

## “REGILDING THE GILDED AGE”: THE LABOR QUESTION REEMERGES

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I am delighted to have been invited to participate in this important symposium on inequality, opportunity, and the law of the workplace, and I am honored to be in the company of such impressive speakers. Let me express my gratitude to the Stetson University College of Law and its Law Review for sponsoring this symposium and for affording me the privilege of giving this luncheon keynote address. I particularly want to thank Dean Christopher Pietruszkiewicz and Professor Jason Bent, who organized this symposium, but I am especially appreciative of the students who are here today. Thank you for your interest in labor law and the promise of that law.

This year, as we celebrate the eightieth anniversary of the passage of the Wagner Act—our nation’s basic law that guarantees workers the right to organize and bargain collectively with their employers—organized labor is, as a percentage of the private sector workforce, at a historic low, in steady decline since the 1950s. Workers’ bargaining power is, as a consequence, sharply reduced, and income inequality is at levels not seen since the Gilded Age. I leave it to other speakers on this program to document the nature and extent of present-day wealth and income disparity. I will confine my remarks to outlining the relevance of labor law to this serious challenge, the limits of existing law, and what the future might hold for restoring the promise of labor law.

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An article in last weekend’s New York Times travel section, entitled “Regilding the Gilded Age,” described Gilded-Age buildings that are

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being rehabbed and put back in service in New York City.<sup>1</sup> It struck me that an apt title for my remarks would be “‘Regilding the Gilded Age’: The Labor Question Reemerges.” In studying the disturbing threat posed by income and power inequality today, a glance backwards to the Gilded Age would make sense.

A hundred years ago, on the eve of World War I, Louis Brandeis, who was about to become a United States Supreme Court Justice, observed that “[t]he labor question is and for a long time must be the paramount economic question in this country.”<sup>2</sup> That sentiment was echoed a bit later as the Great War ended, when President Wilson cabled from Versailles:

The question which stands at the front of all others . . . amidst the present great awakening is the question of labour[:] . . . how are the men and women who do the daily labour of the world to obtain progressive improvement in the conditions of their labour, to be made happier, and to be served better by the communities and the industries which their labour sustains and advances?<sup>3</sup>

Everyone at that time—on all sides—seemed to acknowledge that the “‘labor question’ was not merely the supreme economic question but the constitutive moral, political, and social dilemma of the new industrial order.”<sup>4</sup> America’s rapid industrialization and technological innovation during the late nineteenth century led to glaring inequality, a series of periodic depressions, and massive labor strife—often bloody.<sup>5</sup> The

1. Tony Perrottet, *Regilding the Gilded Age in New York*, N.Y. TIMES (Feb. 27, 2015), [http://www.nytimes.com/2015/03/01/travel/regilding-the-gilded-age-in-new-york.html?\\_r=0](http://www.nytimes.com/2015/03/01/travel/regilding-the-gilded-age-in-new-york.html?_r=0).

The term “Gilded Age” was coined by Mark Twain to satirize an era that was glittering on the surface, masking serious social problems underneath. See MARK TWAIN & CHARLES DUDLEY WARNER, *THE GILDED AGE: A TALE OF TODAY* x–xiv (New Am. Library, Inc. 1969) (describing the 1873 edition of the “The Gilded Age” as a satirical novel criticizing society’s greed). The term now refers to a period of “tumultuous social change that ran from roughly the 1870s to the early 1900s” or sometimes up to the 1929 stock market crash. Perrottet, *supra*.

2. Steve Fraser, *The ‘Labor Question,’ in THE RISE AND FALL OF THE NEW DEAL ORDER 1930–1980*, at 55 (Steve Fraser & Gary Gerstle eds., Princeton Univ. Press 1989); NELSON LICHTENSTEIN, *STATE OF THE UNION: A CENTURY OF AMERICAN LABOR* 13 n.25 (Princeton Univ. Press 2002).

3. Letter from Woodrow Wilson to the Congress, in 59 *THE PAPERS OF WOODROW WILSON* 289, 290 (Arthur S. Link ed., Princeton Univ. Press 1988) (May 20, 1919).

4. Fraser, *supra* note 2, at 55.

5. See generally PHILIP DRAY, *THERE IS POWER IN A UNION: THE EPIC STORY OF LABOR IN AMERICA* 225–33 (Random House, Inc. 2010) (discussing “industrial democracy” and how America coped with strikes, technological progress, and economic depressions); STEVE FRASER, *THE AGE OF ACQUIESCENCE: THE LIFE AND DEATH OF AMERICAN RESISTANCE TO ORGANIZED WEALTH AND POWER* 39–67 (Little, Brown & Co. 2015) (discussing how the Industrial Revolution led to progress in America, but how that progress and industrialization came at societal costs); Louis D. Brandeis, *The Living Law*, 10 ILL. L. REV. 461, 463 (1916) (stating “while invention and discovery created the possibility of releasing men and women from the thralldom of drudgery, there actually came, with

Gilded Age, in turn, sparked in the early twentieth century the Progressive Era—a period of political and cultural reform that sought to address the gap between the promise of democracy and the grim realities of life for so many.

In 1912, Congress established the U.S. Commission on Industrial Relations to study the causes of labor conflict.<sup>6</sup> The Commission found that “[o]nly [two] percent of the nation owned [sixty] percent of its wealth. Sixty-five percent of the population owned but [two] percent of the wealth[,] . . . and most toilers in basic industries were jobless for more than two months each year.”<sup>7</sup> Its report, issued in 1915, analyzed the social conditions of the period, and “caused a sensation in the midst of a decade of labor upheaval by condemning the maldistribution of wealth, calling for measures to stem unemployment.”<sup>8</sup> The report argued that the “‘only hope for the solution’ of labor conflict lay in ‘the rapid extension of the principles of democracy to industry.’”<sup>9</sup> Importantly, it declared that “[p]olitical freedom can exist only where there is industrial freedom; political democracy only where there is industrial democracy.”<sup>10</sup>

What “industrial democracy” meant was open for debate, subject to diverse interpretations and experimentation, but everyone seemed to be talking about it. In *Labor’s Great War*, the historian Joseph McCartin eloquently tells the story of how “industrial democracy” eventually came to have meaning in our country, through the institution and practice of collective bargaining.<sup>11</sup> But, it did not happen overnight. The notion of industrial democracy—a “big idea” that emerged from the Progressive Era’s struggles—was not to be fully realized until the economic crisis of the 1930s with the array of New Deal legislation, including the Wagner Act.<sup>12</sup>

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the introduction of the factory system and the development of the business corporation, new dangers to liberty”).

6. JOSEPH A. MCCARTIN, *LABOR’S GREAT WAR: THE STRUGGLE FOR INDUSTRIAL DEMOCRACY AND THE ORIGINS OF MODERN AMERICAN LABOR RELATIONS, 1912–1921*, at 18–19 (Univ. of N. Carolina Press 1997).

7. *Id.* at 24.

8. *Id.* at 12.

9. *Id.*

10. *Id.* (quoting the U.S. Comm’n on Indus. Relations, *Final Report of the Commission on Industrial Relations* (Aug. 23, 1915), available at <https://archive.org/details/cu31924002663197>).

11. *Id.*; see also Clyde W. Summers, *Industrial Democracy: America’s Unfulfilled Promise*, 28 CLEV. ST. L. REV. 29, 32–33 (1979) (describing experimentation with forms of employee representation in the 1920s and the “battle lines” over “which form industrial democracy should take,” resulting finally in 1935, when the “irrepressible plea for industrial democracy . . . became an affirmed promise by the federal government” with the passage of the Wagner Act).

12. MCCARTIN, *supra* note 6, at 225; Summers, *supra* note 11, at 33–34.

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On July 5, 1935, in the midst of the Great Depression, Congress enacted the Wagner Act,<sup>13</sup> named for its chief sponsor New York Senator Robert Wagner. It is worth recalling why. An express goal was to promote economic growth and stimulate the nation's economy by equalizing bargaining power between labor and capital.<sup>14</sup> Through collective bargaining with their employers, workers would increase their incomes. Congress stated expressly in Section One of the Wagner Act that the "inequality of bargaining power between employees . . . and employers . . . substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners."<sup>15</sup> In other words, this law was seen as a means of restoring the nation to economic prosperity by increasing the purchasing power of workers.

But a central purpose was also to give employees an effective voice through collective bargaining in determining their working conditions. In explaining the underlying philosophy of the statute, its sponsor, Senator Robert Wagner, said, echoing the Progressive Era declaration:

The principles of my proposal were surprisingly simple. They were founded upon the accepted facts that we must have democracy in industry as well as in government; that democracy in industry means fair participation by those who work in the decisions vitally affecting their lives and livelihood; and that the workers in our great mass production industries can enjoy this participation only if allowed to organize and bargain collectively through representatives of their own choosing.<sup>16</sup>

And Professor Clyde Summers has explained:

The expectation and promise of the Wagner Act was to make possible for all employees a system of industrial democracy. Collective bargaining would become the established and accepted form of industrial relations. Through collective bargaining employees would have an effective voice, would be able to protect their own interests, and would achieve human dignity. They would find freedom from the autocratic control of employers, and unilateral dictation would be

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13. 29 U.S.C. §§ 151–169 (2012).

14. *Id.*

15. *Id.* § 151.

16. *Supreme Court Findings Hailed by Wagner as Most Significant Since Marshall: Wagner Asks Unity Behind Labor Law*, N.Y. TIMES, Apr. 13, 1937, at 20.

replaced by mutually accepted rules. The divine right of employers would give way to democratic industrial government.<sup>17</sup>

Unquestionably, this law generated enormous optimism about its promise of collective bargaining, and it worked for a while. For several decades it promised, and to some extent delivered, workplace democracy and economic advances through equality of bargaining power. Collective bargaining became an established part of our life. Millions of workers voted for union representation in elections conducted by the National Labor Relations Board (NLRB or the Board), the agency created by Congress to enforce the Labor Act. And, millions achieved a middle-class way of life through collectively bargained agreements that provided fair wages and benefits in major industries. The labor law regime contributed to creating the widely shared prosperity that prevailed after World War II for several decades. As Nobel Prize winning economist Paul Krugman has written: "Once upon a time, back when America had a strong middle class, it also had a strong union movement. These two facts were connected."<sup>18</sup>

But now, eighty years later—and a hundred years after the nation debated the labor question—it is fair to ask what remains of this law's original promise.<sup>19</sup> The story of faded trust in American labor law unfolded gradually. It lies in the gap between the original promise and later results.

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What happened is well known. The economy changed in dramatic ways—foreign trade surged; major domestic industries were deregulated; technological innovation accelerated; financial, product, and labor markets globalized; manufacturing shrunk, and the service sector exploded. The role of finance and Wall Street expanded dramatically, with a shift from managerial capitalism to financial capitalism, treating companies as assets to be bought and sold, and as vehicles for maximizing profits through financial strategies. At the same time, corporate governance changed, elevating shareholder value over the interests of other stakeholders, especially labor; organized labor steadily

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17. Summers, *supra* note 11, at 34.

18. Paul Krugman, *State of the Unions*, N.Y. TIMES (Dec. 24, 2007), [http://www.nytimes.com/2007/12/24/opinion/24krugman.html?\\_r=0](http://www.nytimes.com/2007/12/24/opinion/24krugman.html?_r=0).

19. Wilma B. Liebman, *Decline and Disenchantment: Reflections on the Aging of the National Labor Relations Board*, 28 BERKELEY J. EMP. & LAB. L. 569, 572–76 (2007) (describing the decline of the National Labor Relations Act and what remains of its original promise).

declined as a percentage of the private sector workforce, and workers' bargaining power eroded. "The regulated and more equitable capitalism of the mid-[twentieth] century has morphed into a far harsher system."<sup>20</sup>

Responding to accelerating competitive pressures, firms seeking "flexibility" began to alter their business models and the nature of the employment relationship. For workers, what once was secure became uncertain. Katherine Stone, a speaker at this conference, has written about this transformation in her book *From Widgets to Digits*,<sup>21</sup> as has David Weil, now serving as the Department of Labor's Wage and Hour Administrator, in his book *The Fissured Workplace*.<sup>22</sup> Ownership of capital became more distant from workers. As vertically integrated corporations began to "dis-integrate," employment relationships "fissured," to use Weil's terms. Non-core functions were moved to other entities and risk shifted away from the corporation to complicated networks of smaller business units, with increasing use of subcontractors, independent contractors, and franchising. At the same time, employment became more precarious, with regular full-time work becoming less common.

With all of these changes—it seems—came a greater willingness by some employers not just to bend the law, but to break it, to defeat unions, and to frustrate collective bargaining. That resistance by employers was a matter of both ideology and economic rationality, as companies faced competition—both domestic and foreign—from nonunion or low-cost rivals. Low-union density itself is both a cause and consequence of employer resistance. And, as a cause and consequence of all this upheaval, politics and government were shifting as well, as deregulatory laissez faire economic policies were taking hold. The result is a New Deal Era labor law increasingly at war with our economy, society, and workplace realities.

Nonetheless, the last major revision to U.S. labor law occurred in 1947, at the end of World War II. Professor James Brudney has vividly described the state of affairs: "Congress has made virtually no changes in [labor law] since Jackie Robinson integrated major league baseball, since television arrived in American homes, or since well before the creation of

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20. Harold Meyerson, *Harold Meyerson: Democrats Lost Because They Didn't Deliver Broad Prosperity*, WASH. POST (Nov. 5, 2014), [http://www.washingtonpost.com/opinions/harold-meyerson-democrats-lost-because-they-didnt-deliver-broad-prosperity/2014/11/05/db11a196-6517-11e4-9fdc-d43b053ecb4d\\_story.html](http://www.washingtonpost.com/opinions/harold-meyerson-democrats-lost-because-they-didnt-deliver-broad-prosperity/2014/11/05/db11a196-6517-11e4-9fdc-d43b053ecb4d_story.html).

21. KATHERINE V.W. STONE, *FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE* (Cambridge Univ. Press 2004).

22. DAVID WEIL, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* (Harv. Univ. Press 2014).

the interstate highway system.”<sup>23</sup> For years, commentators and scholars have been describing this law with words like death or dying, decline, or ossification.<sup>24</sup> As early as 1983, Professor Paul Weiler wrote, “American labor law more and more resembles an elegant tombstone for a dying institution.”<sup>25</sup> On the occasion of the Wagner Act’s seventy-fifth anniversary, labor economist Richard Freeman wrote that “the law no longer fits American economic reality and has become an anachronism irrelevant for most workers and firms.”<sup>26</sup>

Nor is there anything close to a consensus on how to update it. Efforts over the last forty years to amend the statute in any broad fashion all ended in legislative stalemate. Opponents of this law view it as a New Deal relic, out of sync with a globalized economy.<sup>27</sup> But even many supporters have lost confidence in the law. Some say that it is contributing to the demise of the rights that it was intended to protect.<sup>28</sup> They believe that the law is a hindrance and not merely unhelpful.

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As the basic labor law has proven completely resistant to legislative change, the Board is left to apply existing law, struggling to adapt it to emerging realities. But, the Board itself is limited in what it can do—even a Board committed to a dynamic interpretation of this law. A variety of factors and forces constrain its discretion.

First, there is the statutory text itself. The law was written during an industrial era in the context of a much more stable economy and with a very different kind of employment relationship in mind. The model for

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23. James J. Brudney, *Gathering Moss: The NLR’s Resistance to Legislative Change*, 26 A.B.A. J. LAB. & EMP. L. 161, 161 (2011).

24. See, e.g., James J. Brudney, *Reflections on Group Action and the Law of the Workplace*, 74 TEX. L. REV. 1563, 1563 (1996) (noting that collective action seems “moribund”); Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1527 (2002) (explaining the scope of the article and Professor Estlund’s argument “that the ineffectuality of American labor law and the shrinking scope of collective representation are partly traceable to the law’s ‘ossification’”); Liebman, *supra* note 19, at 570–73 (collecting sources).

25. Paul Weiler, *Promises to Keep: Securing Workers’ Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1769 (1983).

26. Richard B. Freeman, *What Can We Learn from the NLRA to Create Labor Law for the Twenty-First Century?*, 26 ABA J. LAB. & EMP. L. 327, 330 (2011).

27. See *The NLRB’s Unfair Labor Practice*, WASH. TIMES (May 10, 2013), <http://www.washingtontimes.com/news/2013/may/10/the-nlrbs-unfair-labor-practice/> (“The National Labor Relations Board is a New Deal relic that has outlived its purpose.”); Richard A. Epstein, *Senseless in Seattle*, HOOVER INST. (Apr. 26, 2011), <http://www.hoover.org/research/senseless-seattle-0> (discussing that the NLRA is no longer necessary, and stating that “[t]here is no good reason to spend public funds to create massive rigidities in labor markets”).

28. See, e.g., James J. Brudney, *A Famous Victory: Collective Bargaining Protections and the Statutory Aging Process*, 74 N.C. L. REV. 939, 941 n.4 (1995) (listing legal scholars and their concerns).

the law was a factory and going to work for the corporation at one physically centralized workplace for a lifetime, ascending a hierarchical structure. Some of the provisions in the law, and some of the doctrines that have evolved over the decades, now seem out of sync with present-day realities. For example, the law's "bargaining unit" basis of union representation and collective bargaining seems misaligned with an economy, business models, and workplace relationships that are in constant flux. Representation based on a "bargaining unit" also seems guaranteed to diminish workers' bargaining leverage.

Similarly, the definitions of who is an "employee" or "employer" covered by the Act, or an "independent contractor," "supervisor," or "manager" excluded from the Act's protections, often seem a poor fit with modern business practices, the evolving nature of work, and varied employment arrangements—at least from the perspective of the people doing the work. The "employee" status of graduate teaching assistants, or the joint employer allegations currently pending against McDonalds and its franchisees, are but two examples of long-standing doctrine being tested by diverse ways of doing business or organizing work.<sup>29</sup>

One can only imagine how the NLRB will grapple with the "employee" status of gig or on-demand economy workers. Recently, two federal district court judges were presented with cases alleging Uber and Lyft drivers to be "employees" under California's wage and hour laws.<sup>30</sup> Faced with the defense that these drivers are independent contractors, the judges questioned whether the traditional test was past its prime, especially when compared to these companies' business models.<sup>31</sup> "As should now be clear, the jury in this case will be handed a square peg and asked to choose between two round holes," district court Judge Vince Chabria observed in the *Lyft* decision, concluding: "The test the California courts have developed over the [twentieth] [c]entury for classifying workers is not very helpful in addressing this [twenty-first] [c]entury problem."<sup>32</sup> These cases arose under wage and hour laws, but the dilemma is the same under our industrial era labor law.

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29. See *Browning-Ferris Indus. of Cal., Inc.*, 362 NLRB No. 186, at \*2 (N.L.R.B. Aug. 27, 2015) (modifying the test for joint employer status in a representation case involving a subcontracting arrangement).

30. Uber and Lyft are two American transportation network companies whose mobile phone applications enable "ridesharing" by connecting passengers who need a ride with drivers who have a car. Lyft, *How Lyft Works*, LYFT.COM, <https://www.lyft.com> (last visited Dec. 13, 2015); Uber, *The Company*, UBER.COM, <https://www.uber.com/about> (last visited Dec. 13, 2015).

31. *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1081–82 (N.D. Cal. 2015); *O'Connor v. Uber Tech., Inc.*, 2015 U.S. Dist. LEXIS 30684, \*25–27 (N.D. Cal. 2015).

32. *Cotter*, 60 F. Supp. 3d at 1081.



Also inherent in the statute itself is the weakness of the available remedies, which fail to adequately deter wrongdoers or compensate victims of discrimination under the statute. And a quirky, little-known statutory provision added by the 1947 Taft-Hartley amendments to the law prevents the Board from spending any of its budget to hire economic analysts and researchers.<sup>33</sup> Why? Because some members of Congress suspected the agency's economic researchers of being Communists.<sup>34</sup> By design or happenstance, this handicap effectively promotes the Board's obsolescence. It would seem to make the Board ill-equipped to examine the economic consequences of its decisions or to modernize labor law doctrines in response to changing economic conditions—let alone, to make informed decisions based on economic realities. It is hard to imagine any other administrative agency with this kind of constraint.

Second, the Board's ability to innovate is constrained not only by the statutory text, but also by well-established doctrines and eighty years of precedent, which the Board must navigate. While it is free to change precedent, it must do so carefully. It acts at its peril if it side steps precedent without reconciling conflicts in the caselaw and without justification. At the same time, of course, rigidly adhering to precedent that no longer makes sense is the antithesis of reasoned decision-making.

A third constraint is the ever-present prospect of judicial review. Some courts insist on strict statutory construction, limiting the Board's ability to adapt the law in light of policy considerations. Writing for the majority in *NLRB v. Kentucky River Community Care, Inc.*,<sup>35</sup> a case involving nurses attempting to unionize, Justice Scalia rejected the Board's attempt to narrowly define a "supervisor" excluded from the Act's provisions. While acknowledging that the Board's interpretation was based on a sound policy argument, he said the problem was that "the policy cannot be given effect through this statutory text."<sup>36</sup>

Moreover, as the percentage of the workforce represented by unions has declined, and with it the Board's caseload, members of the judiciary are less often exposed to such New Deal concepts as solidarity and collective action. They may know the laws that prohibit discrimination or protect individual rights, but they are likely unversed, if not skeptical or even hostile, to collective rights. Take, for example, the views on labor

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33. 29 U.S.C. § 154(a) (2012) (stating that "[n]othing in this subchapter shall be construed to authorize the Board to appoint individuals for the purpose of . . . economic analysis").

34. JAMES A. GROSS, *THE RESHAPING OF THE NATIONAL LABOR RELATIONS BOARD: NATIONAL LABOR POLICY IN TRANSITION 1937-1947*, at 219-21 (State Univ. of N.Y. Press 1981).

35. 532 U.S. 706, 720 (2001).

36. *Id.*

law of Judge Edith Brown Clement who said, albeit in dissent: “[C]ompanies struggle to remain competitive and efficient . . . under the fear of being sued for labor violations. . . . We are far removed from the era in which unions were the necessary, staunch defenders of employee rights in the face of abusive, domineering, and exploitive employers.”<sup>37</sup> While the federal appellate courts enforce the vast majority of the NLRB’s decisions, in whole or in part, the Board does face occasional resistance.

Indeed, certain pre-New Deal Era jurisprudential strains have proven resilient, like freedom of contract and economic freedom. A leaning towards these principles can be in tension with the rigorous enforcement of labor law rights, not to mention with the Board’s ability to innovate under the statute. For example, District of Columbia Circuit Court Judge Janice Brown, in a caustic concurrence in *Hettinga v. United States*,<sup>38</sup> condemned the Supreme Court’s consigning of economic liberty and property rights “to a lower echelon of constitutional protection than personal or political liberty.”<sup>39</sup> As she wrote, “America’s cowboy capitalism was long ago disarmed by [the] democratic process . . . [a]nd the courts, from which the victims of burdensome regulation sought protection, have been negotiating the terms of surrender since the 1930s.”<sup>40</sup> And, in language reminiscent of thinking from a century ago, she revealed her disdain for “redistribution”:<sup>41</sup> “Civil society, ‘once it grows addicted to redistribution, changes its character and comes to require the state to feed its habit.’”<sup>42</sup>

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37. *El Paso Elec. Co. v. NLRB*, 681 F.3d 651, 670, 677 (5th Cir. 2012) (Brown Clement, J., dissenting).

38. 677 F.3d 471, 480 (D.C. Cir. 2012) (Brown, J., concurring) (involving a system of milk-market price controls dating back to the New Deal).

39. *Id.*

40. *Id.*

41. In *Coppage v. Kansas*, 236 U.S. 1 (1915), the Supreme Court made clear that the states must not declare that the public good requires the removal of inequalities between workers and employers:

No doubt, wherever the right of private property exists, there must and will be inequalities of fortune. . . . [Thus it is] impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights.

*Id.* at 17.

42. *Hettinga*, 677 F.3d at 483 (internal quotation marks omitted).

So, while the Supreme Court's 1937 decisions upholding New Deal legislation, like the Wagner Act,<sup>43</sup> led to a dramatic change in the vision of national power to regulate business, resistance remains.<sup>44</sup>

A fourth constraint on the Board comes from external pressures, particularly politics. The NLRB is, of course, no stranger to rancor. Controversial from the start, labor law has once again entered what American historian Richard Hofstadter once described as "an arena [of] angry minds."<sup>45</sup> A major political battle erupted at the start of the Obama Administration with the attempt to enact the Employee Free Choice Act, intended to reform labor law and strengthen its protections. Ultimately, the proposed legislation stalled in Congress, suffering the fate of labor law reform efforts for the last four decades. In its wake, heated political battles erupted on multiple fronts.

These involved the budget of the NLRB—including a move to completely defund the "New Deal Relic," which, although unsuccessful, still garnered 176 votes in the House of Representatives,<sup>46</sup> and constant Congressional oversight of the Board's activities. For ten years, from 2003 until 2013, the Board operated without a full five-member, Senate confirmed composition. Senate confirmation of the President's nominees to head the agency became nearly impossible, and for twenty-seven months, the Board operated with only two (out of five) Board members because of Senate gridlock over nominees. One Obama-nominee to the Board was filibustered in the Senate, and recess appointments were made by the President. Eventually, two adverse Supreme Court decisions issued—*New Process Steel, L.P. v. NLRB*,<sup>47</sup> invalidating the decisions of the two-member Board, and *NLRB v. Canning*,<sup>48</sup> ruling that the President's January 2012 recess appointments to the NLRB were unconstitutional.

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43. See, e.g., *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 49 (1937) (upholding the Wagner Act).

44. See, e.g., Brian Beutler, *The Rehabilitationists: How a Small Band of Determined Legal Academics Set out to Persuade the Supreme Court to Undo the New Deal—And Have Almost Won*, NEW REPUBLIC (Aug. 30, 2015), <http://www.newrepublic.com/article/122645/rehabilitationists-libertarian-movement-undo-new-deal> (noting that opposition about the "proper role of government . . . was never completely vanquished"); Greg Sargent, *So Who Wants to Roll Back the New Deal?*, WASH. POST (Aug. 31, 2015), <https://www.washingtonpost.com/blogs/plum-line/wp/2015/08/31/so-who-wants-to-roll-back-the-new-deal/> (discussing the possibility of a Republican presidential nominee attempting to restore pre-New Deal concepts that could potentially undermine economic state regulations).

45. Richard Hofstadter, *The Paranoid Style in American Politics*, HARPER'S MAG., Nov. 1964, at 77.

46. See, e.g., Ryan Grim, *NLRB Amendment Beaten by GOP, Dem Coalition*, HUFFINGTON POST, (Feb. 17, 2011, 5:19 PM EST), [http://www.huffingtonpost.com/2011/02/17/nlr-amendment-beaten-by-gop\\_n\\_824783.html?](http://www.huffingtonpost.com/2011/02/17/nlr-amendment-beaten-by-gop_n_824783.html?)

47. 560 U.S. 674, 676 (2010).

48. 134 S. Ct. 2550, 2578 (2014).

Battles with the Board persist. Except for the most routine, the Board's ongoing activities spark strong reaction, especially its recent initiative to update rules that govern the conduct of workplace representation elections. The United States Chamber of Commerce has appropriated the rhetoric of battle, vowing earlier this year to engage in "guerrilla warfare" against the NLRB with a variety of weapons including litigation, congressional oversight hearings, legislation, and appropriations riders—all in an effort to obstruct the Board's actions.<sup>49</sup>

For the Board's opponents, nothing short of neutering the agency is the goal, and anything that it does, however modest, will trigger a skirmish and overheated rhetoric. In that sense, labor law is emblematic of the political world and the profound values—the divide in which we live.

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Given these constraints, is there hope for this law and its promise of equality of bargaining power between labor and business? I do not think there is yet cause for doom. The history of American labor would argue otherwise. Unions were formed, grew, and survived in a legal order that was actively hostile to them. Moreover, despite persistent challenges, the fundamental values of our labor law endure—the rule of law as a substitute for often bloody labor battles, freedom of association, the goal of economic advancement through collective bargaining, and the underlying notion of industrial democracy.

Moreover, there is a silver lining to all of this controversy. Out of it has come renewed awareness and attention to issues like stagnating wages and inequality that had been marginalized for years. Public discourse has changed, and the labor question is once again in the public eye. "One reason we should be more optimistic is that we have finally become aware of just how lousy the past several decades were for the average U.S. worker . . . ."<sup>50</sup>

Most promising, perhaps, we are seeing signs of life not seen for decades—a revival of worker activism. Gradually, working people in

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49. John A. Logan, *Right Wing Declares 'Guerrilla War' on NLRB, Again*, HILL (Feb. 17, 2015, 10:00 AM), <http://thehill.com/blogs/pundits-blog/labor/232917-right-wing-declares-guerrilla-war-on-nlr-again>; Chris Opfer, *Slowing Down the NLRB 'Quickie' Election Rule: A Preview of Congressional Review*, LAB. & EMPL. BLOG, BLOOMBERG BNA (Jan. 28, 2015), <http://www.bna.com/slowng-down-nlr-b17179922551/>.

50. Zachary A. Goldfarb, *Why the Economy Isn't Doomed*, WASH. POST (Feb. 14, 2014), [https://www.washingtonpost.com/opinions/why-the-economy-isnt-doomed/2014/02/14/afabb292-8c84-11e3-95dd-36ff657a4dae\\_story.html](https://www.washingtonpost.com/opinions/why-the-economy-isnt-doomed/2014/02/14/afabb292-8c84-11e3-95dd-36ff657a4dae_story.html).

every imaginable type of workplace and occupation are emerging from years of acquiescence, and joining together, with and without unions, to improve life on the job despite the odds and the obstacles. Just in the last year we have seen: drivers who transport Silicon Valley entrepreneurs to join the Teamsters—a striking symbol of confronting inequality; labor strife at West Coast ports, Texas oil refineries, and a New England telephone company; workers at Volkswagen's Chattanooga facility continue their effort to unionize and establish a German-style works council with co-determination rights, despite an early 2014 NLRB election loss;<sup>51</sup> Northwestern University football players seeking to unionize, as well as National Football League cheerleaders and adjunct faculty,<sup>52</sup> and farmworkers, home healthcare workers, fashion models, and others excluded from the basic labor law's coverage mobilizing for better pay and improved working conditions; not to mention the remarkable walkout by thousands of workers and managers at Market Basket, a family-owned New England grocer chain, who joined together to protest the ouster of a worker-friendly CEO.<sup>53</sup>

And, of course, the fast food workers' "Fight for \$15" campaign has gained momentum in city after city and even abroad.<sup>54</sup> The campaign has triggered a wave of minimum-wage hikes around the country. It has also, little by little, introduced hundreds, if not thousands, of workers to collective action and the notion of "organizing" for improved working

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51. Matthew Finkin & Thomas Kochan, *The Volkswagen Way to Better Labor-Management Relations*, L.A. TIMES (Jan. 20, 2014), <http://articles.latimes.com/2014/jan/20/opinion/la-oe-finkin-vw-work-councils-20140120>; Andy Sher, *Sen. Bo Watson Slams VW over Labor Policies, UAW Recognition*, TIMES FREE PRESS (Mar. 18, 2015), <http://www.timesfreepress.com/news/business/aroundregion/story/2015/mar/18/watsquestions-volkswagen-over-labor-policies/293841/>; Brent Snively, *UAW Certified to Represent VW Workers in Tennessee*, DET. FREE PRESS (Dec. 9, 2014, 7:14 AM EST), <http://www.freep.com/story/money/cars/2014/12/08/uaw-union-certified-vw/20111791/>; *UAW Charters Local 42 at Volkswagen in Chattanooga*, CHATTANOOGAN (July 10, 2014), <http://www.chattanooga.com/2014/7/10/280066/UAW-Charters-Local-42-At-Volkswagen.aspx>.

52. Nw. Univ. and College Athletes Players Ass'n (Capa), 362 NLRB No. 167, at \*1 (N.L.R.B. Aug. 17, 2015).

53. Thomas A. Kochan, *What the Market Basket Deal Says About American Workers*, FORTUNE (Aug. 28, 2014, 10:08 AM EDT), <http://fortune.com/2014/08/28/what-the-market-basket-deal-says-about-american-workers/>.

54. The "Fight for \$15" is a worker movement started by fast food industry workers in late 2012, seeking to bring attention to their stagnant wages and poor working conditions through a series of one-day rallies and strikes. These have spread from a few cities to many more across the country and globally. Their stated goal is fifteen dollars an hour and the establishment of a union. There has been extensive media coverage of this movement. See, e.g., Steven Greenhouse, *How to Get Low-Wage Workers into the Middle Class*, ATLANTIC (Aug. 19, 2015), <http://www.theatlantic.com/business/archive/2015/08/fifteen-dollars-minimum-wage/401540/> (discussing the potential success of the movement); Steven Greenhouse & Jana Kasperkevic, *Fight for \$15 Swells into Largest Protest by Low-Wage Workers in US History*, GUARDIAN (Apr. 15, 2015, 5:40 PM EDT), <http://www.theguardian.com/us-news/2015/apr/15/fight-for-15-minimum-wage-protests-new-york-los-angeles-atlanta-boston> (describing the demonstrations across cities).

conditions. These are workers who probably had no prior exposure to this kind of activity, let alone a notion of worker rights or unions. They will presumably lead this movement going forward, and over time it will likely spread. With each of the minimum wage victories, their efforts will be rewarded.

All of these stories demonstrate that the data on declining union density ignores the developing story about workers who are organizing and how grassroots mobilization can move an issue into the mainstream.

It is important to recognize the limits of the law, as I have outlined. Modest but meaningful efforts can be made to keep the law current, to adapt it to changing economic and workplace realities, and, in the words of Justice Brandeis, to keep the law “living.”<sup>55</sup> But, even an active Board, committed to labor law’s potential, cannot solve the underlying problems of stagnant wages, inequality, and lack of worker bargaining power.

Comprehensive labor law reform is not politically viable for now. That said, were an opportunity to arise, there are questions that we should be considering. A fundamental re-examination of American labor law would have to address a wide range of issues, but a few stand out:

- What changes in the law’s coverage provisions should be made so that workers performing services for employers have protections and can effectively organize and bargain collectively, taking into consideration sweeping changes in business models, the nature and organization of work, and the employment relationship?

- Does the bargaining-unit model of representation, based on majority rule and exclusive representation, still make sense, especially given an economy where workplaces are in constant flux, where bargaining units disappear through business transformations, and where jobs are constantly churning? Is the model too restrictive of employee voice at work and of employees’ ability to exert bargaining power?

- How might the statute’s famously weak remedial scheme be overhauled?

- How can we create an enabling environment for collective bargaining? Is the current scope of mandatory collective bargaining too narrow to adequately take into account workers’ interests and competencies?

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55. Brandeis, *supra* note 5, at 464, 467 (blaming the failure of the law to keep pace with the prior fifty years of revolutionary political, social and economic changes, and stating that “[c]ourts continued to ignore newly arisen social needs,” reasoning from abstraction and not from life). “No law, written or unwritten, can be understood without a full knowledge of the facts out which it arises and to which it is to be applied.” *Id.*

- And, how can the process for securing union representation be made less adversarial and more streamlined for those workers who desire it?

These are questions that may not be taken up any time soon, I realize. Real solutions begin with revived worker activism. A stronger law would follow from a stronger labor movement, not the other way around. The law did not create labor power—labor did. Whether you look at the Gilded Era and its massive labor strife, or the labor battles of the 1930s, today's labor laws were the product of tremendous struggle. While we do not yet have a full-fledged sustained social movement, or anything resembling those earlier eras, still there is surely ample evidence of restiveness and discontent. We do well not to ignore these signs. It is easy to give up hope, but that would be wrong.

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In concluding, let me just pose a question for the business community—and Republicans. You express concern about stagnant wages and inequality, but you do not like solutions that involve expanding government or taxes on the wealthy or interfere, in your view, with business or the free market. I would then ask: Why not start by supporting the voluntary, largely laissez faire institution of collective bargaining? It is compatible with free market principles. It is a process left to the private parties to work out for themselves. It is consistent with democracy. So, if we care about democracy—and everyone on the right, the left, and the middle does—why not “giv[e] collective bargaining a serious chance”?<sup>56</sup> While certainly not a panacea for all of our economic woes, it might be a start.

A hundred years ago, Justice Brandeis cautioned: “‘We must make our choice. . . . We may have democracy [in this country], or we may have wealth concentrated in the hands of a few, but we cannot have both.’”<sup>57</sup> Today, again, we must make that choice. The Labor Question

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56. Jim Tankersley, *Robots Are Hurting Middle Class Workers, and Education Won't Solve the Problem, Larry Summers Says*, WASH. POST (Mar. 3, 2015), <http://washingtonpost.com/blogs/wonkblog/wp/2015/03/03/robots-are-hurting-middle-class-workers-and-education-wont-solve-the-problem-larry-summers-says/>.

57. RAYMOND LONERGAN, MR. JUSTICE BRANDEIS: *GREAT AMERICAN*, PRESS OPINION AND PUBLIC APPRAISAL 42 (Modern View Press 1941).

is reemerging,<sup>58</sup> and an industrial democracy suited to twenty-first century realities should be part of the solution.

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58. See, e.g., Rich Yeselson, *Labor at a Crossroads: Will Diversity Foster a New Solidarity and Save the Movement?*, AM. PROSPECT (Jan. 20, 2015), <http://prospect.org/authors/rich-yeselson> (discussing that labor has the best chance it has had in over forty years to put the labor question before the public).