

The Revival of American Labor Law[†]

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I.

It is impossible today to have a discussion about American labor law divorced from the stormy events of the last few weeks in Washington, D.C. In the midst of our historic snow storm, a political storm raged over nominations to the National Labor Relations Board (“NLRB” or “Board”), culminating in a failed cloture vote on Craig Becker¹—one of President Obama’s nominees to fill three vacancies on the five-member Board—who has drawn the intense opposition of business groups. (These vacancies have existed for over two years, since the Democratic-controlled Senate refused to confirm President Bush’s last nominees, and the Supreme Court will soon address the authority of a two-member Board to decide cases.)²

Meanwhile, labor law reform legislation—which would represent the first major changes in the statute in more than sixty years—has

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The views in this Article are mine alone and do not reflect the views of any other Board Member or the NLRB.

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1. Susan J. McGolrick, *Senate Defeats Motion to End Debate On Becker’s Nomination to Serve on NLRB*, DAILY LAB. REP. (BNA, Arlington, Va.), Feb. 11, 2010, at AA-1.

2. Steven Greenhouse, *Labor Panel Is Stalled by Dispute on Nominee*, N.Y. TIMES, Jan. 15, 2010, at A16.

been the subject of rancorous public debate, with both labor and business groups waging campaigns to persuade Congress and the American public.³ Once viewed as an early Obama administration legislative priority, its fate is at best uncertain now that the Senate Democrats have lost their sixty-vote supermajority.

Of course, from its beginnings, the NLRB has been controversial.⁴ The law was the product of fierce struggles and still triggers deeply held and divided views. Our decisions are subject to skeptical, sometimes hostile, judicial review.⁵ Confirmation of the President's nominees to the Agency is often difficult. The Board has long had to make do with vacant seats or recess appointments. Indeed, I have served on every configuration of Board members possible during my twelve-year tenure (five members, four, three, two, and even myself alone for six weeks). Still, the unprecedented twenty-six month long two-member Board, a pending Supreme Court case that will resolve a challenge to the two-member Board's decisions, and the filibuster over confirmation of President Obama's nomination of Craig Becker represent a record accumulation of difficulties.

The election of Barack Obama was an historic moment in many respects, not least for those interested in labor law. The hopes of some (and fears of others) for the revitalization of labor law were enormous. Given the bitter politics of the last several months, it is hard to think hopefully about the future of labor law. Today, the NLRB has become emblematic of political paralysis. And the

3. Brody Mullins, *New Ads Intensify Fight on Union Bill*, WALL ST. J., Apr. 13, 2009, at A4.

4. See John Thomas Delaney et al., *The NLRA at Fifty: A Research Appraisal and Agenda*, 39 INDUS. & LAB. REL. REV. 46 (1985).

Since its enactment, the National Labor Relations Act (NLRA) has proven to be the most controversial and bitterly contested piece of New Deal legislation, alternately receiving support and condemnation from the parties it covers. But this is not surprising, given that the Act tries to interject reason into the emotion-laden reality of worker-management relations. *Fortune* magazine's early (1938) characterization of industrial relations under the Act still holds true: "[It has] become a battlefield of slogans and shibboleths, of coercion and propaganda, of intimidation and mutual accusation, of guerilla warfare and strikes." In order to administer a labor law in this setting, the National Labor Relations Board (NLRB) must referee a holy war.

Id. at 46 (citation omitted).

5. James J. Brudney, *A Famous Victory: Collective Bargaining Protections and the Statutory Aging Process*, 74 N.C. L. REV. 939, 943-47 (1996).

National Labor Relations Act (“NLRA” or “Act”),⁶ first enacted in 1935, and last significantly amended in 1947,⁷ appears completely resistant to revision notwithstanding dramatic social and economic transformation since that time. As New York University Law Professor Cynthia Estlund has observed, “I know of no other major American legal regime—no other body of federal law that governs a whole domain of social life—that has been so insulated from significant change for so long.”⁸

The current labor law regime is widely regarded as being in steep decline. Many commentators have concluded that American law does not effectively protect workers’ right to organize and that it does not promote the institution of collective bargaining as the best way to resolve disputes between labor and management, let alone encourage constructive relations between them.⁹

This year, as we celebrate the seventy-fifth anniversary of the passage of the Act, a law intended to equalize bargaining power between labor and capital, there is glaring income inequality¹⁰ and unionized labor, as a percentage of the private sector workforce, is less than eight percent, an historic low point.¹¹

6. 29 U.S.C. §§ 151–169 (2000); *id.* §§ 141–187.

7. *Id.* §§ 141–187.

8. Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1531 (2002).

9. See Cynthia L. Estlund, *The Death of Labor Law?*, 2 ANN. REV. L. & SOC. SCI. 105 (2006); James J. Brudney, *Isolated and Politicized: The NLRB’s Uncertain Future*, 26 COMP. LAB. L. & POL’Y J. 221 (2005); Julius Getman, *The National Labor Relations Act: What Went Wrong; Can We Fix It?*, 45 B.C. L. REV. 125 (2003); Michael H. Gottesman, *In Despair, Starting Over: Imagining a Labor Law for Unorganized Workers*, 69 CHL.-KENT L. REV. 59 (1993).

10. Analysis of IRS data reveals that the earnings gap is now the widest it has been since 1928, with the richest 1 percent of Americans having captured most of the economy’s 2005 growth, and the bottom 90 percent having received nothing. David Cay Johnston, *Income Gap is Widening, Data Shows*, N.Y. TIMES, Mar. 29, 2007, at C1; see also Larry Swisher, *Income Gap Between Richest Households, Those at Middle, Bottom Grows, Study Finds*, DAILY LAB. REP. (BNA, Arlington, Va.), Apr. 9, 2008, at A-16. Recent reports that the income gap may be shrinking attribute this trend to a decline in income for the top 1 percent of the population, rather than the bottom being lifted up. See Bob Davis & Robert Frank, *Income Gap Shrinks in Slump at the Expense of the Wealthy*, WALL ST. J., Sept. 10, 2009, at A1.

11. The latest data indicates that only 7.2 percent of private sector employees belong to a union. News Release, Bureau of Labor Statistics, *Union Members—2009* (Jan. 22, 2010), available at http://www.bls.gov/news.release/archives/union2_01222010.pdf. At labor’s peak during the 1950s, unions represented about 35 percent of the private sector workforce. See

It is fair to ask, what remains of this Act's original promise? In trying to answer that question, I shall first sketch the historical arc of this law, and then suggest why revitalizing—or some might say resuscitating—labor law matters.

II.

Our current labor law is, fundamentally, a product of the Great Depression and the New Deal that responded to it. Millions were out of work. Most major industries were unorganized. The law barely tolerated labor unions. Violence was commonplace in labor disputes. In the summer of 1935, Congress worked feverishly to enact a series of laws to regulate business and markets and to restore economic prosperity. No other session of Congress had ever adopted so much legislation of permanent importance: Social Security, banking and securities measures, and the National Labor Relations Act.¹²

On July 5, 1935, President Franklin Roosevelt signed the NLRA into law, stating that the law sought to achieve “common justice and economic advance.”¹³ It is worth remembering why Congress did what it did. To quote Section 1 of the Act: “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”¹⁴ In other words, the Act was seen as a means of restoring the nation to economic prosperity. The law was enacted less as a favor to labor, than to save capitalism from itself.

The Act articulated basic rights: the right of workers, free from intimidation, to self-organization to improve their terms and conditions of employment, and the right to bargain collectively with

Steven Greenhouse, *Labor Seeks Boost From Pro-Union Measure*, N.Y. TIMES, Feb. 23, 2007, at A18.

12. WILLIAM E. LEUCHTENBURG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL: 1932–1940, at 150–51, 162–63 (1963).

13. 79 CONG. REC. 10720 (1935) (statement of President Franklin D. Roosevelt upon signing the National Labor Relations Act (the Wagner Act) on July 5, 1935), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 3269 (1959).

14. 29 U.S.C. § 151 (2000).

their employer.¹⁵ It established a system to enforce these rights; it created a permanent independent agency empowered to conduct elections in workplaces and to restrain employers from committing unfair labor practices.¹⁶

Its driving ideas were lofty. They carried forward the Progressive Era notion that industrial democracy (a workplace where workers had a voice in shaping the terms and conditions of their employment¹⁷) is critical to a political democracy. The administrative agency regulatory scheme reflected Felix Frankfurter's ideals of administrative expertise and a disinterested public service.¹⁸ The New Deal provided great opportunities for young lawyers like you. They came to Washington and contributed to a dramatic transformation of our society, with a new role for government in the service of the public good.¹⁹

Things changed, if not easily. After great struggles, collective bargaining became an established part of American economic life. The greatest period of union growth in our nation's history began.²⁰

Over the next decades, millions of workers voted for union representation in NLRB-conducted elections.²¹ And millions achieved a middle class way of life through collective bargaining and agreements that provided fair wages and benefits in major industries of the economy.²² This was the golden age of collective bargaining. 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."²³

15. *Id.*

16. *Id.* §§ 151–169.

17. See WEBSTER'S THIRD INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1155 (Philip Babcock Gove et al. eds., 1993).

18. See PETER H. IRONS, THE NEW DEAL LAWYERS 7–8 (1982).

19. See generally *id.* at 3–14.

20. ROBERT H. ZIEGER, AMERICAN WORKERS, AMERICAN UNIONS, 1920–1985, at 137 (1986).

21. Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1775 (1983).

22. American family incomes grew by an average of 2.8% a year from 1947 through 1973, with every sector of society seeing its income roughly double. LAWRENCE MISHEL, JARED BERNSTEIN & SYLVIA ALLEGRETTO, THE STATE OF WORKING AMERICA 2006/2007, at 45–47 (2007).

23. Paul Krugman, Op-Ed., *State of the Unions*, N.Y. TIMES, Dec. 24, 2007, at A17.

III.

Since the New Deal and the Second World War, our society and our economy have, of course, gone through dramatic changes. Labor law, however, failed to keep up. Well before now, it started to become clear that something had gone wrong. By the time I entered the profession in 1974, the New Deal labor law was past its prime. The long but steady process of “[d]ecline and [d]isenchantment” with this law and with the federal agency that administers it—the one I now head—was beginning.²⁴

In 1981, President Reagan fired striking air-traffic controllers, a watershed event.²⁵ As early as 1983, Harvard Law School professor Paul Weiler lamented that “[c]ontemporary American labor law more and more resemble[d] an elegant tombstone for a dying institution.”²⁶ By then, organized labor was in steady decline. What happened? The economy was beginning its rapid transformation, and the workplace was evolving in complicated ways in response to global and domestic competitive pressures. Technology was beginning to transform ways of communicating and doing business.²⁷ Foreign trade surged.²⁸ Major industries were deregulated. Manufacturing shrunk, and the service sector exploded.²⁹ Shifting demographics changed the composition of the workforce, and new waves of immigrants crossed our borders.³⁰ The nature of the employment relationship was transformed by the rise of a hyper-competitive global economy. Contingent employment relationships became common as firms struggled to achieve flexibility.³¹ So did corporate restructurings,

24. Wilma B. Liebman, *Decline and Disenchantment: Reflections on the Aging of the National Labor Relations Board*, 28 BERKELEY J. EMP. & LAB. L. 569, 569 (2007).

25. RICK FANTASIA & KIM VOSS, *HARD WORK: REMAKING THE AMERICAN LABOR MOVEMENT* 66–68 (2004).

26. Weiler, *supra* note 21, at 1769.

27. ZIEGER, *supra* note 20, at 195.

28. *Id.* at 194.

29. UNIONS IN A GLOBALIZED ENVIRONMENT CHANGING BORDERS, ORGANIZATIONAL BOUNDARIES, AND SOCIAL ROLES 4 (Bruce Nissen ed., 2002).

30. See Ruth Milkman & Kent Wong, *Organizing Immigrant Workers: Case Studies from Southern California*, in REKINDLING THE MOVEMENT: LABOR’S QUEST FOR RELEVANCE IN THE TWENTY-FIRST CENTURY 104–07 (Lowell Turner et al. eds., 2001).

31. PETER CAPELLI ET AL., *CHANGE AT WORK* 4–5 (1997).

downsizings, and the outsourcing of work.³² In short, what once was secure, became uncertain. And these competitive pressures, and resulting trends, have only accelerated over the last two decades.

All of this flux put severe strains on the collective bargaining system, as labor and business both struggled to adapt and survive.³³ Unionized bargaining units and bargaining unit work regularly disappeared. Wages stagnated; health and pension benefits disappeared.

Let me illustrate from my own experience. In 1980, the trucking industry was deregulated by Congress. I went to work for the Teamsters Union, which represented a high proportion of drivers in the industry. With deregulation came economic havoc. Countless trucking companies began to fail under competitive pressures imposed by new non-union entrants into the market. Stable jobs were converted to owner-operator, often independent-contractor arrangements, forcing drivers to purchase vehicles, pay for gasoline and insurance, and push themselves to their physical limits to make a living. Non-union low-paid, no-benefit arrangements became the norm.³⁴

Unions have been criticized for failing to adjust to the changed economy, for failing to devote enough resources to organizing, and for failing to make their case to employees persuasively. But organizing workers is a Sisyphean task in this economic environment. Pushing for job security, wages, and benefits means pushing uphill as well. And strikes have all but disappeared as an effective weapon in collective bargaining disputes.³⁵

32. See LYNN A. KAROLY & CONSTANTIJN W.A. PANIS, *THE 21ST CENTURY AT WORK: FORCES RESHAPING THE FUTURE WORKFORCE AND WORKPLACE IN THE UNITED STATES* 117 (2004).

33. See Samuel Estreicher, *Labor Law Reform in a World of Competitive Product Markets*, 69 CHI.-KENT L. REV. 3, 10 (1993).

34. MICHAEL H. BELZER, *SWEATSHOPS ON WHEELS: WINNERS AND LOSERS IN TRUCKING DEREGULATION* 77–78 (2000).

35. See James Gray Pope, *How American Workers Lost the Right to Strike, and Other Tales*, 103 MICH. L. REV. 518 (2004). In 1946, there were nearly 5,000 strikes involving 4.6 million workers. JEREMY BRECHER, *STRIKE!* 228 (1972); Nicola Pizzolato, *Strikes in the United States Since World War II*, in *THE ENCYCLOPEDIA OF STRIKES IN AMERICAN HISTORY* 226 (Aaron Brenner et al. eds., 2009). In contrast, in 2009, there were fewer than 150 strikes. 2009 FED. MEDIATION & CONCILIATION SERV. ANN. REP. 7, available at http://fmcs.gov/assets/files/Public%20Documents/2009_Annual_Report.pdf.

Compounding the challenge in this climate is a greater willingness by some employers not just to bend the law, but to break the law to defeat unions and to frustrate collective bargaining.³⁶ That resistance is a matter of both ideology and economic rationality, as companies face competition from non-union rivals. Low union density is both a cause and a consequence of employer resistance.

IV.

And where was labor law during all of this? Failing, more or less obscurely. The National Labor Relations Board itself has made little sustained effort to adjust its legal doctrines to preserve worker protections in an increasingly ruthless, competitive economy. The last major legislative revision to the National Labor Relations Act, the Taft-Hartley Act, was made just after World War II ended—as a backlash against union power.³⁷ Labor law reform was last a major issue in Congress during the Carter Administration, more than thirty years ago.³⁸ During the Clinton administration, the subject was relegated to a federal advisory committee, the Dunlop Commission. Its 1994 reports ably documented the problem with labor law and set the stage for action³⁹—just in time for the Republican takeover of Congress. In other words, the work of the Commission was dead on arrival.

During most of the first Clinton term, I served as deputy director of the Federal Mediation and Conciliation Service (a creation of the

36. A recent study of NLRB data asserts that employer opposition to employee organizing has intensified over the past two decades and that the nature of these campaigns has changed to focus on more coercive and punitive tactics. Kate Bronfenbrenner, *No Holds Barred: The Intensification of Employer Opposition to Organizing* 1–2 (Econ. Policy Inst., EPI Briefing Paper No. 235, 2009); see John Schmitt & Ben Zipperer, *Dropping the Ax: Illegal Firings During Union Election Campaigns*, CTR. FOR ECON. & POL'Y RESEARCH (Jan. 2007), http://www.cepr.net/documents/publications/unions_2007_01.pdf; Morris M. Kleiner, *Intensity of Management Resistance: Understanding the Decline of Unionization in the Private Sector*, 22 J. LAB. RES. 519 (2001); see also Wendy Zellner, *How Wal-Mart Keeps Unions at Bay*, BUS. WK., Oct. 28, 2002, at 94 (“Over the past two decades, Corporate America has perfected its ability to fend off labor groups.”).

37. See Labor-Management Relations Act, 29 U.S.C. §§ 141–197 (2000).

38. See Weiler, *supra* note 21, at 1770.

39. See COMM'N ON THE FUTURE OF WORKER-MGMT. RELATIONS, THE DUNLOP COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS—FINAL REPORT (1994), available at http://digitalcommons.ilr.cornell.edu/key_workplace/2/.

1947 Taft-Hartley Act). Those years were marked by a cautious optimism about the so-called “new economy.” Our goal was to foster more constructive, strategic engagement between labor and management, encouraging creative approaches that would both improve firm competitiveness *and* provide good jobs. There were notable successes. But some of these relationships were fragile, and they suffered, even failed, at least in part, because public policy support for them disappeared after the Clinton years.

I joined the NLRB in 1997. The Clinton years at the NLRB were marked by efforts (albeit modest) to keep labor law relevant (or somewhat relevant) in today’s economy. Clinton Board decisions extended statutory coverage to more workers, removed legal obstacles to organizing by contingent workers, protected representational rights when businesses changed hands, and provided non-union workers with an important protection against unfair discipline. These decisions and others were sharply criticized by business as radical, but two union practitioners saw things more realistically. They observed that the Clinton Board’s decisions revealed the “increasingly confined (indeed relatively insignificant) doctrinal terrain on which the conflict over U.S. labor policy is enacted.”⁴⁰

During the last Administration, the situation worsened. The NLRB was deeply divided in nearly all of its major decisions. The Board’s majority missed chance after chance to reinvigorate labor law by taking current economic realities into account in deciding who is covered by the law and what protections the law grants workers and their unions.⁴¹ These decisions made it harder for contingent workers to organize, put new groups of workers outside the coverage of the law altogether, failed to address the phenomenal volatility of the corporate world and how it affected collective bargaining, and took a *laissez faire* approach to the bargaining process.⁴² These decisions were deeply controversial, as reflected, for example, in union complaints to the United Nations’ International Labor

40. See Jonathan P. Hiatt & Craig Becker, *Drift and Division on the Clinton NLRB*, 16 LAB. LAW. 103 (2000).

41. Liebman, *supra* note 24, at 580.

42. See *id.*

Organization and protests outside our headquarters.⁴³ That controversy accelerated a loss of faith in the NLRB. There has been a steep decline in the number of cases brought to the Board, especially union-filed petitions for agency-conducted representation elections.⁴⁴

Critical to any understanding of the American labor law regime today, is an appreciation of the controversy within the Board, and about the Board, during the Bush Administration. The Board was sharply split in virtually all of its major decisions, divided over matters of substance, policy preferences, and judicial philosophy. The split produced, in the form of dissents, a clearly-articulated alternative view of what labor law should be, at least under the existing statute.

Meanwhile, there was Congressional scrutiny of Bush Board decisions in late 2007, and Senate confirmation of President Bush's final slate of three nominees to the Board, announced in January 2008, was stymied. That left a Board with only two members, which has continued to function—somewhat improbably, and in the face of pending legal challenges to its authority—as we await confirmation of President *Obama's* nominees. The issue of our authority to decide cases will be decided by the Supreme Court this spring. It is possible that much of the work of the two-member Board could be undone.

V.

That brings us to the present and the questions of where American labor law is now and where it is going. The short answer is that we are at a moment of great uncertainty. Once again, the United States is in an economic crisis, with major companies in bankruptcy and millions of people out of work, walking an economic tightrope without a net. Once again, we are faced with the challenge of creating

43. Michelle Amber, *AFL-CIO Complaint With ILO Alleges NLRB Decisions Deny Workers' Rights*, DAILY LAB. REP. (BNA, Arlington, Va.), Oct. 26, 2007, at AA-1; Anita Huslin, *Marchers Protest NLRB's Busy Sept.*, WASH. POST, Nov. 16, 2007, at D3.

44. From 2005 to 2006, the Board's representation case intake declined by nearly 26 percent. From 1997 to 2007, it declined by 41 percent. During the same ten-year period, unfair labor practice case intake declined by 31 percent. Susan J. McGolrick, *Effects of NLRB's Landmark Ruling on Supervisory Status Should Become Clearer*, DAILY LAB. REP. (BNA, Arlington, Va.), Jan. 17, 2007, at S-9.

a sustainable and equitable economy. How long will a “jobless recovery” go on? Will it lead to social discord and labor unrest, or simply silent suffering?

Today, the so-called “beautiful system”⁴⁵ of American labor law is derided by some as a relic of the Depression and New Deal era. Collective action and industrial democracy—the animating ideas of this law-likely seem foreign to many Americans. Our legal system focuses more and more on individual rights in the workplace, and that reinforces the feeling that, at work, average Americans are on their own.

Indeed, millions of workers *are* on their own. They work in precarious jobs, under temporary or contingent arrangements. Low-wage and low-skilled, often undocumented, many would be likely candidates for union representation and would clearly stand to gain from collective bargaining. But they fall through the cracks of the law’s coverage and protections either by the express language of the statute (agricultural labor, domestic workers, independent contractors⁴⁶), or by the interpretations of the courts or the Board itself.

There are countless stories that depict the reality at work for millions of workers, but a couple will vividly depict where things stand today.

In a 2005 story,⁴⁷ Steven Greenhouse of the New York Times wrote about workers, largely Dominican immigrants, who for years packed Gillette razors as temporary workers but were never hired permanently. They were “among scores of workers who complain[ed] that Gillette ha[d] gone too far in relying on temporary workers, a practice that they [said was] fostering poverty, destabilizing families and undercutting communities.”⁴⁸ Gillette was bought [that year] by Proctor & Gamble. Gillette’s business model involved subcontracting its packaging operations to companies with

45. Cynthia Estlund, *Reflections on the Declining Prestige of American Labor Law Scholarship*, 23 COMP. LAB. L. & POL’Y J. 789, 791 (2002).

46. 29 U.S.C. § 152(3).

47. Steven Greenhouse, *Workers Are Pressing Gillette Over Conditions at Packaging Plants*, N.Y. TIMES, Nov. 8, 2005, at A24.

48. *Id.*

more expertise in that area so it could concentrate on manufacturing razors and blades.⁴⁹

The workers joined with a local coalition of religious, community and labor groups, to press Gillette to improve wages and conditions for one thousand temporary workers at two razor packing plants.⁵⁰ The coalition protested that Gillette's business model, relying on subcontracting and temporary employment agencies paying about \$8.10 an hour, was hurting hundreds of immigrant families in Lawrence, Massachusetts, a city, Greenhouse described, of "hulking but largely deserted apparel factories that had its heyday nearly a century ago."⁵¹ Local clergy complained that with all these temp jobs, "there [was] no stability in the community. . . . Survival bec[ame] the main issue in their lives. They earn[ed] so little that many [had] to take second and third jobs, and they just [did not] have enough time to give to their children."⁵² An official of one of the subcontractors said that the company had no intention of rethinking its heavy reliance on temporary workers. "It's a business model that requires a temp work force."⁵³

Although the article did not say so, under labor law, these workers faced real obstacles to unionization because of their contingent and temporary arrangements with subcontractors of Gillette. By joining with a coalition of local organizations, they recognized the value of collective protest. But, however powerful, that kind of protest does not substitute for collective bargaining at the workplace.

Another heartbreaking story illustrates the consequences of this destabilization of work and the demise of collective bargaining. Last summer, St. Louis author Nick Reding wrote about small town decay in his book *Methland*,⁵⁴ the story of Oelwein, Iowa, once a community with thriving family farms, good union jobs and small businesses. Emblematic of many towns in America, Oelwein had to cope with the shift to agribusiness, low-wage employment, unemployment, and the blight of methamphetamines. Reding

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. NICK REDING, *METHLAND* (2009).

portrays the affects of the de-unionization of a local meat processing plant, with wages slashed and benefits gone, the influx of undocumented migrants taking remaining jobs at low wages, and the further depression of wages. Reding describes how in this environment, methamphetamine use became habitual and its manufacture became a business. With its opportunity for quick profit and instant highs, it was irresistible.

The dilemma is compounded by the Supreme Court's decision in *Hoffman Plastic Compounds, Inc. v. NLRB*,⁵⁵ involving the labor law rights of undocumented workers. The Supreme Court had held earlier that undocumented workers are "employees" entitled to the coverage of the Act.⁵⁶ But that protection was rendered all but illusory when the Court decided that undocumented workers, fired unlawfully for trying to unionize, could not receive the typical NLRB remedy of back pay and reinstatement.⁵⁷ To do so, the Court majority held, would encourage violation of the nation's immigration laws.⁵⁸ The consequence of this decision, I fear, is not only to remove incentives for employers of undocumented workers to comply with labor law, but also to discourage undocumented workers from attempts to better their wages and working conditions.

VI.

In this overall context, labor law reform—legislation labeled the Employee Free Choice Act ("EFCA")⁵⁹—seemed to be fairly high on the Congressional agenda at the beginning of 2009, although not at the top of the list (which was reserved for health care reform). But from the first, many obstacles, aside from competing legislative priorities, stood in its way.

Today, those obstacles look daunting indeed. Nonetheless, it is not hard to see why organized labor has invested so much in EFCA. The percentage of American workers in the private sector who are

55. 535 U.S. 137 (2002).

56. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984).

57. *Hoffman Plastic Compounds, Inc.*, 535 U.S. at 140.

58. *Id.* at 150–52.

59. H.R. 1409, 111th Cong. (2009); S. 560, 111th Cong. (2009).

represented by labor unions is at a historic low.⁶⁰ At the same time, according to respected surveys, the gap between the percentage of workers who *have* unions and the workers who *want* them is high.⁶¹

According to organized labor, the cause of the gap is the flawed legal regime that governs the union-election process and that gives anti-union employers a host of unfair advantages. Yet, it is one, arguably difficult, thing for workers to win union representation; it is another for their new union to win a first contract from the employer, which unions fail to do in a substantial number of cases.⁶²

As drafted, EFCA aims to address these problems by allowing unions to win representational rights through a card-check process—which involves the collection of employee signatures instead of holding a secret-ballot election—and by imposing meaningful consequences on employers who unlawfully fire union supporters during organizing drives.⁶³ It also provides for mandatory mediation and binding first-contract arbitration should the parties fail to reach a first agreement in a specified period.⁶⁴

The battle over the Employee Free Choice Act escalated all year. Opponents of EFCA have called its “card check” provision a threat to liberty and democratic values. They hammered the message that it would cost jobs and harm the economy—in line with commentators who assert that the original 1935 Wagner Act actually prolonged the

60. *See supra* note 11.

61. A study of recent worker surveys indicated that the proportion of workers who want unions has risen substantially since the mid-1990s, and that a majority of non-union workers in 2005 would have voted for union representation if given the opportunity. Richard B. Freeman, *Do Workers Still Want Unions? More Than Ever* (Econ. Policy Inst., EPI Briefing Paper No. 182, 2007). *But see Just 9% of Non-Union Workers Want to Join Union*, RASMUSSEN REPORTS (Mar. 16, 2009), http://www.rasmussenreports.com/public_content/business/jobs_employment/march_2009/just_9_of_non_union_workers_want_to_join_union (describing the results of a Rasmussen telephone survey that indicated only 9 percent of non-union workers would like to belong to a union). *See generally* Mark Blumenthal, *How Many Would Unionize?*, POLLSTER.COM, Mar. 20, 2009, http://www.pollster.com/blogs/how_many_would_unionize.php (explaining the disparity between the polls Freeman relied upon and the Rasmussen poll).

62. Research has indicated that only one-seventh of organizing drives that filed an election petition with the NLRB from 1999 to 2004 were able to reach a first contract within one year of certification. John-Paul Ferguson, *The Eyes of the Needles: A Sequential Model of Union Organizing Drives, 1999–2004*, 62 *INDUS. & LAB. REL. REV.* 3, 3 (2008).

63. H.R. 1409 § 4.

64. *Id.* § 3.

Depression.⁶⁵ In contrast, EFCA's supporters argue that the economic downturn is actual proof that labor's decline has jeopardized the health of the economy and that the nation can return to broadly shared prosperity only by restoring workers' purchasing power.⁶⁶ And the controversy over EFCA extended to the nomination of Craig Becker with the battle cry that "by fiat" the Board itself could somehow adopt EFCA.

In keeping with the tradition among NLRB members, I am officially agnostic about the merits of EFCA. And I am not a skillful-enough political prognosticator to predict whether EFCA, in some form or another, will ever be approved by Congress. Let me offer an observation, nevertheless: even in its original form, EFCA does not represent comprehensive labor-law reform. What it represents, rather, is the prospect of an end to the ossification of our law.

When I view the current situation, then, I have contradictory feelings. On the one hand, it is gratifying that, after so many decades of marginalization, labor law and labor policy are once again in the public eye. In that sense, the ongoing debate is welcome, however rancorous. On the other hand, it is discouraging to see how deep the divisions are and how paralyzed the process has become. In the words of a *Washington Post* writer:

[T]he environment in which the bill is being debated has further ratcheted up the rhetoric, revealing a divide as wide as that on any other major issue on President Obama's agenda. The two sides put forth starkly different versions of both history and present-day reality, making it hard to imagine how the two sides could compromise.⁶⁷

A fundamental reexamination of American labor law—taking place nearly seventy-five years after Franklin Roosevelt signed the

65. Mark Mix, Opinion, *Labor Unions Prolonged the Depression*, WALL ST. J., Oct. 28, 2008, at A15; Tyler Cowen, *The New Deal Didn't Always Work, Either*, N.Y. TIMES, Nov. 23, 2008, at BU6.

66. In the view of AFL-CIO President Richard Trumka, securing collective bargaining in a union for a larger share of the workforce, presumably leading to higher pay, can revive consumer spending and drive economic growth. Matthew Kaminski, *What Labor Wants*, WALL ST. J., Sept. 19, 2009, at A13.

67. Alec MacGillis, *Labor Union Bill Raises Broader Capitalism Issues*, WASH. POST, Mar. 15, 2009, at A2.

Wagner Act and ushered in a new era—would have to address a whole range of issues that are not yet on the agenda:

- What, if any, changes in the law's coverage provisions should be made, so that workers in non-traditional employment relationships are protected and can effectively organize? This issue will be of increasing significance as firms continue to struggle for flexibility and begin to put more people back to work, including greater use of casual workers or so-called independent contractors.
- Does the bargaining-unit model of representation, based on majority rule and exclusive representation, still make sense, in an economy where workplaces are in constant flux, where bargaining units disappear through consolidations and restructurings, and where jobs are constantly churning?
- How might the statute's famously weak remedial scheme be overhauled?
- Is the current scope of mandatory collective bargaining too narrow to adequately take into account workers' interests and competencies?
- Are there better ways for administering labor law than our New Deal-agency model?
- What should be the relationship between our domestic law and international labor standards?

These are not questions that will be taken up any time soon, I realize. I raise them, rather, in the hope that, as other countries do, the United States will periodically revisit and revise its labor law—more often than, say, every sixty years.

VII.

In the meantime, of course, the work of the National Labor Relations Board goes on—more or less. As I mentioned, the Board now functions with only two members, my Republican colleague Peter Schaumber and myself. For the past nearly twenty-six months, we have continued to issue decisions—indeed, a remarkable number

of decisions—where we can find ways to reach agreement. Significant cases, however, have languished. And as I mentioned, this spring the Supreme Court will decide whether the two-member Board has authority to act.

Notwithstanding recent events, I still expect, some day, to greet new Board members. Hope, after all, springs eternal. Once constituted, a new Board will be able to address important issues and will, I hope, bring a new approach to its mission, an approach that fulfills the duty of an administrative agency, within the limits of its authority, to apply the law faithfully, but also dynamically. The goal for the Board itself, it seems to me, is clear: restoring confidence through a revitalized labor law and an approach to labor law that keeps the law living, taking into consideration actual economic and workplace conditions, keeping pace with relentless real-world change, and not just engaging in a sterile debate over the meaning of words. All this said, I do not think that *fundamental* changes in labor law—as opposed to incremental improvements—can reasonably be expected to come from the National Labor Relations Board, whoever serves there. Even under the best of circumstances, with a Board majority firmly committed to a dynamic interpretation of the Act, the Board operates under serious constraints. There is, most obviously, the statutory text (including a provision that bars that Board from developing an economic-analysis capability). Add to that decades of Board precedent (352 bound volumes and counting) and the ever-present prospect of judicial review, often skeptical and sometimes even hostile. Factor in the turnover in Board members, and the problems—delay, for one—inherent in any bureaucracy, particularly in an agency that has been trending toward irrelevance. If you do that calculation, the result does not suggest that the path to a revitalized labor law starts at the NLRB.

More realistically, the starting point for a revitalized labor law today would be Capitol Hill. But prospects there are cloudy, as I have said. Absent a revitalized labor law, we are essentially left with employment law to govern the workplace, a legal regime based on strictly individual rights. Some may suggest that these laws are sufficient to protect workers. I would disagree.

Both collective and individual rights are vitally important in the workplace. They complement each other. But we do well to

remember that the individual-rights regime was essentially built on the framework of collective action. It is no coincidence that most worker-protections statutes were passed *after* the National Labor Relations Act. Labor unions were instrumental in winning, preserving, and enforcing worker protection laws. But that regime, alone, has real limitations for workers.

The basic premise of the Wagner Act—that collective action is the mechanism for achieving employee bargaining power—still holds true, for the average worker. And with respect to economic terms, the individual-rights model is largely empty. Freedom from discrimination, for example, does not guarantee decent wages; the Employee Retirement Income Security Act does not mandate pension or welfare benefits; and the Occupational Safety and Health Act's guarantees depend on government intervention that is usually missing. Basic rights at work, the kind achieved through collective bargaining, remain unprotected by statute: no law mandates fair treatment, creates a grievance system, requires just cause for discharge, or gives workers a voice in how a business is run. An army of trial lawyers is no substitute for the institution of collective bargaining.

Nonetheless, despite my agnosticism, my skepticism, and my pragmatism, I do want to explain why (even during the long days of being in the minority and writing dissenting opinions, and even at this difficult historical moment) I feel honored to serve on the Board and cautiously hopeful about the revitalization of labor law.

Every day, I read cases involving working people who, despite the odds and the obstacles, join together to improve life on the job. They work on assembly lines and in cardiac wards, on construction sites and in mega-stores. They slaughter hogs and drive trucks, clean hotel rooms and care for the disabled. Sometimes they have unions to help them, but other times they act spontaneously to help each other—a reminder that solidarity is part of who we are. One of the great secrets of the National Labor Relations Act is that it protects these people even in a non-union workplace,⁶⁸ and so does the Board—maybe not as often as it should, and usually not as quickly as it could, but

68. See MARION G. CRAIN, PAULINE T. KIM & MICHAEL SELMI, *WORK LAW: CASES AND MATERIALS* 495–511 (2005).

despite our divisions and disagreements, we do enforce the law and we do have a law to enforce. And as long as that's the case, then the values embodied in the Act are living values, even after seventy-five years.

Indeed, the freedom of association and the freedom to engage in collective bargaining are part of the international legal order. The National Labor Relations Act is the foundation of our commitment to values recognized around the world, even if they are sometimes honored in the breach.

To say that labor law has proved virtually impossible to change, is also to say that it has endured. I also expect the labor movement to endure. The lesson of American history is that unions were formed, grew, and survived in a legal order that was actively hostile, sometimes even violently hostile, to them. Today's labor laws were the product of tremendous struggle.

Let me end by saying that labor law matters. It matters because democracy in the workplace is still basic to a democratic society. It matters because collective bargaining is still basic to a fair economy. It matters because the issues that divide capital and labor will always be with us, in some form and to some degree. Labor law provides access to economic justice at the workplace. It has made a large contribution to the expansion of the middle class in this country. It has allowed labor and business to reach their own solutions in response to changing economic conditions.

Today, the collective bargaining system and the legal institutions that support it are under severe stress. Sober public dialogue is sorely needed if we are to figure out how to allow, indeed encourage, business to be flexible and competitive, yet also ensure workers the protections and promise of the law. In other words, how are we to achieve the necessary delicate balance between market freedom and democratic values? What road we take in addressing these issues will depend on what kind of society we want to be.

POSTSCRIPT

On March 27, 2010, President Obama announced the recess appointments of attorneys Craig Becker and Mark Gaston Pearce to fill two vacancies on the Board.⁶⁹ On June 22, Member Pearce and attorney Brian Hayes were confirmed by unanimous consent in the Senate as members of the Board.⁷⁰ When Member Hayes joined the Board, the NLRB was at full five-member strength for the first time since December 2007.⁷¹ Member Peter C. Schaumber's term expired on August 27, 2010.⁷²

The Board issued a total of 595 rulings during the period of the two-member Board. The two members set aside approximately sixty-five to seventy cases involving novel issues or questions about whether to overturn precedent.⁷³

On June 17, 2010, the U.S. Supreme Court ruled that the Board was not authorized to issue decisions during the twenty-seven month period when three of its five seats were vacant.⁷⁴ The 5-4 decision authored by Justice Stevens concluded:

We are not insensitive to the Board's understandable desire to keep its doors open despite vacancies. Nor are we unaware of the costs that delay imposes on the litigants. If Congress wishes to allow the Board to decide cases with only two members, it can easily do so. But until it does, Congress' decision to require that the Board's full power be delegated to no fewer than three members, and to provide for a Board

69. Michelle Amber & Susan J. Sala, *Obama Recess Appoints Becker, Pearce To Serve on NLRB, Four Nominees for EEOC*, DAILY LAB. REP. (BNA, Arlington, Va.), Mar. 30, 2010, at AA-1.

70. Susan J. McGolrick, *Senate Confirms Pearce, Hayes to Serve Terms as NLRB Members*, DAILY LAB. REP. (BNA, Arlington, Va.), June 12, 2010, at A-2.

71. *Id.*

72. *Id.*

73. Susan J. McGolrick, *Becker, Pearce Sworn in as Members, Creating 3-1 Democratic Majority on NLRB*, DAILY LAB. REP. (BNA, Arlington, Va.), Apr. 8, 2010, at AA-1.

74. *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010); see Press Release, Nat'l Labor Relations Bd., Supreme Court Rules Two-Member NLRB Lacked Authority to Issue Decisions (June 17, 2010), available at http://www.nlr.gov/shared_files/Press%20Releases/2010/R-2752.pdf.

quorum of three, must be given practical effect rather than be swept aside in the face of admittedly difficult circumstances.⁷⁵

At the time of the June 17th decision, ninety-six of the two-member Board decisions were pending on appeal before the federal courts—six at the Supreme Court and ninety in various Courts of Appeals.⁷⁶

75. *New Process Steel, L.P.*, 130 S. Ct. at 2644–45.

76. Press Release, Nat'l Labor Relations Bd., NLRB Outlines Plans for Considering 2-Member Cases in Wake of Supreme Court Ruling (July 1, 2010), available at http://www.nlr.gov/shared_files/Press%20Releases/2010/R-2762.pdf.