was a general consensus that the Supreme Court was likely to impose ‘right to work’ on all public-sector employees. Then Justice Antonin Scalia died unexpectedly on February 2016, and the Court issued a 4-4 decision on the case the following month.

This provided labour a brief respite, but it is likely that a new case, Janus v. AFSCME, will be heard by the Supreme Court. The case raises similar challenges as Friedrichs to fair share fees on constitutional grounds, and with a full court now seated that leans heavily to the right and has shown deep hostility to labour, the Court is likely to agree with the National Right to Work Committee.

1 UAW v. Hardin County, 842 F.3d 407 (6th Cir. 2016).
2 Clayton Act, ch. 323, §6, 38 Stat. 730 (1914), (codified at 15 U.S.C. 17). In response, to the Clayton Act, Samuel Gompers proclaimed that the Clayton Act was the ‘Magna Carta upon which the working people will rear their structure of industrial freedom.’ Jeff Vlasek, Hold Up the Sign and Lie Like a Rug: How Secondary Boycotts Received Another Lease on Life, 32 J.CORPL. 179, 181 (2006).

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3 NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333 (1938)
4 American Ship Building Co. v. NLRB, 380 U.S. 300 (1965)
5 NLRB v. Brown, 380 U.S. 278 (1965)
6 Harter Equipment, 280 NLRB 597 (1986)

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engages in union busting is only a small piece of the puzzle. The bigger issue is that the company, along with many others, knowingly benefits from these efforts. The Special Rapporteur finds this complicity in the violation of workers’ right to freedom of association unconscionable.


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(non-white and leftist) was to be truly a high-risk activist in this historical period.

Each act of violence, each fatality weighed into society’s short-term collective memory: effecting the calculations of future combatants and changes to the overarching structure of state-capital-labour relations within which they were produced. Failure to recognise the frequency and lethality of the violence which so characterised this formative era of American industrial relations leaves our understanding of the American labour movement woefully underdeveloped.

For more detailed discussion, see the following: