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Of Corporatism, Fascism, and the First New Deal

I.

Early in the Autumn of 1934, after several weeks of bureaucratic intrigue within the Roosevelt White House, General Hugh Johnson was forced to resign as chief of the National Recovery Administration. For some months, the President had resisted pressure to dismiss Johnson, who had presided over the NRA in erratic and impolitic fashion. But in late September, after several instances of egregious misbehavior on Johnson's part, the President pushed him out. A few weeks later, General Johnson gave his farewell speech, invoking the "shining name" of Benito Mussolini.¹ It was not the first time that the Director of the NRA, who was widely rumored to have fascist inclinations,² had spoken glowingly of Italian practices.³ Nor was General Johnson alone in the early New Deal years. A startling number of New Dealers had kind words for Mussolini. Rexford Tugwell spoke of the virtues of the Italian Fascist order.⁴ So did internal NRA studies.⁵ And the President himself expressed interest in bringing the programs of "that admirable Italian gentleman" to America.⁶ Moreover, the early New Dealers seemed, to

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1. Quoted in H. Johnson, *The Blue Eagle from Egg to Earth* 405 (1935). For accounts of the forced resignation, see G. Martin, *Madam Secretary: Frances Perkins* 336-37 (1976); B. Bellush, *The Failure of the NRA* 154 ff. (1975). General Johnson's "shining name" speech is noted in J.P. Diggins, *Mussolini and Fascism: The View from America* 280 (1972); P. Irons, *The New Deal Lawyers* 27 (1982); and A. Shonfield, *Modern Capitalism* 310 (1965).

2. See J.K. Ohl, *Hugh S. Johnson and the New Deal* 148, 174, 256 (1985).

3. Most notoriously in his efforts to press upon Frances Perkins a book she identifies as Raffaello Viglione's *The Corporate State*. See F. Perkins, *The Roosevelt I Knew* 206 (1946). I will discuss this pamphlet at length below.

4. See the passages quoted in D. Schmitz, *The United States and Fascist Italy, 1922-1940*, 137 (1988); and M. Vaudagna, "The New Deal and Corporativism in Italy," 4:2 *Radical History Review* 3, 6 (1977).

5. See the passages quoted in Vaudagna, id. at 6-7.

6. For Roosevelt's praise for "that admirable Italian gentleman," see Diggins,

many contemporaries, willing to pass beyond praise into active imitation. To supporters and critics alike, General Johnson's NRA, a vast scheme for delegating governmental authority to private cartels, seemed akin to the "corporativism" of Italian Fascism.⁷ Only with the invasion of Ethiopia in 1935 did the New Dealers abruptly drop their public praise for Italian Fascism⁸ (at the same moment that Cole Porter abruptly dropped, from his popular hit, the line "You're the top! You're Mussolini!"⁹); only in 1935 and 1936, after the Supreme Court struck down the NRA¹⁰ and its companion program, the Agricultural Adjustment Administration,¹¹ did New Deal policies cease reminding contemporaries of those of the Fascist *stato corporativo*.

With *Schechter Poultry* and the invasion of Ethiopia, America's strange moment of flirtation with Italian influences ended. The Roosevelt administration moved into its second phase, the phrase of the so-called Second New Deal,¹² whose policies reminded few of Italian policies. New Dealers ceased speaking kindly of Mussolini. By the end of the 1930s, the United States and Italy had settled into their familiar roles as enemy regimes.¹³

For a generation thereafter, historians preferred to ignore the

supra n.1 at 279, and generally, Schmitz, supra n.4 at 135-52. Diggins notes that "[e]ven as late as 1939 . . . Roosevelt could still look back on Il Duce's regime with some sympathy," id., and discusses FDR's interest in Mussolini's programs, id. at 279-81. Roosevelt, after requesting information from the American embassy in Rome on Fascist deurbanization programs, made it one of his first official acts to appoint a committee to bring similar programs to the U.S. See B. Karl, *The Uneasy State: The United States from 1915-1945*, 130 (1983).

7. An approving *Fortune Magazine* expressed a widespread belief when it declared, a few weeks before General Johnson's forced resignation, that "[t]he Corporate State is to Mussolini what the New Deal is to Roosevelt," quoted in Diggins, supra n.1 at 164. For examples from both opponents and supporters of the New Deal, see Diggins, supra n.1 at 164-66; for details of leading New Deal pro-Fascist sentiment, see id. at 276-83. For the widespread conviction in Italy that the NRA was closely akin to Italian fascist corporativism, see M. Vaudagna, "New Deal e Corporativismo nelle Riviste Politiche ed Economiche Italiane," in *Italia e America dalla Grande Guerra a Oggi* 101 (G. Spini, G. Migone & M. Teodori, eds., 1976).

8. Diggins, supra n.1 at 165, 290-91. But see Schmitz, supra n.4 at 153 ("[T]he straining of relations was only temporary and did not lead to a reevaluation by American policymakers of their favorable assumptions and analysis of Mussolini and Fascism in Italy.")

9. Diggins, supra n.1 at 287.

10. *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

11. *United States v. Butler*, 297 U.S. 1 (1936).

12. For the (somewhat controversial) term "First New Deal," cf. B. Rauch, *The History of the New Deal: 1933-1938*, 205-8 (1944) (cited and discussed in Irons, supra n.1 at 308 n.2); R. Moley, *The First New Deal* (1966). On the distinction between "first" and "second" New Deals see also W. Leuchtenburg, *Franklin D. Roosevelt and the New Deal: 1932-1940*, 162-63 (1963).

13. Schmitz, supra n.4, argues, against the prevailing wisdom, that an essentially favorable attitude toward Italy persisted, in the Roosevelt administration, even after the invasion of Ethiopia.

italophilia of the early New Deal years.¹⁴ Perhaps understandably, the history of American interest in Italian "corporativism," an ill-defined industrial policy involving official state sponsorship of industry cartels and labor unions, remained something of a taboo topic. Indeed, the very word "corporatism"—the commonly-used shortened form of "corporativism"—became a term of opprobrium, rarely used to describe any of the policies of the New Deal years.

But about fifteen years ago, both the scholarly climate and the political climate began to change. In 1973, two prominent historians published articles suggesting that early New Deal government had resembled government in fascist central Europe.¹⁵ A year later, political scientist Philippe Schmitter began a campaign to rehabilitate the term "corporatism." Corporatism, Schmitter argued, should be viewed merely as a form of "interest representation," in which

14. When, in 1967, a leading New Deal historian was called upon to discuss the Roosevelt years comparatively, he felt able to declare flatly that "Mussolini's corporate state did not find [an] American following." W. Leuchtenburg, "The Great Depression," in *A Comparative Approach to American History* 296, 306 (C. Vann Woodward, ed. 1968). If the New Deal had foreign analogues, he added, they were to be found in Scandinavia, not in Italy or Germany; at any rate Roosevelt had been a net exporter of political ideas. *Id.* at 306, 308ff. Cf. also his discussion of the NIRA, devoid of references to foreign parallels, in Leuchtenburg, *supra* n.12 at 57-58. Similarly, Arthur Schlesinger, Jr. in "Sources of the New Deal," in *Paths of American Thought* 381 (A. Schlesinger & M. White, eds. 1963). Many historians have felt obliged to deny that the New Deal had fascist (or communist) parallels: e.g., M. Derber & E. Young, "Foreword," in *Labor and the New Deal* vii (Derber & Young, eds., 1957); Even Diggins, writing in 1972, was unready to concede more than the most superficial resemblance between the NRA and its Italian counterparts. See Diggins, *supra* n.1 at 280.

15. Garraty, "The New Deal, National Socialism and the Great Depression," 78 *American Historical Review* 907 (1973); E. Hawley, "New Deal und 'Organisierter Kapitalismus' in internationaler Sicht," in *Die Grosse Krise in Amerika: Vergleichende Studien zur politischen Sozialgeschichte, 1929-39*, 9-39 (H. Winkler, ed., 1973). Around the same time appeared a number of important studies by Charles Maier, all recently republished. See esp. C. Maier, "Between Taylorism and Technocracy: European Ideologies and the Vision of Industrial Productivity in the 1920s," in Maier, *In Search of Stability: Explorations in Historical Political Economy* 22 (1987) (originally 1970); C. Maier, *Recasting Bourgeois Europe: Stabilization in France, Germany, and Italy after World War I*, e.g. at 545 n.150 (2d ed. 1988) (originally 1975).

The background to this new willingness to site the New Deal in international context was a variety of New Left writings describing the New Deal as a milestone in the development of a "corporate liberalism," a form of government/big business partnership deeply akin to fascism. See esp. R. Radosh and M.N. Rothbard, *A New History of Leviathan* (1972); J. Weinstein, *The Corporate Ideal in the Liberal State* (1968). For the development of this line of literature, see esp. E. Hawley, "The Discovery and Study of a 'Corporate Liberalism,'" in 52 *Business Hist. Rev.* 309-320 (1978). Of course Hawley himself was one of the first to broach the subject of business/government cooperation in the early New Deal. E. Hawley, *The New Deal and the Problem of Monopoly: A Study in Economic Ambivalence* (1966); see also L. Galambos, *Competition and Cooperation: The Emergence of a National Trade Association* (1966). But these earlier writers did not concern themselves with the ideologically charged aspects of their topic.

the state officially licensed a limited number of groups, such as unions or industry associations, to serve as constituent organizations.¹⁶ He conceded that there was a fascist variety of such corporatism, characterized by state-dominated unions and a close collaboration between the state and employers' associations. This fascist corporatism he called *state* corporatism.¹⁷ But he contended that there were also other, *societal* varieties of corporatism, involving a much more benign mutual influence between the state and independent industrial cartels and unions. Some measure of such societal corporatism, argued Schmitter, far from being fascist, was an ordinary form of interest group politics in all modern welfare state—"the concomitant, if not ineluctable, component of the postliberal, advanced capitalist, organized democratic welfare state. . . ."¹⁸ The NRA belonged to the societal variety.¹⁹ Soon after these new winds began to blow in scholarship, new winds began to blow in politics as well. In the presidential campaigns of 1976 and 1980, Ronald Reagan raised a storm of protest by asserting that the New Dealers had admired the Italian Fascists.²⁰

Whether it was owing to the efforts of Philippe Schmitter or the efforts of Ronald Reagan, a vast new literature began to grow, both about the nature of corporatism and about the place of the early New Deal in the dark world of the 1930s. By the late 1980s, it became almost routine for New Deal historians to list resemblances between the New Deal and fascist governments.²¹ At the same time, Schmitter's work stimulated a substantial "neo-corporatist" revival

16. In full, Schmitter's somewhat cryptic definition of corporatism runs: "a system of interest representation in which the constituent units are organized into a limited number of singular, compulsory, noncompetitive, hierarchically ordered, and functionally differentiated categories, recognized or licensed (if not created) by the state and granted a deliberate representational monopoly within their respective categories in exchange for observing certain controls on their selection of leaders and articulation of demands and supports." Schmitter, "Still the Century of Corporatism?," in *The New Corporatism: Social-Political Structures in the Iberian World* 85, 93-94 (F. Pike & T. Stritch, eds., 1974). This carefully crafted definition of corporatism has become standard.

17. Schmitter, *id.* at 103-04.

18. *Id.* at 105.

19. For doubts about Schmitter's characterization, see Brand, *Corporatism and the Rule of Law: A Study of the National Recovery Administration* 18-20 & *passim* (1988).

20. See, e.g., *Washington Post*, Dec. 24, 1981 at A7, col. 1, "Reagan Still Sure Some in New Deal Espoused Fascism;" *N.Y. Times*, Dec. 23, 1981 at A12, col. 3, "Reagan Says Many New Dealers Wanted Fascism."

21. See, e.g., E. Hawley, *The Great War and the Search for a Modern Order* 95 (1979); Karl, *supra* n.6 at 109, 116-17; J. Garraty, *The Great Depression* 182-211 (1986); H.-J. Puhle, "Historische Konzepte des entwickelten Industriekapitalismus: 'Organisierter Kapitalismus' und 'Korporatismus,'" 10 *Geschichte und Gesellschaft* 165, 167 (1984). Much of this literature argues, it should be noted, resemblances that have little to do with corporatism as such.

in political science departments.²² Theorists of industrial policy, too, began to speak in "corporatist" terms, lamenting the NRA episode as a missed opportunity,²³ and arguing that the United States should once again seek corporatist solutions in its bid for world competitiveness.²⁴ This corporatist revival has now made begun to make headway in the legal academic world: in the past few years discussions of "corporatism" have begun to surface in American law reviews. Recent legal literature has included discussions of labor-law "corporatism,"²⁵ contract-law "corporatism,"²⁶ corporate-law "corporatism,"²⁷ and more.²⁸

These revisionist and corporatist stirrings in the academic and political worlds form my starting point in this paper. I want, at this juncture, to turn back to the events of 1933-35. As the corporatist revival grows, I think the time has come to look back at the strange legal culture of the 1930s, and piece together what happened during our NRA episode. The neo-corporatists have not, after all, answered all the questions raised by the NRA experience. The neo-corporatists may be right in saying that not all varieties of corporatism are fascist. They may be right, furthermore, in arguing that the NRA was an example of the benign societal, and not the malignant state, variety. But that does not tell us what, as a matter of intense historical and ideological interest, we desire to know: Did General

22. Of a vast literature, see, e.g., *Patterns of Corporatist Policy-Making* (G. Lehbruch & P. Schmitter, eds., 1982); *Trends Toward Corporatist Intermediation* (P. Schmitter & G. Lehbruch, eds., 1979); *Neokorporatismus* (U. v. Alemann, ed., 1981); *The Political Economy of Corporatism* (W. Grant, ed., 1985).

23. M. Piore & C. Sabel, *The Second Industrial Divide: Possibilities for Prosperity*, esp. 93ff. (1984); and perhaps Shonfield, *supra* n.1 at 309ff.

24. See the discussion of *U.S. Competitiveness in the World Economy* (B. Scott & G. Lodge, eds., 1985) in L.S. Zacharias, "Legal Theory: Repaving the Brandeis Way: The Decline of Developmental Property," 82 *Nw. U.L. Rev.* 596, 643 n.215 (1988).

25. Lothian, "The Political Consequences of Labor Law Regimes: The Contractualist and Corporatist Models Compared," 7 *Cardozo L. Rev.* 1001 (1986).

26. Esp. H. Collins, *The Law of Contract* (1986), reviewed in Beermann, "Contract Law as a System of Values," 67 *B.U.L. Rev.* 553 (1987); and Feinman, "Contract after the Fall," 39 *Stan. L. Rev.* 1537 (1987).

27. M. Stokes, "Company Law and Legal Theory," in *Legal Theory and Common Law* 155 (W. Twining, ed., 1986), reviewed in Morse, "Book Review," 85 *Mich. L. Rev.* 935, 939-40 (1987); Romano, "Metapolitics and Corporate Law Reform," 36 *Stan. L. Rev.* 923, 934ff. (1984).

28. See, e.g., W. Clune, "A Political Model of Implementation and Implications of the Model for Public Policy, Research, and the Changing Roles of Law and Lawyers," 69 *Iowa L. Rev.* 47, 113 (1983), citing R. Unger, *Law in Modern Society* (1976). To be sure, "corporatism" remains a term more of opprobrium than of praise among American lawyers. This is particularly true of commentators on issues of race and gender. See Karst, "Paths to Belonging: The Constitution and Cultural Identity," 64 *N.C.L. Rev.* 303, 344 n.166 (1986); Garet, "Communitarity and Existence: The Rights of Groups," 56 *S. Cal. L. Rev.* 1001, 1041 (1983); Fox-Genovese, "Women's Rights, Affirmative Action, and the Myth of Individualism," 54 *Geo. Wash. L. Rev.* 338, esp. 347ff. (1986).

Johnson *hope* to bring us a fascist variety? Why did he praise Mussolini so lustily? How much of the central European madness of Auden's "low, dishonest decade" touched the minds of our leaders at the moment when the modern American history of industrial and labor legislation was beginning?

These are the questions I want to address. In the course of discussing the susceptibility of General Johnson, and others like him, to fascist theories of corporatism, I hope to reach a better understanding of the place of American government in the world crisis of the early 1930s. I also hope to make some points about the shape of industrial and labor law in the United States, and to offer some thoughts on the future prospects of corporatism here.

II.

Let me begin by offering some definitions and methodological caveats. In particular, I want to say a word about the problematic relationship between fascism and corporatism.

The term "corporatism" is by no means easy to define. As a general matter, one can say that corporatism is the body of political theory that seeks to establish a modern guild order: an order, that is, somehow founded neither on state power nor on individual liberty, but on the autonomy of guild-like intermediary bodies, such as unions and professional associations. Yet such intermediary bodies appear in all modern societies; what is it that distinguishes specifically *corporatist* intermediate bodies from others? Unfortunately, the best scholars at work on the subject have offered discussions that are cryptic²⁹ or vague;³⁰ we lack the sort of definition one wants most for a historical study: a definition both handy and exact.

Perhaps no such definition is possible. Nevertheless, elusive as "corporatism" may be, all orders identified by social scientists as "corporatist" share, to the eye of any American lawyer, one feature: they involve the *delegation* of what most lawyers think of as state powers to private organizations. Accordingly, for purposes of this paper, I will define "corporatism" as the delegation of powers that, in a given society, are generally considered *state* powers, to *private* organizations. Thus to the extent private associations such as bar associations have what most Americans would think of as an *official* power to license professional practice, they are corporatist institutions. Similarly, to the extent industrial cartels have the *official* power to compel compliance with cartel practices, they are corporat-

29. For Schmitter's definition, see n.16 *supra*.

30. Maier's definition: "[t]he term increasingly used to summarize the linkage of public institutions and organized interests. . . ." Maier, *In Search of Stability*, *supra* n.15 at 228 n.3.

ist cartels. And to the extent unions have the legal authority to operate a "closed shop," they are corporatist unions.³¹ Finally, to the extent that a government systematically delegates such licensing or compelling power to private organizations, it is a corporatist government.

Advocacy of such corporatist delegation dates to the nineteenth-century. It has deep roots in the Romantic era fascination with medieval society.³² Its most important expositors were the German academic socialists of the late nineteenth-century—men such as Adolf Wagner and Albert Schäffle.³³ But practical experimentation with corporatist ordering is essentially a twentieth-century phenomenon. In particular, corporatist delegation became quite widespread during World War I, when war governments both in Europe³⁴ and in the United States³⁵ managed their economies in partnership with officially sponsored cartels. Corporatist schemes of the World War I type began reappearing in the early, and particularly in the mid-, 1920s.³⁶ They became quite common in the 1930s.³⁷ Corporatism re-

31. In so defining corporatism in labor law, I come closest to the definitional discussion of Lothian, *supra* n.25 1009. I omit, however, much of Lothian's definition; in particular, I see no reason to agree that "[t]he entire labor force is supposed to be unionized;" it is quite possible to describe individual unions in a partially unionized economy as "corporatist." Other scholars in recent years have described unionization as corporatist without offering much analytical basis for the characterization. See C. Fried, "Individual and Collective Rights in Work Relations: Labor Law and Its Prospects," 51 *U. Chi. L. Rev.* 1012, 1029 (1984); N. Lichtenstein, "From Corporatism to Collective Bargaining: Organized Labor and the Eclipse of Social Democracy in the Postwar Era," in *The Rise and Fall of the New Deal Order, 1930-1980*, 122, 124 (S. Fraser & G. Gerstle, eds., 1989).

32. See esp. H. Heffter, *Die Deutsche Selbstverwaltung im 19. Jahrhundert: Geschichte der Ideen und Institutionen* (1950); M. Elbow, *French Corporative Theory, 1789-1948: A Chapter in the History of Ideas* (1953); M. Bouvier, *L'Etat sans politique: Tradition et modernité* (1986).

33. Of a large literature, see R. Bowen, *German Theories of the Corporative State, with Special Reference to the Period 1870-1919* (1947); Heffter, *id.*; F. Glum, *Selbstverwaltung der Wirtschaft* 13-64 (1924); H. Teuteberg, *Geschichte der industriellen Mitbestimmung in Deutschland* (1961); U. Hientzsch, *Arbeitsrechtslehren im Dritten Reich und ihre historische Vorbereitung* (1970); V. Berghahn, "Corporatism in Germany in Historical Perspective," in *The Corporate State: Corporatism and the State Tradition in Western Europe* 104 (A. Cox & N. O'Sullivan, eds., 1988).

34. For the corporatist character of war economies worldwide during World War I, see the literature cited in Maier, *In Search of Stability*, *supra* n.15 at 247 n.44. On the German war economy, see Maier, *Recasting Bourgeois Europe*, *supra* n.15 at 58, and G. Feldman, "German Business Between War and Revolution: The Origins of the Stinnes-Legien Agreement," in *Entstehung und Wandel der Modernen Gesellschaft: Festschrift für Hans Rosenberg zum 65. Geburtstag* 317 (G. Ritter, ed. 1970); on the French interest in industrial corporatism, never as strong or successful as the German, during and immediately after the war, see *id.* at 70-85; C. Freedman, "Cartels and the Law in France before 1914," 15 *French Historical Studies* 462 (1988).

35. For America, see, e.g., Hawley, *The Great War and the Search for a Modern Order*, *supra* n.15 at 21ff.

36. For Spain, Italy, Austria, Portugal, see Elbow, *supra* n.32 at 123. For the establishment of a (purely advisory) National Economic Council in France in 1925, see *id.* at 127.

mains, in some form, common in the non-American industrial world, from Western Europe³⁸ to (perhaps) Japan.³⁹

There is no general agreement on why such corporatist delegation is so widespread. Many Marxists have seen corporatism as a stage in the decline of capitalism—the stage of “organized capitalism.” According to this view, the cartelization typical of a corporatist order is the result of the efforts of capitalists to unite in order to diminish competition among themselves, and thus stave off the threat presented by organized labor movements.⁴⁰ Others have viewed the phenomenon rather differently—as, for example, the only practical means of managing interest-group bargaining in a developed industrial state;⁴¹ or as a stage in the rise of an interventionist state not yet strong enough to impose its authority without the cooperation of private intermediaries.⁴²

Whatever the explanation for its rise, however, all students of corporatism agree that corporatism and fascism are not the same thing. Not all fascists have been corporatists. While the Nazis⁴³ avowed corporatism from the inception of their movement, the Italian Fascists did not.⁴⁴ Moreover, even in the 1930s, both the Nazis

37. I will discuss the cases of the United States, Germany and Italy, below. For the example of, e.g., Portugal, see P. Williamson, *Varieties of Corporatism* 104ff. (1985).

38. See, e.g., the systems surveyed in *Patterns of Corporatist Policy-Making* (P. Schmitter & G. Lehmbruch, eds., 1982).

39. See, e.g., the literature cited by Romano, *supra* n.27 at 936. To the extent, however, that my definition presupposes a widespread belief, in a given society, that the powers exercised by “private” associations are properly state powers, modern societies in Japan and Europe may possibly not qualify as corporatist. Citizens of those countries may no longer have the sense, still common in the 1930s, that compelling and licensing powers properly belong to the state.

40. The concept was first developed by Rudolf Hilferding in 1915. Its resuscitation began in the New Left era. For insightful discussions, see the contributions to *Organisierter Kapitalismus* (H.A. Winkler, ed., 1974); Puhle, *supra* n.21.

41. Esp. Maier, *Recasting Bourgeois Europe*, *supra* n.15 at 9-10.

42. Karl, *supra* n.6.

43. I leave aside questions about whether or not Nazis and Italian fascists should be classed as representatives of the same “fascist” tendency. Whatever doubts there may be on this score, there is surely no doubt that the Nazis took sufficient inspiration from Italy that theirs can reasonably be described, for purposes of a study of the spread of ideas, as a related movement.

44. Indeed, Italian Fascism was not, at first, a corporatist movement at all; the Fascists hesitated long before they embraced corporatism. See the discussion in A. Lyttelton, *The Seizure of Power: Fascism in Italy, 1919-1929*, 202-03 (2nd ed. 1987); and that in Maier, *Recasting Bourgeois Europe*, *supra* n.15 at 427. The Nazis, too, had, at best, an ambivalent attitude toward corporatism. See A. Barkai, *Das Wirtschaftssystem des Nationalsozialismus: Der historische und ideologische Hintergrund, 1933-1936* 92ff., (1977); Nocken, “Korporatistische Theorien und Strukturen in der deutschen Geschichte des 19. und frühen 20. Jahrhunderts,” in Alemann, ed., *Neokorporatismus* 17, 38; H. Turner, “Hitlers Einstellung zu Wirtschaft und Gesellschaft vor 1933,” *2 Geschichte und Gesellschaft* 89, 104 (1976). For a contrast between the practice and motivation of Nazi and Italian corporatism, see C. Maier, “The Economics of Fascism and Nazism,” in Maier, *In Search of Stability*, *supra* n.15

and the Italian Fascists in many ways only *avowed* corporatism. For in both societies, state power had only in theory been delegated to private organizations.⁴⁵ Indeed, it is not entirely clear why the fascists ever avowed corporatist policies at all⁴⁶ (though I will suggest below some of the reasons why the fascists found it desirable to do so).

Thus the relationship between fascism and corporatism is, at best, tenuous. Nevertheless, it is no accident that fascist associations have dogged corporatism in American minds for so long. For while fascist did not always avow corporatism, when they did avow it, they avowed it very loudly indeed. In particular, during the years 1933-35—precisely the period when the NRA existed—fascists were laboring hard to prove to the world that corporatism was a quintessentially fascist industrial policy. From 1933 to 1935, Italian Fascists made a concerted propaganda effort, the outlines of which I will detail below, to persuade the world that corporativism and Fascism went together, and together offered a solution to economic crisis.⁴⁷ Hitler's newly installed regime did the same.⁴⁸ As a result, while corporatism and fascism were never the same thing, corporatist *propaganda*, during the NRA years, was by and large fascist.

The powerful presence of fascist propaganda about corporatism in the years 1933-35 sets my problem in this paper. In its day-to-day practice, the NRA bore few resemblances to the corporatism of the fascist world. Indeed, as we shall see, the NRA drew principally on indigenous American corporatist tendencies that long pre-dated the rise of fascism. But the *leadership* of the NRA included the kind of unsavory characters—not only General Johnson, but also his colleague Donald Richberg—whose pronouncements make them seem very much like the sort of men susceptible to fascist propaganda. How much impact did the corporatist propaganda drumbeat emanating from Fascist Rome and Nazi Düsseldorf have on the beliefs and aspirations of these men? Did our corporatist experiment, innocent as it may have been in practice, attract fascist sympathizers?

In order to measure the impact of fascist propaganda on General Johnson and his ilk, I will draw my basic account of the corporatist

at 79-80. In practice, moreover, it is quite difficult to distinguish fascist corporatism, at least as it appears on paper, from non-fascist corporatism.

45. For German, see Barkai, *id.* at 95ff.; for Italy, A. Aquarone, *L'organizzazione dello Stato totalitario* (1965).

46. See, e.g., S. Payne, *Fascism: Comparison and Definition* 9 (1980).

47. See M. Ledeen, *Universal Fascism* 114 ff., esp. 117 (1972).

48. Notably through the sponsorship of Thyssen's Institute for Corporatist Studies in Düsseldorf. See Barkai, *supra* n.44 at 95ff. Both the Fascist International and the Institute for Corporatist Studies were dead by 1935, as fascists, under Hitler's influence, moved away from corporatism and toward a greater emphasis on racism. Barkai, *supra* n.44 at 95; Ledeen, *id.* at 123.

ideology of fascism from a source used by Johnson himself: *The Structure of the Corporate State*. This pamphlet, a copy of which is held in the collection of the Hoover Institution, was translated from an Italian original by Oswald Mosley's British Empire Fascist Party in 1933. A typical piece of the sub-intellectual propaganda of Italian Fascism, written by two otherwise unremembered Fascists,⁴⁹ it was, according to the testimony of Frances Perkins, a Johnson favorite.⁵⁰ I will use it as my text, both for discussing why fascists of early 1930s found corporatism attractive, and for determining how much impact fascist ideology had on the leadership of the NRA.

I should emphasize that, in summarizing this pamphlet, it is propaganda I am summarizing—a pastiche of truths, half-truths and alluring pictures offered by partly disingenuous leaders to partly foolish followers. My goal in discussing this propaganda is therefore not to lay out the actual workings of the corporatist aspects of the Fascist state (which are in any case not well characterized by the pamphlet). Nor is it my goal to lay bare the motives of Italian Fascists in embracing corporatism (though I will offer some tentative suggestions on that score). My goal, rather, is to identify the elements of characteristic political argument made by fascists, when those fascists preached the beauties of corporatism to a foreign audience.

III.

The Structure of the Corporate State, the propaganda pamphlet that fell into the hands of General Johnson, was produced at the height of the Italian Fascist experiment with corporatism. The Italian Fascist government officially embraced corporatism in 1926. But it was only in 1930 that the *stato corporativo* put into full operation. And it was especially after 1933 that the Fascists began systematically propagandizing about the beauties of their "corporatist" system, with its Fascist unions and its great cartels, to foreign audiences.⁵¹ The pamphlet in question was indeed, produced at a moment when Italian Fascists decided to spread the corporatist word internationally. In 1933, Giuseppe Bottai, Fascist Minister of Corporations, decided that substantial international exposure for the

49. Neither of the authors of the pamphlet made enough of a name for himself to be listed in any of the standard biographical dictionaries. Guidi was co-editor of the fascist journal *Diritto del Lavoro*, in which the pamphlet in question first appeared in article form. Viglione left no record other than his authorship of the pamphlet under discussion. Indeed, it is because Viglione left no other record that the pamphlet can be positively identified as the one read by Johnson.

50. See Perkins, *supra* n.3 at 206.

51. For the general history, see Lyttelton, *supra* n.44 at 308ff.; Aquarone, *supra* n.45 at 111ff. For early intellectual roots, see P. Ungari, *Alfredo Rocco e l'Ideologia Giuridica del Fascismo* (1963); E. Santarelli, *Origini del Fascismo* 97-177 (n.d.).

Fascist theory of "corporativism" was in order.⁵² It was at that point the British Empire Fascist party commissioned the translation of a brief introduction to the beauties of Italian corporativism by two Fascist lawyers, Rafello Viglione and Dario Guidi, entitled *Elementi di Ordinamento Corporativo*.

That brief introduction emphasized two things: the miseries of class conflict and the farce of parliamentary government. *The Structure of the Corporate State* consisted of a kind of fable of historical political economy. It began with a brief historical account of European developments since the later nineteenth-century, and ended by showing how Fascist corporatism had solved the problems of class conflict and representative government in the modern world. In the beginning, ran the pamphlet's little fable, was class warfare:

The chief characteristic of the present century, in all civilized countries, is the increasingly great and deleterious disputes between the working masses, always more strongly organized, and the capitalist class, also united for self-defence in associations equally powerful. This era has been defined as the era of syndicalism and class-war.⁵³

What was the cause of this rise in syndicalism and class-warfare? The *Structure of the Corporate State* explained that there had been peace in the pre-industrial era of craft industry:

In the past, the mass of workers were distributed in small shops, workshops and businesses dependent on small tradesmen, artisans and agriculturists, and scattered with a certain uniformity over civilized regions. Each workman lived peacefully in the shade of the modest business that was the source of his livelihood and relations between workman and employer had a "family" character in the sense that masters and the dependents felt themselves linked together by the common interest of the prosperity of the business that provided the necessities of life for both.⁵⁴

Industrialization had, however, brought ruin to this happy order. Modern methods of production had brought with them the modern large enterprise. Modern methods of production had also brought with them urbanization of the workforce, attended by "vice and cor-

52. See Ledeen, *supra* n.47 at 74-75. Ledeen notes that a particular demand was felt for English-language propaganda. *Id.* at 75. Whether or not the pamphlet under discussion was produced specifically to meet that felt need, I have not been able to determine. At least one description of the *stato corporativo* by Bottai himself had already been translated into English in 1931: Bottai, "The Corporative State," in *What is Fascism and Why?* 30 (T. Sillani, ed., 1931).

53. Translation and abridgement by Anna Waring, under the title "The Structure of the Corporate State," of D. Guidi & R. Viglione, *Elementi di Ordinamento Corporativo* 1 (1933).

54. *Id.* at 1.

ruption, temptations and desires—especially in simple minds and among poor families—gradually transforming the mentality and soul of the worker who was once accustomed to the healthy simple family life and rural occupations.”⁵⁵ Routinization, meanwhile, had destroyed the modern worker’s joy in his labor.⁵⁶ At the same time, the employer had lost the quasi-paternal affection he had once felt for his workers.⁵⁷ Lack of understanding—indeed, hate—had accordingly come to divide masters from workers, who had formed themselves into warring syndicates. First, workers’ syndicates arose, in part to satisfy emotional needs thwarted by city life:

It is but a short step from the communal life to the trades-union. A short step and a strong impulse to take it—namely, the dissatisfaction of the workers, the awakening in them of desires and needs caused by city life, the impoverishment of some of the industrial groups and the poverty of the masses. These are stimuli more than sufficient to draw the workers together in coalitions having for their first object, by force of numbers, strikes and other forms of violence, the compulsion of the industrialists to ameliorate conditions of labour.⁵⁸

“This grouping of the masses,” the pamphlet went on to explain, “forced the employers to defend themselves by the same methods, forming associations between industries of the same category.”⁵⁹ Thus the European world had been plunged into warfare between opposed associations of employers and workers.

The rise of this warfare would have been quite bad enough. But the situation had been made worse by another feature of modern life: parliamentary democracy. For the great class war had been deepened by the rise of political ambition. Political ambition had corrupted the labor movement. To be sure, not all political activity by labor leaders was bad. On the contrary, labor leaders had at first devoted themselves to social legislation of the best kind. In the end, however, they had been corrupted:

[Labor] leaders, intoxicated by success, began to have political aspirations and to draw the masses into actions which they pretended would give economic advantages, but which, in reality, were only to satisfy their personal desire to command. By this were initiated a whole series of violent actions, uncertain in their ends, which characterised the end

55. *Id.* at 2.

56. *Id.* at 2-3.

57. *Id.* at 3.

58. *Id.* at 4.

59. *Id.* at 4.

of the 19th Century and which were the foundations of class-hatred. This describes in general lines the actions of modern syndicalism and its passage from the field of economic into the field of political conquest.⁶⁰

This was the sad history of modern syndicalism: the history of the "passage from the field of economic into the field of political conquest."

What was to be done? Recent history included one bright moment: World War I, which "distracted men for the time from social warfare."⁶¹ The brief happy moment of the war suggested the model for a necessary new order. There was a need to remove both to end class warfare, and to shield syndicalist leaders from the temptations of politics. To end class-warfare, the authors of the pamphlet, drawing on an established Catholic tradition, argued for "mixed syndicates,"⁶² in which workers and employers would be grouped together, according to their true common identity in a modern economy: their identity as *producers*. The new order would thus create "peace between the two principal forces of production, employers and employed"⁶³ acting together in a "union of producers."⁶⁴

So far so good. But how to prevent the temptation of politics, the disastrous "passage from the field of economic into the field of political conquest?" The pamphlet answered that the farce of parliamentary government must end. The basic authority for exercising social control should be removed from Parliament and delegated to the mixed syndicates, which served as the fundamental governing organs of society under the supervision of a supreme State:

This is what Fascism has done through the Corporate régime. It has utilised the syndicates by assembling them into Corporations which represent the two forces of industry, employers and employees, in every branch of production.

60. *Id.* at 5-6.

61. *Id.* at 7.

62. *Id.* at 12-13: "To solve the problem of class-warfare, the irrepressible tendency of the workers to fight the employers, and *vice versa*, in order to obtain the lion's share of their own productive activity, Fascism proclaims the principle of cooperation which is not an absolute novelty.

"Already in the past, students of syndicalism had launched the idea of utilizing the opposing syndicates of employers and workmen to abolish all forms of conflict between the two classes. These were mixed organizations, the so-called [sic] mixed syndicates, or inter-syndical associations." For the Catholic roots, especially in the thought of Baron von Ketteler and in *Rerum Novarum*, see J. Whitman, "Early German Corporatism in America," forthcoming in *Continental Ideas in Anglo-American Law ca. 1800-1920* (M. Reimann, ed., 1992)

63. *Id.* at 6.

64. *Id.* at 11.

These Corporations are organs of the State—that is, they are invested with authority by the State.

This organisation has various functions to perform, but principally it serves to harmonise the interests of the two opposing classes with the general interests of production and therefore with those of the nation.⁶⁵

The establishment of these representative syndicates by no means undermined the values of representative government. On the contrary. The mixed syndicates of the corporative order, the pamphlet insisted again the again, were fundamentally self-governing:

This assembling of individuals in associations is not *imposed* by the State. It is left to the free initiative of the individual and it is a free, not an obligatory syndicalism. The State only stimulates and protects it so strongly that individuals find it to their own interests to organize themselves into syndicates or associations.⁶⁶

The Fascist syndicates were, indeed, the bases for a free representative government. For they were empowered to send representatives to a Fascist national advisory parliament, in which questions of interest politics could be considered under the watchful direction of the State:

In accordance with the principles of the Corporate system the recognised associations have the privilege of proposing representatives for Parliament and, according to the law which reformed the parliamentary system, members of Parliament are elected in the following manner. The recognised associations and other institutions submit a list of 800 representatives. From this list the Grand Fascist Council select 400 candidates and the list is then submitted to the electoral body for approval.⁶⁷

The Fascist system thus preserved all the values of representative government. Nevertheless, since ultimate political power remained with the supreme State, there was no danger that political ambition would tempt syndical leaders to stray from their appointed task of safeguarding the economic interests of their constituents.

The pamphlet ended with a description of the Fascist state in all its majesty. Composed of sixteen great national corporations, eight each of employers and employees, the Fascist polity marched forward under the eye of the Ministry of Corporations. Perforce civic-minded, the great syndicates made contributions to both “the ‘Opera Nazionale Dopolavoro’ (‘National Leisure Hours Institution’),” and

65. Id. at 12-13.

66. Id. at 11.

67. Id. at 19.

“the ‘Opera Nazionale Balilla’ (an Institution somewhat akin to the Boy Scouts and Girl Guides, but [the pamphlet added darkly] with a very much wider scope).”⁶⁸ The interests of the working man had not been sacrificed. Collective bargaining agreements governed Italy’s industries. Labor disputes were arbitrated by labor courts staffed by experts of “a spotless political and moral record.”⁶⁹ And a reconstituted parliament provided a forum for working out the national economic interest, without any questions of political power entering in to distort the bargaining process.

IV.

In preaching all this, the pamphlet writers drew on more or less typical corporatist argument of the interwar period, fascist or not. The emphasis on craft industry,⁷⁰ the lionization of cartels,⁷¹ the focus on the need for labor peace,⁷² the nostalgia for the war economy of World War I:⁷³ these were all common European coin. To be sure, to say that these features were common to all corporatism is not to say that they had no special fit with fascism. On the contrary, it is easy to see why the fascists emphasized these features of the corporatist vision. The idealization of the Middle Ages appealed to an anti-modernist strain in fascism—though it should always be remembered that the anti-modernist strain in fascism was by no means clearly the dominant strain.⁷⁴ The emphasis on producers’ interests, too, had an appeal for fascists.⁷⁵ And of course, nostalgia for the war experience was close to the core of the fascist mind.⁷⁶

But none of that quite gets at the heart of gave the pamphlet’s deep driving logic, and its air of dangerous disingenuousness. None of that gets at the pamphlet’s peculiar mix of economic and political argument. For what is most striking about the pamphlet, as a work of propaganda, is its aggressive effort to insist that fascism had, not destroyed the values of the labor movement and the values of repre-

68. *Id.* at 20. In fact, the Opera Balilla was a paramilitary youth organization much like the Hitler Youth.

69. *Id.* at 26.

70. For this tradition, see, most recently, A. Black, *Guilds and Civil Society in European Political Thought from the Twelfth Century to the Present* (1984).

71. E.g., Glum, *supra* n.33; Elbow, *supra* n.32.

72. E.g., Hientzsch, *supra* n.33.

73. See *supra* n.34.

74. A.J. Gregor, *The Fascist Persuasion in Radical Politics* 154-66 (1974); J. Joll, “F.T. Marinetti: Futurism and Fascism,” in *Intellectuals in Politics* (1960); *Futurismo e Fascismo* (A. Schiavo, ed., 1980); J. Herf, *Reactionary Modernism* (1984).

75. In particular, it fit the fascist opposition to the credit economy. See, e.g., Maier, *In Search of Stability*, *supra* n.15 at 76. Presumably “producers” were opposed, in the fascist mind, not so much to “consumers,” as to bankers.

76. See G. Mosse, “Two World Wars and the Myth of the War Experience,” 21 *J. Contemp. Hist.* 491, 493 (1986).

sentative government, but transmuted and enhanced those values. What is most striking about the pamphlet, indeed, is its claim that fascism had acted to *preserve* both the labor movement and representative government by getting labor leaders out of politics, by separating the realm of economic bargaining from the realm of politics—by ending, in short, the “passage from the field of economic into the field of political conquest.” It is this claim to have transvalued social democratic values that makes the pamphlet seem so sinister, this claim that makes the pamphlet seem so transparently to harbor other goals than those it openly proclaims.

In making its argument, the pamphlet drew on some very sophisticated sources. In particular, it drew on the great anti-parliamentary theorists of early twentieth-century Italy: Vilfredo Pareto, well-remembered in America as the theorist of Pareto-optimality but often forgotten as an intellectual father of Fascism, and Gaetano Mosca. According to this Fascist version of Paretan-Moscan theory, parliamentary government acted, inevitably, as a magnifier of class conflict. Under parliamentary government, leaders of labor and capital managed to succeed one another, each elite concerned only to aggrandize its own power. Accordingly these elites' time in power was spent despoiling other classes, irreparably damaging the process of economic bargaining in society as a whole, and desperately intensifying class warfare.⁷⁷ Beyond Moscan-Paretan theory, the authors of the pamphlet also drew on a long tradition of anti-parliamentary argumentation in German corporatist thought, according to which it was the special beauty of a corporatist order that it was better capable of representing interests in society than was any parliamentary order; corporatist delegation, in this German tradition, offered true “self-government.”⁷⁸

77. In detail, the theories of Pareto and Mosca are, of course, much more complex. See, e.g., the passages from Pareto in *Italian Fascisms: From Pareto to Gentile*. 82ff. (A. Lyttelton, ed., 1973); and the discussions in S.E. Finer, *Introduction to Vilfredo Pareto: Sociological Writings* (S.E. Finer, ed., 1966), and R. Bellamy, *Modern Italian Social Theory: Ideology and Politics from Pareto to the Present* 12-53 (1987). For Pareto, in particular, the issue was rather different from that described in *The Structure of the Corporate State*, since the battle was between the producing classes—labor and capital together—and the *rentier* classes, dependent on income from savings at fixed interest. See, e.g., Finer, *id.* at 59ff. Nevertheless the traces of both Pareto and Mosca are clear enough in the pamphlet. For the influence of this body of theory on the fascists, especially through Prezzolini, see A.J. Gregor, *Young Mussolini and the Intellectual Origins of Fascism* 89ff. (1979).

For an illuminating discussion of the political-cultural background, see Maier, *In Search of Stability*, *supra* n.15 at 11, 34.

78. In identifying this strain, I am relying on two major historians: Maier, *Recasting Bourgeois Europe*, *supra* n.15 at 9 and *passim* (though note Maier's subsequent strictures at *id.*, xi); and Heffter, *Deutsche Selbstverwaltung*, 6 and *passim* (corporatist theory of later 19th-c. “wurde geradezu zum Ersatz für das parlamentarische Regierungssystem der westlichen Demokratie.”); see also Glum, *supra* n.33 at 13-64; Berghahn, *supra* n.33. For the theme of “self-government” in Italy, see

But the sophistication of the pamphlet's sources tells us little about the ideological color of the pamphlet. That color is the color of disingenuousness. Let me summarize the vulgar ideological fable which the pamphlet's authors made of their sources. Their mix of the old corporatist tradition of "self-government" with matter from the darker work of Pareto can be stated as a set of propositions:

(1) Class conflict is the fundamental problem of modern society. It gives rise to a perfectly legitimate process of bargaining between labor and capital.

(2) Representative government is the legitimate form of government in modern society.

(3) But the principal form of representative government, Parliament, magnifies class conflict by exposing class leaders to the corrupting opportunities of politics, thus distorting the bargaining process.

(4) Accordingly we need an order that will allow economic bargaining between the classes, as well as preserving the values of representative government, without however allowing participation in electoral politics.

(5) The best such order is an authoritarian/corporatist one, in which self-governing mixed syndicates—that is to say worker-management producers' cartels—are watched over by a powerful state. This order preserves both the values of the labor movement and the values of representative government.

In these few propositions we have, I think, the basis of fascist corporatism's peculiar propagandistic claim—a claim to offer, in effect, a superior form of social democracy, immune both to the horrors of class warfare and the abuses of parliament.

V.

Let me now turn to America, and attempt to measure the influence of this style of fascist propaganda here.

An indigenous American form of corporatism had begun to develop long before any species of fascist propaganda appeared here. In the later nineteenth-century, the German theorists of corporatism attracted a number of prominent supporters in the American academic world.⁷⁹ More important, the World War I economy was

E. Ragionieri, *Politica e amministrazione nella storia dell'Italia unita*, 83-84; and Lyttelton, *supra* n.44. For the varieties of anti-parliamentarism in corporatist thought, see Lehbruch, "Liberal Corporatism and Party Government," 10 *Comparative Political Studies* 91 (1977). And for anti-liberalism as central to Fascist thought, see most recently R. Vivarelli, "Interpretations of the Origins of Fascism," 63 *Journal of Modern History* 29 (1991), esp. 37ff.

79. See Whitman, *supra* n.62.

managed, in America, along the same corporatist lines adopted elsewhere, as a close collaboration between the state and industrial cartels was supervised by the War Industries Board under the direction of Bernard Baruch.⁸⁰ The pre-1917 trends gained strength in the 1920s. After the war, followers of Baruch and students of German corporatist thought formed a core of advocates for what American historians call "associationism."⁸¹ Throughout the decade, associationists pressed for relief from the anti-trust laws, so that the various industries and professional groups of the nation could form self-governing associations.⁸² At the same time a number of labor theorists, led by the Germanophile John R. Commons, pressed for official sanction for the closed shop.⁸³ These associationist and labor movements, while far weaker than corporatist movements in Europe, were a noticeable political presence in America throughout the 1920s, before Mussolini's regime had even made "corporativism" its official policy.

Nevertheless it is the case that practical experimentation with corporatism came, on a large scale, only in 1933, at a time when the *stato corporativo* had become the prime model of corporatism worldwide. For it took the shock of the Great Depression to give American corporatists the planning opportunity they sought.⁸⁴

The tale of the embodiment of earlier American corporatist trends in the NRA has been told by a number of historians in recent years. The Roosevelt administration entered office in March of 1933 without any well-defined industrial program. Only in early April, when Congress threatened to pass legislation that the administration considered undesirable, did the administration form three different industrial policy drafting teams, led respectively by Undersecretary of Commerce John Dickinson, Senator Robert Wagner—and General Johnson.⁸⁵

Johnson came to the job of drafting after a very varied career.

80. R. Cuff, *The War Industries Board: Business-Government Relations during World War I* (1973); J. Schwarz, *The Speculator: Bernard M. Baruch in Washington, 1917-1965* (1981).

81. Hawley, *The Great War and the Search for a Modern Order*, supra n.21.

82. R. Himmelberg, *The Origins of the National Recovery Administration: Business, Government, and the Trade Association Issue, 1921-1933* (1976).

83. On the school of "institutional economics" represented by Commons and other figures, see E. Purcell, *The Crisis of Democratic Theory: Scientific Naturalism and the Problem of Value 18-19* (1973). Hoover too brought back similar ideas from a trip to England. R.H. Zieger, "Herbert Hoover, the Wage-Earner, and the 'New Economic System,' 1919-1929," in *Herbert Hoover as Secretary of Commerce: Studies in New Era Thought and Practice* 84-87, 90 (Hawley ed. 1981).

84. Irons describes the NIRA as the "goal sought by the corporatists for the past two decades." Irons, supra n.1 at 23.

85. See the account, e.g., of Hawley, *New Deal and Problem of Monopoly*, supra n.15 at 21ff.

A mediocre cadet at West Point, he had distinguished himself before World War I as an efficient officer and as an author of military stories and novels aimed at boys. He earned a brilliant law degree at Boalt Hall, and during World War I served as a high administrator of the war economy under Bernard Baruch. He remained a Baruch protégé after the war, during a fairly successful business career. Throughout, he made himself a reputation as emotionally unstable, a disastrously hard drinker who periodically disappeared on benders.⁸⁶ He had been brought into Roosevelt's Brains Trust during the campaign of 1932 to please Baruch. Once in the Brains Trust, he evidently captivated Roosevelt, and he became a significant voice in the campaign. After election day (on which he ended a six-day binge), Johnson remained, however, without any official position in the administration until late April, when Raymond Moley asked him to begin work as the leader of one of the groups drafting an Industrial Recovery Act.

Johnson quickly agreed, and brought in with him Donald Richberg, a prominent Chicago labor lawyer, the author of romantic novels about crusading lawyers as well as the principal draftsman of the Railway Labor Act.⁸⁷ Together, the two produced a thoroughly corporatist draft. Their bill called for suspension of the antitrust laws in order to allow government-licensed cartels to set industry-wide standards on wages, prices and competitive practices. Meanwhile, the other two drafting groups had joined forces, and produced an alternative draft bill. This alternative draft contemplated massive public works spending.⁸⁸ But the alternative draft also, like Johnson and Richberg's draft, envisioned some kind of licensing of trade associations. Indeed, apart from the issue of public works spending, the two groups differed on only one really substantial matter. Where General Johnson envisaged a scheme in which fundamental authority to supervise "self-governing" trade associations should be given to the President, Senator Wagner wanted to vest the same fundamental authority in Congress.⁸⁹

In mid-May, Roosevelt instructed the two groups to compromise. From this compromise came the National Industrial Recovery Act. Title II of the compromise statute called for massive federal expenditures on public works. As such, this public works program had nothing to do with corporatist delegationism. But Title I, which established the National Recovery Administration, was the fulfill-

86. Generally Ohl, *supra* n.2.

87. For General Johnson's role in bringing Richberg to the NRA, T. Vadney, *The Wayward Liberal: A Political Biography of Donald Richberg* 119-121 (1970). On Richberg, see also L. Gerber, *The Limits of Liberalism* (1983).

88. Hawley, *New Deal and Problem of Monopoly*, *supra* n.15 at 24-25.

89. Ohl, *supra* n.2 at 101.

ment of a decade of associationist yearnings and memories of the war economy. Under the scheme of Title I, the nation's economy was to be broken up into industrial groupings. These groupings were to establish "Codes of Fair Competition," subject to the approval of the NRA, compulsory upon all entrants into the industry, and dedicated to minimum price maintenance. Title I also included, under labor pressure,⁹⁰ a number of vague guarantees for workers. The NRA made a permanent place for itself in the history of labor with its section 7(a). Section 7(a) included a vague promise that every "Code of Fair Competition" would establish minimum wage and maximum hours. It also included a very vaguely worded guarantee of a right to organize.⁹¹ This provision gave labor considerably less than the rest of the statute gave business associationists; nevertheless, it gave labor something that could potentially sanction some kind of corporatist delegation to unions.

Only in one respect did this Title I go beyond the associationist and labor traditions of the 1920s—in its strong element of executive power. On General Johnson's insistence,⁹² the President retained tremendous residual power. If the Codes industry established were not satisfactory to the NRA, the President had the authority to impose such Codes as he saw fit. It is perhaps in this element that we have a first hint of trans-atlantic influence on the NIRA; Mussolini's own response to this aspect of the NIRA scheme was "Ecco un ditatore!"—"Behold a dictator!"⁹³ In general, however, Title I was simply associationism writ large.

VI.

Indeed, despite Mussolini's enthusiastic reading, it was not the letter of the statute that stirred suspicions of fascism, but the soon-named leadership of the National Recovery Administration. To direct the NRA, the President appointed Johnson.⁹⁴ As his colleague, General Johnson brought with him, once again, Richberg. Both men were destined to develop reputations as men of the far right wing—General Johnson very soon, as rumors of his fascist and even put-

90. Roosevelt had avowed no particular labor policy in 1932, and his brains trusters showed, in general, little interest in unions. I. Bernstein, *The New Deal Collective Bargaining Policy* 25-26 (1950).

91. For the indefiniteness of § 7(a)'s provisions, see 1 J. Gross, *The Making of the National Labor Relations Board: A Study in Economics, Politics and the Law* 11 (1974).

92. Ohl *supra* n.2 at 101.

93. Mussolini, *Ecco un ditatore!*, 26 B. Mussolini, *Opera Omnia*, 10 (1958) (June 28, 1933).

94. See, e.g., Hawley, *New Deal und 'Organisierter Kapitalismus'* *supra* n.15 at 20.

schist leanings spread;⁹⁵ Richberg later, during a post-New Deal career as an opponent of labor and desegregation.⁹⁶

Nor is it difficult to see how their unsavory reputations developed. Both Johnson and Richberg produced, both before and after the passage of the Act, some disturbing statements. Some of their rhetoric, while it resembled the rhetoric of the fascists, was manifestly innocent.⁹⁷ But some seems far from innocent. In particular, the heads of the NRA brought to their work a powerful anti-parliamentarism. The two leaders of the NIRA were marked anti-parliamentarians, the true creatures of the crisis atmosphere of 1932-33.⁹⁸ Donald Richberg's description of the political thinking behind the NIRA bears quoting. I offer several passages from *The Rainbow*, the book Richberg wrote in defense of the program after *Schechter*, to give the flavor of political sentiment among high officials of the NRA. At points, Richberg (who, to be sure, regularly declared himself to be no fascist⁹⁹) seemed to voice all too distinctly a desire for dictatorship:¹⁰⁰

The Great Depression began—and we all had to do some hard thinking. We kept at this for three years, and it became harder and harder to think, and absolutely necessary to do something. We called for a Man of Action, and we got

95. Ohl, *supra* n.2 at 148, 174, 256.

96. Vadney, *supra* n.87 at 188ff.

97. For example, Johnson declared the NIRA, at a 1933 Cabinet-level meeting, to be "guild-government law." Quoted in Irons, *supra* n.1 at 303 n.24. The President used the same language. See the passage quoted in Brand, *supra* n.19 at 11 n.31. The rhetoric of "industrial self-government" was, of course, ubiquitous. See, e.g., M. Derber, *The American Idea of Industrial Democracy* 308-09, 315 (1970). Notoriously, too, the New Dealers were marked by their claim to renew the experience of the war economy of World War I, just as the fascists were. W. Leuchtenburg, "The New Deal and the Analogue of War," in *Change and Continuity in Twentieth Century America* (Braeman, et al., eds., 1964). One more striking resemblance, which perhaps deserves emphasis, is the belief of both Johnson and Richberg that management and labor together belonged to the "general producer interest." See Ohl, *supra* n.2 at 194-96; Vadney, *supra* n.87 at 116. None of this was, of course, fascist as such.

98. Leuchtenburg summarizes the atmosphere this way: "There was less an active demand for change than a disillusionment with parliamentary politics, so often the prelude to totalitarianism in Europe." Leuchtenburg, *supra* n.12 at 26. For earlier anti-parliamentarism, see generally Purcell, *supra* n.83; Hawley, *The Great War and the Search for a Modern Order*, *supra* n.15 at 100ff. (quoting, among others, scholars of the prominence of Harry Elmer Barnes and B.F. Wright, and sources as startling as the U.S. Army Training Manual of 1928).

99. For example, the following: "Some form of a government of business—that is, an intentional orderly control of industrial processes in protection and promotion of the general welfare—is inevitable. To those who have faith in democratic principles this must be a method of self-government with a minimum of exterior regulation and supervision. To those who, through fascist or communist philosophy, believe in an 'authoritarian' economy or a 'totalitarian' state, a political government of industry seems essential." D. Richberg, *The Rainbow* 16 (1936).

100. For 1932 calls for dictatorship, see the quotes collected in Purcell, *supra* n.83 126-27; Leuchtenburg, *supra* n.12 at 30.

one.¹⁰¹

Or again:

The American people might well go down upon their knees and thank God that . . . there came into power the man who alone could save them—the Man of Action.¹⁰²

Or again:

America did not want to reform its bad habits. It wanted to recover its ability to have a good time. Secretary Wallace has written that “America must choose.” He is probably right—eventually, but America is not going to choose to do anything which a large number of Americans do not wish to do—so long as democratic government can endure and politicians can evade a perilous issue.¹⁰³

These are typical examples of Richberg’s distaste for “the inefficiencies and corruptions of popular government.”¹⁰⁴ To be sure, Richberg often sounded tones very different from those to be heard in Europe. In particular, he claimed to speak, not for labor, nor indeed for the class of “producers” at all. Rather he claimed to speak for the consumer, “the little fellow:”

Of course, he [the “little fellow”] has a chance to vote for some of his political managers. But the authority he thus creates soon gets beyond effective control. Politicians, like businessmen, seem to make a lot of money out of him. They entrench themselves in a maze of offices and powers which make it difficult to hold anyone individually responsible. As a customer of private enterprise he can usually shift his patronage. As a stockholder he can usually sell out.¹⁰⁵

This was authoritarianism with a distinctly American consumerist accent.¹⁰⁶ Nevertheless authoritarianism it was.

As for General Johnson, I offer, as an example of his anti-parliamentarism, a notorious document he produced in 1932, and which he named as one of the intellectual sources for the NRA.¹⁰⁷ Entitled “By MUSCLEINNY, *Dictator pro tem. A PROCLAMATION*,” and

101. Richberg, *supra* n.99 at 1-2.

102. July 6, 1933 Speech to the Merchants’ Association of New York, quoted in *id.* at 294. For the reception of this speech, see Vadney, *supra* n.87 at 124-26.

103. Richberg, *supra* n.99 at 11.

104. Richberg, *supra* n.99 at 14. For the connection between liberal dissatisfactions with democracy in this period and the attraction liberals felt to Fascism, see Diggins, *supra* n. 1 at 223.

105. Richberg, *supra* n.99 at 16.

106. I have discussed the very similar idealization of the “little guy” in the writings of another New Deal lawyer, Karl Llewellyn, in Note, “Commercial Law and the American *Volk*,” 97 *Yale L.J.* 156, 173 (1987).

107. Johnson, *supra* n.1 at 157.

written in the midst of the Democratic nominating convention, it purported to offer a complete solution to the crisis of the Republic, to be achieved by sending “[t]he President, Vice President, and all members of Congress . . . to a very pleasant archipelago. . . .”¹⁰⁸ Within a year, this man was one of the most powerful in America.

VII.

All of this makes it uncomfortably clear that the NRA attracted some very ugly characters precisely at the historical moment that fascists were attempting to claim corporatism as their own characteristic program. Nevertheless, if we dig a little deeper into the public pronouncements of the makers of the NRA, we discover some striking differences between their ideology and that of the fascist propaganda I have summarized—differences that point to very stark contrasts between American and central European government.

For if anti-parliamentarism was found in the leadership of the NRA, it was not associated with the great motivating themes of European anti-parliamentarist corporatism. Johnson and Richberg may have believed that Congress was a collection of dangerous boobs. But in seeking public support they never proclaimed the fundamental fascist premise that representative government was a dangerous thing because of its connection with class warfare. They never borrowed the characteristic argument of fascist corporatism, that representative government magnifies class conflict by allowing the leaders of syndicates to attain political power.

First of all, the leaders of the NRA showed none of the fascist fear of organized labor. On the contrary, they showed disdain—disdain that soon embroiled them in battles with labor advocates. The conflicts between NRA administrators and labor leaders have, indeed, long been familiar to students of American labor law. After brief initial enthusiasm,¹⁰⁹ labor soon began to voice dissatisfaction with the administration of the NRA.¹¹⁰ Labor was soon resorting to strikes¹¹¹ and a long bureaucratic war with Johnson and Richberg,

108. *Id.* at 123-32, passage quoted at 125.

109. See, e.g., Bellush, *supra* n.1 at 27; Derber, *supra* n.97 at 319; C. Tomlins, *The State and the Unions: Labor Relations, Law, and the Organized Labor Movement in America, 1880-1960*, 105 (1985).

110. Richberg, in particular, proved a disappointment to labor. The expectation, when the NRA staff was first assembled, that Richberg (who had been the principle draftsman of the Railway Labor Act) would be the leading voice for labor, was not fulfilled. Richberg, perhaps already on the road to anti-unionism that would mark his later career, “failed to understand that he was supposed to be a labor representative in the NRA and instead abdicated this role in favor of an Olympian concept of representing all economic interests. . . .” Vadney, *supra* n.87 at 123.

111. Strikes forced the President, on August 5, 1933, to approve the creation of a National Labor Board. Bernstein, *supra* n.90 at 58; Gross, *supra* n.91 at 15. The new

who envisioned a labor policy hospitable to company unions and inhospitable to the closed shop.¹¹² But labor's efforts stimulated, for the most part, only contempt from the NRA leaders. Far from attempting to co-opt labor by embracing any union corporatism of the fascist type, Johnson and Richberg seemed inclined to ignore labor.

By contrast with the fascists, indeed, Johnson and Richberg seemed to care hardly at all about issues of class conflict. On the contrary, they were motivated by somethings else: the great problem they identified was not ruinous class conflict, but ruinous business competition—"[s]avage wolfish competition," General Johnson called it, "without any direction whatever."¹¹³ It was not the evils of labor-capital conflict, but the evils of capital-capital competition that formed the American theme.

To illustrate, I will recite the corporatist historical fable offered in General Johnson's own bit of sub-intellectual preaching, his memoir of the NRA, entitled *The Blue Eagle from Egg to Earth*. Johnson's own fable deviated strikingly from the fable that he read in *The Structure of the Corporate State*.¹¹⁴ Hear the General speak:

At the adoption of the Constitution almost everybody worked for himself—the boot and shoe industry was the village cobbler, the textile industry was the housewife and the weaver, the steel industry was the forge and the smithy, the electric light industry was the candle maker, and so forth through the whole gamut. In such a scene we invented the doctrine of rugged individualism.¹¹⁵

Indeed, General Johnson's pre-industrial world, wildly unlike that of the fascists, was a place of individual, not communal values:

When the Revolution came every member of a village community was an individualist—the blacksmith, the weaver, the tailor, the butcher, the baker, the candlestick-maker—and the farmer.¹¹⁶

No talk here of craft industry, no talk of the paternal mix of family and business relations in a wholesome union of master and employee. This tradition of rugged individualism had survived the rise of modern industry, abetted by American anti-trust law. By the end of the nineteenth-century, great enterprises had arisen to replace

board had personnel similar to that of the old War Labor Board. *Id.* at 16-17; see also Tomlins, *supra* n.109 at 111-12.

112. Gross, *supra* n.91 at 33. For the President's support of their opposition to majority rule, see Irons, *supra* n.1 at 212. For the views of Wagner and his allies, see Bernstein, *supra* n.90 at 59-60.

113. Johnson, *supra* n.1 at 162.

114. Summarized *supra*, Section III.

115. Johnson, *supra* n.1 at 175.

116. *Id.* at 183 (italics omitted).

the small shops of the old era. But these great enterprises still acted as individuals, refusing to submit to cooperation:

Before the war, American business was a honeycomb of water-tight industrial compartments. Each cell was jealously guarded. There was a maximum of competition and a minimum of coöperation. Ruthless and untempered competition was decreed by the Sherman and Clayton acts.¹¹⁷

Only World War I had brought an interlude, though an insane one:

The war changed that. The world went mad. The nations entered a contest to see which could pour the greatest mass of its young manhood and the largest amount of its money and property into the fire in the shortest space of time. That was the way to win the war.

The old honeycomb machine of the United States couldn't produce things fast enough in this race to destroy everything. We had to scrap it. And in the short period between April, 1917, and November, 1918, we literally tore it apart and put it together again. On the call of government and under the pressure of patriotism the old individualist battlers royal became an organized squad—all marching toward the sound of the guns.¹¹⁸

In this desperate race, anti-trust law was not allowed to work its anti-coöperative effects. Calculated disregard for the law was the order of the day:

We did not repeal the Anti-Trust Acts. *We simply ignored them.* Competitors pooled their resources, their trade secrets, their facilities. Industries organized themselves into groups and figures with the speed and almost the precision of a highly drilled chorus on a musical comedy stage and government took charge of both production and consumption and to a large extent, prices. It worked.¹¹⁹

To some extent, a kind of disordered, destructive cooperation survived the war.¹²⁰ Nevertheless, the post-war years were marked by the government's return to its fatally individualistic bent. Within a few years after the war had ended, the Federal Trade Commission had resumed a "policy, philosophy, and action . . . repressive of coöperation."¹²¹ Indeed, matters reverted:

We had supervised coöperation in the war because we had to have it or suffer defeat. There was a "let-us-alone" gang

117. *Id.* at 172.

118. *Id.* at 172.

119. *Id.* at 172.

120. *Id.* at 174.

121. *Id.* at 173.

then also, but we swept them into the ash can and there was no longer any sentiment for the old slogan of "let-us-alone" because all knew that government intervention was the sole salvation. When that pressure was gone, "Let-us-alone" rebounded into light and became the guiding principle of government administration from the depths of 1921 to the giddy peaks of 1929.

"Let-us-alone" and unhampered individualism worked well enough during the formative days of individual pioneering— nothing else would have worked—but it did not work when we had to meet the war crisis and after-the-war reorganization of trade and industry. It had become a relic of old days and, as things turned out, a very dangerous one.¹²²

The Depression was the result, and there was no solution to it until "rugged individualism" should give way to "balanced economy."¹²³ What was desperately needed was some check on unhampered individualism. That check the NRA provided, by reinstating the "supervised coöperation" of the war:

It is black on the record that the unchecked competitive plan under the Anti-Trust Acts was destroying small enterprise of every kind at a most astonishing rate. It is a shorter record but equally certain the NRA has exactly reversed this killing process.¹²⁴

"Reversing the killing process" by ending "savage competition:" that was the goal of General Johnson's corporatist scheme.

The General's emphasis on the evils of excessive competition was hardly confined to him. On the contrary, it was the prototypically American corporatist ideology.¹²⁵ This indeed was the American fable: corporatism offered a solution, not to conflict between the classes of capital and labor, but to conflict within the class of capital.

122. Id. at 174-75.

123. Id. at 158ff.

124. Id. at 176.

125. Examples are easy to multiply. See, e.g., C. Dearing, P. Homan, L. Lorwin, & L. Lyon, *The ABC of the NRA* 9 (1934) (describing "predatory competition" as one of four factors necessitating NRA); A. Adams, *Our Economic Revolution: Solving Our Depression problems through Public Control of Industry* 10 (1933) ("untrammeled competitive self-interest"); B. Burn, Codes, & Cartels, *National Planning: The Road to Economic Stability* 8 (1934) ("unrestricted or, as it is often called, free competition"); L. Lyon, P. Homan, L. Lorwin, G. Terborgh, C. Dearing, & L. Marshall, *The National Recovery Administration: An Analysis and Appraisal* 7 (1935) ("unfair and excessive" competition."). Cf. generally Hawley, *New Deal and 'Organisierter Kapitalismus'* 20; Gordon, "The Independence of Lawyers," 68 *B.U.L. Rev.* 1, 47 (1988). For this theme in nineteenth-century America, see May, "Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880-1918," 50 *Ohio St. L.J.* 257, 322 (1989).

And thereby, I believe, hangs the tale. To Europeans, the great conflict was between labor and capital, and the risk of conflagration came because that conflict was being fought out in parliament. Because of this insistence on the evil consequences of representative government, European corporatism should be called an ideology of *political* economy, and one profoundly appealing to the thuggish anti-parliamentarians who were the fascists. American corporatist ideology, by contrast, far from being a ideology of political economy, was simply an economic ideology.¹²⁶ Congress, to Americans, was a place full of incompetents, not rogues. As a result, American corporatism embodied no sense of class conflict, and contained no implicit theory of representative government. As one Italian Fascist commentator put it, the First New Deal was "*Fascism on the economic plane.*"¹²⁷ As a result, American corporatist argument, I think it is fair to say, drew only superficially on the corporatist ideology of fascism.

VIII.

Why the great difference between the public ideology of General Johnson and that of the Italian Fascists? One possibility is that the terms of debate had been set by the anti-trust laws in America. But that, I think begs the critical questions.¹²⁸ In the end, the difference between the corporatist propaganda among the fascists and among the leaders of the NRA must come down to two things: (1) class conflict had never reached the pitch of intensity in Ameri-

126. Indeed, this difference between Americans and Europeans dates well back into the nineteenth century. To be sure, German corporatists spoke of the evils of "ruinous competition." See E. Maschke, "Outline of the History of German Cartels from 1873 to 1914," in *Essays in European Economic History* 226, 248-49 (F. Crouzet, W. Chaloner & W. Stern, eds. 1969). But the corporatist theory was always strong as well. See *supra* n.78. The same was not true in America. By the late nineteenth-century, the European industrial corporatist idea had avoid American followers. See Whitman, *supra* n.62. But a comparison of standard European writings with those of American thinkers shows a striking absence, in America, of the emphasis on class warfare as the concomitant of suspicion of parliamentary government. Cf. the discussion of R. Lustig, *Corporate Liberalism: The Origins of Modern American Political Theory, 1890-1920*, 34 (1982) ("corporatist theories of representation" did not survive the 1920s in America); see also J. Chasse, "John R. Commons and the Democratic State," 20 *J. Economic Issues* 759, 762-63 (1986). Accordingly the Paretan antinomy never had much meaning in America.

127. Domenico Rosati, quoted in Vaudagna, *supra* n.7 at 111.

128. It was, the argument would run, impossible to reach any larger questions of political economy in America without first doing battle over whether corporatist schemes violated restrictions on the restraint of trade. There are, however, a number of problems with this explanation, the most important being that it begs the question: *why* were the anti-trust laws so important in America? Only because the question of competition was important—which is precisely what must be explained. I argue elsewhere that what in Europe were theories of political economy in America became economic theory even before the passage of anti-trust laws. Whitman, *supra* n.62.

can minds in the minds of Europeans; and (2) neither had anti-parliamentary sentiment.

As for the first of these, it is old wisdom that class conflict simply never shaped the configuration of political forces in America the way it did in Europe.¹²⁹ On this point, it is necessary to concede the primacy of larger social forces than any intellectual historian of Hugh Johnson and Donald Richberg can easily account for. For some reason, the labor movement in America was never a political movement of the European type. This large difference made itself felt in a transatlantic difference in the political culture of corporatism. There was simply no great impact in speaking of class warfare to Americans who did not perceive class warfare as the defining political problem of their society;¹³⁰ accordingly, Johnson and Richberg did not speak in such terms.

The same is true of anti-parliamentarism. By contrast with Europe, representative government had a lingering legitimacy in America that it lacked in Germany and Italy; America was a place marked by contempt for large representative bodies, not hatred. Americans, unlike Italians, were not latecomers to the traditions of representative government; accordingly they were not subject to the kind of latecomers' *ressentiment* that characterized Italian (and German) value-transvaluing discussions of representation. As a result, just as there was little political capital in evoking the miseries of class warfare in America, there was little political capital in proposing any wholesale abolition of Congress. Again, Johnson and Richberg never went so far as to openly advocate abolition; there was no ideological advantage in doing so, as long as Congress had historic legitimacy.

That is not to say, of course, that the leaders of the NRA

129. See esp. W. Sombart, *Warum gibt es in den Vereinigten Staaten keinen Sozialismus?* (repr. 1969); and most recently the discussion of the absence of an American "class-based political movement" in W. Forbath, *Law and the Shaping of the American Labor Movement* (1991), 1 and passim. For the importance of this factor in the neo-corporatist literature, see G. Wilson, "Why is there no Corporatism in the United States?" in *Patterns of Corporatist Policy-Making* 219, 232-35 (G. Lehmbruch & P. Schmitter, eds., 1982). Wilson suggests, with a rather inconclusive air, that corporatism has failed in America because of the relative weakness of the American labor movement. Never having been faced with a strong labor movement, the suggestion runs, American capitalists have never found it necessary to unite in strong employers' associations; never having been faced with either strong workers' associations or strong employers' associations, American government has never been driven to state-sponsorship of such associations. Schmitter has rung a subtle variation on this interpretation, suggesting that the United States is a polity "where the state lacks autonomy due to the overwhelming hegemony of capitalist interests" and that accordingly "neo-corporatist bargaining" has been "rejected" here. P. Schmitter, "Neo-Corporatism and the State," in *The Political Economy of Corporatism* 32, 37-38 (W. Grant, ed., 1985).

130. Cf. Brand, *supra* n.19.

showed no anti-parliamentarist impulses. On the contrary, as I have already argued, their anti-parliamentarist impulses were strong. The strength of their anti-parliamentarism suggests indeed, a way of locating the New Deal in the world history of the 1930s. Judged by the high officials of the NRA, the First New Deal was apparently only the American theater of a world-wide revolution against national representative bodies. The great theme of both the First and the Second New Deals—delegationism¹³¹—was a world-wide corporatist theme, part of world-wide crisis of representative government.

Nevertheless, seeing the world as a whole, it is hard to mistake the fact that Congress retained far greater legitimacy than did the parliaments of Central Europe.

IX.

Indeed the greater legitimacy of the American Congress brought with it the greatest irony of the comparison between new Deal and Italian Fascism—an irony involving the only bit of the NIRA to survive in any form, its weak guarantee of labor's right to organize. It is one of the most noteworthy features of the New Deal that because Congress was *not* abolished, it remained a viable arena for the application of political pressure and the venting of political ideals by organized labor. As I have already recounted, organized labor soon became disenchanted with § 7(a), and began to press for a more far-reaching alternative. Throughout the early New Deal years, labor's champion, Senator Robert Wagner, was able to promote the cause of labor in Congress, despite powerful executive hostility. In 1934, Wagner attempted to pass his Labor Disputes Bill; without the administration's sponsorship, however, his bill failed.¹³² He continued to propose bills, against the same administration hostility, for the next two years.¹³³ In early 1935, he introduced his Wagner Bill. The administration was again hostile.¹³⁴ But when the Supreme Court struck down the NRA, the administration, suddenly bereft of any industrial program, abruptly shifted its support to Wagner's Bill—which thus became, against all expectation, the law of the United States.¹³⁵

131. Needless to say, the delegationist desire continued into the Second New Deal. But whereas delegation in the First New Deal was typically to private organizations, delegation in the Second New Deal was typically to new agencies of the executive branch.

132. Gross, *supra* n.91 at 64ff.; Tomlins, *supra* n.109 at 119ff.

133. See generally Gross, *supra* n.91 at 61, 69-73, 101; Bernstein, *supra* n.90 at 59, 76-78.

134. Irons, *supra* n.1 at 226, 230.

135. Only a comedy of errors allowed the Wagner Act to pass. *Schechter* was the critical development. *Schechter* had two effects: It altered the views of the White House, which, suddenly lacking a legislative program, supported Senator Wagner at

Wagner's ultimate triumph brings out the great contrast between our government and the governments of central Europe. The only reason there was a Wagner Bill that could pass is that Congress was available as a political staging ground. Such a thing could never have happened in Italy. Indeed, it is well, for purposes of comparison between America and Europe, to view the history of Senator Wagner's efforts from a fascist point of view. Senator Wagner managed to keep the interests of labor alive in Congress during two hard years of hostility from the executive. Paretan-Moscan fascists would have seen, in such labor pressure exercised through Congress, precisely the evil that corporatism was intended to end.¹³⁶

The large irony here deserves comment. Labor leaders ended up succeeding comparatively better in America than they did in fascist central Europe. In central Europe, the labor movement moved from independent strength in the 1920s to comparative subservience in the 1930s; in America, by contrast, the labor movement moved from weakness in the 1920s to greater strength in the 1930s. But the difference did not arise because American labor, in the 1920s, had greater ability to mobilize workers or to strike. Quite the contrary. Our labor movement succeeded better, because Congress remained available, in the 1930s, as a vehicle for the exercise of political pressure. It succeeded better because Congress remained available, in America, as a magnifier of class conflict.

X.

What does all this tell us about the prospects for corporatism, about labor law, about the character of the New Deal?

As for any future corporatism: the NRA experience does not clearly have any great bearing one way or another. Perhaps we can guess that Americans will always be more amenable to economic theories than to theories of political economy. Perhaps we can guess, in particular, that corporatism will have little appeal in America to the extent that its appeal is as a substitute for representative government, or as a solution for class conflict. This means that, if Americans hold true to historic form, we are much more likely to be receptive to corporatism in commerce and trade than to

last; and it won the votes of at least a few—perhaps a decisive few—Senators and Congressmen who were convinced that the Act would be struck down by the Supreme Court, and that their vote would thus constitute a meaningless gesture of support for labor. Gross, *supra* n.91 at 130ff., 149; Irons, *supra* n.1 at 105, 231; Leuchtenburg, *supra* n.12 at 151-52.

136. That is not, of course, to set up any simple opposition between Senator and those subject to fascist influences. Ernest Lindley, it should be noted, recorded at the time that Wagner and William Green had taken "a glance at the corporative laws of Fascist Italy." E. Lindley, *The Roosevelt Revolution: First Phase* 158 (1933). Quoted in K. Davis, *FDR: The New Deal Years, 1933-1937*, 116 (1986).

corporatism in labor relations—much more receptive, that is, to MITI than to Western European social democracy. On the other hand, a variety of corporatism that drew on race tensions—surely as powerful in America as the tensions of class conflict were in interwar Europe—might have a balmier future here than any economic corporatism of any type.¹³⁷

Furthermore, all of this may, perhaps, shed some light on a well-known American historical development: the transition from labor law to employment law.¹³⁸ I have already suggested that organized labor managed to profit from the crisis of 1933-35 largely because Congress was sufficiently legitimate that it could serve as a forum. Organized labor saved itself, at least in part, by using Congress. But since that time, it could be argued, Congress has proven a dangerous instrument. For where once workers were expected to organize in order to safeguard their own welfare, Congress now regularly legislates to achieve the same purpose. The rise of such employment legislation may or may not have improved the lot of American workers. The point, for my purposes here, is only that little room has been left for corporatist “self-government;” Congress no longer delegates its power as it once did. Paretan-Moscan theory,

137. It is, however, precisely scholars of race who have shown themselves, in recent literature, most resistant to any avowed corporatism. See *supra* n.28.

138. Already, in 1938, the Fair Labor Standards Act had arrived as the fruit of a more statist labor policy typical of the Second New Deal. 29 U.S.C. §§ 201-219 (1988). Perhaps the critical milestone was passed in 1963, with the Equal Pay Act, a direct Congressional encroachment on the realm of collective bargaining.

The gulf between the old, corporative liberalism and the new, statist liberalism shows most clearly, perhaps, in the contrast between the LMRDA and ERISA. In 1958 and 1959, when Congress perceived union abuses, it responded, in the LMRDA and its companion Welfare and Pension Plans Disclosure Act, by attempting, through promoting openness and disclosure, to purge union democracy of its corruption, and so to preserve self-government intact. For the union abuses that led to the Welfare and Pension Plans Disclosure Act of 1958 [amended 1962], see S. Rep. No. 1440, 85th Cong., 2d Sess., reprinted in 1958 U.S. Code Cong. & Adm. News, 4137, 4138. For the Welfare and Pensions Plans Disclosure Act as companion act to the LMRDA, see S. Rep. No. 187, 86th Cong., 1st Sess., reprinted in 1959 U.S. Code Cong. & Adm. News, 2318.

By contrast, in 1974, when Congress perceived continuing union abuses, it responded by legislating directly the management of pensions. The legislative history of ERISA shows a telling retreat from the ideal of self-government. The House Report stated: “The policy underlying enactment of [the Welfare and Pension Plan Disclosure Act] was purportedly to protect the interest of welfare and pension plan participants and beneficiaries through disclosure of information with respect to such plans. . . . It was expected that knowledge [conferred through disclosure] would enable participants to police their plans. . . . Experience in the decade since the passage of [the 1962 amendments] has demonstrated the inadequacy of the Welfare and Pension Plans Disclosure Act . . . Its chief procedural weakness can be found in its reliance upon the initiative of the individual employee to police the management of his plan.” H. Rep. No. 93-533, 93rd Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Adm. News, 4639, 4642. So dies an ideology. In the 1950s “reliance upon the initiative of the individual,” however procedurally weak, was a political *sine qua non*.

thus, does not, in the last analysis, describe the American experience very well at all. In America, Congress has in the long run tended to function, not as a magnifier of class conflict, but as a transformer of extra-congressional conflict into intra-congressional conflict.

Finally, all of this gives us a fix on how the NRA leadership should be classed alongside the burgeoning fascist movements of the early 30s. Fascist corporatism was anti-parliamentary corporatism. So was American corporatism; indeed, seen in the large, New Deal delegationism should be viewed only as the American manifestation of a world-wide anti-parliamentarism. But fascist corporatism was something more. Fascist corporatism was anti-parliamentary in the service of a larger cause, the cause of suppressing industrial conflict. Furthermore, fascist corporatism, on the ideological plane, was a corporatism of *ressentiment*, marked by its claim to have transvalued the values of the labor movement and representative government. Johnson and Richberg are very difficult to shoehorn into that model. While it is true that they showed a powerful anti-parliamentarism, it is hard to identify any underlying theory of political economy that linked their anti-parliamentarism with their corporatism. And while they certainly showed disdain for labor leaders, what they showed was emphatically *disdain* and not fear. Perhaps most strikingly, these men presented their corporatism to the public without any disingenuous transvaluing of values. They presented their corporatism to the public simply as an economic solution to a putative economic problem. They made no claim, such as the fascists did, to redefine the values of the political, or the moral, world.

To be sure, Johnson and Richberg had unmistakably ugly impulses; if they were not fascists, it seems fair to guess that in other circumstances they would have been. Accordingly, as we play the favorite American game of asking whether it could have happened here, perhaps we should mention Huey Long and Father Coughlin a bit less frequently, and Hugh Johnson a bit more. And as we weigh the legacy of the New Deal, we will do well to remember that it was managed by human beings, with the full range of human merits and demerits.