# Labour Law, Economic Justice and Political Rhetoric: Reflections on the *Wagner Act*

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## The Seventh Koskie Minsky University Lecture in Labour Law†

I am delighted to be here this evening, and I am grateful to Western Law School and Koskie Minksy LLP for the privilege of participating in this conference and giving tonight's lecture. After hearing the impressive list of prior speakers, I am doubly honoured.

I am also very pleased to be here in Canada. As you may know, many of us who practice labour law in the United States tend to envy the labour law system of our neighbours to the north—or at least various aspects of it. Of course, not everyone would agree with that. This past year, I was asked to testify at a hearing before the Appropriations Committee of the United States House of Representatives. One of the Republican Congressmen asked me whether the National Labor Relations Board

* Chairman, National Labor Relations Board, January 2009 to August 2011; Member, National Labor Relations Board, November 1997 to January 2009. I am most grateful to Professor Michael Lynk, who was instrumental in inviting me to give this lecture; to the law firm of Koskie Minsky LLP, which sponsored the lecture; to Bernie Fishbein, Chair of the Ontario Labour Relations Board, for his very generous introduction; and to the law firm of Heenan Blaikie LLP, which co-sponsored the conference. I also wish to thank Vera van Diepen, an assistant at the Faculty of Law of the University of Western Ontario, for her help in transcribing the lecture; Erin Payne, a student in that faculty, for her help in editing this article; and Deborah Katz and Carrie Menkel-Meadow for their helpful comments.

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(NLRB or "Agency") was planning to implement "quick snaps".[1] I replied that I was unfamiliar with that term. I sensed, however, that he was referring to Canadian procedures under which employees can vote on union representation quickly, as opposed to the drawn-out procedures we use south of the border.

The title of this conference, "Faultlines and Borderlines", is intriguing, and I look forward to the presentations. "Faultlines" is apt to observations I will make this evening about the faultlines now exposed in America, particularly over labour law and policy. And with respect to "borderlines", given the recent shutdown of the Caterpillar plant in London (with the loss of over 450 jobs) and relocation of the work to a non-union plant in Indiana,[2] my fear is that America may be exporting north some of our most problematic labour law practices.

With that, let me begin by saying that it has become impossible to have a candid discussion of American labour law or economic justice—let alone the original promise of the 1935 *Wagner Act*—divorced from the escalating and overheated political storms of the last few years in the United States. While the NLRB is no stranger to controversy, it has faced a record accumulation of difficulties. It has had to navigate storms over labour law reform and nominations of members of the Board,[3] including a Senate filibuster over confirmation of one of President Obama's nominees, an unprecedented twenty-seven-month interval with only two (out of five) Board members and a United States Supreme Court decision striking down the nearly six hundred decisions issued during this interval.[4] Added to these woes, there has been aggressive Congressional oversight, existential threats to the Agency's budget, and attacks (some vitriolic) in the media and the public arena against the actions of the Board and the Agency's Acting General Counsel.

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1. US, *National Labour Relations Board, Chairman and Acting General Counsel: Budget Hearing Before the Subcommittee for Labor, Health and Human Services, Education, and Related Agencies of the House Committee on Appropriations*, 112th Cong (6 April 2011) (Wilma Liebman).

2. Greg Keenan, "Caterpillar Pulls Plug on London Plant", *The Globe and Mail* (3 February 2012) online: The Globe and Mail <http://www.theglobeandmail.com>.

3. I will use "Board" to refer to the five member adjudicatory part of the NLRB. Together, the Board and the office of the General Counsel make up the NLRB or Agency.

4. *New Process Steel v NLRB*, 130 S Ct 2635 (2010) [*New Process Steel*] (finding that two members did not constitute a proper quorum).

Last fall, both Bernie Fishbein (Chair of the Ontario Labour Relations Board) and I spoke at a business conference in Toronto. He may not recall this, but he advised me not to talk too much about American politics, "or else people's eyes will glaze over if you talk about filibusters and all that". Therefore, I apologize in advance, as it is impossible to discuss American labour law today without getting into politics, which has, since Bernie and I met, just gotten "curiouser and curiouser".[5]

This evening, I will describe these ongoing political battles, with particular emphasis on the overheated rhetoric and fierce reaction to the NLRB's recent activities. As I will explain, this New Deal law, with its promise of equality of bargaining power between employees and their employers, was controversial from the beginning. But why is the NLRB a "lightning rod for political fights"[6] seventy-seven years after enactment of the law, and notwithstanding its long and steady decline in the face of massive economic and social change? Is it the Agency's recent record, or is something else going on? After describing the record, I will discuss why I believe that the battle against the NLRB and the legitimacy of labour law is emblematic of broader fault lines in American society, reflecting deep value-driven differences. I will close with a reaffirmation of the fundamental values of US labour law, which in my view endure despite persistent challenges.

# I. The American Labour Law Regime

Before proceeding, let me say a few words about the American labour law regime. The *National Labor Relations Act* (*NLRA* or *Act*)[7] is the principal federal statute governing private-sector labour relations, excluding the railway and airline industries, which are separately regulated by the *Railway Labor Act*.[8] The NLRB is the agency with sole

5. Lewis Carroll, *Alice's Adventures in Wonderland* (New York: The Macmillian Company, 1920) at 15.

6. Sam Hananel, "McCain vows to hold up labor board nominee", *The Seattle Times* (23 October 2009) online: The Seattle Times <http://seattletimes.nwsource.com/> ("[w]hile the NLRB is one of the lesser-known federal agencies, its role as referee of conflicts between unions and management makes it a lightning rod for political fights between business interests and organized labor").

7. 29 USC §§ 151-169 [*NLRA*].

8. *Railway Labor Act*, 45 USC §§ 151-188.

responsibility for enforcing the *NLRA*, which covers all private employers that meet the Board's threshold jurisdictional requirements. A separate federal law governs labour relations in the federal public sector; state and local laws separately govern non-federal public sector labour relations.

The NLRB has two functions. First, it resolves disputes over union representation, conducting secret ballot elections and related legal proceedings. Second, it prevents, or adjudicates and remedies, unfair labour practices by both employers and unions. By statute, the Board consists of five members, nominated by the President "by and with the advice and consent of the Senate".[9] The President designates one member to serve as the Chairman of the Board.[10] The Board members' five-year terms are staggered, with one expiring every year. By tradition, three of the five members are from the President's party and two from the opposition.

Over at least the last thirty years, Senate confirmation of the President's nominees to the Agency has often been difficult. The Board has long had to make do with vacant seats or "recess" appointments.[11]

The *NLRA* also provides for an independent General Counsel who is appointed by the President, "by and with the advice and consent of the Senate".[12] In case of a vacancy in the office of the General Counsel, the *NLRA* provides that the President may designate an employee of the Agency to act as General Counsel.[13]

Finally, it is critical to this story to understand that while most issues in the US Senate are decided by a simple majority vote, under Senate rules a three-fifths vote of all Senators (sixty of one hundred, known as a "supermajority") is required to invoke cloture, which closes debate on a bill or nomination. In practice today, the mere threat of a filibuster prevents passing almost any contentious legislation or confirming any controversial nominee without this supermajority.

9. *NLRA*, *supra* note 7 at § 153(a).

10. *Ibid.*

11. US Const art II, § 2, spelling out the powers of the presidency, says that "the president shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of the next session".

12. *NLRA*, *supra* note 7 at § 153(d).

13. *Ibid.* Since June 2010, an acting general counsel has been in place. His nomination has been stalled in the Senate.

# II. The Promise of American Labour Law

As one scholar has written:

> Since its enactment the [*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 guerrilla warfare and strikes" (p. 53). In order to administer a labor law in this setting, the NLRB must referee a holy war.[14]

Note the language: "battlefield", "guerrilla warfare", "holy war". The *Wagner Act*—as it was called after its chief sponsor, New York Senator Robert Wagner—was the product of fierce struggles, and it still triggers deeply held and divided views. It is fundamentally a product of the Great Depression of the 1930s and President Franklin Roosevelt's New Deal. Enacted in 1935, it was "one of the most drastic legislative innovations of the decade".[15] Its express purpose was to restore the nation to economic prosperity and, in the words of President Roosevelt, "to achieve common

14. John T Delaney et al, "The NLRA at Fifty: A Research Appraisal and Agenda" (1985) 39:1 Indus & Lab Rel Rev 46 at 46. See also Samuel Estreicher, "Workers still need labor law's shield", *The New York Times* (21 July 1985) A2, online: The New York Times <http://www.nytimes.com> ("[o]n the eve of its 50th anniversary, the National Labor Relations Board appears to be at a point of institutional crisis. From all quarters—labor, management and the universities—there is great dissatisfaction. Some firebrands have even called for the abolition of the board and the body of labor law that it enforces"). See also AH Raskin, "Elysium Lost: The Wagner Act at Fifty" (1986) 38:3 Stan L Rev 945 at 948:

> The only change [over the years] has been in the nature of the Board's critics—sometimes management, sometimes labor, sometimes both—depending on which group felt at any given moment that its ox had been gored by the conflicting interpretations given to various sections of the law by the shifting majorities in control of the NLRB in Democratic and Republican administrations. The list of the Board's detractors is by no means confined to those directly involved in the cases before it for adjudication. The roster has embraced almost everyone at one time or another—Presidents of the United States, Congress, the federal judiciary, and that most insatiable of faultfinders, the press.

15. William E Leuchtenberg, *Franklin D. Roosevelt and the New Deal* (New York: Harper Perennial, 1963) at 150.

justice and economic advance".[16] In 1935, the nation was still in the depths of the Depression. Earlier measures to help alleviate economic conditions had not really worked or had been declared unconstitutional by the United States Supreme Court.[17] The *Wagner Act* was groundbreaking in seeking to regulate a whole arena of social life: the relationship between a business and its employees. It was one of the first pieces of New Deal legislation to be upheld by the Court.[18] It ushered in a twentieth century vision of national power to regulate business under the commerce clause of the Constitution.

Things then changed, if not easily. After great struggles,[19] collective bargaining became an established part of the American economic way of life. The greatest period of union growth in US history began. Over the next few decades, millions of American workers voted for union representation in elections conducted by the NLRB, and millions achieved a middle class way of life through collective bargaining and agreements that provided improved wages and benefits in major industries. 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".[20]

For several decades the labour law regime seemed to work, replacing sometimes violent labour conflict with the orderly procedures of the law. Unquestionably, the legislation generated enormous optimism about its promise of economic justice through collective action, and to some extent it delivered on that promise.

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16. 79 Cong Rec 10720 (1935) (statement of President Franklin D Roosevelt upon signing the *National Labor Relations Act* on July 5, 1935). See also NLRB, *Legislative History of the National Labor Relations Act, 1935* (Washington, DC: United States Government Printing Office, 1949) vol 2 at 3269.

17. See e.g. *Schechter Poultry Corp v US*, 295 US 495 (1935) (declaring the *National Industrial Recovery Act* of 1933 unconstitutional); *Louisville Joint Stock Land Bank v Radford*, 295 US 555 (1935) (declaring the *Frazier-Lemke Farm Bankruptcy Act* of 1934 unconstitutional); *United States v Butler*, 297 US 1 (1936) (declaring the *Agricultural Adjustment Act* of 1933 unconstitutional).

18. *NLRB v Jones and Laughlin*, 301 US 1 (1937).

19. See e.g. Kenneth M Casebeer ed, *American Labor Struggles and Law Histories* (Durham, NC: Carolina Academic Press, 2011).

20. Paul Krugman, "State of the Unions", Editorial, *New York Times* (24 December 2007) A17.

## III. The Changing Economy and the Decline of Labour Law

Since the New Deal, of course, American society has undergone dramatic changes. By the mid-1970s, global and domestic competitive pressures had begun to transform our economy, and in response, the workplace started to evolve in complicated ways. Technology changed ways of communicating and doing business. Foreign trade surged, and major industries were deregulated. Manufacturing shrunk, and the service sector exploded. New waves of immigrants crossed our borders. 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. So did corporate restructuring, downsizing and outsourcing. 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 labour and business both struggled to adapt and survive. Unionized bargaining units and bargaining unit work regularly disappeared. Over time, wages stagnated; health and pension benefits disappeared.[21]

In the face of this transformation, labour law failed to keep up, and the long but steady process of decline and disenchantment with the law, and with the federal agency that administers it, followed. For decades the scholarly literature has been full of words like "death", "dying", "moribund" and "ossification".[22] As early as 1983, Harvard Law School professor (and Canadian) Paul Weiler wrote, "American labor law more

21. See generally Peter Cappelli, *Change at Work* (New York, NY: Oxford University Press, 1997); Thomas Kochan, Harry C Katz & Robert B McKersie, *Transformation of American Industrial Relations* (Ithaca, NY: ILP Press, 1994); Bruce Nissen, ed, *Unions in a Globalized Environment: Changing Borders, Organizational Boundaries, and Social Roles* (Armonk, NY: M E Sharpe, 2002); Robert H Zieger & Gillbert J Gall, *American Workers, American Unions: The Twentieth Century* (Baltimore, Md: The Johns Hopkins University Press, 2002); Katherine VW Stone, *From Widgets to Digits: Employment Regulation for the Changing Workplace* (New York, NY: Cambridge University Press, 2004); Samuel Estreicher, "Labor Law Reform in a World of Competitive Product Markets"(1994) 69:1 Chicago-Kent L Rev 3.

22. Wilma B Liebman, "Decline and Disenchantment: Reflections on the Aging of the National Labor Relations Board" (2007) 28:2 Berkeley J Emp & Lab L 569 at 570.

and more resembles an elegant tombstone for a dying institution".[23] Labour law has long been relegated to the margins of our public policy discourse, and treated as a doomed legal dinosaur. And the NLRB, the agency that enforces the law, has been viewed as a "sleepy backwater"[24]—an obscure, little-known federal agency.

Today, seventy-seven years after the enactment of a law intended to equalize bargaining power between labour and capital through collective bargaining, organized labour as a proportion of the private sector workforce is at a historic low—less than seven per cent—having steadily declined since the 1950s. And income inequality is at a record high, not seen since the Gilded Age early in the twentieth century.[25]

The last major legislative revision to US labour law was in 1947, at the end of the Second World War, more than sixty years ago.[26] The most

23. "Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA" (1983) 96:8 Harv L Rev 1769 at 1769.

24. Sean Higgins, "NLRB votes on pro-union rule wed.; will Hayes resign?" *Investors.com* (30 November 2011) online: Investors.com <http://news.investors.com> ("[t]he NLRB was once a sleepy backwater but is now one of the most controversial federal agencies"); Kelsey Snell, "NLRB turns heads by taking on Boeing", *National Journal* (21 May 2011) (referring to the NLRB as "one of Washington's forgotten backwaters").

25. Alexander Eichler & Michael McAuliff, "Income inequality reaches gilded age levels, congressional report finds" *Huffington Post* (26 October 2011) online: Huffington Post <http://www.huffingtonpost.com>. See also Emmanuel Saez, "Striking it Richer: The Evolution of Top Incomes in the United States (updated with 2009 and 2010 estimates", *Pathways Magazine* (2 March 2012) online: Econometrics Laboratory Software Archive, University of California Berkley at 2 <http://elsa.berkeley.edu>:

> After decades of stability in the post-war period, the top decile share has increased dramatically over the last twenty-five years and has now regained its pre-war level. Indeed, the top decile share in 2007 is equal to 49.7 percent, a level higher than any other year since 1917 and even surpasses 1928, the peak of stock market bubble in the "roaring" 1920s. In 2010, the top decile share is equal to 47.9 percent.

26. *Labor Management Relations Act*, 29 USC §§ 141-169 [*LMRA*].

recent attempt to revise the law, the *Employee Free Choice Act* (*EFCA*),[27] stalled in Congress in 2010. Many have questioned the *NLRA*'s relevance to contemporary economic reality. In October 2010, on the occasion of the seventy-fifth anniversary of the *Wagner Act*, Harvard labour economist Richard Freeman said, "[i]t is perhaps harsh and impolitic at the *NLRA*'s seventy-fifth birthday to declare that in 2010 the law no longer fits American economic reality and has become an anachronism irrelevant for most workers and firms. But that is the case".[28]

And yet, the NLRB has again become a lightning rod. Today, we are in the midst not only of a battle for the continued relevance of labour law, but of an existential struggle over the survival and legitimacy of labour law and collective bargaining rights. This battle is being fought in Wisconsin, Ohio, Indiana and other states, on Capitol Hill and on the presidential campaign trail. The recall campaign against Wisconsin Governor Scott Walker was just the latest round. It is uncertain where this is all headed, or how the battle will end. But with its overheated rhetoric, this struggle is certainly emblematic of the broader political battleground, and in that sense seems unlikely to subside any time soon, at least not during the 2012 presidential election year.

Paradoxically, though, all of this controversy just might lead to a renewal of labour law and policy. But one thing seems clear, to me at least: labour law still matters. The noise proves that.

27. US, HR1409, S 560, *Employee Free Choice Act of 2009*, 111th Cong, 2009 (unenacted) [*EFCA*]. The *EFCA* would have allowed unions to be certified as the majority representative through a card-check process, and not only through a secret-ballot election. It would have provided stronger remedies against employers who violate the law during organizing drives and first contract negotiations, including civil penalties up to $20 000 per violation and treble back pay, and it would have required the NLRB to seek preliminary injunctive relief in cases where there is reasonable cause to believe an employer has retaliated against employees for organizing activity. It would also have provided for mandatory mediation and binding first-contract arbitration if the parties failed to reach a first agreement in a specified period.

28. "What Can We Learn from the NLRA to Create Labor Law for the Twenty-First Century?" (2011) 26:2 ABA J Lab & Emp L 327 at 330.

## IV. Controversial Then and Now

In 1964, during an earlier period of political turmoil, American historian Richard Hofstadter wrote an essay entitled "The Paranoid Style in American Politics".[29] He began, "American politics has often been an arena for angry minds".[30] Once again, in today's political culture, political discourse is degraded. Epithets have replaced arguments, opponents are vilified and a sense of common values seems lacking. Social conflict is not something to be mediated or compromised. Rather, there is only the will to fight things out to a finish—total elimination of the enemy. As President Abraham Lincoln once said, what is sought is "rule or ruin".[31]

There is no better illustration of this state of affairs today than the fight over national labour law and policy. The politics of American labour law has once again become an arena for angry minds. The battle is not, however, unprecedented.

From the start, critics of the NLRB attacked it for being "little more than an organizing agent for trade unionism".[32] In a 1939 study of the early struggles of the NLRB, Robert Brooks, a Williams College economics professor, wrote: "Put somewhat less bluntly, it is said that . . . in administering the act the Board is partial to unions and biased against the employer".[33]

Brooks described "the practice of antiunionism [as] deeply rooted in American industrial society".[34] He explained that "with the coming of the New Deal and its attendant spectacular increase in union membership . . . organized antiunionism was received on a heroic scale

29. *Harper's Magazine*, (November 1964) 77, online: Harper's Magazine <http://www.harpers.org>.

30. *Ibid.*

31. "Cooper Union Address", speech (New York, NY: 27 February 1860). Addressing Southerners, President Lincoln said, "Your purpose, then, plainly stated, is that you will destroy the Government, unless you be allowed to construe and enforce the Constitution as you please, on all points in dispute between you and us. You will rule or ruin in all events".

32. Robert RR Brooks, *Unions of Their Own Choosing: An account of the National Labor Relations Board and Its Work*, (New Haven: Yale University Press, 1939) at 45.

33. *Ibid.*

34. *Ibid* at 46.

and with increased subtlety".[35] With respect to opponents of the Board itself, Brooks concluded that "[a]ny inclination to underestimate the power and influence of this opposition should be dispelled by the success with which the policies and actions of the Board have been misrepresented".[36]

In this climate, the first chairman of the NLRB, J Warren Madden, was accused of being biased toward unions. When Madden's first term expired, President Roosevelt decided not to reappoint him to the Board,[37] and instead nominated him to the US Court of Claims after the 1940 election. The Senate confirmed Madden, but not before Senator Taft attacked him for over four hours on the Senate floor, saying that he had shown "no judicial temperament whatsoever" and had "perpetrated a gross perversion of justice while Chair of the NLRB".[38]

During these years, the Board's opponents included not only employers, but also a coalition of anti-New Deal politicians that "pummeled the Board publicly through the use of congressional investigating committees. NLRB General Counsel Charles Fahey called it a 'drum fire of attack' that '[t]hey keep up, and keep it up, and keep it up'".[39]

In other words, as I have said, the NLRB is no stranger to controversy. But even for an institution created out of (an often violent) struggle, and well accustomed to controversy, the battles of the last few years have been exceptional and exceptionally rancorous.

## V. An Unprecedented Accumulation of Difficulties

Storm clouds began to gather in September 2007, toward the end of the Bush-era NLRB, when the Board issued more than sixty divided decisions, every one of them split along party lines. These decisions triggered a

35. *Ibid* at 46.
36. *Ibid* at 48.
37. James A Gross, *Reshaping of the National Labor Relations Board: A Study in Economics, Politics, and the Law* (Albany, NY: State University of New York Press, 1981).
38. "Confirms Madden over Taft protest", *New York Times* (3 January 1941).
39. James A Gross, "The NLRB: Then and Now" (2011) 26:2 ABA J Lab & Emp L 213 at 219-20 (the American Federation of Labor also opposed the new Board, which was seen as favouring the Congress of Industrial Organizations, which had split from the AFL in 1937).

strong reaction. The labour movement dubbed them "The September Massacre".[40] There were demonstrations outside NLRB headquarters, and a Congressional oversight hearing was held in December.[41] At the end of the year, the Board went down to two members, as the term of the then-chairman expired and the recess appointments of two members—one Democrat and one Republican—came to an end.

President Bush made three nominations to fill the vacancies, but Senate Democrats, by then in the majority, took no action to confirm the nominees. The Senate also decided not to recess at all during President Bush's last year in office to preclude him from making recess appointments to the NLRB—or to any other agency of the government or to the courts. As I mentioned, Senate confirmation of the President's nominees to the NLRB has often been difficult. This has resulted in chronic vacancies and frequent recess appointments to the Board.[42] Indeed, I served on every configuration of Board members possible during my nearly fourteen-year tenure on the Board (five members, four, three, two, and even myself alone for six weeks). Still, the two-member Board that resulted—and ultimately lasted for twenty-seven months—was, in my view, the most obvious legacy of the Bush-era NLRB, and a reflection of the controversy within and about the Board during that time.

From January 2008 until April 2010, my sole colleague (a Republican) and I continued to issue decisions in those cases where we could find ways to reach agreement. We managed—somewhat improbably given our significant disagreements, and despite all odds—to issue nearly six hundred decisions during those twenty-seven months. Our authority to act as a two-member Board was challenged in many cases. Ultimately, in June 2010, the Supreme Court ruled on those challenges, holding (in a 5-4

40. "Thousands of workers rally to condemn the Bush Labor Board's massive assault on workers", *Teamsters* (14 November 2007) online: International Brotherhood of Teamsters <http://www.teamster.org>.

41. US, *The National Labor Relations Board: Recent Decisions and their Impact on Workers' Rights: Joint Hearing Before the Subcommittee on Health, Employment, Labor and Pensions of the Committee on Education and Labor and the Subcommittee on Employment and Workplace Safety of the Committee of Education, Labor and Pensions*, 110th Cong (11 December 2007) online: GPO <http://www.gpo.gov>.

42. See "Members of the NLRB since 1935", online: NLRB <http://www.nlrb.gov>. The chart shows Board membership since 1935, including recess appointments. The last time the Board had five confirmed members was August 21, 2003.

decision) that two members did not constitute a lawful quorum.[43] About 120 cases that were pending in the courts of appeals were returned to the Board for new decisions.

By then, of course, President Obama had been elected, and in early 2009, the *EFCA* was reintroduced into Congress.[44] Once seen to be fairly high on the Congressional agenda (although not at the top of the list, which was reserved for health care reform), the *EFCA* ultimately stalled when Senate Democrats lost their sixty-vote supermajority after the death of Senator Ted Kennedy and the election of Republican Scott Brown to his seat in January 2010. Aside from competing legislative priorities, many obstacles stood in the way of the *EFCA*. Its provisions represented major reforms, and they were deeply controversial.[45] As one commentator wrote at the time:

> The Employee Free Choice Act seemed destined to be a relatively narrow clash between unions and employers. But amid the economic downturn, it is *turning into a debate over fundamental questions of American capitalism*. . . . The 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.[46]

Indeed, a heated skirmish over the *EFCA* escalated throughout 2009, with both labour and business groups waging extensive (and expensive) campaigns to persuade Congress and the American public. The controversy also enveloped the NLRB nominations process.

In April 2009, President Obama made three nominations to fill the vacancies on the Board. One of them, Craig Becker, an associate General Counsel of both the American Federation of Labour and Congress of Industrial Organizations (AFL-CIO) and the Service Employees International Union, drew intense opposition from business groups, with the battle cry that, if Becker were confirmed, the NLRB itself could somehow adopt the *EFCA* "by fiat". Becker's nomination was

43. *New Process Steel, supra* note 4.

44. *EFCA, supra* note 27.

45. *Ibid.*

46. Alec MacGillis, "Labor union bill raises broader capitalism issues; economic downturn intensifies rhetoric of workers, businesses", *The Washington Post* (15 March 2009) A2 [emphasis added].

filibustered, and culminated in a failed (52-33) cloture vote in the Senate in February 2010.[47]

Finally, in April 2010, to end the two-member phase and to install his nominees, President Obama made recess appointments to the Board. Because he appointed only two Democratic nominees, but not a Republican, the controversy escalated further. In June, Congressional Republicans warned that unless he installed a Republican nominee, they would take no action on any other Presidential nominee. Confirmation of the Republican nominee and the non-controversial Democratic nominee (though not of Craig Becker) followed on June 22, 2010. Becker, Obama's controversial nominee, remained a recess appointment. After that, and until August 27, 2010, the Board operated with a full five-member complement for the first time since December 31, 2007.

In November 2010, mid-term elections were held, and Republicans took control of the House of Representatives. Once the new Congress was seated in January 2011, scrutiny of the Board's decisions and activities became intense.

A firestorm of reaction from Congress and the public followed in April 2011, when the Agency's Acting General Counsel issued a complaint against the Boeing Company. The complaint alleged that Boeing had violated federal labour law by announcing the transfer of a second production line for the Dreamliner aircraft to a non-unionized facility in South Carolina because its unionized machinists in Washington State had repeatedly gone on strike. I will return to these controversies, including that over the Boeing case, in Part VIII.

My third term on the Board ended on August 27, 2011, leaving it with three members.[48] (I did not seek reappointment.) On August 28, an "Open Letter to GOP NLRB Member Brian Hayes" was posted online, calling

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47. See e.g. Jennifer Haberkorn, "Labor nominee blocked in Senate", *The Washington Times* (10 February 2010) online: The Washington Times <http://www.washingtontimes.com>. Indeed, newly elected Massachusetts Senator Scott Brown announced that he was coming to Washington to be sworn in early "to be present for unspecified votes". Glen Johnson, "Brown demands to be sworn in earlier than planned", *The Seattle Times* (3 February 2010) online: The Seattle Times <http://www.seattletimes.com> ("[o]ne vote where Brown would make a difference is the Senate's consideration of union lawyer Craig Becker").

48. On August 27, 2010, Republican Board Member Peter Schaumber's term expired, and the Board dropped to four members.

on him to resign so that the Board would drop to two members: "If you resign your position, the NLRB will become incapacitated—unable to wreak any more havoc on America's job creators".[49]

Member Hayes did not resign, but did threaten to do so later that fall in an effort to block the two Democratic members from finalizing rules that would revise the Board's procedures for resolving questions of union representation. Those rule changes were controversial, and this internal struggle was widely publicized.[50] Ultimately, Member Hayes chose to remain on the Board.

With Member Becker's recess appointment to the Board due to end by January 2012, the Board was at risk of losing its quorum. Various Republican Senators had threatened that no nominees to the NLRB would be confirmed during the remainder of President Obama's first term. Republicans in the House of Representatives—which has no role in confirmation of Presidential nominees—had made clear that they would not agree to any Congressional recess to prevent the President from making recess appointments.

Many of us in the legal community became aware for the first time of a provision in the US Constitution requiring the agreement of both Houses for Congress to recess for more than three days.[51] As one commentator wrote, "[f]or one chamber to bar the other from recess is an extraordinary step that has seldom been perpetrated in the history of Congress".[52]

As it happened, in January 2012, President Obama made three recess appointments to the Board[53] relying on a legal opinion from the

49. Labor Union Report, "An open letter to GOP NLRB member Brian Hayes: please resign immediately" *RedState* (29 August 2011) online: RedState <http://www.redstate.com>.

50. See e.g. Steven Greenhouse, "Republican might quit Labor Board", *The New York Times* (22 November 2011) B1 [Greenhouse, "Republican might quit"]; Melanie Trottman, "Labor Board member threatens to resign", *The Wall Street Journal* (23 November 2011) online: The Wall Street Journal <http://www.wsj.com>.

51. US Const art I, § 5, defining the powers of Congress, says "neither house, during the session of Congress, shall, without the consent of the other, adjourn for more than three days".

52. Michael McAuliff, "Elizabeth Warren appointment dangles as Democrats duck recess fight with Republicans", *Huffington Post* (30 June 2011) online: Huffington Post <http://www.huffingtonpost.com>.

53. The President gave recess appointments to two Democrats and one Republican. He also recess appointed the Director of the new Consumer Financial Protection Bureau.

Department of Justice's Office of Legal Counsel.[54] Needless to say, these appointments were controversial.[55] Legal challenges are pending.[56]

Perhaps I have delved too deeply into the weeds of American politics, but I have done so to illustrate the exceptional accumulation of difficulties and the escalating conflict that the NLRB has faced and will likely continue to face.

## VI. The Rhetoric

From the start, the rhetoric surrounding the Obama NLRB has been overheated, hyperbolized and rancorous. It mirrors what many have called a degradation of American political discourse.[57] Some of it is so ludicrous as to be comical. "A radical NLRB will destroy corporate America", was one consultant's online advertisement for business just as President Obama made the initial recess appointments to the Board in April 2010.[58] "A dark cloud", the advertisement continued, "is hanging

54. Memorandum from Virginia A Seitz, Assistant Attorney General to President Barack Obama, "Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions", (6 January 2012) online: United States Department of Justice <http://www.justice.gov>.

55. See e.g. Edwin Meese III & Todd Gaziano, "Obama's recess appointments are unconstitutional", *Washington Post* (5 January 2012) online: The Washington Post <http://www.washingtonpost.com>. Compare with Laurence H Tribe, "Games and gimmicks in the Senate", *The New York Times* (5 January 2012) A25, online: The New York Times <http://www.nytimes.com>.

56. Challenges are pending in the US Courts of Appeals for the Third, Fourth, Seventh Circuits. The US Court of Appeals for the District of Columbia Circuit recently ruled against the board. See *Noel Canning v National Labor Relations Board*, No 12-1115, CADC (DC Cir 2013).

57. See e.g. Anthony Lewis, "Abroad at home; winter of discontent", *The New York Times* (29 January 1996) online: The New York Times <http://www.nytimes.com> ("[t]here is a sickness in the American political system, a withering of the public faith in government that is so essential to our democracy. The degraded level of political discourse is one symptom—and cause—of the disease. This has always been a country of rough political rhetoric. But the personal viciousness, the haste, the ideological shrillness are worse now than for many years").

58. "A radical NLRB threatens Corp America" *Labor Relations* (9 April 2010) online: Labor Relations <http://cabotinstitute.blogspot.com/>.

over Corporate America, and only if it implements a pro-active battle plan will the sun shine again on our traditional free enterprise system".[59]

Much of the rhetoric recycles the outworn vocabulary and prejudices of an earlier era, with repeated shouts of "socialist". After the Agency's Acting General Counsel issued the complaint against the Boeing Company—with which neither I nor the other Board members had any involvement[60]—I received a piece of mail exhorting me to "withdraw the Boeing complaint, you partisan progressive Marxist moron". After I wrote a concurring opinion suggesting a re-examination of one legal framework,[61] the *Washington Examiner* editorialized that "were [Leon] Trotsky still around, he would no doubt cheer Obama's NLRB".[62] And rarely was there a reference to Member Craig Becker without the word "radical" attached.[63]

Some of the rhetoric was personal denigration. When the President made the three recess appointments to the Board in January 2012, Governor Mitt Romney called the three appointees—two Democrats and one Republican—"union stooges".[64] Some have called Board members

59. *Ibid.*

60. 29 USC § 153(d). See also National Labor Relations Board, "Fact Check—Boeing Complaint" (6 May 2011) online: NLRB <http://www.nlrb.gov> ["Fact Check"]. See also my discussion of the complaint at 350–52, below.

61. *Embarq Corporation v International Brotherhood of Electrical Works Local 396*, 356 NLRB No 125 at 2 (Liebman concurred, suggesting that the framework for analyzing whether a company should share information with the union before it relocates part of its facility should be reconsidered).

62. "Labor Panel wants union officials in corporate boardrooms", Editorial, *The Washington Examiner* (17 May 2011) online: The Washington Examiner <http://www.washingtonexaminer.com>. See also, "Another Labor Board power play: the latest attempt to restrict the movement of business and capital", Editorial, *The Wall Street Journal* (23 May 2011) online: The Wall Street Journal <http://www.wsj.com>.

63. See e.g. Carter Wood, "Sens. Enzi, Hatch were right about Craig Becker, radicalized NLRB" *Shopfloor* (22 April 2011) online: Shopfloor <www.shopfloor.org> ("Becker's appointment has contributed to a radicalized NLRB that has abandoned its quasi-judicial role for pro-labor activism").

64. Cathleen Decker, "Mitt Romney blasts Obama for appointing 'union stooges' to NLRB", *Los Angeles Times* (5 January 2012) online: Los Angeles Times <http://www.latimes.com>.

"thugs",[65] others, "goons".[66] South Carolina Governor Nicky Haley called the NLRB an "absolutely un-American . . . rogue agency" with a "bully mentality".[67] South Carolina Congressman Joe Wilson claimed that the NLRB is turning union states into "roach motels".[68]

But clearly, the most frequent and constant rhetorical refrain is that the government, and particularly the NLRB, is regulating American business to death.[69] According to the House Education and the Workforce Committee Chairman, John Kline (Republican, Minnesota):

> [T]he NLRB is wreaking havoc on the nation's workforce, and it must be stopped. The NLRB has taken a number of steps that . . . are dramatically increasing the pressure and

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65. Senator Jim DeMint (Republican, South Carolina), quoted in Mark Hemingway, "Sen. Jim DeMint: President has stocked NLRB with 'union thugs'", *The Weekly Standard* (27 May 2011) online: The Weekly Standard <http://www.weeklystandard.com/> ("the board that the President has stocked with union thugs basically. . . . It's pretty amazing in America that we're dealing with this type of third world tyranny").

66. Howard Rich, "Obama's union goon squad", *The Washington Times* (8 December 2011) online: The Washington Times <http://www.washingtontimes.com>. See also comments posted on Matthew Boyle, "Outgoing Democratic NLRB chairwoman: Conservatives attacking Board with 'baseball bat'", *Daily Caller* (30 August 2011) online: The Daily Caller <http://freerepublic.com>.

67. Matthew Boyle, "S.C. Gov. supports crippling 'un-American' NLRB, including resignation of lone GOP member", *The Daily Caller* (1 September 2011) online: The Daily Caller <http://www.dailycaller.com>. See also Laura Clawson, "South Carolina Gov. Haley calls for Republican NLRB member to resign", *Daily Kos Labor* (2 September 2011) online: Daily Kos <http://www.dailykos.com>.

68. Don Loos, "Joe Wilson: NLRB driving businesses to Right to Work states to avoid 'roach motels'" *Breitbart* (24 September 2011) online: Breitbart <http://www.breitbart.com>.

69. Thomas J Donohue, "The Regulatory Tsunami: How a Tidal Wave of Regulation is Drowning America" (Speech delivered at Des Moines Rotary Club, 7 October 2010), *US Chamber of Commerce*, online: US Chamber of Commerce <http://www.uschamber.com> ("proliferation of regulations is like death by a thousand cuts"); Peter Dreier & Christopher R Martin, "'Job Killers' in the News: Allegations without Verification", (June 2012) [unpublished] online: <http://www.uni.edu> ("[i]n the last few years—especially since 2009—charges of 'job killer' have been used against an ever-increasing list of federal policies and policy proposals including: . . . National Labor Relations Board rules" at 6); Steven Pearlstein, "'Job-killing' regulation? 'Job-killing' spending? Let's kill this GOP canard", *Washington Post* (25 February 2011) online: The Washington Post <http://www.washingtonpost.com>.

uncertainty facing business owners, making it more difficult to create jobs and plan for the future.[70]

Likewise, South Carolina Senator Lindsey Graham said, "[t]he NLRB is becoming the Grim Reaper of job creation".[71] If you Google "job killing" and "NLRB", you get tens of thousands of hits. Can anyone seriously think that the NLRB has the ability to kill jobs?[72]

Finally, some of the rhetoric straddles all three categories. "Barack Obama's radical appointees on the National Labor Relations Board (NLRB) continue their jihad against American jobs and the free market economy".[73] And, in a May 6, 2011 segment on Fox Business' *Follow the Money*, with the News Ticker, "NLRB fires shot across bow of American free market", moderator Eric Bolling asked gadfly guest, the late Andrew Breitbart, "is the NLRB-President Obama love affair going to take down the free market project?"[74] Breitbart replied: "Yeah. . . . This is a presidency that's being run by proxy by way of the unions. And it's thuggery. . . . It's anti-capitalism".[75]

Sadly, the degradation of the discourse has made any sensible discussion of important and complex issues impossible.

# VII. Beyond the Rhetoric: Further Battles

Beyond the rhetoric has been the battle to distract, discredit, defund and defang the NLRB. Since January 2011, when the Republicans took

70. US House Education and The Workforce Committee, Press Release, "Witnesses Back Legislation to Protect Workers and Employers from Activist NLRB" (12 October 2011) online: <http://edworkforce.house.gov>. See also Matthew Boyle, "Three NLRB decisions 'will kill jobs and force business closures,' critics say", *The Daily Caller* (30 August 2011) online: The Daily Caller <http://dailycaller.com>.

71. Kevin Bogardus, "Sen. Graham slams NLRB as the 'Grim Reaper' of job creation" The Hill (13 June 2012) online: The Hill <http://www.thehill.com>.

72. See e.g. Dreier & Martin, *supra* note 69 (frequent use of phrase "job killer" is rarely substantiated when it appears in news stories).

73. Howard Rich, "The Chicago Way", *Fitsnews.com* (24 September 2011) online: Fitsnews <http://www.fitsnews.com>.

74. Fox Business, *Follow the Money* (6 May 2011) online: Media Matters <http://mediamatters.org/video/2011/05/06/breitbart-obama-presidency-being-run-by-proxy-b/179430>.

75. *Ibid.*

control of the House of Representatives, there has been aggressive oversight of the Board by the House Education and the Workforce Committee, which held a series of hearings[76] and made repeated, extensive demands for documents relating to a myriad of issues. And there were battles over the Agency's budget, including an effort to defund the Agency entirely: an amendment to the appropriations bill,[77] introduced by Congressman Tom Price (Republican, Georgia), sought to wholly defund "a New Deal Relic". Voting for the amendment were 176 members of Congress—in other words, a majority of the majority party.[78]

Since 2011, over two dozen bills have been introduced into both the House and the Senate in efforts to amend the *NLRA* to expressly undo much of what the Board accomplished by way of rulemaking or adjudication that is supposedly pro-union and anti-business, to weaken the Board's already weak remedial powers, and to prohibit spending on various initiatives.[79] Indeed, a rider was attached to the Agency's 2012

76. US, *Emerging Trends at the National Labor Relations Board: Hearing Before the Subcommittee on Health, Employment, Labor, and Pensions*, 112th Cong (Washington, DC: United States Government Printing Office, 2011), [*Emerging Trends*]; US, *Corporate Campaigns and the NLRB: The Impact of Union Pressure on Job Creation: Hearing Before the Subcommittee on Health, Employment, Labor and Pensions*, 112th Cong (Washington, DC: United States Government Printing Office, 2011); United States, *Rushing Union Elections: Protecting the Interests of Big Labor at the Expense of Workers' Free Choice: Hearing Before the Committee on Education and the Workforce*, 112th Cong (Washington, DC: US Government Printing Office, 2011); US, *Culture of Union Favoritism: Recent Actions of the National Labor Relations Board: Hearing Before the Committee on Education and the Workforce*, 112th Cong (Washington DC: United States Government Printing Office, 2011); US, *H.R. 3094, Workforce Democracy & Fairness Act: Hearing Before the Committee on Education and the Workforce*, 112th Cong (Washington, DC: United States Government Printing Office, 2011) [*HR 3094*].

77. HR Amendment 64 (A054), offered by Price (GA) to US, Bill HR 1, *Department of Defense Appropriations Act*, 2011, 112th Cong, 201 (failed). The title of the *Appropriations Act*, HR 1, has changed five times since introduction. Its current title, as amended by the Senate, is *An Act Making Appropriations for Disaster Relief for the Fiscal Year Ending September 2013, and for other Purposes*.

78. See e.g. Ryan Grim, "NLRB amendment beaten by GOP, Dem coalition", *Huffington Post* (17 February 2011) online: Huffington Post <http://www.huffintonpost.com>.

79. See e.g. *HR 3094*, *supra* note 76. The House, by a vote of 235-188, approved the 2012 *Workforce Democracy and Fairness Act*, introduced by Congressman Kline. This bill would amend the *NLRA* in various ways related to the Board's administration of the union representation process.

appropriation that prohibited spending on electronic voting. Earlier, in the summer of 2010, the Board, through its procurement process, had solicited information from private contractors on how electronic voting might be conducted in union representation elections, as an alternative to the Board's manual voting process. Even though the Board simply sought information and had proposed nothing, there was an immediate outcry that electronic voting would destroy voter privacy and create a "'cyber' card check".[80]

As mentioned, Congressional reaction to the complaint against the Boeing Company was fierce. The House Oversight Committee, chaired by Congressman Darryl Issa (Republican, California), bombarded the Agency with repeated requests for tens of thousands of documents related to the pending case, demanded that the Acting General Counsel appear at a hearing in South Carolina under threat of contempt if he refused,[81] and issued a subpoena to the Board and the Acting General Counsel.[82] Responding to all of these requests consumed countless staff hours.

The South Carolina Republican Congressional Delegation in particular went on the attack: Senator Lindsay Graham introduced a bill, the *Stop the Madness Amendment*, to prohibit the Agency from spending on the Boeing case. Congressman Tim Scott (Republican, South Carolina)[83] introduced the *Protecting Jobs from Government Interference Act*, approved by the House (238-188), to deny the Board the power to order an employer to restore any work, rescind any relocation or other change in business operations, or make an investment at any facility. Finally, Congressman

80. Issues, "Cyber Card Check", online: Workforce Freedom Initiative <http://www.workforcefreedom.com>.

81. Mr. Solomon did appear at the hearing, which was conducted in North Charleston, South Carolina on 17 June 2011. See US, *Unionization Through Regulation: The NLRB's Holding Pattern on Free Enterprise: Hearing Before the Committee on Oversight and Government Reform*, 112th Cong (Washington, DC: United States Government Printing Office, 2011).

82. Committee on Oversight & Government Reform, Press Release, "Oversight Chairman Issa Issues Subpoena to NLRB" (8 August 2011) online: Committee on Oversight & Government Reform <http://oversight.house.gov>. For a recent study of this oversight activity, see Meghan F Chapman, "Ethics and Due Process: The Impact of Aggressive Congressional Oversight of Open Administrative Adjudications" (2012) 25:3 Geo J Legal Ethics 469.

83. Tim Scott was appointed to the US Senate on 2 January 2013 to replace Senator Jim DeMint who resigned.

Trey Gowdy (Republican, South Carolina) introduced a bill to abolish the NLRB entirely and transfer its representation election function to the Department of Labor and its unfair labour practice authority to the Justice Department. On top of all this, Senator Graham, along with other Republican Senators, made it clear that they would block any future White House nominees to the NLRB.

The Boeing case also became a campaign issue in the Republican presidential primaries, especially in South Carolina. Two candidates said they would do away with the NLRB if elected:

> When asked what the NLRB would look like in his administration, Texas Gov. Rick Perry replied succinctly, "There wouldn't be one". Former House Speaker Newt Gingrich, asked the same question, offered a similar response. "If I were Speaker of the House right now, I would have defunded the NLRB," Gingrich said, before adding that he was exploring whether he'd have the authority to sign an executive order ending the agency.[84]

And Governor Romney ran this campaign ad in January 2012:

> You're seeing a president adopt policies which affect our economy based not on what's right for the American worker but instead what's right for their politics. . . . The National Labor Relations Board, now stacked with union stooges selected by the president, says to a free enterprise like Boeing, "You can't build a factory in South Carolina, because South Carolina is a right-to-work state". That is simply un-American. It is political payback of the worst kind. It is wrong for America, and is something that will stop under my administration.[85]

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84. Travis Waldron & Scott Keyes, "Perry, Gingrich say they would do away with NLRB if elected", *Think Progress Economy* (17 January 2012) online: Think Progress Economy <http://thinkprogress.org>.

85. Felicia Sonmez, "Romney SC radio ad slams Obama on NLRB Boeing dispute", *The Washington Post* (6 January 2012) online: The Washington Post <http://www.washingtonpost.com>. See also Bruce Smith, "Romney: NLRB's Boeing complaint is political payback", *The Washington Times* (12 September 2011) online: The Washington Times <http://www.washingtontimes.com>; Tim Devaney, "Graham pushes Boeing fight as 2012 campaign issue", *The Washington Times* (6 July 2011) online: The Washington Times <http://www.washingtontimes.com>:

> The bitter labor dispute is becoming a major point of debate as the campaign season heats up. . . . [Senator] Graham suggested the NLRB-Boeing fight could prove a key issue in picking a GOP candidate to run against Mr. Obama next year. . . . He rejected the idea that lawmakers should not be interfering in the case because the NLRB is an independent agency pursuing an administrative action. "They are about as independent as I am tall," he said, "which is, not very".

It was, to say the least, unusual for an agency long seen as a backwater, little-known and accustomed to remaining in the margins of political discourse, to be thrust into the eye of the political storm and given intense media scrutiny. What explains it?

# VIII. The Reality of the Record

To listen to the rhetoric, the Obama Board was the most "activist" Board on record, and its actions threatened the end of capitalism and the free market. I would suggest that this loaded rhetoric had nothing to do with anything the Board has done, will do, or can do.

So, what was the Board's actual record after April 2010, when it finally acquired a quorum ending the twenty-seven-month, two-member stalemate? During that period, the Board was active and productive, reflecting its new quorum, but hardly "activist". We viewed the statute as dynamic, not static. In this respect, the Obama Board had a different approach to decision making than the prior Board. But, as I have frequently stated, the Board, on its own, cannot effectuate radical change. Only Congress can do that. In my view, what the Board accomplished represented modest but meaningful steps to ensure that its procedures are efficient, and to keep the law vital. To paraphrase Teddy Roosevelt, the Board did "what we could, where we were, with what we had".[86]

At the outset, the Board issued new decisions in about 120 cases, previously decided by the two-member Board, which were returned from the appellate courts after the Supreme Court decided the *New Process Steel* case.[87] These decisions were not controversial.[88] Then the Board focused on resolving about one hundred cases that had been languishing for years because they involved novel or difficult issues that could not be decided

86. Teddy Roosevelt is widely quoted as having told his troops at the Battle of San Juan: "Do what you can, with what you have, where you are". In his 1913 autobiography, Roosevelt credits Squire Bill Widener, of Widener's Valley, Virginia as the quote's source. Theodore Roosevelt, *An Autobiography* (New York: Scribner's Sons, 1913) ch 9.

87. *Supra* note 4.

88. See e.g. *SPE Utility Contractors, LLC*, 355 NLRB No 60 (2010) (unlawful discharge); *Chrysler, LLC*, 355 NLRB No 61 (2010) (refusal to provide information); *ADF*, 355 NLRB No 62 (2010) (repudiation of collective bargaining agreement and withdrawal of recognition).

by the two-member Board. A handful of these generated controversy.[89] We encouraged public participation in our decision-making by seeking briefing from interested parties in several cases where we were considering novel issues or a change in the law. This was done at the price of greater controversy and further clashes with Congress.[90] Contrary to dire warnings issued by various law firms and business associations after President Obama was elected, the Board did not embark on a quest to overrule dozens and dozens of Bush-era precedents.

Most divisive of the Board's actions were two rule-making proceedings. Aside from their substance, they were noteworthy because the NLRB has historically avoided rulemaking, relying solely on adjudication even though it has statutory rule-making authority.[91]

One of those rules would require for the first time that most private sector employers post a notice advising workers of their rights under

89. *Independence Residences*, 355 NLRB No 153 (2010) (dismissing employer objections to election based on New York State law, presumed to be preempted, prohibiting employer expenditure of state funds on anti-union campaign); *Eliason & Knuth of Arizona*, 355 NLRB No 159 (2010) (union stationery bannering not picketing or unlawful secondary boycott); *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No 83 (2011), appeal pending (6th Cir) (clarifying the standard for determining whether a bargaining unit, to be appropriate, must include specific job classifications); *Lamons Gasket* 357 NLRB No 72 (2011) (overruling precedent, holding that following voluntary recognition, a union's representative status may not be challenged for a reasonable period of time); *UGL-UNICCO*, 357 NLRB No 76 (2011) (overruling precedent, holding that representative status of incumbent union of predecessor's employees cannot be challenged for reasonable period of time following successorship); *Dana Corp*, 356 NLRB No 49 (2010) (finding lawful discussions between union and employer about pre-recognition framework agreement). This decision provoked some criticism, but was praised by some management practitioners. Compare Andrew M Kramer & Samuel Estreicher, "NLRB Allows Pre-recognition Framework Agreements" (2011) 245:35 New York LJ 4; Labor Union Report, "New NLRB Decision legitimizes unions' race to the bottom", *RedState* (7 December 2010) online: Redstate <http://www.redstate.com>.

90. See *Emerging Trends*, *supra* note 76 at 27–46 (G Roger King). Indeed, the *Emerging Trends* Congressional hearing, conducted on February 11, 2011, focused in part on these requests for briefing. For months, the Board struggled with congressional demands for production of documents in one of these pending cases. See *Specialty Healthcare*, 356 NLRB 56 (2010) at 4–6 (Hayes) (seeking briefing, over the sharp dissent of Member Hayes).

91. 29 USC § 156 (2006).

the statute.[92] The notice would be posted in a conspicuous place in the workplace, where other notices of workplace rights are posted. The *NLRA* is practically the only federal workplace law that does not require a notice posting.[93] The final version of the rule was issued in August 2011, following a sixty-day notice and comment period and consideration of the seven thousand comments filed.[94] Legal challenges remain pending, and the notice-posting requirement has been temporarily enjoined.[95]

A second proceeding began with the issuance of a Notice of Proposed Rulemaking on June 21, 2011, which proposed reforms to the procedures the Board follows before and after conducting a secret ballot election to determine if employees wish to be represented for purposes of collective bargaining. The proposed amendments were intended to reduce unnecessary litigation, streamline procedures and facilitate the use of electronic communications and document filing. The Board invited written comments from the public on the proposal, and received over 62 000. In July 2011, we conducted two days of public hearings at which we heard from sixty-two witnesses representing labour unions, employers, trade associations, academia and interested non-profit organizations.[96] The final rule, issued in December 2011,[97] after my term had expired, adopted

92. Peter Dreier & Donald Cohen, "GOP and Chamber of Commerce's war over the bulletin board", *Huffington Post* (22 November 2011) online: Huffington Post <http://www.huffingtonpost.com> ("[f]rom the reactions of the corporate crybabies, you'd think that the NLRB had commanded businesses to pass out copies of the *Communist Manifesto* during lunch breaks").

93. See e.g. *Civil Rights Act of 1964*, 42 USC § 2000e-10(a) (2006); *Age Discrimination in Employment Act*, 29 USC § 627 (2006); *Family and Medical Leave Act*, 29 USC § 2601, 2619(a) (2006).

94. *Representation: Case Procedures*, 29 CFR §§ 101–102 (2011).

95. *National Association of Manufacturers v NLRB*, 2012 WL 691535 (DDC 2012) (upholding the Board's authority to issue the rule, but finding that the Board could only find the failure to post an unfair labour practice on a case-by-case basis); *Chamber of Commerce v NLRB*, No 11-cv-2516 (DSC 2012) (invalidating the rule, holding that the Board lacked authority to issue it). Both decisions have been appealed and, in light of the conflicting decisions at the district court level, the US Court of Appeals for the District of Columbia Circuit has stayed the rule, pending resolution of an appeal. See *National Association of Manufacturers v NLRB*, No 12-5068 (DC Cir 2012).

96. National Labor Relations Board, News Release, "Video, transcripts of July 18–19 open meeting on election rules now available" (27 July 2011) online: National Labor Relations Board <http://www.nlrb.gov>.

97. 76 Fed Reg No 246 80138 (2011) (to be codified at 29 CFR §§ 101-02).

some but not all of the reforms originally proposed. Legal challenges are pending, and the rule changes have been temporarily suspended.[98]

Contrary to the battle cries, those changes to election rules were not an attempt to do an end-run around Congress and somehow enact the *EFCA* by "executive fiat". The key charge against the *EFCA* was that it would supplant secret ballot elections with card check certification. By contrast, the rule changes were intended to make the secret ballot election process work better. Nothing in the *EFCA* appears in the rule changes, or vice versa. Nor did the rules authorize ten-day "ambush" elections or "quick snaps", or anything like what its opponents denounce. Under the revised rules, the median time for an election to be conducted would no doubt drop (from thirty-nine days), but it would have been virtually impossible for the Board to schedule an election in only ten days.

To be sure, the Boeing case was highly contentious. Misinformation about it appeared immediately after the complaint was issued and continued to accelerate. Contrary to a frequent refrain, the theory of the alleged violation was *not* that Boeing unlawfully opened a non-union plant in a right-to-work state.[99] Although the second Dreamliner production line was moved to a Boeing facility in South Carolina, which is a right-to-work state, the same complaint allegations could have been made if it had been moved to Pennsylvania. On its face, the complaint alleged that by moving the Dreamliner production line, Boeing retaliated against its unionized machinists in Washington State because they had struck on repeated occasions. In the words of the complaint, the company's CEO and other officials had made public statements to the effect that the work

98. *Chamber of Commerce v NLRB*, 2012 WL 1664028 (DDC 14 May 2012) (setting aside the rule on a legal technicality, finding that it was not properly adopted by the statutorily required quorum). See National Labour Relations Board, News Release, "NLRB suspends implementation of representation case amendments based on court ruling" (15 May 2012) online: NLRB <http://www.nlrb.gov>. The Board's motion for reconsideration was denied.

99. Under section 14(b) of the *NLRA*, the individual states may enact laws proscribing the execution of agreements requiring union membership as a condition of employment. *Supra* note 7, § 14(b). These states are called right-to-work states.

would be moved to South Carolina "due to 'strikes happening every three to four years in Puget Sound'".[100]

Nor was the Boeing complaint a "ruling" by the Board, as was often misrepresented. It was simply a complaint, and it was issued by the Acting General Counsel without the involvement of the Board.[101] Consistent with the statutory scheme, the Acting General Counsel issued the complaint on his own, as an exercise of his prosecutorial discretion. Nor was the President involved, contrary to loud Republican attacks. Indeed, the President has no power to instruct the Agency to bring or drop any case. The NLRB is an independent agency, and like all independent agencies of the federal government, it exists outside of the federal executive departments. In all of its case-related activities, it operates wholly independent of presidential control. Ironically, the only attempted interference in the Boeing case came from Congress, not from the White House.

Certainly, this was not, as proclaimed on the campaign trail, a payback to unions who supported President Obama. In fact, I would venture to say that President Obama would have been relieved if the complaint had never been issued, as it became something of a political liability. I would venture further that the Board's Acting General Counsel issued the complaint reluctantly, and, consistent with standard practice, only after initial efforts to settle the case had failed.

On its face, the Boeing complaint seemed to present a "triable" case. The theory was not novel. As one scholar has recently written:

This is not to say that the legal issues posed by the complaint are simple. They are complex, particularly with regard to remedy. It would be foolhardy to predict how the case would

100. *The Boeing Company v International Association of Machinists and Aerospace Workers*, Case 19-CA-32431, (10 April 2011) (Complaint and Notice of Hearing) online: <http://www.nlrb.gov> at para 6(a).

101. See "Fact Check", *supra* note 60, where the NLRB attempted to correct the record:

> Several blogs and news outlets continue to mischaracterize the complaint issued on April 20 by the NLRB Acting General Counsel as a ruling of the Board. One outlet today described Board Member Craig Becker as having been a "key player" in the decision to issue the complaint. That is untrue. In fact, the case has not yet come before the Board. . . . the General Counsel and the Board are separate and independent under the NLRA. . . . The case is scheduled to be tried before an administrative law judge, acting under the Board's authority. That decision could then be appealed to the Board itself for its decision.

have been decided by an Appeals Court. But the implication that the complaint marked a major activist departure from past law is simply wrong.[102]

As it turned out, during the pre-trial phase, after the complaint was issued, Boeing and the Machinists Union entered into a collective agreement and settled the matter. The case was never presented to the Board for decision, and the General Counsel's legal theory was never tested—that is, it was never tested outside the court of public opinion.

If anything, these events confirm the aptness of the observation, made back in 1939, and quoted above, that "any inclination to underestimate the power and influence of [the opposition to the Board] should be dispelled by the success with which the policies and actions of the Board have been misrepresented".[103]

# IX. Rhetoric versus Reality: What's Really Going On?

At bottom, the rhetoric and the reaction to the Obama Board are so disproportionate to its actual record that I believe something else must be going on. (Tellingly, the rhetorical blitz against the NLRB began even before the Obama Board was seated and well before the Boeing complaint was drafted.) There are several likely explanations.

First, the Board came back to life in 2010 after a long period of dormancy, like the patient who wakes up in a hospital bed and wiggles his toes. It is as if the Board insisted, "I'm not dead yet".[104] As one opponent to the agency revealed, "[w]e're not really focused on where they've gone because they haven't done that much lately. They've been a fairly neutered agency for a long, long period of time. The thing that has us worried is what they've hinted at what they're going to do".[105] The Board

102. Julius Getman, "Defending the NLRB from Romney advisor's attack", *Talking Union* (23 July 2012) online: Talking Union <http://talkingunion.wordpress.com>.

103. Brooks, *supra* note 32 at 48.

104. *Monty Python and the Holy Grail*, 1975, DVD: (Sony Pictures Home Entertainment, 2001).

105. Matthew Boyle, "Republicans likely to push for budget cuts to NLRB soon", *The Daily Caller* (February 2011) online: The Daily Caller <http://dailycaller.com/> (quoting Katie Gage, Executive Director, Workforce Fairness Institute).

refused to be neutered, and its opponents were incensed. Regarding the possibility that the Board might lose its quorum, for example, Senator Graham said, "[g]iven its recent activity, inoperable is progress".[106]

Second, the controversy over the Board cannot be separated from the broader political arena, and especially from presidential election year politics. As two political commentators recently wrote:

> No doubt, acrimony and gridlock are built-in features of our political system, and it is true that we have had several eras of intense stress and polarization. . . . Yet . . . an examination of the Obama presidency suggests that we are experiencing neither politics as usual nor an odd blip. We are witnessing unprecedented and unbalanced polarization of the parties, with Republicans acting like a parliamentary minority party opposing almost everything put forward by the Democrats; the near-disappearance of the regular order in Congress; the misuse of the filibuster as a weapon not of dissent but of obstruction; and the relentless delegitimization of the president and policies enacted into law.[107]

The assault on the NLRB seems to be just one piece of a coordinated strategy to attack the President and, further, to weaken organized labour because of its support—both financial and electoral—for Democratic Party candidates and issues. Organized labour is diminished in size, but its influence is significant because of its ability to rally voters. The battles in Wisconsin, Ohio and elsewhere against public employee unions are part of this larger assault.

But beyond election year politics, it has become increasingly apparent that where you stand on questions of labour law and policy depends in the end on what you believe about more fundamental questions: questions of social, political and moral values that inform (or should inform) our laws, our policies and our debates about them. There has always been a profound divide among Americans, but it periodically becomes more exposed. These fault lines are no doubt exacerbated by the economic crisis, which has created fiscal constraints and in turn has led to partisan arguments against worker rights and to finger-pointing at teachers,

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106. Steven Greenhouse, "Republican might quit Labor Board" *The New York Times* (22 November 2011) online: The New York Times <http://www.nytimes.com>.

107. Thomas E Mann & Norman J Ornstein, "Want to end partisan politics? Here's what won't work—and what will", *The Washington Post* (17 May 2012) (adapted from their book, *It's Even Worse than it Looks: How the American Constitutional System Collided With the New Politics of Extremism* (New York: Basic Books, 2012)).

firefighters and others. The fault lines on labour policy issues are as deep as any on the US domestic policy front.

Fundamentally, I think, this is a war over government and the role of government, especially its role in regulating business and the market. Americans are deeply divided on these issues.[108] There are those who view government as a social good and those who view it as the enemy. There are many who never accepted the New Deal laws in the first place, or the era of expanded national power that the New Deal ushered in.[109] Some believe "that the regulatory state is unconstitutional as well as immoral".[110] The offensive against the NLRB is a proxy for this larger war.

In 1948, Congressman Fred Hartley (Republican, New Jersey), co-sponsor of the *Taft-Hartley Act* (which amended the *Wagner Act* in 1947 over President Truman's veto) published a book explaining his views on the legislation. One passage is telling:

> It is my sincere hope that the Taft-Hartley Act will point the way for the Republican Party to approach its overall problem of reducing the size and cost of government. Once we accept the concept of the Taft-Hartley Act as a model to begin an interim period leading to complete elimination of the governmental labour relations agencies, we can apply that concept to other areas of government activity. I am well aware of the political difficulties of eliminating the New Deal social legislation. It cannot be repealed at a single stroke.[111]

The storm over labour law and collective bargaining rights, and the challenges facing the NLRB, reflect these larger, value-driven conflicts. They always have been, and always will be, with the Board to some degree or another. These conflicts entail not simply differences of opinion, but differences that arise from asymmetrical moral worldviews, or diverging views of social realities, including "starkly different versions of history

108. See Peter Baker, "Philosophic clash over government's role highlights parties' divide", *The New York Times* (18 June 2012) A18, online: The New York Times <http://www.nytimes.com>.

109. John F Kowal, "Healthcare: the latest in New Deal power debate", *Brennan Center for Justice at NYU School of Law* (28 June 2012) online: Brennan Centre for Justice <http://www.brennancenter.org/>.

110. See Jeffrey Rosen, "The Unregulated Offensive", *The New York Times Magazine* (17 April 2005) online: The New York Times Magazine <http://www.nytimes.com/>.

111. Fred A Hartley Jr, *Our New National Labor Policy: The Taft-Hartley Act and the Next Steps* (New York: Funk & Wagnalls, 1948) at 193.

and present day reality, making it hard to imagine . . . compromise" on any issue.[112]

These stark divergences on social realities surfaced in the battle over the *EFCA*. Opponents 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 claim that the original 1935 *Wagner Act* actually prolonged the Depression. In contrast, the *EFCA*'s supporters argued that the economic downturn is actual proof that labour'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.[113] These conflicts were central to the pitched battle over the *Affordable Care Act*, and the Occupy and Tea Party movements put them into high relief.[114]

# X. Persistent Challenges

The escalating controversy surrounding the NLRB in recent years has been exceptional. But, of course, controversy has been a persistent challenge in its history. There are other related and persistent challenges that the Board has faced in trying to enforce the law, such as the deep divide about the continuing legitimacy of the *NLRA* itself. While many agree that the law is outdated and warrants a renewed conversation, beyond that there is little consensus.

112. MacGillis, *supra* note 46.

113. Jacob S Hacker & Paul Pierson, *Winner-Take-All Politics: How Washington made the Rich Richer And Turned Its Back on the Middle Class* (New York: Simon & Schuster, 2010) ("[t]hough the labor bill died a quiet, backroom death, its demise spoke volumes. One of the few initiatives that might have had broader political significance by shifting the balance of organized power in Washington never got started" at 279). The authors quote US Chamber of Commerce President Thomas Donohue on the *EFCA*: "There ain't gonna be a compromise!" (*ibid*).

114. See e.g. Kowal, *supra* note 109:

> In language oddly resonant of the current debate over the Affordable Care Act, conservative politicians and opinion leaders railed against Social Security [in 1937] in apocalyptic terms. "Never in the history of the world has any measure been brought in here so insidiously designed as to prevent business recovery, to enslave workers, and to prevent any possibility of the employers providing work for the people," said Rep. John Taber of New York, one of many fierce opponents of the law.

There are those who see the *NLRA* as critical to a democracy and a sustainable economy. They view unions as helping workers navigate imperfect labour markets and as balancing the power of business. Government, in their view, should guarantee the rights of workers. But they bemoan the law's inability to protect workers in the face of employer resistance and workplace change driven by competitive pressures. For them, the law no longer delivers on its promise, and they urge its revitalization. They see its election procedures and its weak remedies as no longer working to guarantee the right to organize. Some unions bypass the Board's procedures entirely. The NLRB has lost their confidence.

On the other side, there are those who think the *NLRA* is a relic of an earlier era, that collective bargaining exacerbates joblessness and does not fit in a competitive free market economy, and that the law is no longer essential because workers have an array of other legal protections. To them, unions are an impediment to the operation of markets and economic growth, and they think that government should seek to limit the extent and power of trade unions, which they view as a kind of cartel, raising the cost of unionized labour and depressing wages for the rest of the workforce. Some in the business community or the legal community may never have accepted the labour law as legitimate in the first place. The NLRB has never had their confidence.

There is also disagreement about what the purpose of the *NLRA* actually is. Ever since the 1947 Taft-Hartley amendments refashioned labour law, the Board has struggled to reconcile two statutory goals that are sometimes in tension: the *Act*'s overall stated purpose to promote collective bargaining and the basic goal of preserving employee free choice. Since the 1947 amendments, employee freedom of choice has been defined to include not only the right to engage in union activities, but also the right to refrain from and the right to reject union representation in favour of dealing with employers individually. As a result, some believe that our national labour policy is at cross-purposes with itself. Some scholars have suggested that the "homogenization of the Wagner and Taft-Hartley Acts by Congress in 1947 has saddled the Board with the duty

of administering a law that sets forth contradictory, and, in considerable measure, irreconcilable purposes".[115]

The NLRB also faces the challenge of enforcing a law that for decades has proved totally resistant to legislative change—the *EFCA* being just the latest effort at such change. Notwithstanding dramatic economic and social transformation, the law remains essentially what it was in 1947. New York University law professor Cynthia Estlund has observed that "no other body of federal law that governs a whole domain of social life . . . has been so insulated from significant change for so long".[116] As Fordham law professor James Brudney has written:

> Compare the national law of labor-management relations to major statutes governing telecommunications, securities, banking, civil rights, education, health care, or the environment. In stark contrast to these other regulatory schemes, Congress has made virtually no changes in the NLRA since Jackie Robinson integrated major league baseball, since television arrived in American homes, or since well before the creation of the interstate highway system.[117]

As a result of the failure to amend or update the law, the Board faces the difficulty of trying to coherently apply—or adapt—an "aging statute" in a social and economic environment that is substantially altered from 1935 or 1947. How to do that is itself the subject of controversy, and often divided the Board during the Bush era. Its members disagreed not only on what the law is and on policy preferences, but also on legal methodology and judicial philosophy: does the Board itself have a right to adapt the law to changed workplace realities, or is the law static? Do you interpret the law by looking at dictionaries or by looking at the real world consequences of decisions?

Some argue that the law is basically static and that only Congress can update it. Others, myself included, think that within certain constraints,

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115. Raskin, *supra* note 14 at 951. See also James A Gross, "Conflicting Statutory Purposes: Another Look at Fifty Years of NLRB Law Making", (1985) 39:1 Indus & Lab Rel Rev 7 at 18.

116. "The Ossification of American Labor Law", (2002) 102:6 Colum L Rev 1527 at 1531.

117. "Gathering Moss: The NLRA's Resistance to Legislative Change", (2011) 26:2 ABA J Lab & Emp L 161 at 161.

the law is dynamic.[118] This disagreement arises in different contexts, but it is particularly evident in cases that involve the statute's coverage provisions. Who is an employee? Who is a supervisor or manager excluded from coverage? Is an independent contractor also excluded? As competitive pressures have caused businesses to flatten hierarchies and seek flexibility rather than stable, long-term relationships, the nature and variety of employment arrangements have made it challenging to meaningfully enforce the law's protections. The workplace has changed. The law of the workplace has not.

Another persistent challenge is the growing lack of familiarity with the *NLRA*, the rights and obligations it creates and the role it has played in our society and economy. As union density has declined, the notions of collective action and industrial democracy may seem like old-fashioned, even foreign ideas to many in the workforce. Fewer people know what collective bargaining is, let alone the contribution that it made to a fair economy, or the role that trade unions have played in our society and our democracy.

This is particularly true of young people in the workplace, whether they are employees or employers. But it is also true of members of the judiciary. Judges are more familiar with the array of other employment laws that have been enacted, and less and less familiar with collective bargaining or the collective rights protected by the *NLRA*.[119] And most people are surprised to learn that the *NLRA*'s basic right to act concertedly for "mutual aid and protection" applies even outside the unionized sector of the economy. The fact that non-union workers have the right to act together to improve their terms and conditions of employment—and that the NLRB enforces that right—is a well-kept secret. This was a large part of the reasoning behind the rights notice posting rule that the Board issued in August 2011. We thought it was valuable for whatever educational impact it might have, however modest.

118. Certainly, the Board operates under significant constraints—the text of an arguably antique statute, years of accumulated Board precedent and oversight by the federal courts, to name a few. However, as I have argued elsewhere, "the Board, even under the current statutory scheme, can play a modest but meaningful role in preserving the values of [the *NLRA*] and in furthering its aim. . . . Constrained or not, as an administrative agency responsible for enforcing Congressional policy, the Board does have discretion—indeed it has a fundamental duty—to 'adapt [its] rules and practices to the Nation's needs in a volatile, changing economy'". Liebman, *supra* note 22 at 572, 579.

119. *Supra* note 7.

## XI. Enduring Values

Notwithstanding these persistent challenges, the values of the *NLRA* endure—though perhaps like dinosaur DNA.

First among those values is the rule of law. The *NLRA* was remarkable in introducing a legal regime; a system of governance for resolving bitter disputes over the efforts of workers to secure representation and bargain with their employers. Many of these disputes had continued for decades. Many were violent. The rule of law that the statute provided totally transformed how those kinds of disputes could be resolved.

Second would be the freedom of association that the *Act* protects: the right of working people to join together and to participate in decisions that affect their working lives. The *NLRA* embodies the Progressive Era notion that industrial democracy is basic to political democracy. It preserves the important role than an independent trade union movement plays in a democratic society, particularly as a counterweight to the political influence of corporations.

The third enduring value relates to what President Roosevelt said when he signed the *Wagner Act* in 1935: it was necessary as a matter of "common justice and economic advance". As the *NLRA* expressly states, it was enacted in an effort to restore the nation to prosperity by allowing workers to bargain collectively with their employers.[120] The notion was that equalizing bargaining power between workers and business through collective bargaining would improve the purchasing power of workers, which would in turn restore the nation to prosperity. In some ways, I think the *NLRA* is pro-business. It is hard for people to see it that way, but the *Act* was passed not as a favour to labour but to save the market economy from its own excesses. "Economic advance" through equality of bargaining power is indeed another enduring value of this statute. Related to that, of course, is the opportunity through collective bargaining for labour and business to come together, not only to increase workers' share of the wealth created by their labour, but also to come up with shared solutions in response

120. *Ibid* ("[t]he 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", § 151).

to changing economic conditions—in other words, the opportunity to manage change, to innovate and to create additional wealth.

This leads to the fourth enduring value that I would mention: the private system of workplace governance and dispute resolution that has developed under the statute. Under the Wagner model, instead of government mandates, labour and business (at least in a unionized workplace) work out their own solutions through collective bargaining, and dispute resolution processes that have been negotiated and put in place provide a measure of order to countless workplaces. They have had an impact on other forms of dispute resolution in our society, both employment-based and more broadly. In that sense, they have perhaps been the clearest legacy of our labour law regime.[121]

All of these values are, of course, interconnected. They all relate to fairness, they all relate to social stability and they all relate to the economic health of the nation. The risks of social unrest from glaring inequality cannot be disregarded. I believe that over the last two years, the Board made modest but meaningful efforts to preserve these values, and to the extent possible, to advance them.

# XII. The Future?

It is uncertain where labour policy is headed, or how it will evolve. It is not clear if this moment is "D-day or Dunkirk".[122] But there may be a silver lining to all of the overheated rhetoric and controversy. Perhaps recent events have served to increase awareness of labour law and collective bargaining to some extent. Between the battle in Wisconsin, the controversy over the Boeing case and the labour disputes in football, basketball and hockey, there has been a lot of publicity about collective bargaining and workers' rights. You would have had to have been half asleep over the last year not to have at least heard the words "collective

121. Carrie Menkel-Meadow, "The NLRA's Legacy: Collective or Individual Dispute Resolution or Not?", (2011) 26:2 ABA J of Lab & Emp Law 249.

122. Steven Greenhouse, "Organized labor hopes attacks by some states help nurture comeback", *The New York Times* (5 March 2011) A-18, quoting Harley Shaiken ("'[l]abor does best when its back is against the wall,' he said. 'It's hard to predict who's going to win in Madison. It could be labor's D-Day, where a tough battle leads to important victories down the road, or it could be labor's Dunkirk, where it becomes a bitter retreat'").

bargaining". Eventually, perhaps, people will not just recognize the words, but will gain a reinvigorated understanding of what collective bargaining means—or can mean.

And then there is the law of unintended consequences.[123] As one of the Wisconsin protestors declared, "[Governor] Walker created a generation of activists, and we will be his undoing".[124] In November 2011, when Ohio voters repealed the rollbacks to collective bargaining in the public sector, one unnamed Republican strategist was quoted as saying, "[t]his really is a core value and the bill was out of step with that value".[125]

Perhaps there is cautious ground for optimism. Restoring the promise of our labour law is not a panacea for our economic woes, but it might be a good start. In this election year, the battle lines are drawn, but one day the acrimony just might yield an opportunity for a sober dialogue.

Again, let me thank you for inviting me to give this lecture and for graciously paying attention.

# Postscript

On January 25, 2013, the US Court of Appeals for the District of Columbia Circuit issued its decision in *Noel Canning v NLRB*.[126] The Court ruled that President Obama's three recess appointments to the Board in January 2012 were unconstitutional. The Court decided that the President's authority to make recess appointments under Article II, Section 2 of the Constitution[127] exists only during "the recess", which it interpreted as including *the* recess between annual sessions of

123. See e.g. Greenhouse, "Republican might quit", *supra* note 50 ("[o]rganized labor has been on a long decline, but the recent attacks against it in Wisconsin and elsewhere have had a surprising result—they have energized the nation's unions. Instead of just playing defense to protect benefits and bargaining rights, labor leaders are plotting some offense, with several saying Mr. Walker may have unwittingly nurtured a comeback by unions"); William Finnegan, "The storm: did a governor's anti-union crusade backfire?", *The New Yorker* (5 March 2012) online: The New Yorker <http://www.newyorker.com>.

124. *Ibid.*

125. Sabrina Tavernise, "Ohio turns back a law limiting unions' rights", *The New York Times* (8 November 2011) A1, online: The New York Times, <http://www.nytimes.com/>.

126. *Supra* note 56.

127. *Supra* note 11.

a Congress (intersession), but not *a* recess during the same session of a Congress (intrasession). The Court also decided that only offices which become vacant during the intersession recess may be filled by recess appointments. The three recess appointments, the Court held, did not meet those requirements and were thus invalid. Were the decision to ultimately stand, all of the Board's decisions issued since the 2012 recess appointments would be vulnerable.

The Court's decision raises a significant issue of presidential power and will certainly be appealed to the Supreme Court. The Court's interpretation of the recess appointment authority runs counter to over a century of practice during which presidents, both Republican and Democratic, have made numerous recess appointments. Until the Supreme Court resolves the issue, the Board has decided to continue operating and issuing decisions, just as it did in May 2009 after the DC Circuit Court of Appeals found that the two-member Board lacked lawful quorum.[128] A cloud of uncertainty will likely hang over the Board for at least another year.

State-level battles involving organized labour continued throughout 2012. The effort to recall Wisconsin Governor Scott Walker was defeated by voters in June 2012.[129] In Michigan's November election, voters rejected a labour-backed attempt to amend the state Constitution and make collective bargaining a constitutional right. That defeat was followed swiftly by the passage of a right-to-work law in December. The symbolism of Michigan—a historically strong union state—becoming a right-to-work state is striking.

Finally, in California, Proposition 32, the Paycheck Protection Initiative, was placed on the November 2012 ballot. Under the guise of balanced spending limits, it would have effectively restricted only union political spending, and it would have barred unions from using automatic payroll deductions to raise money for political campaigns. Although the initiative was defeated, it nonetheless forced organized labour to spend well over $50 million to fight it.

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128. *Laurel Baye Healthcare v NLRB*, 564F.3d 469 (DCC 2009). This issue also awaits Supreme Court resolution.

129. See above at 333.